Australian article round-up 2011: Arbitration

Continuing the Australian article round-up, readers may be interested in the following two articles raising points about arbitration:

- **Andrew Bell, 'Dispute Resolution and Applicable Law Clauses in International Sports Arbitration' (2010) 84 *Australian Law Journal* 116:**

Choice of law clauses and jurisdiction or arbitration agreements play a critical role in international commerce. They also play an increasingly important role in sporting disputes by reason of the ever-growing internationalisation and commercialisation of sport. The presence of such clauses does not, however, guarantee the elimination of interlocutory or adjectival contests concerning the law which will govern, and the forum or mode of dispute resolution that will apply, to the determination of an international sporting dispute. This article examines standard sports-related choice of law clauses and arbitration agreements, and considers the emerging jurisprudence in this field.

- **Geoffrey Fisher, 'Anti-Suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement' (2010) 22 *Bond Law Review* 1:**

The anti-suit injunction is the remedial device available in common law systems to restrain a party from instituting or continuing with proceedings in a foreign court. … [A] recognised category for the issue of an anti-suit injunction is where a plaintiff has commenced proceedings in a foreign court in breach of a contractual promise, for example, in breach of an exclusive jurisdiction clause or an arbitration agreement. In this type of case there is a tension between the interests of comity on the one hand and the policy of upholding contractual undertakings on the other. The English Court of Appeal in Aggeliki Charis Campania Maritima SpA v Pagnan SpA (The Angelic Grace) can be regarded as having inaugurated a more liberal approach to the jurisdiction to grant an anti-suit injunction restraining breach of an arbitration agreement. The tension between comity and contractual bargain was largely resolved in favour of the

latter. This paper examines the nature and extent of the liberalisation worked by The Angelic Grace and subsequent English decisions.

Foreign arbitration awards in Australia: a 'pro-enforcement bias'

Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131 provides a recent example of the 'pro-enforcement bias' of at least some Australian courts when it comes to international arbitration awards. The Federal Court of Australia enforced a Ugandan arbitration award under the *International Arbitration Act 1974* (Cth) (which applies the *New York Convention*), notwithstanding that the Australian corporate respondent did not participate in the arbitration. That Act was amended in 2010 to favour the enforcement of foreign arbitral awards even further than had previously been the case. There are two points of more general interest.

First, the Court considered that the arbitration clause at issue — which provided that 'Any lawsuit, disagreement, or complaint with regards to a disagreement, must be submitted to a compulsory arbitration' — was not void for uncertainty and nor was the dispute outside its scope or determined otherwise than in accordance with the procedure agreed by the parties. The Court was prepared to read the clause as meaning (at [63]): 'All disputes under or in relation to the Contract must be referred to arbitration'. The Court thus effectively read the words 'under or in relation to the Contract' into the arbitration clause. The arbitral procedure adopted was in accordance with Ugandan arbitration legislation, which supplied any deficiencies in the parties' agreement concerning procedure.

Secondly, the Court rejected the respondent's submission that the award should not be enforced on grounds of public policy (s 8(7) of the Act). The respondent had sought to invoke this ground on the basis that the arbitrator made errors of law and fact when determining the award of general damages. The Court said (at

[126]) that it was not:

> *against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award. The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.*

The Court approved United States authorities consistent with this narrow approach to the public policy exception (*Parsons & Whittemore Overseas Co, Inc v Société Générale De L'Industrie Du Papier*, 508 F 2d 969 (2d Cir 1974); *Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274 at 306 (2004)) and disapproved previous Australian authorities supporting a broader approach (*Resort Condominiums International Inc v Bolwell* [1995] 1 Qd R 406 at 428–432; *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700; (2004) 183 FLR 317 at [6]-[14], [18]).

The New Spanish Arbitration Law Reform Act

This post has been written by Miguel Gómez Jene, Senior Lecturer of Private International Law at the UNED (Universidad Nacional de Educación a Distancia)

On May 21st, the Spanish official Gazette (www.boe.es) published the reform of the Arbitration Act. This Act amends certain provisions concerning the Arbitration legislation (2003). From the point of view of international private law, the most significant changes involve the reallocation of competence in arbitration matters. Indeed, after the coming into force of the Reform (twenty days after its publication), the corresponding High Court of each "autonomous community" (Tribunales Superiores de Justicia de las Comunidades Autónomas) shall be

competent for exequatur and annulment proceedings and appointment of arbitrators. Although this modification appears desirable, it should be noted that no appeal is possible against the judgment of the High Court resolving the exequatur or annulment proceedings. Therefore the Spanish Supreme Court has no competence to deal with arbitration matters.

The prima facie standard of review for the validity of arbitration agreements has also been affected. Specifically, the amendments concern the period to submit the objection to jurisdiction. This objection to jurisdiction shall be made in the first ten days of period to answer the claim.

The possibility of arbitration in relation to company disputes has been expressly affirmed. However two special requirements have been made. First, the introduction of the arbitration agreement in the by-laws of the company requires two thirds of the votes corresponding to shares or participations. Secondly, arbitration in company disputes must be submitted to institutional arbitration. Incomprehensibly, ad hoc arbitrations are not allowed in these matters.

The Reform introduces a new regulative framework for the relationship between arbitrator and mediator. This regulation states that, unless otherwise agreed, a mediator shall not be able to become the arbitrator in the same dispute between the parties.

The expiration of a temporal limit to render an award shall not affect its validity any longer. Previously there was a six months period to render the arbitral award. Such period of time led to a contradictory case law in order to its consideration as a ground for setting aside the award. Furthermore the temporal limit was also considered a very short period of time to render an award in an international arbitration.

The reform also provides an important new amendment regarding the scope of rectification and interpretation of the award. In cases where arbitrators have decided upon matters which have not been submitted to their consideration or upon not arbitrable matters, parties may request for a rectification of “partial extra limitation” to the arbitral tribunal.

Finally, it should be noted that the Bankruptcy Act has also been amended in order to maintain the validity of the arbitral agreement in cases of declaration of bankruptcy.

NY Court Grants Pre-Award Attachment in Aid of Foreign Arbitration

In *Sojitz Corp. v. Prithvi Information Solutions Ltd,* the New York Supreme Court (ie an intermediate appellate court) recently agreed to grant a pre-award attachment in aid of an arbitration with a foreign seat (Singapore) and between two foreign parties over which NY courts did not have personal jurisdiction.

In 1982, the New York Court of Appeals (ie the supreme court in the state of NY) had held in *Cooper* that NY courts did not have such power.

See the report of G. Born and T. Snider over at the Kluwer Arbitration Blog.

Illmer on Arbitration and Brussels I Revisited

Martin Illmer (Max Planck Institute for Comparative and PIL) has posted Brussels I and Arbitration Revisited – The European Commission's Proposal COM(2010) 748 final on SSRN. The abstract reads:

> *In December 2010, the European Commission presented its long-awaited proposal for a reformed Brussels I Regulation. One of the cornerstones of the proposal is the interface between the Regulation and arbitration. In the first part, the article sets out the development of the exclusion of arbitration from the Regulation's scope up to the West Tankers and National Navigation cases. In the second, main part, the author, who is a member of the Commission's*

Expert Group on the arbitration interface, provides a detailed account and evaluation of the new lis pendens-mechanism established by the Commission proposal in order to effectively prevent parallel proceedings in the arbitration context. In the third, final part, the author scrutinizes the Commission proposal against the background of the Commission's Impact Assessment before concluding with a short resumé.

The paper is forthcoming in the *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*.

Call for Papers for a Conference Entitled "Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration"

I am pleased to pass on the following call for papers for an excellent conference to be held October 21, 2011 at the University of Missouri School of Law. Please contact Professor Strong at the information below with any questions.

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CALL FOR PAPERS AND PROPOSALS

Gary Born will give the keynote address at a symposium entitled "Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration," to be convened at the University of Missouri School of Law on October 21, 2011. A works-in-progress conference and a student writing competition is being organized in association with this event, and the University of Missouri School of Law is issuing a call for papers and proposals.

- Proposals for the works-in-progress conference are due by May 20, 2011, with responses anticipated in mid-June. The works-in-progress conference will be held at the University of Missouri on October 20, 2011, the day before the symposium itself.
- Papers for the student writing competition are due August 15, 2011, with the winning paper announced at the symposium. The winner will receive a $300 prize sponsored by the Chartered Institute of Arbitrators (CIArb) North American Branch and may have his or her paper published in the *Journal of Dispute Resolution* as part of the symposium edition.

The symposium brings speakers from Canada, Austria, Switzerland, the United Kingdom and the United States together to discuss complex issues relating to international dispute resolution. Submissions for the works-in-progress conference and student writing competition should therefore bear some relationship to international commercial arbitration, transnational litigation or the connection between the two.

More information about the works-in-progress conference, the student writing competition and the submission process is available at the symposium website, located at: http://www.law.missouri.edu/csdr/symposium/2011/. Submissions and questions should be directed to Professor S.I. Strong at strongsi@missouri.edu. Registration for the symposium itself will open shortly.

The University of Missouri's award-winning program in dispute resolution consistently ranks as one of the best in the nation. The University of Missouri is the only law school in the United States to have received Recognized Course Provider status from CIArb for courses offered during the regular academic year. London-based CIArb was founded in 1915 and offers training courses and competency assessment courses in international commercial arbitration all over the world.

Keynote speaker Gary Born was awarded *Global Arbitration Review*'s inaugural "Advocate of the Year" prize on 3 March 2011 at the annual *GAR* awards dinner in Seoul, Korea. Mr. Born is the author of a number of leading publications on international arbitration and litigation, including *International Commercial Arbitration* (Kluwer 2009), *International Forum Selection and Arbitration Agreements: Drafting and Enforcing* (Kluwer 2010), *International Arbitration: Cases and Materials* (Aspen 2011), and *International Civil Litigation in US Courts*

(Aspen 2007).

Arbitration Academy: Summer Courses 2011

An International Academy for Arbitration Law will be launched in Paris in July 2011.

The Academy is an initiative of the French Arbitration Committee (Comité Français de l'Arbitrage (CFA)) and is presided by Professor Emmanuel Gaillard. The Board of Directors is composed of the Academy's President, Alexandre Hory and Yas Banifatemi as co- Secretary Generals, Jean-Georges Betto as Treasurer, Professor Marie- Elodie Ancel and Professor Jean-Baptiste Racine as members of the Selection Committee, and Maitre Philippe Leboulanger as Chair of the CFA. The Academy also has a Board of Advisors which includes Professor George Abi-Saab (Egypt), Professor Liza Chen (China), Professor Eros Grau (Brazil), Professor Horacio Grigera Naon (Argentina), Judge Gilbert Guillaume (France), Professor Gabrielle Kaufmann-Kohler (Switzerland), Professor Alexander Komarov (Russian Federation), Professor Pierre Mayer (France), Professor Michael Reisman (USA), Professor Dorothé Sossa (Benin), Professor Christoph Schreuer (Austria), and V.V. Veeder QC (UK).

The Academy will offer three-week Summer Courses to students and young practitioners interested in the field, covering both international commercial arbitration and international investment arbitration. The Summer Courses will be given in Paris from 4 July to 22 July 2011, and will be offered in English. They will include a General Course, Special Courses, Workshops on institutional arbitration, an Inaugural Lecture and The Berthold Goldman Lecture on historic arbitration stories.

For the first Session of the Academy in 2011, the General Course will be taught by Professor Christoph Schreuer. The Special Courses will be taught by Professor George Bermann, Professor Pierre- Marie Dupuy, Professor Diego Fernandez

Arroyo, Professor François Knoepfler, Professor Pierre Mayer, Dr. Klaus Sachs, and Maître Michael Schneider. The 2011 Workshops will be offered by ICSID, ICC , and the PCA. The Inaugural Lecture will be delivered by Professor Pierre Lalive on the topic "Is Arbitration a Form of International Justice?". The Berthold Goldman Lecture on historic arbitration stories will be given by V.V. Veeder QC on the Lena Goldfield arbitration.

Interested students and young practitioners are invited to apply to the Academy by April 30, 2011. The Application Form and the complete Program can be viewed on the Academy's Website at www.arbitrationacademy.org.

Many thanks to Marie-Élodie Ancel.

New French Law of Arbitration

A new law of arbitration was adopted yesterday in France. The Décret n° 2011-48 of 13 January 2011 *portant réforme de l'arbitrage* amends the French Code of Civil Procedure accordingly. The old provisions of the Code on arbitration dated back to 1980 and 1981. The reform is concerned with both domestic and international arbitration.

The new provisions are available here. An explanatory report can be found here.

Update: London Arbitration Feast

Further to my post of last week, just to note that the start time of next week's BIICL seminar on the Supreme Court has been moved 15 minutes earlier to 5:15pm on Wednesday 24 November. This is to enable those attending to continue their arbitration themed evening by making the short journey to the LSE to hear Professor Jan Paulsson and Alexis Mourre discuss the subject of "Unilaterally

Appointed Arbitrators – A Good Idea?" from 7:15pm.

European Parliament Committee on Arbitration and Brussels I

On June 28th, the Committee on Legal Affairs of the European Parliament issued a report on the Implementation and Review of Regulation 44/2001.

On the exclusion of arbitration from the scope of the Regulation, the Committee expressed the following view:

> *Whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights,….) must continue to be available and the effect of such procedures … must be left to the law of those Member States as was the position prior to the judgment in West Tankers.*

On the proposal to grant exclusive jurisdiction to the court of the seat of the arbitration, the report provides:

> *Exclusive jurisdiction could give rise to considerable perturbations It appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand.*

See the report of Hans Van Houtte over at the Kluwer Arbitration Blog.