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## **Reforming International Commercial Arbitration: The United Nations, New Zealand – Why Not Australia?**

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## Introduction

This year is the 50<sup>th</sup> anniversary of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), as we were reminded by Dean Gillian Triggs' presentation in Sydney and other materials in the last edition of this *Australian ADR Reporter*. A decade ago, on its 40<sup>th</sup> anniversary, other retrospectives also celebrated the remarkable success of this multilateral treaty, as well as whether and how to resolve some uncertainties or gaps that remained – intentionally or unintentionally – in the NYC regime. The then Secretary-General of UNCITRAL and later President of the London Court of International Arbitration, Professor Dr Gerold Hermann, even posed a seemingly rhetorical question: “does the world need additional uniform legislation on arbitration?”<sup>1</sup>

### *The Legacy of the United Nations*

One intentional limitation is that the United Nations' NYC directly addresses only courts, rather than arbitral tribunals themselves. It also only covers the initial phase of arbitral proceedings (requiring courts to defer to the tribunal, if the parties have properly agreed to arbitration: NYC Art II), and the end phase (court enforcement – but not execution – of a resultant award from abroad). In 1985, the UN helped address those gaps by promoting the Model Law on International Commercial Arbitration (ML). That provides mostly default (derogable) provisions for arbitrators, as well as for courts at the seat of the arbitration to set aside awards (albeit on identical grounds to NYC Art V: see ML Art 34).

The ML has successfully prompted improvements in legislation governing international commercial arbitration (ICA) in around 50 countries, including Australia from 1989 and New Zealand from 1996. This demonstrates a more widely observed phenomenon in harmonising (commercial) law. As coverage is expanded, countries often cannot agree on further hard law (such as treaties). However, they or commercial parties themselves remain open to less direct harmonisation initiatives (“soft law” such as Model Laws).<sup>2</sup> Another example of this phenomenon is the UNIDROIT Principles of International Commercial Contracts (1st ed 1994, 2<sup>nd</sup> ed 2004).<sup>3</sup> Parties have to opt-in to this regime covering more types of contractual relationships and topics than the 1980 UN Convention on Contracts for the International Sale of Goods (CISG, adopted by Australia in 1989), which applies to most cross-border sales of goods worldwide nowadays unless parties opt-out.

Another broad lesson for ongoing harmonisation of ICA emerges from a closer analysis of CISG. Its success in harmonising international – and sometimes even domestic – sales law worldwide both directly, and indirectly (by providing the core for the UNIDROIT Principles), stems from deliberately using words not

normally found in national contract law regimes. For example, CISG allows an innocent party to “avoid” a contract following a serious breach. In Anglo-Australian law we refer instead to “termination” (ab futuro) or “rescission” (ab initio). New Zealand's Contractual Remedies Act 1979 tried substituting the term “cancellation”. The drafters of CISG invented a new term to signal to courts and legal advisors that they should try to give an autonomous and truly international interpretation to this treaty regime. CISG Art 7 adds express requirements to interpret and gap-fill the regime along these lines. Although national courts (especially from the common law tradition) and even arbitrators sometimes fail to respect this approach, most have resisted a “homeward trend” – applying CISG provisions consciously or unconsciously in the light of their national contract law concepts and rules.<sup>4</sup>

A similarly reassuring pattern is evident from the interpretations of the NYC, and more recently the ML, which have emerged especially over the last few decades in court judgments, arbitral awards, and expert commentaries.<sup>5</sup> Nonetheless, those sources do also reveal instances where national courts, in particular, have taken the wrong turn and not followed understandings widely shared worldwide. A solution is often to educate those judges better. We must also keep educating the lawyers on *both* sides, who have the primary responsibility to present the shared understandings – at least in the common law adversarial tradition.<sup>6</sup> Those who fail to meet clear “global standards” can be informally censured by their peers, as well as by arbitral institutions on the lookout for future arbitrators. If one side's lawyers do not advance such global standards favouring their clients, they could even be subjected to professional negligence claims.

Sometimes, however, lawyers and judges are quite constrained by the way the international instruments have been incorporated in their national legislation.<sup>7</sup> Inappropriate incorporation should be less problematic with a treaty like the NYC, but in practice it will be rare for another member country of such a multilateral convention to make a claim under public international law. There is even more scope for divergences to emerge even among countries that have implemented the ML in national legislation, because states are free anyway whether to adopt it in part or

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<sup>4</sup> DiMatteo LA, *International Sales Law: An Analysis of CISG Jurisprudence* (Cambridge University Press, Cambridge, 2005).

<sup>5</sup> See especially the Yearbooks – Commercial Arbitration, and biennial ICCA Congress volumes, edited by Prof Albert van den Berg, both also now on [www.kluwerarbitration.com](http://www.kluwerarbitration.com). See eg the comprehensive update on NYC Art V case law world-wide in van den Berg A, *Why Are Some Awards Not Enforceable?* in van den Berg, A (ed.) *New Horizons for International Commercial Arbitration and Beyond* (The Hague: Kluwer, 2005) 291. Courts still refused enforcement in only about 10% of cases, although delays may be increasing, and the NYC's text or structure do not seem to be problematic. Major reasons were mistakes in drafting arbitration agreements, tribunal or arbitral institution misconduct, and (especially lower-court) errors in interpreting the NYC.

<sup>6</sup> The more pro-active role of judges in the civil law tradition, still, is perhaps part of the reason why there seem to be fewer aberrant judgments for example from courts in Switzerland, Sweden or Germany. Another factor is that such countries also attract more international arbitrations, so their courts and lawyers simply get more practice; but one of the reasons for their attractiveness is probably their sensible approach to civil justice.

<sup>7</sup> Eg *Resort Condominiums v Bolwell* [1995] 1 Qd R 406, highlighting omission of the word “only” in Australia's International Arbitration Act 1974 s 8, in order to conclude that this attempted incorporation of NYC Art V made non-exhaustive its list of grounds for refusing enforcement. Compare van den Berg, op cit, pp 291-2.

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<sup>1</sup> Hermann G, *Does the World Need Additional Uniform Legislation on Arbitration?* (1999) 15 *Arbitration International* 211.

<sup>2</sup> Nottage I, *Legal Harmonization* in Clark D (ed.) *International Encyclopedia of Law and the Social Sciences* (Sage, New York, 2007) 686.

<sup>3</sup> Find out more from the CLE Seminar with Prof MJ Bonell, supported by the Federal Court of Australia, at Sydney Law School on 25 June 2008: via [www.law.usyd.edu.au/scil](http://www.law.usyd.edu.au/scil).

whole. Finally, there are areas in the NYC and ML regimes where there remain true gaps or areas where there is no readily discernable “global standard” for interpretation.

In such situations, we really need to consider amendments to these regimes at the multilateral level, or their implementing legislation in individual countries. Even a few such amendments may also have broader effects. The effort may help precisely in the continuing education of judges, lawyers and arbitrators. It should also signal that the country is serious about ICA as a whole. Empirical and other evidence shows that the legal framework is not enough to attracting ICA cases to a country; the factors “neutrality” and “convenience” are apparently almost as important.<sup>8</sup> But a better legal framework does help, and it also educates our jurists to perform better when they travel abroad (permanently or for individual cases) to engage in ICA.<sup>9</sup>

### *New Zealand’s 2007 Amendments to its 1996 Arbitration Act*

It is therefore encouraging that 2008 marks another milestone. It will be the first full year of operation for the revised New Zealand’s Arbitration Act, after the Arbitration Amendment Act received assent on 17 October 2007.<sup>10</sup> Sir Ian Barker has succinctly outlined the major revisions in this issue of the *Reporter*, so I provide some further context primarily for readers in Australia interested in law reform implications here.

New Zealand’s Arbitration Act was originally enacted in 1996, based on the ML rather than following English arbitration law (including the English Arbitration Act of 1996). Indeed, the Act not only gives effect to the ML (basically reproduced in Schedule 1) for international arbitrations with the seat in that country, unless parties opt-out. Section 6(2) also expressly allows for parties to domestic arbitrations to opt-in to the ML, abandoning the default provisions in Schedule 2 (such as clause 5 allowing for certain appeals to courts for arbitrators’ substantive errors of law, a legacy of the English arbitration law tradition). New Zealand’s revised Act first clarifies the grounds for appeal under clause 5, which had

given headaches to courts in that country (as do still the grounds for such appeals in the current English Act). It makes clear that a question of law does not extend to questions about whether (i) the award or any part of it was supported by any evidence or any sufficient or substantial evidence, or (ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts. This could help lessen the obligation on Australian arbitrators in most commercial disputes under the Commercial Arbitration Acts to provide reasons “of a judicial standard”, as suggested quite controversially in *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 25 (especially at paras 54-9).<sup>11</sup> However, the safest course is to agree to exclude any court review for error of law, for example by opting into the ML regime designed for international arbitrations.

Secondly, New Zealand’s revised Act (s 11) imposes stricter writing requirements for consumer arbitration agreements. To protect consumers, the original Act had already included some requirements. One reason was that s 6(2) so openly allowed for parties to domestic arbitrations, such as consumers, to end up in the more liberal ML regime (which, for example, does not allow review of arbitrators’ substantive error of law: cf ML Arts 34 and 36). Another that one major alteration to the ML in Schedule 1 of the New Zealand Act (clause 7(1)) was to dispense altogether with the ML’s lesser writing requirements designed for international arbitration agreements (cf ML Art 7(1)). Because the Act, from the outset in 1996, thus allowed for purely oral arbitration agreements (except in the case of consumers, under s 11), the revised Act did not need to further amend the ML provisions as adapted in Schedule 1. In fact, UNCITRAL promulgated a revised ML in 2006 that encouraged ML countries either to dispense completely with the writing requirement (as in New Zealand), or to liberalise the 1985 ML writing requirements (as ML countries like Singapore did in their 1995 Act, but taken even further in the English Act of 1996).

However, thirdly, the revised New Zealand Act did decide to update Schedule 1 to adopt the other major change contained in UNCITRAL’s Revised Model Law of 2006.<sup>12</sup> Article 17 of the latter clarifies of the scope and triggers for arbitrators’ “interim measures” and related “preliminary orders”, and their enforceability. Such measures basically become enforceable as an award (reflected in Schedule 1 cls 17L-M). A party can apply also for preliminary orders, even *ex parte*, but if granted the tribunal must give the other party notice so it can present its counter-arguments. Such orders also otherwise expire after 20 days, and are anyway “binding on the parties” but not “enforceable by a court” (cls 17C-G).

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<sup>8</sup> See generally Mistelis L, *International Arbitration - Corporate Attitudes and Practices - 12 Perceptions Tested: Myths, Data and Analysis - Research Report* (2004) 15 *American Review of International Arbitration* 525 and [www.pwc.com/arbitrationstudy](http://www.pwc.com/arbitrationstudy). Over the last decade, London has belatedly started to attract more arbitrations, compared to traditional leaders like Paris and Geneva. Yet the legacy of tight judicial control over arbitration has persisted in key areas despite the UK’s Arbitration Act of 1996, which drew in part on ML principles: Paulsson J, *Arbitration Friendliness: Promises of Principle and Realities of Practice* (2007) 23 (3) *Arbitration International* 477. This suggests that convenience (eg for Eastern European economies), and perhaps broader economic or even psychological factors (like the growth of financial services markets following London’s “Big Bang” deregulation), remain very important. Especially for countries like Australia lacking such advantages, however, the legal framework remains an important consideration that we can work on improving.

<sup>9</sup> Cf eg Drahozal C, *Regulatory Competition and the Location of International Arbitration Proceedings* (2004) 24 *International Review of Law and Economics* 371. He does not include the latter indirect economic benefits to arbitration experts and parties following enactment of better legislation in their home countries.

<sup>10</sup> Available via [www.legislation.govt.nz](http://www.legislation.govt.nz). A concluding note on “Legislative history” shows that the Amendment Bill was introduced on 8 September 2006.

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<sup>11</sup> Setting that case in comparative and historical context, see Gillies P and Selvadurai N, *Reasoned Awards: How Extensive Must the Reasoning Be?* (2008) 74 *Arbitration* 125 (also at <http://ssrn.com/abstract=1120044>). For the debate in New Zealand about the scope of “error of law”, see Kennedy-Grant T, *The New Zealand Experience of the UNCITRAL Model Law: A Review of the Position as at 31 December 2007* (2008) 4 (1) *Asian International Arbitration Journal* 1 especially at pp 46-7. I thank Professor Peter Gillies for information and discussions on this point.

<sup>12</sup> This must make New Zealand one of the first countries to enact major parts of the Revised ML. Unfortunately, UNCITRAL’s does not differentiate between states adopting the original versus revised parts of the ML: [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html). A former Master of the High Court of New Zealand concludes that the country’s adoption of the revised regime for interim measures is “revolutionary”: Kennedy-Grant T, *Interim Measures in Arbitration* [March 2008] *New Zealand Law Journal* 83 at p 88. Revolutions can be messy, however. He goes on to identify several uncertainties created in the amended Act regarding the powers also granted to courts.

These fine distinctions are another compromise after considerable wrangling at UNCITRAL meetings and other fora. One major issue was precisely whether natural justice (mandated under the ML) and contemporary practice could allow any such *ex parte* communications between parties and arbitrators.<sup>13</sup>

Article 28 of the ACICA Arbitration Rules of 2005, which I helped draft, tracked the Working Group's deliberations and phrasing related to what became the Revised ML Art 17, except of course regarding enforceability – a matter for courts and the legislature.<sup>14</sup> Further, our Subcommittee decided not to provide at all for *ex parte* applications, but this issue is clearly still open to debate. For now, it is enough to compliment the New Zealand government for following one attempted international compromise on this topic, of great contemporary significance for ICA. In fact, when its Law Commission was writing reports on possible amendments to the Act, I encouraged them to go beyond issues identified in some local court proceedings, and to take seriously the work of UNCITRAL particularly regarding interim measures.<sup>15</sup>

Fourthly, New Zealand's revised Act largely follows the wording and rationales proposed by the Law Commission regarding another vexed issue: privacy and confidentiality regarding arbitral proceedings. The original Act declined to follow the approach of *Esso Australia Resources Ltd v Plowman* (1995) 128 ALR 391 (HCA), which found no implied-in-law obligation of confidentiality (only, of privacy). Instead, section 14 provided for an implied statutory obligation of confidentiality (and privacy). This decision acknowledged a widespread consensus, confirmed by recent empirical studies, that confidentiality remains a major advantage for users of ICA as opposed to cross-border litigation. The 1985 (and Revised) ML omit confidentiality obligations, as do the 1976 UNCITRAL Arbitration Rules they partly drew on. In turn, those Rules emerged out of a formative era when many international arbitrations involved investment disputes and states, where stronger public interests arguable justify greater transparency and third parties involvement.<sup>16</sup>

Article 18 of the ACICA Rules, based largely still on the UNCITRAL Rules, adds confidentiality obligations. Although the drafting subcommittee considered the New

Zealand Law Commission's original proposals regarding both the scope and limits of confidentiality, ACICA's Art 18 is more broadly worded, in line for example with the Rules of the Singapore International Arbitration Centre. New Zealand's revised Act retains both confidentiality and privacy obligations (unless the parties agree otherwise – “in writing”: s 14). But it adds detailed provisions about possible limits, addressed to tribunals, parties, and also the courts. For example, setting-aside or enforcement proceedings must be conducted in public, except in defined situations (s14F). Such issues have caused headaches not only for courts in New Zealand, but also for their counterparts – and lawyers and legislatures – in other countries.<sup>17</sup>

Confidentiality is one of many topics identified by Hermann a decade ago as a gap in both ML and NYC coverage. However, the UNCITRAL Working Group formed in 2000 under his leadership deferred deliberations on this topic.<sup>18</sup> Instead, it concentrated first on interim measures, writing requirements, and what became the (most disappointing) 2002 Model Law on International Commercial Conciliation.<sup>19</sup> The Group has now embarked on whole-scale revisions of the UNCITRAL Arbitration Rules, which are likely to take several more years,<sup>20</sup> However, as “opt-in” Rules they have broad coverage and it may be relatively easier to reach consensus on new provisions compared even to the ML, and especially compared to a formal Protocol to the NYC. Longer term, the revised Rules may become the basis for further revisions to those other instruments.

Meanwhile, Australia should take seriously the work done so far by UNCITRAL, followed already by New Zealand. It should already use all these opportunities to systematically overhaul its legislative framework for ICA, dating back to 1974. In updating its law, the preference should be firstly for more globally acceptable solutions, not hidebound by the interpretations taken by some of our judges or the legacy of the English law tradition. Secondly, we should aim for solutions that restore some of the more efficient and less formalised procedures, and related substantive principles of ICA, which helped grow the field in its earlier years, but which are also increasingly called for by the new generation of leading practitioners world-wide.<sup>21</sup>

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<sup>13</sup> Compare eg Houtte H, *Ten Reasons against a Proposal for Ex Parte Interim Measures of Protection in Arbitration* (2004) 20 (1) *Arbitration International* 85 with Hober K, *The Trailblazers v. The Conservative Crusaders, or Why Arbitrators Should Have the Power to Order Ex Parte Interim Relief* in van den Berg (ed.) *New Horizons for International Commercial Arbitration and Beyond* (Kluwer, The Hague, 2005) 272. Interim measures were also extensively discussed in the prior and subsequent ICCA Congress volumes. Ex parte communications also relate to the issue of whether and how arbitrators may more actively facilitate settlement (Arb-Med), which I discussed in the December (2007) issue of this *Reporter*.

<sup>14</sup> Under our IAA, if parties so agree in writing (s 22), arbitrators' orders are treated as awards (s 23) enforceable under Chapter VIII of the ML, which is given force of law (s 16). This would make them enforceable even if rendered by foreign arbitrators, because s 20 makes inapplicable Chapter VIII (on enforcement) only if s 8 also applies (attempting to restate NYC Art V, in Part II of the IAA). Interim measures are usually unenforceable under the NYC: van den Berg, op cit, p 317.

<sup>15</sup> See Nottage L, *Reviewing the Arbitration Act 1996* [February 2003] *New Zealand Law Journal* 34. The Law Commission's work in this field is available via [www.lawcom.govt.nz/Publications.aspx](http://www.lawcom.govt.nz/Publications.aspx).

<sup>16</sup> Miles K and Nottage L, *Back to the Future for Investor-State Arbitrations: Revising Rules for Public Interests* (2008) *Sydney Law School Research Paper* forthcoming via [www.ssrn.com](http://www.ssrn.com).

<sup>17</sup> At one extreme, for example, France basically extends confidentiality to such proceedings. See further eg Kouris S, *Confidentiality: Is International Arbitration Losing One of Its Major Benefits?* (2005) 22 *Journal of International Arbitration* 127. For contemporary empirical evidence of users' preference for confidentiality in ICA, see Mistelis, op cit.

<sup>18</sup> Sorieul R, *Update on Recent Developments and Future Work by UNCITRAL in the Field of International Commercial Arbitration* (2000) 17 (3) *Journal of International Arbitration* 163.

<sup>19</sup> Compare the defence of one of its principal architects, Abascal JM, *Some Remarks on the UNCITRAL Model Law on International Commercial Arbitration* in A van den Berg (ed.) *New Horizons for International Commercial Arbitration and Beyond* (Kluwer, The Hague, 2005) 415 with critiques by van Ginkel E, *The UNCITRAL Model Law on International Commercial Conciliation* (2004) 21 (4) *Journal of International Arbitration* 1 and Sanders P, *UNCITRAL's Model Law on International Commercial Conciliation* (2007) 23 (1) *Arbitration International* 105. This Model Law has been adopted by Canada (2005), Croatia (2003), Hungary (2002) and Nicaragua (2005). UNCITRAL also remarks that some of its principles have influenced the Uniform Mediation Act (2001) adopted by some US states [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html).

<sup>20</sup> Deliberations can be followed via [www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

<sup>21</sup> Nottage L, *The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration* (2006) 06/51 *Sydney Law School Research Paper* <http://ssrn.com/abstract=838028>. See also eg the report on David

## *Australia's Turn to Step Up to the Crease*

New Zealand has recently taken some positive steps precisely in those directions, although they could have gone further. It is also worth mentioning that this year marked the passing of Sir Edmund Hillary. “Sir Ed” was celebrated as the country’s greatest 20<sup>th</sup> century hero, for first conquering Mount Everest (in step with his Sherpa friend, who also later joined him in helping countless Nepalese communities). New Zealand’s former Chief Historian explained that New Zealand’s veneration for Ed stemmed partly from the “ANZAC” tradition – former colonies showing they were “better than the British”.<sup>22</sup> A similar impulse may explain not only New Zealand’s “Contract Statutes” enacted from the 1970s, more far-reaching even than their Australian counterparts, but also its bold enactment and now re-enactment of arbitration legislation. But the ANZAC tradition is shared with Australia, of course, and Don Bradman is Sir Ed’s equivalent here. “The Don” was the “boy from Bowral”, who (mostly) beat the British at their own game – of cricket.<sup>23</sup>

Surely it is time too for Australia, then, to revisit its own International Arbitration Act and related legislation. Every year, my LLM course in ICA gets bigger. This year we have 45 students from 14 countries, despite Sydney Law School recently adding two new courses in international dispute resolution. We are grateful for the CI Arb’s (expensive) book prize for the best Research Essay in the ICA course. Several members also share their knowledge and enthusiasm with this increasingly diverse group of keen students – many with considerable practical experience already in their home countries. Every year, though, our class’s list grows about things that should be clarified, gap-filled or simply just corrected in Australia’s legislative framework for ICA.

In themselves, such reforms will not lead to a flood of ICA cases rolling in to our shores, but they may help a little in that respect, and certainly a lot more in others. I will not bore you now with my list, as this essay has grown long enough. But you can already read between the lines (or in the footnotes) for some, and I promise more soon. Meanwhile, I invite you already to begin compiling your own, so we can compare notes in this *Reporter* or other fora.

*This essay is inspired by discussions recently with my Dean, Professor Gillian Triggs, and Jonathan Kay Hoyle (about the New York Convention and the UK); with CI Arb Chairman, Malcolm Holmes QC (about New Zealand); and with other members of the Arbitrator Forum (under Chatbam House rules). I thank them all, while absolving them from any responsibility for my somewhat forthright views. In the spirit of disclosure that should characterise any contemporary arbitration specialist: I am a national of the UK, New Zealand and Australia.*

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Rivkin’s “town elder” model for contemporary ICA proceedings, in this issue of the *Reporter*.

<sup>22</sup> Phillips J, *The Essential Kiwi*, Vol 212 No 3533 *The Listener* (26 January – 1 February 2008) 18.

<sup>23</sup> Hutchins B, *Don Bradman: Challenging the Myth* (Cambridge University Press, Cambridge, 2002).