ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S110 OF 2010 & S219 OF 2010

BETWEEN:

WESTPORT INSURANCE CORPORATION
(ABN 48 072 715 738)
First Appellant

ASSETINSURE PTY LIMITED
(ABN 65 066 463 803)
Second Appellant

MUNICH REINSURANCE COMPANY OF AUSTRALASIA
(ABN 51 004 804 013)
Third Appellant

XL RE LIMITED
(ABN 54 094 352 048)
Fourth Appellant

SCOR SWITZERLAND LTD
(ABN 92 098 315 176)
Fifth Appellant

AND:

GORDIAN RUNOFF LIMITED
(ABN 11 052 179 647)
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE COMMONWEALTH AS AMICUS CURIAE

PART I: FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Attorney-General**) seeks leave to appear as amicus curiae to make submissions on the content of an arbitrator's obligation to give reasons for an award under Art 31(2) of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**). The Model Law is given effect by s 16 of the *International Arbitration Act 1974* (Cth) (***International***

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Arbitration Act). The English text of the Model Law appears as Sch 2 to the *International Arbitration Act*.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. The Attorney-General relies on the affidavit of Elizabeth Kelly sworn 14 January 2010 (**Kelly affidavit**).

4. The content of an arbitrator's obligation to give reasons under Art 31(2) of the Model Law is central to the conflict of opinion between the New South Wales Court of Appeal in the present case and the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd.*[1] Allsop P referred to that provision as the "source and inspiration" of s29(1)(c) of the *Commercial Arbitration Act 1984* (NSW) (**CA Act**) and its equivalents in other States and Territories (at [224] AB 1994).[2] The written submissions of the parties have not included detailed discussion of the content of the obligation of arbitrators to give reasons, under Art 31(2) of the Model Law or otherwise.[3] Doubtless, each of the parties has taken that course for good forensic reasons of their own. However, the result is that submissions of the Attorney-General will likely assist the Court in relation to a central issue in the divergence of opinion between the New South Wales Court of Appeal and the Victorian Court of Appeal and in a manner in which the Court is otherwise unlikely to be assisted[4].

5. The present is also a case where the Court may benefit from the larger view of the matters at issue which the Attorney-General can provide.[5] The policy of the Commonwealth Government, endorsed in the *International Arbitration Amendment Act 2010* (Cth), is to promote the use of commercial arbitration in Australia and the use of Australia as a seat for international arbitrations.[6] The Model Law is now, where it applies, the sole basis for international arbitrations conducted in Australia.[7] Further, State and Territory governments have, through the Standing Committee of Attorneys General, evinced an intention to amend State and Territory *Commercial Arbitration Acts* using the Model Law as the basis.[8] By the passage of the *Commercial Arbitration Act 2010* (NSW), the New South Wales

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1 (2007) 18 VR 345

2 *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57 (***Westport***) at [224].

3 See [75] – [89] of the Appellants' / Applicant's submissions dated 3 December 2010 (**Appellants' submissions**) and [13] – [29] of the Respondent's submissions dated 10 December 2010 (**Respondent's submissions**).

4 *Levy v Victoria* (1997) 189 CLR 579 at 604; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312

5 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312.

6 Kelly affidavit at [5].

7 See section 21, *International Arbitration Act*. See also, the Explanatory Memorandum for the *International Arbitration Amendment Bill 2009* at [10]: "[o]ne of the key purposes of arbitration is to provide an effective alternative to judicial consideration. To ensure that this is the case, tribunals need a wide degree of discretion to manage proceedings and even truncate them where this would be in the interests of the parties by achieving a speedy resolution of their dispute".

8 Kelly affidavit at [6] – [7].

Parliament fulfilled that intention.[9] A central purpose of the Model Law is to ensure the speed, certainty and finality of arbitral awards, reducing ways to delay the arbitral process by challenging awards, while retaining the ability of courts to correct serious failures to comply with the "due process" of arbitral proceedings.[10] The manner in which the issues raised in this appeal concerning the content of an arbitrator's obligation to give reasons are resolved has the capacity to affect the ability of arbitration in Australia to provide efficient, timely and final resolution of commercial disputes and Australia's capacity to attract international arbitrations.

PART IV: LEGISLATION

6. Articles 31 and 34 of the Model Law and s 19 of the *International Arbitration Act* are set out in Annexure A to these submissions.

PART V: SUBMISSIONS

7. These submissions are organised as follows:

   (a) first, the development of the distinct obligations of courts and of arbitrators to give reasons for their decisions in common law jurisdictions is outlined;

   (b) second, the background to the obligation of an arbitrator to give reasons under Art 31(2) of the Model Law is outlined; and

   (c) third, the content of the obligation to give reasons under Art 31 (2) of the Model Law is considered. The obligation is discharged if arbitrators give their actual reasons in a form sufficient to demonstrate whether or not they have dealt with the actual dispute referred to their determination.

Development in common law jurisdictions

8. The practice of judges in the common law world to provide reasons is long standing.[11] The development of the judicial obligation to give reasons found its origin in the creation of statutory rights of appeal and the decline of the use of juries in common law cases.[12] The obligation was initially restricted to the respects

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9 Kelly affidavit at [7].

10 See section 39(2), *International Arbitration Act*; *Lesotho Development v Impreglio SpA* [2006] 1 AC 221 (***Lesotho***) at 235, [27] and 237, [34]. See also PA Keane, "Judicial Support for Arbitration in Australia" (2010) 34 *Aust Bar Rev* 1 (**Keane**) at 2. See also, Parliamentary Debates, House of Representatives (Hansard), 25 November 2009, p12791.

11 *Deakin v Webb* (1904) 1 CLR 585 at 604 – 605. *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 (***Osmond***) at 666 per Gibbs CJ.

12 *Soulemezis v Dudley (Holdings) Pty Limited* (1987) 10 NSWLR 247 (***Soulemezis***) at 277 – 287 per McHugh JA, referred to with approval in *Fleming v The Queen* (1998) 197 CR 250 at 253, [2] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

in which an appeal lay from a decision of a judge.[13] The obligation subsequently came to be seen as a normal, although not universal, "incident of the judicial process".[14] The obligation now has its rationale not only in the facilitation of rights of appeal but also in the need for judicial decisions, as an exercise of public power, to have and be seen to have a reasoned basis by both the parties and the public.[15] Allied to this rationale, the obligation serves to establish "fixed intelligible rules".[16]

9. The content of the judicial obligation to give reasons depends on the nature of the case and the function to be served by the reasons.[17] Their adequacy will turn on whether they permit the appeal court to perform its function and whether they disclose an understandable basis for the decision.[18] Ordinarily, a judge is expected to refer to relevant evidence, set out material findings of fact, and provide reasons for making the findings of fact including why some evidence has been preferred to other evidence and disclose an understandable basis for the decision.[19]

10. In contrast, arbitrators in the common law world were historically under no obligation at all to give reasons for their award.[20] If they chose to give reasons their award could be challenged on the basis of an error of law apparent in those reasons.[21] The availability of such challenge worked in practice to discourage the provision of reasons: if no reasons were provided no challenge could be mounted against the award.[22]

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13 *Ex parte Powter; Re Powter* (1945) 46 SR(NSW) 1 at 5 per Jordan CJ, Halse Rogers J and Nicholas CJ in Eq; *Pettitt v Dunkley* [1971] 1 NSWLR 376 (***Pettitt v Dunkley***) at 382C – E per Aspery JA, at 387 – 388 per Moffitt JA (with whom Manning JA agreed).

14 *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Limited* [1983] 3 NSWLR 387 (***Tatmar***) at 386B – C per Mahoney JA as qualified and approved by Gibbs CJ in *Osmond* at 667.

15 *Soulemezis* at 278E – 279D per McHugh JA; *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430 (***Beale***) at 442 per Meagher JA; *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Limited (No 2)* (2002) 6 VR 1 (***Fletcher No 2***) at 31, [100] per Charles, Buchanan and Chernov JJA.

16 *De Iacovo v Lacanale* [1957] VR 553 at 557 558 per Monahan J, quoting from *Broom's Constitutional Law* (1st Ed, 1866) at p152 – 153. *Soulemezi* at 279D per McHugh JA; *Fletcher No 2* at 31, [100]. *Beale* at 442 per Meagher JA.

17 *Tatmar* at 386B per Mahoney JA; *Soulemezis* at 280G per McHugh JA; *Beale* at 444 per Meagher JA.

18 *Fletcher No 2* at 32, [102]; *Wiki v Atlantis Relocations (NSW) Pty Limited* (2004) 60 NSWLR 127 (***Wiki***) at 136, [56] – [57] per Ipp JA (with whom Bryson JA and Stein AJA agreed).

19 *Beale* at 443 – 444 per Meagher JA; *Fletcher No 2* at 31, [101] – 34, [106], *Wiki* at 136, [59] – 137. [64] per Ipp JA.

20 *Gold Coast City Council v Canterbury Pipe Lines (Aust) Pty Limited* (1968) 118 CLR 58 (***Gold Coast v Canterbury***) at 76 – 77 per Windeyer J; *Max Cooper & Sons Pty Limited v University of New South Wales* [1979] 2 NSWLR 257 (***Max Cooper***) at 262B per Lord Diplock (delivering the advice of himself, Lords Edmund-Davies, Fraser and Scarman and Sir Clifford Richmond).

21 *Melbourne Harbour Trust Commissioner v Hancock* (1927) 39 CLR 570 at 585 per Isaacs J, at 591 per Starke J; *Gold Coast* at 64 per Barwick CJ, at 67 per Kitto J, at 72 per Menzies J , at 76 – 77 per Windeyer J. *Max Cooper* at 261.

22 *Tuta Products Pty Limited v Hutcherson Bros Pty Limited* (1972) 127 CLR 253 at 257 per Barwick CJ; at 267 per Windeyer J. *Max Cooper* at 262B – C.

11. Criticism of the common law approach to arbitration, especially the scope it gave for interference by the courts, led to calls for law reform.[23] In the United Kingdom, calls for reform of commercial arbitration law led to the passage of the *Arbitration Act 1979* (UK) (**UK Act**). That statute, among other things, abolished the jurisdiction of the courts to set aside awards for error of law on their face (including any reasons)[24] and restricted appeals to those arising by leave for obvious errors of law or for errors of which there was a strong prima facie case and which involved questions of wider significance in commercial law.[25] Additionally, the UK Act provided a facility to request an arbitrator to state reasons in sufficient detail to permit a court to consider any question of law arising from it and gave power to order the provision of such reasons if not provided.[26] It was held that, save in exceptional circumstances, arbitrators should state reasons if so requested.[27] The leading exposition of the content of the arbitrator's obligation to provide reasons under the UK Act was given by Donaldson LJ in *Bremer Handelsgesellschaft mBH v Westzucker Bunge GMbH* (***Bremer v Westzucker***)[28] in the passage quoted by Allsop P at [215]; AB 1991. Notably, following the passage cited by Allsop P, Donaldson LJ proceeded to distinguish a reasoned award from a judgment. It was said to be unnecessary and undesirable for an arbitrator under the UK Act to summarise evidence given, set out the evidence on the basis of which they made their findings of fact, or make assessments of witnesses or give reasons for preferring one witness over another as a judge would do.[29] In *The Antaois* Lord Roskill (with the agreement of Lords Keith, Scarman and Brandon) subsequently deprecated the provision by arbitrators of awards containing elaborate reasons under the UK Act:

> "One purpose of arbitration, especially in commercial disputes, is the avoidance of delays, traditionally if often unfairly associated with the judicial process. The award of an arbitral tribunal can, it is supposed, be obtained swiftly and simply and without elaboration. ... [W]ith all respect to the three arbitrators in the present case whose lengthy reasons for their award I have read with admiration for their legal learning, if reasons for which the Act of 1979 makes provision are to be given with such elaboration, the very preparation of those reasons must defeat the possibility of obtaining speedy arbitral decisions independently of any question of further delay brought about by a possible appeal or appeals. In general, businessmen are interested in

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23 *Max Cooper* at 260G – 261A. *Promenade Investments Pty Limited v New South Wales* (1991) 26 NSWLR 203 (***Promenade***) at 216 per Sheller JA (Meagher JA agreeing).

24 *Max Cooper* at 261A.

25 *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 742 – 743.

26 See sections 1(5) and (6), *Arbitration Act 1979,* set out by Allsop P in *Westport* at [205] in the , *Universal Petroleum* at 1192. *Trave Schiffahrtsgesellschaft mBH v Ninemia Maratime Corporation* [1986] 1 QB 802 (***The Ninemia***) at 807D per Donaldson MR.

27 *Warde v Feedex International Inc* [1984] Lloyds Reps 310 at 315 per Staughton J.

28 [1981] Lloyds LR 130 at 132; approved in *Universal Petroleum* at 1192. See also T Bingham "Differences between a Judgment and a Reasoned Award" [1997] *The Arbitrator* 19 (**Bingham**) at 28 – 29.

29 Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (2ed, 1989) at 377. Bingham at 31 – 32.

the decision, not in its underlying legal philosophy, however much lawyers may have that wider interest".[30]

12. In Australia, against the background of the developments in England and the international developments examined below, moves for reform of the law of arbitration, begun in the 1970s,[31] culminated in the mid-1980's in the passage of the CA Act and equivalents in other States and Territories. An "emotional debate"[32] over the desirability of including an obligation on arbitrators to provide reasons was resolved by the enactment of an obligation on an arbitrator to provide a statement of the reasons for making the award in s29(1)(c) of the CA Act. Near contemporaneous commentary on the CA Act denied that the obligation in s29(1)(c) meant that "the lay arbitrator has to give reasons for judgment with the syllogistic wisdom of a judge" and reference was made to the guidance provided by Donaldson LJ in *Bremer v Westzucker* on the "similar English requirement" in the UK Act.[33]

Development of UNCITRAL Model Law

13. In 1976 the General Assembly of the United Nations adopted the Arbitration Rules developed by the United Nations Commission on International Trade Law (**UNCITRAL** and **UNCITRAL Arbitration Rules**) and recommended their use in the settlement of disputes arising in the context of international commercial relations. Art 32(2) of the UNCITRAL Arbitration Rules provided that "[t]he arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given". The *travaux préparatoires* for the UNCITRAL Arbitration Rules disclose that representatives from the United States and United Kingdom opposed the inclusion of any obligation on the part of arbitrators to state reasons for their awards on the basis that it was "not traditional ... for arbitrators" in those countries "to state the reasons as part of the award"

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30 [1985] 1 AC 191 at 208F – 209C. Notably, the arbitrators included a Queen's Counsel (see 194D)

31 The reform of commercial arbitration law was considered by a number of State and Territory Law Reform Commissions. References to the reports are collected in the NSW Law Reform Commission, *Report on Commercial Arbitration* (1976, LRC 27) (**NSWLRC 27**) at [1.4].

32 JJA Sharkey and JB Dorter, *Commercial Arbitration* (1986), p249. Whether there should be an obligation on arbitrators to provide reasons for awards proved a point of disagreement between Law Reform Commissions (The views of the various law reform commissions are summarised in NSWLRC 27 at Section 4, [9.4.1] – [9.5.7], p169 – 172). The law reform commissions of New South Wales and Victoria recommended against such an obligation because it would provide new ground for attacking awards and adversely affect their finality. The law reform commissions of Queensland, Western Australia (albeit with dissent) and the ACT recommended in favour of such an obligation seeing the provision of reasons as a "basic requirement of justice" and a means of ensuring the legal correctness of awards (Law Reform Commission of Western Australia, Commercial Arbitration and Commercial Cases (1974, Project 18), (**WALRC 18**) at [32], p10 and Appendix 1, [17(b)]. See also Queensland Law Reform Commission, A Bill to Consolidate the Law Relating to Commercial Arbitration (Working Paper, No 2), 19 December 1969, p8 – 9). In Queensland, the law reform commission's recommendation was passed into law with the passage of the *Arbitration Act 1973* which, in s 24(2), required an arbitrator to give reasons for his awards. The failure to do so was "misconduct" for which an award could be set aside. In Western Australia, it was proposed that a failure to give reasons should be a "jurisdictional error" with the result that a court could set aside an award so made (WALRC 18 at [38(i)], p14 and clause 23 and 32 of the draft Arbitration Act appearing as Appendix B).

33 JJA Sharkey and JB Dorter, *Commercial Arbitration* (1986), p249. See also Gibbs at 100.

and that an obligation to state reasons may expand the opportunities for courts to overturn arbitral awards on the merits. This was resisted by representatives from civil law jurisdictions on the basis that, in those jurisdictions, it was obligatory to provide reasons and that the absence of them might make international enforcement of an award difficult. The latter position prevailed.[34]

14. In 1979 UNCITRAL requested the Secretary-General to prepare a preliminary draft for a model law on arbitral procedure with the aim of assisting states to reform, modernise and harmonise their laws on arbitration procedure.[35] In 1981 the Secretary-General delivered a report discussing the "possible features of a model law on international commercial arbitration" which noted that:

> "[t]here is a point to be included on which national laws differ and which is controversial, that is whether the award shall state the reasons on which it is based. Probably the most acceptable solution on the international plane would be to require such statement of reasons unless the parties have agreed that no reasons are to be given".[36]

15. Following receipt of the Secretary General's report, UNCITRAL proceeded with the preparation of a draft model law on commercial arbitration, entrusting the task to a Working Group.[37] In a report on its work, the Working Group addressed the question of "[s]hould the model law require that the award state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given?" It answered the question as follows:

> "There was wide support for the view that the model law should require that the award state the reasons upon which it is based. Such a requirement was found in many national arbitration laws and would also have a beneficial influence on the decisions of the arbitrators. Under another view, however, not requiring reasons to be stated also has advantages: the award could be rendered speedily, could not easily be challenged and was appropriate for certain types of arbitrations (eg., quality arbitrations). During the deliberations it was suggested that an acceptable solution might be to require the statement of reasons, but to permit parties to waive this requirement. ... It was noted that this solution was in accordance with Article 32(3) of the UNCITRAL Arbitration Rules, and it received very wide support".[38]

16. The question of whether arbitrators should be obliged to give reasons for their awards occasioned little further discussion in the proceedings of the Working

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34 See Summary Record of the 10th Meeting of the 9th session of UNCITRAL, 19 April 1976, (A/CN.9/9/C.2/SR.10) at [60] – [77].

35 Report of UNCITRAL on the work of its 12th Session, 18 – 29 June 1979 (A/34/17) at [78] – [81], p20 – 21

36 Report of the Secretary General "Possible features of a model law on international commercial arbitration", 14 May 1981 (A/CN.9/207) at [87], p88.

37 Report of UNCITRAL on the work of its 14th Session, 19 – 26 June 1981 (A/36/17) at [63] – [70], p12.

38 Report of the Working Group on International Contract Practices on the Work of the Third Session, 23 March 1982, (A/CN.9/216) [80], p20.

Group.[39] In his report providing an analytical commentary, the Secretary-General stated in relation to Art 31(2) of the Model Law as finally adopted:

> "The practice of stating the reasons upon which the award is based is more common in certain legal systems than in others and it varies from one type of system to another. Paragraph (2) adopts a solution which accommodates such variety by requiring that the reasons be stated but allowing the parties to waive that requirement'".[40]

17. This sequence of events justifies the comment of Allsop P at [208] AB 1987 that the "compromise in the Model Law was not between those who thought arbitrators' reasons should reach the standard of detail of a judge in the common law system and those who thought some lesser standard was called for" but "was a compromise between national laws requiring reasons and those not requiring any reasons". The obligation to give reasons was an adaptation of the arbitration practice of civil law jurisdictions.

18. The civil law obligation of arbitrators to give reasons is not, and has never been, coterminous with the obligation of common law judges to give reasons. The obligation of an arbitrator in a civil law jurisdiction to give reasons is said to be "confined to a summary justification, in fact and in law, of the decision of the arbitral tribunal on the issues to be determined" and "is restricted to allowing a party to understand the main reasons supporting the decision and to assess the possibilities of appeal, without addressing all arguments advanced...". An arbitrator "is not obliged to follow all the parties' arguments and respond to each of them, a logical relationship between the reasons and the decision being deemed sufficient". A lack of reasons is not a ground for setting aside an award unless no reasons are given at all or unless they are "so inadequate as to render it impossible to identify the *ratio decidendi* of the decision". The existence of a contradiction in reasons for an award is not a sufficient ground to set aside an award because that would involve an assessment of the award on its merits.[41]

19. Subsequent judicial consideration of the obligation of an arbitrator to give reasons under Art 31(2) of the Model Law is also inconsistent with the proposition that it imposes on an arbitrator an obligation to give reasons coterminous to that of a common law judge. The Privy Council in *Bay Hotel and Resort Limited v Cavalier Construction Co Ltd* referred to the judgment of Donaldson LJ in *Bremer v Zucker* as providing content to the obligation in Art 31(2) of the Model Law.[42]

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39 The relevant materials are set out in HH Holtzmann and JE Neuhas, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (1980), p843 – 865.

40 Analytical commentary on draft text of a model law on international commercial arbitration: report of the Secretary General (A/CN.9/264), in Yearbook of the United Nations Commission on International Trade Law, 1985, Volume XVI, p135.

41 JF Poudret and S Besson, *Comparative Law of International Arbitration* (translated by S Berri and A Ponti) (2nd edition, 2007), [746] – [750], p 666 – 673.

42 [2001] UKPC 34 at [39] – [42].

20. In *Navigation Sonamar Inc v Algoma Steamships Ltd*[43] Gonthier J, sitting in the Superior Court of Quebec, dismissed an application to set aside an arbitral award on the basis that the obligation in Art 31(2) of the Model Law had not been complied with because of an absence of coherent and comprehensive reasons. Gonthier J said:

> "Although the Award does not disclose any judicial reasoning, it nevertheless covers the essentials such as the findings of fact and provisions of the Charter Party Agreement upon which it draws its conclusions regarding the validity of the claim. The arbitrators were commercial men ... and have acted and expressed themselves as such and not as lawyers. We cannot blame them for that".[44]

21. Similarly, the Hanseatisches Oberlandesgericht Hamburg dismissed an application to set aside an award on the basis of a failure to comply with Art 31(2) of the Model Law by reason of inadequate reasons. The Court found that "such a defence is only available where the reasoning as required is totally lacking content, senseless or contrary to the decision, amounting, in other words to a complete lack of reasoning".[45]

Content of obligation of an arbitrator to give reasons

22. As with the obligation of a judge,[46] the content of the obligation of an arbitrator to give reasons is to be found by reference to the functions the reasons serve. Those functions are distinct from the functions served by the provision of reasons by judges. First, it is no part of the function of arbitrators' reasons to satisfy the public interest in ensuring that powers of adjudication have a reasoned basis. Arbitrators' decisions are not an exercise of public power and are generally confidential. Second, unlike judgments, arbitral awards have no, or very limited, role to play in the development of the law through the accumulation of precedents.[47]

23. Thus, the functions of an arbitrator's provision of reasons is to be found in "the basic rule of justice that those charged with making a binding decision affecting the rights and obligations of others should (unless those others agree) explain the reasons for making that decision"[48] and the facilitation of such avenues of appeal from the arbitrator's award as are available.[49] However, for the reasons which follow, neither of those functions requires more than that an arbitrator provide

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43 [1995] 1 *MAL Quarterly Reports* 1.

44 [1995] 1 *MAL Quarterly Reports* 1 at 19.

45 See the abstract by S Kroll and M Heidkamp, "Case Law of UNCITRAL Texts (CLOUT)" (A/CN.9SER.C/ABSTRACTS/50), 26 August 2005, p6, referred to by Allsop P in *Westport* at [211].

46 *Tatmar* at 386B per Mahoney JA; *Soulemezis* at 280G per McHugh JA; *Beale* at 444 per Meagher JA.

47 Keane at 4.

48 DAC Report at [247].

49 *The Ninemia* at 807D. Bingham at 30.

their actual reasons for decision in terms sufficient to disclose whether or not they have given actual consideration to the dispute referred to them.

24. First, the "basic rule of justice" cannot logically give rise to any greater obligation than that arbitrators provide their actual reasons for decision. It imports no obligation that the reasons satisfy any particular standard of reasoning other than that they contain the *bona fide* reasons of the arbitrator. The reasons may be good or bad, they may expose legal or other error vitiating the decision, but so long as they are the actual reasons of the arbitrator the obligation of the arbitrator to observe the "basic rule of justice" is discharged. [50]

25. In relation to the function of an arbitrator's reasons to facilitate appeals from awards, the trend of arbitration law reform over the past 30 years has been to reduce the capacity of courts to interfere with arbitral awards to promote the finality of the arbitral process.[51] This is reflected in Art 34 of the Model Law which exclusively contains the grounds on which an award governed by the Model Law can be set aside. Error of law or fact is not a basis for the setting aside of an award; nor is a failure to comply with Art 31(2) a ground on which an award can be set aside. The grounds on which an award can be set aside in Art 34 "relate primarily to ensuring that the process of arbitration is fair" and are "not concerned with the substantive outcome".[52] With the exception of the ground in Art 34(2)(b)(ii) – that the award "is in conflict with the public policy of the state" - the grounds on which an award can be set aside would not be informed by the quality of the reasons an arbitrator gave for their award.

26. The "public policy" ground in Art 34(2)(b)(ii) of the Model Law was intended to cover instances where the award contravened "fundamental principles of law and justice in substantive as well as procedural respects" including "corruption, bribery, fraud and similar serious cases".[53] Section 19 of the *International Arbitration Act* includes in the "public policy" basis in Art 34(2)(b)(ii) of the Model Law an instance where "a breach of the rules of natural justice occurred in connection with the making of the ... award". Although under Australian law the provision of adequate reasons as such is not ordinarily viewed as a requirement of the rules of natural justice,[54] inadequate reasons may be argued to disclose a denial of natural justice by demonstrating a failure to "respond to substantial clearly articulated argument[s] upon established facts" such that the decision-

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50 See analogously, *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346, [68] – [69] per McHugh, Gummow and Hayne JJ. See also, *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469 at 491, [91] – 493, [100] per Kiefel J.

51 *Lesotho* at 230, [17] – 231, [19].

52 *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] SCR 1 at 8, [20] – [21], at 12, [37] per Judith Prakash J.

53 Report of UNCITRAL on the work of its 18th Session (3 -21 June 1985) (A/40/17) at [297], p36.

54 *Osmond*; *Perkins v County Court of Victoria* (2000) 2 VR 246 at 270, [55] – 272, [61] per Buchanan JA (with whom Phillips and Charles JJA agreed).

maker has really not determined the dispute referred to them at all.[55] It is likely that an arbitrator's reasons would have to be inadequate to a high degree to establish a breach of the rules of natural justice such that "one could say, in effect, that the lights were on but nobody was home".[56]

27. A construction of the obligation in Art 31(2) of the Model Law as satisfied by arbitrators giving their actual reasons sufficient to disclose whether or not they actually considered the dispute referred to them, is consistent with the international jurisprudence on the Model Law and the civil law obligation of arbitrators to give reasons. It is also consistent with international arbitration best practice which emphasises certainty and finality of arbitral awards at the expense of ensuring legal correctness.

Conclusion

28. When parties choose to resolve disputes by arbitration, even by retired judges, they choose arbitration over litigation in order to achieve a resolution with greater "economy, celerity and finality".[57] As Rogers CJ CommD pointed out, "[t]hose aims, to a large extent, are made impossible of achievement if the procedures of the court are mimicked."[58] In particular, as Lord Roskill observed in *The Antaois,* over elaborate reasons of arbitrators can frustrate the purposes for which parties choose arbitration (see paragraph 11 above). The aims of arbitration for speedy and final determination of disputes are no less when the dispute is complex, a retired judicial officer is an arbitrator and counsel is retained. To assimilate the obligations of arbitrators to provide reasons to that of common law judges, even where those arbitrators are retired judicial officers, runs counter to the trend of arbitration law reform over the past 30 years and recognised international arbitration best practice and, for the reasons given above, is unsupported in the history of an arbitrator's obligation to give reasons both in common law jurisdictions and internationally.

Dated: 25 January 2011

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55 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092, [24] per Gummow and Callinan JJ, at 1102, [95] per Hayne J. *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 at 36, [90].

56 M Aronson, D Dyer, M Groves, *Judicial Review of Administrative Action* (4th Ed, 2009) at [4.450], p275. See also, *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 114 FCR 1 at 22, [68] per Black CJ, French and Selway JJ (such a finding not "lightly to be made").

57 *Tuta* at 257.

58 *Imperial Leatherware Co Pty Limited v Marci & Marcellino Pty Limited* (1991) 22 NSWLR 653 at 661E.

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APPENDIX A – RELEVANT STATUTORY PROVISIONS

UNCITRAL Model Law on International Commercial Arbitration 1985

Article 31 Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 34 Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject□matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Section 19, *International Arbitration Act 1974*:

Articles 17I, 34 and 36 of Model Law--public policy

Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

(a) the making of the interim measure or award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.