

“The importance of the seat of an arbitration under the new uniform commercial arbitration legislation in Australia”¹

by

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The emergence of a global system of international commercial arbitration has been accompanied by the development of the concept of the seat or legal place of an international arbitration². The parties’ choice of the seat for their arbitration has very significant consequences for an international commercial arbitration. However the adoption of the Model Law including the concept of the seat, in the context of domestic arbitration legislation will produce, and has in fact produced, significant, albeit unintended, adverse consequences.

1 The globalisation of trade since the middle of the last century has seen the international commercial arbitration become the system of choice to resolve any resulting cross border disputes. This has been mainly the result of the success of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which was made in New York in 1958.

2 This period from the 1950s to the present has seen the global legal landscape change from a world map dominated by a relatively

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² The propensity of the English language to cause confusion is demonstrated by the variety of words which may be used to describe the same concept; seat, place, judicial seat, legal situs.

few legal systems to a virtual chequerboard of sovereign states each with its own legal system. An example of the former, and which is most apparent to Australians, was the legal order created by the British Empire (who can forget the massive swathes of pink on school atlases of the 1950s), but there were other similar dominant orders as a result of colonial expansions in the 1800s. This concentration of legal orders no longer exists.

3 The dramatic increase in the number of sovereign states since the 1950s has created chequerboard of legal systems. As has been observed “it is an astonishing fact that the majority of states established by 1970 had not existed 25 years before. The single year 1960, saw the accession to independence of the greatest number of states ever. Each was in a position to create its own legal order. Each now had borders that defined what was international in international trade.”³

4 Most disputes arising out of a cross border transaction, and the arbitration processes used to resolve such disputes, in the modern

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chequerboard landscape, are bound to involve the application of a number of different legal systems. The substantive rights of the parties may be determined by the proper law of their contract. An arbitration agreement found in one of the clauses of the main contract, is regarded as a separable and distinct contract and therefore may be subject to a different proper law (eg, *Sulamerica v Enesa* [2012] EWCA Civ 638).

5 After the dispute arises, the arbitration process may also be subject to several different legal systems. The arbitrators may, and usually do, come from different legal systems. The process may involve technology such as videoconferencing with participants situated in different countries. The hearing may have different venues to accommodate the particular needs of the parties and witnesses.

6 As a result, it is necessary to isolate and identify, so far as is possible, the legal system which regulates the conduct of the arbitration and whose courts supervise the process. It is in this

context that the concept of the seat of an international arbitration has evolved.

7 To avoid, as far as is possible, different legal systems applying to their international arbitration, the parties may choose a single legal location for their arbitration. This is a choice by the parties, of the place where the arbitration is agreed to be legally sited, although the hearings and other steps in the arbitration process may physically take place elsewhere.

8 There is an important qualification “so far as is possible” because the parties by their choice of the seat of their arbitration, cannot contract out of a mandatory law which applies to a step in the arbitration process taken in a particular jurisdiction. For example, in some US states, persons appearing in an arbitration which takes place within that state must be legally qualified within that state. In passing, I note the opposite approach has been adopted under the Bill in Clause 24A. This provides that a party may be represented by another person of their choice and such person does not thereby commit an offence under the Legal Profession Act 2007. Note the

different context to the equivalent provision in s 29 of the International Arbitration Act which was aimed at encouraging international commercial arbitration by allowing foreign parties to use foreign counsel.

9 Returning to the importance of the choice of the seat. The seat is the single legal location of the arbitration although the arbitration itself may involve conduct in several jurisdictions by arbitrators, representatives and witnesses. The seat is also the place where the award is made for the purposes of the New York Convention. The arbitration rights and duties of those involved in the arbitration are determined by the laws of that place. These rights may not be merely concerned with the parties' procedural rights and duties in the arbitration process. The law may also govern the parties' rights of appeal and the right to challenge the award and hence the arbitration law may also be concerned with the parties' substantive rights.

10 As it is used to identify the arbitration law which regulates the arbitration process, the seat must be identified as a location which

clearly identifies the arbitration law. There is no such identification if the parties choose a federal or non unitary state. Thus parties may agree that the seat of their arbitration is England because that identifies the law to be applied and the courts to supervise the process. The parties may not choose a Federal State as the seat, such as Australia or Switzerland, because they do not have a unitary legal system and both the arbitration law and the court system varies from state to state. The arbitration law may differ within a federation depending upon where the seat is precisely located.

11 The critical significance of the choice of the seat, is that it determines the curial law and the supervising jurisdiction of the courts where the seat is located. As a result it represents the parties acceptance of the powers of the courts of that place to control and supervise the arbitration process. This acceptance by the parties has been held to be akin to an exclusive jurisdiction agreement.

Accordingly, if a party were to seek to challenge the award in the courts of another jurisdiction, the other party may obtain an anti-suit injunction from the courts of the seat to restrain the bringing of such

proceedings as they would be in breach of the agreement to submit such disputes to the courts of the seat (see for example *C v D* [2007] EWCA Civ 1282). As a result of the parties' agreement on the seat, the courts of the chosen seat have the exclusive jurisdiction to supervise the arbitration. It is the law of the seat which determines the ability of a party to challenge or set aside the award.

12 If the parties have not chosen the seat, either by express or implied agreement, or by the adoption of particular rules of an arbitration institution (eg under LCIA Rules R16, *the seat is London or LCIA Court may chose another place*), the arbitrators may have power, either statutory or contractual, to determine the seat of the arbitration (see for example Article 20(2) of the UNCITRAL Model Law, now clause 20(2) of the Bill). It is significant for present purposes to note that where the parties have not agreed upon a seat but have empowered the tribunal to choose the legal seat, the arbitration does not have a legal seat until that choice is made by the arbitrators. Article 20(2) of the Model Law provides that “[f]ailing such agreement [i.e., between the parties on the place of arbitration]

the place of arbitration is to be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.”

13 As the terms of Article 20(2) make clear, the seat is a distinctively international legal concept designed to deal with the problems of conducting an international arbitration. This international character of the concept of the seat is apparent from the terms of The Notes on Organising Arbitral Proceedings (first published by UNCITRAL in 1996, and reissued in 2012) which discusses the pros and cons of choosing the seat or place of arbitration and state (at paragraph 22):

“Various factual and legal factors influence the choice of the place of the arbitration, and their relative importance varies from case to case. Among the more prominent factors are (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of

the parties and the arbitrators, including travel distances; (d) availability and cost of support services needed; and (e) location of the subject matter in dispute and proximity of evidence.”

14 The concept of the seat is a key feature of the Model Law on International Commercial Arbitration. UNCITRAL, as part of its general mandate to harmonise the laws relating to world trade, prepared the Model Law on International Commercial Arbitration in 1985. The Model Law is not an operative law in itself. It is not a convention or treaty between contracting States. Rather it is in the form of a template prepared by UNCITRAL for a piece of local legislation dealing with international commercial arbitration which sovereign states can use when enacting legislation on the subject matter. It is not comprehensive and does not seek to cover all aspects of the international arbitration process. Australia adopted the Model Law in 1989 as an amendment to the International Arbitration Act. In 2006 UNCITRAL “amended” the Model Law and the amendments had no force or effect in Australia until 2010 when

they were introduced by way of an amendment to the International Arbitration Act.

15 When UNCITRAL was drafting the Model Law a key issue was what connecting factor was required before the legislation would apply to an international commercial arbitration. Ultimately it was decided to adopt “the strict territorial criterion” whereby the law would apply to “international commercial arbitration” and, subject to very limited exceptions, only if the place/seat of the international commercial arbitration was in the State which had enacted the Model Law (Report of UNCITRAL Yearbook, 1985, Vol XVI, UN Doc No A/40/17 at para 73). As a result Article 1(2) when implemented into the legislation by Australia in 1989, provides that the legislation applies “only if the place of arbitration” is in Australia. In addition the drafters wanted to confine the scope of application of the Model Law to international arbitrations. Hence they added in Article 1(3) that an arbitration is international if the parties have their places of business in different states.

16 Turning then to the new uniform legislation and the Commercial Arbitration Bill 2012, this legislation seeks to replicate the success achieved by the Model Law in the global system of international commercial arbitration and to revitalise domestic arbitration by adopting a so called “Model Law approach” to the process of arbitration. It does this by repealing the existing law dealing with arbitration and replacing it with legislation using the structure and the language of the Model Law with, so far as is relevant, minor changes. This is where the problems arise. The copying of the structure and the language of legislation aimed at international arbitration in a statute designed to deal with domestic arbitration.

17 Arbitration agreements and arbitration, as a process to resolve disputes, have long had a history of legislative support in Queensland and the other states and territories. Without such support parties would have to rely on the common law. Under the existing legislation an arbitral award may, by leave, be enforced in the same manner as a judgement of a court (see s 30). Absent any such supportive

legislation, an arbitration award would have to be enforced at common law by an action on the award. The action is founded on an implied promise in the arbitration agreement to abide by the award. This would be a lengthy procedure involving the need to prove the agreement to arbitrate, the fact that the conduct of the arbitration had been in accordance with the parties' agreement, and that the award was final.

18 This supportive legislation will be repealed in its entirety when the Commercial Arbitration Bill 2012 is passed. The general wording and coverage of the previous legislation will be replaced by the new, and more limited, wording and coverage of legislation based on the UNCITRAL Model Law.

19 The first potential problem is caused by the application of the new act being confined to commercial arbitration. What is "commercial"? Whereas the previous legislation (and its predecessor the Arbitration Act 1973, s 4) dealt with the subject matter of arbitration agreements and arbitration generally and was not confined to "commercial" arbitration (see s 3(2)), the Bill

replicates Article 1 of the Model Law, and would result in legislation with a restricted field of operation and which only applies if it is “domestic commercial arbitration”. The word commercial is defined by a footnote and the terms of Article 1 emphasise the “place of business” of the parties.

20 However, there are many arbitration agreements and arbitrations which might not be characterised as “commercial” as defined in the Model Law and as a result, they would no longer receive statutory support. A state legislature has an interest in ensuring that all arbitrations and arbitration agreements between its citizens are supported and enforced. This problem has already arisen in the short history of the new uniform legislation. The NSW Court of Appeal recently considered an arbitration clause in a deed of trust made primarily between family members, some of whom may not have had a place of business, let alone one in Australia, at the time the deed containing the arbitration agreement was made (see Bathurst CJ in *Rinehart v Welker* [2012] NSWCA 1 at [62], “whether the arbitration is a domestic arbitration, there is no evidence that all

parties to the Deed have a place of business in Australia or have a place of business at all. If any of the parties do not and their habitual residence is outside Australia then the Act will not apply”).

21 If the Act does not apply, an award in any such arbitration may not be enforced except at common law. There would be no power to compel witnesses to attend and produce documents in the arbitration. There would be no statutory power to stay court proceedings brought in breach of the arbitration agreement.

22 The second major problem arises because a domestic arbitration agreement, even if commercial, rarely, if ever, deals with the seat/place of arbitration. There is a lacuna in those cases where the seat/place of arbitration is not known until the arbitral panel has been formed and can exercise its power to determine the place of arbitration under the power to be conferred under s 20(2) of the Bill. The legislation does not, and cannot apply unless the seat/place is in Queensland. Accordingly and most critically, the new provisions of the legislation allowing the court to appoint an arbitrator and deal with challenges are not available to support the arbitration.

23 Thus, by repealing the existing broad based law dealing with arbitration and introducing a narrower Model Law system in the hope of revitalising arbitration, it appears that it is a case of *the baby has been thrown out with the bathwater*.