Drafting Arbitration Agreements

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1. INTRODUCTION

It is now widely accepted that contractors should make provision for dispute resolution in commercial agreements. By anticipating problems and providing for their resolution the parties are often able to avoid litigation in unwanted fora and are able to provide for a system of dispute resolution which they regard as appropriate and effective. Often that method of dispute resolution will be arbitration, particularly in international agreements.

Arbitration, unlike litigation, derives its existence and form from the arbitration agreement. The arbitration agreement is the foundation of the dispute resolution mechanism which is to be employed. The arbitration agreement determines:-

(a) the nature of the arbitration process including the composition of the arbitral tribunal and the procedure to be employed;
(b) the extent of the obligation to arbitrate and therefore the jurisdiction of the arbitrator;
(c) other matters such as the place of the arbitration and the laws to be applied.

A court has its own established procedure, structure and form. However arbitration is entirely dependent on the agreement of the parties. Their agreement determines the nature and extent of the arbitration. It is important therefore that the parties carefully think about the drafting of an arbitration agreement.

There is an important difference between ad hoc and institutional arbitrations. The later refers to arbitrations under the rules of an established organisation and often involves assistance from the organisation in the form of nomination of arbitrators and supervision of the arbitration. Where the parties choose institutional arbitration they can use or adapt the recommended arbitration clause of the relevant organisation. This incorporates the rules of the organisation which governs the nature of the arbitration and the procedure to be followed. One advantage is that the arbitration agreement can be quite brief because many of the important questions which arise are dealt with in the rules. In contrast where the parties choose ad hoc arbitration the arbitration clause will need to be longer in order to effectively deal with many issues relating to the nature and procedure of the arbitration to be established.

2. FORM AND TERMS OF ARBITRATION AGREEMENTS

(a) Writing

The Commercial Arbitration Act defines "Arbitration Agreement" to mean "an agreement in writing to refer present or future disputes to arbitration".[1]

Thus the agreement must be in writing but the legislation does not expressly require the signature of the parties. This is in contrast to international arbitration laws in force in Australia. Both the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (the "New York Convention") and the *UNCITRAL Model Law on International Commercial Arbitration* ("Model Law") require that an arbitration agreement be in writing and be signed by the parties. However the requirement of writing and signature is rather expansively defined. The Model Law applies to international commercial arbitrations held in Australia, unless it is excluded, and the New York Convention deals with stay of court proceedings on account of an arbitration agreement in certain international agreements and it also provides for the international enforcement of awards.

Thus if there is an international element present it is wise to ensure that the arbitration agreement complies with the requirements of both the New York Convention and the Model Law.

The requirements of the New York Convention are set out in Article II.1 and 2:

> "1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
> 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

The Model Law is a little more expansive and provides in Article 7 as follows:

> "1. 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
> 2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existences of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

(b) Defined Legal Relationship

Both the New York Convention and the Model Law restrict an arbitration agreement to the arbitration of differences or disputes which may arise 'in respect of a defined legal relationship, whether contractual or not'. This relationship

does not appear in the Commercial Arbitration Act. The requirement is usually met in arbitration agreements by referring to the arbitration of disputes or differences arising under or concerning the contract in which the arbitration agreement is included. But this is not always the case. An example is provided by the New Zealand case of *Roose Industries Ltd v. Ready Mix Concrete Ltd.*[2] There an arbitration clause in a contract was in the following terms 'Any dispute which may arise between the parties to this agreement shall be settled by arbitration in accordance with the Arbitration Act 1908 and any subsequent amendments'. The New Zealand Court of Appeal noted that this clause was very wide in terms and was not expressly confined to disputes which arose out of the particular business arrangement. Literally construed it could cover any dispute whatever its character. However the Court was of the opinion that some limitation had to be placed on it and that the clause only applied to claims which were related to the commercial transaction covered by the contract.

Unless read down it would seem that a clause such as that in *Roose Industries Ltd* would not constitute an arbitration agreement within the New York Convention or the Model Law.

(c) Entry of Judgments Clause

It is common, particularly in the United States, for arbitration agreements to contain an Entry of Judgments Clause. The arbitration agreement will contain words to the following effect 'any award may be entered in any Court having jurisdiction'. Such a clause is apparently based on similar wording appearing in section 9 of the Federal Arbitration Act of the United States. The purpose of such a clause is to make it clear that the parties intended the award to be enforceable. Some earlier court decisions in the United States, in the context of domestic arbitrations, refused enforcement of an award because the contract failed to include the entry of judgments provision. However more contemporary cases suggest that this clause is not required and that a necessary intention can be discerned without it.[3]

(d) Exclusion of Appeals

Section 40 of the *Commercial Arbitration Act* permits the parties to agree in writing to exclude appeals from a decision of an arbitrator to a Court on a question of law. Where this is desired the arbitration agreement should contain such an exclusion. Sometimes an exclusion is incorporated into an arbitration agreement by virtue of designated arbitration rules. Thus, for example, article 24 of the International Chamber of Commerce Arbitration Rules provides that the arbitral award shall be final and that the parties shall be deemed to have "waived their right to any form of appeal insofar as such waiver can validly be made." A number of cases suggest that this constitutes an exclusion agreement.[4]

(e) Foreign Law Requirements

An Arbitration Agreement will be governed by foreign law if the parties have expressly designated a foreign law to govern or if the arbitration is to take place

outside Australia. In these circumstances the foreign law should be examined to see whether it imposes any particular requirements with regard to the form or content of an arbitration agreement. Under the New York Convention the invalidity of the arbitration agreement is a ground for refusing recognition or enforcement of the award.

3. SCOPE OF OBLIGATION

(a) Mandatory Obligation

It is wise to draft the arbitration clause in such a way that the obligation to arbitrate is mandatory not directory. Thus the agreement should provide that disputes or differences 'shall be referred to arbitration'. There have been instances where arbitration agreements which provide that disputes 'may be referred to arbitration' have been held to be mandatory. But there is a danger in such terminology that a court may conclude that there is no binding obligation to arbitrate.

There is also some suggestion that an arbitration agreement requires that either party has a right to refer a matter to arbitration and not simply one party alone although the better view would seem to be that an arbitration clause can be unilateral in nature.[5]

(b) Arbitrability and Scope of the Obligation

A distinction has to be drawn between

(1) whether a dispute can, as a matter of law, be the subject of an arbitration; and
(2) whether the arbitration agreement is broad enough to encompass the dispute.

The first question is a question of law concerning the arbitrability of the subject matter. Thus, for example, some legal systems prohibit the arbitration of intellectual property disputes and family law disputes. The second question only arises if the subject matter of the dispute is capable of arbitration. It concerns the determination of whether the parties have agreed to refer the particular dispute to arbitration. This, of course, depends upon whether the parties have concluded an arbitration agreement *and* it also depends on the terms of the agreement. For example if an arbitration agreement provides for arbitration of disputes concerning the interpretation of the agreement it is arguable that a dispute concerning the validity of the agreement does not fall within it.

(c) Width of the Obligation

The types of disputes and claims that can arise in relation to a contract are many and varied. Whether all or only some of these disputes are within the jurisdiction of an arbitrator is dependant on the terminology employed in the arbitration clause. At one end of the spectrum most arbitration agreements would clearly include disputes relating to the interpretation or construction of the contract. However at the other end of the spectrum only a very widely drawn arbitration agreement would include claims that the contract never came into

existence and was void ab initio. There have been many cases in England and Australia construing particular arbitration agreements and determining their width. Issues which have arisen include determining whether arbitration agreements extend to claims that the contract itself has been frustrated, claims for rectification of the contract, related claims on a *quantum meruit* and claims in tort which are related to the contract.[6]

Initially the Court tended to adopt a fairly strict construction of arbitration agreements but they have evinced a more liberal attitude in recent years. A broadly drawn arbitration agreement will now be regarded as including all contractual and closely associated claims. But the terminology must be sufficiently broad to make such a construction possible. For example an agreement to arbitrate disputes arising 'under this agreement' may not include a claim concerning the initial validity of the agreement, a related claim on *quantum meruit* or associated tort claims. However an agreement to arbitrate disputes 'in respect of' the agreement is broader. It is now generally accepted that the broadest terminology is an agreement to arbitrate disputes arising 'in connection with' the agreement. In the recent report of the Commission on International Arbitration of International Chamber of Commerce the Commission observed:-

> "13. Arising *in connection with*': in our view, this phrase signals the broadest possible grant of jurisdiction to the arbitrator, including questions of contract and tort, and should be retained as such without modification. Disputes arising under, or out of, or relating to, or regarding the existence, validity and termination of the contract, must be considered disputes in connection with the contract. The American Arbitration Association, ICSID, and the London Court of International Arbitration, have respectively used in their model clause: 'arising out of or relating to this agreement, or the breach thereof', 'relating to or arising out of this agreement', and arising out of or in connection with this contract, including any question regarding its existence, validity or termination'. The Stockholm Chamber of Commerce Standard Clause contains a similar expression to the ICC Clause. It states: 'Any disputes in connection with this agreement . . .' "
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> A dispute 'arising out' of an agreement is certainly 'arising in connection with' such an agreement while the reverse is not necessarily true, since the in 'connection with' construction is broader.[7]

Below I note some of the more recent cases which examine specific issues of jurisdiction in context of particular arbitration agreements:-

Pre-contractual representations.

In IBM Australia Ltd v National Distribution Services Ltd[8] an arbitration agreement was in the following terms:-

> 'Any controversy or claim arising out of or related to this Agreement or the breach thereof will be settled by arbitration . . .'

One of the parties alleged that certain pre-contractual misrepresentations had induced the party to enter into the contract and that these representations were misleading and deceptive and therefore contravened section 52 of *The Trade Practices Act.* Damages were sought pursuant to section 82 of the Act. It was

held that the arbitration clause was sufficiently wide to include this claim. Clarke JA observed:

> 'The phrases "in relation to" or "related to" are of the widest import and should not, in the absence of compelling reasons to the contrary, be read down: *Fountain v Alexander* (1982) 150 CLR 615 at 629; *Dowell Australia Ltd v Triden Contractors Pty Ltd* [1982] 1 NSWLR 508 at 511 and *Ashville Investments Ltd v Elmer Contractors Ltd.* In its context I would, in the absence of contrary indications in the contract, understand the clause to be sufficiently wide to encompass claims that pre-contractual misrepresentations induced the claiming party to enter the contract.'[9]

Similarly in *Main Electrical Pty Ltd v Civic Pty Ltd*[10] a contractor claimed that before entering into an agreement certain oral representations and warranties were made which induced it to enter into the agreement. Damages were sought pursuant to s.7 of the *Misrepresentation Act* 1971-72 and for breach of the terms of the collateral contract constituted by the warranties and representations and questions. There was an arbitration agreement providing for the arbitration 'of any dispute or difference . . . whether arising under the cancellation of this order or any variation of the said goods or works or otherwise in respect of anything done or purported to be done or omitted to be done or arising in any other manner whatsoever under or by reason of any of the terms and provisions of this order . . .' The Supreme Court of South Australia held that the claim was within the arbitration agreement. In the words of Bray C. J.:

> 'Arbitration clauses and agreements can, of course, be framed in a variety of ways, some wide, some narrow. Some clauses may be too narrow to cover disputes arising in whole or in part outside the four corners of the instrument or the performance of its express provisions, such as claim in respect of collateral contracts (*Hackendorf v West*) or misrepresentation (*Monro v Bognor Urban District Council*), or rectification (*Printing Machinery Co. Ltd v Linotype and Machinery Ltd*). Other clauses have been held wide enough to cover disputes about claims on a *quantum meruit* for the work done or for frustration (*Government of Gibraltar v Kenney*), damages for the wrongful arrest of a ship in consequence of an alleged breach of the contract (*Astra Vencedor S.A. v Mabanaft*), or the existence of an alleged subsequent variation of the contract (*Graham v Seagoe*). It all depends on the wording.
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> I may say that I place no reliance on words "or otherwise" in clause 16. I do not think the disputes with which we are concerned arise under the terms and provisions of the contract or in respect of anything done, purported to be done, or omitted to be done under them. There remains, however, the phrase "by reason of".
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> This phrase, to my mind, implies a relationship of cause and effect between the terms and provisions of the contract and the claim in question, but it is a relationship which may be indirect (see *The Diamond* where damage caused by water used to put out a fire was held to be damage "by reason of" fire) and one which may exist when the cause is only potential or hypothetical (see *Reg v Steel*, where it was held that a statute giving a defendant acquitted of libel the right to recover his costs sustained "by reason of such . . . information" covered his costs incurred previously to the filing of the information). In my opinion the claims in respect of the alleged representation and the alleged collateral contract are claims in respect of something done by reason of the terms and provisions of the order and arise by reason of one or more of those terms and provisions.'[11]

Rectification

In a number of decisions, courts in England and Australia held that claims for rectification of a contract fell outside particular arbitration clauses. In *Printing Machinery Co Ltd v Linotype and Machinery Ltd*[12] the arbitration agreement provided for the reference of 'any dispute difference or question which may at any time arise between all or any of the parties hereto touch on the construction meaning or effect of these presents . . .' This very wide clause was held not to be broad enough to include a question concerning the rectification of the agreement. Similar conclusions were reached in *Monro v Vognor Urban District Council*[13] and *Crane v Hegeman-Harris Co Inc.*[14] One more recent case following this line is *Mir Brothers Developments Pty Ltd v Atlantic Constructions Pty Ltd.*[15] However in the later case the arbitration agreement was not particularly wide and provided for the arbitration of 'all disputes or differences arising out of the contract or concerning the performance or non-performance by either party of his obligations under the contract . . .' Other relatively recent cases have held that claims for rectification did fall within the particular arbitration clauses in question. Thus, for example, in *Drennan v Pickett*[16] there was a particularly wide arbitration agreement which provided for the arbitration of disputes 'as to construction of this contract or as to any matter or thing of whatsoever nature arising under or out of this contract or in any way in connection there-with . . .'. This was held to be broad enough to give the arbitrator jurisdiction to consider an issue of rectification.[17]

Equitable Relief

In the United States it has been held that parties to an arbitration are free to cloth the arbitrator with such powers as they deem proper to confer including authorising the arbitrator to grant equitable relief such as an injunction. These American authorities were cited with approval by the High Court in *Government Insurance Office of New South Wales v Atkinson-Layton,*[18] although the case before the High Court concerned the power to award interest not equitable relief. In *IBM Australia Ltd v National Distribution Services Ltd*[19] Kirby P accepted that the arbitrator could be armed with the authority to give the claimants such relief as would be available to him in a court of law having jurisdiction with respect to that subject matter.

Existence of Contract

There is no doubt that an appropriately worded arbitration agreement will empower an arbitrator to determine whether a contract has been terminated by breach, discharge, frustration or subsequent invalidity. Somewhat more controversial, however, is the question of whether an arbitrator has jurisdiction to determine the initial validity of a contract. The more traditional view is that an arbitrator does not have such jurisdiction. For example Clarke JA in *IBM Australia Ltd v National Distribution Services Ltd*[20] remarked that "an arbitrator is not able to decide, or make a declaration, that the contract containing the submission [to arbitration] is void at *ab initio* for that would be tantamount to deciding that he had jurisdiction at all". This view is in accord with the

dicta of the High Court in *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales*[21]. But there are two recent decisions which suggest that the position may be of Foster J in *Q H Tours Ltd v Ship Design and Management (Aust) Pty Ltd*[22]. This situation clearly applies under the Model Law by virtue of article 16(1).

(d) Trade Practices Claims

A number of recent Australian cases have examined whether Trade Practices issues can be the subject of arbitrations. There are two distinct issues here. The first is whether an arbitration agreement is broad enough to include a trade practices claim. The second issue is whether as a matter of law such claims can be referred to arbitration. In the United States and in New Zealand, courts have taken the view that anti-trust claims can be the subject of arbitration and have concluded that particular arbitration agreements were broad enough to extend to such claims. The leading authorities are the decision of the Supreme Court of the United States in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*[23] and the decision of the High Court of New Zealand in *Attorney-General v Mobil Oil NZ Ltd*[24].

The Australian cases are a little more chequered. In *White Industries v Trammel*[25] the Court held that a claim based on the *Trade Practices Act* could not be the subject of arbitration and had to proceed in the court. It is not clear whether the court was of the view that the arbitration clause was not broad enough or whether it determined that as a matter of law the claim could not be the subject of an arbitration. In *Allergan Pharmaceuticals Inc v Bausch and Lombe Inc*[26] the Federal Court held that claims founded on the *Trade Practices Act* did not fall within the arbitration agreement before the court. A restrictive interpretation of an arbitration agreement was also adopted in *Dodwell and Co (Aust) Pty Ltd v Moss Security Ltd*[27] but a turning point occurred in *IBM Australia Ltd v National Distribution Services Ltd*[28]. There IBM agreed to supply National Distribution with computer hardware and software. Evidently the equipment was not installed in time and National Distribution sought damages for misleading and deceptive conduct under the *Trade Practices Act*. They alleged that IBM, before the making of the agreement, had represented that they had sufficient experience and competent staff to complete the project by the completion date set out in the contract. The contract contained the following arbitration clause:

> '9. *Governing Law and Arbitration*
> This Agreement will be construed in accordance with the governed by the laws of New South Wales. Any controversy or claim arising out of or related to this Agreement or the breach thereof will be settled by arbitration. The arbitration will be held in Sydney, New South Wales and will be conducted in accordance with the provisions of the *Commercial Arbitration Act*, 1984 (as amended). The decision of the arbitrator(s) will be final and binding.'

An arbitrator was appointed to hear the matter but objection was taken that the arbitrator lacked jurisdiction because the claims fell outside the arbitration clause and because the reference to arbitration was invalid under the Australian

Constitution. The Court of Appeal declined to decide the Constitutional issue and its judgment only deals with the construction of the arbitration clause.

IBM contended that the arbitrator did not have jurisdiction for two reasons;

(a) Because the dispute could not properly be described a 'related to this agreement or the breach thereof' within the arbitration clause; and

(b) Because the *Trade Practices Act* provided for an extensive rang of remedies and the parties could not have intended to confer such very extensive powers on the arbitrator.

The President of the Court, Justice Kirby, extensively reviewed earlier authority. A number of early English cases had held that various arbitration clauses were not broad enough to include claim for rectification of a contract. But Kirby P noted that the earlier cases rested on their own facts and that later decisions including the decision of the New Zealand Court in *Attorney-General v Mobil Oil NZ Ltd* had tended to construe arbitration clauses more generously. He concluded that the arbitration clause was broad enough to include the claim based on the *Trade Practices Act.*

The most recent case is *Q H Tours Ltd v Ship Design and Management (Aust) Pty Ltd*[29] where the Court held that a trade practices claim fell within the arbitration agreement before the Court.

(e) Disputes or differences

Most arbitration agreements provide for the reference of 'disputes' to arbitration although some refer to the reference of 'differences'. There is some authority which suggests that the later term is broader than 'disputes'[30]. However Mustill and Boyd[31] say that in practice the words appear to have been used interchangeably.

The High Court has said that a dispute may exist although it may be plain enough that in point of fact it is certain to be resolved against the party raising it [32] but has suggested that the enforcement on an undisputed claim may not be a dispute.[33] It is submitted, however, that non-payment of monies acknowledged to be due may constitute a dispute if the arbitration agreement is sufficiently broad.

(f) All or any

Some arbitration agreements provide for the reference of 'all disputes' to arbitration while others provide that 'any disputes shall be referred to arbitration'. The Commission on International Arbitration of the ICC has observed that 'any' is a broad term and includes one or more disputes relating to the contract. The Commission goes on to say that 'a far fetched argument could be made that "all" does not include "any" and that one could not arbitrate, at one time, less than all disputes arising under the contract. To the best of the working group's knowledge no one has been lead to dispouse this argument . . .'

4. THE DISPUTE RESOLUTION SYSTEM

(a) General

Having determined the form of the arbitration agreement and the scope of the obligation to arbitrate the next matter which should be considered is the nature

of the dispute resolution system to be established. In domestic agreements the parties may simply provide for the reference of dispute to 'arbitration'. It will then be left to the domestic law to determine what arbitration entails, who can be an arbitrator and what the procedure in the arbitration is to be. But in international arbitrations there is a broad range of choice concerning the structure and procedure of an arbitration and it is wise for the parties to specify the dispute resolution system they desire with some particularity. Even where parties designate institutional arbitration and incorporate an established set of arbitration rules they will generally go further and specify particular characteristics of the arbitration tribunal and procedure. Some of the matters which may be addressed are elaborated below.

(b) Place of Arbitration

It is desirable for the parties to specify the situs of the arbitration. This will avoid any future controversy between the parties on this issue. The place of the arbitration should not merely be determined on the basis of convenience. It has a much broader significance. Generally the place of the arbitration will determine the procedural law applicable to the arbitration[34] unless the parties have specified a different procedural law or unless the arbitration is conducted under provisions of an international convention such as ICSID Arbitration under the Washington Convention.

In designating the place of arbitration the parties should have regard to considerations of enforcement of an award. Thus parties may be careful to choose a country that is a party to the New York Convention because many contracting States will only enforce awards under the Convention if made in the territory of a contracting State. Where one of the parties has its business operations in a country that is not a party to the New York Convention it may be preferable to have the arbitration in the Territory of that party to ensure enforceability of the award. But a problem could arise if the award is made in favour of the party who is resident in that non-contracting State. In these circumstances the award, when sought to be enforced in the other party's country, may be met with the argument that it is an award made in non-contracting State.

Another matter to consider in choosing the place of arbitration is the content of the local arbitration laws. It is obviously desirable to choose a country which has hospitable arbitration laws and whose courts will support but not unduly interfere in the arbitration process. The physical convenience of the parties, the ease of access into and out of the country and restrictions (if any) on persons who can appear in the arbitration as legal counsel or otherwise are all relevant matters.

Where the parties have provided for institutional arbitration it is not essential for them to choose the place of the arbitration because the arbitral rules will generally specify how the place of arbitration is to be determined. Thus article 16.1 of the UNCITRAL Arbitration Rules states that the arbitral tribunal shall determine the place of arbitration if the parties have not agreed. Under article 12 of the rules of the International Chamber of Commerce the place of arbitration is fixed by the Court of Arbitration of the ICC unless agreed upon by the parties.

The London Court of International Arbitration Rules provides in article 7.1 that London is to be the place of arbitration unless the parties agree otherwise.

(c) Tribunal

This, of course, is a central matter. The questions to be considered include the following:-

* How many arbitrators?
* How are they to be appointed?
* What qualifications must they have?
* How are vacancies to be filled?

These questions have to be determined not only on the basis of the parties preference but also having regard to applicable laws. Laws may specify qualifications for arbitrators and some legal systems have provisions concerning the number of arbitrators. For example in some countries there must be an odd number of arbitrators.

The arbitral rules, where the parties have designated institutional arbitration, or the provisions of the law applicable to the procedure, will supply many of these details if the parties have failed to specify them in the arbitration agreement.

(d) Procedure

The great advantage of institutional arbitration is that the designated arbitral rules will provide a complete code of procedure. In *ad hoc* arbitrations, unless the parties are content to rely on the provisions of the law applicable to the procedure, they will have to designate their own code of procedure in the arbitration agreement. Among the matters to be considered are the following:-

* Pleadings - type and number?
  - time limits for delivery?
  - amendments?
* Hearings - mandatory or on request?
* Language
* Evidence - how are facts to be proved?
  - are there exclusionary rules?
* Default - can the arbitration proceed?
* Award - are reasons required?
  - time limit?
  - decision by majority?
  - corrections or interpretation possible?
* Costs - principles for awarding?

(e) Governing Law

Virtually all legal systems, and arbitration rules, permit the parties to choose the law governing their contractual relationship. It is important that the parties do so in the arbitration agreement or in a separate contractual provision for

a number or reasons. Firstly it clarifies the position from the outset so that the parties will be clear as to the governing law from the moment the contract is concluded. They can thus look to this law to fill in any gaps in the contract and to interpret the contract. Secondly where the parties do not designate the governing law its determination can be difficult or uncertain. Under the traditional choice of law rule applicable in Australia a contract will be governed by the law most closely connected with the transaction. The determination of this law can be a very difficult and controversial matter[35]. Where the Model Law applies it provides, in article 28(2), that the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

In choosing the governing law the parties should designate a legal system with which they are both familiar. Otherwise there may be provisions in the governing law which come as a surprise and which may adversely affect them. Commonly each party will prefer to have the contract governed by its own law. Of course this can lead to an impasse with one party not agreeing to the designation of the law of the other party. In such circumstances they can choose a 'neutral' third law or they may be able to avail themselves of a provision of an international convention such as the United Nations Convention on Contracts for the International Sale of Goods ('the Vienna Convention').

A question which has arisen is whether the parties, or the arbitrator, can refer substantive issues to a non-national system of law such as transnational Rules founded on commonly accepted legal principles, widely adopted international conventions and established by trade and custom practices. This is a controversial topic and has engendered much debate[36]. Such principles have occasionally been applied in international arbitrations and have received recognition in other countries[37].

Some national legal systems, and the Model Law, permit the arbitrator to decide as amiable compositeur or *ex aequo et bono* if the parties so authorise. This frees the arbitrator from compliance with strict rules of law. It doesn't follow that an arbitrator cannot apply an established law but the arbitrator is not bound to do so. Empowering the arbitrator to decide as amiable compositeur is useful if the contract is brief and contains many gaps or if the contract is of long duration and the circumstances may change during its currency.

5. CONCLUSION

When parties litigate they refer their dispute to an established judicial tribunal with established procedures structures and legal system. Arbitration is fundamentally different. The obligation to arbitrate is dependant on the agreement of the parties. This establishes the width of the obligation or the scope of matters which are required to be referred to arbitration. Further the arbitration agreement will determine the nature of the arbitration tribunal. Unlike a court, the tribunal may be subject to a wide variety of possible compositions, procedures and proceedings. It is clear, therefore, that an arbitration agreement requires careful consideration and drafting.

REFERENCES

[1] Commercial Arbitration Act 1984 (Vic) s.4 (1). The references in this paper are to be legislation in Victoria unless otherwise indicated.
[2] [1974] 2 NZLR 246.
[3] See e.g. Audiv Overseas Motors Inc 418F. Supp 982 (USDC. ED Mich. 1976).
[4] See *CVI NZ Ltd v Badger Chiyoda* [1989] 2NZLR 669; *Arab African Energy Corporation Ltd v Olienprodukten Nederland BV* [1983] 2 Lloyd's Rep. 419 . . . and *Marine Contractors Inc v Shell Petroleum Development Co of Nigeria Ltd* [1984] 2 Lloyd's Rep. 77
[5] See Sharkie and Dorter, *Commercial Arbitration* (Law Book Company 1986) pp. 24-6.
[6] See General E Sharkie and Dorter *Commercial Arbitration* at pp. 22-3.
[7] Final report of the Commission on International Arbitration, International Chamber of Commerce, 21 October 1991 pp. 15-116.
[8] (1991) 22 NSWLR 466.
[9] Id at p. 483.
[10] (1978) 19 SASR 34.
[11] Id at p. 49.
[12] [1912] 1Ch.566.
[13] [1915] 3KB 167.
[14] [1939] A11 ER 68.
[15] [1984] 1BCL80.
[16] [1983] 1 QdR. 445.
[17] See also *Roose Industries v Ready Mix Concrete Ltd* [1974] 2 NZLR 246; *Dowell Australia v Triden Contractors* [1982] 1 NSWLR 6.
[18] (1982) 146 CLR 206 at 246-247.
[19] Supra. See also Commercial Arbitration Act s.24 (power to order specific performance).
[20] (1991) 22 NSWLR 466.
[21] (1982) 149 CLR 337.
[22] (1991) 105 ALR 371. See also *Thirteenth Telfeb Pty Ltd v Dowsett* (1990) V Convr 54 366.
[23] 473 U.S.614 (1984).
[24] 1989 [2NZLR 649]
[25] (1983) 51 ALR 779.
[26] (1985) ATPR 40-636.
[27] Unreported, Federal Court of Australia, 11 April 1990.
[28] (1991) 22 NSWLR 466.
[29] See Supra
[30] See *F & G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1Lloyds Rep. 53 at 60.
[31] Mustill and Boyd *Commercial Arbitration* (2nd ed 1990) at pp. 128-9.
[32] *Plucis v Fryer* (1967) 126 CLR 17 at 27.
[33] Id at p. 27.
[34] See Sykes and Pryles, *Australian Private International Law* (3rd Edition 1991) at pp. 149-151.
[35] See Sykes and Pryles, op cited pp. 606-611.
[36] See Mustill 'The New Lex Mercatoria; the First Twenty-Five Years' (1988) 4 Arbitration International 86.
[37] *DST v R'as al-Khamiah National Oil Company* [1987] 3 WLR 1023.