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Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand

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This article examines the current status and interpretation of the New York Convention provisions on recognition and enforcement of awards in Australia and New Zealand. While there have been no New Zealand decisions so far, Australian courts have considered a number of important issues including the effect of interim and interlocutory awards, the limitation period applicable to enforcement proceedings, the existence of a residual discretion not to enforce an award, the consequences of misnaming of a party and public policy. While some decisions have been consistent with the Convention's objectives and purposes, in others courts have arguably relied too heavily on principles of Australian domestic law.

I. INTRODUCTION

There have been comparatively few cases on recognition and enforcement of arbitral awards under the New York Convention (the "Convention")[1] in Australia and no decisions at all in New Zealand. Part of the explanation for this could be that Australian and New Zealand corporations are less involved in international arbitrations than entities from other countries. Alternatively, it may be that Australian and New Zealand parties have been more dutiful in honouring awards given against them.

In any case, while there have not been many decisions involving recognition and enforcement under the Convention, a number of important points can be deduced from the cases which will be of relevance or interest to practitioners and scholars in other jurisdictions. Before considering the decisions a few words should be said about the implementation of the Convention in Australia and New Zealand.

II. IMPLEMENTATION OF THE CONVENTION IN AUSTRALIA

Australia acceded to the Convention on March 26, 1975 with the Convention entering into force on June 24, 1975. The Convention was enacted into Australian domestic law in the International Arbitration Act 1974 (Cth) (IAA).[2]

The first question to consider is what "awards" are capable of recognition and enforcement in Australia under the Convention. Article I(1) of the Convention states that

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, 21 U.S.T. 2517, T.I.A.S. No. 6997.

[2] IAA, Sch. 1, s. 8 (enforcement of awards).

the Convention applies to awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought and also to arbitral awards "not considered as domestic awards" in the state of recognition and enforcement.

In its implementing legislation Australia chose to adopt only the first part of this provision such that the Convention will only apply to permit recognition and enforcement of an award in Australia where the award was made in a foreign country, that is, a "country other than Australia."[3] The legislation also requires that the award be made "in pursuance of an arbitration agreement" with "arbitration agreement" defined as "an agreement in writing of the kind referred to Article II(1) of the Convention."

An interesting question has arisen in Australia as to whether an "arbitration agreement" may exist to support an application to enforce a foreign award made under the rules of the International Chamber of Commerce. In *Commonwealth Development Corp. (UK) Ltd. v. Montague*,[4] an arbitrator had determined that it had no jurisdiction to determine a matter because the defendant was not a party to the contract containing the arbitration agreement. However, the arbitrator nevertheless made an award of costs against the plaintiff which the defendant sought to enforce.

While the court accepted that the original arbitration agreement between the parties was no longer operative it noted that the plaintiff, by agreeing to institute arbitral proceedings before the ICC, had entered into "Terms of Reference" with the defendant. Under the Terms of Reference the parties consented to be bound by the award, including any order for costs. The Terms of Reference, therefore, amounted to a separate "arbitration agreement" under Article II(1) which could lead to an enforceable award.[5]

The next point to note about the operation of the Convention in Australia is that at the time of its accession, Australia made no reservation to the Convention under Article I(3). This approach means that, in theory, Australian courts should recognise and enforce awards under the Convention regardless of whether the country in which the award was made was a contracting state to the Convention or not. Yet curiously, in the enacting legislation a different approach was taken.

The combined effect of section 8(1), (2) and (4) of the IAA is that a foreign award will only be capable of recognition and enforcement in Australia if:

(a) the award was made in a Convention country; or
(b) if not made in such a country, if the party seeking recognition and enforcement is either domiciled or ordinarily resident in Australia or another Convention country.

Note that under section 3(3) of the IAA, "ordinary residence" in the case of a corporation refers to its place of incorporation or principal place of business. The consequence then is that a form of reciprocity has been introduced in the Australian implementing

3 *See* the definition of "foreign award" in IAA, s. 3(1).
4 [2000] Q.C.A. 252.
5 *Id.* at 32–33 (Ambrose, J.) (with whom Thomas, J.A. agreed). *See*, for a further discussion, S. Greenberg & M. Secomb, *Terms of Reference and Negative Jurisdictional Decisions: A Lesson from Australia*, 18 Arb. Int'l 125 (2002).

legislation, although no such intent was expressed at the time of Australia's accession to the Convention.

It is true, though, that this limitation on recognition and enforcement is becoming of less practical significance as the number of contracting states to the Convention increases and so the possibility of contact with a "non-Convention country" diminishes. Yet the restriction does potentially expose Australia to liability under international law in the event of a party seeking to enforce an award in Australia with neither the party nor the award having a connection with a Convention country.

Interestingly, in a recent decision an Australian court appeared to misconstrue the above provisions, although the result the court reached was correct in any event. In *ML Ubase Holdings Co. Ltd. v. Trigem Computer Inc.*,[6] a Malaysian plaintiff sought to enforce an award made in New York against a Korean defendant. Because the Korean defendant had no presence in Australia for service, but did have assets available for execution, leave of the New South Wales court was required to serve the defendant outside Australia. In determining whether leave should be granted, the New South Wales court had to determine whether the Convention applied. The court could have simply found the Convention applicable on the basis that the country where the award was made (the United States) was a contracting state to the Convention. However, the court suggested instead that a requirement for the Convention to apply was that "each party to the arbitral award is a party to the Convention."[7]

Such a view of the Convention's applicability in Australia is much more onerous and restrictive than that suggested above. If this view were followed in later cases, it may have serious implications for the operation of the Convention in Australia. Fortunately, however, in the *Ubase* case no such problem arose as both Malaysia and Korea were (and are) Convention countries.

Another general point to mention regarding the scope of operation of the Convention in Australia concerns the relationship between the enforcement provisions of the Convention and the UNCITRAL Model Law on International Commercial Arbitration of 1985 ("Model Law")[8]. The Model Law was implemented in Australia in 1989[9] and in Articles 35 and 36 there are provisions for recognition and enforcement of arbitral awards which could, in some circumstances, overlap with those of Article V of the Convention. Section 20 of the IAA, however, resolves this potential conflict by stating that where both the Convention and the Model Law apply to enforcement of an award, the Convention shall prevail.

A final point to note about the scope of operation of the Convention in Australia is that it also can apply to the situation where a plaintiff seeks to litigate a cause of action in an Australian court which has previously been determined in an arbitral award. In such

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[6] [2005] N.S.W.S.C. 224.

[7] *Id.* at 35.

[8] UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, Annex I, adopted by the United Nations Commission on International Trade (UNCITRAL) on June 21, 1985.

[9] IAA, Sch. 2.

circumstances, a defendant is entitled to plead the award as a defence and to seek its "recognition" by the court. This conclusion follows from the fact that while section 8 of the IAA speaks only of "enforcement" of awards, section 3(2) states that "enforcement" also includes "recognition of the award."

III. Procedure for Recognition and Enforcement

Once it is clear that the Convention applies to an award, the procedural rules of the country where enforcement is sought must then be applied: see Article III of the Convention.

In Australia, the relevant provision is section 8(2) of the IAA which provides that a foreign award "may be enforced in a court of a State or Territory [of Australia] as if the award has been made in that State or Territory in accordance with the law of that State or Territory." The effect of section 8(2) is to equate a foreign award with a domestic award for the purposes of enforcement. The most common procedure for enforcing a domestic award under Australian law is found in section 33 of the uniform domestic arbitration legislation, the Commercial Arbitration Act 1984 (Vic.) (CAA). Under this provision an award may, with the leave of the court, be enforced in the same manner as a judgment of the court.

This provision has been relied upon in all Australian cases where enforcement of a foreign award is sought, although, strictly speaking, it would also be possible for a plaintiff to obtain enforcement by bringing an action on the award in the Australian court. This last option follows from the fact that a foreign award creates a cause of action arising in the country of enforcement. Such a cause of action arises from either the award itself or an implied promise in the arbitration agreement that the award would be honoured.[10]

Once it is accepted that a foreign award creates a fresh cause of action arising in the place of enforcement, it follows therefore that the limitation period for enforcement begins to run when the plaintiff becomes entitled to enforce the award. In *Antclizo Shipping Corp. v. Food Corp. of India*,[11] it was held that a reasonable period (in that case three months) should be allowed for voluntary payment by the defendant at the expiry of which time begins to run against the claimant for enforcement of the award.

A similar approach to the *Antclizo* case was taken in the New South Wales decision in *Hallen v. Angledal*.[12] There, the court confirmed that the relevant cause of action for the purposes of limitation of actions in enforcement cases was not the cause of action giving rise to the arbitration but the cause of action to enforce the award.[13] The court cited with approval the *Brali* case above, to the effect that a foreign award creates a cause of action arising in the jurisdiction of enforcement.[14]

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[10] Brali v. Hyundai Corp., (1988) 84 A.L.R. 176, 183.
[11] Supreme Court of Western Australia, Bredmeyer, M., November 6, 1998 (unreported).
[12] [1999] N.S.W.S.C. 552.
[13] *Id.* at 34.
[14] *Id.* at 35–36.

The final point on procedural matters is that there are other formalities in the Australian implementing legislation which largely replicate Article IV of the Convention. For example, the person seeking enforcement must produce the original award or a certified copy thereof and the original arbitration agreement or a certified copy.[15] Where any such documents are not in English, they must be translated.[16]

IV. Implementation of the Convention in New Zealand

By comparison with Australia, the implementation of the Convention in New Zealand has been refreshingly straightforward. New Zealand acceded to the Convention on January 6, 1983, with the Convention entering into force on April 6, 1983. Like Australia, New Zealand entered no reservations to the Convention under Article I(3) but, unlike Australia, it enacted the Convention into New Zealand law without any limitation as to its operation.[17]

Consequently, any award deemed a "foreign award" under New Zealand law (which would most likely be an award made in a country other than New Zealand) is capable of recognition and enforcement in New Zealand. Specifically, there is no requirement that the award be made in a Convention country or that a party have a connection with such country.

The procedure for recognition and enforcement is very similar to that in Australia, that is, a party may apply to the High Court of New Zealand to have the award enforced as a domestic judgment in terms of the award.

V. Defences to Enforcement/Grounds for Refusal

Once it is established that the Convention applies to enforcement of an award, an Australian court will grant leave to have the award enforced as a judgment of the court unless the defendant can establish one of the grounds of opposition in Article V of the Convention. These grounds are reproduced in section 8(5) and (7) of the IAA. There have been a number of Australian decisions which have examined the grounds for refusal.

A. Residual discretion not to enforce?

Perhaps the most (in)famous Australian case, which has spawned a considerable academic literature, is the decision of the Supreme Court of Queensland in *Resort Condominiums v. Bolwell*.[18] This decision is relevant to a number of aspects of enforcement of foreign arbitral awards but at this stage only one will be examined. Before doing so, a brief statement of the facts of the case is appropriate.

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[15] IAA, s.9(1).
[16] *Id.* s.9(3).
[17] Arbitration Act, 1996, Sch. 3, s. 5(f).
[18] (1993) 118 A.L.R. 655.

The case concerned a U.S. company which entered into a licence agreement with an Australian company which contained an Indiana arbitration clause. After a dispute arose between the parties, the U.S. company commenced proceedings in the Indiana court for preliminary injunctive relief and also a referral to arbitration, both of which were granted. The arbitrator subsequently made an "interim arbitration order and award" in which injunctions were granted on the same basis as the court had awarded. The orders were clearly intended to be of an interlocutory nature and not designed to finally resolve the dispute or the legal rights of the parties. Enforcement of the award was sought in Australia, which was refused for a number of reasons.

For present purposes, the court made an important finding which could have serious consequences if followed in later Australian decisions involving enforcement of awards under the Convention. The court suggested that an enforcing court in Australia has a *general discretion* outside the grounds stated in the Convention not to recognise and enforce an award that otherwise qualifies for recognition under the Convention.[19]

In support of this argument, the court referred to the opening words of section 8(5) of the IAA which states that "in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that" one of the grounds listed in paragraph (5) is available. According to the court, section 8(5) may be contrasted with the apparently more mandatory language of Article V(1) of the Convention: "Recognition and enforcement of the award may be refused … *only if* that party furnishes proof " that one of the grounds in the Article is satisfied. It was therefore the absence of the word "only" in section 8(5) which was relied upon by the court for the argument that a residual discretion exists not to enforce an award.

However, it is the unanimous view of academic commentators that no such residual discretion exists.[20] In their view, it was the clear intention of the drafters of Article V that the defences to enforcement in that Article were to be exhaustive and not capable of supplementation by grounds existing under the law of the place of enforcement. Leading U.S.[21] and English[22] authorities support this view.

The reason why the defences are regarded as "exhaustive" is that a major purpose and objective of the Convention is to encourage and liberalise the process of recognition and enforcement of awards by decreasing the scope for obstruction by national courts and laws. The Convention was therefore intended to be a uniform code dealing with enforcement of foreign awards, to be applied in a similar fashion in each member state party. The intrusion of peculiarly domestic law principles into enforcement of awards would defeat

[19] *Id.* at 675–76.

[20] A.J. van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 265 (1981); M. Pryles, *Interlocutory Orders and Convention Awards: The Case of Resort Condominiums v. Bolwell*, 10 Arb. Int'l 385, 392–93 (1994); O. Chukwumerije, *Enforcement of Foreign Awards in Australia: The Implications of Resort Condominiums*, 5 Australian Disp. Res. J. 237, 245 (1994).

[21] Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974).

[22] Rosseel N.V. v. Oriental Commercial & Shipping Co. (U.K.) Ltd., [1991] 2 Lloyd's Rep. 625.

the goals of uniform interpretation and liberal enforcement. Hence, while there is a slight difference in wording between the Australian legislation and the Convention, much clearer and more emphatic words of departure in the legislation would be required to support the view that the Australian drafters intended to enlarge the grounds of refusal contained in the Convention.[23]

While there seems a strong argument that the opinion of the court in *Resort Condominiums* on this point is wrong, the key question is whether it has been followed in later Australian cases. The issue has only been addressed twice and in neither case did the court take a clear view on the correctness of the Queensland court's approach. However, in one decision the court did in effect apply the *Resort Condominiums* view without stating that it was doing so explicitly.

In the most recent case, *Corvetina Technology v. Clough Engineering Ltd.*,[24] the Supreme Court of New South Wales expressly left open the question as to whether there existed, in addition to the express grounds listed in section 8(5) and (7), "a general discretion" not to enforce.[25]

More directly in point was *International Movie Group Inc. (IMG) v. Palace Entertainment Corp. Pty. Ltd.*[26] Since this case will also be referred to on a number of occasions below, some reference to the facts is required.

The *IMG* case concerned an agreement between a U.S. company (IMG) which entered into a series of agreements with an Australian company (Palace) for the licensing and distribution of films in Australia. Each agreement contained a Californian arbitration clause and after disputes arose which were referred to arbitration, an award was rendered in favour of IMG. Amongst a number of orders in favour of IMG there was an award of damages. However, the arbitral tribunal, while nominating a sum of damages to be paid, then provided that if IMG sold or licensed a particular film in Australia or New Zealand in the future "any net sums received by [IMG] from such sales shall reduce the amount due."

When IMG sought to enforce the award in Australia, Palace argued that enforcement of the damages component should be refused on the ground that it was manifestly uncertain and therefore void. The uncertainty was said to exist because the ultimate amount of damages to be paid may have required adjustment by reference to future events which had the potential almost to extinguish the defendant's liability. The court accepted this argument and refused to enforce the damages portion of the award.[27]

However, what is interesting for present purposes is that both parties and all the courts who adjudicated this matter apparently accepted that "uncertainty" was a legitimate basis for refusing enforcement of a Convention award. While uncertainty is a recognised

[23] Pryles, *supra* note 20, at 393.
[24] [2004] N.S.W.S.C. 700.
[25] *Id.* at 10.
[26] (1995) 128 F.L.R. 458 (Supreme Court of Victoria) *aff'd sub nom.* ACN 006 397 413 Pty. Ltd. v. Int'l Movie Group (Canada) Inc., [1997] 2 V.R. 31.
[27] *Id.* at 470–71; 46 (Court of Appeal).

basis for non-enforcement of *domestic* arbitral awards under Australian law, it is not included as a separate defence under section 8 of the IAA or Article V of the Convention.

In effect then, the court in the *IMG* case adopted an approach similar to that of the Queensland court in *Resort Condominiums.* By relying on a ground of refusal not mentioned in the Convention, the court exercised a "residual discretion" not to enforce the award. Interestingly, it was only in the appellate judgment in *IMG* that the issue of whether such a discretion existed was discussed. The Court of Appeal referred to the view expressed in *Resort Condominiums*, that is, that section 8(5) does not use the word "only" and does not explicitly state that the grounds listed for refusal of enforcement are exhaustive. However, the appellate court in *IMG* stated that it did not have to reach a view on the "correctness" of this argument because counsel for the claimant had conceded that the defendant could raise the argument of uncertainty as a defence to enforcement.[28] This was certainly a curious concession to make by the plaintiff given that the practical effect of the court rejecting the "residual discretion" view would have been to deprive the defendant of *any* grounds to resist enforcement, unless, of course, uncertainty could be argued as falling under one of the other grounds in Article V, such as public policy. Public policy is examined in section H below.

So it seems, unfortunately, that the *Resort Condominiums* "residual discretion" approach has had some impact in later Australian decisions.

Before examining the specific grounds of opposition in section 8(5) and (7) of the IAA, another attempt to invoke a defence not expressly found in the IAA or the Convention will be considered.

B. Misnaming of party

It will be recalled that section 8(1) of the IAA stipulates that, for the purpose of enforcement, "a foreign award is binding … on the parties to the arbitration agreement in pursuance of which it was made." It follows from this provision that an award can only be enforced against a *party* to the arbitration agreement.

This issue was considered in a recent decision of the Supreme Court of New South Wales where it was held that the defendant was bound by an arbitration agreement where he had instructed a third party to enter such agreement on the defendant's behalf.[29] More interestingly, it was also argued by the defendant in the *LKT* case that, for an award to be enforceable under section 8(1), not only must the defendant be a party to the arbitration agreement and award but he or she must also be correctly *named* in both documents. In the *LKT* case the defendant argued that he had been misnamed in the award.

The court rejected the argument that misnomer in the award could be a basis for refusal of enforcement, relying on section 8(2) of the IAA. This paragraph, as noted above, provides that a foreign award may be enforced in a State of Australia as if it had

[28] *Id.* at 47 (Court of Appeal).
[29] LKT Industrial Berhad (Malaysia) v. Chun, [2004] N.S.W.S.C. 820.

been made in that State in accordance with that State's laws. The effect of this paragraph means that the provisions of the domestic arbitration (the CAA) legislation are available to be applied to enforcement of a foreign award. Relevantly, the CAA provides that a misnomer in an award can be corrected under section 30 of the Act. This provision allows a clerical mistake, an accidental slip or omission or a material mistake in the description of a person to be corrected by the enforcing court.[30]

Such an approach is to be welcomed: defendants cannot resist enforcement of awards under the Convention by relying on minor typographical or transcription errors such as regarding their name. Such a conclusion is also consistent with the view that the grounds for refusal of enforcement are limited to those expressly provided in Article V of the Convention with no scope for supplementation under the domestic law of enforcement.

C. Incapacity of party/Invalid arbitration agreement

There have as yet been no Australian decisions under section 8(5)(a) and (b) of the IAA (corresponding to Article V(1)(a) of the Convention) which allow a defendant to resist enforcement on the ground of incapacity of a party to the arbitration agreement or invalidity of the agreement.

D. Lack of notice of the arbitration

The defendant in the *LKT* case also invoked section 8(5)(c) (corresponding to Article V(1)(b) of the Convention) which provides a defence to enforcement where "a party was not given proper notice of … the arbitration proceedings." In that case, the court found that even though the defendant was misnamed in the letter sent to him from the ICC giving notice of the request for arbitration, on balance the defendant would have understood that the documents that he received related to him and identified him as a party to the arbitration proceedings.[31] The court was no doubt influenced in this view by the fact that the misnomer was very minor: "Albert Chun Ying Llo" instead of the correct "Albert Chun Ying Ho."

A more interesting question would have possibly arisen if the naming error had been more significant such that a reasonable person may not have considered that the correspondence was addressed to him or her.

E. Excess of jurisdiction

Another ground for refusal of enforcement of an award is found in section 8(5)(d) of the IAA (corresponding to the first part of Article V(1)(c) of the Convention) which provides that "the award deals with a difference not contemplated by or not falling within

[30] *Id.* at [27].
[31] *Id.* at [74].

the terms of the submission to arbitration or contains a decision on a matter beyond the scope of the submission to arbitration."

This paragraph needs to be read in conjunction with section 8(6) (corresponding to the second part of Article V(1)(c) of the Convention) which states that "where an award to which paragraph 5(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced."

There have been no Australian decisions directly involving section 8(5)(d) and (6), although the *IMG* case (above)[32] concerned an analogous situation. It will be recalled that in *IMG*, the court refused to enforce part of a foreign award on the ground of uncertainty. The court then proceeded to hold that the invalid part could be severed from the award, leaving the remainder enforceable on the basis that the uncertainty did not affect the other portions of the award.[33] The court relied on English, Australian and Hong Kong authorities to support this view.

Strictly speaking, therefore, *IMG* was not a case of severance based on a tribunal's excess of jurisdiction but rather on the basis of partial invalidity of the award. While this particular instance of severance is not specifically provided for under Article V of the Convention or section 8 of the IAA, arguably it is consistent with the spirit and rationale of these provisions to maximise enforcement of foreign awards where possible.

F. Improper arbitral composition/procedure

There have been no Australian decisions considering section 8(5)(e) of the IAA (corresponding to Article V(1)(d) of the Convention) which provides that an award will not be enforced where the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement.

G. Award not binding/set aside in seat

The next paragraph, section 8(5)(f) (corresponding to Article V(1)(e) of the Convention) has been the subject of important recent judicial analysis in Australia. This paragraph provides that an award will not be enforced where it has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which or under the law of which the award was made.

The second part of this paragraph needs to be read in conjunction with section 8(8) of the IAA (corresponding to Article VI of the Convention) which provides that "where in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which or under the law

[32] *Supra* note 26.
[33] *Id.* at 470–71; 46 (Court of Appeal).

of which the award was made the court may, if it considers it proper to do so, adjourn the proceedings."

Consideration will first turn to the initial part of section 8(5)(f), namely that the award has not become binding on the parties. The key authority on this point is again the *Resort Condominiums* case discussed above.[34] It will be recalled that in that decision, a Queensland court was asked to enforce what was described as an "interim arbitration order and award" which in reality consisted of a series of interlocutory injunctions which did not intend to nor did finally resolve the rights of the parties to the arbitration. The Queensland court refused to enforce the award, finding that an interlocutory order or judgment which does not finally dispose of or resolve at least one of the disputes of the parties is not an "award" under the terms of the Convention.[35] While the Convention does not define the term "award," the key inquiry according to the court is whether the arbitral tribunal's order is only provisional in that it can be varied or changed by the same body in a later decision. If that is the case, then there has been no final resolution of any dispute on matters submitted to arbitration and so no enforceable award.

Importantly, the court distinguished *interlocutory* orders from truly interim or partial awards, such as a preliminary award on liability pending a further and final award on quantum.[36] Use of such interim awards is common in international arbitration, no doubt because it "promote[s] the efficiency of the arbitral process by enabling arbitrators to resolve urgent matters without awaiting the conclusion of the proceedings."[37] It would therefore be overly restrictive to demand that the Convention only permit enforcement of absolutely final awards.

Commentators have generally approved of the court's approach[38] to this question, although it has been suggested that it would have been beneficial to international arbitration if interlocutory orders were enforceable under the Convention.[39] Another writer, however, disputes the court's conclusion that the Convention only applies to orders with "final" effect, noting that the issue of finality is not referred to in either the Convention or its legislative history.[40] Moreover, an interlocutory order can be seen as final in the sense that it resolves an issue in dispute between the parties at a given point in time, the issue being whether such an order should be granted.[41] So, even on the question of interim versus interlocutory orders, the decision in *Resort Condominiums* has not been free of controversy.

The question of the binding nature of an arbitral award was also considered by the trial judge in the *IMG* case.[42] It was there argued that a Californian award was not yet

[34] Resort Condominiums v. Bolwell, (1993) 118 A.L.R. 655.
[35] *Id.* at 674.
[36] *Id.* at 673–74.
[37] Chukwumerije, *supra* note 20, at 240.
[38] *Id.* at 239–42; Pryles, *supra* note 20, at 393.
[39] Pryles, *supra* note 20.
[40] T. Kojovic, *Court Enforcement of Arbitral Decisions on Provisional Relief: How Final is Provisional?*, 18 J. INT'L ARB. 511, 523 (2001).
[41] *Id.* at 524.
[42] *Supra* note 26.

binding on the parties because it required the confirmation of the courts of the seat which had not occurred. The court rejected the argument that "correction" of the award was required by the Californian courts on the basis of expert evidence provided of Californian law.[43] Curiously though, there was a more obvious basis for rejecting this argument which was not referred to by the Australian court; that is, the long-standing principle that an award is considered binding on the parties even though an additional formal requirement must be complied with before the award is enforceable in the country where it was made.[44]

The second part of section 8(5)(f)—that the award has been set aside in the seat of arbitration—has not been directly invoked in any Australian decision. However, there have been two applications under section 8(8) to suspend or adjourn enforcement proceedings in Australia pending resolution of a challenge to the award in the seat of arbitration.

In *Hallen v. Angledal*,[45] a New South Wales court was asked to suspend enforcement proceedings pending resolution of an application to challenge an award made in Sweden. The court refused to stay the enforcement proceedings because there was insufficient evidence that an application to set aside the award had been made to a competent authority in Sweden. The New South Wales court noted that the alleged application (a) had not been made to the proper court for challenging awards under Swedish law and (b) did not disclose whether it involved a challenge to the award itself as opposed to the contract containing the arbitration clause.[46] Furthermore, even if an application had been made to challenge the award, the New South Wales court found that there was no arguable case on the face of the award for the award to be set aside.[47]

Further, the court noted that an enforcing court retained a wide general discretion regarding an application to stay enforcement under section 8(8). This discretion would not be exercised in favour of a stay "merely because an application in relation to the award has been made in the country in which the award was made."[48] The application must be specifically to set aside the award and have reasonable prospects of success.

By contrast, in *Toyo Engineering Corp. v. John Holland Pty. Ltd.*,[49] a Victorian court granted a stay of enforcement under section 8(8), for a number of reasons. First, the court found that an application had clearly been made to set aside the award at the courts of the seat and that the chances of success were "not hopeless." Secondly, adequate security for payment of the award was offered by the defendant should the award survive the setting aside application. Thirdly, the setting aside application had been brought promptly by the defendant. Fourthly, there was no relevant prejudice to the plaintiff if a stay was granted given that the adjournment sought was of relatively short duration. Specifically, the challenge proceedings in Singapore would be heard in less than two months.[50]

[43] *Id.* at 476–77.
[44] Union Nationale des Cooperatives Agricoles de Céréales v. Robert Catterall & Co. Ltd., [1959] 2 Q.B. 44.
[45] [1999] N.S.W.S.C. 552.
[46] *Id.* at [20], [22].
[47] *Id.*
[48] *Id.* at [23].
[49] [2000] V.S.C. 553.
[50] *Id.* at [9].

What therefore distinguishes the *Toyo* and *Hallen* cases is the clear evidence of a challenge to the award having been filed in the courts of the seat and the existence of an arguable case for the challenge.

H. Non-arbitrability/Violation of public policy

The final two grounds for refusal of enforcement are contained in section 8(7)(a) and (b) (corresponding to Article V(2)(a) and (b) of the Convention). There have been no Australian decisions on section 8(7)(a) which grants to the court a right to refuse enforcement if "the subject matter of difference between the parties is not capable of settlement by arbitration" under the law of the country of enforcement.

However, there have been some important observations regarding the defence in section 8(7)(b), namely that an award may not be enforced when it "would be contrary to public policy." The leading Australian case is again *Resort Condominiums.*[51] Another ground relied upon by the court in that decision to reject enforcement was that the award offended Australian public policy. In addressing the issue of public policy, the court referred to the famous statement derived from the *Parsons & Whittemore* case[52] that public policy "must be narrowly construed and must touch the forum state's most basic notions of morality and justice."[53] The court, however, did not expressly endorse this view; indeed the court's decision on public policy seems to contradict it.

The *Resort Condominiums* court found the award to violate public policy on three bases: first, the orders made by the arbitrator were so vague and sweeping as to make enforcement impossible; secondly, they were not orders that a Queensland court would make; and thirdly, the enforcement of the orders would constitute double vexation as similar orders had already been issued by a U.S. court in respect of the same subject matter.[54]

While the first and third reasons are unremarkable, depending as they do on the particular circumstances of the case, the second ground is much more concerning. For an enforcing court to suggest that an arbitral tribunal's orders or decision must correspond with the law of the enforcing court to be enforceable is both extremely parochial as well as inconsistent with the traditionally narrow scope of the public policy exception and the pro-enforcement policy underlying the Convention itself. The effect of such an approach would surely be to reduce the number of awards enforceable under the Convention.[55] It is also impractical to require an arbitral tribunal to apply the laws of the country of enforcement since it "may not even know, at the time it makes an award, in which jurisdiction its award would be enforced."[56]

Fortunately, such an approach does not appear to have been adopted in later Australian decisions. The only other reference to the public policy defence in the context

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[51] *Supra* note 34.
[52] *Parsons & Whittemore*, *supra* note 21.
[53] *Id.* at 974.
[54] *Supra* note 34, at 680.
[55] O. Chukwumerije, *supra* note 20, at 246.
[56] *Id.*

of enforcement of awards under the Convention occurred in the recent New South Wales decision in *Corvetina Technology Ltd. v. Clough Engineering Ltd*.[57] There, the court made two important points regarding the public policy exception. First, the court suggested that a defendant may be able to rely on the public policy defence to argue that the contract containing the arbitration clause was illegal, even though the question of illegality was raised before and decided by the arbitrator.[58] On this issue, the court approved comments of the English Court of Appeal in *Soleimany v. Soleimany*.[59]

The second point made regarding public policy was that the defence is a serious one and must not be easily dismissed by the enforcing court, even though the object of the New York Convention is to facilitate enforcement of awards. As the court said:

> The very point of provisions such as section 8(7)(b) is to preserve to the court in which enforcement is sought the right to apply its own standards of public policy in respect of the award … There is, as the cases have recognised, a balancing consideration. On the one hand it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy.[60]

While such a view certainly does not go as far as the approach in *Resort Condominiums* in suggesting that local public policy would be offended by anything unfamiliar to local law, it does insist that Australian standards of public policy will be rigorously applied in applications to enforce foreign awards. Fortunately, though, the court in *Corvetina* also showed an awareness of the harm to the Convention of too indulgent and unbalanced an approach to public policy.

VI. Conclusion

This article began by examining the procedure by which the recognition and enforcement provisions of Article V of the New York Convention have been implemented in Australia and New Zealand, with New Zealand appearing to offer the simpler and clearer approach. The article then proceeded to consider the Australian decisions applying the Convention. While the number of cases is too small to draw any far-reaching conclusions, the record so far has been a rather mixed one. While a number of courts have shown an understanding of the Convention's objectives and purposes, others have been rather too willing to impose or imply Australian law notions into what is a uniform, international text. The success of international commercial arbitration to date has been substantially built on the solid edifice for enforcement of awards that the Convention has provided. Hopefully, Australian and New Zealand courts will be mindful of this fact in future decisions.

57 [2004] N.S.W.S.C. 700.
58 *Id*. at para 14.
59 [1999] Q.B. 785, 803.
60 *Supra* note 57, at para 18.