AMERICAN DIAGNOSTICA INC v GRADIPORE LTD

Commercial Division: Giles CJ Comm D

10, 11, 26 March 1998

Arbitration — Appeals — Exclusion of — Exclusion agreements — Requirements — Agreement that award be final and binding — Not sufficient — Commercial Arbitration Act 1984, ss 38(2), 39(1)(a), 40.

Arbitration — Commercial arbitration legislation — Application to international agreements — Where party domiciled in Convention country — Agreement not outside ambit of local statute — Proposition that international arbitration beyond reach of local statute not maintainable — New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 — Commercial Arbitration Act 1984.

Private International Law — Commercial arbitrations — Choice of law — Where party domiciled in Convention country — Agreement not outside ambit of local statute — Proposition that international arbitration beyond reach of local statute not maintainable — New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 — Commercial Arbitration Act 1984.

Private International Law — Commercial arbitrations — Choice of law — Where chosen lex arbitri different from law of place of arbitration — Compulsory local procedural rules not to be set aside by agreement — Right of appeal as compulsory local rule — Commercial Arbitration Act 1984.

Section 40 of the *Commercial Arbitration Act* 1984 provides:

"40.(1) Subject to this section and section 41 —

(a) the Supreme Court shall not, under section 38(4)(b), grant leave to appeal with respect to a question of law arising out of an award; and

(b) no application may be made under section 39(1)(a) with respect to a question of law;

if there is in force an agreement in writing (in this section and section 41 referred to as an 'exclusion agreement') between the parties to the arbitration agreement which excludes the right of appeal under section 38(2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material."

Held: (1) An agreement that an award shall be final and binding, with an undertaking to carry out the award without delay, falls short of an agreement pursuant to s 40 of the *Commercial Arbitration Act* 1984 excluding the right of appeal under s 38(2) of the Act. (333D-E)

(Per Giles CJ Comm D) it would be wise, although not strictly necessary, to frame an exclusion agreement by specific reference to the right of appeal under s 38(2) of the Act and/or an application for determination of a question of law under s 39(1)(a). (333C)

Held further: (2) There is nothing in the terms of the *Commercial Arbitration*

Act 1984 to exclude from its application arbitration agreements a party to which was, when or after the agreement was made, domiciled or ordinarily resident in a Convention country (that is, a contracting state within the meaning of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958). (322F)

(3) The proposition that the *Commercial Arbitration Act* 1984 does not apply to an international arbitration is not maintainable. (323F)

Held also: (4) Parties to an international commercial arbitration may choose a lex arbitri (procedural law governing the conduct of the arbitration) different from the law of the place they choose for holding the arbitration. But so far as the local procedural rules compulsorily apply and are inconsistent with the chosen lex arbitri, they cannot be put aside by agreement that they do not apply. (325E)

(5) Thus the application of the *Commercial Arbitration Act* 1984, so far as it provides for leave to appeal, a compulsory local rule, cannot be put aside by agreement that the Act will not apply to the arbitration at all. (325F)

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1992] 1 QB 656 and *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48, applied.

Note:

A Digest (3rd ed) — ARBITRATION [2], [21], [30], [39.5]; PRIVATE INTERNATIONAL LAW [63], [90]

CASES CITED

The following cases are cited in the judgment:

Arab African Energy Corporation Ltd v Olieprodukten Nederland BV [1983] 2 Lloyd's Rep 419

Bank Mellat v Helliniki Techniki SA [1984] 1 QB 291

Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep 446

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1992] 1 QB 656

Chromalloy Aeroservices Inc v Arab Republic of Egypt 939 F Supp 907 (1996)

Corner v C & C News Pty Ltd (Yeldham J, 28 April 1989, unreported)

CSR Ltd v Cigna Australia Ltd (1997) 189 CLR 345

Doran Constructions Pty Ltd v Health Administration Corporation of New South Wales (Rolfe J, 24 August 1994, unreported)

Hi-Fert Pty Ltd v Kuikiang Maritime Carriers Inc (1998) 71 FCR 172

Hilmarton Ltd v Otv, Cass cv Ire (Hilmarton) Rev Arb 1994, 327

James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583

Marine Contractors Inc v Shell Petroleum Development Co of Nigeria Ltd [1984] 2 Lloyd's Rep 77

McKain v RW Miller & Co (SA) Pty Ltd (1991) 174 CLR 1

Natoli v Walker (Court of Appeal, 26 May 1994, unreported)

Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru [1988] 1 Lloyd's Rep 116

Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197

Phillips v Eyre (1870) 6 QB 1

Promenade Investments Pty Ltd v State of New South Wales (1991) 26 NSWLR 203

Resort Condominiums Inc, Re [1995] 1 Qd R 406

Sargent v ASL Developments Ltd (1974) 131 CLR 634

Stevens v Head (1993) 176 CLR 433

Three Valleys Water Committee v Bonnie & Partners (1990) 52 BLR 42

Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1

Union of India v McDonnell Douglas Corporation [1993] 2 Lloyd's Rep 48

Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538
White Constructions (NT) Pty Ltd v Mutton (1988) 57 NTR 8

APPLICATION

This was an application for leave to appeal to the Supreme Court under s 38 of the *Commercial Arbitration Act* 1984.

B W Rayment QC and *G J Nell*, for the plaintiff.

M S Jacobs QC and *S Jacobs*, for the defendant.

Cur adv vult

26 March 1998

GILES CJ Comm D. American Diagnostica Inc and Gradipore Ltd (Gradipore) are parties to an arbitration. The arbitrator published an interim award on 20 November 1997. American Diagnostica applied for leave to appeal on questions of law arising out of the award pursuant to s 38 of the *Commercial Arbitration Act* 1984 (the Act). Gradipore opposed the grant of leave, on grounds going to the Court's jurisdiction to entertain the application as well as on the merits of the application. These reasons are concerned with the application for leave to appeal.

The referral to arbitration:

Gradipore developed a reagent for detecting the presence in blood of lupus anticoagulants, antibodies the presence of which is associated with a number of disorders. It was known as Lupo-Test. By a distribution agreement dated 27 June 1991 Gradipore appointed American Diagnostica a world-wide non-exclusive distributor of Lupo-Test and any modified or improved versions thereof for a period of eighteen months. The distribution agreement included an arbitration clause and a choice of law clause:

> 18. SETTLEMENT OF DISPUTES
>
> In the case of any controversy, claim or dispute arising out of or related to this Agreement or the breach thereof the parties shall meet and exert their best efforts to resolve the dispute. Failing such agreement within seven (7) days of the first meeting called for such purpose the parties shall settle the dispute by referring the matter to arbitration, pursuant to the rules of the Australian American Arbitration Agreement in effect at that time or if there shall be no such Agreement in effect then in accordance with the Arbitration Act current in New South Wales, Australia at the time of such dispute. Such meetings aforesaid and arbitration will take place in Sydney, Australia.
>
> 19. APPLICABLE LAW
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> This Agreement shall be deemed to have been made in the State of New South Wales and the construction, validity and performance of this Agreement shall be governed in all respects by the law for the time being in force in the State of New South Wales, Australia."

As found by the arbitrator (Garry Downes AM, QC), the distribution agreement ran for a little longer than eighteen months but expired on 16 March 1993. During its currency American Diagnostica developed its own reagent and associated products. Following the expiry of the distribution agreement

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American Diagnostica began to sell its own products, while Gradipore appointed Centerchem Inc (Centerchem) as distributor of the Gradipore products. The products competed in the United States market.

On 27 September 1994, American Diagnostica began proceedings in the United States District Court Southern District of New York alleging trade mark and trade dress infringement against Centerchem, and on 2 June 1995 it added Gradipore as a defendant. Centerchem and Gradipore counter-claimed against American Diagnostica alleging trade mark infringement and breach of the distribution agreement.

Centerchem and Gradipore moved to stay the District Court proceedings in reliance on the arbitration clause in the distribution agreement. American Diagnostica contended that none of its claims and only two of the counter-claims fell within the arbitration clause, but it was held that the entire dispute arose out of or related to the distribution agreement. Centerchem agreed to be bound by the arbitration. By s 206 of the *Federal Arbitration Act* 1988 9 USC (US) the District Court was empowered to direct that arbitration be held in accordance with the agreement in the arbitration clause, and on 15 February 1996, Judge Chin ordered arbitration of all claims between American Diagnostica and Gradipore and stayed the litigation of American Diagnostica's claims against Centerchem pending arbitration. His Honour placed the proceedings on the suspense docket pending the outcome of the arbitration, an administrative procedure whereby proceedings which could neither be tried nor otherwise terminated did not count in statistics upon the disposal of cases. If reactivated, the proceedings would be restored to Judge Chin's docket or if he was not available reassigned by lot to the docket of another judge.

Dispute over rules of procedure:

There was nothing in effect answering the description of the rules of the Australian American Arbitration Agreement, and I infer that the parties so appreciated at the time although there was no direct evidence thereof. (In its written submissions Gradipore asserted that there were some rules answering the description, but in oral submissions it acknowledged, correctly, that there were not — how the original submission could have been made is not easy to see.) In accordance with the arbitration clause, therefore, the referral to arbitration was to be in accordance with the Act, being "the Arbitration Act current in New South Wales".

There were nonetheless many exchanges between American Diagnostica and Gradipore, not all well informed, concerning what were usually referred to, in terms or by cognate expressions, as the rules to apply to the arbitration or the rules of procedure to apply to the arbitration. It is tolerably clear that the exchanges were associated with American Diagnostica's wish to have the arbitrator consider two particular issues as preliminary matters and grant injunctive relief with respect thereto. American Diagnostica was not confident that this procedure was available under the Act. It proposed as rules to apply to the arbitration the *International Arbitration Rules* of the American Arbitration Association, under which the procedure was expressly available. There came a time at which American Diagnostica asserted that Gradipore (hereafter in referring to Gradipore I include Centerchem) had agreed to the *International Arbitration Rules*, while Gradipore asserted that it was willing to agree to any generally recognised arbitration rules and the issuing of interim relief and that

there had been agreement upon the Act "including its rules of procedure" as such rules.

There can be seen in the exchanges two different approaches, possibly not clearly recognised by the opposing parties, an appreciation of which is important to what follows.

On the approach of American Diagnostica, arbitration in accordance with the Act was a separate matter from the rules to apply to the arbitration, the rules to apply to the arbitration being supplementary to the Act. This can best be seen from a letter from Mr Harold Haidt, the New York attorney for American Diagnostica, to Judge Chin dated 6 June 1996 (copied to Mr James Jacobs, the New York attorney for Gradipore), citing part of a statutory declaration by the New South Wales solicitor for American Diagnostica stating that the Act "is the 'curial law' for any arbitration held in New South Wales and therefore is a separate matter from the rules of arbitration, which in New South Wales are determined either by agreement or by the arbitrator" and was confirmed by Mr Haidt's evidence that what was at issue at the meeting of 20 June 1996 shortly considered was "not what law applies [meaning the Act] but what rules would apply and whether the arbitrator had sufficient power to grant a preliminary injunction".

On the approach of Gradipore, the Act carried with it rules of procedure to apply to the arbitration. To begin with Gradipore's approach was similar to that of American Diagnostica. In a letter from Mr Jacobs to Judge Chin dated 1 April 1996 Mr Jacobs said:

> "We represent defendants Centerchem, Inc and Gradipore Ltd. At the hearing last Friday you asked whether an Australian arbitrator could award a preliminary injunction.
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> After conferring with associate Australian counsel, the answer is without doubt that he may. The American Diagnostica Inc — Gradipore Ltd arbitration agreement does not specify the arbitration rules that will apply during the arbitration. Accordingly, the parties must agree upon the rules, and in the absence of agreement, the arbitrator will order which rules will apply.
>
> To our knowledge all rules provide that arbitrators can award preliminary relief. For example, Commercial Arbitration Rules of the American Arbitration Association, r 22, both provide for 'interim measures' (copies enclosed). Gradipore Ltd and Centerchem Inc will agree to those rules, or the rules of any other generally recognised arbitration body.
>
> In any event by agreement the parties can supplement the arbitration rules. Gradipore Ltd and Centerchem Inc will agree that the arbitrator(s) will have the right to issue a preliminary injunction. The prevailing party on any such interim award may then file it with this court for enforcement."

But in a letter to Mr Haidt dated 30 May 1996 Mr Jacobs said that there had been earlier agreement between the New South Wales solicitors for the parties that the Act including its rules of procedure applied, with the comments that the agreement confirms the default provisions of the distribution agreement and that the Act provided for interim relief. Following this came Gradipore's assertion earlier summarised, in a letter from Mr Jacobs to Mr Haidt dated

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A A 3 June 1996, but on Gradipore's approach the Act's rules of procedure may still have depended on future agreement or the arbitrator's order.

It is not surprising that American Diagnostica caused the District Court proceedings to be brought before Judge Chin on 20 June 1996, on an application for orders that the rules governing the arbitration be the *International Arbitration Rules* and that the parties empower the arbitrator to consider the preliminary issues and grant an interim injunction. There was then agreement, embodied in an order made the next day recording that the parties agreed that the arbitrator "has, and shall have, jurisdiction and power to consider requests for and to issue both preliminary and permanent injunctive relief ...". No order was made as to rules to apply to the arbitration, and there was evidence that Judge Chin said that he did not care what rules the arbitrator followed so long as they provided that the arbitrator might issue injunctive relief and that Gradipore concurred.

C C **Agreement on rules of procedure:**

Immediately following the hearing before Judge Chin there was a meeting between Mr Haidt and Mr Haffner, representing American Diagnostica, and Mr Jacobs and Mr Berman, representing Gradipore. The meeting was initiated by Mr Jacobs in order to obtain from American Diagnostica agreement to the *UNCITRAL Arbitration Rules*. This was a marked change in Gradipore's stance. Unknown to American Diagnostica, counsel recently engaged for Gradipore in New South Wales had advised, as recounted by Mr Jacobs, that "Gradipore prefers that the arbitration be conducted pursuant to the UNCITRAL rules and ... now rejects that the New South Wales *Commercial Arbitration Act* ... is at all applicable". Mr Jacobs said that the meeting and, according to Mr Jacobs, his purpose in referring to the Act at the meeting, were "pursuant to a strategy that I devised to obtain American Diagnostica's agreement to use the UNCITRAL rules in the Gradipore — American Diagnostica arbitration".

E E There was a conflict in the evidence of what was said during the meeting. According to Mr Jacobs, supported by Mr Berman, Mr Jacobs said that he was willing to recommend a compromise to Gradipore and "rather than the New South Wales *Commercial Arbitration Act* 1984 as amended, including its rules and procedure, I suggest the parties agree to the use of the *UNCITRAL Arbitration Rules* and an Australian appointing authority"; Mr Haidt said that he would recommend this to American Diagnostica. According to Mr Haidt, however, supported by Mr Haffner, there was no mention of the Act; Mr Jacobs proposed the *UNCITRAL Arbitration Rules*, pointing out that they provided for interim relief. Mr Haidt said he was unhappy with the *UNCITRAL Arbitration Rules* because there was no person or organisation who would administer the arbitration, and preferred the *International Arbitration Rules* because the association was available to administer the arbitration; Mr Jacobs said that Gradipore objected to the *International Arbitration Rules* because of the perceived high cost of fees payable to the association, and suggested the G G *UNCITRAL Arbitration Rules* plus the appointment of an Australian other than the arbitrator as the administrator; Mr Haidt thought that an acceptable compromise; both attorneys said they would recommend this to their clients; there was also discussion of withdrawal of a notice of dispute served by Gradipore.

Mr Haidt wrote to Mr Jacobs on 21 June 1996, so far as presently relevant in the terms:

> "No doubt you have received a copy of Judge Chin's order of 21 June 1996.
>
> I want to advance the understandings reached at our meeting following the hearing. Counsel for the parties agreed to recommend to their respective clients that:
>
> (a) the UNCITRAL rules be adopted as the rules governing the arbitration;
>
> (b) an administrator, other than the arbitrator, be appointed to administer the arbitration;
>
> (c) Gradipore's 'Notice of Dispute' would be considered null and void, and not be asserted by any party as the commencement of the arbitration; and
>
> (d) the arbitration will be commenced by both parties filing their claims simultaneously on an agreed upon day, and then answering the claims of the other party within thirty (30) days thereafter.
>
> Jim, don't hesitate to modify my stated understanding if your recollection differs, or my statement is unclear."

Mr Jacobs replied the same day, again so far as presently relevant in the terms:

> "Thank you for sending [sic] forth the substance of our understanding. We agree with your statement except as to clarification of two points. We agreed that we should recommend to our respective clients that an Australian administrator, other than the arbitrator, be appointed to administer the arbitration and we did not agree as to the date answer claims would be filed after the simultaneously filed original claims. Australian counsel should be able to work out the dates. . . .
>
> Please confirm that my clarifications of our agreement are in accordance with your recollection. I have already forwarded our understanding with my recommendation to Australian counsel. Hopefully we will have an affirmative response on Monday."

The exchange ended with a letter from Mr Haidt to Mr Jacobs on 24 June 1996, again so far as presently relevant in the terms:

> "Referring to your letter of 21 June, 1996, your clarification of our understanding is correct. We have discussed this with our client and the understandings reached are acceptable to our client. You reported to me that Gradipore also agrees to the understandings."

I do not think it matters whether there was reference to the Act in connection with agreement on the *UNCITRAL Arbitration Rules*. It became quite clear, and was accepted by Gradipore, that whatever passed between the attorneys at the meeting was subject to referral to their clients, and that what was referred to American Diagnostica and Gradipore and agreed to by them was the "understandings" recorded in the subsequent letters. There was no agreement between American Diagnostica and Gradipore in the terms that the *UNCITRAL Arbitration Rules* be used "rather than the New South Wales *Commercial*

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Arbitration Act 1984 as amended, including its rules and procedure". There was agreement that the *UNCITRAL Arbitration Rules* be adopted "as the rules governing the arbitration", and later in these reasons I will come to the significance of that agreement.

If a finding be necessary, it seems to me that Mr Jacobs' strategy probably caused him to mention the Act, but to do so in passing so as not to highlight the change in Gradipore's stance or alert American Diagnostica to Gradipore's rejection of the applicability of the Act. Consistently with that implementation of his strategy, Mr Jacobs deliberately did not add to the understandings as set out in Mr Haidt's letter of 21 June 1996 an understanding that the Act did not apply or that the agreement on the *UNCITRAL Arbitration Rules* had the effect of excluding its application. So much in passing was the mention of the Act that, particularly when American Diagnostica had been urging the adoption of the *International Arbitration Rules* as a separate matter from the application of the Act, it passed Messrs Haidt and Haffner by. Even if Mr Jacobs' reference to the Act was in the terms of which he gave evidence, I consider that in the circumstances there could not thereby be found in agreement to adoption of the *UNCITRAL Arbitration Rules* as the rules governing the arbitration the further agreement that those rules should apply instead of, that is, to the exclusion of, the application of the Act. If that was part of Mr Jacobs' strategy — and some of his evidence suggested that it was not — his failure sufficiently to bring it out at the meeting deprived him of his objective. While I would so hold in any event, it seems to me that the conclusion that such reference to the Act as occurred was insufficient to give rise to an agreement that the *UNCITRAL Arbitration Rules* should apply instead of the Act is underlined by the absence of exclusion of the Act's application in the understandings immediately recorded.

The arbitration:

As recounted in the award, the Australian Commercial Disputes Centre was appointed to administer the arbitration but the parties did not call on it to play any role in the arbitration. The arbitrator convened a preliminary meeting on 17 July 1996. A question arose as to whether Gradipore's claims in the arbitration could go outside the issues raised in the District Court proceedings, and the arbitrator heard argument on that question and published an interim award. Hearings on the claims in the arbitration began on 24 September 1996, and occupied two periods from 24 September 1996 to 18 October 1996 and from 3 March 1997 to 27 March 1997. Written submissions were then prepared and provided to the arbitrator, and oral submissions were made in the period from 5 May 1997 to 12 May 1997. Further written submissions were provided to the arbitrator, by leave, over the following months. There were frequent interim applications, including applications for directions and discovery.

On 28 August 1997, the arbitrator published reasons leading to conclusions that all American Diagnostica's claims in the arbitration failed and that Gradipore succeeded on three of its claims in the arbitration but failed on all its other claims. His reasons included that the conclusion in favour of Gradipore on its breach of contract claim was tentative. He thereafter received further submissions upon the breach of contract claim and the consequences of his reasons and conclusions, and on some other matters raised by the parties. Finally he published the interim award on 20 November 1997.

The statutory basis for American Diagnostica's application:

American Diagnostica applied pursuant to s 38 of the *Commercial Arbitration Act* 1984:

"(1) Without prejudice to the right of appeal conferred by subsection (2), the Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

(2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.

(3) On the determination of an appeal under subsection (2) the Supreme Court may by order:

(a) confirm, vary or set aside the award; or

(b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration.

and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make the award within 3 months after the date of the order.

(4) An appeal under subsection (2) may be brought by any of the parties to an arbitration agreement —

(a) with the consent of all parties to the arbitration agreement; or

(b) subject to section 40, with the leave of the Supreme Court.

(5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that:

(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and

(b) there is:

(i) a manifest error of law on the face of the award; or

(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

(6) The Supreme Court may make any leave which it grants under subsection (4)(b) subject to the applicant complying with any conditions it considers appropriate.

(7) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire."

Section 40 referred to in s 38(4)(b) deals with exclusion agreements whereby the right of appeal in relation to an award may be excluded. It is set out later in these reasons; for the present, it is sufficient to note that an exclusion agreement must be in writing, in some circumstances a purported agreement will be of no effect, and it is expressly provided that s 38 has effect unless there is an exclusion agreement "notwithstanding anything in any agreement purporting ... to prohibit or restrict access to the Supreme Court ... [or] to restrict the jurisdiction of the Supreme Court".

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interim award. Since Gradipore did not consent to the appeal, leave is necessary: hence American Diagnostica's application. Leave may not be granted unless s 38(5) is satisfied. The issues in the application included whether the errors on the part of the arbitrator alleged by American Diagnostica gave rise to questions of law arising out of the award and, if they did, whether s 38(5) was satisfied. But Gradipore also contended: (a) that leave to appeal could not be granted because the Act does not apply to the arbitration at all; (b) alternatively that leave to appeal could not be granted because there was an exclusion agreement; (c) alternatively again, that leave to appeal should not be granted (strictly, that the application for leave to appeal should be permanently stayed) on forum non conveniens grounds; (d) that American Diagnostica's application for leave to appeal was out of time.

Does the Act apply to the arbitration?

By s 3(2)(a) of the Act it applies to "... an arbitration agreement ... and to an arbitration under such an agreement". The definition of "arbitration agreement" in s 4(1) is "... an agreement in writing to refer present or future disputes to arbitration". The Act deals with the appointment of arbitrators and umpires (ss 6-13); the conduct of arbitration proceedings (ss 14-27); awards and costs (ss 28-37); powers of the Court (ss 38-49); and generally as to arbitration (ss 50-55). Within these general topics are a diverse collection of provisions, many stated to apply subject to the arbitration agreement, unless a contrary intention is expressed in the arbitration agreement, or unless it is otherwise agreed in writing by the parties to the arbitration agreement, but some stated to apply notwithstanding any agreement to the contrary between the parties (for example, s 20 in part, to do with representation) or declaring void contrary provisions in the arbitration agreement (for example, s 34 to do with costs; in the same category is s 40 in part, whereby certain exclusion agreements shall be of no effect). The Act does not set out procedures for the conduct of an arbitration, but provides by s 14 that subject to the Act and to the arbitration agreement the arbitrator "may conduct proceedings under that agreement in such manner as the arbitrator ... thinks fit".

At the heart of the application of the Act is the arbitration agreement. But the Act will not apply to any and every arbitration agreement in the world: an arbitration agreement between two Ruritanian subjects, made in Ruritania concerning a Ruritanian dispute and with the conduct of the arbitration in Ruritania, could hardly be subjected to its provisions. The reach of the Act is as found in its terms, but provided that a sufficient nexus appears between the Act operating as so found and the territory of New South Wales so that there is a valid exercise of the power conferred by s 5 of the *Constitution Act* 1902 to make laws "for the peace, welfare and good government of New South Wales": see *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

The arbitration clause in the distribution agreement is an arbitration agreement within the definition in the Act, and as a matter of language the Act applied and applies to it. The evidence did not disclose where the distribution agreement, and so the arbitration agreement, was made. The distribution agreement identifies American Diagnostica as a Connecticut company and Gradipore as a New South Wales company, so sufficient reason can be seen for the parties' choice of New South Wales law in cl 19 and the agreement in cl 18

that any arbitration should take place in Sydney is readily understandable. Even if the default agreement that the referral to arbitration be in accordance with the Arbitration Act current in New South Wales be put aside, the arbitration agreement is not of the Ruritanian kind. It is unnecessary, and unwise, to seek to canvass all criteria by which the reach of the Act might be determined: given the other connections with New South Wales, the fact that the arbitration was to take place in New South Wales and did take place in New South Wales is in my view sufficient to attract the Act's application to the arbitration agreement for the purposes of grant of leave to appeal. Subject to the submissions to which I now come, I did not understand Gradipore to say otherwise.

Gradipore's contention that leave to appeal could not be granted because the Act does not apply to the arbitration was put in two ways. First, it was submitted that the Act does not apply to the arbitration because the arbitration agreement was international in nature. Secondly, it was submitted that the Act does not apply to the arbitration because of the agreement on the *UNCITRAL Arbitration Rules* as the rules governing the arbitration in June 1996.

(i) *An arbitration agreement international in nature:*

The submission began by categorising the arbitration agreement as a foreign arbitration. By a foreign arbitration agreement Gradipore meant an arbitration agreement a party to which was domiciled or ordinarily resident in a Convention country, as described in s 7(1)(d) of the *International Arbitration Act* 1974 (Cth). A Convention country is a country, other than Australia, that is a Contracting State within the meaning of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted in 1958 by the United Nations Conference on International Commercial Arbitration (the Convention), approval to accession to which was given by s 4 of the *International Arbitration Act* 1974 (Cth). American Diagnostica was domiciled in Connecticut in the United States of America, and the United States of America is a Contracting State.

How categorisation as a foreign arbitration agreement then led to the submission's conclusion was unclear. It may have been argued that the Act did not in its own terms apply to a foreign arbitration agreement, but if that was argued I do not accept it. There is nothing to exclude from the application of the Act via s 3(2)(a) and the definition of arbitration agreement — an arbitration agreement a party to which was when the agreement was made, or thereafter, domiciled or ordinarily resident in a Convention country. On the contrary, provisions in the Act reflect an intention that it apply to an arbitration agreement a party to which is domiciled or ordinarily resident outside Australia (see ss 11(2), 40(7) and 55(2)), and there is no reason in the terms of the Act to distinguish domicile or residence outside Australia in a Convention country from domicile or residence outside Australia not in a Convention country.

The submission otherwise seemed to be that because the arbitration was an international arbitration it could not be regarded as a domestic arbitration, and therefore was not subject to the Act. So it was asserted in Gradipore's written submissions that "Australia does not consider an arbitration under the *International Arbitration Act* when the parties have opted out of the *UNCITRAL Model Law* as a domestic arbitration"; that: "It could never have been the legislative intention that arbitrations, even with their situs in Australia, with an international flavour such as the arbitration in this case, must be

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I endeavoured in the course of oral submissions to identify the reasoning to the submission's conclusion. The result was inconsistencies and non sequiturs. I have endeavoured thereafter to reconcile all that was said and understand the reasoning: I have not been able to do so. Assuming an international arbitration, the *International Arbitration Act* 1974 (Cth) gives the *UNCITRAL Model Law* the force of law in Australia (s 16(1)), whereby the arbitration may be in accordance with the Model Law. It seemed to be said that it is the intention of the Federal legislature that, in that event, the Act can not apply to the arbitration. But that the intention takes effect because of inconsistency between the Federal legislation and the State legislation was emphatically eschewed, it was accepted that nothing in the *International Arbitration Act* 1974 (Cth) in terms so provides, and in the end the argument seemed to be that the Act does not apply to an international arbitration simply because it is an international arbitration (with further reference to the description of a foreign arbitration agreement in s 7(1)(d) of that Act). Even at this point the submission's conclusion is reached by a leap of faith rather than a process of reasoning.

But the *International Arbitration Act* 1974 (Cth) provides that the Model Law does not apply in relation to the settlement of a dispute if the parties agree that the dispute is to be settled otherwise than in accordance with the Model Law (s 21). Whatever other agreement is to be found in cl 18 of the distribution agreement and the subsequent adoption of the *UNCITRAL Arbitration Rules*, there was clearly agreement that disputes falling within the arbitration clause were to be settled otherwise than in accordance with the Model Law. The arbitration was not to be in accordance with the Model Law, the optional provisions of the *International Arbitration Act* 1974 (Cth) were not taken up (ss 22-21), and the proposition that the Act does not apply to the arbitration because it is an international arbitration is not maintainable. The application of the Act must be found from its terms, properly construed and with regard to the extent of the legislative power of the Parliament of New South Wales, and absent any question of inconsistency with the terms or effect of the *International Arbitration Act* 1974 (Cth) its application so arrived at is not negated because an arbitration has an international flavour or because an advocate describes the provisions of the Act as parochial.

(iii) *Agreement on the UNCITRAL Arbitration Rules:*

The submission was put in three ways: that there was a variation to the arbitration clause whereby the *UNCITRAL Arbitration Rules* applied to the exclusion of the Act; that there was an election by American Diagnostica that the Act would not apply to the arbitration; and that there was "an implied rejection" of the Act. Can the Act, if otherwise applying to the arbitration, be excluded by act of the parties?

In *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116, Kerr LJ, with whom Russell LJ and Sir Denys Buckley agreed, identified three systems of law potentially relevant to an arbitration with a foreign element, namely the law governing the substantive contract, the law governing the agreement to arbitrate and the performance of that agreement, and the law governing the conduct of the arbitration. As to the law governing the conduct of the arbitration, his Lordship said (at 119):

> "English law does not recognise the concept of a 'de-localised' arbitration ... (see *Dicey & Morris* (at 541, 542)) or of 'arbitral procedures floating in the trans national firmament, unconnected with any municipal system of law' (*Bank Mellat v Helliniki Techniki SA* [1984] QB 291 at 301 (Court of Appeal)). Accordingly, every arbitration must have a 'seat' or locus arbitri or forum which subjects its procedural rules to the municipal law which is there in force."

The seat of the arbitration is not necessarily where it is held, although where the parties have failed to choose the law governing the conduct of the arbitration it will prima facie be the law of the country in which the arbitration is held because that is the country most closely connected with the proceedings: see *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 607, 609, 616; *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at 453-454; *Bank Mellat v Helliniki Techniki SA* [1984] QB 291 at 301.

Although the law governing the conduct of the arbitration (the lex arbitri) is said to be concerned only with procedural matters, it goes beyond, for example, the production of documents or the order of witnesses. The appointment, removal, and replacement of arbitrators, time-limits, interim relief, consolidation of arbitrations, representation before the arbitrator, the form and validity of the award, and the finality of the award, are amongst the matters which can fall within the lex arbitri. The de-localisation theory, and what it means, have been much debated: see, eg, the series J Paulsson, "Arbitration Unbound: Award Detached from the Law of its Country of Origin" (1981) 30 ICLQ 358; W W Park, "The Lex Loci Arbitri and International Commercial Arbitration" (1983) 32 ICLQ 25; J Paulsson, "Delocalisation of International Commercial Arbitration: When and Why it Matters" (1983) 32 ICLQ 53. But in principle de-localisation "is only possible if the local rules permit it": A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration*, 2nd ed (1991) Sweet & Maxwell, London at 90. That is, the law of the seat of the arbitration, or of a jurisdiction asserting with a sufficient nexus control over the conduct of the arbitration, may according to its terms apply so as to govern the conduct of the arbitration, and even recognition of the concept of a de-localised arbitration will not necessarily mean freedom from local rules. The Act provides a lex arbitri, and lays down local rules. If the seat of the arbitration is New South Wales, its procedural rules (in the expanded sense above) are subject to the Act (*Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116); even if its seat is elsewhere or it can be regarded as de-localised, local rules may apply.

Gradipore's submission involved that the parties could overcome the application of the local rules by agreement. If there be agreement not to invoke the exercise of a discretionary power available under the lex arbitri, that will be an important consideration in whether the power should be exercised (see *Bank*

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Mellat v Helliniki Techniki SA (at 302)), although the lex arbitri will remain as the law governing the conduct of the arbitration. The submission was not that the agreement on the *UNCITRAL Arbitration Rules* went to this Court's discretion. It could not reasonably have been put in that way, when leave to appeal is in question and by specifically regulating exclusion of the right of appeal in relation to an award (s 40 dealing with exclusion agreements) the Act puts aside as a discretionary factor contrary agreement not constituting an exclusion agreement. Rather, the submission was that there could be agreement that the Act will not apply at all.

That there can be a lex arbitri different from the law of the country in which the arbitration is held is implicit in what was said in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*, *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* and *Bank Mellat v Helleniki Techniki SA* referred to above. The place where the arbitration is held is not necessarily conclusive of the seat of the arbitration, as is obvious when one considers a peripatetic arbitration, and in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*, Kerr LJ said (at 120):

> "There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. The limits and implications of any such agreement have been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve."

Can agreement on a lex arbitri different from the law of the country in which the arbitration is held entirely escape the local rules? The foundation for agreement on a lex arbitri is that all arbitrations are consensual, party autonomy being the cornerstone of modern arbitration, and so Gradipore said that the consensual nature of the arbitration permitted American Diagnostica and Gradipore to agree to exclude the Act if it would otherwise have applied to their arbitration. But there must be a limit to the parties' freedom, because their choice of the place of their arbitration may carry with it application to the arbitration of the law of that place according to its terms so as to govern the conduct of the arbitration. The freedom is to choose the place. So far as the local rules compulsorily apply and are inconsistent with the chosen lex arbitri, they can not be put aside by agreement that they do not apply.

Hence in principle it seems to me that the application of the Act so far as it provides for leave to appeal, a compulsory local rule applying to the arbitration, can not be put aside by agreement that the Act will not apply to the arbitration at all. I think that finds some support in the reasons of Saville J in *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48. The arbitration agreement provided that the arbitration should be conducted in accordance with the procedure in the *Arbitration Act* 1940 (India); it also provided that the seat of the arbitration should be London. The arbitration was about to begin in London. His Lordship was asked to determine whether the law governing the arbitration was Indian law or English law. He held in favour of English law, expressing his conclusion (at 51) in the terms that the arbitration and any award would be "subject to the supervisory jurisdiction" of the English courts. The reasoning included, in the emphasised part of the

passage next set out, that the supervisory jurisdiction of the English courts could not be excluded by the agreement.

His Lordship referred (at 50) to the choices of a law to govern the commercial bargain, a law to govern the arbitration agreement, and a law to govern the procedures in any arbitration. These laws corresponded to those identified in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*. He said that in theory, and subject to a proviso to which he would return, the parties could choose a different law for each of these purposes. He set out the arguments put to him as to choice of procedural law, and said (at 50):

> "These arguments are nicely balanced. It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but against this is the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities, as Lord Justice Kerr observed in the *Amazonica* decision. *For example (and this is the proviso to which I referred earlier in this judgment) it seems to me that the jurisdiction of the English Court under the Arbitration Acts over an arbitration in this country cannot be excluded by an agreement between the parties to apply the laws of another country or indeed by any other means unless such is sanctioned by those Acts themselves. Thus, to my mind, there can be no question in this case that the English Courts would be deprived of all jurisdiction over the arbitration. However, much of that jurisdiction is discretionary in character so that if the Court were convinced that the parties had chosen the procedural law of another country, then it might well be slow to interfere with the arbitral process. Again, for the sake of avoiding parallel Court proceedings, the Court might be minded to regard the choice of a foreign legal procedure as amounting to an exclusion agreement within the meaning of s 3 of the Arbitration Act 1979. Be that as it may, the choice of a procedural law different from the law of the place of the arbitration will, at least where that place is this country, necessarily mean that the parties have actually chosen to have their arbitral proceedings at least potentially governed both by their express choice and by the laws of this country*[1].

Such a state of affairs is clearly highly unsatisfactory: indeed in *Black-Clawson International Ltd v Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at 453, Mr Justice Mustill (as he then was) described the converse situation (that is, a foreign arbitration suggested to be governed by English procedural law) as producing an absurd result.

In the end, therefore, the question is whether the parties have agreed to such a potentially unsatisfactory method of regulating their arbitration procedures. In my judgment, they have not because, as Mr Veeder submitted, there is a way of reconciling the phrase relied upon by Mr Colman with the choice of London as the seat of the arbitration, namely by reading that phrase as referring to the internal conduct of the arbitration as opposed to the external supervision of the arbitration by the Courts. The word used in the phrase relied upon by Mr Colman is 'conducted' which I agree with Mr Veeder is more apt to describe the way in which the parties and the tribunal are to carry on their proceedings than

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the supervision of those proceedings by the Indian courts, for example through the Special Case provisions of the Indian Act. It is true, as Mr Colman pointed out, that this would mean that only s 3 and Schedule 1 of the Indian Act would be applicable (though many of the other provisions are still to be found in the English statutes and so would be applicable in the English Courts) but the construction for which he contends would to my mind, not only have the unsatisfactory and possibly absurd results to which I have referred, but would also necessarily give the word 'seat' a meaning which excluded any choice of London as the legal place for the arbitration. In my view, such a change from the ordinary meaning to be given to that word in an international arbitration agreement (the ordinary meaning being that submitted by Mr Veeder) cannot be accepted, unless the other provisions of the agreement show clearly that this is what the parties intended. I am not persuaded that that is the case here. On the contrary, for the reasons given, it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law." (Emphasis added.)

Earlier in *Bank Mellat v Helliniki Techniki SA*, Goff LJ had said (at 315) that if parties choose to arbitrate in England "... English law will, as the curial law, apply to the conduct of the arbitration; and the parties will, by holding their arbitration here, subject themselves for that purpose to English law ...". His Lordship was not addressing agreement on a different curial law, but appears not to have doubted the application of English curial law of its own force.

In M J Mustill and S C Boyd, *Commercial Arbitration*, 2nd ed (1989) Butterworths, London, the law governing the conduct of the arbitration is part of the curial law. The authors observe (at 64) that an express choice of curial law different from the law of the country in which the arbitration is to be held is almost unknown, "... no doubt because of the formidable conceptual and practical problems which are likely to arise should it be necessary to invoke the power of a court in relation to the reference". They say (at 90):

> "The choice of a foreign curial law does not, we submit, deprive the English court of jurisdiction. It has never, so far as we are aware, been suggested that parties may validly contract out of the power to set aside or remit an award for misconduct; and if an explicit agreement cannot accomplish this, it is hard to see how it could be achieved indirectly by the choice of a foreign curial law. Nevertheless the choice of a foreign curial law is a strong reason for the court refusing leave to serve proceedings abroad or to grant discretionary remedies."

This passage was cited with approval by Staughton LJ, with whom Woolf LJ and Neill LJ agreed, in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1992] 1 QB 656 at 675. In that case it was held that the connecting factor for the application of s 12(6)(h) of the *Arbitration Act* 1950 (UK), dealing with interim injunctions, to a case containing a foreign element was the place the parties had chosen as the seat of the arbitration. If the seat was in England or Wales, the court could grant an injunction, it seems in his Lordship's view even if the parties had agreed on the procedural laws of another country.

In Collins (ed) *Dicey and Morrison, The Conflict of Laws*, 12th ed (1993) Sweet & Maxwell, London it is said (at 581-582):

> "... Although most systems of arbitration allow the parties considerable procedural freedom (for example, to stipulate the extent of discovery or the admission of oral evidence) it does not follow that the parties can for all purposes contract out of the mandatory procedural rules of the place where the arbitration is being conducted. Thus where there are rules of English procedure which the parties cannot validly exclude by express agreement, a choice of foreign procedural law would not prevent those English rules being applicable to an arbitration in England. But as Mustill and Boyd point out, the occasions in which English law treats procedural rules relating to arbitration as mandatory are rare. It is very doubtful whether the parties could, merely by choosing a foreign procedural law, contract out of the supervisory role of the English court in relation to an arbitration being conducted in England."

There is thus some judicial and other guidance contrary to Gradipore's submission. In principle, party autonomy does not mean complete freedom to exclude a system of law, or particular elements of a system of law, from the relationship between the parties. Confining attention to statutory law, if the statute on its proper construction and with regard to the legislative power of the legislature applies to the parties and their conduct of the arbitration, and expressly or by necessarily implication can not be excluded by agreement, the agreement of the parties to exclude it will count for nothing. If the statute applies to the arbitration, a prohibition against contracting out can not be avoided by contracting out of the prohibition.

For these reasons I do not accept the foundation for Gradipore's submission. But in any event I do not think the facts support it. I return to the significance of the agreement that the *UNCITRAL Arbitration Rules* be adopted as the rules governing the arbitration.

In my opinion that agreement did not carry with it agreement that the Act should not apply. In the light of the preceding communications between the parties, the rules governing the arbitration were supplementary to the Act not in substitution for it. Viewed objectively, not pursuant to the uncommunicated advice of Gradipore's counsel that it rejected that the Act was applicable, the rules governing the arbitration were what Mr Jacobs had referred to in his letter of 1 April 1996 as rules to apply during the arbitration, not specified in the distribution agreement (which did specify the Act) but to be agreed between the parties or in default of agreement ordered by the arbitrator. They were what Mr Haidt had described in his letter of 6 June 1996 as the rules of arbitration determined by agreement or by the arbitrator, as distinct from the Act as the curial law for the arbitration. While the facts were quite different, there is a degree of similarity with *Union of India v McDonnell Douglas Corporation*. Taking the agreement in context, the *UNCITRAL Arbitration Rules* as the rules governing the arbitration were to govern the procedures of the arbitration so far as not inconsistent with the Act as the chosen law in accordance with which there had been the referral to arbitration. All this is supported by the fact that, as was presumably well-known to Messrs Jacobs and Haidt, the *UNCITRAL Arbitration Rules* provided by art 1(2) that they should govern the arbitration "except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that

provision shall prevail''. The Act was such a law and contained some such provisions, including s 38 from which the parties could derogate only to the extent permitted by s 40. So the Act was left to apply, relevantly so far as it provided for leave to appeal subject to any exclusion agreement.

Addressing each of the ways Gradipore put its submission, there was not a variation of the arbitration clause whereby the referral to arbitration was not to be in accordance with the Act, but at most a variation of the arbitration clause by the addition that the referral to arbitration should be in accordance with the Act and, in its procedures, the *UNCITRAL Arbitration Rules*, with the Act prevailing in the event of inconsistency. There was no election that the Act would not apply to the arbitration: Gradipore relied on *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641-642, but there was no question of election between inconsistent rights. Nor, whatever Gradipore meant thereby in its submission, was there an implied rejection of the Act.

An exclusion agreement?

Section 40 of the *Commercial Arbitration Act* 1984 provides:

''(1) Subject to this section and section 41:

(a) the Supreme Court shall not, under section 38(4)(b), grant leave to appeal with respect to a question of law arising out of an award; and

(b) no application may be made under section 39(1)(a) with respect to a question of law;

if there is in force an agreement in writing (in this section and section 41 referred to as an 'exclusion agreement') between the parties to the arbitration agreement which excludes the right of appeal under section 38(2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

(2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular arbitration agreement or to any other description of awards, whether arising out of the same arbitration agreement or not.

(3) An agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the commencement of this Act and whether or not it forms part of an arbitration agreement.

(4) Except as provided by subsection (1), sections 38 and 39 shall have effect notwithstanding anything in any agreement purporting:

(a) to prohibit or restrict access to the Supreme Court; or

(b) to restrict the jurisdiction of the Supreme Court.

(5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration being an arbitration under any other Act.

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises.

(7) In this section, 'domestic arbitration agreement' means an arbitration

agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither:

(a) an individual who is a national of, or habitually resident in, any country other than Australia; nor

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia;

is a party at the time the arbitration agreement is entered into."

Section 39(1)(a) is concerned with curial determination, with the consent of the arbitrator but not of all parties, of a question of law arising in the course of the arbitration. Section 41 deals more specifically with exclusion agreements in relation to particular kinds of dispute, and is of no present relevance. As will appear, in the consideration of s 40 regard must be had to s 28 of the Act, which provides:

"Unless a contradictory intention is expressed in the arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Act, be final and binding on the parties to the agreement."

Gradipore submitted that there was an exclusion agreement because the parties had agreed in writing, in the exchange of letters in June 1996, that the *UNCITRAL Arbitration Rules* be adopted as the rules governing the arbitration, and had thereby agreed that the award should be final and binding because art 32.2 of the *UNICTRAL Arbitration Rules* dealing with the form and effect of the award states:

"2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay."

(Gradipore also submitted that there was an exclusion agreement because the entire Act had been rejected, repeating the submission considered in the preceding portion of these reasons. The logical difficulty of excluding the Act entirely but relying on its provisions as to an exclusion agreement need not be explained; for the reasons I have given, there was not the entire rejection.)

There appears to be little guidance in the cases as to the effect of the parties' agreement. Speaking of the equivalent to s 40 of the Act, s 3 of the *Arbitration Act* 1979 (UK), M Mustill and S C Boyd, *Commercial Arbitration*, 2nd ed (1989) Butterworths, London suggest (at 635) that there is "... room for uncertainty as to what exactly the Act contemplates by way of an exclusion agreement". The authors advert to the equivalent to s 40(4) as possibly indicating that a general ouster of a right of appeal is ineffective, but I consider they correctly find this unconvincing on the ground that the subsection is intended to ensure that only a valid exclusion agreement will suffice.

In *Arab African Energy Corp Ltd v Olieprodukten Nederland BV* [1983] 2 Lloyd's Rep 419, the parties agreed that their arbitration should be "according to ICC Rules". Article 24 of the ICC Rules provided:

"1. The arbitral award shall be final. 2. By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made."

It was held that the parties had entered into an exclusion agreement within s 3 of the *Arbitration Act* 1979 (UK). Leggatt J said (at 423):

"Section 3(1) of the 1979 Act does not require the overt demonstration of an intention to exclude the right of appeal. True it is, that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their awards. But that aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency. Since public policy has now changed its stance, I see no reason to continue to adopt an approach to the construction of exclusion agreements which might well have been appropriate before it had done so. In my judgment, the phrase 'an agreement in writing ... which excludes the right of appeal' is apt to apply to an exclusion agreement incorporated by reference ...

While recalling Sir Alan Herbert's dictum about 'deeming', I am quite unable to hold that if parties agree that they should be deemed to have waived their right to any form of appeal they have not thereby done so. It also seems to me that the exclusion (in effect) of every right of appeal which can lawfully be excluded, not only achieves that result but achieves it in a way which is harmonious with the 1979 Act and allows for those particular matters in which the right of appeal cannot be excluded."

This decision was accepted as correct by the Court of Appeal in *Marine Contractors Inc v Shell Petroleum Development Co of Nigeria Ltd* [1984] 2 Lloyd's Rep 77. Gradipore said that the decision supported its submission because both the ICC Rules and the *UNCITRAL Arbitration Rules* stated that the award should be final (in the case of the *UNCITRAL Arbitration Rules* adding that it should be binding) and both the ICC Rules and the *UNCITRAL Arbitration Rules* provided that the parties undertook to carry out the award without delay. However the decision was founded not on the statement as to finality or the undertaking to carry the award out but on the deemed waiver of the parties' right to any form of appeal. The waiver is not to be found in the *UNCITRAL Arbitration Rules*. American Diagnostica did not submit that the exclusion agreement, if there was one, could not be by incorporation by reference of art 32.2 of the *UNCITRAL Arbitration Rules*, and I do not think Gradipore gains any assistance from *Arab African Energy Corporation Ltd v Oliesprodukten Nederland BV* as to the effect of art 32.2.

In *White Constructions (NT) Pty Ltd v Mutton* (1988) 57 NTR 8, the arbitrator told the parties he would accept nomination "on the clear understanding that my award as arbitrator will be accepted by both parties as final and binding ...". The parties agreed. The statute was materially in the same terms as the Act. It was held that any exclusion agreement was not in writing, but Martin J considered whether there was an exclusion agreement and held that there was.

His Honour observed (at 12) that it would not be right to approach the question of an exclusion agreement on the basis that either the arbitrator or the parties to the arbitration were ignorant of the provisions of the Act, and that their agreement could only have meaning if it was directed to excluding the qualified right of appeal in s 38(2). After discussion making it clear that he had in mind both the equivalent to s 28 of the Act and that part of the arbitration clause providing that the arbitrator's award should be final and binding on the parties, Martin J said (at 15):

"Although it is undoubtedly preferable that the terms of an exclusion agreement incorporates specific reference to such of ss 38(2) and 39(1)(a)

as the parties seek to exclude from operation, it is not necessary that they do so. The Act does not expressly require it and such a requirement should not be implied. It is up to the parties as to how they express their agreement and, if an intention to exclude the right of appeal (or to have a preliminary exclusion [sic question] of law determined) can be fairly seen from the words they choose to employ, then it should be made effectual. I consider that if parties agreed that they would both accept an arbitrator's award as 'final and binding' they thereby exclude the qualified right of appeal under s 38(2)."

This was a stronger case than the present case. The parties' attention was specifically directed to the status of the award, and they agreed not just that it *would be* final and binding (which was already the case, quite apart from s 28 of the Act, by virtue of the arbitration clause) but that it *would be accepted as* final and binding. That the parties intended by their further agreement more than that the award should be final and binding subject to the statutory right of appeal, and intended to exclude the right of appeal, can be accepted. I do not think that Gradipore really gains support from this decision, and I do not accept Gradipore's argument that the fact that the arbitration in this case has an international flavour suggests that the parties intended to exclude what were called parochial rights of appeal in aid of finality of the arbitral process.

A decision in the opposite direction is *Corner v C&C News Pty Ltd* (Yeldham J, 28 April 1989, unreported). The arbitration clause included: "The parties agree that the Award of the Arbitrator shall be final, conclusive and binding upon them." It was held that the arbitration agreement was a domestic arbitration agreement, and by force of s 40(6) of the Act any exclusion agreement would have been of no effect. His Honour said, however (at 431-432):

> "Although, on the face of it, the words 'final, conclusive and binding upon them', being words of considerable width, would appear to be sufficient to exclude a right of appeal, the reality is that the expression 'final and binding' is to be found in s 28, and in the old *Arbitration Act* 1902 in the Second Schedule, as well as in s 16 of the *Arbitration Act* 1950 (UK). Such expression was employed to bring finality, subject to well recognised methods of challenging awards, to arbitral proceedings. Certainly such expressions (and the word 'conclusive' does not alter the situation) do not constitute an attempt to oust the jurisdiction of the court: see *Ford v Clarkson's Holidays Ltd* [1971] 1 WLR 1412. I think it is correct to submit, as counsel for the plaintiff in the present case did, that the words here employed in cl 7(e) merely restate what has long been the rule in relation to arbitrations, namely that an award is final and binding in the traditional sense, and such an award creates a res judicata and an issue estoppel, subject to judicial review by the courts.
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> In Mustill and Boyd, *Commercial Arbitration* (1982) at 591, the authors say, in relation to the corresponding English provision:
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> > 'It must, however, be acknowledged that there is some room for uncertainty as to what exactly the Act contemplates by way of exclusion agreement, and we believe that the safest course will be to use a form of words which, by express reference to section 3(1) of the Act, excludes all rights of appeal."

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In a note to s 3 of the *Arbitration Act* 1979 appearing in the *Supreme Court Practice* 1988 (UK) at par 5885, it is said:

> "It is thought, or at any rate it would be wise, that an exclusion agreement should expressly exclude the exercise of each of these rights rather than it should be expressed in general terms."

In my opinion both these comments properly reflect what is required in order that there may be a valid exclusion agreement. Such an agreement must demonstrate that the parties have adverted to the right of appeal which, within the limits of the legislation, would otherwise exist and they must expressly exclude it. I do not think it is sufficient merely to say, as was said in cl 7(e), that the award should be final, conclusive and binding. But, as I have indicated, the present application succeeds because there was no exclusion agreement entered into after the commencement of the arbitration."

It would undoubtedly be wise to frame an exclusion agreement by specific reference to the right of appeal under s 38(2) of the Act and/or an application for determination of a question of law under s 39(1)(a). If on its proper construction, and read with permissible regard to the circumstances in which it was made, the agreement is one which excludes the right of appeal or the application, I doubt that it is necessary that the agreement identify the relevant provisions in terms. I am not sure that Yeldham J said that it is necessary, since the terms of an exclusion agreement may demonstrate adversion to the right of appeal (or an application) and expressly exclude it in any sufficient language. But in my opinion agreement that an award shall be final and binding and an added undertaking to carry out the award without delay (which is the most which can be found in the agreement in relation to the *UNCITRAL Arbitration Rules*) is insufficient for an agreement which excludes the right of appeal under s 38(2) in relation to the award. In accordance with a long history, reference to an award as final and binding leaves it subject to challenges properly available to a dissatisfied party. Section 28 of the Act continues that position; consistently with it, mere repetition that the award is final and binding can not make an exclusion agreement.

In the circumstances of the present case, there is no suggestion on the evidence that the parties had in mind, when they agreed that the *UNCITRAL Arbitration Rules* should govern the arbitration, the question of finality of the award and the effect of art 32.3, let alone its effect by way of exclusion of a right of appeal under the Act — for reasons already given, objectively determined they were concerned with other matters. The agreement as to adoption of the *UNCITRAL Arbitration Rules*, and of art 32.3 itself, falls short of demonstrating an intention to exclude the right of appeal available under the Act according to which, by the arbitration clause, there would be the referral to arbitration.

Forum non conveniens?

Gradipore submitted that this Court is "clearly an inappropriate forum to consider the issues raised between the parties". No doubt it had in mind the "clearly inappropriate forum" test considered and explained in the judgment of Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247-248 and adopted by all members of the bench in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

The argument in support of the submission seemed to go as follows. The District Court was still seised of the dispute between American Diagnostica and Gradipore, because Judge Chin had not disposed of the proceedings but had placed them on the suspense docket. The evidence showed that Judge Chin inquired, and was informed, as to the progress of the arbitration from time to time. Under s 207 of the *Federal Arbitration Act* (US) application could be made to the District Court for an order confirming the award, and the District Court was obliged to confirm the award unless it found one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention. There was therefore an available regime, indeed a regime already in place, for taking up the award and giving effect to the award and the rights and obligations of the parties flowing therefrom. It would be "seriously and unfairly burdensome, prejudicial or damaging" or vexatious in the sense of "productive of a serious and unjustified trouble and harassment" (see *Voth v Manildra Flour Mills Pty Ltd* (at 565)), for this Court to intervene by entertaining the application for leave to appeal, because Gradipore would be exposed to litigation on two fronts. The clear inappropriateness of this Court as a forum was all the more so, it was said, when the disputes primarily concerned events which took place in the United States of America, and when one of the claims on which Gradipore had succeeded in the arbitration called for the application of the *Connecticut Uniform Trade Secrets Act* in assessing its compensation and other relief.

I have some difficulty in seeing that a forum non conveniens question arises at all. Gradipore relied on the decision of Tamberlin J in *Hi-Fert Pty Ltd v Kuiking Maritime Carriers Inc* (1996) 71 FCR 172 at 185, saying that the present case was an a fortiori case, but that was a stay of proceedings in favour of a London arbitration and was nothing to do with leave to appeal in an arbitration ordered by a court with (I will assume) a residual interest in the proceedings in which the arbitrated disputes were first embodied. By its application for leave to appeal American Diagnostica seeks to invoke an entitlement to approach this Court given to it by the Act; there is no question of an alternative forum in which it may do the same, and the purpose of Gradipore's opposition is to preclude American Diagnostica from challenging the award for error of law. This Court has a jurisdiction not available elsewhere, a jurisdiction to which (if I am correct in what I have said thus far) the parties agreed their arbitration would be subject. It may be thought that inappropriateness of this Court as a forum for these proceedings is a non-issue — it is the only forum and, in the sense explained, the agreed forum.

In any event, I do not think it has been shown that this Court is a clearly inappropriate forum so that it should decline to entertain the application for leave to appeal. When arbitration of all claims between American Diagnostica and Gradipore was ordered and the litigation of American Diagnostica's claims against Centerchem was stayed it was known that the arbitration would be held in Sydney: see cl 18 of the distribution agreement. It must have been recognised that one or more of the parties to the arbitration might seek to invoke the supervisory jurisdiction of this Court, and I do not think it can be said that the District Court kept for itself, to the exclusion of this Court, everything which might follow or flow from the orders the District Court made — placing the District Court proceedings on the suspense docket was, as I have noted, an administrative procedure. American Diagnostica's entitlement to

invoke the supervisory jurisdiction of this Court, as it has done in seeking leave to appeal, is not matched by any equivalent entitlement to apply to the District Court to have error of law on the part of the arbitrator identified and corrected, nor do the grounds on which the District Court might decline to confirm the award on an application made to it by Gradipore extend to allowing American Diagnostica to raise the errors of law which it seeks to raise in its application to this Court. In a real sense, therefore, American Diagnostica asks this Court to exercise a jurisdiction which can not be exercised by the District Court, being a jurisdiction which is available to it because of the agreement of the parties whereby the arbitration was held in New South Wales. Gradipore will not be twice vexed: it may be vexed in this Court when it would not be vexed at all if this Court were to decline to entertain American Diagnostica's application, but that underlines that the issue of forum non conveniens may not arise at all. I am certainly not persuaded that a stay of these proceedings (being the way in which this Court would decline to entertain the application for leave to appeal on forum non conveniens grounds) is necessary to prevent this Court's process being used to bring about injustice, that being the underlying basis of a stay of proceedings on forum non conveniens grounds: see *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 399. Nor am I persuaded that this Court is a clearly inappropriate forum for these proceedings.

Gradipore also relied on *Chromalloy Aeroservices Inc v Arab Republic of Egypt* 939 F Supp 907 (1996). The proper law of the contract between Chromalloy and Egypt was Egyptian law. The contract included an arbitration clause providing for arbitration in Cairo. Chromalloy invoked the arbitration clause and an award was made in its favour. Chromalloy applied to the United States District Court for enforcement of the award. Egypt appealed to the Egyptian Court of Appeal seeking nullification of the award, and nullification was ordered. The District Court held that it would nonetheless enforce the award, because under United States law it was obliged to do so unless one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention was made out, that the Egyptian court nullified the award gave a discretion to refuse to enforce the award, but the discretion should not be exercised because the award was not open to challenge under United States law and the United States public policy in favour of final and binding arbitration of commercial disputes was so strong that the decision of the Egyptian court should not be recognised.

Gradipore used this decision for the proposition that "where there is a potential conflict in decisions, this should attract the forum conveniens point". So far as it permitted the enforcement of a foreign award set aside in its country of origin, *Chromalloy Aeroservices Inc v Arab Republic of Egypt* is not free from controversy. It has been welcomed, but has been criticised in principle and for its reasoning and described as "anomalous in a number of respects": Schwartz, "A Commentary on *Chromalloy*: Hilmarton, à l'américaine" (1997) 14 J Int Arb 125 at 131; see the full discussion in Sampliner, "Enforcement of Nullified Foreign Arbitral Awards" (1997) 14 J Int Arb 141. It seems that no other jurisdictions apart from Belgium (the *Hilmarton* decision (*Hilmarton c/Otv, Cass Civ 1re* Rev Arb 1994, 327)) are reported to have given effect to an award annulled at the seat of the arbitration, and whether other courts in the United States will follow the lead of *Chromalloy Aeroservices Inc v Arab Republic of Egypt* remains to be seen. The potential conflict in decisions is by

no means assured, but in any event I do not think the possibility that the District Court will not recognise a decision of this Court to grant leave to appeal makes this Court, or contributes to making this Court, a clearly inappropriate forum for the application for leave to appeal.

Time for application for leave to appeal

Gradipore's written submissions included the submission that American Diagnostica was out of time for its application for leave to appeal other than in relation to Gradipore's claim for breach of contract. Nothing was said of this in the oral submissions, and the point may have been abandoned. In any event, I do not think it should be accepted.

By Pt 72A, r 5(3) of the *Supreme Court Rules* 1970 American Diagnostica had to commence these proceedings within twenty-eight days of the "material date" or within such extended time as the Court may fix. By Pt 72A, r 5(1)(b) the material date is "the date on which notice of the award is given by the arbitrator" to American Diagnostica. American Diagnostica commenced these proceedings on 17 December 1997. Gradipore contended that the material date is 28 August 1997, submitting that what I earlier called the arbitrator's reasons leading to certain conclusions was an award, and the interim award as to which American Diagnostica had to apply for leave to appeal. American Diagnostica did not apply for an extension of time.

The reasons published on 28 August 1997 were in a document entitled "Interim Award". After stating his conclusions the arbitrator recorded:

> "I will give the parties time to consider my reasons and address me on the form of my next award. There should be no difficulty with the claims which are to be dismissed. As to the other claims I will hear submissions about what award I should now make and how the arbitration should continue."

This was rather mixed. The title and the reference in the first sentence in the passage just set out to a "next award" suggested that there was an award on 28 August 1977, but the second and third sentences in the passage suggested that the award by which some claims would be dismissed and other claims disposed of was to be made in the future. I will return to what the arbitrator said in the body of his reasons, which seems to me to throw light on what the arbitrator intended.

When informing Judge Chin of the status of the arbitration Mr Haidt described what had occurred as an interim award on liability, but Mr Jacobs said that the arbitrator would "formalize his Interim Award . . . and that Award is expected in the week commencing 10 November 1997".

What I have called the interim award published on 20 November 1997 was in a document entitled "Further Interim Award (2)". In that document the arbitrator said that on 28 August 1997 he had "stated my conclusions on liability in this arbitration and published my written reasons in a document headed Interim Award", and:

> "In all the circumstances I refrained from making any formal award when I published my award because I considered that it would be better to delay the making of the award until I could deal with all matters of liability, leaving for future determination only the question of what relief should be granted to Gradipore and questions of costs."

While continuing to refer to the document published on 28 August 1997 as

an interim award, the arbitrator ended the document published on 20 November 1997:

> "INTERIM AWARD
>
> I now make the following formal interim award, which interim award incorporates the material and reasons in the document dated 28 August 1997 and called Interim Award and the materials and reasons above in this document. The amounts in paragraph 4 have been agreed between the parties.
>
> I determine order direct declare and award as follows . . . ."

In my opinion, although referring to the document published on 28 August 1997 as an interim award the arbitrator did not intend to, and did not, make an award at that time. An award must finally resolve a matter referred for arbitration, even if (as an interim award) only part of what has been referred to arbitration: *Re Resort Condominiums Inc* [1995] 1 Qd R 406 at 423-436. It is to be distinguished from a procedural ruling or publication of reasons for the parties' information or comment: see, eg, *Three Valleys Water Committee v Binnie & Partners* (1990) 52 BLR 42; *Re Resort Condominiums Inc*; *Doran Construction Pty Ltd v Health Administration Corporation of New South Wales* (Rolfe J, 24 August 1994, unreported). Clarification of the rather mixed indications earlier mentioned, and that the arbitrator did not intend to, and did not, finally resolve any matter referred for arbitration on 28 August 1997, is apparent from the body of the arbitrator's reasons. At one point, when dealing with the submission that a particular argument was not open on the pleadings, the arbitrator said, "However, this award is interim. My conclusions are provisional", and that the particular matter could be taken up again. The matter concerned Gradipore's breach of contract claim, as to which the arbitrator's conclusion was expressly tentative, but the arbitrator's language shows that in describing his reasons as an interim award he meant that his conclusions were provisional and did not then resolve the matters considered by making an award. With that understanding, what the arbitrator then said left for the future making the award whereby he finally determined matters referred for arbitration. This he did by the document published on 20 November 1997, clearly stating (albeit retrospectively) that the earlier document was not his award. The material date was 20 November 1997, and these proceedings were commenced within time.

I should add that, although no application for an extension of time was made and extension of time was not in issue, in the circumstances I have recounted it is not easy to see why an extension of time should not have been granted if the material date had been 28 August 1997.

Leave to appeal

American Diagnostica sought leave to appeal in relation to what it said were three questions of law. The first was to do with cl 12 of the distribution agreement; the second was to do with misuse of confidential information; and the third was to do with assessment of damages.

I have set out s 38 of the Act, from which appear the cumulative and alternative requirements for a grant of leave to appeal. It is well-established that s 38 should be construed and applied in the light of a legislative policy "to promote the finality of arbitral awards even at the price of denying a party its usual entitlement to the determination of the dispute by a court of law" (*Natoli*

v Walker (Court of Appeal, 26 May 1994, unreported), per Kirby P; see also *Promenade Investments Pty Ltd v State of New South Wales* (1991) 26 NSWLR 203), and that even if the requirements of s 38 are met the Court retains a general discretion to grant or refuse leave to appeal: see *Natoli v Walker*. Even if error of law be shown, the parties to an arbitration may be left with the arbitrator's award. For reasons which will appear, elaboration of all the requirements of s 38, and of the general discretion, is not necessary in order to determine American Diagnostica's application.

[His Honour then dealt with matters in a manner not calling for report and continued:]

(c) *Assessment of damages:*

Gradipore succeeded in its claim for misappropriation of trade secrets under the *Connecticut Uniform Trade Secrets Act*. In s 35-51 of the Act "trade secret" is defined, and then "misappropriation" is defined in terms involving improper disclosure or acquisition of a trade secret. No provision specifically proscribes misappropriation or creates a duty not to misappropriate. Section 35-52 goes straight to injunctive relief against actual or threatened misappropriation. Section 35-53 then provides:

> "35-53. Damages. Punitive damages for wilful and malicious misappropriation.
>
> (a) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.
>
> (b) In any action brought pursuant to subsection (a) of this section, if the court finds wilful and malicious misappropriation, the court may award punitive damages in an amount not exceeding twice any award made under subsection (a) and may award reasonable attorney's fees to the prevailing party."

Recovery of damages assessed in accordance with s 35-53 is potentially different from, and greater than recovery of damages assessed simply by inquiring into the loss suffered by Gradipore or the profit gained by American Diagnostica by the misappropriation. The arbitrator was asked to rule (as the issue was identified by or for him) upon whether questions of relief with respect to the *Connecticut Uniform Trade Secrets Act* were to be determined in accordance with the law of Connecticut or in accordance with the law of New South Wales. He ruled in favour of the law of Connecticut. American Diagnostica submitted that he erred in law in so doing, relying in the alternative on subpars (i) and (ii) of s 38(5)(b). If there was an error of law, again I did not understand Gradipore to dispute that the determination of the question of law could substantially affect the rights of the parties to the arbitration agreement. Gradipore again submitted that any error was not of law; it said that if there was an error of law it was not a manifest error, and that its resolution was not likely to add substantially to the certainty of commercial law; and it said that in any event leave to appeal should be refused in the exercise of the general discretion.

As appears from the award, American Diagnostica submitted before the arbitrator that the assessment of damages, even damages for infringement of the

Connecticut Uniform Trade Secrets Act, was to be in accordance with the law of New South Wales as the law of the forum, and relied upon the decision of the High Court in *Stevens v Head* (1993) 176 CLR 433. The arbitrator said:

"I do not agree with American Diagnostica's submission, for a number of reasons:

1. The concept of the forum has very little role to play in international arbitrations. This must particularly be so when an arbitration is based on an arbitration clause as wide as is the present clause in which a number of claims under United States statute law happen to fall for determination in an arbitration in New South Wales.
2. Although the proper law of the contract is the law of New South Wales, by express provision in the arbitration agreement, and the seat of the arbitration is New South Wales, the former does not affect the law applicable to claims outside, although related to, the contract, and it can hardly be assumed that the parties had in mind a claim under Connecticut statute law when they provided that the seat of the arbitration should be New South Wales.
3. *Stevens v Head* dealt with a particular statute which was directed simply to the assessment of damages in tort, where the underlying substantive law was the common law which was uniform throughout Australia. Where a cause of action is created by statute the remedy provided cannot be separated from the cause of action. Although the cause of action created by the Act has its parallels in New South Wales they are not identical. The cause of action is unknown in New South Wales. It cannot be appropriate that procedures for the assessment of damages in a place where the cause of action is unknown be substituted for the method prescribed by the Act which creates the cause of action.
4. This is particularly so with the Connecticut Act which does not expressly identify causes of action which are separate from the remedies which it confers.
5. If the assessment of damages is not substantive but procedural then the method of their assessment is a matter for me as arbitrator acting in accordance with the *UNCITRAL Arbitration Rules*. For the reasons inherent in the above propositions I think that the only sensible means of assessment of the damages is pursuant to the Act itself. I would add that otherwise it would be extremely difficult to differentiate between those aspects of the Act which were substantive and those which were not.

It follows that the remedies available under the Act and the quantification of any compensation under the Act will be determined in accordance with the Act."

If there was an error of law, at first sight determination of the question whether damages are to be assessed in accordance with the *Connecticut Uniform Trade Secrets Act* or in some other manner may be likely to add substantially to the certainty of commercial law: the principle involved, and its elucidation in considering the position of the *Connecticut Uniform Trade*

Secrets Act, may be of importance in many commercial transactions. There are some as yet unresolved difficulties in s 38(5)(b)(ii) of the Act, in its reference to strong evidence and otherwise (see *Promenade Investments Pty Ltd v State of New South Wales* (1991) 26 NSWLR 203 at 226-227), but again it is not necessary to go into the intricacies of the provision. While I would prefer to put the matter in my own words rather than adopt all the arbitrator said, in my opinion there was no error of law, manifest or otherwise, in the arbitrator's conclusion. Again it is unnecessary to go to the general discretion.

Before me American Diagnostica again relied on *Stevens v Head*. Gradipore submitted that the short answer was that there is no lex fori in an international arbitration, so talk of applying the law of the forum was misconceived. The issue as identified by or for the arbitrator presupposed that relief with respect to the *Connecticut Uniform Trade Secrets Act* could be determined in accordance with the law of New South Wales, which as will appear may be doubted.

In *Stevens v Head*, the plaintiff suffered a motor vehicle injury in New South Wales and brought proceedings in Queensland. A New South Wales statute restricted the amount a plaintiff could recover for non-economic loss suffered as a result of a motor accident. It was held by majority (Brennan J, Dawson J, Toohey J and McHugh J; Mason CJ and Deane J and Gaudron J dissenting) that the relevant provision of the statute was not to be applied in assessing the plaintiff's damages in the Queensland proceedings. The majority first referred to the distinction between substantive and procedural laws applied in determining whether by the law of the place of the wrong the facts give rise to a civil liability of the kind which the plaintiff seeks to enforce. The distinction is applied for the second of the principles governing enforcement of liability in respect of a wrong occurring outside the territory of the forum, stemming from *Phillips v Eyre* (1870) 6 QB 1 as reformulated in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1. The existence of the civil liability is governed by the substantive laws of the place of the wrong and is unaffected by its procedural laws: so, in *McKain v R W Miller & Co (SA) Pty Ltd*, it was held that a law limiting the time within which proceedings should be brought in the courts of the place of the wrong, but not extinguishing the cause of action, was procedural rather than substantive, and that there was a civil liability which could be enforced in the forum. Their Honours then said that a similar distinction was drawn between a law which denied a remedy in respect of a particular head of damage in negligence (a substantive law) and a law which affected the quantification of damages in respect of the particular head of damage (a procedural law). The relevant provision was held to affect the measure of damages but not the heads of liability in respect of which damages might be awarded, and was described (at 459) as "simply a law relating to the quantification of damages". It was therefore a procedural law of the place where the wrong occurred, and did not apply in the assessment of damages in the Queensland proceedings, which was governed solely by the law of Queensland.

The context of proceeding in a forum in respect of a wrong occurring in another legal jurisdiction is less apparent in a case such as the present than in a case such as *Stevens v Head*. New South Wales provides a forum because the parties agreed that the arbitrator should sit in New South Wales, and the principles reformulated in *McKain v R W Miller & Co (SA) Pty Ltd* do not have the same significance as where a party unilaterally sues in one legal jurisdiction

in respect of a wrong occurring in another legal jurisdiction. It was not suggested before me that cl 19 of the distribution agreement excluded Gradipore from claiming relief under the *Connecticut Uniform Trade Secrets Act*, and if there be a wrong for which the arbitrator can otherwise give relief there is little point in denying the relief on the ground that the arbitrator happens to sit in a place where the relief is not available. New South Wales law does not forbid relief as contained in the *Connecticut Uniform Trade Secrets Act*, it is just that there is no equivalent New South Wales relief. These considerations underlie the suggestions that there is no lex fori in an international arbitration, although for reasons earlier given I do not think the law of the forum can be entirely put aside. I doubt that the distinction considered in *Stevens v Head* should be held to govern the present situation.

However, even if the distinction between substantive laws and procedural laws, and its manifestation in the distinction between a law governing heads of damages and a law governing quantification of damages be adopted, in my opinion assessment of damages in accordance with the *Connecticut Uniform Trade Secrets Act* is a matter of heads of damages rather than quantification of damages. In *Stevens v Head* the plaintiff brought proceedings to enforce the common law cause of action in negligence, a cause of action available in both New South Wales and Queensland, and the New South Wales statute assumed the cause of action and the heads of damages available thereunder but limited the amount which could be awarded in quantifying general damages as one of those heads of damage. The *Connecticut Uniform Trade Secrets Act* does not assume a cause of action, or heads of damages under a cause of action, and lay down rules for quantifying the damages. It creates a cause of action by stating that an injunction or damages of certain kinds are recoverable in the event of misappropriation. The cause of action and the damages are so extensive, and the prescription as to damages in s 32-53 is part of the definition of the wrong, or at best for American Diagnostica a statement as to heads of damages. If it were only a statement as to quantification of damages, and so was ignored in the arbitration, there would be nothing left — there are no heads of damages independent of s 35-53 — and as earlier suggested relief with respect to the *Connecticut Uniform Trade Secrets Act* could not be determined in accordance with the law of New South Wales. If the distinction between substantive laws and procedural laws is to be applied at all, I do not think s 32-53 is to be classified as procedural, and in my opinion the arbitrator was correct in determining that Gradipore's damages for misappropriation of trade secrets are to be determined pursuant to the *Connecticut Uniform Trade Secrets Act*.

The result

This Court has jurisdiction to grant leave to appeal pursuant to s 38 of the Act, and should not decline to exercise its jurisdiction, but the application for leave to appeal should be dismissed. Gradipore has failed on the jurisdictional aspects of the proceedings, but has succeeded in relation to the leave to appeal; American Diagnostica's fortunes have been the reverse. Each party has failed in part and succeeded in part, and in my opinion there should be no order as to costs with the intent that each party should bear its own costs.

I order that the summons be dismissed and make no order as to costs.

Summons dismissed

Solicitors for the appellant: *Norton Smith & Co.*

Solicitors for the respondent: *David Landa Stewart & Co.*

C SAKKAS.
Solicitor.

MEALEY'S **International Arbitration Report**

Vol. 14, #1 January 1999

Commentary

International Commercial Arbitration In Australia

The Application Of The Act To An Arbitration With An International Flavour — A Leap Of Faith?

By
Marcus S. Jacobs

[Editor's Note: Marcus S. Jacobs QC is a barrister in Sydney, New South Wales. He has practiced at the Cape Town Bar, South Africa, where he was appointed a Senior Counsel (S.C.). Jacobs is a founding member of the London Court of International Arbitration (LCIA). He serves on the panel of the Hong Kong International Arbitration Association (HKIAA). Jacobs has authored two volumes on arbitration in Australia, Commercial Arbitration Law and Practice and a South African text book on The Law of Arbitration in South Africa. *Replies to this commentary are welcome.]*

On 26 March 1998 Giles CJ. in America Diagnostica Inc. v Gradipore Ltd.[1] delivered a judgment which will have far reaching consequences for the future of international commercial arbitration in Australia. If followed in other Australian courts, and if not suppressed by Commonwealth legislation, this decision may tend to frustrate the very purpose of the International Arbitration Amendment Act 1989 (Cth) referred to below.

The fundamental question that arises is whether or not by opting out, parties so to speak opt in to the domestic legislation and in so doing, are precluded from adopting an arbitral regime of their choice such as the LCIA or the ICC.

The Commonwealth Parliament passed the International Arbitration Amendment Act 1989 (Cth) (assented to on 15 May 1989) for the purpose of grafting the UNCITRAL Model Law onto the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth). At the same time the name of the principal Act was changed to the International Arbitration Act 1974 ("the Act"). Under s.8 of the Act the UNCITRAL Model Law has the force of law on an opt-out basis.

The purpose of the 1989 amendment was to bring Australian international commercial arbitration legislation into the twenty-first century and to unshackle international commercial arbitration in Australia from the chains of the domestic commercial arbitration legislative regime, and to attract international commercial arbitration to the shores of Australia.

In discussing Australia's role for the promotion of commercial international arbitration in the Pacific, Sir Laurence Street in his article "Australia's International Commercial Arbitration Role in the Pacific" stated in 1989 at p.14:

> "Our nation has the enormous advantage of political and economic stability and of soundly based, well-established financial and legal capacity. We are not aggressive or acquisitive on the international stage. We present no political or military threat. We enjoy the trust and confidence of our sister nations in the Pacific, from the super powers down to the tiniest of the island states. In short, Australia's stature within the Pacific places us well to fulfill both the geographic and substantive role of a reliable honest broker in servicing the flow of commerce within this large region of the world."

In his paper September 1990 "Dispute Resolution in the Asia/Pacific Region — Practice Sites and Centres — Australia" at p. 2, Sir Laurence said further:

> "Australia does not have as does London, a history of being the hub of international commerce, a clearing house for the financial, legal and other concomitant of world trade. Many of us in Australia hope that it may be our destiny to play some part on that stage in the Pacific region. We are, however, thus far only seeing the beginning of a real presence on that stage."

Section 21 of the Act states:

> "If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.";

ie. the parties may opt out of its provisions in which event they are free to choose any other set of arbitral rules.

The difficulty which arises from the legislative scheme is that the definition of international commercial arbitration is to be found not in the Act, but in Art.1(3)(a)-(c) of the UNCITRAL Model Law itself. Accordingly, where parties opt out of the UNCITRAL Model Law, they also opt out of the definition contained in Art.1(3) of international commercial arbitration, with nothing to replace it. It is emphasised that there is no similar definition in the Act.

This hiatus in the law was pointed out by the Australian Law Reform Commission in Report No.80 "Legal risk in international transactions."[2]

It must be assumed that when the Commonwealth Parliament enacted the 1989 Amendment it was aware of the fact that major international arbitration associations such as the LCIA (London Court of International Arbitration) and the ICC (International Court of Arbitration) had established a presence in Australia and were competing with each other and the Australian Centre for International Commercial Arbitration (ACICA – Melbourne) for international commercial arbitration business in Australia.

In the second reading speech when the 1989 Amendment was introduced into the Federal Parliament the Honourable Lionel Bowen, then the Deputy Prime Minister and Attorney-General stressed that the new international arbitral regime would apply on an "opt out" basis. The Minister continued thus:

> "This means it will apply to all international arbitrations unless parties agree, in writing, to exclude its operation."

Opting out carries with it the difficulties listed below. It is however submitted, that it was never the Legislative intent that opting out of the UNCITRAL Model Law would bring with it all of the parochial statutory provisions of the domestic legislation such as the leave to appeal procedure which most western jurisdictions (but for England which has retained it on a very limited basis) have sought to avoid in international commercial arbitrations.

Accordingly an election to opt out of the UNCITRAL Model Law under s.21 may result in the following difficulties, which naturally must be borne in mind by the draftsperson:

(i) Definitional Problems

As noted above, there would be no definition of an international comercial arbitration as the definition contained in Art.1(3) of the UNCITRAL Model Law would not apply.

It could hardly have been the intention of the Commonwealth Parliament to allow parties who have opted out to include their own definition of international commercial arbitration in their arbitration rules. This would lead to chaotic litigation and widespread forum-shopping.

(ii) Enforcement Problems

If parties opt out of the UNCITRAL Model Law, they thereby also opt out of Arts.35 and 36, which deal with the recognition and enforcement of awards. There is therefore no statutory enforcement procedure under the International Arbitration Act 1974 (Cth) for an international commercial arbitration award in Australia, except for an ICSID award.[3] A foreign arbitral award is enforceable under Pt.1 of the Act, which takes up in modified form the relevant recognition and enforcement procedures under the New York Convention.

An Australian ICSID award may be enforced under s.35(2) of the Act, which reads:

> "An award may be enforced in the State Supreme Court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of the State or Territory."

For the reasons set out below,[4] it is submitted that the parties cannot agree on their own enforcement procedure and so confer jurisdiction on an Australian State or Territory Supreme Court, by consent.

An arbitral award made in Australia, even between parties with no connection to Australia, may not be considered as a foreign arbitral award (see the definition of "foreign award" in s.3(1) of the International Arbitration Act) under the New York Convention.[5] Consequently, the enforcement procedures under that Convention do not assist in the enforcement of an Australian award in Australia.

Unless the successful claimant in an international commercial arbitration in Australia not governed by the UNCITRAL Model Law (or the ICSID Convention) moves to have the award recognised and enforced under common law, it would have to consider the following circuitous route to effect enforcement.

The successful party should obtain a judgment on the award in a foreign court, outside the jurisdiction of the Australian judicial system. The feasibility of this would depend on the central provisions of the governing set of rules, and the various conventions between Australia and the state concerned.

(iii) Problems Concerning Interim Measures

The opt-in provision found in s.23 of the Act, which provides that the enforcement of interim measures of protection must be the same as awards under Art.17 of the UNCITRAL Model Law, would not apply.

(iv) Status Of Alternative Rules

As stated above, the UNCITRAL Model Law has the force of law in Australia under s.16 of the Act. Other arbitral rules, whether ad hoc, or institutional, do not enjoy this status, except perhaps for the arbitration Articles in Chs.II-VII of the ICSID Convention. (The ICSID Arbitration Rules are not discussed in this section).

(v) Procedure For Recourse

The procedures under Art.34 for recourse against an award would not apply to non-UNCITRAL Model Law awards. It is doubtful whether the parties can legally agree on their own procedure, as this would require the parties, in effect, conferring jurisdiction on a court by agreeing to their own rules of court.

(vi) Evidentiary Problems

Curial assistance under Art.27 would not be available for the taking of evidence. The problems of obtaining evidence when the parties, witnesses and documents are located in several jurisdictions may be insurmountable without court assistance.

(vii) Jurisdiction And Curial Assistance

The parties will not have the benefit of the kompetenz-kompetenz provisions found in Art.16(1)-(3) of the Model Law. These provisions enshrine the principle of separability[6] in international commercial arbitrations under the UNCITRAL Model Law in Australia, and will be lost in non-UNCITRAL Model Law arbitrations. They provide that if the arbitral tribunal so decides, it may either rule on its jurisdiction as a preliminary question or reserve its decision until it gives an award on the merits.

(viii) Curial Assistance For Appointment Of Members Of Arbitral Tribunal

The parties will not have the benefit of curial assistance under Art.11(3) of the UNCITRAL Model Law for the appointment of members of the arbitral tribunal in those circumstances set out in Art.11(3)(a)-(c). The consequences of this might be that the entire arbitration agreement may fail if no alternative mechanism has been agreed on for the appointment of a substitute arbitral tribunal.

One of the most fundamental questions that arises is whether or not the opting out by the parties of the UNCITRAL Model Law triggers the application of the domestic arbitration legislation (the various commercial arbitration acts of the states and territories), and brings with it all of the parochial provisions which parties to an international commercial arbitration in this day and age may wish to avoid.

In American Diagnostica Inc., v Gradipore Limited[7] an arbitration clause in a distribution agreement between American Diagnostica Inc., a Connecticut company, and Gradipore Limited, an Australian company, required disputes to be determined by arbitration in accordance with arbitral rules that were either non-existent or difficult to identify.

A subsequent agreement between the parties provided for arbitration under the UNCITRAL Arbitration Rules (a precursor to the UNCITRAL Model Law). The arbitrator made interim awards in favour of Gradipore. American Diagnostica Inc. sought leave to appeal under s.38 of the Act. It was common ground between the parties that their adoption of the UNCITRAL Arbitration Rules resulted in the opting out under s.22 of the International Arbitration Act 1974 (Cth) of the provisions of the UNCITRAL Model Law which under s.15 of the Act which would otherwise have been the curial law of the arbitration. Gradipore submitted that the mere fact of the opting out did not trigger the application of the domestic Arbitration Act, and that therefore s.38 of the Act (the leave to appeal procedure), could not be invoked by American Diagnostica Inc.

Giles J.[8] was of the opinion that the agreement to import the UNCITRAL Arbitration Rules did not carry with it an agreement that the Commercial Arbitration Act would not apply.

Giles J commenced his analysis with a reference to s.3(2)(a) as read with s.4(1) of the Commercial Arbitration Act 1994 (NSW) where an arbitration agreement is defined as "an agreement in writing to refer present or future disputes to arbitration."

His Honour held[9] that provided there was "a sufficient nexus between the Act and New South Wales, the Act applied."

His Honour[10] categorised the submission by Gradipore's counsel that the parochial provisions of the domestic Commercial Arbitration Act should not apply to an international arbitration clause even though the parties had opted out of the UNCITRAL Model Law as "a leap of faith rather than a process of reasoning."

In dealing with the de-localisation theory Giles J.[11] said:

> "The de-localisation theory, and what it means, have been much debated (see for example the series Paulsson, 'Arbi-

> tration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358; Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 25; Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters' (1983) 32 ICLQ 53). But in principle de-localisation *'is only possible if the local rules permit it'* (Redfern and Hunter, Law and Practice of International Commercial Arbitration, 2nd ed. At 90)."

His Honour [12] summed up the submission made on behalf of Gradipore:

> "the consensual nature of the arbitration permitted ADI and Gradipore to agree to exclude the Act if it would otherwise have applied to the arbitration."

In rejecting this submission his Honour held:

> "there must be a limit to the party's freedom, because their choice of the place of arbitration may carry with it application of the arbitration law of that place according to its terms so as to govern the conduct of the arbitration."[13]

Giles J.[14] found that "In principle, party autonomy does not mean complete freedom to exclude a system of law, or particular elements of a system of law, from the relationship between the parties."

There can be no doubt that his Honour's analysis of the law is correct.

However, the fundamental flaw in the conclusion to which his Honour arrived is the failure by his Honour to recognise the logical extension of the principles upon which his Honour relied ie. the curial law of the arbitration is determined by the municipal law at the seat of the arbitration. If the municipal law allows the application of some other lex arbitri that is the end of the enquiry and the curial law at the seat of the arbitration does not and cannot apply. His Honour, as pointed out above acknowledged that when local rules permitted, de-localisation is possible. The International Arbitration Act 1974 (Cth) provides for international commercial arbitration and enshrines party autonomy to construct the arbitral agreement as they wish, provided only that there is nothing illegal or contrary to public policy. Both Gradipore and American Diagnostica Inc., within the context of an international commercial agreement, chose an international set of arbitral rules to govern their arbitration. It is unthinkable that the parties intended the domestic Commercial Arbitration Act to apply with all of its parochial provisions, including the leave to appeal procedure.

Giles J.'s reliance on English authority does not recognise the concept of arbitral procedures floating in the transnational firmament unconnected with any municipal system of law is, with respect unhelpful. The English authority on which he relies can have no relevance to the principle of party autonomy enshrined in the International Arbitration Act 1974 (Cth) to choose a curial regime otherwise than the domestic Arbitration Act. Giles J.'s reference to English authority assumes the absence of legislative intent to al-

low party autonomy where, within the context of an international commercial arbitration agreement, the parties have opted out of the UNCITRAL Model Law.

It is respectfully submitted that his Honour's judgment is unfortunate in that it will discourage international commercial arbitration in Australia. Furthermore, it is respectfully submitted that his Honour's judgment is wrong and should not be followed.

ENDNOTES

1. Unreported Sup.Ct. NSW 26 March 1998 (about to be published in the official New South Wales Law Reports).

2. Para. 4.56 at 107.

   "Reform proposals

   4.56 The first three of those points are essentially dependent on the assessment of the advisory committee of how best to deal with the cross border legal risk faced by Australian firms, particularly in transactions involving Asia Pacific countries. Consideration of those points should be deferred pending that assessment. The fourth point on technical flaws is not dependent on that assessment and does not need to be deferred. (The Commission understands that the International Arbitration Act is also to be reviewed by the Attorney-General's Department in relation to competition and related issues, and by the House of Representatives Standing Committee on Industry, Science and Tourism in relation to fair trading.) In summary the particular technical issues raised are:

   - whether the term 'international commercial arbitration' should be defined in the International Arbitration Act to ensure that parties who choose arbitration rules other than the UNCITRAL Model Law still have the benefit of the International Arbitration Act

   - whether additional provisions should be included in the International Arbitration Act to govern arbitrations where parties have opted out of the UNCITRAL Model Law and not made provision for procedural issues such as the appointment of a replacement for an arbitrator who dies or is incapacitated

   - whether the International Arbitration Act should set out the grounds on which an award can be challenged if the parties have opted out of the UNCITRAL Model Law.

   Recommendation 28 – amendments to the International Arbitration Act

   The Attorney-General should review, as a matter of priority, the proposal that amendments should be made to the International Arbitration Act to clarify the principles applying where the parties opt out of the UNCITRAL Model Law and any related technical issues."

3. See the definition of "foreign award" in s.3 of the Act insofar as the enforcement of an award under the New York Convention is concerned.

4. See however, Matter of Fils et Cables d'Acier de Lens (Midland Metals Corp), 584 F.Supp.240 (SDNY 1984) in which it was held that there was no legal or public policy reason for parties not providing for broad judicial review in their arbitration agreement. The question of conferring jurisdiction by consent does not appear to have been addressed.

5. See Diapulse Corp. (America) v Carba Ltd.; 78 Civ.3263 (SDNY 1979) reversed on other grounds, 626 F2d 1108 (2d Cir.1980) in which it was held that the UNCITRAL Convention did not apply to the case, as an award rendered in New York was n ot a "foreign award" within the meaning of the Convention.

6. See Jacobs, Commercial Arbitration, Law and Practice (Law Book Co., Looseleaf Service), Vol.1 para.[5.220].

7. Unreported Sup.Ct. NSW 26 March 1998.

8. at 30.

9. at 16.

10. at 20.

11. at 22.

12. at 24.

13. Giles J. in arriving at this conclusion cited Union of India v McDonnell Douglas Corporation (1993) 2 Ll.Rep.48, Naviera Amazonica Peruana SA v Compagna Internacional De Seguros Del Peru (1988) 1 Ll.Rep.116, Bank Mellat v Helleniki Techniki SA (1984) 1 QB 291 at 315 per Goff LJ., Mustill & Boyd Commercial Arbitration 2nd Ed. at 90 and Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd. (1992) 1 QB 556 at 675.

14. at 29. ■

MEALEY'S **International Arbitration Report**

Vol. 14, #2 February 1999

Commentary

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The Application Of The Domestic Commercial Arbitration Legislation To An Arbitration With An International Flavour — A Leap Of Faith?

By
Marcus S. Jacobs, Q.C.

[Editor's Note: Marcus S. Jacobs Q.C. (one of Her Maguesty's Counsel for the State of New South Wales) is a barrister in Sydney, New South Wales. He has practiced at the Cape Town Bar, South Africa, where he was appointed a Senior Counsel (S.C.). Jacobs is a founding member of the London Court of International Arbitration (LCIA), serves on panels of the World Intellectual Property Organization (WIPO) and is a fellow of the Chartered Institute of Arbitrators. Jacobs has authored six volumes on arbitration in Australia, Commercial Arbitration Law and Practice (dealing with domestic arbitration) and International Commercial Arbitration in Australia) and a South African text book on The Law of Arbitration in South Africa). This is a revised version of a commentary which appeared in the January 1999 issue of ***Mealey's International Arbitration Report****. Copyright 1999 by Marcus S. Jacobs QC. Replies to this commentary are welcome].*

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in international commercial arbitrations under the UNCITRAL Model Law in Australia, and will be lost in non-UNCITRAL Model Law arbitrations. They provide that if the arbitral tribunal so decides, it may either rule on its jurisdiction as a preliminary question or reserve its decision until it gives an award on the merits.

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The parties will not have the benefit of curial assistance under Art.11(3) of the UNCITRAL Model Law for the appointment of members of the arbitral tribunal in those circumstances set out in Art.11(3)(a)-(c). The consequences of this might be that the entire arbitration agreement may fail if no alternative mechanism has been agreed on for the appointment of a substitute arbitral tribunal.

One of the most fundamental questions that arises is whether or not the opting out by the parties of the UNCITRAL Model Law triggers the application of the domestic arbitration legislation (the various commercial arbitration acts of the states and territories), and brings with it all of the parochial provisions which parties to an international commercial arbitration in this day and age may wish to avoid.

In American Diagnostica Inc., v Gradipore Limited[7] an arbitration clause in a distribution agreement between American Diagnostica Inc., a Connecticut company, and Gradipore Limited, an Australian company, required disputes to be determined by arbitration in accordance with arbitral rules that were either non-existent or difficult to identify.

A subsequent agreement between the parties provided for arbitration under the UNCITRAL Arbitration Rules (a precursor to the UNCITRAL Model Law). The arbitrator made interim awards in favour of Gradipore. American Diagnostica Inc. sought leave to appeal under s.38 of the Act. It was common ground between the parties that their adoption of the UNCITRAL Arbitration Rules resulted in the opting out under s.22 of the International Arbitration Act 1974 (Cth) of the provisions of the UNCITRAL Model Law which under s.15 of the Act which would otherwise have been the curial law of the arbitration. Gradipore submitted that the mere fact of the opting out did not trigger the application of the domestic Arbitration Act, and that therefore s.38 of the Act (the leave to appeal procedure), could not be invoked by American Diagnostica Inc.

Giles J.[8] was of the opinion that the agreement to import the UNCITRAL Arbitration Rules did not carry with it an agreement that the Commercial Arbitration Act would not apply.

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His Honour held[9] that provided there was "a sufficient nexus between the Act and New South Wales, the Act applied."

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In dealing with the de-localisation theory Giles J.[11] said:

> "The de-localisation theory, and what it means, have been much debated (see for example the series Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358; Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 25; Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters' (1983) 32 ICLQ 53). But in principle de-localisation *'is only possible if the local rules permit it'* (Redfern and Hunter, Law and Practice of International Commercial Arbitration, 2nd ed. At 90)."

His Honour[12] summed up the submission made on behalf of Gradipore:

> "the consensual nature of the arbitration permitted ADI and Gradipore to agree to exclude the Act if it would otherwise have applied to the arbitration."

In rejecting this submission his Honour held:

> "there must be a limit to the party's freedom, because their choice of the place of arbitration may carry with it application of the arbitration law of that place according to its terms so as to govern the conduct of the arbitration."[13]

Giles J.[14] found that "In principle, party autonomy does not mean complete freedom to exclude a system of law, or particular elements of a system of law, from the relationship between the parties."

There can be no doubt that his Honour's analysis of the law is correct.

However, the fundamental flaw in the conclusion to which his Honour arrived is the failure by his Honour to recognise the logical extension of the principles upon which his Honour relied ie. the curial law of the arbitration is determined by the municipal law at the seat of the arbitration. If the municipal law allows the application of some other lex arbitri that is the end of the enquiry and the curial law at the seat of the arbitration does not and cannot apply. His Honour, as pointed out above acknowledged that when local rules permitted, de-localisation is possible. The International Arbitration Act 1974 (Cth) provides for international commercial arbitration and enshrines party autonomy to construct the arbitral agreement as they wish, provided only that there is nothing illegal or contrary to public policy. Both Gradipore and American Diagnostica Inc., within the context of an international commercial agreement, chose an international set of arbitral rules to govern their arbitration. It is unthinkable that the parties intended the domestic Commercial Arbitration Act to apply with all of its parochial provisions, including the leave to appeal procedure.

Giles J.'s reliance on English authority does not recognise the concept of arbitral procedures floating in the transnational firmament unconnected with any municipal system of law is, with respect unhelpful. The English authority on which he relies can have no

relevance to the principle of party autonomy enshrined in the International Arbitration Act 1974 (Cth) to choose a curial regime otherwise than the domestic Arbitration Act. Giles J.'s reference to English authority assumes the absence of legislative intent to allow party autonomy where, within the context of an international commercial arbitration agreement, the parties have opted out of the UNCITRAL Model Law.

The submission above is supported by a judgment of Gillard J. (unreported Sup.Ct. Vic. 16 October 1998) in Abigroup Contractors Pty. Limited v Transfield Pty. Limited & Obayashi Corporation, in which the relevant sub-clause of the arbitration clause provided that:

> "(d) the arbitration must be conducted in accordance with the following rules and procedures:
> (vi) the Commercial Arbitration Act of Victoria applies to the arbitration except to the extent it is inconsistent with the preceding provisions of this clause."

It was submitted that this sub-clause imported the Commercial Arbitration Act of Victoria and constituted an opting out of the UNCITRAL Model Law as contained in a schedule to the International Arbitration Act 1974 (Cth).

At 19 Gillard J. noted that the sub-clause was concerned with the conduct of the arbitration and did not exclude s.7 of the International Commercial Arbitration Act. His Honour stated:

> "In my opinion, s.7 does apply but that is not to say the procedures set out in the Commercial Arbitration Act of Victoria do not apply to the conduct of the arbitration."

It is respectfully submitted that Gillard J.[15] judgment is more consistent with the spirit and intent of the International Arbitration Act, which is designed to encourage international commercial arbitrations to come to the shores of Australia. On the contrary if parties faced with the prospect that the adoption of any international set of arbitral rules other than the UNCITRAL Model Law will cause the Commercial Arbitration Act to apply, may be discouraged in bringing their international commercial arbitrations to Australia. The provisions in the Commercial Arbitration Acts of the various States and Territories for leave to appeal, even on the restricted grounds as provided therein, will probably deter parties from conducting their international commercial arbitration disputes in Australia. This is to be regretted and it is sincerely hoped that the position will be clarified by an appropriate legislative amendment.

ENDNOTES

1. (1998) 44 NSWLR 312

2. Para.4.56 at 107

"*Reform proposals*

4.56 The first three of those points are essentially dependent on the assessment of the advisory committee of how best to deal with the cross border legal risk faced by Australian firms, particularly in transactions involving Asia Pacific countries. Consideration of those points should be deferred pending that assessment. The fourth point on technical flaws is not dependent on that assessment and does not need to be deferred. (The Commission understands that the International Arbitration Act is also to be reviewed by the Attorney-General's Department in relation to competition and related issues, and by the House of Representatives Standing Committee on Industry, Science and Tourism in relation to fair trading.) In summary the particular technical issues raised are:

- whether the term 'international commercial arbitration' should be defined in the International Arbitration Act to ensure that parties who choose arbitration rules other than the UNCITRAL Model Law still have the benefit of the International Arbitration Act
- whether additional provisions should be included in the International Arbitration Act to govern arbitrations where parties have opted out of the UNCITRAL Model Law and not made provision for procedural issues such as the appointment of a replacement for an arbitrator who dies or is incapacitated
- whether the International Arbitration Act should set out the grounds on which an award can be challenged if the parties have opted out of the UNCITRAL Model Law.

Recommendation 28 — amendments to the International Arbitration Act

The Attorney-General should review, as a matter of priority, the proposal that amendments should be made to the International Arbitration Act to clarify the principles applying where the parties opt out of the UNCITRAL Model Law and any related technical issues."

3. See the definition of "foreign award" in s.3 of the Act insofar as the enforcement of an award under the New York Convention is concerned.

4. See however, Matter of Fils et Cables d'Acier de Lens (Midland Metals Corp) 584 F.Supp.240 (SDNY 1984) in which it was held that there was no legal or public policy reason for parties not providing for broad judicial review in their arbitration agreement. The question of conferring jurisdiction by consent does not appear to have been addressed.

5. See Diapulse Corp. (America) v Carba Ltd.; 78 Civ.3263 (SDNY 1979) reversed on other grounds, 626 F2d 1108 (2d Cir.1980) in which it was held that the UNCITRAL Convention did not apply to the case, as an award rendered in New York was n ot a "foreign award" within the meaning of the Convention.

6. See Jacobs, Commercial Arbitration, Law and Practice (Law Book Co., Looseleaf Service), Vol.1 para.[5.220].

7. (1998) 44 NSWLR 312.

8. at 328E-F.

9. at 321F.

10. at 323D.

11. at 324D-F.

12. at 325D-E.

13. At 325E Giles J. in arriving at this conclusion cited Union of India v McDonnell Douglas Corporation (1993) 2 Ll.Rep.48, Naviera Amazonica Peruana SA v Compagna Internacional De Seguros Del Peru (1988) 1 Ll.Rep.116, Bank Mellat v Helleniki Techniki SA (1984) 1 QB 291 at 315 per Goff LJ., Mustill & Boyd Commercial Arbitration 2nd Ed. at 90 and Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd. (1992) 1 QB 556 at 675.

14. at 328C-D.

15. 584 F.Supp.240 (SDNY 1984). ■

International Commercial Arbitration in Australia

Marcus S. Jacobs QC
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The Application of the Commercial Arbitration Acts of the various States and Territories, to an Arbitration with an International Flavour – A Leap of Faith?

On 26 March 1998 Giles CJ. in *America Diagnostica Inc. v Gradipore Ltd.*[1] delivered a judgment which will have far reaching consequences for the future of international commercial arbitration in Australia. If followed in other Australian courts, and if not suppressed by Commonwealth legislation, this decision may tend to frustrate the very purpose of the *International Arbitration Amendment Act* 1989 (Cth) referred to below.

The fundamental question that arises is whether or not by opting out, parties so to speak opt in to the domestic legislation and in so doing, are precluded from adopting an arbitral regime of their choice such as the LCIA or the ICC.

The Commonwealth Parliament passed the *International Arbitration Amendment Act* 1989 (Cth) (assented to on 15 May 1989) for the purpose of grafting the UNCITRAL Model Law onto the *Arbitration (Foreign Awards and Agreements) Act* 1974 (Cth). At the same time the name of the principal Act was changed to the *International Arbitration Act* 1974 ("the Act"). Under s.8 of the Act the UNCITRAL Model Law has the force of law on an opt-out basis.

The purpose of the 1989 amendment was to bring Australian international commercial arbitration legislation into the twenty-first century and to unshackle international commercial arbitration in Australia from the chains of the domestic commercial arbitration legislative regime, and to attract international commercial arbitration to the shores of Australia.

In discussing Australia's role for the promotion of commercial international arbitration in the Pacific, Sir Laurence Street in his article "Australia's International Commercial Arbitration Role in the Pacific" stated in 1989 at p.14:

> "Our nation has the enormous advantage of political and economic stability and of soundly based, well-established financial and legal capacity. We are not aggressive or acquisitive on the international stage. We present no political or military threat. We enjoy the trust and confidence of our sister nations in the Pacific, from the super powers down to the tiniest of the island states. In short, Australia's stature within the Pacific places us well to fulfill both the geographic and substantive role of a reliable honest broker in servicing the flow of commerce within this large region of the world."

In his paper September 1990 "Dispute Resolution in the Asia/Pacific Region – Practice Sites and Centres – Australia" at p.2, Sir Laurence said further:

> "Australia does not have as does London a history of being the hub of international commerce, a clearing house for the financial, legal and other concomitant of world trade. Many of us in Australia hope that it may be our destiny to play some part on that stage in the Pacific region. We are, however, thus far only seeing the beginning of a real presence on that stage."

Section 21 of the Act states:

> "If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.";

ie. the parties may opt out of its provisions in which event they are free to choose any other set of arbitral rules.

The difficulty which arises from the legislative scheme is that the definition of international commercial arbitration is to be found not in the Act, but in Art.1(3)(a)-(c) of the UNCITRAL Model Law itself. Accordingly, where parties opt out of the UNCITRAL Model Law, they also opt out of the definition contained in Art.1(3) of international commercial arbitration, with nothing to replace it. It is emphasised that there is no similar definition in the Act.

This hiatus in the law was pointed out by the Australian Law Reform Commission in Report No.80 "Legal risk in international transactions".[2]

It must be assumed that when the Commonwealth Parliament enacted the 1989 Amendment it was aware of the fact that major international arbitration associations such as the LCIA (London Court of International Arbitration) and the ICC (International Court of Arbitration) had established a presence in Australia and were competing with each other and the Australian Centre for International Commercial Arbitration (ACICA – Melbourne) for international commercial arbitration business in Australia.

In the second reading speech when the 1989 Amendment was introduced into the Federal Parliament the Honourable Lionel Bowen, then the Deputy Prime Minister and Attorney-General stressed that the new international arbitral regime would apply on an "opt out" basis. The Minister continued thus:

> "This means it will apply to all international arbitrations unless parties agree, in writing, to exclude its operation."

Opting out carries with it the difficulties listed below. It is however submitted, that it was never the Legislative intent that opting out of the UNCITRAL Model Law would bring with it all of the parochial statutory provisions of the domestic legislation such as the leave to appeal procedure which most western jurisdictions (but for England which has retained it on a very limited basis) have sought to avoid in

international commercial arbitrations.

Accordingly an election to opt out of the UNCITRAL Model Law under s.21 may result in the following difficulties, which naturally must be borne in mind by the draftsperson:

(i) Definitional problems

As noted above, there would be no definition of an international comercial arbitration as the definition contained in Art.1(3) of the UNCITRAL Model Law would not apply.

It could hardly have been the intention of the Commonwealth Parliament to allow parties who have opted out to include their own definition of international commercial arbitration in their arbitration rules. This would lead to chaotic litigation and widespread forum-shopping.

(ii) Enforcement problems

If parties opt out of the UNCITRAL Model Law, they thereby also opt out of Arts.35 and 36, which deal with the recognition and enforcement of awards. There is therefore no statutory enforcement procedure under the *International Arbitration Act* 1974 (Cth) for an international commercial arbitration award in Australia, except for an ICSID award.[3] A foreign arbitral award is enforceable under Pt.I of the Act, which takes up in modified form the relevant recognition and enforcement procedures under the New York Convention.

An Australian ICSID award may be enforced under s.35(2) of the Act, which reads:

> "An award may be enforced in the State Supreme Court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of the State or Territory."

For the reasons set out below,[4] it is submitted that the parties cannot agree on their own enforcement procedure and so confer jurisdiction on an Australian State or Territory Supreme Court, by consent.

An arbitral award made in Australia, even between parties with no connection to Australia, may not be considered as a foreign arbitral award (see the definition of "foreign award" in s.3(1) of the *International Arbitration Act*) under the New York Convention.[5] Consequently, the enforcement procedures under that Convention do not assist in the enforcement of an Australian award in Australia.

Unless the successful claimant in an international commercial arbitration in Australia not governed by the UNCITRAL Model Law (or the ICSID Convention) moves to have the award recognised and enforced under common law, it would have to consider the following circuitous route to effect enforcement.

The successful party should obtain a judgment on the award in a foreign court, outside the jurisdiction of the Australian judicial system. The feasibility of this would depend on the central provisions of the governing set of rules, and the various conventions between Australia and the state concerned.

(iii) Problems concerning interim measures

The opt-in provision found in s.23 of the Act, which provides that the enforcement of interim measures of protection must be the same as awards under Art.17 of the UNCITRAL Model Law, would not apply.

(iv) Status of alternative rules

As stated above, the UNCITRAL Model Law has the force of law in Australia under s.16 of the Act. Other arbitral rules, whether ad hoc, or institutional, do not enjoy this status, except perhaps for the arbitration Articles in Chs.II-VII of the ICSID Convention. (The ICSID Arbitration Rules are not discussed in this section).

(v) Procedure for recourse

The procedures under Art.34 for recourse against an award would not apply to non-UNCITRAL Model Law awards. It is doubtful whether the parties can legally agree on their own procedure, as this would require the parties, in effect, conferring jurisdiction on a court by agreeing to their own rules of court.

(vi) Evidentiary problems

Curial assistance under Art.27 would not be available for the taking of evidence. The problems of obtaining evidence when the parties, witnesses and documents are located in several jurisdictions may be insurmountable without court assistance.

(vii) Jurisdiction and curial assistance

The parties will not have the benefit of the kompetenz-kompetenz provisions found in Art.16(1)-(3) of the Model Law. These provisions enshrine the principle of separability[6] in international commercial arbitrations under the UNCITRAL Model Law in Australia, and will be lost in non-UNCITRAL Model Law arbitrations. They provide that if the arbitral tribunal so decides, it may either rule on its jurisdiction as a preliminary question or reserve its decision until it gives an award on the merits.

(viii) Curial assistance for appointment of members of arbitral tribunal

The parties will not have the benefit of curial assistance under Art.11(3) of the UNCITRAL Model Law for the appointment of members of the arbitral tribunal in those circumstances set out in Art.11(3)(a)-(c). The consequences of this might be that the entire arbitration agreement may fail if no alternative mechanism has been agreed on for the appointment of a substitute arbitral tribunal.

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> "The de-localisation theory, and what it means, have been much debated (see for example the series Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358; Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1983) 32 ICLQ 25; Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters' (1983) 32 ICLQ 53). But in principle de-localisation *'is only possible if the local rules permit it'* (Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 2nd ed. At 90)."

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> "the consensual nature of the arbitration permitted ADI and Gradipore to agree to exclude the Act if it would otherwise have applied to the arbitration."

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"In my opinion, s.7 does apply but that is not to say the procedures set out in the Commercial Arbitration Act of Victoria do not apply to the conduct of the arbitration."

It is respectfully submitted that Gillard J.'s judgment is more consistent with the spirit and intent of the International Arbitration Act, which is designed to encourage international commercial arbitrations to come to the shores of Australia. On the contrary, parties faced with the prospect that the adoption of any international set of arbitral rules other than the UNCITRAL Model Law will cause the Commercial Arbitration Act to apply, may be discouraged in bringing their international commercial arbitrations to Australia. The provisions in the Commercial Arbitration Acts of the various States and Territories for leave to appeal, even on the restricted grounds as provided therein, will probably deter parties from conducting their international commercial arbitration disputes in Australia. This is to be regretted and it is sincerely hoped that the position will be clarified by an appropriate legislative amendment.

Notes

1 (1998) 44 NSWLR 312.

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4.56 The first three of those points are essentially dependant on the assessment of the advisory committee of how best to deal with the cross border legal risk faced by Australian firms, particularly in transactions involving Asia Pacific countries. Consideration of those points should be deferred pending that assessment. The fourth point on technical flaws is not dependent on that assessment and does not need to be deferred. (The Commission understands that the *International Arbitration Act* is also to be reviewed by the Attorney-General's Department in relation to competition and related issues, and by the House of Representatives Standing Committee on Industry, Science and Tourism in relation to fair trading.) In summary the particular technical issues raised are:

- whether the term "international commercial arbitration" should be defined in the International Arbitration Act to ensure that parties who choose arbitration rules other than the UNCITRAL Model Law still have the benefit of the *International Arbitration Act*
- whether additional provisions should be included in the *International Arbitration Act* to govern arbitrations where parties have opted out of the UNCITRAL Model Law and not made provision for procedural issues such as the appointment of a replacement for an arbitrator who dies or is incapacitated
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Recommendation 28 – amendments to the International Arbitration Act

The Attorney-General should review, as a matter of priority, the proposal that amendments should be made to the ***International Arbitration Act*** to clarify the principles applying where the parties opt out of the UNCITRAL Model Law and any related technical issues".

3 See the definition of "foreign award" in s.3 of the Act insofar as the enforcement of an award under the New York Convention is concerned.

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6 See Jacobs, *Commercial Arbitration, Law and Practice* (Law Book Co., Looseleaf Service), Vol.1 para.[5.220].

7 Unreported Sup.Ct. NSW 26 March 1998.

8 at 328E-F.

9 at 321E.

10 at 323D.

11 at 324D-E.

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COMMERCIAL ARBITRATION ACT 1984 No. 160

An Act to make provision with respect to the arbitration of certain disputes and to repeal the Arbitration Act 1902 and the Arbitration (Foreign Awards and Agreements) Act 1973, and for other purposes.

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the Commercial Arbitration Act 1984.

Commencement

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Repeal, transitional and application provisions

3. (1) The Acts mentioned in Schedule 1 are repealed to the extent to which they are in that Schedule expressed to be repealed.

(2) Subject to subsection (3):

(a) this Act applies to an arbitration agreement (whether made before or after the commencement of this Act) and to an arbitration under such an agreement; and

(b) a reference in an arbitration agreement to the Arbitration Act 1902, or a provision of that Act, shall be construed as a reference to this Act or to the corresponding provision (if any) of this Act.

(3) Where an arbitration was commenced before the commencement of this Act, the law governing the arbitration and the arbitration agreement shall be that which would have been applicable if this Act had not been enacted.

(4) Subject to this section, this Act shall apply to arbitrations provided for in any other Act as if:

(a) the other Act were an arbitration agreement;

(b) the arbitration were pursuant to an arbitration agreement; and

method for filling the vacancy, the vacancy should be filled by the Court,

the Court may, on the application of a party to the arbitration agreement, make an appointment to fill the vacancy.

Power of the Court where arbitrator or umpire is removed

11. (1) Where an arbitrator or umpire is removed by the Court, the Court may, on the application of a party to the arbitration agreement:

(a) appoint a person as arbitrator or umpire in place of the person removed; or

(b) subject to subsection (2), order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.

(2) Subsection (1) (b) does not apply unless all the parties to the arbitration agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3 (4) (a).

Appointment of umpire

12. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, where an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they fail to determine a matter arising for determination.

(2) An umpire appointed in relation to an arbitration is not required to sit with the arbitrators while the arbitrators are conducting proceedings under the arbitration agreement.

Position of person appointed by the Court etc.

13. An arbitrator or umpire appointed pursuant to a power conferred by this Part shall be deemed to have been appointed pursuant to the provisions of the arbitration agreement.

(6) The Supreme Court may make any leave which it grants under subsection (4) (b) subject to the applicant complying with any conditions it considers appropriate.

(7) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

Determination of preliminary point of law by Supreme Court

39. (1) Subject to subsection (2) and section 40, on an application to the Supreme Court made by any of the parties to an arbitration agreement:

(a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with the consent of the umpire; or

(b) with the consent of all the other parties,

the Supreme Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.

(2) The Supreme Court shall not entertain an application under subsection (1)(a) with respect to any question of law unless it is satisfied that:

(a) the determination of the application might produce substantial savings in costs to the parties; and

(b) the question of law is one in respect of which leave to appeal would be likely to be granted under section 38 (4) (b).

Exclusion agreements affecting rights under sections 38 and 39

40. (1) Subject to this section and section 41:

(a) the Supreme Court shall not, under section 38 (4) (b), grant leave to appeal with respect to a question of law arising out of an award; and

(b) no application may be made under section 39 (1) (a) with respect to a question of law,

if there is in force an agreement in writing (in this section and section 41 referred to as an **"exclusion agreement"**) between the parties to the arbitration agreement which excludes the right of appeal under section 38 (2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

(2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular arbitration agreement or to

any other description of awards, whether arising out of the same arbitration agreement or not.

(3) An agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the commencement of this Act and whether or not it forms part of an arbitration agreement.

(4) Except as provided by subsection (1), sections 38 and 39 shall have effect notwithstanding anything in any agreement purporting:

(a) to prohibit or restrict access to the Supreme Court; or

(b) to restrict the jurisdiction of the Supreme Court.

(5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration being an arbitration under any other Act.

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case required, in which the question of law arises.

(7) In this section, **"domestic arbitration agreement"** means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither:

(a) an individual who is a national of, or habitually resident in, any country other than Australia; nor

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia,

is a party at the time the arbitration agreement is entered into.

Exclusion agreements not to apply in certain cases

41. (1) Subject to subsection (3), if an award or a question of law arising in the course of an arbitration relates, in whole or in part, to:

(a) a question or claim falling within the Admiralty jurisdiction of the Supreme Court;

(b) a dispute arising out of a contract of insurance; or

(c) a dispute arising out of a commodity contract,

an exclusion agreement shall have no effect in relation to the award or question unless either:

may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

(2) An application under subsection (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance.

(3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement.

Interpleader

54. Where relief by way of interpleader is granted in any court and it appears to that court that the claims in question are matters to which an arbitration agreement (to which the claimants are parties) applies, the court may, unless it is satisfied that there is sufficient reason why the matters should not be referred to arbitration in accordance with the agreement, make an order directing the issue between the claimants to be determined accordance with the agreement.

Effect of Scott v. Avery clauses

55. (1) Where it is provided (whether in an arbitration agreement or some other agreement, whether oral or written) that arbitration or an award pursuant to arbitration proceedings or the happening of some other event in or in relation to arbitration is a condition precedent to the bringing or maintenance of legal proceedings in respect of a matter or the establishing of a defence to legal proceedings brought in respect of a matter, that provision, notwithstanding that the condition contained in it has not been satisfied:

(a) shall not operate to prevent:

(i) legal proceedings being brought or maintained in respect of that matter, or

(ii) a defence being established to legal proceedings brought in respect of that matter: and

(b) shall, where no arbitration agreement relating to that matter is subsisting between the parties to the provision, be construed as an agreement to refer that matter to arbitration.

(2) Subsection (1) does not apply to an arbitration agreement unless all the parties to the agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3 (4) (a).

PART 7

56-59. * * * * * * *

PART 8—MISCELLANEOUS

Service of notices

60. Where under this Act a notice is required or permitted to be served on any person, the notice may be served in or out of New South Wales:

(a) by delivering it personally to the person to be served;

(b) by leaving it at the usual or last known place of residence or business of the person to be served with a person apparently over the age of 16 years and apparently residing thereat or (in the case of a place of business) apparently in charge of or employed at that place;

(c) by sending it by post addressed to the person to be served at the usual or last known place of residence or business of that person; or

(d) by serving it in such other manner as the Court may, on application made to it in that behalf, direct.

61. * * * * * * *

Supreme Court rules

62. (1) Rules of court may be made under Supreme Court Act 1970 for carrying the purposes of this Act into effect and, in particular, for or with respect to:

(a) applications to the Supreme Court under this Act and the costs of such applications;

(b) the payment or bringing of money into and out of the Supreme Court in satisfaction of claims to which arbitration agreements apply and the investment of such money;

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMERCIAL DIVISION

GILES CJ Comm D

50224 of 1997 - AMERICAN DIAGNOSTICA INC -v- GRADIPORE LTD

Dates of hearing - 10 & 11 March 1998

Date of judgment - 26 March 1998

Counsel for the plaintiff -
Mr B Rayment QC/Mr G Nell

Instructed by -
Messrs Norton Smith & Co

Counsel for the defendant -
Mr M S Jacobs QC/Mr S Jacobs

Instructed by -
Messrs David Landa Stewart & Co

*****

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMERCIAL DIVISION

GILES CJ Comm D

Thursday, 26 March 1998

50224 of 1997 - AMERICAN DIAGNOSTICA INC -v- GRADIPORE LTD

JUDGMENT

HIS HONOUR: American Diagnostica Inc ("ADI") and Gradipore Ltd ("Gradipore") are parties to an arbitration. The arbitrator published an interim award on 20 November 1997. ADI applied for leave to appeal on questions of law arising out of the award pursuant to s 38 of the Commercial Arbitration Act 1984 (NSW) ("the Act"). Gradipore opposed the grant of leave, on grounds going to the Court's jurisdiction to entertain the application as well as on the merits of the application. These reasons are concerned with the application for leave to appeal.

The referral to arbitration

Gradipore developed a reagent for detecting the presence in blood of lupus anticoagulants, antibodies the presence of which is associated with a number of disorders. It was known as Lupo-Test. By a distribution agreement dated 27 June 1991 Gradipore appointed ADI a world-wide non-exclusive distributor of Lupo-Test and any modified or improved versions thereof for a period of eighteen months. The distribution agreement included an arbitration clause and a choice of law clause -

> "18. SETTLEMENT OF DISPUTES
>
> *In the case of any controversy, claim or dispute arising out of or related to this Agreement or the breach thereof the parties shall meet and exert their best efforts to resolve the dispute. Failing such agreement within seven (7) days of the first meeting called for such purpose the parties shall settle the dispute by referring the matter to arbitration, pursuant to the rules of the Australian American Arbitration Agreement in effect at that time or if there shall be no such Agreement in effect then in accordance with the Arbitration Act current in New South Wales, Australia at the time of such dispute. Such meetings aforesaid and arbitration will take place in Sydney, Australia.*
>
> 19. APPLICABLE LAW
>
> *This Agreement shall be deemed to have been made in the State of New South Wales and the construction, validity and performance of this Agreement shall be governed in all respects by the law for the time being in force in the State of New South Wales, Australia."*

As found by the arbitrator, the distribution agreement ran for a little longer than eighteen months but expired on 16 March 1993. During its currency ADI developed its own reagent and associated products. Following the expiry of the distribution agreement ADI began to sell its own products, while Gradipore appointed Centerchem Inc ("Centerchem") as distributor of the Gradipore products. The products competed in the United States market.

On 27 September 1994 ADI began proceedings in the United States District Court Southern District of New York alleging trade mark and trade dress infringement against Centerchem, and on 2 June 1995 it added Gradipore as a defendant. Centerchem and Gradipore counter-claimed against ADI alleging trade mark infringement and breach of the distribution agreement.

Centerchem and Gradipore moved to stay the District Court proceedings in reliance on the arbitration clause in the distribution agreement. ADI contended that none of its claims and only two of the counter-claims fell within the arbitration clause, but it was held that the entire dispute arose out of or related to the distribution agreement. Centerchem agreed to be bound by the arbitration. By s 206 of the Federal Arbitration Act (US) the District Court was empowered to direct that arbitration be held in accordance with the agreement in the arbitration clause, and on 15 February 1996 Judge Chin ordered arbitration of all claims between ADI and Gradipore and stayed the litigation of ADI's claims against Centerchem pending arbitration. His Honour placed the proceedings on the suspense docket pending the outcome of the arbitration, an administrative procedure whereby proceedings which could neither be tried nor otherwise terminated did not count in statistics upon the disposal of cases. If reactivated, the proceedings would be restored to Judge Chin's docket or if he was not available reassigned by lot to the docket of another judge.

Dispute over rules of procedure

There was nothing in effect answering the description of the rules of the Australian American Arbitration Agreement, and I infer that the parties so appreciated at the time although there was no direct evidence thereof. (In its written submissions Gradipore asserted that there were some rules answering the description, but in oral submissions it acknowledged, correctly, that there were not - how the original submission could have been made is not easy to see). In accordance with the arbitration clause, therefore, the referral to arbitration was to be in accordance with the Act, being *"the Arbitration Act current in New South Wales"*.

There were nonetheless many exchanges between ADI and Gradipore, not all well informed, concerning what were usually referred to, in terms or by cognate expressions, as the rules to apply to the arbitration or the rules of procedure to apply to the arbitration. It is tolerably clear that the exchanges were associated with ADI's wish to have the arbitrator consider two particular issues as preliminary matters and grant injunctive relief with respect thereto. ADI was not confident that this procedure was available under the Act. It proposed as rules to apply to the arbitration the International Arbitration Rules of the American Arbitration Association ("the AAA Rules"), under which the procedure was expressly available. There came a time at which ADI asserted that Gradipore (hereafter in referring to Gradipore I include Centerchem) had agreed to the AAA Rules, while Gradipore asserted that it was willing to agree to any generally recognised arbitration rules and the issuing of

interim relief and that there had been agreement upon the Act *"including its rules of procedure"* as such rules.

There can be seen in the exchanges two different approaches, possibly not clearly recognised by the opposing parties, an appreciation of which is important to what follows.

On the approach of ADI, arbitration in accordance with the Act was a separate matter from the rules to apply to the arbitration, the rules to apply to the arbitration being supplementary to the Act. This can best be seen from a letter from Mr Harold Haidt, the New York attorney for ADI, to Judge Chin dated 6 June 1996 (copied to Mr James Jacobs, the New York attorney for Gradipore), citing part of a statutory declaration by the New South Wales solicitor for ADI stating that the Act *"is the 'curial law' for any arbitration held in NSW and therefore is a separate matter from the rules of arbitration, which in NSW are determined either by agreement or by the arbitrator"*, and was confirmed by Mr Haidt's evidence that what was at issue at the meeting of 20 June 1996 shortly considered was *"not what law applies [meaning the Act] but what rules would apply and whether the arbitrator had sufficient power to grant a preliminary injunction"*.

On the approach of Gradipore, the Act carried with it rules of procedure to apply to the arbitration. To begin with Gradipore's approach was similar to that of ADI. In a letter from Mr Jacobs to Judge Chin dated 1 April 1996 Mr Jacobs said -

> *"We represent defendants Centerchem, Inc and Gradipore Limited. At the hearing last Friday you asked whether an Australian arbitrator could award a preliminary injunction.*
>
> *After conferring with associate Australian counsel, the answer is without doubt that he may. The American Diagnostics Inc-Gradipore Limited arbitration agreement does not specify the arbitration rules that will apply during the arbitration. Accordingly, the parties must agree upon the rules, and in the absence of agreement, the arbitrator will order which rules will apply.*
>
> *To our knowledge all rules provide that arbitrators can award preliminary relief. For example, Commercial Arbitration Rules of the American Arbitration Association, Rule 22, both provide for 'interim measures' (copies enclosed). Gradipore Limited and Centerchem Inc will agree to those rules, or the rules of any other generally recognized arbitration body.*
>
> *In any event by agreement the parties can supplement the arbitration rules. Gradipore Limited and Centerchem Inc will agree that the arbitrator(s) will have the right to issue a preliminary injunction. The prevailing party on any such interim award may then file it with this court for enforcement."*

But in a letter to Mr Haidt dated 30 May 1996 Mr Jacobs said that there had been earlier agreement between the New South Wales solicitors for the parties that the Act *"including its rules of procedure"* applied, with the comments that the agreement *"confirms the default provisions"* of the distribution agreement and that the Act provided for interim relief. Following this came Gradipore's assertion earlier summarised, in a letter from Mr Jacobs to Mr Haidt dated 3 June 1996, that on

Gradipore's approach the Act's rules of procedure may still have depended on future agreement or the arbitrator's order.

It is not surprising that ADI caused the District Court proceedings to be brought before Judge Chin on 20 June 1996, on an application for orders that the rules governing the arbitration be the AAA Rules and that the parties empower the arbitrator to consider the preliminary issues and grant an interim injunction. There was then agreement, embodied in an order made the next day recording that the parties agreed that the arbitrator *"has, and shall have, jurisdiction and power to consider requests for and to issue both preliminary and permanent injunctive relief ..."*. No order was made as to rules to apply to the arbitration, and there was evidence that Judge Chin said that he did not care what rules the arbitrator followed so long as they provided that the arbitrator might issue injunctive relief and that Gradipore concurred.

Agreement on rules of procedure

Immediately following the hearing before Judge Chin there was a meeting between Mr Haidt and Mr Haffner, representing ADI, and Mr Jacobs and Mr Berman, representing Gradipore. The meeting was initiated by Mr Jacobs in order to obtain from ADI agreement to the UNCITRAL Arbitration Rules. This was a marked change in Gradipore's stance. Unknown to ADI, counsel recently engaged for Gradipore in New South Wales had advised, as recounted by Mr Jacobs, that

"Gradipore prefers that the arbitration be conducted pursuant to the UNCITRAL rules and ... now rejects that the New South Wales Commercial Arbitration Act ... is at all applicable". Mr Jacobs said that the meeting and, according to Mr Jacobs, his purpose in referring to the Act at the meeting, were *"pursuant to a strategy that I devised to obtain ADI's agreement to use the UNCITRAL rules in the Gradipore-ADI arbitration"*.

There was a conflict in the evidence of what was said during the meeting. According to Mr Jacobs, supported by Mr Berman, Mr Jacobs said that he was willing to recommend a compromise to Gradipore and, *"rather than the New South Wales Commercial Arbitration Act 1984 as amended, including its rules and procedure, I suggest the parties agree to the use of the UNCITRAL Arbitration Rules and an Australian appointing authority"*; Mr Haidt said that he would recommend this to ADI. According to Mr Haidt, however, supported by Mr Haffner, there was no mention of the Act; Mr Jacobs proposed the UNCITRAL Arbitration Rules, pointing out that they provided for interim relief; Mr Haidt said he was unhappy with the UNCITRAL Arbitration Rules because there was no person or organization who would administer the arbitration, and preferred the AAA Rules because the Association was available to administer the arbitration; Mr Jacobs said that Gradipore objected to the AAA Rules because of the perceived high cost of fees payable to the Association, and suggested the UNCITRAL Arbitration Rules plus the appointment of an Australian other than the arbitrator as the administrator; Mr Haidt

thought that an acceptable compromise; both attorneys said they would recommend this to their clients; there was also discussion of withdrawal of a notice of dispute served by Gradipore.

Mr Haidt wrote to Mr Jacobs on 21 June 1996, so far as presently relevant in the terms -

> *"No doubt you have received a copy of Judge Chin's Order of June 21, 1996.*
>
> *I want to advance the understandings reached at our meeting following the hearing. Counsel for the parties agreed to recommend to their respective clients that:*
>
> *a) the UNCITRAL rules be adopted as the rules governing the arbitration;*
>
> *b) an administrator, other than the arbitrator, be appointed to administer the arbitration;*
>
> *c) Gradipore's 'Notice of Dispute' would be considered null and void, and not be asserted by any party as the commencement of the arbitration; and*
>
> *d) the arbitration will be commenced by both parties filing their claims simultaneously on an agreed upon day, and then answering the claims of the other party within thirty (30) days thereafter.*
>
> *Jim, don't hesitate to modify my stated understanding if your recollection differs, or my statement is unclear."*

Mr Jacobs replied the same day, again so far as presently relevant in the terms -

> *"Thank you for sending [sic] forth the substance of our understanding. We agree with your statement except as to clarification of two points. We agreed that we should recommend to our respective clients that an Australian administrator, other than the arbitrator, be appointed to administer the arbitration and we did not agree as to the date answer claims would be filed after the simultaneously filed original claims. Australian counsel should be able to work out the dates.*
>
> ...
>
> *Please confirm that my clarifications of our agreement are in accordance with your recollection. I have already forwarded our understanding with my recommendation to Australian counsel. Hopefully we will have an affirmative response on Monday."*

The exchange ended with a letter from Mr Haidt to Mr Jacobs on 24 June 1996, again so far as presently relevant in the terms -

> *"Referring to your letter of June 21, 1996, your clarification of our understanding is correct. We have discussed this with our client and the understandings reached are acceptable to our client. You reported to me that Gradipore also agrees to the understandings."*

I do not think it matters whether there was reference to the Act in connection with agreement on the UNCITRAL Arbitration Rules. It became quite clear, and was accepted by Gradipore, that whatever passed between the attorneys at the meeting was subject to referral to their clients, and that what was referred to ADI and Gradipore and agreed to by them was the *"understandings"* recorded in the subsequent letters. There was no agreement between ADI and Gradipore in the terms that the UNCITRAL Arbitration Rules be used *"rather than the New South Wales Commercial Arbitration Act 1984 as amended, including its rules and procedure"*.

There was agreement that the UNCITRAL Arbitration Rules be adopted *"as the rules governing the arbitration"*, and later in these reasons I will come to the significance of that agreement.

If a finding be necessary, it seems to me that Mr Jacob's strategy probably caused him to mention the Act, but to do so in passing so as not to highlight the change in Gradipore's stance or alert ADI to Gradipore's rejection of the applicability of the Act. Consistently with that implementation of his strategy, Mr Jacobs deliberately did not add to the understandings as set out in Mr Haidt's letter of 21 June 1996 an understanding that the Act did not apply or that the agreement on the UNCITRAL Arbitration Rules had the effect of excluding its application. So much in passing was the mention of the Act that, particularly when ADI had been urging the adoption of the AAA Rules as a separate matter from the application of the Act, it passed Messrs Haidt and Haffner by. Even if Mr Jacobs' reference to the Act was in the terms of which he gave evidence, I consider that in the circumstances there could not thereby be found in agreement to adoption of the UNCITRAL Arbitration Rules as the rules governing the arbitration the further agreement that those rules should apply instead of, that is, to the exclusion of, the application of the Act. If that was part of Mr Jacobs' strategy - and some of his evidence suggested that it was not - his failure sufficiently to bring it out at the meeting deprived him of his objective. While I would so hold in any event, it seems to me that the conclusion that such reference to the Act as occurred was insufficient to give rise to an agreement that the UNCITRAL

Arbitration Rules should apply instead of the Act is underlined by the absence of exclusion of the Act's application in the understandings immediately recorded.

The arbitration

As recounted in the award, the Australian Commercial Disputes Centre was appointed to administer the arbitration but the parties did not call on it to play any role in the arbitration. The arbitrator convened a preliminary meeting on 17 July 1996. A question arose as to whether Gradiport's claims in the arbitration could go outside the issues raised in the District Court proceedings, and the arbitrator heard argument on that question and published an interim award. Hearings on the claims in the arbitration began on 24 September 1996, and occupied two periods from 24 September 1996 to 18 October 1996 and from 3 March 1997 to 27 March 1997. Written submissions were then prepared and provided to the arbitrator, and oral submissions were made in the period from 5 May 1997 to 12 May 1997. Further written submissions were provided to the arbitrator, by leave, over the following months. There were frequent interim applications, including applications for directions and discovery.

On 28 August 1997 the arbitrator published reasons leading to conclusions that all ADI's claims in the arbitration failed and that Gradiport succeeded on three of its claims in the arbitration but failed on all its other claims. His reasons included that the conclusion in favour of Gradiport on its breach of contract claim was tentative.

He thereafter received further submissions upon the breach of contract claim and the consequences of his reasons and conclusions, and on some other matters raised by the parties. Finally he published the interim award on 20 November 1997.

The statutory basis for ADI's application

ADI applied pursuant to s 38 of the Act -

"38 (1) Without prejudice to the right of appeal conferred by subsection (2), the Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

(2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.

(3) On the determination of an appeal under subsection (2) the Supreme Court may by order -

(a) confirm, vary or set aside the award; or

(b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration,

and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make the award within 3 months after the date of the order.

(4) An appeal under subsection (2) may be brought by any of the parties to an arbitration agreement -

(a) with the consent of all parties to the arbitration agreement; or

(b) subject to section 40, with the leave of the Supreme Court.

(5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that:

(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and

(b) there is:

(i) a manifest error of law on the face of the award; or

(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

(6) The Supreme Court may make any leave which it grants under subsection 4(b) subject to the applicant complying with any conditions it considers appropriate.

(7) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire."

Section 40 referred to in s 38(4)(b) deals with exclusion agreements whereby the right of appeal in relation to an award may be excluded. It is set out later in these reasons. For the present, it is sufficient to note that an exclusion agreement must be in writing, in some circumstances a purported agreement will be of no effect, and it is expressly provided that s 38 has effect unless there is an exclusion agreement "notwithstanding *anything in any agreement purporting ... to prohibit or restrict access to the Supreme Court ... [or] to restrict the jurisdiction of the Supreme Court*".

There can be appeal only on a question or questions of law arising out of the interim award. Since Gradiport did not consent to the appeal, leave is necessary: hence ADI's application. Leave may not be granted unless s 38(5) is satisfied. The issues in the application included whether the errors on the part of the arbitrator alleged by ADI gave rise to questions of law arising out of the award and, if they did,

whether s 18(5) was satisfied. But Gradipore also contended (a) that leave to appeal could not be granted because the Act does not apply to the arbitration at all; (b) alternatively that leave to appeal could not be granted because there was an exclusion agreement; (c) alternatively again, that leave to appeal should not be granted (strictly, that the application for leave to appeal should be permanently stayed) on forum non conveniens grounds; and (d) that ADI's application for leave to appeal was out of time.

Does the Act apply to the arbitration?

By s 3(2)(a) of the Act it applies to "*an arbitration agreement ... and to an arbitration under such an agreement*". The definition of "*arbitration agreement*" in s 4(1) is "*an agreement in writing to refer present or future disputes to arbitration*". The Act deals with the appointment of arbitrators and umpires (ss 6-13); the conduct of arbitration proceedings (ss 14-27); awards and costs (ss 28-37); powers of the Court (ss 38-48); and generally as to arbitration (ss 50-55). Within these general topics are a diverse collection of provisions, many stated to apply subject to the arbitration agreement, unless a contrary intention is expressed in the arbitration agreement, or unless it is otherwise agreed in writing by the parties to the arbitration agreement, but some stated to apply notwithstanding any agreement to the contrary between the parties (eg s 20 in part, to do with representation) or declaring void contrary provisions in the arbitration agreement (eg s 34 to do with costs; in the same category is s 40 in part, whereby certain exclusion agreements shall be of no effect).

The Act does not set out procedures for the conduct of an arbitration, but provides by s 14 that subject to the Act and to the arbitration agreement the arbitrator "*may conduct proceedings under that agreement in such manner as the arbitrator ... thinks fit*".

At the heart of the application of the Act is the arbitration agreement. But the Act will not apply to any and every arbitration agreement in the world: an arbitration agreement between two Ruritanian subjects, made in Ruritania concerning a Ruritanian dispute and with the conduct of the arbitration in Ruritania, could hardly be subjected to its provisions. The reach of the Act is as found in its terms, but provided that a sufficient nexus appears between the Act operating as to found and the territory of New South Wales so that there is a valid exercise of the power conferred by s 5 of the Constitution Act 1902 (NSW) to make laws "*for the peace, welfare and good government of New South Wales*": see Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1.

The arbitration clause in the distribution agreement is an arbitration agreement within the definition in the Act, and as a matter of language the Act applied and applies to it. The evidence did not disclose where the distribution agreement, and so the arbitration agreement, was made. The distribution agreement identifies ADI as a Connecticut company and Gradipore as a New South Wales company, so sufficient reason can be seen for the parties' choice of New South Wales law in cl 19 and the

agreement in cl 18 that any arbitration should take place in Sydney is readily understandable. Even if the default agreement that the referral to arbitration be in accordance with the Arbitration Act current in New South Wales be put aside, the arbitration agreement is not of the Ruritanian kind. It is unnecessary, and unwise, to seek to canvass all criteria by which the reach of the Act might be determined: given the other connections with New South Wales, the fact that the arbitration was to take place in New South Wales and did take place in New South Wales is in my view sufficient to attract the Act's application to the arbitration agreement for the purposes of grant of leave to appeal. Subject to the submissions to which I now come, I did not understand Gradipore to say otherwise.

Gradipore's contention that leave to appeal could not be granted because the Act does not apply to the arbitration was put in two ways. First, it was submitted that the Act does not apply to the arbitration because the arbitration agreement was international in nature. Secondly, it was submitted that the Act does not apply to the arbitration because of the agreement on the UNCITRAL Arbitration Rules as the rules governing the arbitration in June 1996.

(i) An arbitration agreement international in nature

The submission began by categorising the arbitration agreement as a foreign arbitration. By a foreign arbitration agreement Gradipore meant an arbitration agreement a party to which was domiciled or ordinarily resident in a Convention

country, as described in s 7(1)(d) of the International Arbitration Act 1974 (C'th)("the IA Act"). A Convention country is a country, other than Australia, that is a Contracting State within the meaning of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration ("the Convention"), approval to accession to which was given by s 4 of the IA Act. ADI was domiciled in Connecticut in the United States of America, and the United States of America is a Contracting State.

How categorisation as a foreign arbitration agreement then led to the submission's conclusion was unclear. It may have been argued that the Act did not in its own terms apply to a foreign arbitration agreement, but if that was argued I do not accept it. There is nothing to exclude from the application of the Act via s 3(2)(a) and the definition of "*arbitration agreement*" an arbitration agreement a party to which was when the agreement was made, or thereafter, domiciled or ordinarily resident in a Convention country. On the contrary, provisions in the Act reflect an intention that it apply to an arbitration agreement a party to which is domiciled or ordinarily resident outside Australia (see ss 11(2), 40(7), and 55(2)), and there is no reason in the terms of the Act to distinguish domicile or residence outside Australia in a Convention country from domicile or residence outside Australia not in a Convention country.

The submission otherwise seemed to be that because the arbitration was an international arbitration it could not be regarded as a domestic arbitration, and therefore was not subject to the Act. So it was asserted in Gradiporte's written submissions that "*Australia does not consider an arbitration under the International Arbitration Act when the parties have opted out of the UNCITRAL Model Law as a domestic arbitration*"; that "*It could never have been the legislative intention that arbitrations, even with their situs in Australia, with an international flavour such as the arbitration in this case, must be regarded as domestic arbitrations under the Commercial Arbitration Acts of the various States and Territories with all of their parochial provisions including applications for leave to appeal against manifest errors of law, (a procedure eschewed by most international arbitral regimes in other jurisdictions), merely because the parties have used s 21 of the International Arbitration Act 1974 (C'th) to opt out of the provisions of the UNCITRAL Model Law.*"; and that "*The recognition of international awards and any challenge thereto, should be dealt with by legislation concerning such matters and not by legislation dealing with domestic arbitrations.*"

I endeavoured in the course of oral submissions to identify the reasoning to the submission's conclusion. The result was inconsistencies and non sequiturs. I have endeavoured thereafter to reconcile all that was said and understand the reasoning. I have not been able to do so. Assuming an international arbitration, the IA Act gives the UNCITRAL Model Law the force of law in Australia (s 16(1)), whereby the

arbitration may be in accordance with the Model Law. It seemed to be said that it is the intention of the Federal legislature that in that event, the Act can not apply to the arbitration. But that the intention takes effect because of inconsistency between the Federal legislation and the State legislation was emphatically eschewed, it was accepted that nothing in the IA Act in terms so provides, and in the end the argument seemed to be that the Act does not apply to an international arbitration simply because it is an international arbitration (with further reference to the description of a foreign arbitration agreement in s 7(1)(d) of the IA Act). Even at this point the submission's conclusion is reached by a leap of faith rather than a process of reasoning.

But the IA Act provides that the Model Law does not apply in relation to the settlement of a dispute if the parties agree that the dispute is to be settled otherwise than in accordance with the Model Law (s 21). Whatever other agreement is to be found in cl 18 of the distribution agreement and the subsequent adoption of the UNCITRAL Arbitration Rules, there was clearly agreement that disputes falling within the arbitration clause were to be settled otherwise than in accordance with the Model Law. The arbitration was not to be in accordance with the Model Law, the optional provisions of the IA Act were not taken up (ss 22-24), and the proposition that the Act does not apply to the arbitration because it is an international arbitration is not maintainable. The application of the Act must be found from its terms, properly construed and with regard to the extent of the legislative power of the Parliament of New South Wales, and absent any question of inconsistency with the

terms or effect of the IA Act its application so arrived at is not negated because an arbitration has an international flavour or because an advocate describes the provisions of the Act as parochial.

(ii) Agreement on the UNCITRAL Arbitration Rules

The submission was put in three ways: that there was a variation to the arbitration clause whereby the UNCITRAL Arbitration Rules applied to the exclusion of the Act, that there was an election by ADI that the Act would not apply to the arbitration; and that there was "an *implied rejection*" of the Act. Can the Act, if otherwise applying to the arbitration, be excluded by act of the parties?

In Naviera Amazonica Peruana SA v Compania Internacional De Seguros Del Peru (1988) 1 Ll R 116 Kerr LJ, with whom Russell LJ and Sir Denys Buckley agreed, identified three systems of law potentially relevant to an arbitration with a foreign element, namely the law governing the substantive contract, the law governing the agreement to arbitrate and the performance of that agreement, and the law governing the conduct of the arbitration. As to the law governing the conduct of the arbitration, his Lordship said (at 119) -

> *"English law does not recognize the concept of a 'de-localised' arbitration ... (see Dicey & Morris at pp 541, 542) or of 'arbitral procedures floating in the trans national firmament, unconnected with any municipal system of law' (Bank Mellat v Hellenic Technki SA (1984) QB 291 at p 301 (Court of Appeal)). Accordingly, every arbitration must have a 'seat' or local arbitri or forum which subjects its procedural rules to the municipal law which is there in force."*

The seat of the arbitration is not necessarily where it is held, although where the parties have failed to choose the law governing the conduct of the arbitration it will prima facie be the law of the country in which the arbitration is held because that is the country most closely connected with the proceedings (see James Millet & Partners Ltd v Whitworth Street Estates (Manchester) Ltd (1970) AC 583 at 607, 609, 616; Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG (1981) 2 Ll R 446 at 453-4; Bank Mellat v Hellenki Technki SA (1984) 1 QB 291 at 301).

Although the law governing the conduct of the arbitration (the lex arbitri) is said to be concerned only with procedural matters, it goes beyond, for example, the production of documents or the order of witnesses. The appointment, removal, and replacement of arbitrators, time limits, interim relief, consolidation of arbitrations, representation before the arbitrator, the form and validity of the award, and the finality of the award, are amongst the matters which can fall within the lex arbitri. The de-localisation theory, and what it means, have been much debated (see for example the series Paulsson, "Arbitration Unbound: Award Detached from the Law of its Country of Origin" (1981) 30 ICLQ 358; Park, "The Lex Loci Arbitri and International Commercial Arbitration" (1983) 32 ICLQ 25; Paulsson, "Delocalisation of International Commercial Arbitration: When and Why it Matters" (1983) 32 ICLQ 53). But in principle de-localisation *"is only possible if the local rules permit it"* (Redfern and Hunter, Law and Practice of International Commercial Arbitration, 2nd ed at 90). That is, the law of the seat of the arbitration, or of a jurisdiction asserting

with a sufficient nexus control over the conduct of the arbitration, may according to its terms apply so as to govern the conduct of the arbitration, and even recognition of the concept of a de-localised arbitration will not necessarily mean freedom from local rules. The Act provides a lex arbitri, and lays down local rules. If the seat of the arbitration is New South Wales, its procedural rules (in the expanded sense above) are subject to the Act (Naviera Amazonica Peruana SA v Compania Internacional De Seguros Del Peru); even if its seat is elsewhere or it can be regarded as de-localised, local rules may apply.

Gradipore's submission involved that the parties could overcome the application of the local rules by agreement. If there be agreement not to invoke the exercise of a discretionary power available under the lex arbitri, that will be an important consideration in whether the power should be exercised (see Bank Mellat v Hellenki Technki SA at 302), although the lex arbitri will remain as the law governing the conduct of the arbitration. The submission was not that the agreement on the UNCITRAL Arbitration Rules went to this Court's discretion. It could not reasonably have been put in that way, when leave to appeal is in question and by specifically regulating exclusion of the right of appeal in relation to an award (s 40 dealing with exclusion agreements) the Act puts aside as a discretionary factor contrary agreement not constituting an exclusion agreement. Rather, the submission was that there could be agreement that the Act will not apply at all.

That there can be a lex arbitri different from the law of the country in which the arbitration is held is implicit in what was said in James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd, Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG and Bank Mellat v Hellenikl Techniki SA referred to above. The place where the arbitration is held is not necessarily conclusive of the seat of the arbitration, as is obvious when one considers a peripatetic arbitration, and in Naviera Amazonica Peruana SA v Compania International De Seguros Del Peru Kerr LJ said (at 120) -

> *"There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. The limits and implications of any such agreement have been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve."*

Can agreement on a lex arbitri different from the law of the country in which the arbitration is held entirely escape the local rules? The foundation for agreement on a lex arbitri is that all arbitrations are consensual, party autonomy being the cornerstone of modern arbitration, and so Gradipore said that the consensual nature of the arbitration permitted ADI and Gradipore to agree to exclude the Act if it would otherwise have applied to their arbitration. But there must be a limit to the parties' freedom, because their choice of the place of their arbitration may carry with it application to the arbitration of the law of that place according to its terms so as to govern the conduct of the arbitration. The freedom is to choose the place. So far as

the local rules compulsorily apply and are inconsistent with the chosen lex arbitri, they can not be put aside by agreement that they do not apply.

Hence in principle it seems to me that the application of the Act to far as it provides for leave to appeal, a compulsory local rule applying to the arbitration, can not be put aside by agreement that the Act will not apply to the arbitration at all. I think that finds some support in the reasons of Saville J in Union of India v McDonnell Douglas Corporation (1993) 2 Ll R 48. The arbitration agreement provided that the arbitration should be conducted in accordance with the procedure in the Indian Arbitration Act 1940; it also provided that the seat of the arbitration should be London. The arbitration was about to begin in London. His Lordship was asked to determine whether the law governing the arbitration was Indian law or English law. He held in favour of English law, expressing his conclusion (at 51) in the terms that the arbitration and any award would be *"subject to the supervisory jurisdiction"* of the English courts. The reasoning included, in the emphasised part of the passage next set out, that the supervisory jurisdiction of the English courts could not be excluded by the agreement.

His Lordship referred (at 50) to the choices of a law to govern the commercial bargain, a law to govern the arbitration agreement, and a law to govern the procedure in any arbitration. These laws corresponded to those identified in Naviera Amazonica Peruana SA v Compania Internacional De Seguros Del Peru. He said that in theory,

and subject to a proviso to which he would return, the parties could choose a different law for each of these purposes. He set out the arguments put to him as to choice of procedural law, and said -

> *"These arguments are nicely balanced. It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but against this is the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities, as Lord Justice Kerr observed in the Amazonica decision. For example (and this is the proviso to which I referred earlier in this judgment) it seems to me that the jurisdiction of the English Court under the Arbitration Acts over an arbitration in this country cannot be excluded by an agreement between the parties to apply the laws of another country, or indeed by any other means unless such is sanctioned by those Acts themselves. That, to my mind, there can be no question in this case that the English Courts would be deprived of all jurisdiction over the arbitration. However, much of that jurisdiction is discretionary in character so that if the Court were convinced that the parties had chosen the procedural law of another country, then it might well be slow to interfere with the arbitral process. Again, for the sake of avoiding parallel Court proceedings, the Court might be minded to regard the choice of a foreign legal procedure as amounting to an exclusion agreement within the meaning of s 3 of the Arbitration Act 1979. Be that as it may, the choice of a procedural law different from the law of the place of the arbitration will, at least where that place is this country, necessarily mean that the parties have actually chosen to have their arbitral proceedings at least potentially governed both by their express choice and by the laws of this country.*
>
> *Such a state of affairs is clearly highly unsatisfactory: indeed in Black-Clawson International Ltd v Waldhof-Aschaffenburg AG (1981) 2 Lloyd's Rep 446 at p 453, Mr Justice Mustill (as he then was) described the converse situation (ie a foreign arbitration suggested to be governed by English procedural law) as producing an absurd result.*
>
> *In the end, therefore, the question is whether the parties have agreed to such a potentially unsatisfactory method of regulating*

their arbitration procedures. In my judgment, they have not because, as Mr Veeder submitted, there is a way of reconciling the phrase relied upon by Mr Colman with the choice of London as the seat of the arbitration, namely by reading that phrase as referring to the internal conduct of the arbitration as opposed to the external supervision of the arbitration by the Courts. The word used in the phrase relied upon by Mr Colman is 'conducted' which I agree with Mr Veeder is more apt to describe the way in which the parties and the tribunal are to carry on their proceedings than the supervision of those proceedings by the Indian courts, for example through the Special Case provisions of the Indian Act. It is true, as Mr Colman pointed out, that this would mean that only s 3 and Schedule 1 of the Indian Act would be applicable (though many of the other provisions are still to be found in the English statutes and so would be applicable in the English Courts) but the construction for which he contends would to my mind, not only have the unsatisfactory and possibly absurd results to which I have referred, but would also necessarily give the word 'seat' a meaning which excluded any choice of London as the legal place for the arbitration. In my view, such a change from the ordinary meaning to be given to that word in an international arbitration agreement (the ordinary meaning being that submitted by Mr Veeder) cannot be accepted, unless the other provisions of the agreement show clearly that this is what the parties intended. I am not persuaded that that is the case here. On the contrary, for the reasons given, it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law."

Earlier in Bank Mellat v Hellenki Techniki SA Goff LJ had said (at 315) that if parties choose to arbitrate in England *"English law will, as the curial law, apply to the conduct of the arbitration; and the parties will, by holding their arbitration here, subject themselves for that purpose to English law ..."*. His Lordship was not addressing agreement on a different curial law, but appears not to have doubted the application of English curial law of its own force.

In Mustill and Boyd, Commercial Arbitration, 2nd ed the law governing the conduct of the arbitration is part of the curial law. The authors observe (at 64) that an express choice of curial law different from the law of the country in which the arbitration is to be held is almost unknown, *"... no doubt because of the formidable conceptual and practical problems which are likely to arise should it be necessary to invoke the power of a court in relation to the reference"*. They say (at 90) -

> *"The choice of a foreign curial law does not, we submit, deprive the English court of jurisdiction. It has never, so far as we are aware, been suggested that parties may validly contract out of the power to set aside or remit an award for misconduct, and if an explicit agreement cannot accomplish this, it is hard to see how it could be achieved indirectly by the choice of a foreign curial law. Nevertheless the choice of a foreign curial law is a strong reason for the court refusing leave to serve proceedings abroad or to grant discretionary remedies."*

This passage was cited with approval by Staughton LJ, with whom Woolf and Neill LJJ agreed, in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd (1992) 1 QB 656 at 675. In that case it was held that the connecting factor for the application of s 12(6)(h) of the Arbitration Act 1950 (UK), dealing with interim injunctions, to a case containing a foreign element was the place the parties had chosen as the seat of the arbitration. If the seat was in England or Wales, the court could grant an injunction, it seems in his Lordship's view even if the parties had agreed on the procedural laws of another country.

In Dicey and Morris, The Conflict of Laws, 12th ed it is said (at 581-2) -

> *"Although most systems of arbitration allow the parties considerable procedural freedom (eg to stipulate the extent of discovery or the admission of oral evidence) it does not follow that the parties can for all purposes contract out of the mandatory procedural rules of the place where the arbitration is being conducted. Thus where there are rules of English procedure which the parties cannot validly exclude by express agreement, a choice of foreign procedural law would not prevent those English rules being applicable to an arbitration in England. But as Mustill and Boyd point out, the occasions in which English law treats procedural rules relating to arbitration as mandatory are rare. It is very doubtful whether the parties could, merely by choosing a foreign procedural law, contract out of the supervisory role of the English court in relation to an arbitration being conducted in England."*

There is thus some judicial and other guidance contrary to Gradipore's submission. In principle, party autonomy does not mean complete freedom to exclude a system of law, or particular elements of a system of law, from the relationship between the parties. Confining attention to statutory law, if the statute on its proper construction and with regard to the legislative power of the legislature applies to the parties and their conduct of the arbitration, and expressly or by necessarily implication can not be excluded by agreement, the agreement of the parties to exclude it will count for nothing. If the statute applies to the arbitration, a prohibition against contracting out can not be avoided by contracting out of the prohibition.

For these reasons I do not accept the foundation for Gradipore's submission. But in any event I do not think the facts support it. I return to the significance of the agreement that the UNCITRAL Arbitration Rules be adopted as the rules governing the arbitration.

In my opinion, that agreement did not carry with it agreement that the Act should not apply. In the light of the preceding communications between the parties, the rules governing the arbitration were supplementary to the Act not in substitution for it. Viewed objectively, not pursuant to the uncommunicated advice of Gradipore's counsel that it rejected that the Act was applicable, the rules governing the arbitration were what Mr Jacobs had referred to in his letter of 1 April 1996 as rules to apply during the arbitration, not specified in the distribution agreement (which did specify the Act) but to be agreed between the parties or in default of agreement ordered by the arbitrator. They were what Mr Haidt had described in his letter of 6 June 1996 as the rules of arbitration determined by agreement or by the arbitrator, as distinct from the Act as the curial law for the arbitration. While the facts were quite different, there is a degree of similarity with Union of India v McDonnell Douglas Corporation. Taking the agreement in context, the UNCITRAL Arbitration Rules as the rules governing the arbitration were to govern the procedures of the arbitration so far as not inconsistent with the Act as the chosen law in accordance with which there had been the referral to arbitration. All this is supported by the fact that, as was presumably well known to Messrs Jacobs and Haidt, the UNCITRAL

Arbitration Rules provided by Art 1.2 that they should govern the arbitration "*except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail*". The Act was such a law and contained some such provisions, including s 38 from which the parties could derogate only to the extent permitted by s 40. So the Act was left to apply, relevantly so far as it provided for leave to appeal subject to any exclusion agreement.

Addressing each of the ways Gradipore put its submission, there was not a variation of the arbitration clause whereby the referral to arbitration was not to be in accordance with the Act, but at most a variation of the arbitration clause by the addition that the referral to arbitration should be in accordance with the Act and, in its procedures, the UNCITRAL Arbitration Rules, with the Act prevailing in the event of inconsistency. There was no election that the Act would not apply to the arbitration. Gradipore relied on Sargent v ASL Developments Ltd (1974) 131 CLR 634 at 641-2, but there was no question of election between inconsistent rights. Nor, whatever Gradipore meant thereby in its submission, was there an implied rejection of the Act.

An exclusion agreement?

Section 40 of the Act provides -

"*40 (1) Subject to this section and section 41 -*

(a) the Supreme Court shall not, under section 38(4)(b), grant leave to appeal with respect to a question of law arising out of an award; and

(b) no application may be made under section 39(1)(a) with respect to a question of law,

if there is in force an agreement in writing (in this section and section 41 referred to as an 'exclusion agreement') between the parties to the arbitration agreement which excludes the right of appeal under section 38(2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

(2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular arbitration agreement or to any other description of awards, whether arising out of the same arbitration agreement or not.

(3) An agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the commencement of this Act and whether or not it forms part of an arbitration agreement.

(4) Except as provided by subsection (1), sections 38 and 39 shall have effect notwithstanding anything in any agreement purporting -

(a) to prohibit or restrict access to the Supreme Court; or

(b) to restrict the jurisdiction of the Supreme Court.

(5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration being an arbitration under any other Act.

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises.

(7) In this section, 'domestic arbitration agreement' means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither -

(a) an individual who is a national of, or habitually resident in, any country other than Australia; or

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia,

is a party at the time the arbitration agreement is entered into."

Section 39(1)(a) is concerned with curial determination, with the consent of the arbitrator but not of all parties, of a question of law arising in the course of the arbitration. Section 41 deals more specifically with exclusion agreements in relation to particular kinds of dispute, and is of no present relevance. As will appear, in the consideration of s 40 regard must be had to s 28 of the Act, which provides -

> *"28. Unless a contradictory intention is expressed in the arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Act, be final and binding on the parties to the agreement."*

Gradipore submitted that there was an exclusion agreement because the parties had agreed in writing, in the exchange of letters in June 1996, that the UNCITRAL Arbitration Rules be adopted as the rules governing the arbitration, and had thereby agreed that the award should be final and binding because Art 32.2 of the UNCITRAL Arbitration Rules dealing with the form and effect of the award states -

> *"2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay."*

(Gradipore also submitted that there was an exclusion agreement because the entire Act had been rejected, repeating the submission considered in the preceding portion of these reasons. The logical difficulty of excluding the Act entirely but relying on its

provisions as to an exclusion agreement need not be explored: for the reasons I have given, there was not the entire rejection.)

There appears to be little guidance in the cases as to the effect of the parties' agreement. Speaking of the equivalent to s 40 of the Act, s 3 of the Arbitration Act 1979 (UK), Mustill and Boyd, Commercial Arbitration, 2nd ed suggest (at 635) that there is *"room for uncertainty as to what exactly the Act contemplates by way of an exclusion agreement"*. The authors advert to the equivalent to s 40(4) as possibly indicating that a general ouster of a right of appeal is ineffective, but I consider they correctly find this unconvincing on the ground that the subsection is intended to ensure that only a valid exclusion agreement will suffice.

In Arab Africa Energy Corp Ltd v Olieprodukten Nederland BV (1983) 2 Ll R 419 the parties agreed that their arbitration should be *"according ICC Rules"*. Article 24 of the ICC Rules provided -

> *"1. The arbitral award shall be final. 2. By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made."*

It was held that the parties had entered into an exclusion agreement within s 3 of the Arbitration Act, 1979 (UK). Leggatt J said (at 423) -

> *"Section 3(1) of the 1979 Act does not require the overt demonstration of an intention to exclude the right of appeal. True it is, that formerly the Court was careful to maintain its supervisory jurisdiction over arbitrators and their awards. But that aspect of public policy has now given way to the need for finality. In this respect the striving for legal accuracy may be said to have been overtaken by commercial expediency. Since public policy has now changed its stance, I see no reason to continue to adopt an approach to the construction of exclusion agreements which might well have been appropriate before it had done so. In my judgment, the phrase 'an agreement in writing ... which excludes the right of appeal' is apt to apply to an exclusion agreement incorporated by reference.*
>
> *While recalling Sir Alan Herbert's dictum about 'deeming', I am quite unable to hold that if parties agree that they should be deemed to have waived their right to any form of appeal they have not thereby done so. It also seems to me that the exclusion (in effect) of every right of appeal which can lawfully be excluded, not only achieves that result but achieves it in a way which is harmonious with the 1979 Act and allows for those particular matters in which the right of appeal cannot be excluded."*

This decision was accepted as correct by the Court of Appeal in Marine Contractors Inc v Shell Petroleum Development Co of Nigeria Ltd (1984) 2 Ll R 77. Gradipore said that the decision supported its submission because both the ICC Rules and the UNCITRAL Arbitration Rules stated that the award should be final (in the case of the UNCITRAL Arbitration Rules adding that it should be binding) and both the ICC Rules and the UNCITRAL Arbitration Rules provided that the parties undertook to carry out the award without delay. However, the decision was founded not on the statement as to finality or the undertaking to carry the award out but on the deemed waiver of the parties' right to any form of appeal. The waiver is not to be found in the UNCITRAL Arbitration Rules. ADI did not submit that the exclusion agreement, if there was one, could not be by incorporation by reference of Art 32.2 of

the UNCITRAL Arbitration Rules, and I do not think Gradipore gains any assistance from Arab African Energy Corp Ltd v Olieprodukten Nederland BV as to the effect of Art 32.2.

In White Constructions (NT) Pty Ltd v Mattos (1988) 57 NTR 8 the arbitrator told the parties he would accept nomination *"on the clear understanding that my award as arbitrator will be accepted by both parties as final and binding ..."*. The parties agreed. The statute was materially in the same terms as the Act. It was held that any exclusion agreement was not in writing, but Martin J considered whether there was an exclusion agreement and held that there was.

His Honour observed (at 12) that it would not be right to approach the question of an exclusion agreement on the basis that either the arbitrator or the parties to the arbitration were ignorant of the provisions of the Act, and that their agreement could only have meaning if it was directed to excluding the qualified right of appeal in s 38(2). After discussion making it clear that he had in mind both the equivalent to s 28 of the Act and that part of the arbitration clause providing that the arbitrator's award should be final and binding on the parties, Martin J said (at 15) -

> *"Although it is undoubtedly preferable that the terms of an exclusion agreement incorporates specific reference to such of ss 38(2) and 39(1)(a) as the parties seek to exclude from operation, it is not necessary that they do so. The Act does not expressly require it and such a requirement should not be implied. It is up to the parties as to how they express their agreement and, if an intention to exclude the right of appeal (or to have a preliminary exclusion [sic: question] of law determined) can be fairly seen from the words they choose to employ, then it should be made effectual. I consider that if parties agreed that they would both accept an arbitrator's award as 'final and binding' they thereby exclude the qualified right of appeal under s 38(2)."*

This was a stronger case than the present case. The parties' attention was specifically directed to the status of the award, and they agreed not just that it would be final and binding (which was already the case, quite apart from s 28 of the Act, by virtue of the arbitration clause) but that it would be accepted as final and binding. That the parties intended by their further agreement more than that the award should be final and binding subject to the statutory right of appeal, and intended to exclude the right of appeal, can be accepted. I do not think that Gradipore really gains support from this decision, and I do not accept Gradipore's argument that the fact that the arbitration in this case has an international flavour suggests that the parties intended to exclude what were called parochial rights of appeal in aid of finality of the arbitral process.

A decision in the opposite direction is Comet v C&C News Pty Ltd (Yeldham J, 28 April 1989, unreported). The arbitration clause included, *"The parties agree that the Award of the Arbitrator shall be final, conclusive and binding upon them."* It was held that the arbitration agreement was a domestic arbitration agreement, and by force of s 40(6) of the Act any exclusion agreement would have been of no effect. His Honour said, however -

> *"Although, on the face of it, the words 'final, conclusive and binding upon them', being words of considerable width, would appear to be sufficient to exclude a right of appeal, the reality is that the expression 'final and binding' is to be found in s 28, and in the old Arbitration Act 1902 in the second schedule, as well as in s 16 of the Arbitration Act 1950 (UK). Such expression was employed to bring finality, subject to well recognised methods of challenging awards in arbitral proceedings. Certainly such expressions (and the word 'conclusive' does not alter the situation) do not constitute an attempt to oust the jurisdiction of the Court - see Ford v Clarkson's Holidays Ltd (1971) 1 WLR 1412. I think it is correct to submit, as counsel for the plaintiff in the present case did, that the words here employed in cl 7(e) merely restate what has long been the rule in relation to arbitrations, namely that an award is final and binding in the traditional sense, and such an award creates a res judicata and an issue estoppel, subject to judicial review by the courts.*
>
> *In Commercial Arbitration by Mustill and Boyd (1982) (at p 591) the authors say, in relation to the corresponding English provision:*
>
> > *'It must, however, be acknowledged that there is some room for uncertainty as to what exactly the Act contemplates by way of exclusion agreement, and we believe that the safest course will be to use a form of words which, by express reference to section 3(1) of the Act, excludes all rights of appeal'.*
>
> *In a note to s 3 of the Arbitration Act 1979 appearing in the Supreme Court Practice (UK) 1988 at par 5885, it is said:*
>
> > *'It is thought, or at any rate it would be wise, that an exclusion agreement should expressly exclude the exercise of each of these rights rather than it should be expressed in general terms'.*
>
> *In my opinion both these comments properly reflect what is required in order that there may be a valid exclusion agreement. Such an agreement must demonstrate that the parties have adverted to the right of appeal which, within the limits of the legislation, would otherwise exist, and they must expressly exclude it. I do not think it is sufficient merely to say, as was said in cl 7(e), that the award should be final, conclusive and binding. But, as I have indicated, the present application succeeds because there*

was no exclusion agreement entered into after the commencement of the arbitration."

It would undoubtedly be wise to frame an exclusion agreement by specific reference to the right of appeal under s 38(2) of the Act and/or an application for determination of a question of law under s 39(1)(a). If on its proper construction, and read with permissible regard to the circumstances in which it was made, the agreement is one which excludes the right of appeal or the application, I doubt that it is necessary that the agreement identify the relevant provisions in terms. I am not sure that Yeldham J said that it is necessary, since the terms of an exclusion agreement may demonstrate aversion to the right of appeal (or an application) and expressly exclude it in any sufficient language. But in my opinion agreement that an award shall be final and binding and an added undertaking to carry out the award without delay (which is the most which can be found in the agreement in relation to the UNCITRAL Arbitration Rules) is insufficient for an agreement which excludes the right of appeal under s 38(2) in relation to the award. In accordance with a long history, reference to an award as final and binding leaves it subject to challenges properly available to a dissatisfied party. Section 38 of the Act continues that position, consistently with it, mere repetition that the award is final and binding can not make an exclusion agreement.

In the circumstances of the present case, there is no suggestion on the evidence that the parties had in mind, when they agreed that the UNCITRAL Arbitration Rules

should govern the arbitration, the question of finality of the award and the effect of Art 32.3, let alone its effect by way of exclusion of a right of appeal under the Act - for reasons already given, objectively determined they were concerned with other matters. The agreement as to adoption of the UNCITRAL Arbitration Rules, and of Art 32.3 itself, falls short of demonstrating an intention to exclude the rights of appeal available under the Act according to which, by the arbitration clause, there would be the referral to arbitration.

Forum non conveniens?

Gradipore submitted that this Court is *"clearly an inappropriate forum to consider the issues raised between the parties"*. No doubt it had in mind the *"clearly inappropriate forum"* test considered and explained in the judgment of Deane J in Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197 at 247-248 and adopted by all members of the bench in Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538.

The argument in support of the submission seemed to go as follows. The District Court was still seised of the dispute between ADI and Gradipore, because Judge Chin had not disposed of the proceedings but had placed them on the suspense docket. The evidence showed that Judge Chin enquired, and was informed, as to the progress of the arbitration from time to time. Under s 207 of the Federal Arbitration Act (US) application could be made to the District Court for an order confirming the award, and the District Court was obliged to confirm the award unless it found one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention. There was therefore an available regime, indeed a regime already in place, for taking up the award and giving effect to the award and the rights and obligations of the parties flowing therefrom. It would be "seriously and unfairly burdensome, prejudicial or damaging", or vexatious in the sense of "productive of a serious and unjustified trouble and harassment" (see Voth v Manildra Flour Mills Pty Ltd at 564-5) for this Court to intervene by entertaining the application for leave to appeal, because Gradipore would be exposed to litigation on two fronts. The clear inappropriateness of this Court as a forum was all the more so, it was said, when the disputes primarily concerned events which took place in the United States of America, and when one of the claims on which Gradipore had succeeded in the arbitration called for the application of the Connecticut Uniform Trade Secrets Act ("the Connecticut Act") in assessing its compensation and other relief.

I have some difficulty in seeing that a forum non conveniens question arises at all. Gradipore relied on the decision of Tamberlin J in Hi-Fert Pty Ltd v Kuikiang Maritime Carriers Inc (1996) 71 FCR 172 at 185, saying that the present case was an a fortiori case, but that was a stay of proceedings in favour of a London arbitration and was nothing to do with leave to appeal in an arbitration ordered by a court with (I will assume) a residual interest in the proceedings in which the arbitrated disputes

were first embodied. By its application for leave to appeal ADI seeks to invoke an entitlement to approach this Court given to it by the Act; there is no question of an alternative forum in which it may do the same, and the purpose of Gradipore's opposition is to preclude ADI from challenging the award for error of law. This Court has a jurisdiction not available elsewhere, a jurisdiction to which (if I am correct in what I have said thus far) the parties agreed their arbitration would be subject. It may be thought that inappropriateness of this Court as a forum for these proceedings is a non-issue - it is the only forum and, in the sense explained, the agreed forum.

In any event, I do not think it has been shown that this Court is a clearly inappropriate forum so that it should decline to entertain the application for leave to appeal. When arbitration of all claims between ADI and Gradipore was ordered and the litigation of ADI's claims against Centrichem was stayed it was known that the arbitration would be held in Sydney (see cl 18 of the distribution agreement). It must have been recognised that one or more of the parties to the arbitration might seek to invoke the supervisory jurisdiction of this Court, and I do not think it can be said that the District Court kept for itself, to the exclusion of this Court, everything which might follow or flow from the orders the District Court made - placing the District Court proceedings on the suspense docket was, as I have noted, an administrative procedure. ADI's entitlement to invoke the supervisory jurisdiction of this Court, as it has done in seeking leave to appeal, is not matched by any equivalent entitlement to

apply to the District Court to have error of law on the part of the arbitrator identified and corrected, nor do the grounds on which the District Court might decline to confirm the award on an application made to it by Gradipore extend to allowing ADI to raise the errors of law which it seeks to raise in its application to this Court. In a real sense, therefore, ADI asks this Court to exercise a jurisdiction which can not be exercised by the District Court, being a jurisdiction which is available to it because of the agreement of the parties whereby the arbitration was held in New South Wales. Gradipore will not be twice vexed: it may be vexed in this Court when it would not be vexed at all if this Court were to decline to entertain ADI's application, but that underlines that the issue of forum non conveniens may not arise at all. I am certainly not persuaded that a stay of these proceedings (being the way in which this Court would decline to entertain the application for leave to appeal on forum non conveniens grounds) is necessary to prevent this Court's process being used to bring about injustice, that being the underlying basis of a stay of proceedings on forum non conveniens grounds (see CSR Ltd v Cigna Insurance Australia Ltd (1997) 71 ALJR 1143 at 1165). Nor am I persuaded that this Court is a clearly inappropriate forum for these proceedings.

Gradipore also relied on Chromalloy Aeroservices Inc v The Arab Republic of Egypt 939 F Supp 907 (1996). The proper law of the contract between Chromalloy and Egypt was Egyptian law. The contract included an arbitration clause providing for arbitration in Cairo. Chromalloy invoked the arbitration clause and an award was

made in its favour. Chromalloy applied to the United States District Court for enforcement of the award. Egypt appealed to the Egyptian Court of Appeal seeking nullification of the award, and nullification was ordered. The District Court held that it would nonetheless enforce the award, because under United States law it was obliged to do so unless one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention was made out, that the Egyptian court nullified the award gave a discretion to refuse to enforce the award, but the discretion should not be exercised because the award was not open to challenge under United States law and the United States public policy in favour of final and binding arbitration of commercial disputes was so strong that the decision of the Egyptian court should not be recognised.

Gradipore used this decision for the proposition that "*where there is a potential conflict in decisions, this should attract the forum conveniens point*". So far as it permitted the enforcement of a foreign award set aside in its country of origin, Chromalloy Aeroservices Inc v The Arab Republic of Egypt is not free from controversy. It has been welcomed, but has been criticised in principle and for its reasoning and described as "*anomalous in a number of respects*" (Schwartz, "*A Commentary on Chromalloy: Hilmarton, à l'américaine*" (1997) 14 J Int Arb 125 at 131; see the full discussion in Samplonius, "*Enforcement of Nullified Foreign Arbitral Awards*" (1997) 14 J Int Arb 141). It seems that no other jurisdictions apart from Belgium (the Hilmarton decision) are reported to have given effect to an award

annulled at the seat of the arbitration, and whether other courts in the United States will follow the lead of Chromalloy Aeroservices Inc v The Arab Republic of Egypt remains to be seen. The potential conflict in decisions is by no means assured, but in any event I do not think the possibility that the District Court will not recognise a decision of this Court to grant leave to appeal makes this Court, or continues to making this Court, a clearly inappropriate forum for the application for leave to appeal.

Time for application for leave to appeal

Gradiport's written submissions included the submission that ADI was out of time for its application for leave to appeal other than in relation to Gradiport's claim for breach of contract. Nothing was said of this in the oral submissions, and the point may have been abandoned. In any event, I do not think it should be accepted.

By Pt 72A r 5(3) of the Supreme Court Rules ADI had to commence these proceedings within twenty-eight days of the *"material date"* or within such extended time as the Court may fix. By Pt 72A r 5(1)(b) the material date is *"the date on which notice of the award is given by the arbitrator"* to ADI. ADI commenced these proceedings on 17 December 1997. Gradiport contended that the material date is 28 August 1997, submitting that what I earlier called the arbitrator's reasons leading to certain conclusions was an award, and the interim award as to which ADI had to apply for leave to appeal. ADI did not apply for an extension of time.

The reasons published on 28 August 1997 were in a document entitled *"Interim Award"*. After stating his conclusions the arbitrator recorded -

> *"I will give the parties time to consider my reasons and address me on the form of my next award. There should be no difficulty with the claims which are to be dismissed. As to the other claims I will hear submissions about what award I should now make and how the arbitration should continue."*

This was rather mixed. The title and the reference in the first sentence in the passage just set out to a *"next award"* suggested that there was an award on 28 August 1977, but the second and third sentences in the passage suggested that the award by which some claims would be dismissed and other claims disposed of was to be made in the future. I will return to what the arbitrator said in the body of his reasons, which seems to me to throw light on what the arbitrator intended.

When informing Judge Chin of the status of the arbitration Mr Haigh described what had occurred as an interim award on liability, but Mr Jacobs said that the arbitrator would *"formalise his Interim Award ... and that Award is expected in the week commencing 10 November 1997"*.

What I have called the interim award published on 20 November 1997 was in a document entitled *"Further Interim Award (2)"*. In that document the arbitrator said that on 28 August 1997 he had *"stated my conclusions on liability in this arbitration and published my written reasons in a document headed Interim Award"*, and -

> *"In all the circumstances I refrained from making any formal award when I published my award because I considered that it would be better to delay the making of the award until I could deal with all matters of liability, leaving for future determination only the question of what relief should be granted to Gradiport and questions of cost."*

While continuing to refer to the document published on 28 August 1997 as an interim award, the arbitrator ended the document published on 20 November 1997 -

> *"INTERIM AWARD*
>
> *I now make the following formal interim award, which interim award incorporates the material and reasons in the document dated 28 August 1997 and called Interim Award and the materials and reasons above in this document. The amounts in paragraph 4 have been agreed between the parties.*
>
> *I determine order direct declare and award as follows ...."*

In my opinion, although referring to the document published on 28 August 1997 as an interim award the arbitrator did not intend to, and did not, make an award at that time. An award must finally resolve a matter referred for arbitration, even if (as an interim award) only part of what has been referred to arbitration (re Resort Condominiums Inc (1995) 1 QdR 406 at 423-6). It is to be distinguished from a procedural ruling or publication of reasons for the parties' information or comment (see for example Three Valleys Water Committee v Binnie & Partners (1990) 52 BLR 42; re Resort Condominiums Inc; Dorna Construction Pty Ltd v Health Administration Corporation of New South Wales (Rolfe J, 24 August 1994, unreported)). Clarification of the rather mixed indications earlier mentioned, and that the arbitrator did not intend to, and did not, finally resolve any matter referred for arbitration on 28 August 1997, is apparent from the body of the arbitrator's reasons.

At one point, when dealing with the submission that a particular argument was not open on the pleadings, the arbitrator said, *"However, this award is interim. My conclusions are provisional"*, and that the particular matter could be taken up again. The matter concerned Gradipore's breach of contract claim, as to which the arbitrator's conclusion was expressly tentative, but the arbitrator's language shows that in describing his reasons as an interim award he meant that his conclusions were provisional and did not then resolve the matters considered by making an award. With that understanding, what the arbitrator then said left for the future making the award whereby he finally determined matters referred for arbitration. This he did by the document published on 20 November 1997, clearly stating (albeit retrospectively) that the earlier document was not his award. The material date was 20 November 1997, and these proceedings were commenced within time.

I should add that, although no application for an extension of time was made and extension of time was not in issue, in the circumstances I have recounted it is not easy to see why an extension of time should not have been granted if the material date had been 28 August 1997.

Leave to appeal

ADI sought leave to appeal in relation to what it said were three questions of law. The first was to do with cl 12 of the distribution agreement; the second was to do with misuse of confidential information; and the third was to do with assessment of damages.

I have set out s 38 of the Act, from which appear the cumulative and alternative requirements for a grant of leave to appeal. It is well established that s 38 should be construed and applied in the light of a legislative policy *"to promote the finality of arbitral awards even at the price of denying a party its usual entitlement to the determination of the dispute by a court of law"* Natoli v Walker (CA, 26 May 1994, unreported, per Kirby P); see also Promenade Investments Pty Ltd v State of New South Wales (1991) 26 NSWLR 203), and that even if the requirements of s 38 are met the Court retains a general discretion to grant or refuse leave to appeal (see Natoli v Walker). Even if error of law be shown, the parties to an arbitration may be left with the arbitrator's award. For reasons which will appear, elaboration of all the requirements of s 38, and of the general discretion, is not necessary in order to determine ADI's application.

(a) **Clause 12 of the distribution agreement**

By cl 1(b) of the distribution agreement it was to commence on a day left blank in the document *"and shall continue for a period of Eighteen (18) months thereafter unless sooner terminated in accordance with clause 13 hereof"*. The arbitrator found that the commencement date was 27 June 1991 and, as I have already said, that the distribution agreement continued until 16 March 1993.

Clause 12 of the distribution agreement was an anti-competition clause by which, excluding certain identified products, ADI undertook -

> *"... that it will not, without the previous consent in writing of Gradipore be concerned or interested either directly or indirectly in the manufacture, production, importation, sale or advertisement of any goods in the territory which are like or similar to or which either alone or in conjunction with some other product perform or are designed to perform the same or a similar function to or which might otherwise compete or interfere with the sale of any of the said products."*

The territory was the whole of the world. *"The said products"* were Lupo-Test and any modified or improved versions thereof.

One of Gradipore's claims in the arbitration was that ADI had breached cl 12 in certain respects, and the arbitrator found that it was in breach of cl 12 in some of those respects. They included the manufacture and sale of one of ADI's own products for a period from May 1993. The arbitrator held that on the proper construction of the distribution agreement the undertaking not to compete extended beyond 16 March 1993 until such time as ADI no longer marketed Gradipore's products purchased from Gradipore prior to 16 March 1993.

ADI contended that the arbitrator erred in law in his determination of the duration of the undertaking in cl 12. It relied on s 38(5)(b)(i) of the Act, submitting that there was a manifest error of law on the face of the award. If there was a manifest error of law on the face of the award, I did not understand Gradipore to dispute that the determination of the question of law could substantially affect the

rights of the parties to the arbitration agreement. Gradipore submitted that any error was not of law and that the error, if of law, was not manifest on the face of the award; it also said that leave to appeal should be refused in the exercise of the general discretion.

The arbitrator's reasoning in the document published on 28 August 1997 was as follows. Not all the provisions of the distribution agreement ceased to operate when it came to an end on 16 March 1993. Some expressly continued to operate, for example cl 7 (secrecy of confidential information and return of materials) and cl 16 (right of first refusal for another distributorship). Others of their nature continued to operate, for example cl 9(f) and (g) (indemnity against third party claims) and cl 16. Clause 10(b) was in truth a provision as to the time during which Gradipore would continue to supply orders, not a provision as to the time at which all rights and obligations under the distribution agreement would come to an end. Addressing cl 12, he said -

> *"Suppose ADI had placed an order on the second last day of the agreement. If Gradipore could not supply the product until after the last day of the agreement could it decline to supply? I think not. That the real test is the date of last order. Obligations to supply after that date must continue. Could Gradipore decline to supply such an order unless it were paid for by the last day? Again, I think not. The payment provisions must continue. What, then, does one do with cl 12? Clause 12 is about 'Competitive Activities'. That is its heading. In part the clause refers to acts which 'might otherwise compete or interfere with the sale of any of the said products'. That must include a reference to sale of the products by ADI. The clause precludes ADI from selling the competing products while it sells Gradipore products.*

> *It seems to me that cl 12 must apply to ADI, as a matter of construction, as long as ADI is selling Gradipore products. A competitive act of ADI which falls within cl 12, while it continues to sell Gradipore products, will be competition of the purest kind to which the clause is directed. Conduct after that time will not be. However, I do not think that the clause will continue to apply after ADI ceased to sell Gradipore products, even though it retained some stock. That would give the clause a construction which extended to the time when ADI was competing with Gradipore's products acquired by it under the Distribution Agreement."*

The arbitrator received further submissions before publication of the interim award. ADI relied on the decisions at various levels in Hospital Products Ltd v United States Surgical Corporation (1982) 2 NSWLR 766 (McLelland J); (1983) 2 NSWLR 157 (CA); (1994) 156 CLR 41 (HC), but in the interim award the arbitrator said that he considered that the part played by the anti-competition provision after termination of the distribution agreement in that case was really not addressed, and that in any event the significance of the oral terms there found in conversations did not provide a reliable guide to the construction of cl 12 in the written distribution agreement. He then said -

> *"I have given careful consideration to whether I should depart from my earlier tentative conclusion. It has been submitted that the purpose of the clause must have been to protect sales by Gradipore to ADI and that once the point was reached that there would not be further sales, namely at the time of termination, that purpose no longer was relevant. This submission is entitled to weight. However, sales promotion is not the true subject matter of the clause. That subject matter is competition. Just as ADI could not compete with Gradipore products it had purchased from Gradipore, prior to termination, it seems to me that the clause precluded it from competing with Gradipore products it had purchased from Gradipore, after termination. Such a construction of cl 12 reads it as applying to 'the said products' as products*

> *acquired by ADI under the distribution agreement. For the above reasons, for the reasons I have earlier given, and in conformity with the whole of the distribution agreement this seems to me to be the proper construction of the agreement. This construction does not require any implication of any date, but simply depends upon giving the words of the agreement the meaning, in all the circumstances, they must bear."*

ADI submitted that on the proper construction of the distribution agreement the undertaking in cl 12 ceased to operate at the latest on 16 March 1993. Either it was unlimited or it ceased when the distribution agreement came to an end, there being nothing expressly or by necessary implication giving it some intermediate duration. If it was unlimited it was an unreasonable restraint of trade, so it ceased when the distribution agreement came to an end. Any other duration was not reasonable in the interests of both parties, and therefore can not have been intended by the parties (referring to Beaython v The Commonwealth (1948) 75 CLR 589 at 624-5) and was at odds with Hospital Products Ltd v United States Surgical Corporation.

Gradipore submitted that the arbitrator's conclusion was "substantially fact driven", and that any error did not give rise to a question of law: it referred to Warley Pty Ltd v Adco Constructions Pty Ltd (1989) 8 ACLR 73 and State of New South Wales v Coya (Constructions) Pty Ltd (Rolfe J, 4 July 1994, unreported, see on appeal CA, 4 August 1995, unreported). I have considerable difficulty in seeing the error, if there be one, as other than an error of law, and the arbitrator arrived at his

conclusion as a matter of construction of the distribution agreement. It does not matter, because I do not think any error of law was a manifest error of law on the face of the award. It is unnecessary to go to the general discretion.

In Promenade Investments Pty Ltd v State of New South Wales Stellar JA, with whom Mahoney and Meagher JJA relevantly agreed, stated (at 225) that "manifest" denoted that the error must be apparent, something evident or obvious rather than arguable. His Honour accepted that adversarial argument might be appropriate, but said (at 226) that it was necessary that there be *"powerful reasons for considering on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law"*. This approach to the meaning and effect of s 38 was informed by the deliberate legislative intention of confining curial intervention in arbitrations earlier mentioned, and it follows (and has been held) that if an arbitrator's construction of a contract is reasonably open, it can not be said that his error is evident or obvious or that there are powerful reasons for considering that he was in error. So in re Tiki Village International Ltd (1994) 2 Qd R 674 it was said that an arbitrator who construed an instrument in a way that was fairly arguable did not make a manifest error of law within the meaning of s 38(5)(b)(i) of the Act, and in Leighton Contractors Pty Ltd v South Australian Superannuation Fund Investment Trust (11 November 1994, unreported) Debelle J said if the construction adopted by the arbitrator was reasonably open the applicant for leave to appeal will generally fail: his Honour gave effect to that approach with the added observation that there was

much to point to the validity of the arbitrator's conclusion. In Natoli v Walker Kirby P said succinctly, with reference to United States cases on manifestly erroneous or clearly wrong findings of fact, *"The existence of two possible views contradicts 'manifest error'."*

I have described the arbitrator's reasoning to his conclusion as to the duration of the undertaking in cl 12. I was taken to the decisions in Hospital Products Ltd v United States Surgical Corporation, but I respectfully agree with the arbitrator that they do not provide significant guidance: in my opinion, they neither dictate nor materially sway the proper construction of cl 12. That other constructions may be arguable does not demonstrate manifest error of law. In my opinion other constructions of the distribution agreement may have been arguable, but the construction of cl 12 at which the arbitrator arrived was reasonably open to him and (to use the words of Debelle J) there was much to point to the validity of his conclusion. If there was an error of law, and there may not have been, it was not a manifest error, and in conformity with the legislative intention the parties should be left to the arbitrator's determination.

(b) Misuse of confidential information

Underlying Gradipore's development of Lupo-Test was the knowledge and expertise of Dr Thomas Exner. Dr Exner entered into an agreement with Gradipore under which Gradipore could exploit the information he provided and became the

owner of the information, and Gradipore made a material contribution to the development of its products.

Some of the information was provided to ADI so that it could deal, as distributor, with customer complaints, stability problems, and regulatory problems. The arbitrator held that this information had been provided in confidence so that, although ADI was free to use it for the above purposes, there was misuse of confidential information when ADI used it for the different purpose of seeking to reproduce Gradipore's products. The application for leave to appeal was not concerned with this, but with what the arbitrator called *"essential aspects of the formula for another potential product, STFIT, which aspects happened also to be a part of Lupo-Test"*.

Dr Exner began to develop a further reagent, the formula for which was very similar to the Lupo-Test formula but with one of the ingredients substituted. It came to be known as STFIT. In April 1992 Dr Exner spent some weeks at ADI's laboratories in Connecticut, during which time he worked on STFIT. When he returned to Australia he left with ADI the STFIT formula and his working papers. He began to work full time for Gradipore as a research director. When ADI set about developing its own reagent, it drew on the information in the STFIT formula and was thereby assisted in that development. Gradipore's claims included that ADI had wrongly made use of Gradipore's confidential information and had misappropriated

is trade secrets contrary to the Connecticut Act, inter alia in relation to the STFIT information. The arbitrator upheld the claim in this respect, both as to misuse of confidential information and as to misappropriation of trade secrets. (At least in these proceedings, liability for misuse of confidential information and liability for misappropriation of trade secrets were treated by ADI (but not by Gradipore) as standing or falling together, and so I refer only to misuse of confidential information: the liability for misappropriation of trade secrets returns in connection with the alleged error of law to do with assessment of damages.) ADI contended that the arbitrator erred in law in upholding the claim in relation to the STFIT information.

ADI relied in the alternative on s 38(5)(b)(i) of the Act, submitting that there was a manifest error of law on the face of the award, and on s 38(5)(b)(ii), submitting that there was strong evidence that the arbitrator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law. If one of these provisions was satisfied, again I did not understand Gradipore to dispute that the determination of the question of law could substantially affect the rights of the parties to the arbitration agreement. Gradipore again submitted that any error was not of law; it said that if there was an error of law it was not a manifest error, and that its resolution was not likely to add substantially to the certainty of commercial law; and it said that in any event leave to appeal should be refused in the exercise of the general discretion.

The arbitrator said -

"The issues relating to STFIT seem to me to be important. There may have been nothing untoward, so far as the confidential information claim is concerned, about the original conduct of ADI with respect to STFIT. I say nothing, for the moment, about the compensation clause in the distribution agreement. Gradipore may have had no claim to any confidential information in the STFIT proposal as such, even though part of it was very close to Lupo-Test. ADI may have been free to seek to procure that technology from Dr Exner with a view to developing STFIT in the future. However, there can be no doubt that ultimately that is not the use it made of the STFIT formulae. It used them to assist it to develop its own DRVVT test. That is the step it could not take. The information had been imparted to it to assist it to develop a STFIT test, not to develop a DRVVT test.

The argument that the proposed STFIT test and the DRVVT test as developed by Dr Exner are different does not avail ADI. Nor does it matter whether ADI deliberately sought to procure information relating to the proposed STFIT technology to reproduce the DRVVT test or whether that was a decision it subsequently made. What ADI could not do, without misusing the confidential information of Gradipore, was to use this information on the basis that it knew or suspected that it was an essential part of the DRVVT test itself. I do not have to be unduly concerned whether there is evidence that ADI knew that the essence of STFIT (apart from the absence of dilute Russell viper venom) was the same as Lupo-Test, although I have no doubt that the evidence does show this, because ADI, by its conduct, demonstrated that it was aware of this fact, and sought to make use of it.

ADI was given the STFIT formula as part of a proposal to develop STFIT as a commercial product. That may have been permissible. However, once the formula was used, as I have found, to assist ADI in developing a DRVVT test it seems to me that there was a misuse of the information which, for that purpose, belonged to Gradipore. Of course, a critical aspect of the relevant information, was that STFIT was very close to Lupo-Test. That fact was the ultimate piece of confidential information. It was confidential information about Lupo-Test which belonged to Gradipore, not confidential information about STFIT."

ADI submitted that the arbitrator erred in law because the STFIT information was confidential information of Dr Exner, not of Gradipore. It described the error as erroneously giving to Gradipore rights in relation to confidential information not its own confidential information, an error not in determining whose was the confidential information but in giving to A a remedy for misuse by B of C's confidential information. Gradipore again submitted that the arbitrator's conclusion was "fact driven", saying that it depended on the application of findings of fact to well established principles of law; it also submitted, perhaps with some force, that if the error of law was as described by ADI it was so basic that there was really no certainty in commercial law to which resolution of the error would add, but that submission carried with it that the error could properly be found to be a manifest error. However, for the reasons which follow I do not think any error of law has been shown, manifest or otherwise, and it is unnecessary to consider the further intricacies of s 38(5)(b); it is also unnecessary to go to the general discretion.

ADI's submission depended upon there being no relevant confidential information of Gradipore - the confidential information was all Dr Exner's. In the first paragraph in the extract from the award set out above the arbitrator observed that Gradipore may have had no claim to any confidential information in the STFIT proposal as such. In the second and third paragraphs, however, he referred to confidential information of Gradipore. It seems that the arbitrator considered that the confidential information was not the STFIT information itself, but information about

Lupo-Tent which came to ADI through Dr Ezner and was used by ADI to develop its own products. That is evident from the concluding sentence in the third paragraph, and from the preceding sentences identifying as at least part of the confidential information of Gradipore the information that STFIT was very close to Lupo-Tent. On the arbitrator's findings of fact, there was confidential information of Gradipore misused by ADI (and a trade secret of Gradipore under the Connecticut Act). The confidential information found to be confidential information of Gradipore may have been more confined than ADI's submission seemed to assume, and the arbitrator may or may not have been correct in his identification of the confidential information and his conclusion that it was confidential information of Gradipore, but if he was incorrect his error was not that for which ADI contended and, being essentially factual, was not an error of law within s 38(5)(b)(i).

(c) Assessment of damages

Gradipore succeeded in its claim for misappropriation of trade secrets under the Connecticut Act. In s 35-51 of the Connecticut Act "*trade secret*" is defined, and then "*misappropriation*" is defined in terms involving improper disclosure or acquisition of a trade secret. No provision specifically prescribes misappropriation or creates a duty not to misappropriate. Section 35-52 goes straight to injunctive relief against actual or threatened misappropriation. Section 35-53 then provides:

> *"Sec 35-53. **Damages. Punitive damages for wilful and malicious misappropriation.** (a) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.*
>
> *(b) In any action brought pursuant to subsection (a) of this section, if the court finds wilful and malicious misappropriation, the court may award punitive damages in an amount not exceeding twice any award made under subsection (a) and may award reasonable attorney's fees to the prevailing party."*

Recovery of damages assessed in accordance with s 35-53 is potentially different from, and greater than, recovery of damages assessed simply by enquiring into the loss suffered by Gradipore or the profit gained by ADI by the misappropriation. The arbitrator was asked to rule (as the issue was identified by or for him) upon whether questions of relief with respect to the Connecticut Act were to be determined in accordance with the law of Connecticut or in accordance with the law of New South Wales. He ruled in favour of the law of Connecticut. ADI submitted that he erred in law in so doing, relying in the alternative on subparas (i) and (ii) of s 38(5)(b). If there was an error of law, again I did not understand Gradipore to dispute that the determination of the question of law could substantially affect the rights of the parties to the arbitration agreement. Gradipore again submitted that any error was not of law; it said that if there was an error of law it was not a manifest error, and that its resolution was not likely to add substantially to the certainty of commercial law; and it said that in any event leave to appeal should be refused in the exercise of the general discretion.

As appears from the award, ADI submitted before the arbitrator that the assessment of damages, even damages for infringement of the Connecticut Act, was to be in accordance with the law of New South Wales as the law of the forum, and relied upon the decision of the High Court in Stevens v Head (1993) 176 CLR 433. The arbitrator said:

> *"I do not agree with ADI's submission, for a number of reasons:*
>
> *1. The concept of the forum has very little role to play in international arbitrations. This must particularly be so when an arbitration is based on an arbitration clause as wide as is the present clause in which a number of claims under US statute law happen to fall for determination in an arbitration in New South Wales.*
>
> *2. Although the proper law of the contract is the law of New South Wales, by express provision in the arbitration agreement, and the seat of the arbitration is New South Wales, the former does not affect the law applicable to claims outside, although related to, the contract, and it can hardly be assumed that the parties had in mind a claim under Connecticut statute law when they provided that the seat of the arbitration should be New South Wales.*
>
> *3. Stevens v Head dealt with a particular statute which was directed simply to the assessment of damages in tort where the underlying substantive law was the common law which was uniform throughout Australia. Where a cause of action is created the remedy provided cannot be separated from the cause of action. Although the cause of action created by the Act has its parallels in New South Wales they are not identical. The cause of action is unknown in New South Wales. It cannot be appropriate that procedures for the assessment of damages in a place where the cause of action is unknown be substituted for the method prescribed by the Act which creates the cause of action.*
>
> *4. This is particularly so with the Connecticut Act which does not expressly identify causes of action which are separate from the remedies which it confers.*

3. If the assessment of damages is not substantive but procedural then the method of their assessment is a matter for me as arbitrator acting in accordance with the UNCITRAL Rules of Arbitration. For the reasons inherent in the above propositions I think that the only sensible means of assessment of the damages is pursuant to the Act itself. I would add that otherwise it would be extremely difficult to differentiate between those aspects of the Act which were substantive and those which were not.

It follows that the remedies available under the Act and the quantification of any compensation under the Act will be determined in accordance with Act."

If there was an error of law, at first sight determination of the question whether damages are to be assessed in accordance with the Connecticut Act or in some other manner may be likely to add substantially to the certainty of commercial law: the principle involved, and its elucidation in considering the position of the Connecticut Act, may be of importance in many commercial transactions. There are some as yet unresolved difficulties in s 38(5)(b)(ii) of the Act, in its reference to strong evidence and otherwise (see Promenade Investments Pty Ltd v State of New South Wales at 226-7), but again it is not necessary to go into the intricacies of the provision. While I would prefer to put the matter in my own words rather than adopt all the arbitrator said, in my opinion there was no error of law, manifest or otherwise, in the arbitrator's conclusion. Again it is unnecessary to go to the general discretion.

Before me ADI again relied on Stevens v Head. Gradipore submitted that the short answer was that there is no lex fori in an international arbitration, so talk of

applying the law of the forum was misconceived. The issue as identified by or for the arbitrator presupposed that relief with respect to the Connecticut Act could be determined in accordance with the law of New South Wales, which as will appear may be doubted.

In Stevens v Head the plaintiff suffered a motor vehicle injury in New South Wales and brought proceedings in Queensland. A New South Wales statute restricted the amount a plaintiff could recover for non-economic loss suffered as a result of a motor accident. It was held by majority (Brennan, Dawson, Toohey and McHugh JJ, Mason CJ and Deane and Gaudron JJ dissenting) that the relevant provision of the statute was not to be applied in assessing the plaintiff's damages in the Queensland proceedings. The majority first referred to the distinction between substantive and procedural laws applied in determining whether by the law of the place of the wrong the facts give rise to a civil liability of the kind which the plaintiff seeks to enforce. The distinction is applied for the second of the principles governing enforcement of liability in respect of a wrong occurring outside the territory of the forum, stemming from Phillips v Eyre (1870) LR 6 QB 1 as reformulated in McKain v R W Miller & Co (SA) Pty Ltd (1991) 174 CLR 1. The existence of the civil liability is governed by the substantive laws of the place of the wrong and is unaffected by its procedural laws: so in McKain v R W Miller & Co (SA) Pty Ltd it was held that a law limiting the time within which proceedings should be brought in the courts of the place of the wrong, but not extinguishing the cause of action, was procedural rather than

substantive, and that there was a civil liability which could be enforced in the forum. Their Honours then said that a similar distinction was drawn between a law which denied a remedy in respect of a particular head of damage in negligence (a substantive law) and a law which affected the quantification of damages in respect of the particular head of damage (a procedural law). The relevant provision was held to affect the measure of damages but not the heads of liability in respect of which damages might be awarded, and was described (at 419) as *"simply a law relating to the quantification of damages"*. It was therefore a procedural law of the place where the wrong occurred, and did not apply in the assessment of damages in the Queensland proceedings, which was governed solely by the law of Queensland.

The context of proceeding in a forum in respect of a wrong occurring in another legal jurisdiction is less apparent in a case such as the present than in a case such as Stevens v Head. New South Wales provides a forum because the parties agreed that the arbitrator should sit in New South Wales, and the principles reformulated in McKain v R W Miller & Co (SA) Pty Ltd do not have the same significance as where a party unilaterally sues in one legal jurisdiction in respect of a wrong occurring in another legal jurisdiction. It was not suggested before me that cl 19 of the distribution agreement excluded Gradipore from claiming relief under the Connecticut Act, and if there be a wrong for which the arbitrator can otherwise give relief there is little point in denying the relief on the ground that the arbitrator happens to sit in a place where the relief is not available. New South Wales law does not

forbid relief as contained in the Connecticut Act, it is just that there is no equivalent New South Wales relief. These considerations underlie the suggestions that there is no lex fori in an international arbitration, although for reasons earlier given I do not think the law of the forum can be entirely put aside. I doubt that the distinction considered in Stevens v Head should be held to govern the present situation.

However, even if the distinction between substantive laws and procedural laws, and its manifestation in the distinction between a law governing heads of damages and a law governing quantification of damages, be adopted, in my opinion assessment of damages in accordance with the Connecticut Act is a matter of heads of damages rather than quantification of damages. In Stevens v Head the plaintiff brought proceedings to enforce the common law cause of action in negligence, a cause of action available in both New South Wales and Queensland, and the New South Wales statute assumed the cause of action and the heads of damages available thereunder but limited the amount which could be awarded in quantifying general damages as one of these heads of damage. The Connecticut Act does not assume a cause of action, or heads of damages under a cause of action, and lay down rules for quantifying the damages. It creates a cause of action by stating that an injunction or damages of certain kinds are recoverable in the event of misappropriation. The cause of action and the damages are co-extensive, and the prescription as to damages in ss 32-53 is part of the definition of the wrong, or at best for ADI a statement as to heads of damages. If it were only a statement as to quantification of damages, and so

was ignored in the arbitration, there would be nothing left - there are no heads of damages independent of s 35-53 - and as earlier suggested relief with respect to the Connecticut Act could not be determined in accordance with the law of New South Wales. If the distinction between substantive laws and procedural laws is to be applied at all, I do not think s 32-53 is to be classified as procedural, and in my opinion the arbitrator was correct in determining that Gradipore's damages for misappropriation of trade secrets are to be determined pursuant to the Connecticut Act.

The result

This Court has jurisdiction to grant leave to appeal pursuant to s 38 of the Act, and should not decline to exercise its jurisdiction, but the application for leave to appeal should be dismissed. Gradipore has failed on the jurisdictional aspects of the proceedings, but has succeeded in relation to the leave to appeal; ADI's fortunes have been the reverse. Each party has failed in part and succeeded in part, and in my opinion there should be no order as to costs with the intent that each party should bear its own costs.

I order that the summons be dismissed and make no order as to costs.

I certify that this and the 66 preceding pages are a true copy of the reasons for judgment herein of the Hon Justice Giles.

Associate

Dated: 26 March 1998