TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF QUEENSLAND No 389 of 1993

CIVIL JURISDICTION

LEE J

RESORT CONDOMINIUMS INTERNATIONAL INC Applicant

and

RAY BOLWELL First Respondent

and

RESORT CONDOMINIUMS (AUSTRALASIA) PTY LTD Second Respondent

BRISBANE

..DATE 29/10/93

..JUDGMENT

HIS HONOUR: For the reasons which I am about to publish, application is dismissed with costs to be taxed.

I publish my reasons.

IN THE SUPREME COURT OF QUEENSLAND MOT. No. 389 of 1993

Brisbane

Before Mr. Justice Lee

[Resort Condominiums International Inc. v. Ray Bolwell & Anor.]

BETWEEN:

RESORT CONDOMINIUMS INTERNATIONAL INC. (Applicant)

AND:

RAY BOLWELL (First Respondent)

AND:

RESORT CONDOMINIUMS (AUSTRALASIA) PTY. LTD. (Second Respondent)

REASONS FOR JUDGMENT - W.C. LEE J.

CATCHWORDS:

Arbitration - International Arbitration - Whether interlocutory or procedural order of arbitrator in Indiana United States of America a "foreign award" within the meaning of International Arbitration Act 1974 (Cth) or an "arbitral award" within the meaning of 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards - whether order capable of enforcement in Queensland, Australia - whether enforcement should be refused as contrary to public policy of Queensland - whether general discretion to refuse enforcement - International Arbitration Act 1974 (Cth), ss. 3,7,8,9,10,10A,12; United Nations Conference on International Commercial Arbitration - Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York 1958, Articles I,II,III,IV,V,VI.

Judgment delivered 29th October, 1993

Counsel: Mr McMurdo of Queen's Counsel for the Applicant
Mr P. North of Counsel for the Respondents

Solicitors: Gadens Ridgeway for the Applicant

Baker Mackenzie for the Respondents
Hearing Date: 26th August, 1993
IN THE SUPREME COURT OF QUEENSLAND MOT. No. 389 of 1993

BETWEEN:

RESORT CONDOMINIUMS INTERNATIONAL INC. (Applicant)

AND:

RAY BOLWELL (First Respondent)

AND:

RESORT CONDOMINIUMS (AUSTRALASIA) PTY. LTD. (Second Respondent)

REASONS FOR JUDGMENT - W.C. LEE J.

Judgment delivered 29th October, 1993

The applicant, Resort Condominiums International Inc. ("RCI") is a "corporation organised under the laws of the State of Indiana, U.S.A." The second respondent, Resort Condominiums International (Australasia) Pty. Ltd. ("RCI Aust") is a company incorporated in New South Wales, Australia. The first respondent, Ray Bolwell ("Bolwell") is the managing director and principal of RCI Aust and is an Australian resident.

By notice of motion filed 17th August 1993, and heard in the Practice Court, Brisbane, RCI seeks an order pursuant to s.8 of the International Arbitration Act 1974 (Cth.) ("the Act") that "the arbitral award made by Angelika C. Schmidt-Lange in Indianapolis in the State of Indiana, United States of America on 16th day of July 1983" between RCI, RCI Aust and Bolwell, be by leave of the Court enforced as a judgment of this Court. The application was served on the two respondents in accordance with the decision of Moynihan J. (as His Honour then was) in S.P.P. (Middle East) Limited v. The Arab Republic of Egypt [1984] 2 Qd.R. 410. Mr McMurdo of Queen's Counsel appeared for the

applicant and Mr D. North of Counsel appeared for both respondents. The application was supported by an affidavit and exhibits filed on behalf of the applicant. No material was filed or evidence adduced on behalf of the respondents.

RCI conducts a time sharing business world wide. It operates a program of conducting exchanges of possessory rights in time sharing interests, whole-owner condominiums and other accommodations to individuals who purchase such rights at resorts subject to certain resort affiliation agreements. It operates principally by way of exchange during vacations whereby a person of one country who wishes to spend a vacation in another country, agrees to utilise the time sharing facilities of a resident of that other country who in turn has the reciprocal right to utilise the time sharing facilities of the first person in that person's country. RCI does not own any of the properties the subject of its business. The project is called the "RCI Exchange Program".

On February 18th 1986, RCI entered into a "License Agreement" with RCI Aust (by its then name Rajupe Pty. Ltd.) as licensee and Bolwell (Exhibit KWR1). It has been amended from time to time. By that agreement, RCI granted RCI Aust rights to the RCI Exchange Program within an enlarged area including Australia, Fiji, New Zealand and Tahiti. In exchange for using RCI's business, its trade marks, its expertise, RCI Aust and Bolwell agreed to pay a royalty to RCI based upon sale of memberships and exchanges. There were also other conditions, stipulations and restrictions set out in the agreement.

Disputes have arisen between the parties. Shortly stated, RCI has alleged that the respondents failed to:—

(a) pay RCI annual royalty fees as required by the terms of the License Agreement in 1990, 1991 and 1992.

(b) deposit and maintain portions of revenues from subscription/membership fees in a trust account as required by the License Agreement;

(c) provide an annual audit of its operations under the License Agreement;

(d) maintain and allow RCI and its auditor access to accurate books and records of their operations under the License Agreement as required by the License Agreement;

(e) honour the confidentiality provisions of the License Agreement.

(f) otherwise cure the remaining defaults under the License Agreement.

There is no material before me on this application as to the respondents' answers, if any, to these allegations, or as to whether the respondents have a counter-claim or demand on RCI, although it was stated by Lloyd Steven Miller, executive vice president of RCI at an Interim Relief Hearing on 2nd June 1993 before the arbitrator that Bolwell did not consider that he was in violation of the License Agreement. I am not concerned with the merits of the dispute.

Relevant provisions of the License Agreement insofar as they deal with resolution of disputes between the parties are as follows:—

> "15. Dispute resolution
>
> 15.1 Arbitration. All claims, disputes and other matters arising out of this Agreement or any amendments thereto, or the breach thereof, shall be decided by mandatory and binding arbitration in the City of Indianapolis, Indiana, U.S.A. in accordance with the Commercial Arbitration rules of the American Arbitration Association, U.S.A. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association within a reasonable time after the claim, dispute or breach has arisen. The final award of the arbitrator shall be final and binding on RCI and Licensee to the extent permitted by the law of the State of Indiana, U.S.A. The final award shall be

entered and enforced as the judgment decree of any court of competent jurisdiction."

"16.6 Choice of Law. Licensee acknowledges that this Agreement has been executed, made and entered into in Indianapolis, Indiana, U.S.A. This Agreement shall in all respects be interpreted and construed in accordance with and governed by the laws of the State of Indiana, U.S.A. The venue for any action at law or in equity, to the extent that such acting (sic) may be brought under the terms of Agreement, shall be in Indianapolis, Indiana, U.S.A."

The law of Indiana was not placed before me. To the extent if any that it may be necessary to consider that law in the course of determining this application, I proceed on the usual assumption that, with one possible qualification to mentioned later, the law of Indiana is the same as the law of Queensland unless proven otherwise: Conflict of Laws in Australia Nygh, 5th ed. Butterworths at 234; Standard Bank of Canada v. Wildey (1919) 19 S.R. (N.S.W.) 384 at 388.

An outline of the history of proceedings leading up to this application (without intending that it is necessarily conclusive or exhaustive), is, so far as it may be extracted from the material filed by the applicant, as follows:—

29th December 1992. RCI advised Bolwell and RCI Aust that unless the alleged breaches were remedied within 60 days, RCI "may elect to terminate the License Agreement". A meeting was arranged in Indianapolis during the week commencing January 10th, 1993.

24th February 1993. RCI filed in Indiana State Court a verified complaint for injunctive relief and request for arbitration. A temporary restraining order (TRO) was granted to RCI requiring the respondents to supply and provide access to information as required by the License Agreement including audited financial statements, information about monies held in trust in Australia and other information including discovery.

25th February 1993. RCI filed a request for production by the respondents. The Indiana State Court ordered a response by 4th March 1993. A motion for a preliminary injunction was set for hearing on the 8th March 1993.

27th February 1993. RCI terminated the License Agreement (see letter March 15, 1993 from RCI exhibit KWR6, and letter 3rd March 1993 from RCI's Australian solicitors to the respondents, exhibit KWR5).

1st, 2nd March 1993. RCI's complaint was personally served on the respondents.

3rd March 1993. RCI's Australian solicitors requested agreement from the respondents that they would (inter alia) abide by the orders of the Marion Superior Court as contained in documents served on them, that they would in consequence of the termination of the License Agreement, immediately cease using RCI's registered trademarks and deliver up or destroy material bearing those marks, that the respondents would appear to the summons served on them in respect of the Indiana Court action on or before 23rd March 1993, and that the respondents would agree that any dispute arising out of the License Agreement be determined by arbitration in Indiana. A reply was requested by 4th March 1993, the date for response ordered by the Indiana State Court on 25th February 1993.

7th March 1993. Counsel for the respondents sought and obtained a continuance (adjournment), and agreed that the TRO should remain in force pending hearing of the motion for a preliminary injunction. Apparently the respondents had not complied with the State Court order.

8th March 1993. The State Court apparently on the agreement of all parties extended the TRO and required the respondents to comply and file a report in the Court.

10th March 1993. RCI filed a notice of demand for arbitration and request for interim relief, duly served on the respondents and the American Arbitration Association.

12th March 1993. The respondents had not complied with the Court's TRO, or its order to provide extensive discovery, or to file an order of compliance. The State Court held a status conference. RCI's counsel wrote to

the respondents' counsel asking when the respondents would respond to discovery and TRO. The respondents forthwith removed the whole matter to the Federal District Court (U.S.A.) under the diversity jurisdiction and moved to vacate the TRO and the State Court's discovery order. The Court subsequently conducted a hearing on this issue.

18th March 1993. Respondents sought extra time within which to plead to RCI's complaint.

19th March 1993. The Federal District Court denied the respondents' application to vacate the TRO and discovery order of the State Court. The respondents' counsel at that hearing admitted that RCI had an absolute contractual right to examine the respondents' books and records in Australia. This was confirmed by letter of 19th March 1993. RCI's Australian counsel had been denied access to the respondents' offices in Australia. The Federal Court directed a response to RCI's complaint by 5th April 1993.

24th March 1993. RCI served a first set of interrogatories on the respondents with a first request to produce in order to obtain materials needed for the preliminary injunction hearing and any subsequent arbitration.

2nd April 1993. On parties agreement the Federal Court granted an extension of time to 23rd April 1993 within which the respondents were to plead and otherwise respond to RCI's complaint.

15th April 1993. RCI filed in the Federal Court a motion to compel response to the TRO and discovery, also seeking an order that the respondents open an escrow account into which all monies be deposited, and seeking orders to provide information and documents and to file a report of compliance with the TRO as ordered on 8th March 1993 by the State Court.

19th April 1993. The Federal Court ordered the respondents to respond to the first request to produce and to abide by the TRO within 3 days, and that the respondents establish an escrow account for depositing of revenues derived from the respondent's operations under the License Agreement and provide extensive books of

account and other documents, as well as file a report of compliance with the TRO. It appears that the respondents had not complied with the Federal Court order by 14th July 1993 (see judgment of Judge Larry J. Mclnney, United States District Court, 14th July 1993 - exhibit KWR10).

2nd June 1993. Two hearings occurred in Indiana before arbitrator Angelika C. Schmidt-Lange (see exhibits KWR 2, KWR 3):

(a) Preliminary Hearing - Respondents were represented by Mr Greatorix by teleconference. RCI's counsel was present. Mr Greatorix appeared only to object to the proceedings and submitted that as the agreement had long since been terminated by RCI, all rights and obligations of the parties thereunder were terminated including the right of either party to refer the matter to arbitration. The arbitrator refused to make a ruling as to whether the matter was arbitrable. She took the matter under advisement, notwithstanding that Mr Greatorix submitted that the question could only be determined by a Judge. Mr Greatorix withdrew on behalf of the respondent. The arbitrator in the absence of representatives of the respondents, discussed preliminary matters for the arbitration including timetable. She indicated that even if Mr Greatorix withdrew, the arbitration would go forward with the preliminary hearing and the hearing on interim relief and that the respondents would receive documentation of papers from the American Arbitration Association in due course.

(b) Interim Relief Hearing - This was then conducted in the absence of representatives of the respondent. The purpose was to present and hear evidence on interim relief on behalf of RCI. Witnesses were examined. Counsel for RCI filed a motion for a discovery order and a brief in support of it. No formal orders were made by the arbitrator that day. It is clear from the transcripts exhibited that those two hearings were not final but were of an interlocutory or procedural nature.

11th June 1993. RCI sought and obtained an entry of default from the Federal Court. Respondents were duly served with this and other documents and motion for a default judgment.

14th July 1993. Order made by Judge Larry J. Mclnney, a Judge of the United States District Court granting RCI's motion for a default judgment and entering a preliminary injunction in RCI's favour against the respondents (see exhibit KWR 10). The Court considered the transcripts covering the preliminary hearing and interim relief hearing before the arbitrator on 2nd June 1993. The order then enjoined the respondents and fourteen other organisations whose connection with the respondents does not appear from the material ("the defendants"), "until such time as the arbitrator enters a final award in this matter," from:—

"(a) directly or indirectly operating or entering into any agreement with any exchange entity other than RCI offering an internal or international exchange program in Australia, New Zealand, Fiji, or Tahiti or be involved or be involved in any way in the exchanges of timeshare interests, whole-owner condominiums or other accommodations in Australia, New Zealand, Fiji or Tahiti or in the offering of any services which defendants offered under the terms of the License Agreement;

(b) disseminating, disposing or otherwise using, except as provided in the License Agreement, in any manner, any confidential or proprietary information obtained from operating the business under the License Agreement or provided by RCI or in which RCI has any interest, title or right under the terms of the License Agreement;

(c) entering into any membership/subscription agreement with any person for a period of greater than three (3) years or otherwise in violation of the terms of the License Agreement;

(d) failing to comply with the trust account provisions of the License Agreement;

(e) refusing to return to RCI all material belonging to or in which RCI has any interest under the terms of the License Agreement;

(f) refusing to provide RCI and its auditors with access to and copies of all records and data generated or created by or on behalf of defendants during the

course of their operations under the License Agreement;

(g) refusing to provide to RCI and its auditors with access to and copies of all records and information concerning the list of members maintained by defendants including but not limited to the name, address, payment history, length of membership, and status and nature of membership;

(h) refusing to provide RCI with copies of the annual audits, monthly reports, Resort Affiliation Agreements, membership lists, and Membership Agreements;

(i) taking any action which is inconsistent with the mandatory arbitration clause under the License Agreement which requires all claims, disputes, and other matters arising out of the License Agreement and its Amendments to be decided by mandatory arbitration in Indianapolis, Indiana, U.S.A.;

(j) instituting any proceeding or taking any other action which is inconsistent with the Choice of Law provision of the License Agreement requiring the venue for any action of law or equity concerning the License Agreement and its Amendments to be filed in Indianapolis, Indiana, U.S.A.;

(k) disposing of revenues derived from their current operation under the License Agreement in any manner other than by paying such revenues into an escrow account requiring both parties' signatures for withdrawals or any other transaction; and

(l) altering, destroying or rendering unusable any records or data generated or created by or for defendants during the course of their operation under the License Agreement."

It was further ordered that the respondents engage in arbitration of all claims arising from or in relation to the agreement attached to RCI's complaint as all such claims were arbitrable. The court further ordered that further proceedings following the imposition of the preliminary injunction should be stayed and that the

parties be sent to arbitration as required by their agreement. The judgment concluded as follows:—

"This court will retain jurisdiction of this matter for the limited purposes of enforcement of any final award the arbitrator may enter."

16th July 1993. The arbitrator made an "Interim Arbitration Order and Award". (See exhibit KWR 7). That "Order and Award" was made with several terms identical in effect to but in slightly different form from those ordered by the District Court Judge on 14th July 1993, and with additional terms, and limited to the respondents only. It was expressed to apply "during the pendency of this arbitration", as follows:—

"Respondents Ray Bolwell and Resort Condominiums International (Australasia) Pty. Ltd, formerly known as Rapjupe Pty. Ltd. are directed and ordered to do the following during the pendency of this arbitration:

a. cease and abstain from, directly or indirectly operating or entering into any agreement with any exchange entity other than RCI offering an internal or international exchange program in Australia, New Zealand, Fiji, or Tahiti, or be involved in any way in the exchanges of timeshare interests, whole-owner condominiums or other accommodations in Australia, New Zealand, Fiji, or Tahiti, or in the offering of any services which Respondents offered under the term of the License Agreement (and its Amendments) entered into by and between Claimant and Respondents on February 6, 1986 (the "License Agreement");

b. cease and abstain from disseminating, disposing or otherwise using, except as provided in the License Agreement, in any manner, any confidential or proprietary information obtained as a result of business conducted pursuant to the License Agreement or from or provided by RCI or in which RCI has any interest, title or right under the terms of the License Agreement;

c. cease and abstain from entering into any membership/subscription agreement with any person for a period greater than three (3) years or in any manner

otherwise in violation of the terms of the License Agreement;

d. cease and abstain from altering, destroying or rendering unusable any records or data generated or created by or for defendants during the course of their operation under the License Agreement;

e. provide RCI and its auditors with access to and copies of all records and data generated or created by or for Respondents during the course of their operations under the License Agreement;

f. provide RCI and its auditors with access to and copies of all available information concerning the current list of members/subscribers maintained by or on behalf of Respondents, including but not limited to members' names, telephone numbers, addresses, payment history by member, length of membership, and status of membership;

g. provide RCI with copies of the annual audit, monthly reports, Resort Affiliation Agreements, membership lists, and Membership Agreements;

h. open an escrow account in the name of both RCI (Australasia) and RCI. All revenues received as a result of operations under the License Agreement from the date of this order and award shall be deposited in that account. Monies needed to pay bills and to maintain Respondents' business may be withdrawn from the account by signature of both parties only;

i make the following available for copying and/or inspection in Australia, within seven (7) days of the entry of this Order:

(1) Annual audited financial statements and all related documentation from 1990 to the present;

(2) All monthly reports generated in the course of the operation of Respondents' business, including, but not limited to all, monthly memberships lists, resort affiliation agreements, and subscription agreements;

(3) A copy of all resort affiliation agreements currently in Respondents' possession or control;

(4) The most current copy of Respondents' membership list, both in paper form and on computer diskette;

(5) A copy of all membership agreements, currently in effect;

(6) A copy of all other records and information concerning or relating to Respondents' current members/subscribers including, but not limited to, the names, addresses, payment history, length of membership, status and nature of membership.

(7) A copy of any documents relating to the opening, maintenance or closure of any trust or escrow accounts established pursuant to either the License Agreement, the Temporary Restraining Order issued on February 24, 1993, or this Interim Arbitration Order and Award;

(8) A copy of any and all documents relating to any revenues received by Respondents in the course of their operations under the License Agreement since 1990;

(9) A copy of any and all documents relating to any expenditures by RCI (Australasia), its predecessor or successor, in the course of their operations under the License Agreement since 1990;

(10) All documents concerning any loan, gift, payment, or other transfer of any funds from or between Resort Condominiums International (Australasia) Pty. Ltd. to Ray Bolwell or his wife, Lee Harris, or to any company or other entity which Ray Bolwell or his wife own in whole or in part;

(11) All documents concerning any loan, gift, payment or other transfer of any funds from or between Ray Bolwell or his wife, Lee Harris or any company or other entity which Ray Bolwell or his wife, Lee Harris, own, in whole or in part, or otherwise have any interest, to RCI (Australasia) or to any other person or entity including a copy of Ray Bolwell's trust agreements'

(12) All documents Respondents intend to introduce into evidence at the final arbitration hearing;

(13) All documents relating to the advertising, sale, transfer, or use in any fashion of any memberships of a duration longer than three years;

(14) All documents, including but not limited to any letter of intent, notes, summaries of agreements in principle, draft agreements or signed agreements, concerning any agreement to enter into a management buy-out agreement or any other type of sale of any interest in RCI (Australasia);

(15) All documents relating to the formation and/or amendment of the License Agreement;

(16) All documents concerning any attempt, effort, or agreement by Ernst Meisinger and/or John Havemann or any person or entity related to or affiliated with them, to engage in any operations of business in Australia, New Zealand, Tahiti, and Fiji; and

(17) All documents relating to the sale, lease or transfer of any timeshares to individuals or entities who are or were not members at the time of such sale, lease or transfer.

Further, Respondents Ray Bolwell and RCI (Australasia) are hereby ordered to make available for deposition in Australia, any necessary witnesses to this proceeding who currently are directors, officers, employees or otherwise representatives of RCI (Australasia) on or before the final arbitration hearing date in this matter."

These orders, as well as the orders made by the District Court Judge on 14th July 1993, are clearly of an interlocutory and procedural nature and in no way purport to finally resolve the disputes or any of them referred by RCI for decision or to finally resolve the legal rights of the parties. They are provisional only and liable to be rescinded, suspended, varied, or reopened by the tribunal which pronounced them. This was made clear by Mr McMurdo in his reply to submissions by Mr North that an estoppel based on the principle of res judicata arose by virtue of the subsisting order of the District Court Judge. He submitted authorities and references which establish that no such estoppel can arise with respect to interlocutory orders:

Carr v. Finance Corporation of Australia (1980-1981) 147 C.L.R. 246; Res Judicata, Spencer-Bower and Turner, 2nd Ed. at 131/132, paras. 163, 164, and at 370, para. 446. Mr North submitted that many of the orders made by the arbitrator were vague and uncertain and related to activities of the respondents subsequent to the termination of the License Agreement by RCI on 27th February, 1993, and further that some orders are in the form of mandatory and/or mareva injunctions with no undertakings as to damages or security offered by RCI.

No point was taken by the respondents that the arbitrator did not have the power to make orders of the above kind, after a Judge had already made similar orders. If the arbitrator, following the Judge's order made two days previously had a concurrent (or separate) power to make similar orders, then to this extent the law of Indiana may be thought to confer a wider power on an arbitrator (as opposed to a Court) to make interlocutory orders of this kind than the law of Queensland confers on a Queensland arbitrator (see s. 47 of the Commercial Arbitration Act - "the Queensland Act" and Imperial Leatherware Co Pty. Ltd. v. Macri and Marcellino Pty. Ltd. (1991) 22 N.S.W.L.R. 653 at 666-7), although it is not necessary to determine that question for the purposes of this application. I presume that the order of the 16th July 1993 was within power as the respondents did not raise any question under s. 8(5)(e) of the Act (Article V(1)(d) of the Convention), or otherwise on this aspect.

Also in a properly constituted arbitration, it is clear that in Australia and England, an arbitrator is empowered to proceed ex-parte in the absence of one of the parties who, having been given due notice, fails or neglects to appear. (See eg. s.18(3) of the Queensland Act and Russell on Arbitration (20th Ed. - Stevens and Sons London 1982 at pp. 262-3). It was not suggested that the position is not the same in the United States of America. The material shows that the respondents had due notice of the hearings before the arbitrator on 2nd of June 1993 and

of the proceedings before the United States District Court Judge. It does not appear whether the respondents had notice of the order of that Judge on 14th July 1993 before the arbitrator made the order of 16th July 1993, or whether any further hearing before the arbitrator occurred or might have been sought by the respondents following the order of 14th July 1993. As no question was raised by the respondents' counsel that the respondents had not been given proper notice of any proceedings or given the opportunity to present their case before any further orders could be made by the arbitrator (the onus being on the respondents by virtue of s. 8(5)(c) of the Act which is the parallel of Article V(1)(b) of the Convention), I assume that all procedural law was duly complied with. In any event, Mr Greatorix had previously declared that the respondents would take no further part in the arbitration proceedings.

The application is made pursuant to s.8 of the Act which in relevant parts provides as follows:—

> "8(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.
>
> 8(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory"

Also s. 12(1) is as follows:—

> "12(1) This part applies to the exclusion of any provisions made by a law of a State or Territory with respect to the recognition of arbitration agreements and the enforcement of foreign awards, being provisions that operate in whole or in part by reference to the Convention.

(2) Except as provided in sub-section (1), nothing in this Part affects the right of any person to the enforcement of a foreign award otherwise than in pursuance of this Act."

"State" or "Territory" means a State or Territory of the Commonwealth of Australia.

By s.4 of the Act, approval is given to the accession by Australia to the Convention which is defined in s.3 as follows:—

> "Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in Schedule 1."

Pursuant to ss.4, 10(2) of the Act, the Governor-General of Australia by proclamation published in the Government Gazette dated 24th day of June 1975 declared that the Convention entered into force in Australia on 24th day of June 1974 (see Exhibit KWR 9). Pursuant to s.10(1), 10A of the Act, a Certificate signed by the delegate of the Secretary to the Department of Foreign Affairs stated that the United States of America, the country in which the award was made, is a country which is a Contracting State within the meaning of the Convention on the recognition and enforcement of foreign arbitral awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting. (See Exhibit KWR8).

It was not in dispute that the Convention applied in Australia, or that Australia and the United States, where the orders the subject of this application were made, are Contracting States within the meaning of the Convention, or that the United States of America is a "Convention Country" as that term is defined in s.3 of the Act to mean a country (other than Australia) that is a Contracting State within the meaning of the Convention. Nor was it in dispute that

the strict requirements of proof specified in s.9 of the Act (Article IV of the Convention) had been complied with by the applicant.

What was in dispute however, was whether the orders made by the arbitrator on the 16th July 1993 constituted a "foreign award" within the meaning of s.8(1)(2) of the Act which may be enforced in Queensland and further, if those orders may be so classified, whether there are grounds provided for by the Act and/or the Convention or otherwise which would persuade the Court to decline to make the order sought. Counsel informed me that there were no relevant authorities on the nature of a "foreign award" within the meaning of the Act or Convention, or otherwise of assistance in the interpretation of the Act or Convention in matters raised on this application, including matters in "defence" or opposition to the application. This is surprising, having regard to the fact that many other countries have legislation adopting the Convention including the United Kingdom and the United States of America. Extensive submissions were made on behalf of both parties, contained not only in brief written outlines but as substantially supplemented by oral argument.

Mr McMurdo first of all referred to the submissions by Mr Greatorix who represented the respondents at the Preliminary Hearing, being the first of two hearings before the arbitrator on 2nd June 1993. Mr Greatorix there contended that as RCI had terminated the License Agreement as far back as 27th February 1993, which included cl.15.1 (the arbitration clause), there was no jurisdiction in the arbitrator to proceed. Mr McMurdo referred to Contract Law in Australia (Lindgren Carter and Harland, Butterworths Australia 1986) para. [1988] to para. [1993], citing McDonald v. Dennys Lascelles Ltd. (1933) 48 C.L.R. 457 per Dixon J at 469-70, Heymans v. Darwins Ltd. [1942] A.C. 356 and Photo Production Ltd. v. Securior Transport Ltd. [1980] A.C. 827 at 850. The text states that "a procedural term, such as an ordinary agreement to submit disputes to arbitration, or a choice of forum clause, is generally

intended by the parties to be enforceable notwithstanding termination of the agreement". It was submitted that the termination in this case was the termination for alleged breach and was not a termination (or recission) ab initio eg. in cases where fraud was involved at the outset, so that the hearings before the arbitrator were properly conducted notwithstanding termination of the License Agreement. Mr North did not contend to the contrary. Indeed, the United States District Court Judge on 16th July 1993 (Exhibit KWR10 p.23) held that the arbitration clause remained and was enforceable after termination, citing Saturday Evening Post 816 F. 2d at 1196. Clause 12 of the License Agreement is to the same effect. There is no reason to conclude otherwise.

The next point concerns the meaning of "foreign award" which is the only award which may be enforced pursuant to s.8 of the Act. Mr McMurdo submitted that the order of 16th July 1993 was an "interim award", that no distinction was made between interim awards and final awards, and that there was no good reason to make such a distinction. He compared the Queensland Act ss.4, 23, 33 (see also Russell on Arbitration at 311, 467 and the Arbitration Act (1950) U.K. s.14.) Both provisions expressly empower the arbitrator to make an interim award "unless a contrary intention is expressed" in the arbitration agreement. There is no reason to assume that a similar power does not exist under local law. Interim awards have been made in various States of the United States: see e.g. Eurolines Shipping Co. v. Metal Transport Corp., S.D.N.Y. 1980 491 F. Supp. 590; Zephyros Maritime Agencies, Inc. v. Mexicana De Cobre, S.A., S.D.N.Y. 1987 662 F. Supp. 892. But notwithstanding the existence of a power under local laws to make interim awards, this is not determinative of the question of whether the Act and the Convention contemplate that an interim as opposed to a final award can be enforced in Queensland.

Mr North, in his written submissions, submitted that the Act, (and the Convention) operates only to awards and

not to interim orders, and that for an award to be enforced pursuant to the Act or the Convention, there can only be one final award which must determine all of the disputes referred by the parties under the arbitration agreement. In oral argument however, he did not submit that the orders of the 16th July 1993 did not constitute an award as such, but argued that the Act and the Convention, not specifying that interim awards could be enforced, meant only that an award which finally determined the legal rights of the parties on all the matters in dispute so referred, was an "arbitral award" within the meaning of the Convention and so a "foreign award" within the meaning of the Act which intended to enforce one such award, particularly a final money order, rather than a series of orders including those of an interlocutory or procedural kind. As will subsequently appear, it will be necessary to consider whether the order of 16th July 1993 is in fact "an award" at all, but it is first necessary to interpret the meaning of the expression "foreign award" in the Australian Statute.

Section 3 of the Act provides the following definitions:—

> "foreign award" means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.
>
> "arbitral award" has the same meaning as in the Convention.
>
> "arbitration agreement" means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention.

It was not in dispute that the License Agreement is "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by

arbitration." : Article II(1). The term includes the arbitral clause, cl. 15.1: Article II(2). The arbitral clause is in very wide terms, as the United States District Court Judge concluded in his ruling that RCI's claim was arbitrable and in sending the parties to arbitration (Exhibit KWR10, p.22).

For present purposes, relevant parts of the Convention are as follows:—

> "Article I(1). This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
>
> Article I(2). Term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
>
> Article III. Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

Thus "arbitral awards" within the meaning of the Convention must be awards made only by arbitrators appointed for each case, and also those made by permanent arbitral bodies to which the parties have submitted: Article I(2). The term includes such awards "not considered as domestic awards in the State where the recognition and enforcement are sought (i.e. Queensland): Article I(1). This means that orders made by a foreign court in aid of a foreign arbitration separately conducted by arbitrators,

does not fall within the definition of "arbitral awards" in Article I(2) of the Convention and so are not "foreign awards" within the meaning of the Act. (See Pilkington Bros. P.L.C. v. AFG Industries Inc., D.C. Del. 1984, 581 F. Supp 1039.) Accordingly the order of the United States District Court Judge made on 14th July 1993 could not be enforced in Australia pursuant to the Act or the Convention. Also, that Judge held at p. 20 of his ruling of 14th July 1993 (Exhibit KWR10) that United States' judgments may not be registered and automatically enforced in Australian Courts because the United States is not listed in the Schedule to the Foreign Judgments Act 1991 (Commonwealth).

On this application I am not concerned with whether the order of the Court of 14th July 1993 may be enforced in some other way in Queensland or elsewhere in Australia, or whether a judgment by a United States Court to enforce a final foreign award (as envisaged by the final words of the order of 14th July 1993) may be enforced in Australia. A question may then arise whether the award has merged in the foreign judgment and whether there may no longer be a "foreign award" capable of enforcement in Australia under the Act: Union Nationale Des Cooperatives Agricoles De Cereales v. Robert Catterall and Co. Ltd. [1959] 2 Q.B. 44 per Lord Evershed at 54.

Article I(1) provides that an "arbitral award" must be an award "arising out of differences between persons whether legal or physical". Article I(3) provides a further pointer to the fact that recognition and enforcement of awards applies only to awards with respect to "differences" arising out of legal relationships, even though that sub-article allows a particular type of declaration to be made. "Differences" within the meaning of cl. 15.1 of the License Agreement and within the meaning of the Convention clearly refer to the subject matter of the dispute referred by the parties to arbitration for resolution, rather than to some interlocutory or procedural direction or order which does not resolve the disputes referred. The term "difference"

has a clear meaning when used in connection with arbitration proceedings: Halsbury's Laws of Australia Vol. 1 [25-20], [25-345] and is a "dispute" within the meaning of cl. 15.1 of the License Agreement (Exhibit KWR 1).

However, in one sense, an award, if it encompasses an order of a type made on 16th July 1993, can, during the course of an arbitration, "arise" out of or result from procedural or interlocutory questions which aid or in some way bear upon the conduct of the arbitration proper and so indirectly "arise" out of the differences referred. On the other hand, an order (even if it be classified an award) giving interlocutory directions, may be made by agreement and not directly as a result of any differences between the parties as to the form of the procedural orders or directions. In my opinion, even though the expression "arising out of" is of very wide import, such a construction is not correct.

Other references in the Convention appear to support this conclusion. The term "award" or "the award" is referred to in several other parts of the Convention, all of which are a reference to "arbitral award" within the meaning of the Convention. Article V(1)(c) is of some significance. It provides one basis on which a Court may refuse to recognise and enforce an award where the party opposing the order proves that:—

> "c. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or"

The counterpart of that sub-article is contained in s. 8(5)(d),(6) of the Act. In both provisions, it is clear that the award referred to contemplates only an award which deals with a "difference" referred or to a "difference" not

referred and beyond the scope of the reference, and not to an order which merely deals with procedural or interlocutory matters. The expression "submission to arbitration" also has a well recognised meaning: Russell on Arbitration Ch. 5 p. 38 et. seq: Halsbury's Laws of Australia vol. 1 [25-345]. Indeed, the use of the word "arbitral" before the word "award" in the Convention may of itself be a pointer to an award which results from an arbitration properly so called. As long ago as 1859 in Collins v. Collins, 28 L.J. Ch (N.S. Equity) 184 at 186-7, Romilly M.R. said that "An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference between the parties;".

Also Article VI (see also s.8(8) of the Act), should be referred to. It provides:—

> "Article VI. If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

Article V(1)(e) and s. 8(5)(f) of the Act also provide a basis on which a Court may refuse to recognise and enforce an foreign award. It provides:—

> "(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made."

Nygh in Conflict of Laws in Australia at 167 states with respect to s.8(5)(f) of the Act (the counterpart of Convention Article V(1)(e)) that it can be assumed that this sub-paragraph confirms the attitude of the English Court of Appeal in Union Nationale Des Cooperatives Agricoles De Cereales v. Robert Catterall and Co. Ltd. (supra) that a foreign award is final and binding

notwithstanding the fact that some additional formalities require to make it enforceable in the country where it was made. Lord Evershed M.R. dealt with the enforcement of a foreign award pursuant to the Arbitration Act 1950 (U.K.) ss. 26, 36, 37. That award was made in Penmark in accordance with Danish law and was a final award, notwithstanding that under Danish law, it could not be enforced in Denmark without a judgment of a Danish Court. Accordingly it was a final award which determined rights of the parties and was enforceable in England in the same way as an English award. The Master of the Rolls referred to s. 37(3) of the Arbitration Act 1950 which allows the Court to refuse to enforce the award if there was proved to be a basis for challenge of the award in the foreign court (See s.8(8) of the Act, Article VI of the Convention). His Lordship said that if various conditions were satisfied, a foreign award was to be put in pari materia with an English award (p. 53). He was referring to a final award which determined rights. This suggests that the award referred to in Article VI, V(1)(e), and s. 8(5)(8) of the Act means only an award which determines rights and not an interlocutory or procedural order.

The reference to "competent authority" refers to a Court. This is clear from the reference to "competent authority" in the opening words of Article V which, by reference to the counterpart of that Article in s. 8(5) of the Act means a Court and not the arbitrator. The Court of the country which has general supervision over a local arbitration can in certain circumstances set aside or suspend an award which determines rights.

The question then is whether this is the only type of award (or order) of an arbitrator which a Court can set aside or suspend, or whether there is also power to set aside or suspend a regular order of a procedural or interlocutory kind duly made by an arbitrator in accordance with local law.

In Queensland and the United Kingdom, an arbitrator engaged on a duly constituted arbitration is, as a matter of principle, a master of his or her own procedure: Carlisle Place Investments v. Wimpey Constructions UK Ltd. (1980) 15 BLR 1109; Three Valleys Water Committee v. Binnie and Partners (a firm) (1990) 52 BLR 42. Russell on Arbitration p. 221 ex. et. seq; S.14 of the Queensland Act. It has been held in England that a Court has no inherent jurisdiction to interfere in an entirely private system of adjudication. Its powers to interfere must be derived solely from legislation; per Donaldson J. in Exormisis v. Oonsoo [1975] 1 Lloyd's Rep. 432 at 434. In K/s A/s Bill Biakh and K/s A/s Bill Blall v. Hyundia Corporations [1988] 1 Lloyd's Rep. 187. Steyn J. said at 189:—

> "In an extreme case it is conceivable that an arbitrator's failure to observe the principles of natural justice in the making of interlocutory rulings may lead either to the revocation of the mandate of the arbitrator under Section 1 of the 1950 Act, or the removal or the arbitrator under Section 23(2), but it follows from the decision in Bremer Vulkan Schiffbau und Machinenfabrik v. South India Shipping Corporation Ltd. [1981] A.C. 909 that the Court has no inherent jurisdiction to correct procedural errors even if they can be categorised as misconduct during the course of the reference and that the statutory scheme of the Arbitration Acts does not authorise such corrective measures. The remedies are therefore revocation of the authority of the arbitrator or removal of the arbitrator in the exceptional cases where that might be appropriate or resisting enforcement of the award."

This principle and extracts from Bremer Vulcan (supra) and Exormisis v. Oonsoo (supra) were adopted in the strongest possible language by Rogers J. in Imperial Leatherware Co. Pty. Ltd. v. Macri and Marcellino Pty. Ltd. (supra) at 662-5.

The Court therefore can act only under authority conferred by statute. Eg. in Queensland s.17 requires that subpoenas to a witness to attend an arbitration and to produce documents must be issued by the Court. Section 18

provides for recourse to the Court if a person fails to attend to produce documents. Section 47 gives the Court the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court. Section 38(3)(b) gives the Court the power following an appeal on questions of law arising out of the award to remit the award to the arbitrator for reconsideration. Section 42 gives the Court power to set aside an award for misconduct and s. 43 gives a general power of remitter on "any matter referred to arbitration by an arbitration agreement together with any directions it thinks proper to the arbitrator or umpire for reconsideration . . .". In the United Kingdom, various powers are also conferred by legislation: see Russell on Arbitration, 221-2, 297-8.

Therefore, whilst supportive or auxiliary jurisdiction including coercive powers which are conferred upon the Court by legislation may be exercised in certain circumstances, including the power to make interlocutory orders, interlocutory powers will not usually be exercised by the Court where the matter is one properly for the arbitrator either under the agreement or as conferred by legislation: Halsbury's Laws of Australia Vol. 1 [25-500]: K/s A/s Bill Biakh v. Hyundai Corp. (supra) at 189; Imperial Leatherware Co. Pty. Ltd. v. Macri and Marcellino Pty. Ltd. (supra) at 668 F-G. Presumably the same situation exists in Indiana.

This is a further pointer to the conclusion that the award referred to in Article VI, Article V(1)(e) and in s. 8(5)(f),(8) of the Act is to a type of award which a foreign court (ie. not the arbitrator) may set aside or suspend viz an award which has determined some or all of the issues submitted to the arbitrator for determination, rather than to an interlocutory order of an arbitrator of the kind referred to in this application.

The foregoing has proceeded on the basis that the order of the 16th July 1993 was in fact an "award" within

the meaning of the Act and the Convention. However, it emerges from the decision of Steyn J. in Three Valleys Water Committee v. Binnie and Partners (supra) that a pre-trial order of a procedural or interlocutory nature is not an award at all. In that case an arbitrator refused to give a party leave to serve points of reply out of time and also refused to give reasons for that decision. That party applied to the Court for the removal of the arbitrator on the grounds of misconduct. The commentary on the report at p. 45 states:—

> "...an arbitrator's interlocutory decision on a procedural point is not susceptible of challenge (unless of course it is a decision on a substantive issue and becomes an award). It follows that the court has no power to compel the arbitrator to give reasons for any such decision."

At p. 53 of the judgment, Steyn J. made this clear in holding that the stage of an award had not been reached. It was merely a challenge to a pre-award ruling. At 55 His Honour said:—

> "Then reliance was placed on Section 22 of the Arbitration Act 1950. It is necessary to look at its terms. It reads as follows, the marginal note is 'Power To Remit Award'. It then provides as follows:—
>
> 'All cases of reference to Arbitration, the High Court or a Judge thereof, may from time to time remit the matters referred, or any of them, to the reconsideration of the Arbitrator or Umpire'.
>
> It is perfectly clear, not only from the marginal note, but also from the terms of section 22(1) that that power to remit only comes into play after an award has been pronounced. An attempt was made to argue that it is wide enough to cover the position where the arbitrator has made a pre-award ruling. I reject this argument. It is contradicted not only by the marginal note but also by the very fact that section 22(1) refers to a 'reconsideration' by the arbitrator. It therefore contemplates that the arbitrator has already considered the matter and reflected his views in an award, and that thereafter the court may, in appropriate cases, remit it

> to him for reconsideration. It is, therefore, in my judgment, clear that there is no power to remit in this case."

The equivalent Queensland Section giving a power of remitter is s. 43 which is expressed in similar terms. See also per Donaldson J. in Exormisis v. Oonsoo (supra) at 433 where His Honour, in refusing to remit an interlocutory order, said "-and I stress the word 'award'". This is a further reason for concluding that the reference to "arbitral award" in the Convention does not include an interlocutory order made by an arbitrator but only an award which finally determines the rights of the parties; i.e. one in which the arbitrator has already "considered" those matters and reflected his views in an award.

In the event that the foregoing is incorrect, I should deal with the submission by Mr McMurdo that this was an "interim award". There is no reference to an interim award in the Act or the Convention. Mr North conceded that an interim award can be a final award if it determined some but not all of the discrete issues referred to the arbitrator for resolution, but he maintained the submission that only one final award could be enforced under the Act because no specific reference was made to an interim award as appears in legislation in Queensland, the United Kingdom and elsewhere, and it was not mentioned in the License Agreement. It may be that the arbitration cl. 15.1, which incorporates the rules of the American Arbitration Association, provides for this although as submitted, the words in clause 15.1 viz "The final award of the arbitrator shall be final and binding on RCI and licensee . . ." does not make reference to an "interim award".

For well over a century, the general rule was that there should be one final award determining all the matters the subject to the reference, in the absence of some special authority to make more than one award, ie. in the arbitration agreement itself or by legislation: Gould v. The Staffordshire Potteries Waterworks Company (1850) 5 Ex. 214; 155 E.R. 92 at 96; Halsbury's Laws of Australia Vol. 1

[25.565], or by subsequent agreement: Imperial Leatherware Co. Pty. Ltd. v. Macri and Marcellino Pty. Ltd. (supra) at 655. An arbitrator could not in his award reserve either to himself or delegate to another, the power of performing in the future an act of a judicial nature with respect to the matter submitted for his determination. His duty was to make a final and complete determination respecting them by his award, and it was a breach of duty to leave anything to be determined thereafter: Re: O'Connor and Whitall (1919) 88 L.J.K.B. 1242; Cogstad v. Newsum [1921] 2 A.C. 528; Russel on Arbitration at 311. The fact that specific statutory exceptions to this rule are provided in Queensland and the United Kingdom and that such awards can undoubtedly be made in the United States does not determine the question of whether they fall within the purview of the Act or the Convention where no reference to such an award appears.

Indeed, it was submitted that s.8(1)(2) of the Act, which provides that a foreign award may be enforced as if it was made in Queensland (which legislation provides that an award must be final and binding: s.28 of the Queensland Act) recognised only one final award rather than a succession of foreign awards under the one reference to arbitration. Whilst the Act contemplates that, if various conditions are satisfied, a foreign award is placed in pari materia with a local award; Union Nationale Des Cooperatives Agricoles De Cereales v. Robert Catterall and Co. Ltd. (supra) at 53, I do not see that this latter point, which is somewhat circuitous, supports this particular submission, if for no other reason than that the Queensland Act expressly provides for the enforcement of interim awards as well as final awards, both of which must determine rights.

However, as Russell points out at 311, notwithstanding the duty to make one final award determining all the matters dispute, there are cases where it is highly desirable that an arbitrator should reserve some judicial authority to himself eg. where issues of liability, being

one of the substantive issues referred for decision, are determined in the first instance, leaving the question of quantum of damages to be determined later, if the parties thereafter cannot agree on the quantum. The author points out that this habitually occurs in the Chancery Division. He also states that such an interim award is in effect a declaratory judgment: Compagine Grainiere S.A. v. Fritz Capp A.G. [1978] 1 Lloyd's Rep. 511, upheld on appeal [1980] 1 Lloyd's Rep. 463 C.A. There may be other examples.

It would appear to be unduly restrictive if the expression "arbitral award" in the Convention was construed as excluding a valid interim award. However, it is not necessary in this application to finally determine that point because even if the Act and Convention contemplate the enforcement of an interim award, and even if the License Agreement confers the power to make more than one award, the question then is whether the orders of 16th July 1993 can properly be characterised as an interim award, as that term is used with reference to arbitration proceedings.

All authorities which I have been able to locate indicate that an interim award determines at least some of the matters in issue between the parties which were referred to the arbitrator for determination as Mr North submitted: Halsbury's Laws of Australia Vol 1, [25-565]; Eurolines Shipping Co. v. Metal Transport Corp. (supra); Stanley Hugh Leach Ltd. v. Haringey London Borough Council, The Times March 23rd 1977.

In the latter case, Sir Douglas Frank Q.C. (sitting as a Deputy Judge in the Queen's Bench Division) held that a claimant who seeks an interim award must elect his cause of action and stipulate the heads of claim in respect of which he is in effect saying that there was no defence, and likewise the arbitrator must in his (interim) award, specify the cause of action or head of claim involved otherwise the award may be set aside: Russell on Arbitration at 310; see also SL Sethia Liners Ltd. v.

Naviagro Maritime Corporation, The Kostas Melas [1981] 1 Lloyd's Rep. 18, where Goff J. held that the jurisdiction of an arbitrator was to decide disputes and that an award, interim or final, can only be an award in respect of matters referred for decision. Thus the power to make an interim award was the power to decide matters in dispute between the parties and that an arbitrator when making an interim award had to specify the issues or claim or part of a claim which was a subject matter of that award.

This view is consistent with the meaning of "interim award" under Australian Legislation: Halsbury's Laws of Australia Vol 1 [25.565]. For example, the Queensland Act s. 4 defines "award" as meaning a final or an interim award. By s. 23, an arbitrator in Queensland has the power to make an interim award unless the contrary intention is expressed in the arbitration agreement. By s. 28, awards must be final and this means either an interim award or a final award. Section 28 provides that any such award (that is interim or final) must be "final and binding on the parties to the agreement". By s. 33, an award, (that is interim or final) made under an arbitration agreement may by leave of the Court be enforced in the same manner as a judgment or order of the Court to the same effect, and when leave is so given, judgment may be entered in terms of the award. This refers only to awards which finally determine all or some of the disputes referred to the arbitrator for determination. So even if an interim award is capable of enforcement under the Act, it is clear that the order made on the 16th July 1993 cannot be classified as an interim award as that term is usually understood with respect to arbitration proceedings.

It does not appear that the Act or Convention contemplates any type of "award" or "order" of an arbitrator, other than an award which determines at least all or some of the matters referred to the arbitrator for decision. The applicant can derive no comfort from s.8(1) of the Act which states that ". . a foreign award is binding by virtue of this Act for all purposes on the

parties to the arbitration agreement in pursuance of which it was made", with no word "final" appearing therein, as it does for example in s. 28 of the Queensland Act. Whilst it is true that a valid interlocutory order is in one sense "binding" on the parties to the arbitration agreement at least until it is varied or discharged by the tribunal which made it, s. 8(1) when read with s. 8(2) of the Act makes it clear that the award which may be enforced must be an award which is final and binding on the parties. An interlocutory order which may be rescinded, suspended, varied or reopened by the tribunal which pronounced it, is not "final" and binding on the parties as referred to earlier in these reasons.

Furthermore, s. 8(2) of the Act is in similar terms to s. 36(2) of the Arbitration Act 1950 (U.K.) which was dealt with by Kerr J. in Dalmia Cement v. National Bank of Pakistan and Same v. Same [1975] Q.B. 9. Section 36(2) of that Act, which is in similar terms to s. 8(2) of the Act, clearly contemplates an award which is final and binding in the sense that it determined the substantive matters in dispute, notwithstanding that the sub-section did not use the word "final", but simply the words "binding for all purposes on the persons as between whom it was made". (Compare s.8(2) of the Act). As Evershed M.R. said in Union Nationale Des Cooperatives Agricoles De Cereales v. Robert Catterall and Co. (supra), the effect of provisions of the kind referred to in this application was that subject to conditions being satisfied, a foreign award is in the same position quoad enforcement as an award of a Queensland arbitrator, which must be final and binding on the parties to the agreement.

In the result, I conclude that the "Interim Arbitration Order and Award" made by the arbitrator on the 16th July 1993 is not an "arbitral award" within the meaning of the Convention nor a "foreign award" within the meaning of the Act. It does not take on that character simply because it is said to be so. However, in the event that the foregoing conclusions are incorrect, I should deal

with the points raised in opposition to recognition and enforcement, on the basis that the order is a foreign award within the meaning of the Act.

It was not in dispute that where an applicant seeks to enforce a valid foreign award (i.e. an arbitral award), the onus is upon the party opposing such an order to persuade the Court accordingly. This much is clear at least with respect to the matters contained in s.8(5) of the Act (Article VI of the Convention) which expressly so provides. The position is not so clear with respect to the grounds contained in s.8(7)(8) of the Act (Article V(2) of the Convention), although it was assumed that the onus was on the respondents. As to the position in the United States, see eg. American Const. Machinery and Equipment Corp. Ltd. v. Mechanised Const. of Pakistan Ltd. 659 F. Supp. 426 (1987), 828 F. 2d 117, 108 S.Ct. 1024, 484 U.S. 1064, 98 L. Ed 2d 988 where it was held that the party opposing confirmation of a foreign arbitration award bears the burden of proof. As there are differences in layout between the respective provisions in the Act and the Convention, the provisions of s.8 of the Act and Articles V, VI of the Convention are included in this judgment as an addendum.

There are differences between the opening words of s. 8(5) and Article V(1). In the latter case, recognition and enforcement of an award may be refused only if the party against whom it is sought "furnishes proof" to the competent authority (i.e. the Court) on one or more of the matters contained in that Article, whereas in s.8(5), enforcement may be refused "if that party proves to the satisfaction of the court" one or more of the matters contained in the sub-section.

Mr McMurdo contended that the respondents must adduce actual evidence to establish one or more of the matters referred to. However, as Mr North submitted, this onus may be discharged by reliance on the material advanced by the applicant, and by reference to legal authority and

principle, although obviously in some cases there must be specific evidence adduced.

Also Mr North submitted that there was a general discretion in the Court to refuse to enforce an award, quite apart from the specific matters above referred to. He relied on s.8(2) which uses the word "may", Re Boks and Co. [1919] 1 K.B. 491 at 496-8, Dalmia Cement and National Bank of Pakistan [1975] 1 Q.B. 9 at 14-15, 22 Kerr J., Benedette v. Sasvary [1967] 2 N.S.W.R. 772 at 797-8. In Dalmia Cement (supra), Kerr J. at 14-5, with respect to an application to enforce a foreign award, said that even though s.36(1) of the Arbitration Act 1950 (U.K.) provided that a foreign award shall, subject to the provisions of that Act be enforced in England and that s. 36(2) provided that such an award shall be treated as "binding for all purposes on the persons as between whom it was made", the reference to s. 26 of that Act, where the word "may" was used meant that it was clearly a matter of discretion whether a particular award should be enforced (p. 22). See also Russell on Arbitration 383. Further, in the United States of America, it has been held that the "defenses" to an application to enforce a foreign award were not limited to the specific matters referred to in the Convention: Dworkin-Cosell Interair Courier Services Inc. v. Avraham, 728 F.Supp. 156 (1989 U.S. District Court, S.D. New York).

It may also be thought that the omission of the word "only" from the opening words of s.8(5) of the Act, when compared with the opening words of Article V of the Convention, is a further pointer to the existence of a residual discretion. I conclude that Mr North's submissions are correct, namely that a general discretion exists whether to enforce a foreign award, although the general rule is that a valid foreign award is usually enforced if all the conditions are satisfied: Dalmia Cement (supra) at 14.

As indicated earlier, counsel for the respondents did not rely upon s. 8(5), s.8(7)(a) or 8(8) of the Act.

Reliance was placed only on the provisions of s.8(7)(b) of the Act (the counterpart of Article V(2)(b) of the Convention) which provides that the Court may refuse to enforce the award if to do so would be contrary to public policy which is the public policy of Queensland. He also relied upon the general discretion to decline enforcement. It has been held in the United States of America that the public policy "defense" under the Convention must be narrowly construed and must touch the forum State's most basic notions of morality and justice: Corcoran v. A.I.J. Multi-line Syndicate, Inc. 539 N.W.S. 2d 630 at 636 (1989). No Australian or English authority has been located precisely on this point.

Mr North's main attack revolved around the nature of the orders sought to be enforced. He submitted that many of the orders were so vague and sweeping as to make enforcement impossible; that they are not orders a Court in Queensland would make in their current form and should be remitted to the arbitrator to be redrafted pursuant to s. 43 of the Queensland Act; and that some orders were merely pre-trial directions which should not be the business or concern of this Court to enforce. That he submitted is a matter entirely for the U.S. District Court in Indiana which may make orders in aid of the conduct of the arbitration as it has done. Enforcement of that order is quite another matter. Of particular concern were orders h, i(10) (11) (12) and particularly the last paragraph which orders that the respondents make available for deposition in Australia, any necessary witnesses to the proceedings who are currently directors, officers, employees or otherwise representatives of RCI Aust on or before the final arbitration hearing date in this matter.

He further submitted that many of the orders sought to be enforced are interlocutory mandatory injunctions; (orders e, f, g, h and i); that the orders are sought on the ground of an asserted contractual entitlement notwithstanding the determination of the agreement by the applicant and particularly where this Court has no way of

knowing the relative merits of the parties to the dispute; that the Courts require a "high degree of assurance" that a plaintiff's action will succeed before making such orders: State of Queensland v. Telecom (1985) 59 A.L.J. 562 at 563; Gillespie v. Whiteoak [1990] 1 Qd.R. 284; that there is no evidence which indicates prospects of success or irreparable harm; that there is no evidence as to the extent to which the award has been complied with: O.85 r.16(2)(a)(ii); that some of the orders at least Order (h)) sought to be enforced are also of a "mareva" style without compliance with the requirements laid down by McPherson J. (as His Honour then was) in Abella v. Anderson [1987] Qd.R. 1; that notwithstanding the injunctive nature of the relief sought on an interlocutory basis, no undertaking as to damages was proffered and no security for such is available as e.g. was expressly ordered by the United States District Court Judge in his order of 14th July 1993 (see Exhibit KWR10 p.24 where His Honour ordered that RCI post a bond in the amount of $50,000 (U.S.) with the Court as security for costs and damages the respondents may incur to the extent that they may have been wrongfully enjoined).

On the latter point, it is clear that no interlocutory order for an injunction will be granted in Queensland unless it contains an undertaking by the party at whose instance it is granted to pay to the opposite party any damages which such opposite party may sustain by reason of the injunction, and which the Court or Judge may think he ought to pay. This is expressly required by O.58 r.12 of the Rules of the Supreme Court of Queensland (see also Practice Direction No. 5/1982 [1982] Qd.R. 651; Queensland Supreme Court Practice (Ryan Weld Lee) [7050]). This strict requirement has recently been confirmed by the Court of Appeal of Queensland in Rural Finance Pty. Ltd. v. Equus Financial Services Ltd. (Appeal No. 240 of 1992, 4th March 1993). No such undertaking or security was offered on behalf of RCI notwithstanding that the point had been raised by counsel for the respondents before the commencement of the hearing as appeared in his written outline of submissions, as well as during argument.

Mr McMurdo submitted that the order of the United States District Court Judge on 14th July 1993 was simply brought in aid of arbitration proceedings: Russell on Arbitration at 297-8, and that no question of double vexation can arise. He further submitted that this Court would not be supervising a foreign arbitration but would simply be giving effect to an "award" of a foreign arbitrator as required by the Act, such an award being capable of being made during the course of the arbitration and not only when the arbitration is complete as contended for by the respondents.

He further submitted that the weight of the respondents' objections to the form of some of the orders was diminished by their refusal to participate in the arbitration proceedings and to make submissions as to the appropriate form of orders in aid of the arbitration. He also submitted that O.85 r.16 of the Rules of the Supreme Court of Queensland apply only to an arbitration conducted in Queensland and not to foreign arbitrations and that there was no power of remitter pursuant of s.43 of the Act. I accept Mr McMurdo's submissions as to the application of O.85 r.16 and also for reasons stated earlier in this judgment, there is no power in this Court to remit pursuant to s.43 of the Queensland Act for the reconsideration of the arbitrator, the various orders made on 16th July 1993. That power refers only to matters of difference which the arbitrator has "considered" by rulings thereon in an award properly so called.

It is clear that many of the orders made on 16th July 1993 are not in the form which would be ordered by this Court. Many are far reaching without limitation as to time and without distinction between matters properly arising under and pursuant to the License Agreement and matters outside that agreement or of a purely private nature. (See in particular Order (i)(10),(11)). There appears to be substance in Mr North's submissions.

Mr North also submitted that to order the enforcement of the order of the arbitrator made 16th July 1993 by an order of this Court would amount to a double vexation as the matters the subject of that order were already previously litigated before the U.S. District Court Judge and were the subject of his order of 14th July 1993. It was said that to enforce the arbitrator's order in Queensland would amount to a double vexation so that an estoppel arose: Port of Melbourne Authority v. Ashen Pty. Ltd. (1980) 147 C.L.R. 589. As Mr McMurdo submitted, there is no question of estoppel based on res judicata as the orders were of an interlocutory kind and not final and binding. Nevertheless, there appears to be some substance in Mr North's submission that to enforce the order in Queensland would mean that there would be in existence at the one time, orders from two separate Courts dealing with the same matters, which is most undesirable and could also cause practical difficulties in enforcement. The U.S. District Court Judge in the concluding words of his order of 14th July 1993 (Exhibit KWR10 - p. 23) said:—

> "Based on the foregoing, the Court finds that the parties' claims are arbitrable and that these proceedings should be stayed following the imposition of the preliminary injunction and the parties sent to arbitration as required by their agreement. This Court will retain jurisdiction of this matter for the limited purposes of enforcement of any final award the arbitrator may enter."

Mr North is correct in the submission that notwithstanding the stay ordered by that Judge, the preliminary injunction and other orders made by him on 14th July 1993 remain on foot. They were expressed to operate "until such time as the arbitrator enters a final award in this matter". Whilst no authority has been located dealing expressly with a situation where orders of an interlocutory or procedural kind are made by Courts of two separate forums, I do not think that the situation in this respect is substantially different to the situation where separate proceedings claiming substantive relief are brought at the same time in two separate forums. In Australian Commercial

Research and Development Ltd. v. A.N.Z. McCaughlan Merchant Bank Ltd. [1989] 3 All E.R. 65 Sir Nicholas Browne-Wilkinson V.C. at 69 said:—

> "Counsel for the plaintiff sought to approach this case as though it was simply one in which one applied the rules of forum conveniens as now stated in Spiliada Maritime Corp. v. Cansulex Ltd., The Spiliada [1986] 3 All E.R. 843, [1987] A.C. 460. In my judgment it is not as straight forward as that. What we have in this case, and so far as I know it has not previously arisen, is the case in which the same party has initiated proceedings in two separate jurisdictions, those proceedings raising either at the present time or inevitably in the future exactly the same issues. The plaintiff, having itself invoked the two jurisdictions, now applies for a stay of the counterclaim (which naturally arises out of the claim) on the terms that it merely stays its own existing action in this country. In my judgment, where a plaintiff seeks to pursue the same defendant in two jurisdictions in relation to the same subject matter, the proceedings verge on the vexatious. I am not suggesting in any sense that the plaintiff in this case was being deliberately vexatious, but the outcome is vexatious."

His Honour held that the plaintiff who initiated proceedings against the same defendant in two separate jurisdictions in respect of the same subject matter was required to elect which set of proceedings he wished to pursue and if he elected to pursue the proceedings abroad the English action would be dismissed and not merely stayed. As the appropriate forum for the trial of the action was Queensland, the Court gave the plaintiff leave to discontinue the English claim and stay the counterclaim. Whilst cases of that type are not on all fours with the present situation, it seems to me that the sentiments there expressed have some relevance.

Also I think that some assistance is obtained from a United States decision in a case where the background facts were somewhat similar to those of the present case: Pilkington Brothers v. A.F.G. Industries Inc. (supra) (Murray M. Schwatz, District Court Judge). Pilkington was a British Corporation with its principal place of business in

England. The defendant was a Delaware (U.S.A.) Corporation. Pilkington licensed the defendant's predecessors an interest in certain technology involved in the making of "float glass". Its licensing agreement provided that disputes arising under the agreement should be arbitrated in London according to English law. Disputes arose and arbitration proceeded in England over an alleged failure by the defendants to make royalty reports and payments and in some other respects. During the course of the arbitration Pilkington became concerned that the defendants were contemplating selling the float glass technology covered by the License Agreement. The defendants formed a new corporation which the plaintiff feared would be the vehicle to be used by the defendants. The defendants allowed another company to inspect the defendant's float glass plant. These misgivings were brought by the plaintiff before an arbitrator in England and on the 26th August 1983, Pilkington sought and obtained in the High Court (Queen's Bench Division Commercial Court) an injunction which the Court was specifically empowered to give under s.12(6)(h) of the Arbitration Act 1950 (U.K.), (a power similarly granted to the Queenslands Courts under s.47 of the Queensland Act). Pilkington supplied the defendant's London Counsel with copies of its filings but counsel for the defendant did not appear at the hearing. The High Court made an ex-parte interim injunction restraining the defendants from doing various acts with orders which are comparable to some of the orders made in the instant case by the United States Court on 14th July 1993 and by the arbitrator on 16th July 1993. See p. 1041-1042. No such orders were made by the arbitrator in England, as in the present case.

In the United States District Court, the plaintiff then sought an injunction and orders exactly parallel to those granted by the High Court in England but did not ask that Court to decide the underlying merits of the dispute or to craft its injunction based on that dispute. The plaintiff relied solely on the principles of international comity. The Court refused a temporary restraining order,

not being persuaded that the defendants would violate the High Court order and held that the plaintiff had failed to demonstrate irreparable injury. On a further motion for preliminary injunction, the parties stipulated that the defendant would violate the High Court injunction so that the issue then was only whether an American Court should duplicate a foreign interim injunction without reference to the underlying dispute.

The District Court Judge concluded that the principles of international comity did not require and in fact militated against the issuing of a duplicative order that would interject the United States Court into the arbitration dispute then before the English Courts and the English Arbitration Panel (as opposed to the enforcement by the United States Court of a final foreign award). Whilst referring to the generally recognised rule of international comity which provides that American Courts will only recognise a final and valid judgment, His Honour held that the question of "finality" was not dispositive (1045), referring to Recognition of Foreign Adjudications - a Survey and Suggested Approach by A. von Mehren and B. Trautman, 81 Harv. L. Rev. 1601 (1968) at 1657-58, to the Re Statement (Second) of Conflict of Laws [109] comment d and McElroy v. McElroy, 256 A. 2d 763, 766-67 (Del. Ch. 1969). However, on the facts of the case he held that it would be inappropriate to grant the orders sought. At p. 1046 he said:—

> "By issuing an identically worded injunction while arbitration is still proceeding under the watchful jurisdiction of the English High Court, this Court would offend, rather than promote principles of international comity. For were this Court to issue Pilkington's requested relief, it would interfere unnecessarily in those foreign proceedings - proceedings in which Pilkington agreed by contract to participate. For example, upon a future application to this Court for a sanction against violations of its order, this Court would be compelled to interpret and apply an injunction which was drafted by the English High Court in furtherance of the High Court's special role under the

> English Arbitration Act. This might lead to inconsistent interpretations and inconsistent enforcement. Any interpretation of the High Court's order should be made by that court, not a United States district court. In addition, the existence of two identical outstanding injunctions could lead to a race to that courthouse which is perceived by each party as the more favourable forum. Finally, modifications of an injunction in one jurisdiction could lead to confusion and procedural tangles in the other jurisdiction. It is far simpler to have one court receive all applications for modifications."

His Honour held that the defendant was not free to violate the English High Court order in the United States, and that, assuming the High Court had jurisdiction over the defendant and gave it sufficient opportunity to be heard, the High Court order did restrict conduct by the defendant within the territorial limits of the United States as well as in England. In those circumstances there was no reason to intrude on the ongoing English arbitration proceedings by issuing a redundant interim American order. Furthermore, at 1047, His Honour ruled that the order of the English High Court was not an "arbitral award" within the meaning of the Convention and could not be enforced by that process. See in particular Convention Article I(2).

Many of the orders of the present kind are contrary to the public policy of Queensland not only in the sense that many of them as drafted would not be made in Queensland, particularly without undertakings as to damages and appropriate security and in certain other respects, but also because of possible double vexation and practical difficulties in interpretation and enforcement of the kind referred to in the passage cited about. No request was made by Mr McMurdo to sever or modify any of the orders or to impose any conditions if orders were made, no doubt because to do so would go behind the validity of the "award" of the arbitrator. The application was fought on an "all or nothing" basis. No reliance was placed upon s. 49 of the Queensland Act which does not appear to have its counterpart in the Act.

In my view, even if it be correct that the orders of 16th July 1993 were in fact an "arbitral award" within the meaning of the Convention and a "foreign award" within the meaning of the Act I would refuse the application on the grounds referred to in s.8(7)(b) of the Act (Article V(2)(b) of the Convention), or alternatively in the exercise of my discretion.

It appears therefore that this Court on the present application is unable to aid the applicant in advancing the arbitration proceedings in Indiana by making the orders sought. The apparent frustration experienced by RCI is understandable. However, my function on this application is limited to an interpretation of the Act and the Convention, to a consideration of whether the orders of 16th July 1993 are capable of enforcement under the Act, and if so whether there is an proper basis for refusing to order enforcement in Queensland. In summary, I rule as follows:—

"(i) The "Interim Arbitration Order and Award" made by the arbitrator in Indiana (U.S.A.) on 16th July 1993 is not a "foreign award" within the meaning of the Act and so it cannot be enforced under that Act;

(ii) Alternatively, if those orders do comprise a "foreign award" within the meaning of the Act, I refuse to order their enforcement on the ground that to do so would be contrary to the public policy of Queensland, or in the further alternative in the exercise of my discretion;

(iii) The application is dismissed with costs to be taxed.

ADDENDUM

INTERNATIONAL ARBITRATION ACT 1974(COMMONWEALTH) (EXTRACTS)

RECOGNITION OF FOREIGN AWARDS

8.(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award has been made in that State or Territory in accordance with the law of that State or Territory.

(4) Where:

(a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and

(b) the country in which the award was made is not, at that time, a Convention country;

subsections (1) and (2) do not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.

(5) Subject to subsection (6), 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:

(a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him, under some incapacity at the time when the agreement was made;

(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;

(d) the awards deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award 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.

(6) 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.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

(8) 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 of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ADDENDUM

(1958) CONVENTION (EXTRACTS)

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, 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 the country where the award was made; or

(b) The party against whom the award is invoked was not give proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party

claiming enforcement of the award, order the other party to give suitable security.