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**Review of the International Arbitration Act 1974 –
Interim Submission to the Attorney-General’s Department (AGD)**

Professor Richard Garnett (Melbourne Law School; Consultant, Freehills) &
Associate Professor Luke Nottage (Sydney Law School; Director, Japanese Law
Links Pty Ltd)

We welcome this opportunity to contribute to a review of the IAA. Our research, writing, teaching and practice in the field of international commercial arbitration (ICA) confirm that the Act is long overdue for a comprehensive overhaul. This will help Australia:

- to renew its commitment to becoming a more attractive venue for arbitrations (especially now that Hong Kong and Singapore are now so competitive in our region);
- to enforce awards from abroad more consistently with international instruments and contemporary expectations world-wide; and
- to better educate businesspeople, legal advisors, judges and others in Australia about those norms.

There are limits to what can be achieved by non-legislative initiatives, although we have been involved in many over recent years.

With Garnett as a Director and Nottage as a Special Member, we served on the Rules Committee of the Australian Centre for International Arbitration (ACICA), which developed new generic Arbitration Rules (2005) and Expedited Arbitration Rules (2008). We were founding members of the Australasian Forum for International Arbitration (AFIA). Nottage has also been involved in lecturing, organising seminars and writing for the Chartered Institute of Arbitrators – Australian Branch, and is a member of the new Arbitrator Forum. He regularly teaches international arbitration in four LLM courses and 1 LLB course at Sydney Law School. Garnett’s experience in ICA is based on twelve years of lecturing and research in the subject; and six years as a consultant and counsel in a major national commercial law firm, where he regularly advises on applications to stay court proceedings or enforce arbitral awards and on the conduct of arbitral proceedings more generally.

We both write extensively on international commercial arbitration for publications in Australia and abroad,¹ and in mid-2009 we had begun working on a co-authored paper proposing widespread reforms to the International Arbitration Act (IAA) regime. In this Interim Submission, we extract points directly addressing some specific questions (D, H and G(i)) raised by the AGD in its Discussion Paper (DP) for the Review.

¹ See eg Richard Garnett, ‘International Commercial Arbitration in Australia: Legal Framework and Problems’ (2008) 19 ADRJ 249; Luke Nottage, ‘Reforming International Commercial Arbitration (ICA) Law: The UN, New Zealand – Why Not Australia?’ (July 2008) 7 *The Australian ADR Reporter* 15 (available via www.arbitrators.org.au and www.law.usyd.edu.au/scil/WorkingPapers.html) and Nottage’s papers reproduced at <http://ssrn.com/author=488525> (especially ‘The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration’ (2003) 03-1 *CDAMS Discussion Paper* at <http://ssrn.com/abstract=838028>).

We will provide a Final Submission addressing the other questions, and many of our own further suggestions for reforming the legislative regime, by early February. After 20 years since the Act was last amended, it deserves to be reformed carefully and methodically. In the meantime, we also invite the AGD to also consider AFIA's Submission, to which we contributed.

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12. Opt-in and Opt-Out

12.1 **In response to Q.D** of the AGD Review's DP, we strongly agree with the need to reverse the *Eisenwerk* decision. That judgment fundamentally misunderstands the relationship between (opt-in) Arbitration Rules, and arbitration legislation (mostly now opt-out default rules, plus some mandatory rules). It has been another obstacle to having Australia being taken seriously as an arbitration venue, exacerbated by the delay in correcting this misunderstanding by legislation.

12.2 The Singaporean legislature responded to some similar misunderstandings by promptly amending – twice! – s15 of its ML-based International Arbitration Act.² At a minimum, we support the DP's suggestion to add a provision like s15(2) to s21 of our own Act.³ This is preferable to requiring parties or their legal advisors to remember to add a similar provision into an arbitration agreement when the seat is Australia, or to adopt the ACICA Arbitration Rules (which contain a similar provision in Rule 2.3).

² In response to first to a case involving an Australian company, *John Holland Pty Ltd v Toyo Engineering Corporation* [2001] 2 SLR 262:

Law of arbitration other than Model Law

15. —(1) If the parties to an arbitration agreement (whether made before or after 1st November 2001*) have expressly agreed either —

*Date of commencement of the International Arbitration (Amendment) Act 2001 (Act 38/2001).

(a) that the Model Law or this Part shall not apply to the arbitration; or

(b) that the Arbitration Act (Cap. 10) or the repealed Arbitration Act (Cap. 10, 1985 Ed.) shall apply to the arbitration,

then, both the Model Law and this Part shall not apply to that arbitration but the Arbitration Act or the repealed Arbitration Act (if applicable) shall apply to that arbitration.

[38/2001]

(2) For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned.

[38/2001; 28/2002]

(From <http://statutes.agc.gov.sg/>, emphasis added.)

³ Our Act's s21 reads: '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.'

- 12.3 However, Australia should take this opportunity to also clarify what happens when the parties have chosen (a) a State’s Commercial Arbitration Act, or (b) foreign arbitration legislation, to govern their arbitration. Regarding a bare choice of (a), the Court in *Aerospatiale* held that this displaced the ML pursuant to IAA s21.⁴ The outcome seems similar to that provided by s15(1)(b) of the Singaporean Act. Australia’s revised IAA could also add a similar provision addressing situation (b), although such a choice is less likely to arise in practice.
- 12.4 In all these situations, namely express exclusion of the ML or a bare selection of (a) a CAA or (b) a foreign arbitration law, we should require parties to have done this “in writing” in their arbitration agreement (including, by necessary inference, any Arbitration Rules incorporated by reference therein⁵). Parties generally should be taken to want to retain the ML (designed specifically for *international* arbitrations, unlike the CAAs and some arbitration laws overseas), especially in its updated version envisaged by the AGD Review and our further suggestions in this joint Submission, unless there is clear evidence of a contrary intention (in their written arbitration agreement).
- 12.5 There is also an argument for making a further amendment along the lines of s 15A of the Singaporean Act.⁶ It is verbose, and we would hope that Australian courts would get this point even without such an amendment. But one Singaporean Court did not,⁷ and an Australian court might be persuaded that its reasoning is left open by our legislature only making an amendment similar to s 15(2) of the Singaporean Act but not one like s 15A.

⁴ *Aerospatiale Holdings Australia Ltd v Elspan International Ltd* (1992) 28 NSWLR 321.

⁵ The words ‘or in any other document in writing’ in our current Act’s s21 is presumably aimed at such Rules. The words seem too broad, or unnecessary (s15 of the Singaporean Act refers only to “arbitration agreement”, in turn defined in s2 to be “in writing”).

⁶ Application of rules of arbitration

15A. —(1) It is hereby declared for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties, whether before or after the commencement of the arbitration, shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate.

(2) Without prejudice to subsection (1), subsections (3) to (6) shall apply for the purposes of determining whether a provision of rules of arbitration is inconsistent with the Model Law or this Part.

(3) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter on which the Model Law and this Part is silent.

(4) Rules of arbitration are not inconsistent with the Model Law or this Part merely because the rules are silent on a matter covered by any provision of the Model Law or this Part.

(5) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter which is covered by a provision of the Model Law or this Part which allows the parties to make their own arrangements by agreement but which applies in the absence of such agreement.

(6) The parties may make the arrangements referred to in subsection (5) by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.

(7) In this section and section 15, “rules of arbitration” means the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation.

[28/2002]

⁷ *Dermajaya Properties v Primum Properties* [2002] 2 SLR 164

13. Jurisdiction of Courts and Devolving Powers to Arbitral Institutions

- 13.1 **In response to Q.H** of the AGD Review's DP, on balance we do not agree with the idea of giving the Federal Court exclusive jurisdiction for all matters arising under the IAA. This will entail practical problems of re-educating parties and their legal advisors. However, the major objection we identify is constitutional.
- 13.2 State courts have always enjoyed full subject matter jurisdiction over state and federal matters (with a few small exceptions like antitrust matters under Part IV of the TPA which are exclusively reserved to the Federal Court). Federal Courts, by contrast had full jurisdiction over federal matters (most importantly matters arising under Commonwealth statutes) but only limited jurisdiction over state matters. In particular, the Federal Court could only hear a matter when it falls within the court's accrued jurisdiction i.e. it was pendent to a federal claim, which effectively means that it arose out of the same factual basis.
- 13.3 In 1987 the cross-vesting scheme was enacted, which purported to vest the Federal Court with full state jurisdiction and to put it on the same footing as a state court, with unlimited jurisdiction. However in *Wakim*⁸ the High Court held that the conferral of power on federal courts to resolve matters beyond the accrued jurisdiction was unconstitutional. In effect, the pre-1987 position, where the Federal Court had limited jurisdiction over state matters, was restored.
- 13.4 What is the relevance of this to the proposed vesting of exclusive jurisdiction over matters under the IAA in the Federal Court? It is this: suppose a party commences proceedings in an Australian court, say, for breach of contract in breach of an agreement to arbitrate in New York. Such a claim cannot be brought in the Federal Court because it is a purely state law claim (unless it is "attached" to a federal claim say, for breach of s 52 TPA). So the party sues in a state court. The defendant however is unable to apply for a stay under s 7 of the IAA because such power is now exclusively reserved to the Federal Court. The state court cannot use its cross vesting power to transfer the matter to the Federal Court because the Federal Court has no jurisdiction over the plaintiff's cause of action. So you have jurisdictional gridlock.
- 13.5 What other alternatives are there? We could require parties to proceed only in Federal Court if there is accrued jurisdiction. But it may be expecting too much even of Australian legal advisors, or significantly increase transaction costs to them (and therefore their clients), to ensure they always correctly anticipate when accrued jurisdiction is present.
- 13.6 Alternatively, we could vest exclusive jurisdictions in state courts. However, although the record of the Federal Court is not spotless in applying the IAA, the state courts face additional challenges given their more widely dispersed and diverse nature.

⁸ (1999) 198 CLR 511

13.7 On balance, therefore, we favour maintaining the status quo for the revised Act. But we would suggest a range of more indirect and non-legislative measures to address the underlying goal of promoting greater expertise among our judges in contemporary international arbitration law and practice. Specialist Lists could be developed, and more extensive continuing education offered for example through the Australian Institute of Judicial Administration.

Appointment Powers for an Arbitral Institution

13.8 **In response to Q.G(i)** of the AGD Review’s DP, we recommend devolving default powers to appoint arbitrators under s11 of the Act, from the courts to a designated arbitral institution. This would advance the related goal of promoting expertise in ICA more generally in this country. Such an arbitral institution, by definition, is more specialised in ICA than the courts, even if they develop more specialist Lists.

13.9 Devolution of this power to an institution devoted to ICA would also expand its profile and the other activities by such an institution. Further, it could encourage innovations by competing institutions interested in becoming the institution nominated through the legislation.

13.10 However, since this will involve devolving a hitherto public function on an institution that is or may be partly or fully private, familiar issues of regulatory design and good governance need to be addressed. The institution will have to offer expertise in identifying suitable arbitrators, but also maintain core elements of transparency and other values that we expect of public bodies as well as private bodies partnered with the public. The government may need to provide ongoing funding or other support, and certainly monitor the governance and practices within the nominated institution.

13.11 For example, in Part V Div 1A of the Trade Practices Act regarding Product Safety, s 65E allows the Minister to adopt a safety standard developed by “Standards Australia International Limited” (which now has a listed associate company, SAI Global) instead of developing its own mandatory standard pursuant to s 65D. The Minister provides significant annual funding to ensure that Standards Australia retains the expertise to provide good standards, and to ensure that its standard-setting process includes broad stakeholder involvement and is not “captured” by better-organised and self-funded interest groups. The other public values that the government expects Standards Australia to promote are also entrenched in a Memorandum of Understanding.⁹

⁹ See further Nottage’s Submission (18 April 2006) and the Productivity Commission’s Inquiry into “Standards and Accreditation”, at <http://www.pc.gov.au/study/standards/>.

- 13.12 As another example, even after the federal government largely decentralised the outsourcing of legal services from 1999, it required private suppliers to abide by certain standards (such as its “Model Litigant Policy”).¹⁰
- 13.13 What does this imply when devolving arbitrator appointment powers from the courts to an arbitral institution nominated in the IAA? As a starting point, the preferred institution should be one not only with expertise specifically in ICA, but also with a history of a sound relationship with the government and the courts. The most obvious candidate is ACICA, since it was established in 1985 precisely to focus on ICA (not domestic arbitration or other ADR). In addition, over the years it has persuaded the government to provide significant in-kind and financial support (such as a grant from the AGD in 2003), on the ground that ACICA serves more than the private interests of its members.
- 13.14 However, a final decision on whether ACICA should be nominated in the revised IAA should depend on whether it can demonstrate that it is and will remain committed to the public values expected by the government, especially those hitherto advanced by the courts when making default arbitrator appointments.
- 13.15 Regarding transparency, for example, does ACICA explain clearly and publically how it selects arbitrators when so requested by the parties (by express agreement, or by adopting Arbitration Rules that provide that ACICA makes the appointment)?
- 13.16 Substantively, does it only appoint such arbitrators only from a panel of its Fellows, and what conditions (other than payment of a \$440 annual fee) are involved in admission as a Fellow? If ACICA were nominated as the appointing authority in lieu of the Courts even when parties had not selected ACICA’s Arbitration Rules to govern the arbitration, would it still be appropriate to apply the same conditions, or should a separate panel be established solely for this purpose with different conditions? In order to diversify the pool and minimise some possible conflicts of interest for the institution, those listed on a separate panel might not have to pay an annual fee; but the costs then of maintaining such a panel might then have to be at least partly funded by the government. Alternatively, ACICA might commit to appointing arbitrators who are not necessarily on its existing panel, especially when acting pursuant to the revised IAA.
- 13.17 As a condition of providing such funding, and/or ongoing designation of ACICA in the revised Act, the government might also require it to insist that any nominated arbitrators bind themselves at least to the standards of independence and disclosure set out in the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration (discussed further in Part 15 of our Final Submission). This could be a condition of admission onto the new

¹⁰ Attorney General’s *Legal Services Directions* (eg Appendix B). See further Stephen Green, Shinichi Nishikawa and Luke Nottage, ‘Who Defends Japan? Government Lawyers and Judicial System Reform in Australia and Japan’, paper in preparation (outline available on request) for Leon Wolff et al (ed) *Who Judges Japan*.

separate ACICA panel, or a condition to an arbitrator accepting an appointment via ACICA under the Act. However, this may involve significant further administrative costs for ACICA, in the cause of ensuring that arbitrators meet minimum standards of probity expected not just by the parties but also the legal system and society as a whole, as part of a dispute resolution system underpinned by public legislation. This might justify some further government funding, at least partially offsetting such costs.

- 13.18 Especially when designation also likely involves possible funding to the institution, however, it is important that the process of reaching and maintaining agreement on that institution be itself made transparent and open to review through the legislature. We therefore recommend that the revised IAA (a) designates as the institution

“ACICA, unless another institution (or consortium of institutions, possibly including ACICA) is prescribed by Regulation; and (b) subject to such nominee concluding a Memorandum of Understanding with the Minister – with appointment powers reverting to the courts if such a Memorandum cannot be agreed upon”.

This would encourage both ACICA and existing or potential competitor institutions to design and offer to the government increasingly attractive processes on arbitrator appointment, appropriately balancing private and public interests.

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We would be pleased to respond to any queries on our views on these selected points. We look forward to remaining involved in this Review, including lodging a Final Submission in the next few weeks.

Please note also already that Professor Yasuhei Taniguchi, recently retired from 8 years on the WTO's Appellate Body and one of Asia's leading ICA specialists will be based at Sydney Law School from mid-July to mid-August. Hopefully Australian policy-makers will be able to draw on his experience, for example in enacting in Japan in 2003 a Model Law based regime with some interesting variations.

Yours sincerely

Richard Garnett
r.garnett@unimelb.edu.au
Direct tel: (03) 8344 7483

Luke Nottage
L.Nottage@usyd.edu.au
Direct tel (02) 9351 0210