STREAMLINING INTERNATIONAL ARBITRATION—THE MODEL LAW AND RESPONDING TO THE CHALLENGE OF ALTERNATIVE DISPUTE RESOLUTION

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CRITICISMS OF TRADITIONAL LITIGATION AND ARBITRATION

Both litigation and arbitration have attracted a lot of criticism in recent times. The criticism is based largely in two matters: the expense of engaging in these processes, and the delay which seems so often to be involved in securing a judgment or award. It is said that the processes are too slow and too expensive.

There are other criticisms. With litigation, the courts are criticised for not having implemented systems of effective case management early enough. The lawyers are condemned, both in court proceedings and in arbitrations, for prolonging the proceedings: it is said that they engage in unnecessary interlocutory assaults, and too often divert attention into sterile technical argument. Arbitrators are criticised for being unduly concerned with aping Judges: it is said that they try too hard to mimic judicial proceedings, and that they fail to appreciate that disputants generally prefer a quick and simple resolution, not demanding, in arbitrations, the full trappings of the proceeding in court. It is claimed that in the result, arbitrators are not sufficiently robust to stop delay, and there is an inflexibility about the processes which is unappealing.

THE RESPONSE

What is the response to these criticisms? Initially, the courts took refuge in establishing vital commercial causes lists, and these have worked well. There is now, however, a realisation that case management must be undertaken more broadly. I detect a developing determination to redirect the focus of litigating parties to the process of negotiation. But that aside, parties to the case which cannot be settled are, in the end, entitled to invoke all of the traditional court processes which may sensibly apply: pleadings, particulars, discovery of documents, interrogatories, interlocutory applications, and the rest. That process is inevitably expensive and time consuming. What I am emphasising is that try as we may in the court, we cannot in the ultimate deny a litigant the so-called "Rolls Royce treatment" if generally appropriate to his case.

Now it has been thought that this need not necessarily apply with arbitrations. Of course the great advantage of commercial arbitration lies in having, as arbitrator, a person with the relevant technical expertise. The resolution of

complicated engineering or construction disputes is undoubtedly facilitated by having an arbitrator who can readily comprehend the technical concepts. Judges are experienced in reaching an understanding of such things. The difference is that it usually takes much longer and the eventual perception will be less acute. The problem is bringing the Judge to a sufficient understanding of the complex technical concepts. If appropriately selected, the arbitrator will already have the technical understanding. But will he have the confidence to cut through attempts at delay? Will he respond decisively to the frustrating tactics of lawyers? I fear that in following the judicial tradition, arbitrators have lost some of their determination to deal out that robust decisiveness: to proceed firmly, while of course with proper allowance for the requirements of natural justice and the law.

THE TURN TO ADR

I believe that it is these aspects of dissatisfaction which have inspired the current interest in the mechanisms of so-called "Alternative Dispute Resolution". The mechanisms I have in mind are mediation, conciliation, expert appraisal, the mini trial and the like. They are flexible processes which the parties initiate and control. The tribunal—whether he be a mediator or quasi Judge or quasi arbitrator—plays a subsidiary role. The disputing parties who invoke these processes themselves assume the responsibility for devising a solution for their problem. They do not rely on a judgment or award compulsorily imposed by an external tribunal.

The advantages of this sort of approach have often been listed: it can be quicker and less expensive, commercial relationships need not be irreparably fractured, the parties can devise solutions which a court or arbitrator may be unable to impose, and the whole process should be less intimidating than the alternatives.

The point I emphasise for the moment is that by engaging in these alternative processes, the parties show renewed enthusiasm for trying to resolve their disputes themselves.

This is, I think, the problem with modern litigation. The courts are almost exclusively concerned with reaching the perfectly correct legal solution, and pay insufficient regard to the other interests of the litigants. That is reflected in the courts' past lack of interest in ensuring that the prospect of negotiation is properly explored before a case goes to trial. We are now doing our best to deal with this sort of deficiency.

But we have to recognise that there are nevertheless many complex cases for which the traditional process of litigation must be preserved.

THE NEW REGIME OF INTERNATIONAL ARBITRATION

Because the process of arbitration is consensual, delay and undue expense are less excusable. Parties invariably want a quick and cheap solution. If they do not achieve it, then the fault will often lie with the legal representatives or the arbitrator. Hence my plea for a robust approach by the arbitrator.

The Commercial Arbitration Acts in the States facilitate that to some degree.

My focus today is, however, upon international arbitration. I consider that the Uncitral Model Law on International Commercial Arbitration also facilitates a more robust approach by arbitrators.

The thesis I hope to develop is that the Model Law achieves that by enlarging the power of the parties in dispute to control the process, not only by emphasising their right to define how the process of arbitration will be conducted, but by strictly limiting the prospect of external interference by the courts. In a sense, therefore, in the international context, the new arbitration regime reflects the feature which interests people about ADR: controlling their own process, and through that, reducing the prospect of delay and crippling expense which has made litigation and, to a lesser extent, domestic arbitration, unattractive to them.

SPECIAL FEATURES OF INTERNATIONAL ARBITRATION

As I will shortly attempt to demonstrate by a more detailed analysis, the Model Law does give parties to international arbitrations greater control over the process than parties to domestic arbitrations enjoy. It also more stringently limits the prospect of court interference than do the Commercial Arbitration Acts. Why one asks, should international arbitration be singled out for this "special treatment"?

There is one feature of international commerce which means that a system of international arbitration is absolutely necessary, more necessary than a system of domestic arbitration. In the absence of an arbitration, parties to a domestic dispute can always litigate in a local court, a court in which they will both usually have confidence. But there is no international court to which parties of different nationalities can present their case. One party to an international dispute should not be compelled to submit to the judgment of a court of the other's country, if he is prepared to arbitrate as an alternative. Courts are generally not biased of course towards their own nationals. But litigation in such circumstances may involve immense inconvenience and unfairness. The foreign party may not share the language of the court, for example. He may be compelled to retain local lawyers with whom he has no general rapport. But that aside, especially if the parties are from differing legal cultures—one the common law and the other the civil law for example—their natural distrust of the courts of other regimes will ordinarily put litigation out of the question. Such parties are entitled to demand a tribunal which will be quintessentially neutral, and a foreign court may not appear to offer that guarantee. As it was put by José Siqueiros at the Institute's 1989 conference in Honolulu: "The mutual distrust of foreign courts and unknown laws would prevent the fair and fast resolution that modern trade practices now seek. The only alternative is international commercial arbitration."

A system of international arbitration is, therefore, essential, whereas one might think that a system of domestic arbitration may, at the highest, be considered as desirable.

But why need a system of international arbitration be more flexible and accommodating to the parties than the domestic arbitration system? It is sometimes

said that parties to international commercial transactions generally require an earlier, final determination of their disputes than do their domestic counterparts, and that they need less protection from the adjudicating tribunal. I am not convinced that those particular features ordinarily distinguish the international from the domestic. I suppose that international disputes generally do involve more substantial sums of money, their resolution has wider ramifications for more valuable trading relationships, and the whole question of resolution may be vastly complicated by language problems and the difficulty of selecting an appropriate place for the arbitration proceedings.

But the more significant issue, to my mind, is the importance of avoiding the unintended repercussions of special features of local law upon the resolution of the problem. The differences in arbitration laws from country to country can frustrate the expectations of parties who want to be able to secure a quick, definitive result, without the surprise intrusion of some peculiarity of a legal system with which they are unfamiliar. Hence the Model Law gives them the opportunity to determine in advance precisely what system of law should apply.

There is one other matter relevant to Australia. The Australian government's implementation of the Model Law was motivated by a wish to make this country an attractive centre for international arbitration. The London experience shows that it is lucrative business, important in attracting international business benefiting the local economy.

Our adoption of the Model Law, which may be construed as a progressive step, has particular significance in the Asian/Pacific region. Some of our commercially important neighbours have a decided preference for non-curial methods of commercial dispute resolution. The Chinese and Japanese, for example, regard resort to ligation as involving a loss of face. The Japanese prefer institutional arbitration. The Chinese start with negotiation or consultation, then proceed to arbitration, and finally, if absolutely necessary, to litigation. It is important to be able to offer a streamlined international arbitration facility to these countries, especially of course with relation to disputes they have with trading partners other than ourselves. Hence the establishment of the Australian Centre for International Commercial Arbitration in Melbourne and the Australian Commercial Disputes Centre in Sydney. Those centres offer institutional arbitration under all of the major internationally recognised sets of arbitration rules, and if none is specified, use the Uncitral Rules. Judges have played a role in publicising such facilities. Witness the bold support of the English Judges for the London facilities, that of Robert Goff J., for example, in *Bank Mellat v. Helleniki Techniki* (1984) Q.B. 291, 315:

> "Parties to such arbitration may well choose London as a convenient neutral forum. There are new, excellent and rapidly developing services available in London for the conduct of such arbitrations. The English language is frequently a language familiar to both parties, and often too the language of the contract; for that reason too, London may be a suitable forum. The services of many experienced solicitors, counsel, experts and arbitrators are readily available there. So London may be chosen as a convenient neutral forum; or it may be nominated as such by a body such as the I.C.C."

How are these expectations by disputants in the international field to be met, that is, speed, finality and predictability as to the law?

The first preference, should negotiation fail, should be for arbitration. Its success depends upon having appropriate arbitrators. One's ability to secure, as arbitrator, an appropriately qualified and experienced expert, is, as I have said, the particular advantage of arbitration over litigation. Experienced international arbitrators develop great expertise. It is suggested that that is what has raised arbitration to be the preferred method of dispute resolution between United States and Soviet companies, being a system in which they trust notwithstanding the great political differences and distrust between their nations.

But apart from securing an appropriate arbitrating tribunal, how can the parties secure their other objectives: quick finality, and the avoiding of any unexpected intrusion by surprise features of local legal systems? They are assisted by the Model Law format, a format which may distance their process from the court model, enhancing their own control over what occurs and reducing the prospect of court interference.

INTERNATIONAL ARBITRATION AMENDMENT ACT 1989

The Uncitral Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law on 21st June, 1985 and dispatched to member nations following an instruction from the General Assembly on 11th December, 1985. (The history of the Model Law may be traced through the comprehensive work by H. Holzmann and J. Neuhaus: *A Guide to the Uncitral Model Law on International Commercial Arbitration, Legislative History and Commentary* (Kluwer, 1989).)

The International Arbitration Act 1989 amended our Arbitration (Foreign Awards and Agreements) Act 1974. The 1974 Act had given effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The 1989 Act gave the Model Law the force of law in Australia.

But acknowledging that the process of arbitration is consensual, the 1989 Act recognised by s. 21 that parties may agree that the Model Law should not apply to the arbitration of their dispute. However in the absence of an agreement that the Model Law does not apply, it will apply. One may therefore safely assume that in practice it will ordinarily apply. That is obviously what the Parliament wanted to achieve by this opt out provision. If parties elect to opt out of the Model Law regime, they will be left—subject to their agreement—to arbitrate, if in Australia, on a domestic basis.

As well as enacting the Model Law without change—and that was important in the interests of international uniformity and predictability—the Australian Parliament added some supplementary optional provisions. The Act provides in s. 22 that if the parties agree, these additional provisions may apply. The provisions relate to court enforcement of interim protection orders made by arbitrators, making orders for the consolidation of arbitration proceedings and the awarding of interest and costs. I will revert to these provisions.

"INTERNATIONAL COMMERCIAL ARBITRATION"

Before going further, I should identify the extent of the application of the Model Law to international arbitration. It applies only to international commercial arbitration. But that nevertheless gives it a very broad application, as the definitions of these words show.

INTERNATIONAL

I first mention the requirement that the arbitration be international. The primary criterion is that the parties to the arbitration agreement have their places of business in different countries. If a party has no place of business, then one considers the location of his habitual residence; and if a party has more than one place of business, then one focuses on the one with the closest relationship to the arbitration agreement. This primary criterion is concerned with places of business.

There are two alternative possibilities. An arbitration will be international if the arbitration is to be conducted in a country different from that of the parties' place of business, or indeed if the subject matter of the arbitration is most closely connected with such other country, or further, if a substantial part of the obligations of the commercial relationship between the parties is to be performed in such other country. Then finally, and interestingly, the Model Law provides that an arbitration will be international if the parties have expressly agreed that the subject matter of their arbitration agreement relates to more than one country. I should say at once that I doubt that parties to a purely domestic dispute could label their agreement international and thereby escape features of local arbitration law thought to be otherwise unattractive.

In summary, then, the necessary international character will emerge from the circumstance that the parties' places of business are in different countries; or the connection, with a country other than that of their businesses, of the subject matter of the arbitration or their commercial obligation, or the fact that the arbitration be carried out there; or finally, the subjective agreement of the parties to the effect that the character of their arbitration is international.

COMMERCIAL

The arbitration must, in addition, be commercial in character. That is a very broad concept. Most international arbitrations will arise out of commercial relationships.

A footnote to the word "commercial" in the Model Law says that the word should be given a wide interpretation, covering matters arising from all relationships of a commercial nature, whether contractual or not. The footnote gives some examples. They show that the concept is very wide, extending, for example, to the carriage of passengers by air.

The footnote was included in the enacting statute in British Colombia. That was not done in Australia. But in view of the licence given by s. 17 to have recourse to extrinsic materials, including working papers, in order to aid one's interpretation of the Model Law, it is difficult to see why one could not resort

orders in respect of interim protection (s. 23). The parties may agree that a tribunal have the power to order consolidation of arbitration proceedings (s. 24), and this is very important in order to avoid inconvenience and expense, the duplication of effort, and the possiblity of conflicting findings in respect of the same subject matter. The parties may agree that their arbitrator have the power to award interest (s. 25), and costs (s. 27).

SELECTION OF PLACE OF ARBITRATION AND APPLICABLE LAW

Thus far I have emphasised the great latitude which the Model Law gives the parties in determining their own procedure. That is consistent with the consensual nature of arbitration. But determining the best procedure may involve daunting responsibility. The parties will, for exaınple, have to determine the place where the arbitration is to occur and the system of law which is to apply.

They will usually prefer to embody their agreement on these matters in their arbitration agreement. It will in most cases be preferable that they agree on such matters before any dispute arises. Considering those matters at that early stage may require a great deal of foresight—what sorts of disputes are likely to arise; which systems of law could be available, and which would be most useful to the parties? These are not necessarily easy questions to answer, in advance as it were.

THE SYSTEM OF LAW

The parties may agree upon the applicable system of law (article 28), as we have seen. The arbitral tribunal must respect that selection.

If the parties fail to designate the applicable law, then the tribunal applies the law determined by the relevant conflict of laws rules. Put briefly, the proper law of the overall contract containing the arbitration agreement will usually apply, or if that has not been specified, then the tribunal determines the applicable law, which will usually be the law of the place where the arbitration takes place.

An issue of some contention is whether parties may agree to be bound, not by an established system of domestic law, but by a loose and undefined collection of international principles, perhaps also including provisions taken from a number of national legal systems. Sir John Donaldson was not prepared to exclude the prospect of parties' effectually submitting to what he called "a common denominator of principles underlying the laws of various nations governing contractual relations "(cf. *Deutsche Schachtbau-und . . . v. National Oil Co* (1987) 3 W.L.R. 1023, 1035). One doubts that there is a so-called lex mercatoria or transnational system. Whatever its content, if it exists, parties seeking predictability and certainty would be unwise to invoke it.

What I emphasise, however, is that the parties have the power to determine the body of law which should apply, and they should do that clearly, in order to avoid subsequent difficulties, especially to avoid what I have described as the surprise intrusion of unattractive features of local legal systems.

It must be appreciated that the Model Law is not a code for the regulation of international commercial arbitration. Not only will the local law bear upon

their arbitration agreement relates to more than one country (article 1(3)(c)). They may agree on the manner of appointment of arbitrators (article 11(2)). They may determine that their arbitration be ad hoc or institutionalised, and on the Rules to govern it (article 2). By article 19, they are "free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". It is up to them to agree upon the law which is to govern the arbitration, and the arbitrator is bound by their choice (article 28(1)). They select the language to be used (article 22(1)), and the place where the arbitration is to be conducted (article 20(1)). One could go on, but this list sufficiently illustrates the extent of the power reserved to the parties to tailor the proceedings to suit their own needs.

As I suggested earlier, a certain lack of procedural flexibility is one feature contributing to disenchantment in many litigants and others who have participated in traditional domestic arbitration.

RESTRICTION ON COURT CONTROL

Complementary to this acknowledgment of a large degree of independence in the parties to determine their own procedure is a stringent restriction on court supervision of the process.

I say at once that the courts are indispensable to the effectiveness of arbitration. All else aside, but for court recognition and enforcement, awards by arbitrators would be ineffectual. The powers exercised by courts with respect to domestic arbitrations, or international arbitrations conducted subject to local arbitration laws, are usefully classified by Sir Michael Kerr as "powers of assistance, powers of intervention, powers of supervision or control, and powers of recognition and enforcement" ("Arbitration and the Courts: The Uncitral Model Law", International Comparative Law Quarterly, vol. 34 (January, 1985) p. 3). The Model Law severely limits the extent of these powers.

Article 5 provides the fundamental limitation, decreeing that "no court shall intervene" except where authorised by the Model Law to do so. When may a court intervene?

The court has power to appoint arbitrators where the agreed mechanism breaks down (article 11). The court may remove an arbitrator, if he is unable to perform his functions, or fails to act without undue delay (article 14). These are relatively mechanical provisions designed to help the parties, and reserving a role to the court in those limited circumstances is necessary.

An arbitrator faced with a jurisdictional challenge may rule on that himself. It is only if he rules upon it as a preliminary question that a dissatisfied party may seek court review, and then only within strict time limits (article 16(3)). But in the meantime, the arbitrator may continue with the proceedings, even to the point of making an award.

The court has a very limited power to set aside an award, under article 34. Importantly, it has no power to review the accuracy of the award in terms of legal principle.

The power of review arises only if, put briefly, the arbitration agreement was

to this footnote, if otherwise inclined to impose some limitation on the broad meaning of "commercial" where used in the Model Law.

LIMITS

The concept of International Commercial Arbitration is therefore correspondingly broad. There may however be some limitations upon what may be arbitrated arising from the applicable system of law.

For example, if the parties were to determine that Australian law should apply, then that would ordinarily preclude the arbitration of certain types of dispute. Disputes concerning bankruptcy or company winding up, matrimonial disputes, and disputes touching the criminal law and things like patentability would be excluded from the scope of arbitration by Australian law. That is because such disputes concern rights not within the free disposition of the parties.

The United States Supreme Court has countenanced the international arbitration of disputes which could not be arbitrated on a domestic basis because of considerations of public policy. An example is the arbitration of anti-trust issues arising out of a contract, ordinarily barred from domestic arbitration, but permitted under international arbitration. The public policy consideration favouring reserving such claims for the courts was outweighed, in the international context, by what the Supreme Court termed "sensitivity to the need of the international commercial system for predictability in the resolution of disputes". The case is *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Incorporated* (1985) 105 S.Ct. 3346, 3355.

I turn now to the aspect of the Model Law central to the thesis I advanced at the outset: enlargement of the power of the parties in dispute to control their process, and strict limitations on the possibility of external interference by local courts. It was those features which, I suggested, may give international arbitration an enhanced attractiveness.

THE PARTIES' POWER TO CONTROL THEIR OWN PROCEEDINGS

It is true to say that the Commercial Arbitration Acts of the States do expand the freedom of arbitrating parties to determine their own procedure. While the Acts lay down certain procedural requirements, these are generally subject to any contrary agreement of the parties. In the ultimate, the parties may even agree that their arbitrator decide by reference to considerations of general justice and fairness.

The extensive treatment given by the Model Law to the parties' own power to designate what should occur indicates even more strongly that the legislature considers party autonomy, as it is termed, to be of more critical importance to the effectiveness of *international* arbitration. To the extent that earlier domestic legislation has not accorded that autonomy, it has, to my mind, sat rather uncomfortably with the essential nature of arbitration as a consensual process.

Let me list briefly some of the areas reserved for particular determination by the parties under the Model Law. As seen already, they may themselves erect the shelter of international arbitration, by agreeing that the subject matter of

in England is unique. There has for many years been an extremely close and co-operative relationship there between the courts and the system of arbitration. Indeed, the English Parliament has even allowed the Judges to act as arbitrators. A sophisticated body of principle has been developed. Since the 1979 Act, there has been little complaint from the users of the arbitration system. There is an ever increasing vitality about London as a centre for international arbitration. English practitioners are understandably reluctant to change things. Why do so, if the system seems to be working so well? Sir Michael Kerr's criticism of the Model Law is of course more profound (cf. "Arbitration and the Courts: the Uncitral Model Law", supra). But I do think that one's assessment of the Model Law must be different from the Australian perspective.

There are two other things I would say in response to this sort of criticism. In the first place, article 18 of the Model Law obliges the arbitral tribunal to treat the parties equally and to give each party a full opportunity of presenting his case. It is bound to the requirements of natural justice. It is also bound to the parties' choice of applicable law. What is absent, as we know, is court supervision. But parties choose arbitrators who they confidently expect will act in accordance with these requirements, and there is usually a reasonable basis for that expectation.

My second point is that we who have been brought up in the court tradition presume if we insist that parties should always be entitled to the legally correct result, no matter that that might be achieved only through multiple appeals or review. I suppose that the parties to international arbitration agreements want what they might term a "just" result. But the circumstances which bear upon what is a just result are many. The desirability of achieving perfect legal accuracy may not predominate. Considerations of speed and finality and broad notions of fairness may be much more important to such parties.

This robust limitation on court review under the Model Law would be greatly encouraging to many participants in international arbitrations. It certainly distinguishes international arbitration from its domestic counterpart here. The local parliaments have not been so courageous (although most lawyers would commend them for that).

THE "OPT-IN" PROVISIONS

I have already mentioned s. 21 of the Act, confirming that parties may elect that the Model Law not apply to their arbitration agreement, and importantly, that if they do not so elect, it will apply. I said earlier that that would ensure that the Model Law would usually apply. I commented on the desirability of the Commonwealth Parliament's having implemented the Model Law without modification, that being important in the interests of international uniformity and predictability.

The Parliament has however included several provisions in Division 3 of the Act on the basis that they apply to an arbitration agreement only if the parties so provide. They are, in brief, as follows. The parties may agree to extend the recognition and enforcement provisions of the Model Law to an arbitrator's

invalid; a party was not given notice of the proceedings or an opportunity otherwise to present his case; the award goes beyond the scope of the submission; the tribunal was not properly constituted; the subject matter of the dispute was not arbitrable under the applicable law; or the award was in conflict with public policy, meaning, for Australia, that it was fraudulent or corrupt, or that a breach of natural justice occurred in connection with it.

One notes that there is here no suggestion of any power to review the legal correctness of the award, even under stringent leave conditions such as with the Commercial Arbitration Acts. By way of aside, may I say that to my mind, one of the disappointing features of the new appeal by leave system is that the circumstances in which leave might be given are not exhaustively stated in the Acts. One must go to cases like *The Nema* to "supplement" the legislation. This might seem a naive complaint, but arbitrating parties would almost certainly prefer their rights to be more plainly defined. They would prefer not to have them ultimately depend on the exercise of a judicial discretion which may go one way or the other. There is no such uncertainty under the Model Law regime.

There are a few ancillary powers which bear mention. The court may assist in the taking of evidence, but only if requested by the arbitrators (article 27). Article 8 provides, importantly, for the court to refer a dispute to arbitration, if there is an agreement to arbitrate, and if court proceedings are nevertheless commenced. The court must do that, if requested to do so, unless the arbitration agreement is "null and void, inoperative or incapable of being performed". In short, the court has no discretion but to uphold the arbitration agreement. A court may grant interim protection measures, if requested to do so (article 9), and that could include, for example, a Mareva injunction. Then finally, there are the important provisions for the enforcement of awards, in articles 35 and 36. The only grounds which could justify a court in refusing to enforce an arbitration award are those referred to earlier with respect to the setting aside of awards—put briefly, incapacity of a party, legal invalidity of the agreement, absence of notice of the proceedings, award beyond the submission, improperly constituted tribunal, award not yet binding, subject matter not arbitrable, or enforcement contrary to public policy. As I have said, that means, for Australia, that the making of the award was tainted by fraud or corruption or a breach of the rules of natural justice.

Although the court may interfere in a large number of instances, the object of the interference is either unequivocally beneficial—as with the appointment or removal of arbitrators, or to meet a request—as with, for example, the taking of evidence; and where the court may pass upon the legitimacy of what has been done, either with respect to jurisdictional questions or the validity of the award, then its power is very strictly limited. There is, as I have stressed, no question of a court's considering the legal accuracy of the arbitrators findings, even by leave.

Traditionalists deplore this. Lord Roskill, for example, has spoken of the risk of "absolute power corrupt(ing) absolutely", and "palm tree justice". Sir Michael Kerr has expressed similar concern. He does however concede that the position

substantive issues. It may also fill in other gaps in the Model Law, such as the absence of a statement of principles for the interpretation of arbitration agreements, definitions of capacity and arbitrability as to application of doctrines like res judicata and so on. (Cf. F. Davidson: "International Commercial Arbitration—The United Kingdom and Uncitral Model Law", Journal of Business Law, November, 1990, p. 491.)

THE PLACE FOR THE ARBITRATION

The parties also, obviously, should themselves agree in advance on where any arbitration is to take place.

Their first consideration will be convenience. How far distant will it be, what language is spoken, and what is the dependability of the local legal profession? More fundamentally important, however, is the quality of the local law, for it is that which will ordinarily apply. Another related consideration will be the local court system, lest its support be needed in the limited circumstances to which I have referred. Other considerations arise—will proper facilities be available for the conduct of the arbitration, and so on.

CONCLUSION

At the beginning of this paper, I said that the turn to ADR reflects dissatisfaction with the speed, expense and inflexibility associated with traditional litigation and arbitration. I noted one peculiarity of the ADR mechanisms—greater control by the parties of their own dispute resolution process, and less interest in the imposition of solutions upon them.

While obviously the international arbitration tribunal does impose a solution, the Model Law certainly emphasises the desirability of the parties' moulding the proceedings to suit their own particular situation. In this licence, the Model Law goes beyond its Australian counterparts in the field of domestic arbitration, especially in limiting so robustly the prospect of court supervision.

If contracting parties give proper attention to these features at the outset, they may establish a process in which the international arbitrator may much more effectively meet their needs. The substantial removal of court supervision will undoubtedly encourage such arbitrators to be more robust in their control of proceedings to avoid delay and unnecessary expense. Lawyers will often would often baulk at this. But I am sure that that robust approach would usually conform with what the parties themselves want.

Opinions differ, but I am also not in the least concerned about a consensually based system of international arbitration in which the court has no residual power to check the legal accuracy of the award.

The new international process will only succeed, however, if parties to international contracts act with robust good sense in determining their procedure, and if arbitrators, for their part, act with robust good sense in conducting the proceedings and in making their awards.