SUPREME COURT OF QUEENSLAND

CITATION:	*Wagners Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS* [2010] QCA 219
PARTIES:	**WAGNERS NOUVELLE CALEDONIE SARL** (appellant/respondent) **v** **VALE INCO NOUVELLE CALEDONIE SAS** (respondent/appellant) **GORO NICKEL SAS** (not a party to appeal)
FILE NO/S:	Appeal No 4886 of 2010 SC No 1458 of 2010 SC No 4262 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Case Stated
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2010
JUDGES:	McMurdo P and Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The questions in the Case Stated are answered as follows:** • **Question (a): No;** • **Question (b): It is inappropriate to answer this question;** • **Question (c): In view of the answer to question (b), no answer to this question is required;** **2. The appellant pay the respondent's costs of the Case Stated**
CATCHWORDS:	ARBITRATION – THE SUBMISSION AND REFERENCE – DISPUTE OR DIFFERENCE WITHIN THE MEANING OF AN ARBITRATION CLAUSE – DISPUTE AS TO MEANING OF CONTRACT – clause provided that contractual disputes would be "submitted to arbitration in accordance with and subject to the UNCITRAL Arbitration Rules" – whether clause constituted an agreement that the Model Law would not apply to any arbitration between the parties – whether *Australian Granites Limited v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* wrongly decided

International Arbitration Act 1974 (Cth), s 21
Commercial Arbitration Act 1990 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 483

Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488, cited
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, cited
Australian Granites Limited v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH [2001] 1 Qd R 461; [1999] QCA 242, distinguished
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485; [1993] HCA 15, cited
Comandate Marine Corporation v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45; [2006] FCAFC 192, cited
Co-op International Pte Ltd v Ebel SA [1998] 3 SLR 670, cited
Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd & Anor [2002] 2 SLR 164, cited
Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2004] 1 AC 715; [2003] UKHL 12, cited
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896; [1997] UKHL 28, cited
John Holland Pty Ltd v Toyo Engineering Corp (Japan) [2001] 2 SLR 262, cited
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108, cited
McCann v Switzerland Insurance Australia Limited (2000) 203 CLR 579; [2000] HCA 65, cited
Read v J Lyons & Co [1947] AC 156; [1946] UKHL 2, cited
Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd [2007] 3 SLR 86; [2007] SGCA 28, cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited

COUNSEL: T P Sullivan SC for the appellant
J T Gleeson SC, with J A Redwood, for the respondent

SOLICITORS: DLA Phillips Fox for the appellant
Norton Rose for the respondent

[1] **McMURDO P:** Questions in this case stated should be answered as follows:

> **Question (a):** Whether clause 8.17 of the Contract between the Appellant and the Respondent ("the Litigants"), which relevantly provided *"any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with and subject to the UNCITRAL Arbitration Rules"*, constituted, within the meaning of section 21 of the *International Arbitration Act* 1974 (Cth) (*"* the Act") , an agreement between the Litigants *"that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law"'* such that by the terms of section 21 the Model Law does not have any

application to any part of the settlement of the dispute the subject of the arbitration between the Litigants: Answer: No.

Question (b): Whether the principle contained in paragraph 12 of the decision of the Queensland Court of Appeal in *Australian Granites Limited v Eisenwerk Hensel Bayreuth Dipl-lng GmbH* (2001) 1 Qd R 461, namely *"that, by expressly opting for one well known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the Model Law'* ("the Eisenwerk Principle"), is distinguishable from the facts of this case, by reason of the adoption by the Litigants of the UNClTRAL Arbitration Rules rather than the Rules of Conciliation and Arbitration of the International Chamber of Commerce: Answer: It is inappropriate to answer this question.

Question (c): If the answer to question (b) is *"no"*, whether the Eisenwerk Principle was correctly decided. Answer: In view of the answer to question (b), no answer to this question is required.

[2] I agree with Muir JA's reasons for answering the questions in the case stated in this way. I also agree that the appellant, Vale Inco Nouvelle-Caledonie SAS (formerly Goro Nickel SAS), pay the respondent's costs of the case stated.

[3] **MUIR JA:** On the application of the parties, a judge of the trial division ordered, pursuant to Rule 483 of the *Uniform Civil Procedure Rules* 1999 (Qld), that a case be stated for the opinion of this Court. The questions posed are:

"(a) Whether clause 8.17 of the Contract between the Appellant and the Respondent ('the Litigants'), which relevantly provided '*any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with and subject to the UNCITRAL Arbitration Rules*', constituted within the meaning of section 21 of the *International Arbitration Act 1974* (Cth) ('the Act') an agreement between the Litigants '*that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law*' such that by the terms of section 21 the Model Law does not have any application to any part of the settlement of the dispute the subject of the arbitration between the Litigants;

(b) whether the principle contained in paragraph 12 of the decision of the Queensland Court of Appeal in *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing GmbH* (2001) 1 QdR 461, namely '*that, by expressly opting for one well known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the Model Law*' ('the Eisenwerk Principle'), is distinguishable from the facts of this case, by reason of the adoption by the Litigants of the UNCITRAL Arbitration Rules rather than the Rules of

Conciliation and Arbitration of the International Chamber of Commerce;

(c) if the answer to question (b) is '*no*', whether the Eisenwerk Principle was correctly decided."

The facts upon which the case is stated

[4] The facts upon which the case is stated are as follows:

"1. By 29 June 2005 the Appellant and the Respondent had entered into a contract in writing which included a contractual provision for arbitration in the following terms:

> *'8.17 — Dispute Resolution*
> *Any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with and subject to the UNCITRAL Arbitration Rules. In the absence of an agreement by the parties to the appointment of an arbitrator, the appointing person shall be the National President of the Institute of Arbitrators and Mediators Australia (IAMA). The administrating body shall be the Institute of Arbitrators and Mediators Australia (IAMA). There shall be one arbitrator, the language of the arbitration shall be English, the place of the arbitration shall be Brisbane.'*

2. Clause 8.17 is similar in content to the model arbitration clause which has been suggested by the Institute of Arbitrators and Mediators Australia (IAMA) from time to time, for inclusion for separate arbitration agreements. …

3. On 24 August 2009 a Notice of Arbitration under Article 3 of the UNCITRAL Arbitration Rules was given by the Respondent to the Appellant. … Pursuant to that notice arbitration commenced between the parties with Mr Ian Bailey SC as the arbitrator.

4. There is a dispute between the parties as to whether the Model Law as contained in the *International Arbitration Act 1974 (Cth)* (as amended to 4 July 2008) applies to this arbitration.

5. The seat or place (the *lex loci arbitri)* of the arbitration is Brisbane, Australia.

6. The supervisory law (the *lex arbitri)* is governed by the law of Queensland, including laws passed by the Commonwealth Parliament and the common law of Australia, as applicable.

7. The arbitration is an 'international' commercial arbitration for purposes of clauses (1) and (3) of Article 1 of the Model Law.

8. A decision entitled 'interim award' was made by Mr Bailey SC on the arbitration on 15 January 2010. …

9. On 15 December 1976 the United Nations General Assembly by General Assembly Resolution 31/98 promulgated the UNCITRAL Arbitration Rules. …

10. On 11 December 1985 the United Nations General Assembly by United Nations General Assembly Resolution 40/72 recommended that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. …

11. The *International Arbitration Act 1974* (Cth) (as amended to 4 July 2008) is the applicable version of that Act in respect of the issue of whether the Model Law applies to the current arbitration. …

12. The content of the material under the heading *'Legislative History'* in the text book *'A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary'*, Holtzmann and Neuhaus:
    (a) for articles 2 (at pages 150 to 182), 4 (at pages 201 to 215), 12 (at pages 391 to 405), 13 (at pages 410 to 436), 14 (at pages 442 to 463), 15 (at pages 467 to 476), 16 (at pages 487 to 528), 19 (at pages 568 to 591) 20 (at pages 596 to 608), 23 (at pages 650 to 669), 24 (at pages 675 to 697), 25 (at pages 701 to 716), 26 (at pages 721 to 732), 27 (at pages 734 to 762), 28 (at pages 772 to 807), 29 (at pages 811 to 821), 33 (at pages 892 to 907), 34 (at pages 910 to 1003) and 36 (pages 1054 to 1114);
    (b) for the 1979 UNCITRAL Report (A/34/17 (15 August 1979) (at pages 1187 to 1189),

    accurately records extracts of the content of various meetings, reports, drafts, submissions, notes and other documents as described therein, together with editorial notes of the text writers which provide accurate context to the relevant extracts, leading to the promulgation of the Model Law by UNCITRAL as referred to in the General Assembly Resolution 40/72. …

13. The parties note that in respect of the preceding paragraph that section 17 entitled *"Interpretation of Model Law—use of extrinsic material"* provides as follows:

    '(1) For the purposes of interpreting the Model Law, reference may be made to documents of:
    (a) the United Nations Commission on International Trade Law; and
    (b) its working group for the preparation of the Model Law;
    relating to the Model Law.
    (2) Subsection (1) does not affect the application of section 15AB of the Acts Interpretation Act 1901 for the purposes of interpreting this Part.'

14. The Model Law was implemented into Australian law by the *International Arbitration Amendment Act 1988* (Cth) and by operation of Part III (section 16(1)) of the IAA "has

force of law" in Australia. The Second Reading Speech to the *International Arbitration Amendment Act 1988* (Cth) is attached to this statement …

15. The Eisenwerk Principle (as defined in the Case Stated Questions) concerned the effect of the adoption by the parties of the Rules of Conciliation and Arbitration of the International Chamber of Commerce ('The ICC Rules') on the application of the Model Law. The version of the ICC Rules considered by the Court of Appeal in that decision is attached to this statement …

16. The parties have agreed for the purposes of the Appellant's appeal, the Respondent's application and the case stated that:

    (A) questions (b) and (c) are subsidiary questions to the ultimate question (a) in the questions stated for the opinion of the Court of Appeal pursuant to rule 483 of the UCPR;

    (B) if the answer to question (a) is 'no', then the settlement of the dispute the subject of the arbitration between the parties is governed by:

        (i) the provisions of the Model Law, as adopted by Part III, Division 2 of the IAA;

        (ii) the UNCITRAL Arbitration Rules, to the extent those rules are not inconsistent with mandatory provisions of the Model Law, such as Article 18 of the Model Law;

        (iii) Part I and Part II of the IAA and Divisions 1, 2 and 4 of Part III of the IAA; and

        (iv) those provisions of the *Commercial Arbitration Act 1990* (Q1d) ('the CAA') not covered by the Model Law and not rendered inoperative by section 109 of the *Commonwealth Constitution* (if any).

    (C) if the answer to question (a) is 'yes', then the settlement of the dispute the subject of the arbitration between the parties is governed by:

        (i) the provisions of the CAA;

        (ii) the UNCITRAL Arbitration Rules to the extent that they are not modified by the CAA; and

        (iii) those parts of the IAA not rendered inapplicable by section 21 thereof (if any).

17. The parties agree that a binding and authoritative determination by the Court of Appeal as to the applicable supervisory law is essential to the efficacious conduct of the arbitration in respect of the underlying dispute concerning the rights and liabilities of the parties. The parties also agree it is also important for them to know at an early stage of the

arbitration their rights of judicial review of any award of the Arbitrator determining their rights and liabilities.

18. There are many sets of arbitration rules in the commercial market which parties can adopt for arbitrations, other than the UNCITRAL Arbitration Rules or the ICC Rules. These include the Swiss Rules of International Arbitration, the Hong Kong International Arbitration Centre Administered Arbitration Rules, the Rules for Arbitration of the Regional Centre for Arbitration Kuala Lumpur (2003 version and 2008 version), London Court of International Arbitration Rules and Australian Centre for International Commercial Arbitration ('ACICA') Arbitration Rules. A copy of the ACICA's suggested (from time to time) model clause and the ACICA Arbitration Rules are annexed to this statement …"

The appellant's contentions

[5] Counsel for the appellant contended that on the proper construction of cl 8.17 of the Contract, the parties "agreed" that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the "Model Law". Section 21 of the *International Arbitration Act* 1974 (Cth) ("the Act") provides:[1]

> "**21 Settlement of dispute otherwise than in accordance with Model Law**
>
> If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute."

[6] Clause 8.17 of the Contract relevantly provides:

> "*Any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with and subject to the UNCITRAL Arbitration Rules."*

[7] It is argued that the express selection of the UNCITRAL[2] Arbitration Rules ("the UAR") necessarily imports an agreement by the parties that their disputes are to be settled otherwise than in accordance with the "Model Law" for reason that:

(a) The UAR establish a regime distinct from the "Model Law";[3]

(b) The UAR provide a comprehensive framework for, inter alia, the establishment of an arbitral tribunal, for the conduct of the proceedings and for the making of the award;

(c) The UAR are designed to stand on their own and to carry out arbitration to the end;[4] and

---

1 As in force at the relevant time.

2 United Nations Commission on International Trade Law.

3 *Russell on Arbitration*, 23rd ed, 2007, edited by Sutton, Gill & Gearing at p 23, para 1-049, footnote 198.

4 Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2nd ed, 2004, p 500.

(d) An award made pursuant to the UAR is final and binding.[5]

[8] Particular reliance is placed by counsel for the appellant on *Australian Granites Limited v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH*. Clause 13.1 of the Contract in *Eisenwerk* provided:[6]

> "Any dispute arising out of the Contract shall be finally settled, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators designated in conformity with those Rules."

[9] Pincus JA, with whose reasons Thomas JA and Shepherdson J agreed, noted that:

> "It would have made little sense to agree to subject disputes to arbitration under both the Model Law and the ICC Rules, since the two are irreconcilable in a number of respects."

[10] After referring, by way of example, to the provisions concerning the number and identity of arbitrators his Honour said that if the argument advanced by the appellant was correct the: [7]

> "… use of this recommended clause[8] is insufficient to avoid the, surely highly inconvenient, result that the parties are bound to both a Model Law arbitration and an ICC arbitration. And the former would not be an arbitration under the aegis of an established international organisation, as the latter is; …"

[11] His Honour then stated the "principle" in question (b) of the case stated:[9]

> "In my opinion the better view is that, by expressly opting for one well-known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the Model Law. …"

[12] Section 16 of the Act provides that "Subject to this Part" [Part III] the Model Law has the force of law in Australia. Section 21 is in Part III and recognises that parties to an international commercial arbitration are entitled to determine how their disputes are to be settled. The Eisenwerk Principle recognises that if the parties expressly opt for a well known and quite different set of rules from the Model Law, then in terms of s 21, they will have agreed for the dispute to be settled otherwise than in accordance with the Model Law. The Eisenwerk Principle does not require the parties to state literally in their arbitration clause, "The Model Law does not apply to this arbitration", or to use similar words, for there to be an agreement to settle the dispute otherwise than in accordance with the Model Law.

[13] The appellant's outline of submissions gives a number of examples of differences between the Model Law and the UAR and notes that the incompatibility of the Model Law with the UAR was implicitly recognised by the Singapore High Court in *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd & Anor*.[10]

---

5 UAR, r 32(2).
6 [2001] 1 Qd R 461 at [8].
7 [2001] 1 Qd R 461 at [11].
8 Clause 13.1 of the contract in *Eisenwerk*.
9 *Australian Granites Limited v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461 at [12].
10 [2002] 2 SLR 164 at paras [69] and [87].

[14] As in *Eisenwerk*, the parties have chosen "a well known regime", the UAR, which differs from another well known regime, the "Model Law", and the parties have thus agreed to have their dispute settled otherwise than in accordance with the Model Law.

[15] Reference was made to the principle that, in the interests of uniformity in the interpretation of uniform national legislation, a court should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.[11] It was submitted that if this Court, contrary to the appellant's argument, considered there to be doubt about the correctness of *Eisenwerk*, it would nevertheless be unable to conclude that the decision was "plainly wrong". In that regard it was noted that an approach, similar to that in *Eisenwerk*, has been taken in Singapore in *Co-op International Pte Ltd v Ebel SA*[12] and *John Holland Pty Ltd v Toyo Engineering Corp (Japan)*.[13]

[16] Counsel for the appellant's written submissions analysed the material differences between the Model Law and the UAR. It is unnecessary to give any detailed consideration to this analysis as counsel for the respondent did not dispute that there were both mandatory and non-mandatory provisions of the Model Law which were inconsistent with provisions of the UAR.

The respondent's contentions

[17] The essence of the respondent's case is that cl 8.17 of the Contract does not constitute an agreement within the meaning of s 21 of the Act because:

(a) the UAR sit comfortably with the Model Law as part of a unified system for the regulation of International Commercial Arbitration;

(b) the UAR are conspicuously silent on one of the most important defining characteristics of a national arbitral law such as the Model Law: the role of the Courts. Thus an agreement to adopt the UAR cannot constitute an agreement to depart from a critical element of the stipulation in s 21;

(c) The adoption of the UAR constitutes the adoption of rules of a different genus to the Model Law and s 21 only contemplates a like-for-like substitution of rules of the same genus as the Model Law;

(d) the adoption of a set of procedural rules capable of operating in tandem with the Model Law falls well short of conveying a sufficiently clear and unambiguous intention to displace the Model Law as the applicable supervisory law; it attributes an objective intention to apply and revive the strictest supervisory court framework contained in the *Commercial Arbitration Act* 1990 (Qld) by indirect consequence only of the operation of s 109 of the Constitution, rather than affirmative agreement; and

(e) As a result, the parties have not expressed a sufficiently clear and unambiguous intention to have their arbitration supervised by a state-based system of review rather than the system of supervisory review under the Model Law, such that it cannot be concluded they have agreed to settle their dispute otherwise than in accordance with the Model Law.

---

11 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

12 [1998] 3 SLR 670 at 703.

13 [2001] 2 SLR 262 at 266.

[18] The UAR largely concern aspects of arbitral procedure governing the conduct and organisation of the arbitral proceeding. They are of the same broad genus as the ICC rules and other arbitration rules referred to in paragraph 18 of the agreed facts. They do not fulfil the role of a national law on arbitration and, in particular, are silent on the role of the Courts of the arbitral situs in the supervision of the arbitration and any review or appeal from an arbitral award – a matter central to a national arbitration law.

[19] The purpose of the Model Law is fundamentally different to that of the UAR. It offers a system of national law governing International Commercial Arbitrations, which countries are free to adopt as their supervisory law, or curial law, for that class of arbitrations. If adopted, the Model Law becomes the controlling *lex arbitri* for International Commercial Arbitrations where the judicial seat is the adopting state. A critical component of the exercise by the Court of its supervisory jurisdiction is the scope for challenges to the arbitral award. The Model Law is recognised by the leading treatise on International Commercial Arbitration as "a benchmark for any model law of arbitration".[14] It was adopted by Australia in 1988 and has since been adopted in over 60 countries and is now recognised as an integral part of "a coherent international system" for dealing with the settlement of disputes by International Commercial Arbitration.[15]

[20] The fourth paragraph of the General Assembly Resolution of the United Nations adopting the Model Law recognises that the Model Law sits together with the Convention and the UAR as part of a "unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations".[16] The leading commentary on the provisions and debates leading up to the adoption of the Model Law ("the Commentary") concludes that this paragraph of the General Assembly Resolution indicates that the Model Law is intended to operate as an "interrelated legal framework" for international arbitration, together with the UAR and Convention.[17]

[21] The UAR is an example of efficient procedural rules, the Model Law is the national law that facilitates arbitration and the Convention is the international treaty supporting enforcement of foreign arbitral awards.[18] The Model Law sets out the basic relationship between the courts and the arbitration in Articles 5 and 6. Article 5 provides that in matters governed by the Model Law, no court shall intervene except where so provided by the Model Law. Article 6 then specifies those matters in which the involvement of the courts of the State is envisioned.

[22] The most significant provision referred to in Article 6 is Article 34. It lists the "only" grounds upon which a court can set aside an award. It embodies the Model

---

14 Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed, 2004, preface. See also Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd ed, 2010, Sweet Maxwell, preface.

15 The Honourable JJ Spigelman AC, "Transaction Costs and International Litigation", address to the 16th InterPacific Bar Association Conference, Sydney, 2 May 2006.

16 United Nations General Assembly Resolution 40/72.

17 Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History*, 1995, pp 6-9.

18 Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards" in *The Internationalization Arbitration* (ed(s) Hunter, Marriott & Veeder, 1995), p 109.

Law's underlying philosophy of minimal court interference with the finality of an arbitral award.[19]

[23] The UAR either does not make any provision with respect to some of these matters in the Model Law (i.e., Articles 8, 27, 34, 35 and 36), or with respect to others, may deal with the general topic without addressing the extent of court involvement (i.e., Articles 9, 11, 13, 14 and 16). These additional matters addressed in the Model Law are not appropriate to be addressed in the UAR because the latter are consensual procedural rules and not matters upon which the parties can agree to between themselves.

[24] The concurrent application of the UAR and the Model Law to an International Commercial Arbitration "is entirely reconcilable", once it is appreciated that:

> "26. …
>
> (a) there is an essential juristic difference between the UAR and the Model Law;
>
> (b) the UAR and the Model Law were intended by the body that promulgated them to operate together; and
>
> (c) the UAR and the Model Law serve different purposes, with the Model Law primarily directed at defining the relationship between the courts and the arbitration whilst the UAR is primarily concerned with procedural rules to regulate the conduct of the arbitral process,
>
> the concurrent application of the UAR and the Model Law to an international commercial arbitration is entirely reconcilable.
>
> 27. Both the UAR and the Model Law contain rules of reconciliation providing for their harmonious concurrent operation. ...
>
> 28. Article 19 of the Model Law expressly leaves the parties free[20] to adopt procedural rules, including the UAR, to regulate the conduct of their arbitration in respect of the matters contained in Chapter V of the Model Law, except where the Model Law has specified mandatory provisions which, consistently with Article 1(2) of the UAR, the parties are not free to derogate from.
>
> 29. Articles 2(d) and 2(e) of the Model Law are to similar effect.[21]
>
> …

---

19 The rational justification for this approach was recently explained by the Singapore Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR 86 at paras [59]-[62].

20 The legislative history reveals that "Article 19 may be regarded as the most important provision of the Model Law. It goes a long way towards establishing procedural autonomy by recognizing the parties' freedom to lay down the rules of procedure (paragraph (1)) and by granting the arbitral tribunal, failing the agreement of the parties, wide discretion as to how to conduct the proceedings (paragraph (2)), both subject to fundamental principles of fairness (paragraph (3))." See Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History* (1995), pp 582-583.

21 See Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History* (1995), p 171.

> 30. … the debates leading to the adoption of the Model Law and the Commentary to those debates reveals that it was expressly contemplated that Article 19 would embrace an adoption by the parties of the UAR.[22] …
>
> 31. Whilst there is a potential for some overlap between the UAR and the Model Law, this does not produce any intractable or unworkable inconsistency between them. It is intended that they sit together. …
>
> 34. A subsidiary principle is that so far as the text reasonably permits, the procedural provisions of the UAR and the Model Law should be read harmoniously. Where they cannot sensibly be read together, however, the internal rules of reconciliation resolve any inconsistency without ambiguity."

Principles of contractual construction

[25] The object of contractual construction is to "ascertain and give effect to the intentions of the contracting parties".[23] Those intentions, to be determined objectively, are "what a reasonable person would have understood [the words of the contract] to mean".[24] And to ascertain that "normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction".[25] Such a reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract.[26] As the Contract is a commercial one it "should be given a businesslike interpretation" with "attention to…the commercial circumstances which the document addresses, and the objects which it is intended to secure".[27] Commercial contracts are to be construed with a view to making commercial sense of them.

[26] It is also important in an exercise of construction like the present to bear in mind that the task is to ascertain the meaning of the terms which the parties have selected: not the terms which, with the advantage of hindsight or with the benefit of different legal advice, the parties may have more advantageously agreed upon.[28]

[27] Words in a contractual provision take colour, not merely from the remainder of that provision but from the context in which they are found. As Gibbs J explained in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*:[29]

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of

---

22 See Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History* (1995) pp 565, 571, 583 and 189.

23 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at 737.

24 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179.

25 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179.

26 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 per Lord Hoffman referred to with approval in the joint reasons in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] 210 CLR 181 at 188.

27 *McCann v Switzerland Insurance Australia Limited* (2000) 203 CLR 579 at 589.

28 C.f. *Equity & Law Life Assurance Society P/L v Bodfield Ltd* [1987] 281 EG 1448 per Dillon L.J.

29 (1973) 129 CLR 99 at 109.

> course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another."

[28] It is a curious feature of the facts upon which the case is stated that nothing is disclosed concerning the parties, the background to the Contract, let alone its terms and conditions. The exercise in construction then which the Court is being invited to embark upon is of a somewhat unusual and sterile nature. Presumably, the parties have concluded that there is nothing in the terms of the Contract or the circumstances in which it was entered into which is likely to assist with the construction of cl 8.17.

Question (a) - consideration

[29] One of the respondent's primary arguments was that for there to be an agreement that a dispute "is to be settled otherwise than in accordance with the Model Law", the agreement "needs to be targeted to the essential purpose which the Model Law fulfils as the national supervisory law for international arbitrations in Australia" and must manifest "an intention by the parties to accept another curial law". These conclusions are said to flow from "the Court supervision of arbitration [being] one of the critical matters addressed by the Model Law" as the opting out of the Model Law for an Australian based arbitration would make applicable the arbitration laws of a State. In this regard, the UAR were said to be of a different genus to the articles of the Model Law and it was submitted that s 21 contemplated a like-for-like substitution of rules.

[30] It was submitted also that the construction contended for by the appellant was "inconsistent with the legislative history of the [Act] which indicates that Parliament envisaged the operation of the Model Law and the UAR as complementary". It was further argued that:

> "It imputes to Parliament the unlikely intention that it adopted the Model Law as the primary position in the knowledge of its role as part of a unified framework with the UAR, but that paradoxically this primary position would be severed by the parties' choice of the UAR."

[31] In this case, whether the parties have agreed that any dispute between them is to be settled otherwise than in accordance with the Model Law depends on the construction of cl 8.17. It is not to be resolved by determination of the role, construction, or legal categorisation of the Model Law or of the consequences of opting out of the Model Law. Nor is the intention of Parliament relevant to the issue to be decided except in as much as the relevant intention finds its expression in the clear, unambiguous language of s 21. That is not to say that many of the matters relied on by the respondent are not relevant to the construction of cl 8.17: they form part of the background against which, and the context in which, the Contract was made.[30]

[32] It is significant that cl 8.17 makes no express reference to the choice of supervisory law. There is an express choice that the arbitration be subject to the UAR. The

---

30 C.f. *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 193 per Lord Porter; *International Air Transport Association v Ansett Australia Holdings Ltd (subject to Deed of Company Arrangement)* (2008) 234 CLR 151 at 160 per Gleeson CJ; and *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462.

UAR, however, are procedural in nature and, unlike the Model Law, are not the law of a nation or state, supervisory or otherwise. I accept that this is also of significance as are the consequences of opting out of the Model Law: the substitution of the application of the *Commercial Arbitration Act* for the application of the Act.

[33] A reasonable person with the attributes of the parties would have been aware that the UAR and the Model Law were capable of operating together. There existed a wealth of commentary and other materials, including the second reading speech for the *International Arbitration Bill*, to that effect and the terms of the UAR and the Model Law demonstrated that this was so. Counsel for the appellant drew attention to the observations in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)*[31] that, "the adoption of two different codes only serves as a distraction and will dissipate the energy and time of the protagonists in unnecessary clarification of conflicting rules". That point is, with respect, a valid one, but its weight in comparison with other relevant considerations is dependent on the difficulty involved in determining the applicable provision in any relevant circumstance. It is worth noting in this regard that the current model rules of the Australian Centre for International Commercial Arbitration provide, in rule 2.3:

> "By selecting these Rules the parties do not intend to exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration."

[34] Obviously, that body takes the view that its rules can function harmoniously with the Model Law. Rule 2.2 of those model rules is similar in terms to Article 1(2) of the UAR.

[35] Counsel for the appellant, although drawing attention to the inconsistencies between the UAR and Model Law, did not suggest that they could not be read together. Nor did he suggest that there was any particular difficulty in ascertaining those provisions of the Model Law which were mandatory and which would take precedence over conflicting provisions of the UAR or those provisions which were not mandatory and which would give way to conflicting UAR provisions.

[36] Article 1.2 of the UAR provides:

> "These rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

[37] Article 19 of the Model Law provides:

> "(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

---

31 [2001] 2 SLR 262.

[38] Article 2(d) and (e) of the Model Law provide:

> "*(d)* where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
>
> *(e)* where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;"

[39] The parties accepted that the freedom to agree conferred by Article 19 is limited to "the procedure to be followed by the arbitral tribunal in conducting the proceedings" and that such freedom is "subject to the provisions of this Law". There is no other provision in the Model Law which confers on the parties freedom to depart from the Model Law's provisions except to the extent that provisions of the Model Law are prefaced by expressions such as "unless otherwise agreed by the parties", "the parties are free to agree", or "subject to any contrary agreement".[32] However, the UAR are procedural in nature and the application of the mandatory provisions of the Model Law does not cause a choice of the UAR to operate in conjunction with the Model Law to be improbable or impractical.

[40] As counsel for the respondent submitted, Article 1(2) of the UAR and Articles 2(d) and (e) and 19 of the Model Law, operate to prevent conflict between the two sets of provisions and to produce the result that:

(a) In the event of inconsistency, a mandatory Model Law provision will prevail over a UAR provision and a UAR provision will prevail over a non-mandatory Model Law provision; and

(b) Non-mandatory provisions of the Model Law will apply if their subject matter is not addressed by a provision of the UAR.

[41] I do not think it difficult to envisage circumstances in which a provision similar to cl 8.17, which does not mention the Model Law or adopt any other supervisory law, could be construed as excluding the application of the Model Law. There may be indications elsewhere in the agreement, or in the background to the agreement, which assist such a construction, or the expressly adopted rules for the arbitration may be so incompatible with the provisions of the Model Law as to compel the inference that the parties intended to exclude it. But, as the above discussion shows, none of these considerations operate here. Although the appellant's arguments were by no means lacking in substance, the considerations addressed above necessitate the conclusion that the parties, by their choice of the UAR did not agree that "any dispute … is to be settled otherwise than in accordance with the Model Law". They did not need to choose between the Model Law and the UAR: the Model Law applied by operation of the Act and cl 8.17 does not manifest an intention that it ceases to apply. I would answer question (a) – "no".

Questions (b) and (c) - consideration

[42] I turn now to questions (b) and (c). What is said to be "the principle contained in paragraph 12" of *Eisenwerk* is, in truth, no principle at all. It is a conclusion as to the contractual intention of particular parties in particular circumstances. It was

---

[32] See Articles 3(1), 10(1), 11(1) and (2), 13(1), 17, 20(1), 21, 22(1), 23(1) and (2), 24(1), 25, 26(1) and (2), 28(2), 33(3).

based, in particular, on a comparison of the provisions of the Model Law with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

[43] Pronouncements in the reasons of a court construing particular contractual provisions should rarely be regarded as propounding generally applicable principles of law, especially where the contract is not in standard form. The role of the Court, as discussed earlier, is to ascertain the intention of the contracting parties by reference to the words of the contract and, normally, to the surrounding circumstances known to the parties, including the background knowledge which would reasonably have been available to the parties, and the purpose and object of the transaction.[33] Consequently, identically worded contracts entered into between different parties in different circumstances may be construed differently. It may be accepted that there are legitimate reasons for citing decisions on the construction of one contract in aid of the arguments on the construction of a similarly worded contract. But, as May LJ explained in *Ashville Investments v Elmer Contractors Ltd*,[34] the precedent value of a decision on the construction of an agreement worded similarly to the one to be construed is necessarily limited:[35]

> "However, I do no think that there is any principle of law to the effect that the meaning of certain specific words in one arbitration clause in one contract is immutable and that those same specific words in another arbitration clause in other circumstances in another contract must be construed in the same way. This is not to say that the earlier decision on a given form of words will not be persuasive, to a degree dependent on the extent of the similarity between the contracts and surrounding circumstances in the two cases. In the interests of certainty and clarity a court may well think it right to construe words in an arbitration agreement, or indeed in a particular type of contract, in the same way as those same words have earlier been construed in another case involving an arbitration clause by another court. But in my opinion the subsequent court is not bound by the doctrine of stare decisis to do so.
>
> If I were wrong, then in any event it must be necessary to compare the surrounding circumstances in each case to ensure that those in the latter case did not require one to construe albeit the same words differently when used in the different context."

[44] With the passage of time, circumstances may change so that a provision in a contract worded identically to a provision in a contract construed by a court some time before, may need to be construed differently. For example, over time, the adoption and use of the Model Law in international arbitrations is likely to have changed from something of a novelty to a common practice where the seat of the arbitration has adopted the Model Law. Perceptions of how the UAR and similar rules fit, and may be used in conjunction, with the Model Law, may also change with time. In *Eisenwerk*, it was found that "only 19 countries" had adopted the Model Law to February 1998. It is not disputed that over 60 countries have now adopted it.

[45] The following observations of Lord MacMillan in *Read v J Lyons & Co*,[36] although made in a rather different context, are of relevance also:

---

33 See *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 130 per Lord Wright.

34 [1989] QB 488 at 495.

35 *Ashville Investments v Elmer Contractors Ltd* [1989] QB 488 at 495.

36 [1947] AC 156 at 175.

> "Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England. That attractive if perilous field may well be left to other hands to cultivate. It has been necessary in the present instance to examine certain general principles advanced on behalf of the appellant because it was said that consistency required that these principles should be applied to the case in hand. Arguments based on legal consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life and as a great American judge has reminded us 'the life of the law has not been logic; it has been experience'."

[46] It is apparent that there are significant differences between the Rules of Conciliation and Arbitration of the International Chamber of Commerce before the Court in *Eisenwerk* and the UAR. The former are more elaborate than the latter and include provision for the supervisory role of the International Court of Arbitration. It is of particular significance that the Model Law and the UAR were intended by UNCITRAL to complement each other and many commentators accept that the UAR can operate harmoniously with the Model Law. The decision in *Eisenwerk* is thus plainly distinguishable.

[47] For the reasons given above, question (b) should be answered, "It is inappropriate to answer this question". Question (c) should be answered, "In view of the answer to question (b), no answer to this question is required".

Conclusion

[48] I would order that the appellant pay the respondent's costs of the case stated. As a further hearing in the trial division will be necessary if the respondent wishes to pursue its application for declaratory relief, it is premature to dispose of the costs of Appeal No. 1458 of 2010 (to a judge of the Supreme Court) and of the originating application 4262 of 2010.

[49] **WHITE JA:** I have read the reasons of Muir JA and agree with those reasons and the answer "no" which he proposes should be given to question (a) posed in the Case Stated. I wish only to add some brief observations about questions (b) and (c) concerning the decision in *Australian Granites v Eisenwerk Hensel Bayreuth Dipl.-Ing Burkhardt GmbH.*[37]

[50] As the parties note in the Agreed Facts, questions (b) and (c) are subsidiary to question (a), the answer to which would sufficiently dispose of the controversy between them as to which supervisory law should apply to the arbitration – effectively, the Model Law or the provisions of the *Commercial Arbitration Act* 1990 (Qld). However, because the proposition at para 12 of the reasons for judgment in *Eisenwerk* as set out in question (b), namely, "that by expressly opting for one well-known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the "Model Law", continues to be cited in isolation from the facts, issues and arguments in the case, it does require some revisiting.

[51] The arbitrator in his Interim Award recognised that while there is wide acceptance by legal practitioners involved in international arbitration that *Eisenwerk* was

---

37 [2001] 1 Qd R 461.

wrongly decided, it could not be said to be plainly or manifestly so.[38] The arbitrator suggested that *Eisenwerk* cannot properly be understood as meaning that the:

> "mere agreement of the parties to adopt, or adapt, any arbitral procedural rules necessarily, or in all circumstances, leads to the legal conclusion that the parties have agreed that their disputes will be determined under a supervisory law other than the statutory prescribed Model Law".

[52] Plainly, he is correct. The ICC Rules of Arbitration establish the International Court of Arbitration, a body independent of the ICC, which supervises and ensures the application of the Rules. To that extent it differs markedly from the UAR and other sets of procedural rules. The reference by Pincus JA in *Eisenwerk* to the high standing of the Court of Arbitration[39] suggests that his Honour regarded that institution as providing a complete system of supervisory control of arbitrations conducted under the ICC Rules. So complete, that there was no need to make reference to the default position which, presumably, would have been the *Commercial Arbitration Act* 1990 (Qld), to the extent that it was not inconsistent with the provisions of the *International Arbitration Act* 1974 (Cth). But it does seem, nonetheless, that the court failed to grapple with the distinction between the *lex arbitri* – the law of the seat of the arbitration – and the procedural rules adopted by the parties for the arbitration proper. The Model Law can sit harmoniously with this dichotomy.

[53] It is not clear if counsel in *Eisenwerk* subjected the ICC Rules and the mandatory provisions of the Model Law to a detailed comparison, such as the parties here have done between the UAR and the Model Law, to ascertain if they were truly irreconcilable and, thus, had opted to exclude the Model Law. Pincus JA determined that they were irreconcilable by reference to the number and identity of arbitrators. As the respondent's supplementary submissions have demonstrated, it is quite possible for the two sets of provisions to sit comfortably together when the parties' freedom of choice, recognised in Article 19 of the Model Law, is given effect.

[54] The reason for the perceived collision between the Model Law and the *International Arbitration Act* concerned Eisenwerk Hensel's entitlement to a stay. The apparent acceptance by the court of the conclusion, at first instance, that Article 8(1) of the Model Law was inconsistent with s 7(2) of the *International Arbitration Act* received no further elaboration in the appeal since the Model Law was held not to apply. However, in *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd*[40], Allsop J (as his Honour then was) concluded that s 7(2) and Article 8(1) are independent operative provisions[41] and, to that extent, *Eisenwerk* has been overtaken. That approach will, no doubt, colour the resolution of any subsequent matter more directly invoking *Eisenwerk* that on this Case Stated.

---

38 *Australian Securities Commission v Marlborough Gold Mines Limited* (1993) 177 CLR 485 at 492; [1993] HCA 15. However Ward J in *Cargill International SA v Peabody Mining Ltd* [2010] NSWSC 887 (judgment of 11 August 2010) has argued, persuasively, that *Eisenwerk*'s reasoning was plainly wrong and should not be followed, at [42]-[91].

39 At [9].

40 157 FCR 45; [2006] FCAFC 192 at 97-99; [197]-[205].

41 See also M Pryles in Sanders P (ed) *International Handbook on Commercial Arbitration* (Kluwer) at p.12, cited in *Comandate.*

[55] As Muir JA's reasons demonstrated, it is unnecessary to have regard to *Eisenwerk* to answer question (a). It is unnecessary to respond to the questions posed in (b) and (c).

[56] I agree with the answers proposed by Muir JA.