Hard and Soft Law in Arbitration

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Introduction

Challenges to arbitrators in both domestic and international arbitrations are becoming more common. Aggressive counsel representing recalcitrant respondents apparently see their role in advancing their clients' interests to require attempting to destroy an arbitral tribunal by attacking one or more of the tribunal members thus delaying or causing the proceedings to be abandoned.

Challenges are, or can be, mounted on a variety of grounds, but by far the most numerous relate to arbitrator bias – actual or perceived - or other tainting, eg conflict of interest.

The basic concepts of impartiality and independence are accepted as the tests for potential arbitrator conflicts of interest[2] in both international and domestic arbitration.

In essence, independence may be considered as being an absence of improper connections and impartiality related to matters which may give rise to prejudgement.

Legal Environment

Much has been made in Australia of current changes or potential changes to the law governing international and domestic arbitration. Most of the hype by some commentators in support, particularly of the need for change to the domestic arbitration law as being 'critical', simply does not stand up to scrutiny. The theory is apparently that commonality and consistency between the Federal and State Laws are necessary to create an Australian legal regime to attract international arbitrations to Australia.

In arguing the 'need' to have domestic arbitration law consistent with the UNCITRAL Model Law the proponents cited the position in Singapore and Hong Kong as major centres for international arbitration. A distinction must, however, be made that both of these places have a monistic legal system; contra Australia which has a dualist system of commonwealth and state or territorial laws.

Hong Kong has recently adopted a slightly varied version of the UNCITRAL Model Law to govern domestic arbitration but has not, as is the case in NSW, included significant additional sections on consolidation, mediation and confidentiality.

Two aspects mitigate against this argument.

(i) The proponents appear not to have taken into account the provisions of s21 Model Law Covers the Field[3] *which excludes the applicability of domestic arbitration law to any international arbitration to which the Model Law applies (per the Commonwealth Bill). This provision is also mirrored in Part 1.1.3(c) of the New South Wales Act.*

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2 Independence, Impartiality and duty of Disclosure of Arbitrators; Loretta Malintoppi, Oxford Handbook of International Investment Law 789

3 S21 International Arbitration Bill 2010 (Clth) reads as follows:
If the Model Law applies to an international commercial arbitration, the law of a State or Territory does not apply to that arbitration.

If parties to an international arbitration in electing that the rules of an International Arbitral Institute are to govern the arbitration the Model Law does not apply[4] *then the domestic legislation may apply. The parties can expressly elect the application of domestic law.*

(ii) *The presumption essentially in common law countries that by agreeing a situs the parties by implication have agreed that the procedural law of the situs (*lex arbitri*) must apply. This convention is widely accepted as convenient by many in the international arbitration community but is not absolute.*[5]

English law requires every arbitration to have a seat which subjects its procedural rules to the municipal law which is there in force.[6]

Such a presumption is irrational and inaccurate.[7]

Civil law recognises that it is possible for an arbitration to be detached from any national law and subject to a 'transnational law'.[8]

European Civil Code theory does not allow that choice of a place of arbitration, absent any other reference to the applicable procedural law, constitute a choice of procedural law of the named situs.

Modern international arbitration practise gives less importance to the choice of the seat of arbitration in necessarily establishing the governing procedural law.[9]

By Art 28(1) of the UNCITRAL Model Law[10] *party autonomy allows the parties to agree the rules of law to be applied and express agreement by the parties to a procedural law (or to no national law eg* lex mercatoria*) must prevail.*

Thus, by agreeing the procedural law to be applied, whether or not a situs is agreed, removes any uncertainty and settles the Conflict of Laws Rules to be applied in the event of any residual uncertainty.

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4 *Aerospatial Holdings Australia Pty Ltd v Elspan International Ltd* (1992) NSWLR 321

5 See eg *Slovenian company Formerly Yugoslav State enterprise v Agent (Germany)* RIW681 (1985) XXII YBCA 707 (1997) choice of Zurich as a seat may imply choice of law of Canton of Zurich

6 *Bank Mellat v Helliniki Techniki SA* [1984] QB291 at 301.

7 *Compagnie d'Armament Maratime v Compagnie Tunisienne de Navigation* [1971] AC 572, 588 per Lord Morris of Borth y Guest

8 J Paulsson 'Arbitration Unbound: Award detached from the law of its country of origin' (1981) 30 International and Comparative Law Quarterly 358.

9 See ICC Case No 5717 (1988)

10 Art 28(1) Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.'

Some international arbitral institutes have, as a provision, their rules to the effect that

(a) a nominated situs does not settle whether a trial in a matter must be held at that situs[11]

(b) rules of procedure of a national law do not necessarily apply.[12]

In the Commonwealth Act governing international arbitration[13] the UNCITRAL Model Law is incorporated on an opt out basis and the present Bill adopts 2006 amendments to the Model Law.[14]

With the review of the Model Law by UNCITRAL[15] it made both sense and an obligation on Australia to adopt the changes to the Model Law introduced by UNCITRAL.

In 2009 the government introduced into the Parliament of Australia a Bill to amend the law in relation to international arbitration[16] which, by Schedule 2, purported to adopt the amended Model Law.

New Zealand was well ahead of Australia by its adoption in 2006 of the revised version of the UNCITRAL Model Law.[17]

Challenge Of Arbitrators

Purported adoption is used in the context of, for example, the application of Art 12(1) of the Model Law[18] by the use of the words 'real damage of bias' when considering whether 'justifiable doubts' of impartiality or independence exist.

The UNCITRAL Model Law does not have the caveat of 'real damage' and uses only 'justifiable doubts'[19]

In its adoption, New Zealand incorporated some novel provisions adopted in the Australian adoption, for example Art 34(4) of the New Zealand Act dealing with death of a party cf s23H of the Australian Bill. Also in relation to statements of applicable New Zealand public policy[20] and in Australia.[21]

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11 eg ICC Rules or Arbitration Art 14(2), (3)

12 Ibid Art 15(1)

13 International Arbitration Act 1974

14 UNCITRAL Commission 39th Sessional Meeting July 2006

15 Ibid Footnote 13

16 International Arbitration Amendment Bill 2010 (Clth)

17 Arbitration Act 1996 (including Arbitration Amendment Act 2007)

18 (1) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting this arbitration.

19 UNCITRAL Model Law Art 12 – Grounds of Challenge 12(1) and 12(2)
(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
«(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

20 Art 34(6) New Zealand Arbitration Act 1966 (as amended)

21 S36(b)

In the Commercial Arbitration Act 2010 (NSW) at s12 Grounds for Challenge s12(3) reads:

> *An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed to by the parties.*

and s12(6) reads

> *For the purposes of subsection (3), there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.*

effectively replicating the Commonwealth Bill.

Bias – 'Reasonable Apprehension' and 'Real Danger'

Under English law the seminal test for 'reasonable apprehension' of bias is that a fair minded and informed third party observer with knowledge of the material facts would have justifiable doubts that the arbitrator was biased. Justifiable doubts is equated with 'reasonable apprehension' or 'reasonable suspicion'.[22]

An oft cited and an extreme example of bias is a statement made by arbitrator Sir William Norman Raeburn QC in an arbitration between respective owners of a Norwegian and Portuguese ships which collided in the English Channel. The arbitrator commented on the Portuguese party's witnesses

> *'They are not Italians. The Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese. But the other side here are Norwegians, and in my experience the Norwegians are generally a truthful people. In this case I accept the evidence of the master of the Norma.'*[23]

By qualifying the 'reasonable apprehension' test by the 'real danger' test, both the Commonwealth Bill and the NSW Act have apparently raised the bar significantly from the common law test of apprehended bias but have created a degree of uncertainty of application which will only be clarified in future court decisions.

The 'real danger' test arises interalia in common law from a decision of the House of Lords in *Gough*[24] and a later judgement in *Porter & Magill*[25] in which Lord Hope formulated the test as

> *'.. whether a fair minded and informed observer having considered the facts, would conclude there is a real possibility that the tribunal was biased.'*

Whilst there can be little doubt that the use of the term 'real' is unequivocal and identical in meaning in both *Gough* and *Porter & Magill*, a 'possibility' and 'danger', if distinguishable, are still qualified by the term 'real' such that under the recently introduced or proposed arbitration law in Australia the test for arbitrator bias would appear to be of a much higher standard.

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22 *R v Sussex Justices*, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER 233

23 *Re the Owners of the Steamship 'Catalina' and the Owners of the Steamship 'Norma'* [1938] 61 Lloyds Reps 362-363

24 *R v Gough [2000] 1 Lloyds Rep 14 per Lord Goff of Chevely*

25 *Porter & Magill* [2002] 2AC 357

This position was, to some extent, pre-empted by the High Court of Australia in *Webb v The Queen*[26] per Dean J who stated the test as

'Actual (but unconscious) bias based on evidence rather than perceptions of the parties.'

These interpretations, if correct, place arbitrators in a stronger position than they might otherwise be in if challenged under earlier tests of bias or apprehended bias.

A masterly analysis and argument in favour of a 'real danger' test has been advanced in a recent doctorial thesis by Dr S Luttrell of Western Australia.[27]

Important Inclusions in NSW Domestic Act cf Model Law

By s2A of the Commercial Arbitration Act 2010 (NSW) at s2A(1)[28] the legislation purports to rely upon and defer to the UNCITRAL Model Law.

However the Act introduces changes or additions to the provisions of the Model Law which have important consequences on the conduct of an arbitration or of an arbitrator. Without limitation these include the power of the arbitrator to act as a mediator, conciliator or other non-arbitral intermediary.[29] A difficulty arises in that should the parties agree to the arbitrator continuing with the arbitration as provided in s28D, the arbitrator having entered into an agreement with the parties to act as arbitrator other than withdrawal pursuant to s13(3) the arbitrator may have to continue with the arbitration. By

26 [1994] CLR

27 S Luttrel, Bias Challenges in International Commercial Arbitration: Wolters Kluwer 2010

28 International origin and general principles
- (1) Subject to section 1C, in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) to international commercial arbitrations and the observance of good faith.

29 s27D Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary
- (1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement mediation proceedings) if:
  - (a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration), or
  - (b) each party has consented in writing to the arbitrator so acting.
- (2) An arbitrator acting as a mediator:
  - (a) may communicate with the parties collectively or separately, and
  - (b) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide.
- (3) Mediation proceedings in relation to a dispute terminate if:
  - (a) the parties to the dispute agree to terminate the proceedings, or
  - (b) any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings, or
  - (c) the arbitrator terminates the proceedings.
- (4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.
- (5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section.

s27D(5) which reflects in its wording the like provisions of s27(2) of the Uniform Arbitration Acts,[30] in particular the qualification of 'solely', is arguably to be read narrowly and consequently leaves open a basis for challenge for anything done or not done or conduct when acting as a mediator notwithstanding the provisions of s27D(7) relating to confidential information received by the arbitrator during the mediatory process.

Mediation cannot and does not replace arbitration and is no substitute for arbitration.

The Model Law does not provide for mediation.

It is trite to observe that mediation succeeds when both sides agree.

An arbitrator is required to adopt and apply procedures which will withstand legal and ethical scrutiny. In particular, an arbitrator acting as a mediator under the legislative provisions may very well be acting legally but unethically none the less. But it is also possible that other requirements under governing law are breached.

The introduction of a mediation provision in the NSW Act reflects current 'political correctness' in common law jurisdictions and is born, among other things, on a desire to minimize cost and delay in dispute resolution processes. It continues a like (but less complicated) provision in the previous domestic Act.

The differing roles and skills necessary in the practice of arbitration and mediation are unlikely to exist in a single person and the implication that they do by the incorporation of s27D in the NSW Act does not necessarily lead to either cost or time savings or necessarily an appropriate outcome.

Notwithstanding, the extraordinary lengths and procedures relating to mediation incorporated by legislators in the NSW Act, a person appointed as arbitrator should consider carefully whether or not to proceed under this provision, and it is suggested not proceed under this provision.

By s27C Consolidation of Arbitral Proceedings[31] allows, under certain circumstances, the consolidation of arbitrations and imposes obligations upon arbitrators in related proceedings to determine a single party application for consolidation and order future conduct.

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(6) If the parties do not consent under subsection (4A), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.

(7) If confidential information is obtained from a party during mediation proceedings as referred to in subsection (2)(b) and the mediation proceedings terminate, the arbitrator must, before conducting subsequent arbitration proceedings in relation to the dispute, disclose to all other parties to the arbitration proceedings s9 much of the information as the arbitrator considers material to the arbitration proceedings.

(8) In this section, a reference to a mediator includes a reference to a conciliator or other non-arbitral intermediary between parties.

30 Commercial Arbitration Act 1984 (Vic) (as amended);
Commercial Arbitration Act 1985 (NSW);
Commercial Arbitration Act 1985 (NT);
Commercial Arbitration Act 1986 (WA);
Commercial Arbitration Act 1986 (SA);
Commercial Arbitration Act 1986 (Tas);
Commercial Arbitration Act 1986 (ACT).

31 Consolidation of arbitral proceedings

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may apply to the arbitral tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that:

There is no like provision in the Model Law and the consolidation theory has precedent in common law curial proceedings (including the facility to join third parties) and is advanced inter alia on arguments of cost and time savings and the avoidance of conflicting findings.

The contra position recognises and relies on a fundamental concept of arbitration – the autonomy of the parties particularly that arbitration exists only as a result of agreement between the parties to dispute and no others.

The complimentary UNCITRAL Arbitration Rules allow the joining of a third party but only where that party is a signatory to the arbitration agreement.

In international arbitration the non-consensual joining of a third party or an arbitral finding against a party not involved in the arbitral proceedings constitutes a breach of arbitration law and international public policy.

Challenge Procedure

S13[32] of the NSW Act purports to reflect the Challenge Procedure of Art 13 of the Model Law. Consistent with the Model Law concept of its application to international arbitrations (and not domestic arbitrations) where arbitral tribunals of more than one person are the norm[33] s13(3) requires the 'arbitral tribunal' to determine in first instance the challenge.

Where the arbitral tribunal consists of a single person s13(3) gives rise to an obvious fundamental breach of natural justice requiring a challenged arbitrator sitting in his/her own cause and s13(6) permits a challenged arbitrator to proceed to publish a final award. By this provision public policy in Australia appears to permit what would otherwise be unacceptable. Perhaps the drafters misconstrued the common law provision in respect to jurisdiction which requires a person challenged to make a determination which is subject to review for error.

Another contradictory aspect between the Commonwealth Bill and the UNCITRAL Model Law and the NSW domestic act arises in s25(1)(b)[34] which makes continuing with an arbitration in default

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32 Challenge Procedure
 (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to subsection (4).
 (2) Failing such agreement a party who intends to challenge an arbitrator must, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in section 12(3), send a written statement of the reasons for the challenge to the arbitral tribunal.
 (3) Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal must decide on the challenge.
 (4) If a challenge under any procedure agreed on by the parties or under the procedure of subsections (2) and (3) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the Court to decide on the challenge.
 (5) A decision of the Court under subsection (4) that is within the limits of the authority of the Court is final.
 (6) While a request under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator may continue the arbitral proceedings and make an award.

33 cf domestic arbitrations in Australia and New Zealand where arbitrations are ordinarily conducted by single arbitrators

34 Default of a party
 (1) Unless otherwise agreed by the parties, if, without showing sufficient cause:
  (c) The respondent fails to communicate the respondent's statement of defence in accordance with section 23(1) – the arbitral tribunal may continue the proceedings without treating such failure in itself as an admission of the claimant's allegations,

of respondent filing a statement of defence discretionary whilst in the Model Law at Art 25(b)[35] an arbitrator is compelled to proceed with the arbitration subject to certain caveats.

The International Bar Association (IBA) has established guidelines covering a general approach to arbitrator independence, impartiality and bias or apparent bias based on reasonable apprehension. The IBA Guidelines are being progressively more accepted by courts, challenge determining authorities and arbitrators or prospective arbitrators as customary rules or tests to be applied. In some instances, aspects of the IBA Guidelines have been adopted into Municipal Law.[36]

Arbitrator Role Confusion

In international arbitration and increasingly in domestic arbitrations, particularly in Australia, parties appoint as chairs of arbitral tribunals or as sole arbitrators persons who are lawyers (or barristers in a separated profession) who interchange roles as arbitrators in one dispute or counsel in another dispute. Also there is a tendency worldwide, but again in domestic arbitrations, to appoint retired superior court judges as arbitrators.

It is important to recognise that arbitration is not (and should not be) a mirror image of curial proceedings. This is particularly so in international arbitrations. In common law jurisdictions the belief that 'Rules of Court' of the state applicable procedural law which may provide guidance to arbitrators of principles in some circumstances,[37] arbitration and curial litigation are and must be different if arbitration is to survive as a valuable and desirable dispute resolution process.

Given that nearly all arbitrations involve questions of law, the logic of appointing a person knowledgeable in the law is proposed as unarguable. However, in practise this is not universally true.

Where there is an interchange of counsel and arbitrator roles there is a tendency to assess or determine procedural steps or processes from a biased position of 'what would I like if I was acting as counsel' rather than necessarily on the merits consistent with the governing rules (where they exist).

With retired judges, their experience and conduct whilst on the bench sometimes is translated and applied to conduct not acceptable in arbitration.[38]

It is understandable that a person will apply those principles and practices which their training and professional life as a judge or lawyer have established.

However, the 'rules of Court' are rules established in and by courts or statutes which reflect, among other things,

(1) that courts are established by a state to administer justice, municipal law and public policy
(2) courts have upon them other imperatives of efficiency, availability, accessibility and constraints on the public purse.

For lay arbitrators, particularly in domestic disputes, the situation is more difficult.

With arbitrations under the supervision of the courts, an abundance of caution on the part of a lay

35 Art 25(b) – the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.
36 Federal Arbitration Law of United Arab Emirates (2008) Arts 12(1)(c) and (d)
37 eg in relation to adducing of evidence, admission of witness statements and the like
38 eg in *Pimas v Metropolitan Waste Disposal Authority* Full Court of Supreme Court of NSW 1988 ACLR Vol 7/68 a retired judge sitting as arbitrator was removed for misconduct for 'descending' into the arena in a manner which might have been permissible in a judge.

arbitrator may lead to blind following of court procedure to avoid reprimand or removal and it takes a brave (or stupid) arbitrator to act in a manner consistent with delivery of arbitral propriety and a proper outcome, which may, nevertheless, be inconsistent with curial processes.

Arbitrators are bound to decide the matters referred to them by the parties, no more and no less. There is a fundamental requirement upon arbitrators for intellectual integrity.

It is not appropriate, and may give rise to removal of an arbitrator or the voiding of an award, if in the face of evidence which would lead to a particular singular outcome, an arbitrator unsure of the provisions of the applicable law or unable to assess the evidence particularly expert evidence of competing experts, renders a compromise decision without being authorised by the parties.[39]

Arbitrator Selection

In international arbitration by the autonomy of party appointment of a co-arbitrator in arbitral tribunals sometimes gives rise to role confusion and difficulty.

A party may apply differing rationales in selecting the person they appoint as arbitrator. These may include

(a) nationality
(b) expertise in the subject matter of the dispute
(c) past knowledge
(d) belief of preferential treatment

such party appointment may and often does not have knowledge or experience in arbitration and perceives their role as carrying a brief for their appointing party.

To some extent this is permissible and sometimes valuable.[40] But where the appointee's bias and conduct is so obstructive and not reflective of obligations of impartiality such conduct often alienates the other members of the tribunal who themselves may fall into counter bias with resultant prejudice and denial of justice.

The basic principles should apply to any arbitrator conduct and decision making, however and by whomever appointed should be independence, impartiality and neutrality. Additionally to the tests for independence and impartiality referred to elsewhere in this paper which are likely encompassed in the term neutrality, in some jurisdictions and under some rules[41] arbitrator neutrality is not required but these principles are now becoming the exception and with progressive development and adoption of international public law and private law principles are now losing favour.[42]

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39 ie empowered to act as *amiable compositeur*

40 See AA de Fina, The Party Appointed Arbitrator in International Arbitrations – Role and Selection: Arbitration International, Vol 18, No 3

41 See American Arbitration Association/American Bar Association Code of Ethics permitting parties to agree non-neutral arbitrators.
Certain arbitrations under commodity trade arbitration rules where appointed arbitrators act as counsel for their appointing party.

42 See changes to London Maritime Arbitrators Association Terms 1 January 2006 which previously permitted party appointed arbitrators to act as the party's counsel before a referee if the party appointed arbitrators could not in first instance agree.

Confidentiality

Confidentiality has long been argued as a fundamental and desirable difference between arbitration and curial proceedings, in some instances giving rise to a preference for arbitration over curial determination.

Until the landmark case in *Esso Australia Resources v Plowman*[43] decided by the High Court in Australia the belief of the international arbitration community was essentially to the effect that information provided in an arbitration was confidential and the High Court of Australia judgement an aberration.

Many rules of international arbitral institutes impose obligations of confidentiality upon arbitrators.

Both the International Arbitration Amendment bill 2010 (Clth) at s23Dff[44] and the commercial Arbitration Act 2010 (NSW) at s27Eff[45] allow in certain circumstances disclosure of confidential information.

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43 (1995) 183 CLR 10 at 33, Mason CJ

44 23D Circumstances in which confidential information may be disclosed

(1) This section sets out the circumstances in which confidential information in relation to arbitral proceedings may be disclosed by a
  (a) a party to the arbitral proceedings; or
  (b) an arbitral tribunal.

(2) The information may be disclosed with the consent of all of the parties to the arbitral proceedings.

(3) The information may be disclosed to a professional or other adviser of any of the parties to the arbitral proceedings

(4) The information may be disclosed if it is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present the party's case and the disclosure is no more than reasonable for that purpose.

(5) The information may be disclosed if it is necessary for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party and the disclosure is no more than reasonable for that purpose.

(6) The information may be disclosed if it is necessary for the purpose of enforcing an arbitral award and the disclosure is no more than reasonable for that purpose.

(7) The information may be disclosed if it is necessary for the purposes of this Act, or the Model Law as in force under subsection 16(1) of this Act, and the disclosure is no more than reasonable for that purpose.

(8) The information may be disclosed if the disclosure is in accordance with an order made or a subpoena issued by a court.

(9) The information may be disclosed if the disclosure is authorized or required by another relevant law, or required by a competent regulatory body, and the person making the disclosure gives written details of the disclosure including an explanation of reasons for the disclosure to:
  (a) If the person is a party to the arbitral proceedings – the other parties to the proceedings and the arbitral tribunal; and
  (b) If the arbitral tribunal is making the disclosure – all the parties to the proceedings.

(1) In Subsection (9);
  another relevant law means:
  (a) a law of Commonwealth, other than this Act; and
  (b) a law of a State or Territory; and
  (c) a law of a foreign country, or of a part of a foreign country:
    (i) in which a party to the arbitration agreement has its principal place of business; or
    (ii) in which a substantial part of the obligations of the commercial relationship are to be performed; or
    (iii) to which the subject matter of the dispute is most commonly connected.

A significant argument in favour of publication of arbitral awards, particularly those dealing with state rights, is that the outcomes often reflect or perhaps even develop international private or public law enabling adoption in domestic law of principles considered desirable.

The concept of reliance on precedent is a common law concept and the arguments in favour of publication emanate mainly from common law lawyers.

Notwithstanding the general prohibition of disclosure by arbitrators which it is suggested extends to

1. the existence of and parties to an arbitration
2. information disclosed during an arbitration
3. the outcome of an arbitration

it is now common practice for many arbitrators or aspiring arbitrators to include in their CVs a list of arbitrations carried out including the names of the parties.

By the 2007 Amendment Act New Zealand has left no uncertainty as to what constitutes confidential information[46] and prohibits disclosure[47] with certain caveats including a power in the arbitral tribunal to allow disclosure.[48]

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45 Disclosure of confidential information
- (1) The provisions of this section apply in arbitral proceedings unless otherwise agreed by the parties.
- (2) The parties must not disclose confidential information in relation to the arbitral proceedings unless:
  - (a) The disclosure is allowed under section 27F, or
  - (b) The disclosure is allowed under an order made under section 27G and no order is in force under section 27H prohibiting that disclosure, or
  - (c) The disclosure is allowed under an order made under section 27I.
- (3) An arbitral tribunal must not disclose confidential information in relation to the arbitral proceedings unless:
  - (a) the disclosure is allowed under section 27F, or
  - (b) the disclosure is allowed under an order made under section 27G and no order is in force under section 27H prohibiting that disclosure, or
- (c) the disclosure is allowed under an order made under section 27I.

46 S4 Interpretation
- (a) means information that relates to the arbitral proceedings or to an award made in those proceedings; and
- (b) includes –
  - (i) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party:
  - (ii) any evidence (whether documentary or otherwise) supplied to the arbitral tribunal:
  - (iii) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal;
  - (iv) any transcript of oral evidence or submissions given before the arbitral tribunal;
  - (v) any rulings of the arbitral tribunal;
  - (vi) any award of the arbitral tribunal.

47 S14B Arbitration agreements deemed to prohibit disclosure of confidential information
- (1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.

S14C Limits on prohibition on disclosure of confidential information in section 14B

A party or an arbitral tribunal may disclose confidential information 0
- (a) To a professional or other adviser of any of the parties;
  or
- (b) If both of the following matters apply:
  - (i) The disclosure is necessary –
    - (A) to ensure that a party has a full opportunity to present the party's case, as required under article 18 of Schedule 1; or

As with precedent in common law, publication of arbitral awards generally is argued as giving rise to and allowance of reliance in subsequent awards. This may be of some value where there is significant commonality, for example the same substantial law, the same or similar nature of dispute and like facts but this common law theory is not reflected in the other significant legal systems of Civil Code or Arabic or Shari'a codified law.

Cultural Differences

A difficulty facing arbitrators principally in international arbitrations and occasionally in domestic arbitrations –

Australia and New Zealand as western English speaking common law states carry with them a culture which, among other things, assumes a superiority over other legal systems and cultures.

The ascendancy of China and India as manufacturing and financial powerhouses and the growing financial influence of the Arab states means that there will inevitably be a growth of transnational commercial disputes involving not only different legal systems but language and cultural differences.

Arbitrators must be alive and sensitive to these differences which may bring with them attitudes to arbitration which differ substantially from the western concepts.

An advantage of the tripartite tribunal concept is that it can be collectively created culturally neutral even although cultural neutrality does not exist in each of the arbitrators.

Where an arbitral tribunal is composed of a single arbitrator cultural neutrality as opposed to general neutrality (but not instead of) is an aim to be strived for in an arbitrator.

It should be appreciated that to a great extent culture is dictated by religion, and religious values

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(B) for the establishment or protection of a party's legal rights in relation to a third party; or
(C) for the making and prosecution of an application to a court under this Act; and
(ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or
(c) if the disclosure is in accordance with an order made, or a subpoena issued, by a court; or
(d) if both of the following matters apply:
(i) the disclosure is authorized or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and
(ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure);
or
(e) if the disclosure is in accordance with an order made by –
(i) an arbitral tribunal under section 14D; or
(ii) the High Court under section 14E.

48 S14D Arbitral tribunal may allow disclosure of confidential information in certain circumstances
(1) this section applies if –
(a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorized under section 14C(a) to (d); and
(b) at least 1 of the parties agrees to refer that question to the arbitral tribunal concerned.
(2) The arbitral tribunal, after given each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.

and mores may sometimes govern commercial transactions or dictate the law and/or principles to be applied in determining a dispute.[49]

It cannot be assumed that procedures acceptable and promoted as standard in one jurisdiction or legal system can be transposed to apply to another legal system.

Currently with the growth of influence of Arabic States and involvement of those States in commercial relationships with non-Arabic or Islamic entities, the issue of culture has become significant by the appointment of arbitrators (particularly Chairmen of Arbitral Tribunals) who are from western Common law backgrounds.

In an award delivered in 1951 by Lord Asquith of Bishopstone[50] he stated, in circumstances which required the application of the law of Abu Dhabi (which includes mandatorily Shari'a law

> *'But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.'*

This rationale was used by Sir Alfred Buckwill to support the exclusion of Qatari law[51] on the grounds that

> *'This is a cogent reason for saying that such law does not contain a body of legal principles applicable to a modern commercial contract.'*

In 1958 a Tribunal chaired by Georges Sauser-Hall refused to apply Muslim law because the Tribunal was not in a position to interpret the rules of the fiqh and because

> *'Hanabali Islam Law (applicable in Saudi Arabia) contains no precise rule about mining concessions and a fortiori about oil concessions'*.[52]

In all of the above cited cases the Arab party was not successful.

Since the time of those examples and some codified commercial law has been introduced into the Arab States, but that this is o does not limit the application of Shari'a law and a dispute cannot be determined on grounds that Shari'a law is not a national law or that the dictates of the Shari'a include principles which govern aspects of life and behaviour.

It is western arrogance and untenable to argue that the Shari'a is not appropriate to govern modern commercial contracts.

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49 eg Shari'a law may be independent of a Muslim nation state's commercial law, but may nevertheless affect the validity and required conduct in an arbitration – see *Bechtel v Emirate of Dubai* – swearing of witnesses.

50 *Sheikh Abu Dhabi v Petroleum Development Ltd* [1952] ICLQ247

51 *Ruler of Qatar v International Marine Oil Co Ltd* Int'l Law Rep Vol 20 p534

52 *Aramco v Government of Saudi Arabia* (1963) 27 Int'l Law Rep 117

Conclusions

Arbitrations and arbitrators are governed by the provisions of municipal law and in common law countries such as Australia and New Zealand the common law concept of precedent. Arbitration law is both a moveable feast and steel shackles, the obligations and idiosyncrasies of which must be understood and applied by arbitrators, lawyers and legislators.

The hard law is readily identified and applied; it is the soft law of convention, implication or practise which may prove difficult for arbitrators to apply without an understanding of the guiding philosophy or culture.

International Bar Association Guidelines Ethics

1. Non-Waivable Red List

1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.

1.3 The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

1.4 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

2. Waivable Red List

2.1 Relationship of the arbitrator to the dispute

2.1.1 The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

2.2 Arbitrator's direct or indirect interest in the dispute.

2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

2.2.2 A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

2.2.3 The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

2.3 Arbitrator's relationship with the parties or counsel

2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

2.3.2 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.

2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

2.3.7 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.

2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.

2.3.9 A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

3. Orange List

3.1 Previous services for one of the parties or other involvement in the case.

3.1.1 The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.

3.1.2 The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.

3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

3.1.4 The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

3.2 Current services for one of the parties.

3.2.1 The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.

- 3.2.2 A law firm that shares revenues or fees with the arbitrator's law firm renders services to one of the parties or an affiliate of one of the parties before the arbitral tribunal.
- 3.2.3 the arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.

3.3 Relationship between an arbitrator and another arbitrator or counsel.

- 3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.
- 3.3.2 The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers.
- 3.3.3 The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.
- 3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.
- 3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.
- 3.3.6 A close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.
- 3.3.7 The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

3.4 Relationship between arbitrator and party and others involved in the arbitration.

- 3.4.1 The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.
- 3.4.2 The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.
- 3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert, as demonstrated by the fact that the arbitrator and such director, manager, other person, witness or expert regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or organizations.
- 3.4.4 If the arbitrator is a former judge, he or she has within the past three years head a significant case involving one of the parties.

3.5 Other circumstances

- 3.5.1 The arbitrator holds shares, either directly or indirectly, which by reason of number of denomination constitute a material holding in oen of the parties or an affiliate of one of the parties that is publicly listed.
- 3.5.2 The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated whether in a published paper or speech or otherwise.

3.5.3 The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.

3.5.4 The arbitrator is a manger, director or member of the supervisory board, or has a similar controlling influence, in an affiliateof one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.1 Previously expressed legal opinions.

4.1.1 The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).

4.2 Previous services against one party.

4.2.1 The arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the Arbitrator.

4.3 Current services for one of the parties.

4.3.1 A firm in association or in alliance with the arbitrator's law firm, but which does not share fees or other revenues with the arbitrator's law firm, renders services to one of the parties or an affiliate of one of the parties in an unrelated matter.

4.4 Contacts with another arbitrator or with counsel for one of the parties.

4.4.1 The arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization.

4.4.2 The arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel.

4.5 Contacts between the arbitrator and one of the parties.

4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.

4.5.2 The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one or the parties, which is publicly listed.

4.5.3 The arbitrator and a manger, director or member of the supervisory board, or any person having a similar controlling influence, in one of the parties or an affiliate of one of the parties, have worked together as joint experts or in another professional capacity, including as arbitrators in the same case.