

THE ROLE OF COURTS IN ARBITRATION PROCEEDINGS

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by

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The scope of this paper

- 1 Other speakers have already addressed, or will address, the following aspects of the role of courts in arbitration proceedings:
 - a. Challenging the arbitrator and arbitral jurisdiction: only one bite? *Res Judicata?*
 - b. Interim measures of protection
 - c. Recourse against and enforcement of awards.
- 2 This paper is, therefore, limited to considering the remaining aspects of the role of courts in arbitration proceedings.

The starting point

- 3 The starting point for any discussion of the role of courts in arbitration proceedings under the UNCITRAL Model Law on International Commercial Arbitration (“MAL”) is article 5 of the Model Law. This reads as follows:

In matters governed by this Law, no court shall intervene except where so provided in this Law.
- 4 The intention of the article is quite clear. As the New Zealand Law Commission put it, in its Report No 20 “*Arbitration*”¹ at paragraph 293:

¹ NZLC R20

Article 5 is critical to the structure of the Model Law ... It limits the scope for judicial intervention to the situations expressly contemplated under later articles in relation to “matters governed by” the Model Law.

- 5 Two questions have to be considered in relation to this article:
- a. What matters are governed by the MAL? and
 - b. What provisions are made in the MAL for court intervention?
- 6 The matters governed by the MAL fall, I suggest, into two categories:
- a. Provisions defining the arbitrations to which the MAL applies (“Substantive Provisions”); and
 - b. Provisions governing the procedure in arbitrations to which the MAL applies (“Procedural Provisions”).
- 7 The sole Substantive Provision is article 1, which reads as follows:

*Article 1. Scope of Application**

- (1) *This Law applies to international commercial** arbitration, subject to any agreement in force between this State and any other State or States.*
- (2) *The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.*
- (3) *An arbitration is international if:*
 - (a) *the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or*
 - (b) *one of the following places is situated outside the State in which the parties have their places of business:*
 - (i) *the place of arbitration if determined in, or pursuant to, the arbitration agreement ;*
 - (ii) *any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or*
 - (c) *the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.*
- (4) *For the purposes of paragraph (3) of this article:*

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this law.

* Article headings are for reference purposes only and are not to be used for purposes of interpretation.

** The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

8 This provision contains the following elements:

- a. The requirement that the arbitration be an “*international*” arbitration, as defined in paragraphs (3) and (4) of the article;
- b. The requirement that the arbitration be a “*commercial*” arbitration, a consideration to which the second note to the article is relevant;
- c. The provision (in Article 1(2)) that the provisions of the Law, other than articles 8, 9, 35 and 36 “*apply only if the place of arbitration is in the country of this State*”.

The application of the MAL to a particular arbitration is thus dependent upon the nature of the arbitration and the location of the place of arbitration.

9 Professor Pryles has dealt with the concepts of “*internationality*” and “*commerciality*” in a paper presented earlier today. I therefore propose to say nothing more about either of those concepts.

- 10 The importance of the location of the place of arbitration is that, unless the place of arbitration is within a particular state, the courts of that state may only intervene in the circumstances described in articles 8, 9, 35 and 36 of the MAL, ie in the articles providing for the court to refer a matter to arbitration, to grant interim measures of protection, to set aside an award, and to refuse to recognise or enforce an award. To put the matter the other way round, it is only the courts of the jurisdiction which is the place of arbitration that may exercise the powers conferred upon the courts by provisions of the MAL other than those in articles 8, 9, 35 and 36.
- 11 How, then, is the place of arbitration to be determined?
- 12 Article 20(1) provides for the place of arbitration to be agreed by the parties, failing which it is to be determined by the arbitral tribunal, *“having regard to the circumstances of the case, including the convenience of the parties”*.
- 13 If the parties have agreed on the place of arbitration or it has been determined by the tribunal then, for the purpose of the articles considered in this paper the court must act on the basis of that agreement or determination. If, however, neither of those events has occurred, it will be necessary for a court which is asked to exercise any power other than those conferred by articles 8, 9, 35 and 36 of the MAL to determine, for the purpose of the application to it, whether the place of arbitration is within the jurisdiction of that court.
- 14 How is the court to do this? In most national legislation no guidance is given on this point. Section 3 of the English Arbitration Act 1996 provides that, in the absence of agreement or determination by an arbitral institution or by the tribunal, the place of arbitration is to be determined *“having regard to the parties’ agreement and all the relevant circumstances”*, wording very similar to that used by the MAL in relation to the determination of the point by the tribunal. Essentially, the court will identify the jurisdiction with which the

arbitration has the closest connection². This will be the approach in most jurisdictions, even in the absence of statutory provision.

- 15 The MAL provides for court intervention in the following circumstances:
- a. Where an action is brought in a matter which is the subject of an arbitration agreement (article 8);
 - b. Where a party to an arbitration agreement requests from a court an interim measure of protection (article 9);
 - c. Where a court is requested to appoint an arbitrator (article 11);
 - d. Where a court is asked to decide a challenge to an arbitrator (article 13);
 - e. Where a party requests a court to decide on the termination of the mandate of an arbitrator (article 14);
 - f. Where a party requests a court to decide on the jurisdiction of the arbitral tribunal (article 16(3));
 - g. Where the arbitral tribunal, or a party with the approval of the arbitral tribunal, requests from a competent court assistance in taking evidence (article 27);
 - h. Where a party applies to a court to set aside an arbitral award (article 34);
 - i. Where a party seeks recognition or enforcement of an arbitral award (articles 35 and 36).

16 I consider the Procedural Provisions in articles 8, 11, 14, 16(3) and 27 in the following sections of this paper.

17 As already noted, the Procedural Provisions contained in articles 9, 13, 34, 35 and 36 are the subject of other papers in this conference

Intervention under Article 8 of the MAL

18 Article 8(1) of the MAL reads as follows:

² For an example of the application of s 3 of the English Act see *Dubai Islamic Bank PJSC v Paymantech Merchant Services Inc* [2001] 1 Lloyd's Rep 65

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

- 19 There are four elements to this provision:
- a. There must be an arbitration agreement before the court can intervene;
 - b. The matter in issue before the court must be a matter coming within the arbitration agreement;
 - c. The court's intervention must be requested "*not later than when submitting [the party's] first statement on the substance of the dispute*"; and
 - d. The agreement must not be "*null and void, inoperative or incapable of being performed*".
- 20 The term "*arbitration agreement*" is defined in article 7(1) of the MAL as :
- ... an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not ...*
- 21 In order for an arbitration agreement to apply, the matter in issue must be a matter coming within the arbitration agreement. In order to decide whether the matter in issue does come within the arbitration agreement it is necessary to determine the nature of the dispute, the scope of the arbitration agreement, and whether the parties to the dispute are parties to the arbitration agreement.
- 22 What approach should a court adopt when called upon to make an order under article 8 of the MAL referring a matter to arbitration? Is it necessary for the court to be satisfied of the matters identified in the last two paragraphs of this paper to the same level of satisfaction as an arbitral tribunal would have to be satisfied before it exercised its jurisdiction? The answer of the courts in British Columbia and Hong Kong, at least, is that the same high standard of proof of these matters is not required by the court, on the basis that the

primary responsibility for determining issues of jurisdiction under the MAL is the arbitral tribunal's and courts should not assume that responsibility to the exclusion of the tribunal³. In *Gulf Canada Resources v Arochem International Ltd*⁴ the British Columbia Court of Appeal spoke of requiring a clear case that the matter in issue in the proceeding before the court was not the subject matter of an arbitration agreement before it would refuse to grant a stay. In *Nanhai West Shipping Co v Hong Kong United Dockyards Ltd*⁵ the Hong Kong High Court spoke of requiring only a prima facie case of the existence of an applicable agreement before the court would grant a stay. The English courts, in interpreting s 9 of the English Arbitration Act (1996) (which is the equivalent of article 8(1) of the MAL), do not give the same primacy to the role of the arbitral tribunal, approaching the matter on a case by case basis having regard to “*all the circumstances ... the dominant matters being the interests of the parties and the avoidance of unnecessary delay or expense.*”⁶

- 23 The timing requirement of article 8 of the MAL is an aspect of the article which has been amended in various jurisdictions on the MAL's incorporation into the domestic law of those jurisdictions.
- 24 Examples of amendment of the timing requirements of article 8 are found in the Arbitration Acts of the various Provinces of Canada. In British Columbia, for example, the legislation requires that the application be made “*before delivery of any pleadings or taking any other step in the proceedings*” whereas in the other Common Law jurisdictions in Canada the language of the Model Law is adopted without amendment and in Quebec, the sole Civil Law jurisdiction in Canada, the application is required to be made before the action

³ *Gulf Canada Resources Ltd v Arochem International Ltd* (1992) 66 BCLR (2^d) 113, 43 CPR (3^d) 390; *The City of George v AL Sims & Sons Ltd* (1995) 9 BCLR (3^d) 368, [1995] 9 WWR 503, 61BCAC 254, 23 CLR (2^d) 253, CLOUT; *Nanhai West Shipping Co v Hong Kong United Dockyards Ltd* [1996] 2 HKC 639.

⁴ (1992) 66 BCLR (2^d) 113, 43 CPR (3^d) 390

⁵ [1996] 2HKC 639. See also *Private Company “Triple V” Inc v Star (Universal) Co Ltd* [1995] 3 HKC 129 (CA), CLOUT, a case on article 11 of the MAL

⁶ Harris, Planterose & Tecks: *The Arbitration Act 1996 A Commentary* (3rd ed, 2003) paragraph 9D. See the cases of *Birse Construction Ltd v St David Ltd* [1999] BLR 194 and *Ahmad Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 (CA) referred to in that paragraph. It is interesting that in the latter case one of the judges (Waller J) envisaged the use of the court's inherent jurisdiction to stay, on a lower standard of proof, notwithstanding the presence in the English Act (in s 1(c)) of a provision in the same terms as article 5 (see paragraph 3 of this paper).

has been “*inscribed on the roll*”, which is a much later stage in the proceeding than applies in any of the other Canadian Provinces.

25 Amendments with respect to the timing requirement for an application under article 8 are designed to assimilate practice under the MAL, as adopted in particular jurisdictions, to the prior practice in those jurisdictions with regard to the timing of such applications.

26 There remain for consideration the concluding words of article 8(1) of the MAL:

... unless [the court] finds that the agreement is null and void, inoperative or incapable of being performed.

and, in the case of the New Zealand Arbitration Act 1996, what have become known as the “added words”.

27 It is impossible to define the scope of the terms “*null and void*” or “*inoperative*”, or “*incapable of being performed*” with any precision; and courts sometimes describe an arbitration agreement by one of these terms when one might think that another of the terms was more appropriate.

28 Broadly speaking, the three terms may be differentiated in the following way:

- a. An arbitration agreement is “*null and void*” if, by reason, for example, of the subject matter not being arbitrable or the provisions of some statute having been breached, the agreement has no force and effect *ab initio*⁷;
- b. An arbitration agreement is “*inoperative*” when it is spent or when a statutory precondition to arbitration has not been met⁸;

⁷ Examples of an arbitration agreement being held “*null and void*” on the ground that the dispute referred to arbitration was not arbitrable according to the relevant law are *Cogeco SpA Piersanti* (1979) *Yearbook Commercial Arbitration* VI pp 229-230 – Italy Case 37 (labour dispute) and *Coveme SpA v CFI* (1987) *Yearbook Commercial Arbitration* XVII pp 534-538 – Italy Case 191 (breach of European Community law).

⁸ In *Marnell Carrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608, the High Court of New Zealand held that the arbitration agreement was “*inoperative*” because it was a consumer arbitration agreement and the requirements of s 11(1) of the Act had not been satisfied. Failure to comply with a contractual requirement of, for example, reference of the dispute to an expert or to mediation may not have this effect: *Westco Airconditioning Ltd v Sui Chong Construction & Engineering Co Ltd* 13(3) *International Arbitration Report* F-I (March 1998) High Court of Hong

c. An arbitration agreement is “*incapable of being performed*” when, for example, a dispute has been referred to arbitration in accordance with the rules of an institution which has never existed or no longer exists and to which there is no successor institution.

29 The New Zealand Arbitration Act 1996, has added words to article 8(1) of the MAL. Article 8(1), as amended in the New Zealand Act, reads as follows:

A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party’s first statement of the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred .

30 The rationale for the addition of the ground for refusal of the stay that “*there is not in fact any dispute between the parties with regard to the matters agreed to be referred*” is contained in paragraphs 308-309 of the New Zealand Law Commission Report No 20 *Arbitration*⁹:

308 *The proposed addition at the end of article 8(1) may be explained by a passage in the Mustill Committee report:*

Section 1 of the Arbitration Act 1975 has a ground for refusing a stay which is not expressed in the New York Convention, namely “that there is not in fact any dispute between the parties with regard to the matter agreed to be referred”. This is of great value in disposing of applications for a stay by a defendant with no arguable defence. ((1990) 6 Arbitration International at 53)

The phrase makes explicit in the provision the element of “dispute” which is already included in article 7(1) when read with s4. The same reasoning underlies the recommendation in the Alberta ILRR report that a court be empowered to refuse to stay an action if the case is a proper one for a default or summary judgment”

309 *In the course of our consultative activity, we received a number of suggestions that the efficiency of summary judgment procedure as it has developed*

Kong SAR, Court of First Instance. An arbitration agreement might be rendered “*inoperative*” by settlement of the dispute: *Shanghai Foreign Trade Corporation v Sigma Metallurgical Co. Pty. Ltd* 11 (8) *International Arbitration Report* (August 1996), CLOUT (Supreme Court of NSW, Commercial Division). In *Jean Charbonneau v Les Industries AC Davie Inc., et al* [1989] RJQ 1255, CLOUT (Superior Court Quebec) the court held an arbitration agreement was “*inoperative*” because it provided for one of the parties to act as the arbitrator. It is arguable that this is a matter affecting the validity of the agreement rather than its operability.

⁹ NZLC R20

under the High Court Rules should not be lost by reason of any implication that a dispute where there is no defence must be arbitrated under an arbitration agreement. We agree. Although it may be argued that if there is no dispute, then there is no “matter which is the subject of an arbitration agreement” within the meaning of article 8(1) it seems useful to spell out that the absence of any dispute is a ground for refusal to stay.

31 The, to other than New Zealanders, somewhat cryptic reference in paragraph 309 of the Report to “*article 7(1) when read with s4*” is clarified if I note that in the New Zealand Act the contents of article 7(1) of the MAL are distributed between an amended article 7(1), which simply refers to “[*an*] *arbitration agreement*” without including the defining words which follow in the MAL, and s 4, which is the definitions section of the Act.

32 The New Zealand Law Commission declined to revisit the wisdom of the “added words” in article 8 in its Report No 83 *Improving the Arbitration Act 1996*¹⁰, stating (in paragraph 247 of the report):

The efficacy of the summary judgment procedure is in issue. Clearly the Commission, in 1991, made its recommendation after receiving submissions which led it to believe that the “added words” were necessary. We are not prepared to reject that view without undertaking further public consultation. It is a matter which submitters will be at liberty to raise with the Select Committee if a Bill is introduced into the House of Representatives to give effect to recommendations made in this report.

33 The potential for a court to decline to refer a matter to arbitration, on the ground that there is no dispute, even in the absence of “added words” such as exist in the New Zealand Act is illustrated in a number of cases. A brief reference to two will suffice.

- a. In *Methanex New Zealand Ltd v Fontaine Navigation SA*¹¹, a shipment of methanol from British Columbia was contaminated on arrival in Japan. The Federal Court of Canada refused an application for a stay of proceedings, on the ground that there was no dispute in

¹⁰ NZLC R83

¹¹ [1998] 2 FC 583, (1998) 142 FTR 81, CLOUT

existence between the parties since the defendants had never denied responsibility for contamination of the cargo.

- b. In *Joong and Shipping Co Ltd v Choi Chong-sick*¹² the High Court of Hong Kong refused to grant a stay of proceedings because the defendant had admitted the plaintiff's claim for freight and demurrage unequivocally both as to liability and quantum.

34 This does not, however, mean that the “added words” in the New Zealand version of article 8 are otiose. In deciding whether the matters before the court are “*the subject of an arbitration agreement*” the court has regard to whether there is a dispute and not to the merits of that dispute¹³. The inclusion of the “added words” in the article permits the New Zealand Court to consider whether there is an arguable basis for the dispute which exists. This was recognised in *Rayonier MDF New Zealand Ltd v Metso Panelboard Ltd*.¹⁴

35 There is a divergence of view between members of the High Court of New Zealand as to the test to be applied in deciding whether there is “*in fact any dispute between the party with regard to the matters agreed*”. In *Fletcher/Brown Joint Venture v Kiwi Dairies Ltd*¹⁵ I held that the test is “*whether the party disputing liability is bona fide but whether it has arguable grounds for disputing liability*”. In *Natural Gas Corporation of New Zealand Ltd v Bay of Plenty Electricity Ltd*¹⁶ Master Thomson took the same approach. However, in two subsequent decisions¹⁷ he resiled from that position and adopted a lesser test of whether there was in fact “*anything disputable*”. The Court of Appeal has not considered the issue yet.

¹² Reported only in CLOUT

¹³ *Tai Hing Cotton Mill Ltd v Glencore Grain Rotterdam BV* [1996] 1 HKC 363 (CA), where the Hong Kong Court of Appeal said: “*the Court is not concerned with investigating whether the defendant has an arguable basis for disputing the claim. If a claim is made against him in a matter which is the subject of an arbitration agreement and he does not admit the claim then there is a dispute within the meaning of the Article.*”

¹⁴ High Court, Auckland, CIV2002-404-001747, CP256-02, 27/5/03, Master Faire

¹⁵ High Court, New Plymouth, CP 7/98, 27/5/98

¹⁶ High Court, Wellington, CP 179/99, 22/12/99

¹⁷ *Todd Energy Ltd v Kiwi Power (1995) Ltd* High Court, Wellington, CP 46/01, 29/10/01 and *Alstom New Zealand Ltd v Contact Energy Ltd* High Court, Wellington, CP 160/01, 12/11/01

Intervention under Article 11 of the MAL

36 Article 11 of the MAL provides for the intervention of the courts to secure the appointment of arbitrators.

37 The Article reads as follows:

- (1) *No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*
- (2) *The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.*
- (3) *Failing such agreement ,*
 - (a) *in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator: if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;*
 - (b) *in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6;*
- (4) *Where, under an appointment procedure agreed upon by the parties,*
 - (a) *a party fails to act as required under such procedure. or*
 - (b) *the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or*
 - (c) *a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement of the appointment procedure provides other means for securing the appointment.*
- (5) *A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.*

- 38 Alvarez, Kaplan and Rivkin: *Model Law Decisions. Cases Applying the UNCITRAL Model Law on International Commercial Arbitration* (1985-2001) report the case of *Nippon Steel Corporation et al v Quintette Coal Ltd*, an unreported decision of the British Columbia Supreme Court, in which that court, in a dispute between a Japanese company and a Canadian company in which the two party appointed arbitrators, both Canadians, had been unable to agree on the third arbitrator, appointed the retiring Chief Justice of British Columbia as the third arbitrator, subject to his acceptance. The authors note that the British Columbia International Commercial Arbitration Act was amended, subsequent to this decision, to provide that the Chief Justice should not appoint a sole or third arbitrator who was of the same nationality of any of the parties without the prior agreement of the parties.
- 39 The same issue as to the approach to be adopted by the Court arises in relation to this article as in relation to article 8 (see paragraph 22 above). In *Private Company “Triple V” Inc v Star (Universal) Co Ltd*¹⁸ the Court of Appeal of Hong Kong held that all that was necessary was a prima facie case that there was a dispute. In contrast, in the unreported decision of *Sinochem International Oil (London) Co Ltd v Fortune Oil Ltd*¹⁹ the English High Court clearly envisaged a full scale enquiry in appropriate cases into the issue of whether there was an agreement.

Intervention under article 14 of the MAL

- 40 Article 14 of the MAL provides for intervention by the court to terminate the mandate of an arbitrator who fails or is unable to perform his functions.
- 41 The article reads as follows:

(1) *If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates*

¹⁸ [1995] 3HKC 129 (CA)

¹⁹ [1999] EWHC Comm 204

if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) *If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).*

42 Lew, Mistelis & Kröll: *Comparative International Commercial Arbitration* comment as follows on inability to perform the arbitrator's function²⁰:

Inability to perform his functions may arise if the arbitrator is seriously ill or dies or perhaps where due to political controls an arbitrator is physically and legally prevented from performing

and give as an example of legal prevention the issuing of an anti-suit injunction²¹.

43 Alvarez, Kaplan and Rivkin: *Model Law Decisions* note the unreported Canadian decision of *D Frampton & Co Ltd v Sylvio Thibeault & Anor* in which one of the three arbitrators had declined to file his opinion in the mistaken belief that his mandate had been terminated because the defendants, who had nominated him, had failed to pay the \$5,000 deposit requested on account of fees. The Federal Court of Canada, Trial Division, held that article 14(1) did not apply in those circumstances.

Intervention under article 16(3) of the MAL

44 Article 16(3) of the MAL reads as follows:

The arbitral tribunal may rule on a plea referred to in paragraph (2) [ie a plea that the arbitral tribunal does not have jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the court to decide the matter, which decision shall be subject to no

²⁰ Paragraph 13-49

²¹ See footnote 57 to that paragraph

appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

45 In ***Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd***²² the High Court of New Zealand held :

- a. that “*Article 16 ... makes no mention of the form in which jurisdictional matters must come before the Tribunal for its provisions to apply. The provisions of article 16(3) are enlivened simply by the raising of a jurisdictional issue which the arbitrator has ruled upon*”²³
- b. that the proper approach of the court to an application under article 16(3) “*is to reconsider the issue of jurisdiction de novo since the procedure is not by way of appeal, and since the issue before me is the threshold issue of jurisdiction*”²⁴.

Intervention under article 27 of the MAL

46 Article 27 reads as follows:

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence .

47 In the New Zealand legislation a further paragraph has been added to the article, setting out the powers of the High Court and District Courts in this regard. This reads as follows:

- (2) *For the purposes of paragraph (1) –*
 - (a) *The High Court may make an order of subpoena or a District Court may issue a witness summons to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents :*
 - (b) *The High Court or a District Court may order any witness to submit to examination on oath or affirmation before the arbitral tribunal, or*

²² High Court, Auckland, CIV 2004-404-4488, 26/10/04, Winkelmann J

²³ Ibid at paragraph 48

²⁴ Ibid at paragraph 56

before an officer of the court, or any other person for the use of the arbitral tribunal :

- (c) *The High Court or a District Court shall have for the purpose of the arbitral proceedings, the same power as it has for the purpose of proceedings before that court to make an order for-*
 - (i) *the discovery of documents and interrogatories;*
 - (ii) *the issue of a commission or request for the taking of evidence out of the jurisdiction;*
 - (iii) *the detention, preservation, or inspection of any property or thing which is in issue in the arbitral proceedings and authorising for any of those purposes any person to enter upon any land or building in the possession of a party, or authorising any sample to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence*

48 Lew, Mistelis & Kröll: *Comparative International Commercial Arbitration* comment²⁵ in relation to this article:

Since such assistance in taking evidence clearly belongs to the first category of supportive measures [ie the ordering of purely procedural steps which cannot be ordered or enforced by the arbitrators], courts have in general been willing to make use of their powers to aid arbitration

49 In *Delphi Petroleum Inc v Derin Shipping and Trading Ltd*²⁶, the Federal Court of Canada, Trial Division, held that it had jurisdiction to entertain a request to compel a third party to give evidence which could subsequently be tabled at an arbitration. The court held that MAL article 9 gave it that jurisdiction but also took guidance from MAL article 27.

Conclusion

50 This paper is one of two presented under the heading “*Balance of Powers: party autonomy and court intervention*”.

²⁵ Paragraph 15-44

²⁶ (1993) 73 FTR 241, 24 Admin. LR (2d) 1994, CLOUT

- 51 It is clear that, viewed in that context, the articles that I have been discussing (articles 8, 11, 14, 16(3) and 27) fall into three distinct groups:
- a. Articles 8 and 11;
 - b. Article 16(3); and
 - c. Articles 14 and 27.
- 52 Articles 8 and 11 both involve the intervention of the court in relation to matters of jurisdiction when the tribunal has not yet decided those matters.
- 53 Article 16(3) involves the intervention of the courts in relation to matters of jurisdiction but after the tribunal has decided those matters.
- 54 Articles 14 and 27 do not raise matters of jurisdiction but are, rather, cases of intervention in support of the arbitral process.
- 55 In the first group of interventions (those under articles 8 and 11), there is a tension between party autonomy and court intervention. What approach should the court adopt to issues of jurisdiction in those circumstances? Should it adopt the approach that the tribunal has the primary responsibility, so that the courts should only intervene in the clearest cases, or should the courts approach the matter without a predisposition one way or the other and decide on a case by case basis? I have discussed this issue in paragraphs 22 and 39 of this paper.
- 56 In the case of intervention under article 16(3) of the Mal, however, this tension does not exist. The tribunal has already decided the issue of jurisdiction. The party against whom the decision has gone is dissatisfied and seeks a ruling from the court. The court clearly has to make a decision on a full consideration of the facts, because its decision will be final.
- 57 Interventions under articles 14 and 27 of the MAL do not raise any of these issues.

58 It therefore follows that it is only in relation to intervention under articles

8 and 11 that potential difficulties arise regarding the balance of powers between party autonomy and court intervention. The two views considered in this paper, while different, will generally, I suggest, not lead to different results.

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