

Tokyo

BAKER & MCKENZIE

東京青山・青木・粕法律事務所

Resource Contracts with Asian Customers



ANJeL 2009

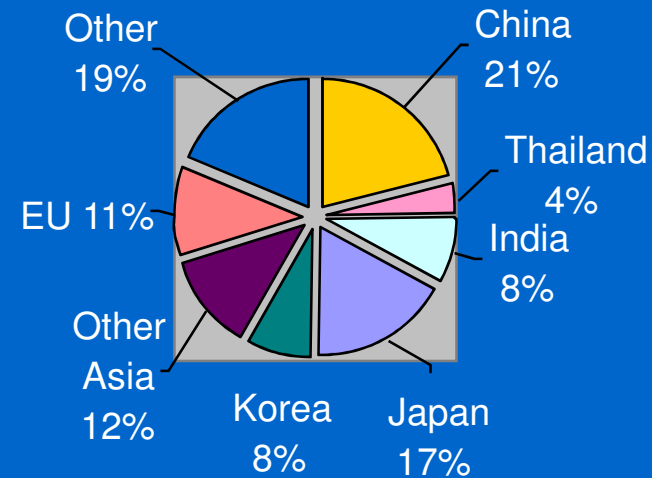
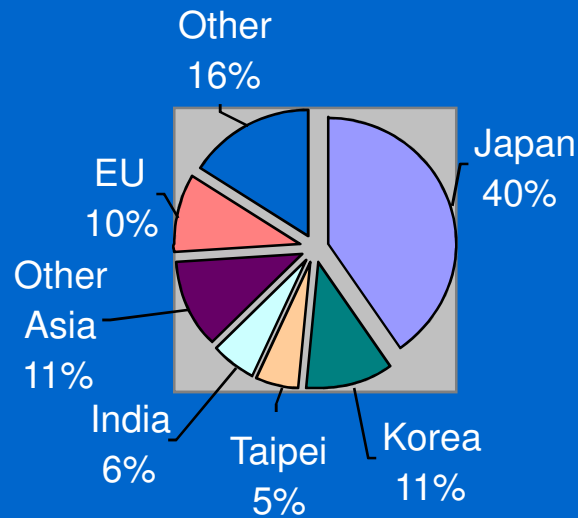
Paul Davis

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Major Australian Export Markets (2005-2006)

Energy (incl oil, gas, uranium, coal)

Other Minerals



Source: ABARE in "The Australian Minerals Industry and the Australian Economy Factsheet", MCA, May 2007

Resource contracts (relationships) between Australia Japan and its customers

- The Australian model - unique
- How those relationships are changing because of:
 - Changes in business environment
 - Changes in our customers
 - New types of customer
- Some of the legal issues arising

The focus on ownership:

Traditional Australian Model

- Long term sale contract
- Strategic equity stake

Overseas Models

- Vertical Integration

The strategic stake

What the buyer wants:

- Access the seller's cost information
- Pre-warning of price increases
- Access to seller's marketing (other customers)
- Pre-warning on reserves/quality issues



rush for resources

changing business models

new customers

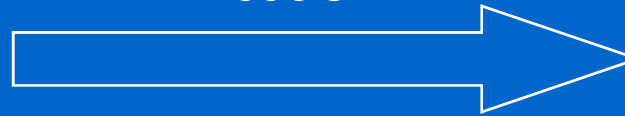
Australia's
Customers

The Buyers' Response Shopping Bag

- diversify sources
- good friends
- \$ ¥ 元 ₩
- champion companies
- **OWNERSHIP**



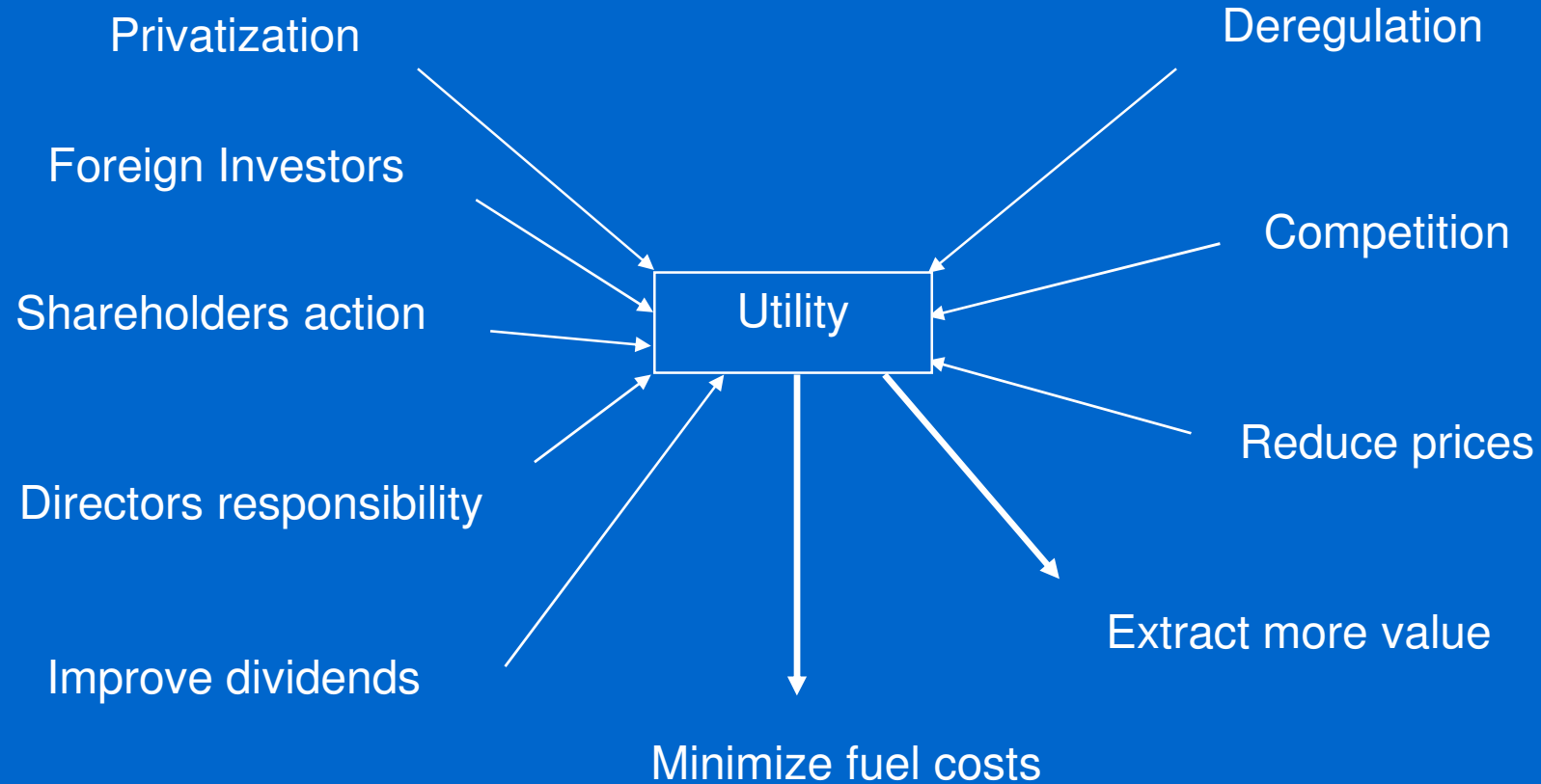
changing business
models

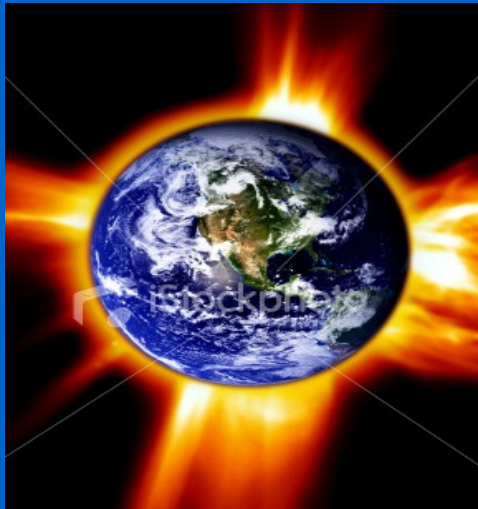


Australia's

Customers

Japanese Utilities





Australia's
Customers

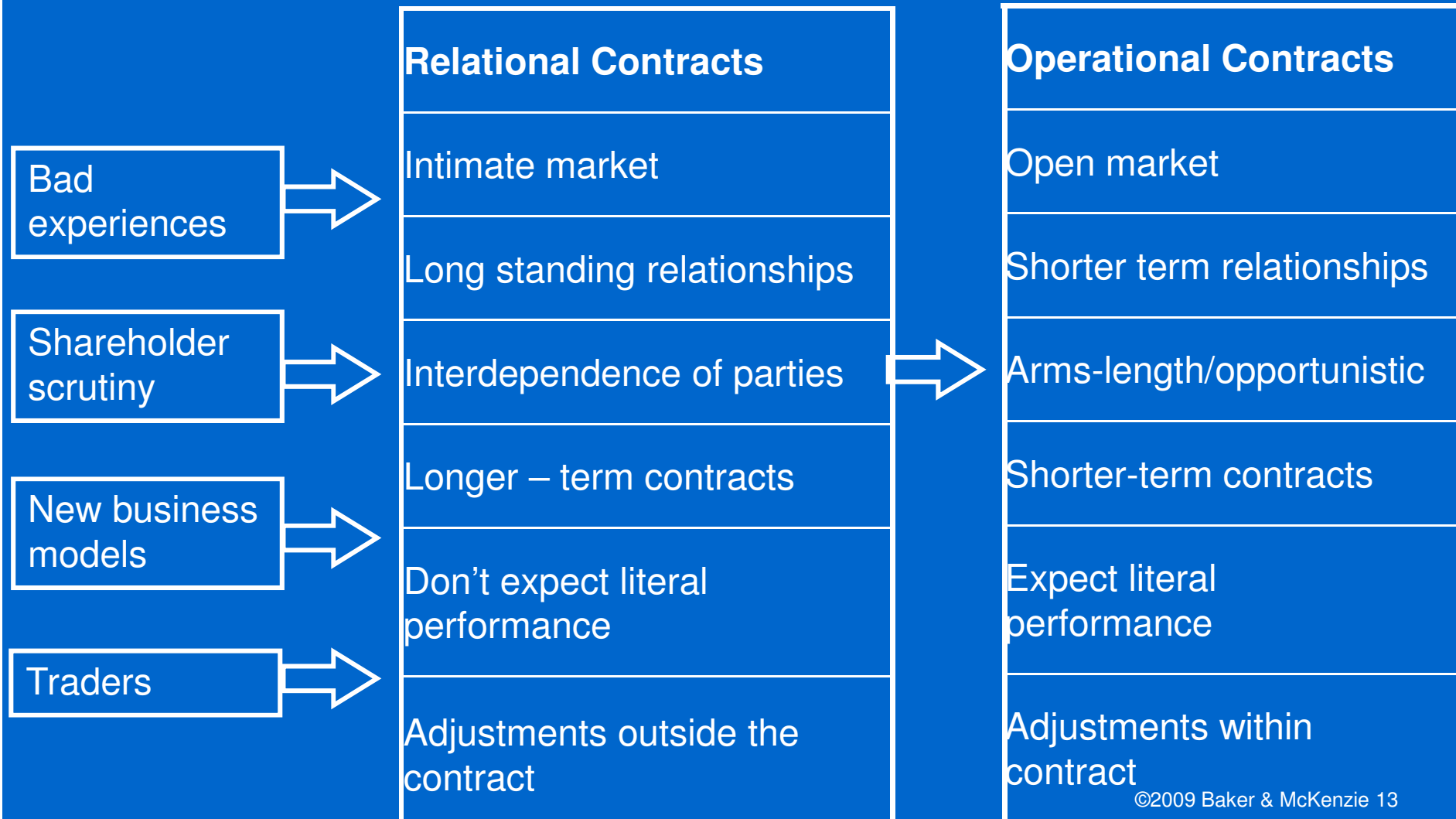
New Kinds of Customer

- China & India
- Trading companies
- Commodity traders
- New supra-corporates

Current legal issues

- Sales contracts
- Evolution of sales contracts
- Trend towards Commoditization

Functioning of a Ltsc



Trend towards commoditization



Current legal issues

The Ltsc/equity combination

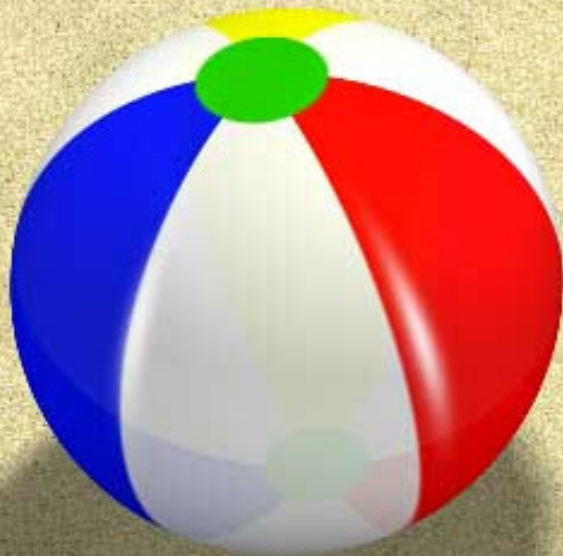
- Buyers as investors – national interest
- Are they interdependent?
- Does the buyer have increased duties under the Ltsc?
- Buyer involvement in marketing

–“If God were on our side, why would he bury all our fuel under those maniacs?”

–John Stewart, humorist “The Daily Show”

Cross-border Contracts - Comments

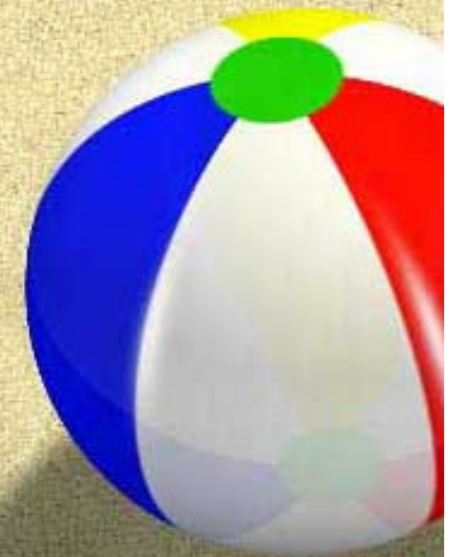
Dr Luke Nottage
Sydney Law School &
Japanese Law Links Pty Ltd



ANJeL Australia-Japan Biz Law
Update - CLE, Tokyo, 14/02/09

Overview

- ☾★ Rush for resources, new players and business models ->
 - ☾★ Shift from relational to market/spot Ks
 - ☾★ Even for more intimate mkts (iron)
 - ☾★ Yet some products/Ks have also evolved thru' (in/efficient) 'path dependence'
- ☾★ Another challenge:
 - ☾★ (small) equity stake, with LTK, vs
 - ☾★ Rise of big (sovereign) investors



Focus on CISG - why?

- ★ Davis paper fn 42: (one path-dependency) CISG not found/applied much in resource contracts, despite
 - ★ Accession by Oz, PRC, now
 - ★ More suitable for LTKs than Anglo-English law, eg re
 - ★ Termination, FM/renegotiation



Termination under CISG

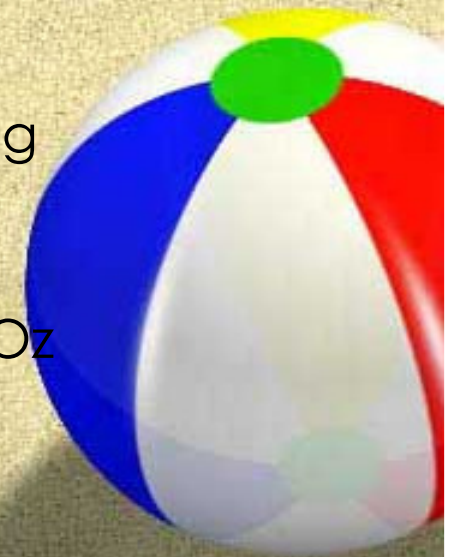
☾★ Depends on whether 'fundamental breach' (Art 25)

☾★ (or: if non-delivery, no performance despite *Nachfrist*)

☾★ 'Innocent party substantially deprived of expected benefit'

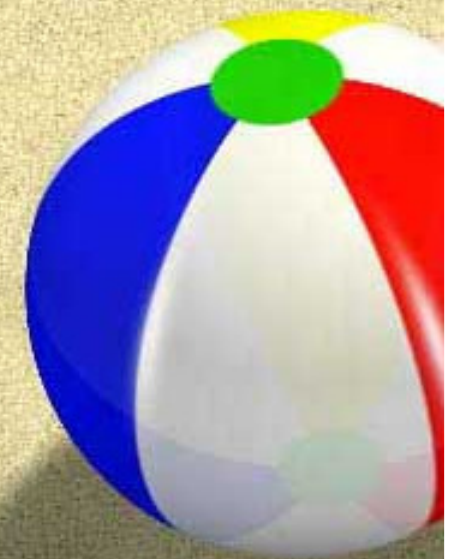
☾★ Various factors (including nature of gds, eg commodities in string Ks - even small breach may allow termn

☾★ But: less likely to allow term'n than Anglo-Oz law (implied *condition*): 'keep K alive'



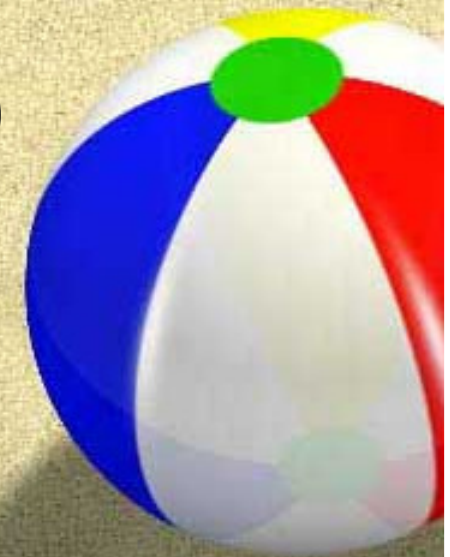
'Excuse' if changed circumstances

- ☾ Unexpected impediment to performance (incl. *extreme* market/price fluctuations)
- ☾ Notice (never: automatic termination)
- ☾ Termination only if ['fundamental']
- ☾ Only if in good faith (? Art 7).



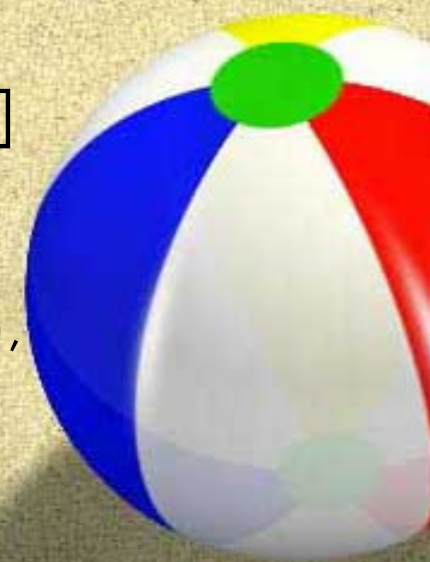
Australia (or some law firms)

- ☾★ Use CISG Art 6 to add in any cross-border Ks “we exclude CISG [for domestic Oz law]”
 - ☾★ But: more restrictions on termination, or chance for excuse, help eg sellers!
 - ☾★ And: CISG is more accessible, and consistent (especially with arbitration) as well as closer to business norms [VUWLR 2005, eg flowers]



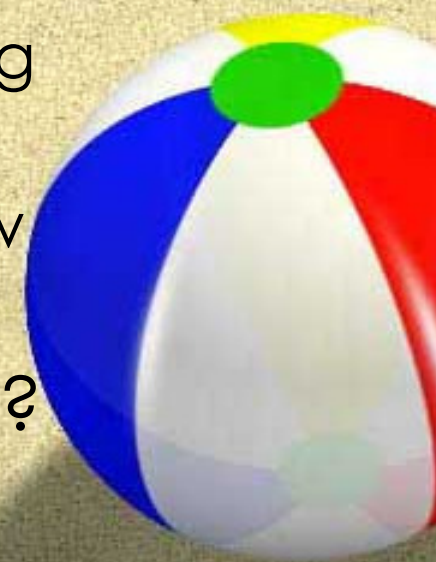
So partly: ignorance?

- ★ Eg *Playcorp* [Oz distributor] v *Taiyo Kogyo* [J maker] [2003] VSC 108
 - ★ breach of framework distributorship: not 'sale' so CISG n/a
 - ★ Defects in some shipments sold: CISG (Art 1(1)(a)) ... but SoGA (Vic) considered similar - yet eg defects must be notified within reasonable time (CISG Art 39)
- ★ Cf eg *Hannaford* [TVO/Oz cherry grower] v *Farmlink* [Oz exporter - onsold to 3P buyers in Spore & HK] [2008] FCA 1591
 - ★ Finn J: sale (so SoGA applies re defect claims), not agency (fiduciary - in which case CISG applies re Spore but not HK = PRC buyer)



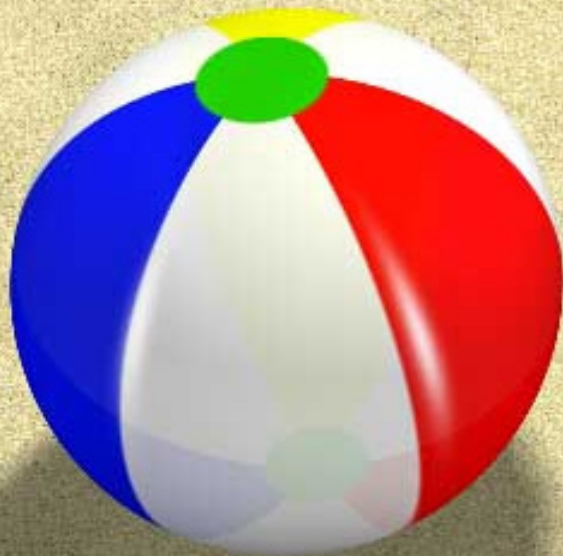
What about Japan?

- ☪ Initial indifference, eg
 - ☪ Unfamiliar, thinking UCC better, big law firms do more corporate work, big clients have foreign subsidiaries, small ones use *sogo shosha* - cf growth of Asia trade, useful in choosing governing law & to (re)draft clauses
 - ☪ Fear of unpredictability - cf cases now (generally and even some J parties)
- ☪ Will they prompt Oz firms to rethink?



Cross-border Dispute Resolution

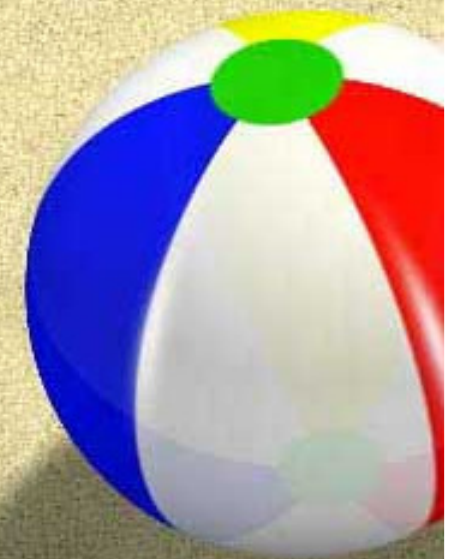
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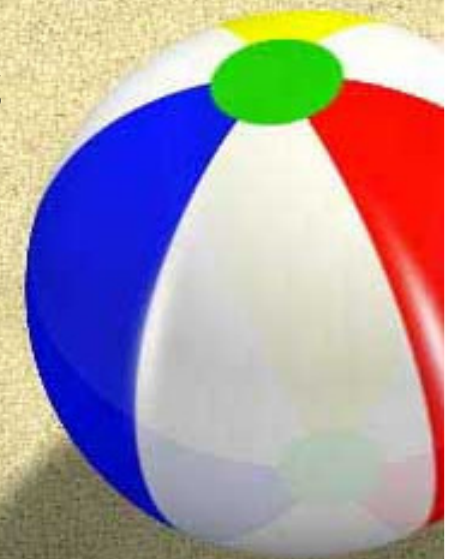
Overview

- ☾ Introduction: Australia-Japan FTA
negos - & business law
harmonisation?
- ☾ Trans-Tasman Judgments
Enforcement - Treaty, 2008
- ☾ Review of Intl Arb Act (& 2008
ACICA Expedited Arb Rules)
- ☾ Investor-state arbitration for
Australia, Japan and beyond?



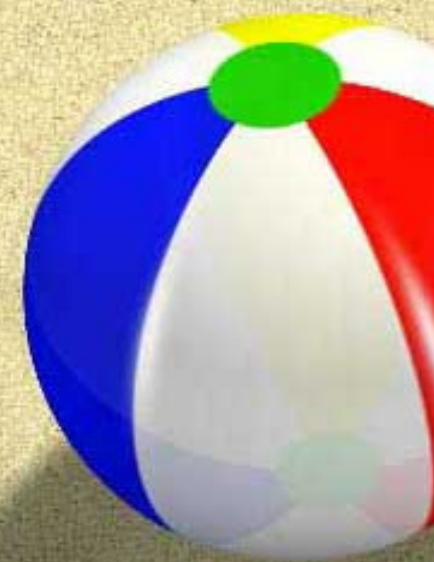
“Trans-Tasman Court Proceedings and Regulatory Enforcement”

- ☉ Agreement between Australia & NZ
 - ☉ Christchurch, 24 July 2008
 - ☉ Not yet in force, but “priority”!
- ☉ [2008] ATNIF 12, eg via AustLII
- ☉ Underpinned by CER '82 -> Business Law Harmonisation MoU ('88-)
- ☉ Similar to Brussels Convention (now: Regulation) in EU: treat NZ and Australian courts as the same!



Current problems

- ☾ Under common law and even legislation, judgments can be enforced only if:
 - ☾ Foreign court had “jurisdiction” as defined by the enforcing court (not: the foreign court)
 - ☾ Usually, eg: parties have a forum selection clause giving jurisdiction to such foreign Ct
 - ☾ Survives any ‘forum non conveniens’ challenge:
 - ☾ NZ (etc): another court more appropriate?
 - ☾ Vs Oz courts: not inappropriate?
 - ☾ Monetary judgment awarded
 - ☾ not eg specific performance orders



The new Treaty: Art 3

4. The following [civil] judgments shall be capable of recognition and enforcement under Article 5:

a) final money judgments, and

b) final non-money judgments,
except for the following:

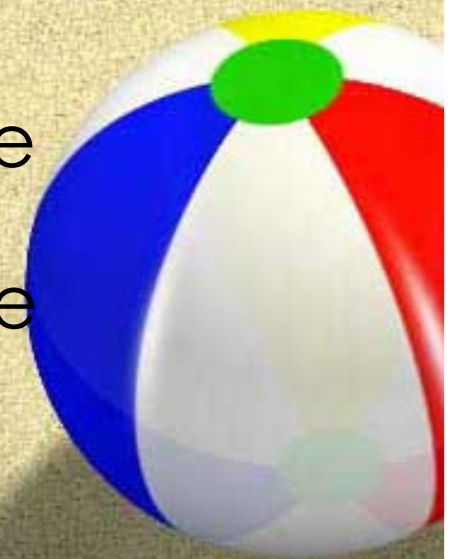
i)-iii) guardianship etc,

iv) orders that, if not complied with, may lead to conviction for an offence in the place where the order was made.

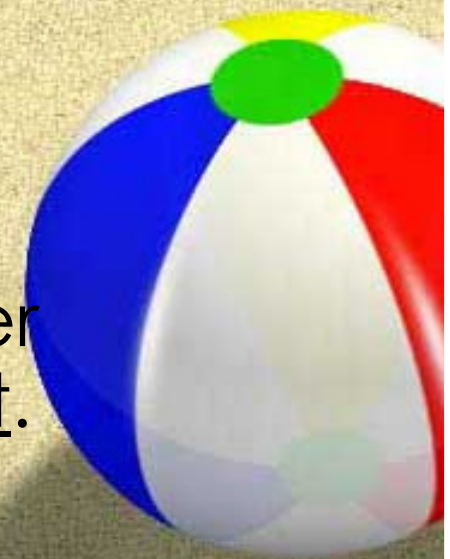


Service of process: Art 4

1. Initiating process in civil proceedings in a court within the territory of one Party may be served, without leave of a court, in the territory of the other Party.
2. Service rendered in accordance with this Article shall have the same effect as if it had occurred in the jurisdiction of the court in which the initiating process was issued.

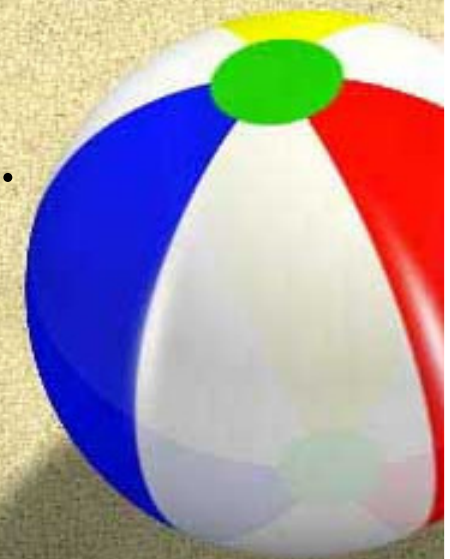


3. A plaintiff to a proceeding in the court in which the initiating process is issued shall not be required to establish any particular connection between the proceedings and the forum in order to render service under this Article.
4. Once service has been rendered under this Article, the defendant may apply for a stay of the proceedings on the basis that a court within the territory of the other Party is the more appropriate court.

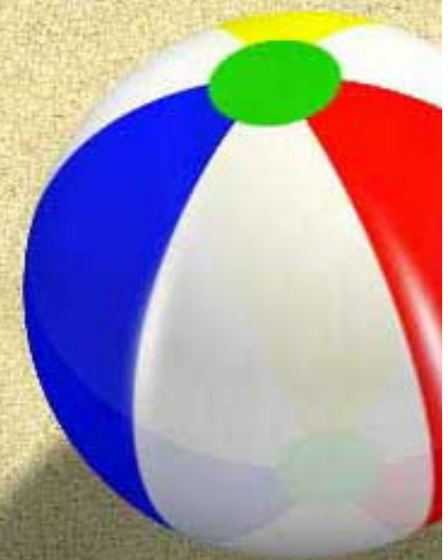


Recognition & Enforcement: Art 5

1. On application by the plaintiff, a judgment to which this Article applies issued by a court within the territory of one Party shall be registered by a court within the territory of the other Party (hereinafter “the registering court”).
2. A judgment registered under this Article shall have the same force and effect, and may be enforced, as if the judgment had been issued by the registering court.

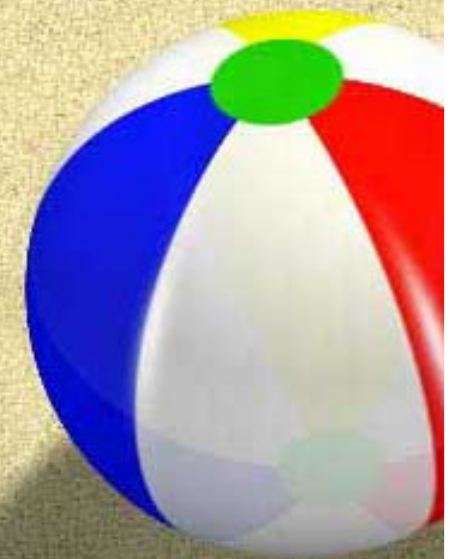


6. The registration of a judgment pursuant to this Article may only be set aside in the registering court, and the judgment refused recognition and enforcement in the country of registration, if registration of the judgment would be contrary to the public policy of that country.



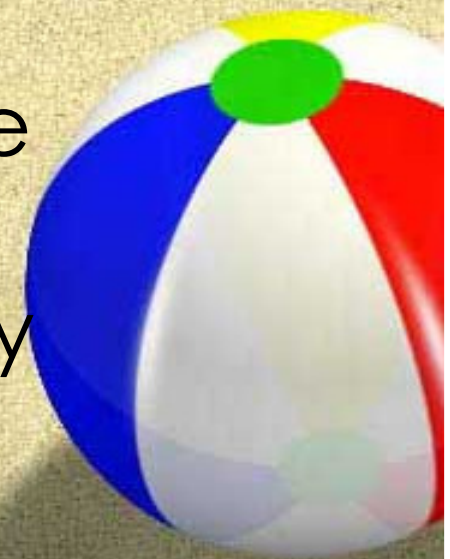
8. [...] may be set aside in the registering court on the basis that the property in question was not, at the time of the proceedings before the court which issued the judgment, situated within the territory of the Party in which the court which issued the judgment is located:

- a) judgments given in an action where the subject matter is immovable property; and
- b) judgments in an action in rem where the subject matter is movable property.



Cf Hague Convention '05?

- ☾★ 'Opt-in' system only: parties must agree on a (foreign) court in their contracts
- ☾★ Then: that takes jurisdiction (no FNC issues), other courts cannot and later must enforce the award.
- ☾★ Few accessions; NZ, Oz unlikely



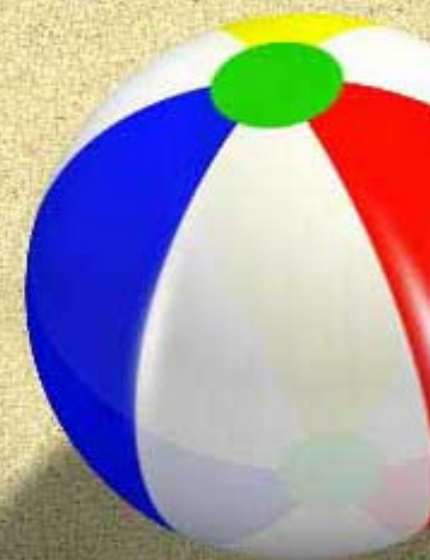
International Comm Arb

☾★ 1990 Act:

- ☾★ Pt 1 = New York Convention '58 (similar concepts as Hague Convention '05!)
- ☾★ Pt 2 = '85 ML (also core in NZ '96)
- ☾★ Pt 3 = '65 ICSID Convention (investor-state, not inter-firm, arbitration)

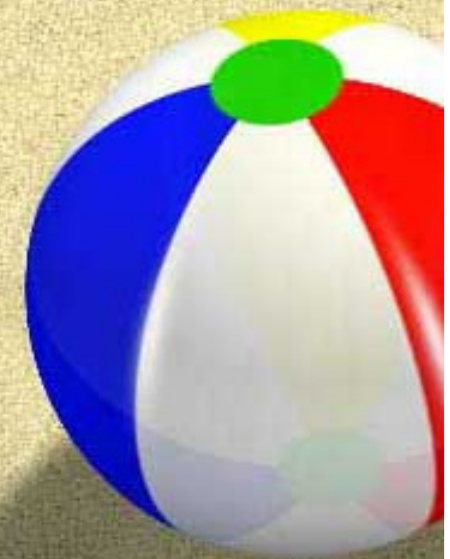
☾★ AGD review since Nov '08

- ☾★ Discussion Paper: mostly no-brainer issues! (eg incorrect incorporation of NYC Art V on enforcing awards)
- ☾★ Many submissions (eg mine): likely bigger reform



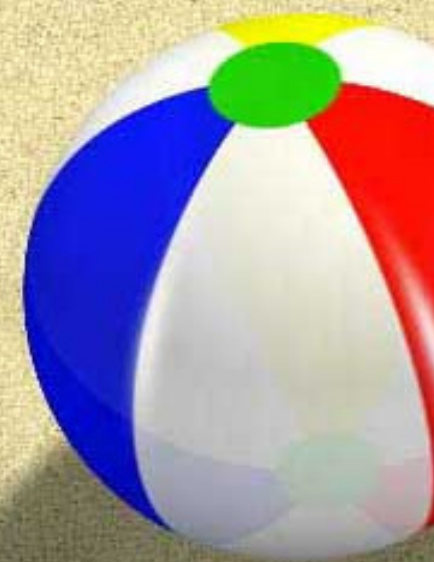
ACICA Expedited Arb Rules

- ☾★ Drafted by me and others over '08
 - ☾★ Also for AMTAC (maritime arbs)
- ☾★ General principle: fast, cheap but still fair
 - ☾★ quicker timelines
 - ☾★ ACICA appoints sole arbitrator
 - ☾★ No oral hearing (doc-only)
 - ☾★ Award within 4 months
 - ☾★ Cheaper for smaller-value (designed for simple, <\$250k disputes)



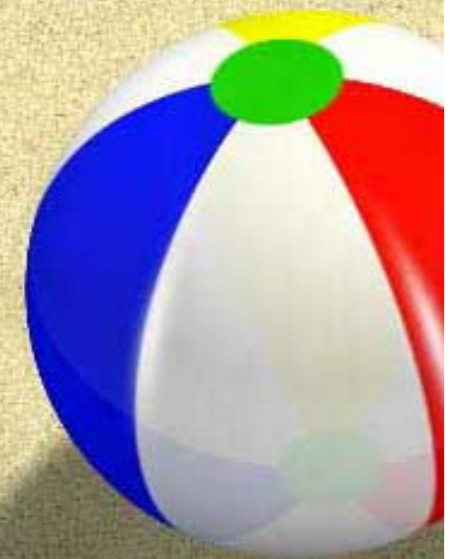
Investor-state arbitrations

- ☾★ Host state discriminates vs foreign investor, who can claim in arbitration if host state has 'consented' eg through BIT or FTA (altho' with home state!)
- ☾★ Usually under ICSID Rules (Washington), sometimes UNCITRAL Rules



My proposal

- ☾★ ACICA (and JSAA) develop more tailored ISA Arb Rules
 - ☾★ Recognising more public interests in ISA compared to ICA
- ☾★ Get this option added to eg Oz-Japan FTA.
- ☾★ Persuade foreign investors to use these Rules (not ICSID's)



Recognition and Enforcement of Foreign Judgments in Japan

- with a particular reference to Australian Judgments -

Koji Takahashi

Doshisha University Law School

ANJeL CLE Seminar, 14 Feb 2009, Ritsumeikan Tokyo campus

Recognition / Enforcement

- Automatic recognition if conditions enumerated in Art. 118 of the Code of Civil Procedure are met. No procedural step needs to be taken.
 - Exceptionally, there are cases in which the courts allowed a petition for a declaration that a particular foreign judgment (e.g. divorce decree) is null and void.
- Enforcement requires the filing of a suit to obtain an enforcement judgment: Art. 22(6) of the Civil Execution Act. The conditions are substantially the same as recognition: Art. 24(3).

Requirements

- Article 118 of the Code of Civil Procedure
 - A final and conclusive judgment
 - Jurisdiction of the foreign court
 - Service of a claim form on the defeated defendant (other than by publication) or voluntary appearance by that party
 - No infringement of substantive and procedural public policy
 - Reciprocity
- Reopening the merits is proscribed: Art 24(2) of the Civil Execution Act.

Final and conclusive judgments

- Irrespective of how it is called: e.g. ordinance, decree.
- Only civil (cf. criminal) judgments.
- Including non-monetary judgments.
- cf. Judgments subject to ordinary forms of review
- cf. interim measures, e.g. Mareva injunctions
- cf. in-court settlements, notarial deeds

Jurisdiction of the foreign court

- Whether a Japanese court, put in the position of the foreign court, would have jurisdiction under the Japanese rules of international jurisdiction (“mirror image” theory).
- Case-law: e.g. domicile of the defendant, principal place of business of the defendant, place of performance of the contractual obligation, place of tort, forum chosen by jurisdiction agreement, forum to which the defendant submitted by appearance, etc.

Service of a claim form

- Japan is a party to the Hague Service Convention 1965. But Australia is not.
- Assistance of Japanese courts must be sought through the diplomatic channel (requesting court – embassy in Japan – Japanese Ministry of Foreign Affairs – Head of Civil Division of the Supreme Court Secretariat – District Court – Defendant) cf. direct mail by the plaintiff.
- Act on Judicial Assistance given at the Request of Foreign Courts – Translation is required. Reciprocity exists with Australia, e.g. 1960 case.

Public policy (*ordre public*)

- Both procedure and substance
- e.g. A U.S. judgment for punitive damages was denied enforcement: Supreme Court on 9 July 1997. In Japan, damages are compensatory.
- e.g. A U.S. judgment was denied enforcement because of a conflicting Japanese judgment between the same parties on the same cause of action. Irrelevant which suit was filed earlier and which judgment was given earlier: Osaka District Court on 22 Dec 1977

Public policy (*ordre public*)

- e.g. An Australian divorce decree was denied recognition: Tokyo Family Court on 11 Sep. 2007. On the facts, which exhibited a close connection with Japan, the Japanese courts would not have allowed the petition, made by the culpable spouse, since to do so would have been repugnant to good morals.
- e.g. An Australian summary judgment was enforced: Tokyo District Court on 25 Feb. 1998. The defendant had been ordered to post considerable security for costs as a condition of appearance because of its weak case. Held not to offend procedural public policy.

Reciprocity

- Whether a comparable Japanese judgment is recognised in the foreign country under substantially the same conditions: Supreme Court on 7 June 1983
- Examples where reciprocity was denied are rare.
 - PR of China: Osaka High Court on 9 April 2003. The Supreme People's Court denied reciprocity with Japan.
 - Belgium: Tokyo District Court on 20 July 1960. Revision au fond.
- Australia deems reciprocity to exist with Japan (at least in pecuniary cases): Foreign Judgments Act 1991 (Australia) ss 5(1) and (3). Schedule 1. Relying partly on this Act, the Tokyo District Court (on 25 Feb. 1998) confirmed reciprocity with Australia.