THE ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS AND PUBLIC POLICY

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PART I: The Basic Outline of Enforcement

1. An international arbitration award may be enforced by courts in Australia upon application using either of two provisions of the *International Arbitration Act 1974* (Cth) (the Act). This paper is concerned with enforcement of an award upon an application being made to a competent court although it should be noted that substantive enforcement may also be achieved by "recognition" in legal proceedings that the award is binding as between the

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parties thereby giving rise to a *res judicata* or issue estoppel.[1]

2. The first provision, s 8, was enacted in 1974 to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York on 10 June 1958 (the Convention). Article III of the Convention requires each Contracting State, such as Australia, to recognise and enforce foreign arbitral awards. At that time the provisions of the Act (and the Convention) only addressed the enforcement of arbitration agreements and foreign arbitration awards. Relevantly s 8(2) provides that *"a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court."*

3. The second provision, s 16 was enacted in 1989. Section 16 gives Schedule 2 to the Act, *"the force of law in Australia."* Schedule 2 is the Model Law on International Commercial Arbitration adopted by United Nations Commission on International Trade Law (UNCITRAL) in 1985 (the Model Law). The Model Law is a template for legislation regulating international arbitration which sovereign States may use, adopt or modify when enacting legislation dealing with international arbitration. It is, in effect, a draft arbitration statute which includes provisions for the enforcement of arbitration awards in Art 35 which are "*modelled*

[1] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, French CJ and Gageler J at [19]-[23].

closely on"[2] Art III of the Convention. In 1989, Australia passed the International Arbitration Amendment Act 1989, which, introduced s 16 and subject to some minor qualifications irrelevant for present purposes, gave the unaltered Model Law, including Art 35, the force of law in Australia. Relevantly Art 35(1) provides that an "*arbitral award ... upon application in writing to a competent court, shall be enforced subject to the provisions of this article and of article 36*."

4. Following the promulgation of the Model Law, some Contracting States [3] to the Convention repealed their earlier legislation implementing the Convention, preferring instead the more comprehensive and more recent provisions of the Model Law. Australia has not done so, but has avoided the possibility of the dual application of s 8 and Art 35, by inserting s 20 in the Act which provides *"where, but for this section, both* [Article 35] *and* [s 8] *of the Act would apply in relation to an award,* [Article 35] *does not apply."*[4]

A "foreign" award or an "international" award

5. It should be noted that the language used in s 8 is different to the

[2] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, French CJ and Gageler J at [18].

[3] See e.g., Malaysia, s 51(1) of the *Arbitration Act 2005*.

[4] This provision accords with Article 1(1) of the Model Law which states that the provisions of the Model Law apply subject to any agreement in force between Australia and other States. The Convention is such an agreement and had been implemented by the prior enactment of s 8 in 1974.

language used in Art 35. Section 8 applies to a foreign award, which is defined as an award made *"in a country other than Australia."* [5] The Convention makes the distinction between "domestic" awards[6] and those awards made in another sovereign State. Article 35, however, applies to an award which is made in an *"international commercial arbitration"*.[7] Such an award may also be a foreign award and made in another sovereign state, or it may be an international arbitration award made in Australia as was the case in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*.[8]

6. In both cases, the award is binding on the parties from the time that it is made and may be enforced upon application in Australia in a competent court. An application for enforcement of a *foreign award* under s 8 may be made in a court of a State or Territory, or in the Federal Court of Australia (see s 8(2) and s 8(3) respectively). There is no provision of the Act which expressly confers jurisdiction on a court to deal with applications for enforcement under Art 35. Nevertheless, an application for enforcement of an *international award* under Art 35 may be

[5] Section 3(1) of the Act, see definition.

[6] See Art III of the Convention.

[7] See Article 1(1) of the Model Law.

[8] [2013] HCA 5, the award was made in Victoria in an international commercial arbitration.

made in the Federal Court of Australia[9] and in any State court.[10]

The structure of the enforcement provisions of the New York Convention

7. At this stage it is important to note the approach to award enforcement structure adopted by the Convention and which is also reflected both in s 8, and in Art 35 of the Model Law. Article III of the Convention requires that each Contracting State *"shall recognize [foreign] arbitral awards as binding and shall enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles"*. Article IV(1) of the Convention requires the party seeking enforcement (aka, the award creditor) to supply (a) the original award or a certified copy and, (b) the original arbitration agreement or a certified copy of the agreement. These two requirements are found in s 9 of the Act but not now in the Model Law which was amended in 2006. Article 35(2) only requires the applicant to produce a "*copy of the award*" on an application to enforce an international arbitration award.

[9] Note, s 18 and Article 6 do not refer to power of enforcement in Article 35. The Federal Court of Australia may enforce an award in its original jurisdiction under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) in a matter arising under a law made by the Commonwealth Parliament "because the rights in issue in the application depend on Art 35 of the Model Law for their recognition and enforcement and because the Model Law is a law made by the Commonwealth Parliament"; *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5, French CJ and Gageler J at [2].

[10] See s 39(1)(2) of the *Judiciary Act 1903* (Cth).

8. Article V(1) of the Convention then provides that enforcement of the award *may* be refused, at the request of the party against whom enforcement is sought (aka, the award debtor), "*only if that party furnishes to*" the enforcement court "proof" which establishes one or more of five limited grounds for refusal listed in Art V(1).

9. Briefly these limited grounds, which are reproduced in the Act and the Model Law, are;

1 *"that party . . . was, under the law applicable to him or her, under some incapacity . . ."* (Art V(1)(a) of the Convention, s 8(5)(a) of the Act, and Arts 34(2)(a)(i) and 36(1)(a)(i) of the Model Law).

2 *"the arbitration agreement is not valid under the law…"* (Art V(1)(a), s 8(5)(b), and Arts 34(2)(a)(i) and 36(1)(a)(i)).

3 *"that party was not given proper notice"* or *"otherwise unable to present… case"* (Art V(1)(b) s 8(5)(c), and Arts 18, 34(2)(a)(ii) and 36(1)(a)(ii)).

4 *"award deals with a difference not contemplated by… the submission to arbitration"* or *"contains a decision on a matter beyond the scope of the submission to arbitration"* (Art V(1)(c), s 8(5)(d), and Arts 34(2)(a)(iii) and 36(1)(a)(iii)).

5 *"composition of the arbitral authority or the arbitral procedure"* was not in accordance with arbitration agreement or applicable law (Art V(1)(d), s 8(5)(e), and Arts 34(2)(a)(iv) and 36(1)(a)(iv)).

6 *"the award has not yet become binding"*, *"set aside"* or *"suspended"* (Art V(1)(e), s 8(5)(f), and Arts 34(2)(a)(v) and 36(1)(a)(v)).

10. An enforcement court, of its own motion, "*may also"* refuse enforcement, if it finds that (a) the subject matter is not capable

of settlement by arbitration under the law of the place of enforcement court, or (b) enforcement would be contrary to public policy of that country[11]. In any case, even if one or more of these grounds for refusal is established, an enforcing court may nonetheless enforce the award.

11. The characteristic pro-enforcement structure of the process is the presentation of the award and the arbitration agreement by the award creditor to an enforcement court, whereupon the enforcement court may only refuse enforcement if one or more limited grounds are established by the award debtor, or if the enforcement court is satisfied on either of the public policy grounds.

The Procedures followed by Australian Courts

12. This pro-enforcement structure is most strongly reflected in the procedure followed in Victoria in relation to enforcement of foreign awards under s 8. There the Rules and the Practice Note provide for a two-stage process[12]. As noted by the Court in *IMC*

[11] see Article V(2)(a) and (b), and also reproduced in s 8(7) of the Act and in Art 36(1)(b) of the Model Law.

[12] Order 9 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic) and Practice Note No 2 of 2010, Arbitration Business, the Victorian Supreme Court has on 6 November 2014 has announced the making of the *Supreme Court (Chapter 11 Arbitration Amendment) Rules* 2014 (SR No 205/2014). These new rules come into effect on 1 December 2014. The Court hopes to provide in the reasonably near future a guide in the form of a practice note to the new rules.

Aviation Solutions Pty Ltd v Altain Khuder LLC;[13]

> "*Stage one usually involves the making of an ex parte application for leave to enforce the award. If leave is granted, an order is made which gives effect to the award as a judgment of this Court and stays the enforcement of the award for the purpose of giving the award debtor an opportunity to apply to the Court to set aside the order. Stage two occurs only if an application is made to set aside the order. If such an application is made, stage two involves an inter partes hearing of the application. This two-stage model has been adopted in other Convention countries*."

13. Nonetheless, there is no uniform procedure followed by Australian courts and award enforcement in other courts will normally involve a contested hearing before any judgment order is made.

14. In New South Wales, applications for the enforcement of foreign awards under s 8 are placed in the Commercial List in the Equity Division of the Supreme Court of New South Wales and are commenced by the filing of a Summons supported by matters such as a statement of the steps considered by the plaintiff

[13] [2011] VSCA 248, Hansen JA and Kyrou AJA at [132].

necessary to prepare the matter for hearing[14]. The defendant is then served, and is required to serve a Commercial Arbitration List Response including any additional or different steps necessary to prepare the matter for hearing.

15. In Victoria, as noted above, foreign award enforcement applications do proceed ex parte. In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248, the trial judge made ex parte orders for the enforcement of the foreign award and provision was made for the defendants to apply to set aside the order within 42 days of service. One defendant, who was not named in the arbitration agreement, unsuccessfully tried to set aside the orders. This decision was reversed on appeal where the Court of Appeal considered at what stage in the procedure, a court should consider whether the award debtor who is not named in the arbitration agreement, is a party to that agreement. Was this an issue which must be established by the award creditor at the outset, or did the award debtor bear the onus of establishing that it was not a party to the agreement under one of the limited grounds of defence found in s 8(5)(b), namely, "*the arbitration agreement was not valid under the law*…".

16. The Court analysed s 8(1) which provides that, subject to Pt II of

[14] see, Practice Note No. SC Eq 9, Commercial Arbitration List, and e.g., *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403, where partial enforcement was ordered.

the Act, a foreign award "*is binding by virtue of this Act for all purposes on the parties to an arbitration agreement in pursuance of which it was made*" and s 8(2) which provides that, subject to Pt II, a foreign award "*may be enforced in a court… as if the award were a judgment or order of that court.*" As the award creditor could not produce the arbitration agreement naming the award debtor, the award creditor could not rely on s 9(5) which provides that such document once received by the court is "prima facie evidence" of the matters to which it relates. In the view of Warren CJ, the words "*arbitration agreement*" in s 8(1) mean "*purported or apparent arbitration agreement.*"[15] Accordingly, the applicant award creditor must establish these facts before the respondent award debtor is liable under s 8(1). The effect of the deeming provision in s 9(5) is "*that the mere production of the original arbitration agreement and the original award (or duly certified copies of these documents) will normally be sufficient to discharge the burden that the Act places on the award creditor*", such as in the situation where the arbitration agreement names the award debtor.[16] Warren CJ held that where the award debtor is not named, the award creditor will need to lead extrinsic evidence to show, "*on the balance of probabilities*",[17] that the award debtor is a party to the arbitration agreement pursuant to which

[15] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 at [43].

[16] Ibid at [43], Warren CJ, (although see Foster J in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 at [71]-[75]).

[17] Ibid at [43.1].

the award was made. Once this threshold legal burden in s 8(1) has been satisfied, the award debtor may then only resist enforcement of the award by relying on one of the grounds in s 8(5) and (7). On this view, Warren CJ held that the *"party-hood"* of the award debtor is a threshold issue, and the claim by the award debtor that it is not a party to the arbitration agreement is dealt with at this stage and is not treated as falling within the invalidity defence in s 8(5)(b), as it "*would be to seriously strain the language*" of the provision.[18]

17. A different two stage approach, involving a different onus of proof on the applicant, was applied by Hansen JA and Kyrou AJA. This approach requires at stage one that the award creditor satisfies the enforcing court "*on a prima facie basis*"[19] that:

    (a) an award has been made by a foreign arbitral tribunal granting relief to the applicant award creditor against the respondent award debtor;

    (b) the award was made pursuant to an arbitration agreement; and

    (c) the award creditor and the award debtor are parties to

[18] Ibid at [47], Warren CJ.

[19] Ibid at [135], Hansen JA and Kyrou AJA.

the arbitration agreement.

18. Where, the required production under s 9(1) does not provide prima facie evidence of these three matters, the majority said that application should not proceed ex parte at stage one. The award creditor should be required *"to give notice of the proceeding to the award debtor and the proceeding should continue on an inter partes basis."*[20] At this stage, the *"evidential onus would be on the award creditor to adduce evidence, in addition to the arbitration agreement and the award, to satisfy the Court of those prima facie evidential requirements."*[21] Once *"the award creditor discharges the evidential onus of adducing prima facie evidence of the [three] matters"* at stage one, the matter proceeds to stage two and *"the legal onus will immediately be on the award debtor to prove one of the matters set out in s 8(5) or (7)."*[22] In propounding the alternative view, Hansen JA and Kyrou AJA held[23] that the ground of defence in s 8(5)(b) *"extends to the ground that the award debtor was not a party to the arbitration agreement"* but they recognised[24] that the terms of s 8(5)(b) *"may be inapt to accommodate the ground that a person*

[20] Ibid at [140].

[21] Ibid at [144].

[22] Ibid at [146].

[23] Ibid at [171].

[24] Ibid at [159].

is not a party to the arbitration agreement."[25]

19. Applications to enforce foreign awards under s 8 in the Federal Court are dealt with by Rule 28.44 of Division 28.5, International Arbitration, of the Federal Court Rules. Rule 28.44 requires an originating summons and the documents required by s 9 (which is in the same terms as Art IV of the Convention) namely, (a) the original award or a certified copy and, (b) the original arbitration agreement or a certified copy of the agreement and a supporting affidavit which evidences the non-compliance with the award and the award debtor's last known address. The application may be made *"without notice"*[26] although (I understand that) no case as yet has involved the entry of a judgment order prior to service of the process on the award debtor.

20. Nevertheless, the Federal Court has in practice adopted a two stage approach, requiring first that the Court be satisfied that the applicant has established "*to a prima facie level*" that there is a foreign award and an arbitration agreement,[27] before requiring the award debtor to discharge the onus of "*proving to the satisfaction of the Court*" one or more of the matters set out in s 8(5) or

[25] The majority followed the approach of Lord Collins JSC in *Dallah Real Estate and Tourism Holding Company v Govt of Pakistan* [2010] UKSC 46 at [77]; and Mance LJ in *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543.

[26] Rule 28.44(3) of the *Federal Court Rules 2011* (Cth).

[27] See *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636 at [46]-[47], and *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 at [78]-[79].

8(7).[28]

21. In Queensland[29] and South Australia[30], there are no specific court rules relating to the enforcement or foreign awards under s 8. In Western Australia[31], Order 81D of the Supreme Court Rules relates to proceedings generally under the Act but has no provision specifically directed to the enforcement of foreign awards.

22. Applications for enforcement of an international award under Art 35 of the Model Law are not specifically addressed in the Federal Court Rules and the usual initiating application is required.

PART II: The Juridical Seat of an International Arbitration

23. The role of the enforcement court as noted above is limited. It is to be contrasted to the broader and ongoing role of the supervisory court at the seat of the arbitration. The seat is the

[28] *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636 at [48].

[29] In *Resort Condominiums v Bolwell* (1993) 118 ALR 655 there was a contested hearing and in *Commonwealth Development Corporation v Montague* [2000] QCA 252, there was a decision following a contested hearing in the District Court which was overturned on appeal and the award enforced.

[30] In *Jebsens International (Australia) Pty Ltd & Anor v Interert Australia Pty Ltd & Ors* [2012] SASC 50 the awards were enforced following a contested hearing.

[31] E.g., *Antclizo Shipping Corporation & Ors v The Food Corporation of India & Anor* [1998] WASC 342 where the award was enforced after a contested hearing.

place to which the arbitration proceedings are legally attached.[32]

24. An international arbitration is not the natural extension of the judicial process of any one particular country and in that sense may be seen as legally unattached. However, the common law "*does not recognize the concept of arbitral procedures floating in the transnational firmament unconnected with any municipal system of law*". [33] Every international arbitration must be localised in the sense of having a juridical base or home which is generally where the arbitration is deemed to be located, although physically the arbitration process may involve venues and participants in a number of different jurisdictions. In the case of an international arbitration, there may be no natural law of the forum to regulate the procedure to be followed should disputes arise. The parties must therefore choose a seat or place where their arbitration is to be located legally. This place so identified is referred to variously as the juridical seat or home of the arbitration, the place of the arbitration, the legal situs of the arbitration and, most commonly, the seat of the arbitration. As noted by the Singapore Court of Appeal, "*the English concept of 'seat of arbitration' is the same as 'place of arbitration' under the Model Law*."[34]

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[32] "*The Place of Arbitration",* Jeremy Gauntlett, Arbitration (2014) issue 80(4) at 377-381.

[33] *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, Kerr LJ at 301.

[34] *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401 at 407.

25. The choice of a juridical seat for the arbitration carries with it the choice of the laws of that place as the laws to govern the arbitration process from start to finish. The use of the word "juridical" in qualifying the seat of arbitration is deliberate, as the word "*means and connotes the administration of justice so far as the arbitration is concerned. It implies that there must be a country whose job it is to administer, control or decide what control there is to be over an arbitration*."[35] Thus selecting the juridical seat, whilst it does involve choosing a physical location, is concerned with selecting a legal system as distinct from choosing a venue for any hearing. Thus the choice of the seat involves the parties choosing the arbitration law of the seat. This law so selected is variously referred to as the *lex arbitri*, the curial law of the arbitration or procedural law.

26. A choice of seat for the arbitration amounts to a choice of forum for remedies seeking to attack the award. An agreement as to the seat of arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration[36]. The parties' choice of the seat is an agreement that the courts of the seat will have

[35] *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC) at [15].

[36] *C v D* [2007] EWCA 1282, Longmore LJ at [17].

exclusive supervisory jurisdiction over the arbitration. Thus, any challenge to the award should be made under the laws of the seat absent an express agreement between the parties to the contrary and except where the challenge arises on an application for enforcement of the award under the Convention. The law of the seat is the curial law which governs the validity of the award and challenges to it. The *"principle is that a party should not generally bring proceedings in relation to an arbitration except in the courts of the jurisdiction of the seat of the arbitration"*[37] (except of course enforcement proceedings in those jurisdictions where the assets may be located).

Relationship between the Supervisory Court and Enforcement Court

27. There is an implied term in the parties' arbitration agreement on the seat and the curial law, that the courts of the seat of arbitration will have exclusive supervisory jurisdiction.[38] It should be noted that the proper law of the arbitration agreement may be different to the proper law of the contract in which the separate arbitration agreement is embedded.[39] Accordingly an attempt to invoke the courts of another jurisdiction to set aside the award is in breach of the parties' contractual rights and may

[37] *Chalbury MccOuat International Ltd v PG Foils Ltd* [2010] EWHC 2050 (TCC) at [21].

[38] *C v D* [2007] EWHC 1541 (Comm) at [52], affirmed on appeal *C v D* [2007] EWCA Civ 1282.

[39] *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638 (16 May 2012).

be restrained by an anti-suit injunction.[40] Whilst a challenge to the award in accordance with the terms of the arbitration agreement or in accordance with the law of the agreed supervisory jurisdiction does not constitute a breach of contract, an "*attempt to invoke the jurisdiction of another court is such a breach, of the contract to arbitrate, the agreement to refer and the agreement to the curial law. Such a challenge usurps the function of the [supervisory court] which has power to grant injunctions to protect its own jurisdiction and the integrity of the arbitration process. In such a case there is an infringement of the legal rights …[of the parties] and an abuse of the process of [the supervisory court] in the usurpation of its exclusive jurisdiction to supervise arbitrations with their seat in this [jurisdiction]*."[41]

28. The supervisory jurisdiction should not be underestimated as being confined to or only concerned with procedural matters such as challenging the appointment of arbitrators, revoking an arbitrators authority, or providing the extent of court intervention in the arbitration process. The arbitration law of the supervisory law of the jurisdiction also governs such matters as the final appeal or challenge to the final award, such as Art 34 of the Model Law. In this sense, the supervisory jurisdiction is concerned with matters which are substantive in nature, and not

[40] *Shashoua v Sharma* [2009] EWHC 957 (Comm) Ramsey J at [23]).

[41] *Terna Bahrain Holding Company Wll v Al Shamsi & Ors* [2012] EWHC 3283 (Comm) at [131].

procedural.

29. An award debtor may have a right to challenge an award before the supervisory court and, assuming the challenge is unsuccessful, a question then arises as to whether it would be inappropriate for an enforcement court to reach a different conclusion on the same question as that which had been reached by the court of the seat of the jurisdiction. This issue arose in *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [42]where the trial judge has said that it would be a rare case where it would be appropriate for an enforcement court in a Convention country to reach a different conclusion on the same question as that reached by the court of the seat of the arbitration. The Full Court, while agreeing that it would *"generally be inappropriate,"*[43] did not find it necessary to resolve the issue. The Full Court endorsed the view of Colman J in *Minmetals Germany GmbH v Ferco Steel Ltd*[44] that "*outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement*

[42] [2013] FCAFC 109 at [55]-[68].

[43] Ibid at [65].

[44] [1999] 1 All ER (Comm) 315.

application is to be most strongly deprecated."[45]

30. An enforcement application may be made while proceedings are on foot before the supervisory courts to set aside the award. In these circumstances a question arises as to whether the enforcement court should proceed to hear the application while the challenge is pending before the supervisory court. It will be recalled that one of the defence grounds is: "*The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*"[46]

31. Article VI of the Convention (which is reproduced in s 8(8) of the Act and Art 36(2)) provides that where an application for the setting aside or suspension of the award has been made to the court of the country in which, under the law of which, the award was made (ie. the supervisory court), the enforcement court may, if it considers it proper to do so, adjourn the proceedings, and may also, on the application of the award creditor order that the award debtor give "suitable security".

32. In *ESCO Corp v Bradken Resources Pty Ltd*[47]; the Federal Court suggested that s 8(8) was *"not the only source of power which*

[45] Ibid at 331.

[46] Article V(1)(e) of the Convention.

[47] [2011] FCA 905 at [55].

would enable [the] *Court to adjourn"* as the court has a *"general power to control its own processes."*[48]

33. As was noted in relation to the equivalent provision in England: *"Pro-enforcement assumptions are sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of origin — the venue chosen by the parties for their arbitration."*[49]

34. The discretion contained in s 8(8) has been described as a *"general discretion"* to adjourn enforcement proceedings[50] The onus is on the party resisting enforcement to establish a case for an adjournment: at [20(d)]. In the absence of evidence that an application has been made to a "competent authority" and in a proper and timely manner and had, at least prima facie, some prospects of success, an adjournment will not be granted. The enforcing court's "*assessment of the strength of the arguments in support of setting aside or suspending the award would ordinarily be undertaken on incomplete material and in circumstances where only the briefest consideration of the arguments would be appropriate*."[51]

35. A similar approach was taken under the equivalent provision in

[48] See, eg, *QH Tours Ltd v Ship Design and Management (Aust) Pty Ltd* (1991) 33 FCR 237 at 231.

[49] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm) at [14].

[50] *Hallen v Angledal* [1999] NSWSC 552; at [23].

[51] *ESCO Corp v Bradken Resources Pty Ltd* [2011] FCA 905 at [77].

Hong Kong in Hebei Import & Export Corp v Polytek Engineering Co Ltd[52] where the Court said: *"It is for the defendant to show that it has some reasonably arguable grounds which afford some prospect of success… it is going too far to say that the defendant must show that he is likely to succeed."* The applicant for an adjournment needs to satisfy the court that its application to set aside or suspend the award has been made *"bona fide"*.[53]

36. It has been said of the discretion found in the equivalent section of the *Arbitration Act 1996* (Eng, W & NI), that *"the court may adjourn but only if it considers it 'proper' to do so. The enforcing court's role is not therefore entirely passive or mechanistic. The mere fact that a challenge has been made to the validity of an award in the home court does not prevent the enforcing court from enforcing the award if it considers the award to be manifestly valid."*[54] On the other hand in *Dardana Ltd v Yukos Oil Co*[55] Mance LJ noted that a court could, of its own motion, consider that the determination of the application *"would be an inappropriate use of Court time and/or contrary to comity or likely to give rise to conflict of laws problems, when there were concurrent proceedings which would be likely to resolve the issue*

[52] [1996] 3 HKC 725 at 728.

[53] *ESCO Corp v Bradken Resources Pty Ltd* [2011] FCA 905 at [62], [66] and [86(a)].

[54] *Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd* [2008] EWCA Civ 1157, at [15].

[55] [2002] EWCA Civ 543, at [23]-[24].

in the country in which or under the law of which the award was made." Accordingly, even if the relevant principles of foreign law which were raised to challenge the award were agreed, it was preferable for the foreign court to apply them rather than the enforcing court and a stay was appropriate in that case. Nevertheless in considering whether to order security, it is necessary for the enforcement court to assess the strength or otherwise of the challenge to the award.[56] Even where the enforcement court forms the view that there is no realistic prospect of the challenge succeeding it may nonetheless order a stay on the provision of full security in the interests of comity and to avoid the possibility of inconsistent decisions, particularly when the supervisory court will determine the challenge in the near future.[57]

37. If an adjournment is refused and subsequently the award is set aside at the place of arbitration, it has been stated in relation to the equivalent English provision that the party which had obtained enforcement, "*would be under a duty to reimburse the amount paid*."[58]

[56] *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm) [29] – [37].

[57] *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm) [73].

[58] *Minmetals Germany v Ferco Steel* [1999] 1 All ER 315 (Comm) at 333.

PART III: PUBLIC POLICY IN THE NEW YORK CONVENTION AND THE MODEL LAW

38. The certainty and stability of the award as the contractual resolution of the parties' dispute depends upon national court systems recognising and enforcing awards. That was the subject, of course, of the Convention. It is also one subject of the Model Law. The Model Law also deals with setting aside the award and other matters.

39. Article V of the Convention (recognition and enforcement), and Arts 17I, 34 and 36 of the Model Law (recourse against the award and recognition and enforcement of interim measures and awards) have as one of their grounds:

    1 "*contrary to the public policy of that country*": Art V(2)(b) of the Convention.

    2 "*in conflict with the public policy of this State*": Art 34(2)(b)(ii) of the Model Law.

    3 "*contrary to the public policy of this State*": Arts 17I(1)(b)(ii) and 36(1)(b)(ii) of the Model Law.

40. The Act deals with recognition and enforcement in s 8. By subs (7)(b), the Court may refuse to enforce the award if it finds that the award "*would be contrary to public policy*." That notion is the subject of elaboration in subs (7A) which says "*to avoid*

doubt and without limiting paragraph (7)(b) the enforcement would be contrary to public policy if …(b) breach of the rules of natural justice occurred in connection with making the award". Section 19 deals with Arts 17I, 34 and 36 of the Model Law (which are made law in Australia by s 16 of the Act). Again, "*for the avoidance of any doubt*" it is declared that an interim measure or award "*is in conflict with, or is contrary to, the public policy of Australia if… a breach of the rules of natural justice occurred in connection with the making of the interim measure or award*."

41. Textually there is no apparent difference between the expression of the relationships between the award and the public policy in question: "contrary to" and "in conflict with". The meaning is identical.

42. Both the Convention and the Model Law as a matter of text make it clear that it is the public policy of the State in which the enforcement or recourse is occurring that is to be addressed. Though s 8(7) does not say that explicitly, s 19 of the Act does.

43. What is the public policy of Australia in this context? One needs to appreciate the full context and the meaning of the two instruments – the Convention and the Model Law. An examination of the preparatory works (*travaux préparatoires*) of the instruments and learned commentary (*la doctrine*) are essential, as are influential decisions of other countries are

essential, and as required by Art 2A of the Model Law and s 17 of the Act.

44. Public policy, or *ordre public*, is a traditional ground for refusal of foreign awards and judgments. It was generally recognised in this context at the time of the negotiation of the Convention and the Model Law to be a phrase representing the fundamental moral convictions or policies of the forum. But although of the State in question, it was not a domestic or parochial conception. It was a narrower conception in operation than true domestic public policy. Nor was it some truly commonly-shared international public policy. Rather, it was the State's recognition of its own fundamental values which it cannot give up despite the international character of the arbitral award. The notion of a truly commonly-shared international public policy based on natural law has been suggested from time to time, but this is not the relevant notion. The relevant conception is the public policy of the State that has an international dimension: the difference between "*ordre public à usage international"* and *"ordre public réellement international*".

45. This is the context in which one understands the case law that restricts the phrase to the fundamental principles of justice and morality of the State, recognising the international dimension of

the context.[59] Perhaps the most lucid exposition of the conception is in the reasons of Bokhary PJ and Sir Anthony Mason NPJ in *Hebei Import & Export* cited in *TCL* in the Full Court.

46. An important feature of public policy that was always recognised to inhere in the civilian concept of *ordre public*, was what might be called procedural justice. Some doubt existed in common law jurisdictions about this and so some (like Australia) for the avoidance of doubt sought to make clear that natural justice (as procedural justice based on fairness) was a part of public policy.

47. What is the significance and what are the limits of the rules of natural justice being part of public policy?

48. The significance of the question is that the fairness of the arbitral process is critical to the acceptance and legitimacy of arbitration. Article 18 of the Model Law expresses the fundamental norms of equality and fairness:

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[59] *Parsons Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F 2d 969 (2d Cir 1974); *MGM Productions Group Inc v Aeroflot Russian Airlines* 91 Fed Appx 716 (2d Cir 2004); *Hebei Import & Export Corp* [1999] 2 HKC at 215-216 (Bokhary PJ) and 232-233 (Sir Anthony Mason, with whom Li CJ and Ching PJ agreed, in the Hong Kong Court of Final Appeal); *Boardwalk Regency Corp v Maalouf* (1992) 6 OR (3d) 737 at 743 (Ontario Court of Appeal); *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 at 625-626 [41]-[46] and 630 [59] (New Zealand Court of Appeal); *Downer-Hill Joint Venture* [2005] 1 NZLR at 568-570 [76]-[84]; *Quintette Coal Ltd v Nippon Steel Corporation* (1990) 50 BCLR (2d) 207 at 217 (British Columbia Court of Appeal); *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295 at 316 (Sir John Donaldson MR); *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41; [2007] 1 SLR 597 at 619-622 especially 622 [59] (Singapore Court of Appeal); *Attorney General of Canada v S D Myers Inc* [2004] 3 FCR 368 at [55] (Federal Court of Canada).

"The parties are to be treated with equality and each party shall be given a full opportunity of presenting his case."

49. This has been described as the Magna Carta of arbitration.[60] It is the short expression of the uncompromising demand of the fairness of the arbitration process. This is not some pernickety body of rules, but the demand for equality and fairness that lie at the root of any legal order.

50. What are the limits of natural justice or procedural fairness? Those of you familiar with the operation of administrative law will be familiar with the variety of rules against which decisions of a public character are judged.

51. The expression of the rules of natural justice is often in terms of the fundamental principle that a fair and unbiased hearing be given. There are two traditional "rules": the hearing rule (*audi alteram partem*) that requires a decision-maker to hear a person before making a decision that affects that person's interests; and the *bias* rule (*nemo debet esse iudex in propria sua causa)* that no one may be a judge in his own cause.[61] These are procedural aspects of fairness that are well understood.

[60] H Holtzmann and J Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Kluwer, 1999 at 550 and noted by the Court in *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95 at 139.

[61] See generally M Aronson and M Groves *Judicial Review of Administrative Action* (5th Ed) ch 7.

52. There have been developments, however, of the notion of natural justice beyond such a procedural focus. For example, in *Dranichnikov v Minister* (2003) 77 ALJR 1088 a majority of the High Court treated the relevant tribunal's misunderstanding of the basis on which the applicant's claim was put as a breach of natural justice.[62] This can be seen to link with other lines of cases that require the decision-maker (as an aspect of affording natural justice) to act rationally, to respond to the case made by a party and to base the decision on probative evidence.[63] At least one thread of this (the requirement to have a decision on logically probative and relevant material) has a pedigree in decisions of Lord Diplock in the Court of Appeal and the Privy Council.[64]

53. The characterisation of such decisional failures as natural justice is of some consequence for arbitration as it potentially gives an avenue for factual review under the guise of natural justice. This issue was dealt with by the Full Court of the Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83.

54. It may be taken from the discussion by the Full Court at [89]-[109] that this characterisation is not without its doctrinal

[62] at [24] Gummow and Callinan JJ; and [95] Hayne J.

[63] *Applicant 164/2002 v Minister* [2006] FCAFC 15 at [79]-[92] (Lee J) [108] and [118]-[119] (Tamberlin J).

[64] *R v Deputy Industrial Injuries Commissioner; Ex parte Moore* [1965] 1 QB 456 at 488; *Mahon v Air New Zealand* [1985] AC 808 at 820-821; *Minister v Pochi* (1980) 31 ALR 666 at 687-670 and *ABT v Bond* (1990) 170 CLR 321 at 368 (both Deane J).

difficulties. That said, assuming it to be correct, the context of international commercial arbitration (context always being critical to procedural fairness) and the terms of the Convention and the Model Law required that the party seeking to invoke the rules of natural justice in this way to demonstrate real unfairness in how the hearing was conducted and award made. Such demonstration should be able to be done shortly and without a substantial analysis of the evidence on the reasoning: see [113].

55. It is critical that challenges to awards raising questions of natural justice do not degenerate into rehearings of facts. Critical to preventing this is the discretion inhering in the word 'may' Art V and Arts 34 and 36. The Full Court in *TCL* made clear that the award would not be set aside and enforcement would not be refused unless real unfairness was demonstrated. That unfairness was to be judged by the context – international arbitration between the parties, being persons hardly likely to be vulnerable.

The "implied" public policy in awards of costs.

56. Costs in legal proceedings, whether curial or arbitral are endemically high.

57. It is in this context that public policy considerations arise in the award of costs. At its most essential characterisation, the Court's power to award costs against the losing party is one informed by conscience and fairness.

58. The English common law rule that "costs follow the event" can be viewed as an adjectival manifestation of public policy to ameliorate the financial damage inflicted on an innocent party forced to conduct litigation to defend his or her position. On the other hand, in the United States, order for costs are viewed as an imposition preventing citizens from exercising the fundamental rights of access to the courts.

59. Of course, there are many species of costs orders: party/party costs, indemnity costs and solicitor/client costs. The question of which type of costs order should be made in a case will be affected by both specific characteristics of the matter, as well as public policy considerations. One will usually find that public policy attitude towards certain kinds of litigious conduct is expressed through its presumptive jurisprudence for the award of costs.

60. Where an arbitral award is unsuccessfully resisted, the policy question is a simple one: if a party is unsuccessful in their resistance to enforcement, what kind of costs should they pay? If there is no legitimate basis for objecting to enforcement, should costs be awarded on a full indemnity basis? Or would this, without any additional exacerbating factor, pose an unreasonable burden for the losing party? Should enforcement proceedings be viewed as just another ordinary piece of litigation?

61. The difficulty in resolving the conflicting concerns is reflected in the divided practice in the award of costs. It is worth considering in some detail three illustrative jurisdictions: Australia, the United Kingdom and Hong Kong, before returning to the question of how public policy should shape a court's approach to costs in enforcement proceedings.

United Kingdom

62. Before 2007, the United Kingdom courts dealing with arbitral enforcement proceedings examined the circumstances of the case closely to determine whether an award of indemnity costs would serve the interests of justice, and by extension, public policy. For example, in *Exfin Shipping (India) Ltd Mumbai v. Tolani Shipping Co. Ltd Mumbai* [2006] EWHC 1090 (Comm), Langley J assessed the question of costs as follows:

> "*Mr Whitehead, for the Owners, submitted the application should not only be dismissed with costs… but with those costs to be assessed on the indemnity basis. He submitted the application was unreasonable and intended to achieve (and had achieved) the objective of delay in payment which had been offered by the Charterers and rejected. Mr Whitehead also and rightly pointed to the warning shot fired at the Charterers by Gross J when he granted a 2 day extension of time for the application to be made. The comments of Gross J are recorded in the Order made on 17 March 2006. I agree. Charterers have*

acted in their own perceived commercial interests and without merit and should pay the commercial price of doing so."[65]

63. This basic philosophy was expressed more strongly in *A v B* [2007] EWHC 54, where Colman J held:

"*If one asks whether the predominant cause of their preparation and presentation was the wrongful invocation of English jurisdiction, the answer is clearly that it was. It would have been otherwise if they were unreasonably raised in the sense of being clearly without substance. That can be said of none of them. Given that the rationale of an indemnity costs order being attracted by breach of a jurisdiction clause is both an expression of judicial disapproval of deliberate misuse of the English courts and an attempt to provide compensation at an appropriate level for a breach of contract, I conclude that in a case such as the present it is open to me to make an indemnity costs order covering all the costs unless this is an exceptional case in which for example the innocent party's own conduct displaces such an order. In my judgment, there is in the points raised on behalf of A nothing which would justify that course.*"[66]

64. As such, the position in the United Kingdom is that indemnity costs will be awarded unless there are exceptional circumstances

[65] *Exfin Shipping (India) Ltd. Mumbai v. Tolani Shipping Co. Ltd Mumbai* [2006] EWHC 1090 (Comm) at [13].

[66] *A v B* [2007] EWHC 54 at [54].

to displace the presumption. The resistance of an award in breach of the contractual obligation engaged by the arbitration agreement is thus viewed as an abuse of process. This reflects the prima facie right to recognition and enforcement.[67]

Hong Kong

65. Like the United Kingdom, Hong Kong's arbitration judges take a dim view of proceedings brought to resist enforcement of an arbitral award.

66. This statement was made most clearly in *A v R* [2009] HKCFI 342, where Reyes J held that:

> "*in the absence of special circumstances, when an award is unsuccessfully challenged, the Court will henceforth normally consider awarding costs against a losing party on an indemnity basis.*"[68]

67. The public policy justification is set out eloquently from paragraph [68] and is worth quoting in full:

> *"Parties should comply with arbitration awards. A person who obtains an award in his favour pursuant to an arbitration agreement should be entitled to expect that the Court will enforce the award as a matter of course…*

[67] *Dardana v Yukos* [2002] 2 Lloyd's Rep 326 at [107] (Mance LJ).

[68] *A v R* [2009] HKCFI 342 at [72].

Applications by a party to appeal against or set aside an award or for an Order refusing enforcement should be exceptional events. Where a party unsuccessfully makes such application, he should in principle expect to have to pay costs on a higher basis. This is because a party seeking to enforce an award should not have had to contend with such type of challenge.

If the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award. The winning party would only be able to recover about two-thirds of its costs of the challenge and would be out of pocket as to one-third. This is despite the winning party already having successfully gone through an arbitration and obtained an award in its favour. The losing party, in contrast, would not be bearing the full consequences of its abortive application.

Such a state of affairs would only encourage the bringing of unmeritorious challenges to an award. It would turn what should be an exceptional and high-risk strategy into something which was potentially "worth a go". That cannot be conducive to CJR and its underlying objectives."[69]

68. Subsequent cases in the Hong Kong Court of First Instance and Court of Appeal have overwhelmingly adopted this approach,

[69] *A v R* [2009] HKCFI 342 at [68] – [71].

with clear statements endorsing the public policy philosophy that underlies it. In *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd* [2012] HKCA 332, the court agreed that ordering costs on a standard basis in such situations would in effect be '*to subsidise the losing party's abortive attempt to frustrate enforcement of a valid award*'.[70] The settled position in Hong Kong is captured in *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)* [2012] 1 HKC 491, where Tang VP (with the rest of the Court agreeing) observes:

> "*Experienced judges in charge of the Construction and Arbitration List have adopted the approach that, in proceedings arising out of or in connection with arbitral proceedings, in the absence of special circumstances, the court will normally consider it appropriate to order costs on an indemnity basis.*"[71]

69. The jurisprudence outlined above demonstrates clearly that the Hong Kong approach, like that of the UK, seeks to guard against abuse of process.

Australia

70. In Australia, the settled position on costs is that expressed in *MC Aviation Solutions Pty Limited v Altain Khuder* [2011] VSCA 248, a decision overturning the trial judge's application of the

[70] *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd* [2012] HKCA 332.

[71] *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)* [2012] 1 HKC 491 at [12].

Hong Kong approach outlined above. In that case, the Victorian Court of Appeal stated:

> "*A decision to award indemnity costs against an unsuccessful party is dependant upon there being 'circumstances of the case ... such as to warrant the Court ... departing from the usual course' of awarding costs on a party and party basis. Such a departure will only be countenanced in the presence of special circumstances. Unsuccessfully resisting enforcement of a foreign arbitral award is not an established category of special circumstances in Australia.*"[72]

71. This remains the position, and reflects the general approach to costs in Australia, which will generally award party/party costs unless there are circumstances that provide a clear indication that a higher rate of costs in the form of indemnity or solicitor/client costs is warranted. This approach operates on the assumption that enforcement proceedings are substantially the same as other proceedings brought before Australian courts. Under this system, the innocent party receiving costs orders in their favour on a party/party basis can expect to recover between 50-70 per cent of the actual legal costs incurred.[73]

72. However, there have been some proceedings in which Australian

[72] *MC Aviation Solutions Pty Limited v Altain Khuder* [2011] VSCA 248 at [55].

[73] Andrew Stephenson, 'Creating efficient dispute resolution processes: lessons learnt from international arbitration' (2004) 20 *Building and Construction Law Journal* 151 at 155.

judges have deemed indemnity costs appropriate. For example, Chief Justice Martin of the Supreme Court of Western Australia ordered Pipeline Services WA Pty Ltd to pay, on an indemnity basis, the costs incurred by ATCO Gas Australia Pty Ltd in applying for a stay of proceedings under section 8 of the *Commercial Arbitration Act 2012* (WA).[74]

73. The real question for Australian courts is whether the approach to enforcement proceedings adequately reflects the public policy considerations that should properly attend them. The shortcoming of Australia's position may be that while the presumption of party/party costs arguably delivers a just outcome in ordinary proceedings, enforcement proceedings in the context of arbitral awards are different in character.

74. The decision to enter into an arbitration agreement represents a bargain between the parties under which they consent to refer disputes to an arbitrator, along with the concomitant undertaking to accept and abide by the arbitral award. Commencing litigation to resist enforcement (if without foundation) may be viewed first and foremost as an abandonment of that contractual bargain. The United Kingdom is explicit in referring to this as a breach of contractual obligations. It may be said that there is a public policy interest in discouraging parties from abandoning promises made

[74] *Pipelines Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10.

by way of contract. Distinguishing it from other kinds of proceedings, the very act of commencing (unsuccessful) litigation to resist enforcement is itself an attempt to subvert the dispute resolution agreed upon by the parties, a repudiation of a contractual undertaking that causes further, unnecessary damage to the innocent party.

75. In addition, delaying the realisation of the award will often have serious commercial consequences for the party entitled to the benefit of the award. This is what the UK and Hong Kong courts determine is an abuse of process, and the Honourable Murray Gleeson summarises: "*For some of them, the more expensive and dilatory the process the better*."[75] It is unclear where Australian jurisprudence may draw the line between a "standard" application to resist enforcement, and one that is manifestly in bad faith and therefore an abuse of process.

76. One reason, perhaps, for promoting the UK and Hong Kong approach is that this reinforces the arbitration process and gives a high degree of confidence that awards will be enforced. This is particularly important in the international commercial context, where arbitrations are the dominant form of dispute resolution. As the Court observed in *TCL*:

[75] Hon Murray Gleeson AC 'The purpose of litigation' (2009) 83 *Australian Law Journal* 601 at 608.

"*Parties in international commerce may choose arbitral dispute resolution for many reasons… that chosen international legal order depends crucially upon reliable curial enforcement and a respect by the courts for the choice and autonomy of the parties and for the delicate balance of the system*."[76]

77. That is the ultimate objective to which all public policy considerations and the powers of the arbitration courts should be directed.

[76] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at [110]. Citations omitted.