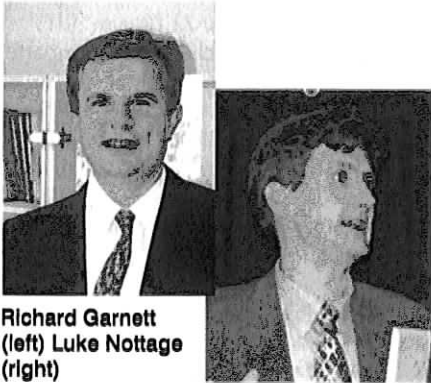


IAA Review: Towards more informal, global and comprehensive solutions



Richard Garnett
(left) Luke Nottage
(right)

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Act, highlighting eight major issues in its Discussion Paper (those emphasised in bold in the headings below). Social psychologists, however, alert us to a tendency – especially among Westerners – to attribute causation readily.² So we should be wary of assuming that the *ADR Reporter* is widely read amongst politicians and bureaucrats in Canberra!

Still, the AGD's Review has encouraged many of us to present our views on the issues already floated for discussion, and from February several dozen Submissions have been made available online.³ Some organisations and individuals, especially ourselves, have also presented a more comprehensive list and analysis of issues that should be addressed in and around a revised IAA. Below is a summary version of our main

points, under the original headings in our Final Submission online. That also includes a summary comparison of the main views presented by the other Submissions.⁴ We hope all this is helpful for all stakeholders interested in helping Australia developing a more functional international commercial arbitration (ICA) regime for the 21st century. We also already welcome feedback on our views, as we now go back to finalising a law journal article based on the points restated in our Final Submission.⁵

Introduction

To combat renewed concerns particularly about the growing costs of ICA, guiding principles for a more comprehensive overhaul should be:

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In the June 2008 issue of this *Australian ADR Reporter*, it was pointed out that UNCITRAL and New Zealand had reformed its arbitration legislation – “why not Australia?”¹ Readers were also encouraged to elaborate and share their own lists of problems with our current International Arbitration Act (IAA) regime. In November 2008, the Attorney-General's Department (AGD) announced a formal Review of the

CIArb Australia submission for IAA review

Med-Arb

First, CIArb submitted that the IAA should be amended to confer express power on an arbitrator to act as a mediator, subject to the parties' consent in writing to do so. It noted that legislative recognition of the Med-Arb procedure in respect of transnational disputes existed in many Asia-Pacific countries, including Hong Kong and Singapore.

CIArb submitted that express legislative recognition of the Med-Arb procedure in international arbitration legislation was desirable in order to promote the enforcement of an international arbitration award made in accordance with the Act. CIArb's submissions set out a proposed Med-Arb provision for insertion in the IAA (modeled on the Singapore International Arbitration Act, but with some important differences).

Reform of the Domestic Arbitration Acts

Secondly, CIArb submitted that it was highly desirable for the uniform domestic arbitration Acts to be reformed to bring them into conformity with the standards

contained in the Model Law (given effect to by the IAA) which, among other things, promoted finality of arbitral awards. CIArb expressly endorsed the sentiments of the Chief Justices in their letter dated December 2008 addressed to the Commonwealth Attorney-General which stated in part:

“Any attempt to hold out Australia as a centre for international arbitration will not succeed if the domestic arbitration system does not operate consistently with the international arbitration regime.”

Public Policy

Thirdly, CIArb submitted that consideration ought to be given to amending section 19 of the IAA to narrow and clarify the definition of public policy – and in particular, to re-draft section 19 to provide that an award is in conflict with the public policy of Australia if it is “manifestly contrary to widely accepted principles of international public policy.”

CIArb submitted that reference in section 19 to the concept of “natural justice” should be removed as it has the potential of undermining the finality of international

arbitration awards attracting the operation of the IAA if Australian courts apply parochial concepts of natural justice.

Confidentiality

Finally, CIArb submitted that consideration should be given to amending the IAA to codify the duty of arbitral confidentiality (as has been done in New Zealand). CIArb argued that enacting a statutory duty of confidentiality (subject to defined exceptions) may operate to attract international arbitrations to Australia by signaling to the international community that the default position in Australia is that arbitral proceedings and awards are confidential.

In conclusion, CIArb submitted that in order for Australia to establish itself as a credible venue for international commercial arbitration, it needs to adopt progressive national arbitration law reflecting international best practice, particularly as Australia's neighbours, including Singapore and Hong Kong are well in advance of Australia in establishing themselves as centres for international commercial arbitration.

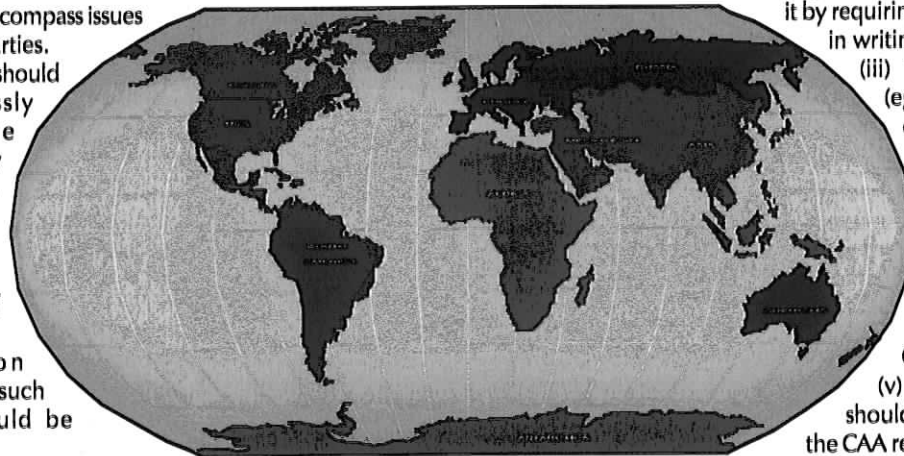
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- (i) fairness, but also especially more scope to restore greater informality in arbitration compared to cross-border litigation; and
- (ii) more global solutions (including a further shift away from the English tradition of tighter court supervision and diminished respect for arbitrator and party autonomy).

A. Stays

1. Arbitrability:
 - i) Its scope should be clarified especially by specifying consistently what disputes cannot be arbitrated (in part or in whole), particularly regarding various portions of the Trade Practices Act and similar fair trading legislation.
 - (ii) The applicable law for arbitrability, in the stay context, should be clarified as that of the forum (namely, Australia)
2. Arbitration agreement:
 - (i) It should clearly encompass issues regarding third parties.
 - (ii) Its applicable law should be that expressly chosen by the parties (possibly including "rules of law", not just a national contract law), otherwise that of the seat of the arbitration.
3. Conditions on stays: Limits on such conditions should be enunciated.
4. Stays under s7 vs Model Law (ML) Art 8:
 - (i) The revised IAA should clarify whether these are alternatives.
 - (ii) Anyway, time limits for stays should be specified.
5. Arbitration agreement – formal validity / writing requirements:
 - (i) Option 1 of the 2006 ML revisions should be adopted as a minimum (as now in Ireland, Slovenia, Mauritius and Peru – according to a personal communication from UNCITRAL⁶)
 - (ii) Option 2 (full liberalisation) should also be more seriously considered (as adopted in NZ already in 1996,⁷ but also for much longer in France and Sweden). Specifically, in light of the evidentiary, channeling and cautionary functions of writing requirements in contracts in general.



B. ENFORCING AWARDS

6. Two issues when Australia implemented New York Convention (NYC) Art V:
 - (i) **The word "only" should be included in IAA s8, to clarify that the grounds for refusing enforcement are exhaustive.**
 - (ii) The new regime should reconsider the partial reciprocity currently existent in s8, even though Australia has not made the (full) reciprocity reservation allowed by the NYC.
7. Enforcement possible only under IAA s8: This should be amended to allow enforcement also under ML Art 34.
8. Enforcing awards set aside at seat: This should be expressly allowed, as a helpful example of "delocalization".
9. Suspending enforcement if setting aside sought at seat: The revised IAA should at least consider an approach more likely not to suspend enforcement.

10. Public policy:

- (i) This should be amended simply to refer to "international" public policy, but with legislative history pointing to the 2002 Resolution/Report of the International Law Association.
- (ii) The revised IAA should then still consider whether, especially if arbitrability is expanded in stay contexts to allow more scope for arbitrators abroad to proceed to consider various disputes, there should be a "second look" provision along the suggestions (*obiter*) of the US Supreme Court in *Mitsubishi v Soler Chrysler-Plymouth*.⁸
- (iii) It should also consider adopting the approach of the English Court of Appeal, regarding substantive illegality of the underlying contract, in *Westacre*.⁹

11. Interim measures

- (i) Australia's revised IAA should adopt the revised ML Art 17;
- (ii) This should probably include ex parte preliminary orders, which after all was the compromise reached by UNCITRAL, at least on an opt-in basis. UNCITRAL has indicated to us that they have been allowed in revised legislation for Peru and Slovenia, and we can certainly confirm this for New Zealand.¹⁰

C. MODEL LAW

12. Opt-out and opt-in:

- (i) **The revised IAA should overrule Eisenwerk**,¹¹ possibly also adopting the (admittedly verbose) s15A of Singapore's own IAA.
- (ii) We should clarify that parties adopting the CAA regime or a foreign arbitration law signifies an opt-out, but discourage it by requiring such agreements to be in writing.
 - (iii) The possibility of parties (eg to domestic disputes) opting-in to the ML regime from the CAA should be highlighted, especially within the CAA.
 - (iv) When this new ML regime applies, it should exclude the CAA completely.
 - (v) Longer-term, Australia should be thinking of aligning the CAA regime much more closely with the ML regime, as in more and more countries that follow the ML approach.
13. **Jurisdiction of courts and devolving powers to arbitral institutions:**
 - (i) The Federal Courts should not have the exclusive jurisdiction proposed by the AGD, if only for constitutional reasons.
 - (ii) ACICA should have powers in lieu of courts regarding default appointment of arbitrators, but not challenges to them. And this should be subject to ACICA (or any other institution designed by Regulation under the revised IAA) agreeing on a MoU with the Government. This could include conditions such as ACICA requiring all arbitrators to abide at least by the standards set by the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration.

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14. Arbitrators ruling on own Jurisdiction: The revised IAA should adopt at least time limits beyond which concurrent applications to courts are not permitted.
15. Evidence: The revised IAA should require arbitrators and the parties to consider whether to use the 1999 IBA Rules on the Taking of Evidence in ICA.
16. Arb-Med: This should be expressly authorised, but subject to written agreement and with no ex parte communications, as one option (at least).
17. Awards:
- (i) Copies should be sufficient, as under the revised ML.
- (ii) We should consider provisions clarifying the extent to which reasons by arbitrators are required or encouraged (although presently this is mainly an issue under the CAA).
18. Other optional provisions:
- (i) Provisions on costs and interest (including compound interest) should apply clearly on an opt-out basis.
- (ii) More expansive provisions on consolidation are required.

D. OVERARCHING ISSUES

19. Confidentiality and privacy: Australia should simply adopt the solutions in the 2007 amendments in New Zealand.
20. Overarching principles:
- (i) We should adopt the revised ML Art 2A on interpreting in a more international and consistent spirit.
- (ii) We should also authorise reference to *travaux préparatoires* for Parts I and III of the IAA, not just Part II and the ML.
- (iii) All Parts should also have general principles encouraging expeditious and cost-effective arbitrations, as under ACICA Expedited Arbitration Rule 3.1.

E. CONCLUSION

- (i) This is a rare opportunity to comprehensively review the IAA regime to meet global standards, regaining lost ground in ICA for Australia particularly within the Asia-Pacific region.
- (ii) The revised IAA should include a commitment to regular further reviews, possibly including a broader reference to the Australian Law Reform Commission.



Endnotes:

1. Nottage L, *Reforming International Commercial Arbitration (ICA) Law: The United Nations, New Zealand – Why Not Australia?* (June 2008) 7 *The Australian ADR Reporter* 15.
2. Nisbett RE, *A Geography of Thought* (Free Press, 2003).
3. See <http://www.ag.gov.au/internationalarbitration>.
4. Also available directly via http://www.law.usyd.edu.au/scil/pdf/2009/AbrilrationTableSummary_Nottage.pdf. We are grateful to Sue Souled, intern for the Sydney Centre for International Law, for compiling most of that summary Table.
5. Our latest update from our Final Submission can be found as SCIL Working Paper #20 via <http://www.law.usyd.edu.au/scil/WorkingPapers.html>.
6. See also generally http://www.uncitral.org/uncitral/en/uncitral_texts/

arbitration/1985Model_arbitration_status.html. However, we are unable yet to confirm whether Ireland's Arbitration Bill of June 2008 has been enacted: cf <http://www.justice.ie/en/JELR/Pages/Publication%20of%20Arbitration%20Bill%202008> (with further links to the legislature and Department of Justice). That Bill proposed both Option 1 and Option 2 for consideration. Nor can we find yet revisions to Peru's arbitration law via its legislature's website: http://www.congreso.gob.pe/out_of_domain.asp?URL=http%3A/www.leyes.congreso.gob.pe/. However, Professor Fernando Cantuarias Salaverry has kindly sent us the new "Ley de arbitraje. Decreto legislativo of 28 Jun 2008.

In force 1 Sep 2008" Art 13 in effects adopt Option 1. The Slovenian Act may be available via the following website, but regrettably we cannot read Slovene: <http://lus-info.lus-software.si/LUSINFO.asp>. The International Arbitration Act 2008 in Mauritius has been gazetted and is available via <http://supremecourt.intnet.mu/Entry/dyn/legislation.htm>. Section 4 adopts Option 1. Section 43(b) also amends other legislation incorporating the NYC by requiring that: "In applying the Convention, regard shall be had to the Recommendation regarding the Interpretation of Article II(2) and Article VII(1) of the Convention adopted by UNCITRAL at its Thirty-Ninth session on 7 July 2006".

7. Nottage, above note 1.. The current New Zealand legislation is available via <http://www.legislation.govt.nz/>.

nz/.

8. 473 US 614 (1985). Also relevant to these questions is the Court's obiter (in the stay context) about "prospective waivers", where parties agree that foreign arbitrators should apply foreign law to the express exclusion of all Australian law; as well as the vexed question of whether arbitrators should be bound (morally, if not legally) by more universal "transnational public policy".

9. *Westacre Investments Inc v Jugoimport-SDRP Holding Co Ltd* [1999] 3 WLR 811.

10. Above, notes 5 and 6. They were proposed in Ireland's Arbitration Bill 2008, but (as indicated above) we are unsure if and how that has been enacted. We thank Will Story from the AGD for pointing out that ex parte preliminary orders have not been included in the 2008 Act in Mauritius.

11. *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461.