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AUGUST 2010

ARBITRATION IN AUSTRALIA: HOW RECENT REFORMS HAVE IMPROVED THE CONDUCT OF INTERNATIONAL ARBITRATION AND THE ENFORCEMENT OF AWARDS

Recent reforms to the *International Arbitration Act 1974* (Cth) (the "Act") have increased the certainty and effectiveness of conducting and enforcing international arbitrations in Australia.[1] The Act applies to arbitration agreements[2] made in relation to international trade and commerce. Most of the amendments to the Act arise from the implementation of the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"). In addition, there have been a number of specific amendments to the Act designed to streamline the conduct of arbitrations in Australia.

The key changes to the arbitration process in Australia implemented by the Act are:

- The scope for resisting the enforcement of foreign arbitral awards has been restricted.
- The Act is the exclusive law governing international commercial arbitrations in Australia.
- The UNCITRAL Model Law, as implemented by the Act, now "covers the field" in relation to international arbitrations conducted in Australia.
- Arbitral tribunals are explicitly granted power to make various interlocutory orders.
- The threshold test for establishing arbitrator bias has been lifted.

1 The changes were implemented pursuant to the *International Arbitration Amendment Act 2010* (Cth), which became fully operative on 6 July 2010. The Act is available online at http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200402434?OpenDocument.

2 An "arbitration agreement" is defined as "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", per sub-article 1 of Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

- The Act now provides a suite of optional provisions that the parties may adopt or exclude. Jurisdiction in respect of arbitration matters has been extended to the Federal Court of Australia.

These matters, and their practical importance, are discussed in turn below.

KEY CHANGES TO THE ACT

Limiting the Grounds on Which the Enforcement of Foreign Arbitral Awards May Be Resisted. The recent changes to the Act limit the grounds on which an Australian Court may refuse to enforce a foreign arbitral award. The Act now provides (consistent with the UNCITRAL Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)) an exhaustive list of factors upon which the enforcement of a foreign arbitral award in Australia may be challenged, namely:[3]

- The challenging party was subject to some incapacity.
- The arbitral agreement was not valid under its governing law.
- The challenging party was not given proper notice of the arbitration.
- The arbitral award deals with a dispute beyond that contemplated by the arbitral agreement.
- The arbitral tribunal was constituted, or the arbitration process proceeded, in a manner inconsistent with the arbitral agreement.
- The arbitral award has not yet become binding on the parties.
- The subject matter of the dispute is not capable of settlement by arbitration under Australian law.
- The award is contrary to public policy.[4]

The Act expressly provides that the Court retains no residual discretion to refuse to enforce a foreign arbitral award,[5] as had been suggested in some earlier Australian cases prior to the implementation of the Act.[6]

The Act Is the Exclusive Governing Law. The Act is now the exclusive law governing international commercial arbitrations in Australia. This amendment aims to provide greater certainty in respect of governing law in circumstances where Australian Courts have previously held that the Commercial Arbitration Act of an Australian State or Territory could also apply to international arbitrations in Australia.

The Act as an Exclusive Regime that "Covers the Field". Prior to the recent amendments to the Act, parties to an arbitration agreement governed by Australian law could elect to entirely opt out of the UNCITRAL Model Law. Accordingly, parties had complete freedom to determine the manner in which any arbitration between them would be conducted. The parties could, for instance, agree that an arbitration be conducted in accordance with the provisions of one of the Commercial Arbitration Acts in force in a particular Australian State or Territory, or in accordance with the laws of a foreign country.

The effect of the recent amendments to the Act is that the UNCITRAL Model Law, as adopted by the Act, "covers the field" in relation to international arbitrations conducted in Australia.[7] In particular, the operation of the various Australian State and Territory Commercial Arbitration Acts is expressly excluded.[8] Accordingly, international arbitrations conducted in Australia must proceed within the framework of the UNCITRAL Model Law as adopted by the Act. This framework still allows the parties considerable flexibility, including with respect to the scope of disputes that may be the subject of arbitration, the composition of the arbitral tribunal, the procedural rules that will apply to the arbitral proceedings, and the governing law that will apply to the dispute.[9]

3 *International Arbitration Act 1974* (Cth), s 8(6).

4 An award may only be considered contrary to public policy where it was affected by fraud or corruption, or where it was made in contravention of the rules of natural justice.

5 *International Arbitration Act 1974* (Cth), s 3A.

6 For example, the Explanatory Memorandum to the *International Arbitration Amendment Act 2010* (Cth) refers at paragraph 41 to the decision of *Resort Condominiums Inc v Lowell and Another* [1995] 1 Qd R 406.

7 *International Arbitration Act 1974* (Cth), s 21.

8 *Ibid*.

9 See generally, *UNCITRAL Model Law*, Article 7, Chapter III, and Articles 19 and 28, which apply by virtue of s 16 of the *International Arbitration Act 1974* (Cth).

Additional Powers for Arbitrators to Grant Interlocutory Orders. Prior to 2006, the UNCITRAL Model Law provided that arbitral tribunals have the power to take such interim measures that they "consider necessary in respect of the subject matter of the dispute". The 2006 amendments to the UNCITRAL Model Law introduced a more sophisticated regime with respect to the making of interlocutory orders (such as orders made in relation to maintaining the status quo and the preservation of evidence) and set out the types of orders that can be made, together with the procedures that will apply in respect of such orders. The recent amendments to the Act implement the 2006 amendments to the UNCITRAL Model Law, and also provide for the enforcement by the Courts of interlocutory orders made by arbitral tribunals.

The recent amendments to the Act, however, do not adopt Article 17B of the UNCITRAL Model Law, which provides for the making of various *ex parte* interlocutory orders by arbitral tribunals.[10] Accordingly, in Australia an arbitral tribunal may not make an *ex parte* interlocutory order.

Restricting Challenges to the Arbitrator on Grounds of Bias. In accordance with the UNCITRAL Model Law, the Act now provides that the identity of an arbitrator may only be challenged where there are "justifiable doubts" as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties. The test for whether there is "justifiable doubts" is whether there is "a real danger of bias" by the arbiter.[11] By contrast, the traditional common law test for bias under Australian law is whether a fair-minded objective person would reasonably apprehend that the arbitrator may not be impartial.

The Suite of Optional Provisions. The Act now includes a number of optional provisions that the parties may adopt or exclude if they wish. Some of these provisions apply by default, and so it is important that parties to an arbitration agreement consider whether it is appropriate for these provisions to apply at the time of drafting. These optional provisions are separate from, and designed to supplement, the UNCITRAL Model Law.

10 *International Arbitration Act 1974* (Cth), s 18B.

11 *International Arbitration Act 1974* (Cth), s 18A.

The "Opt-Out" Provisions. Unless the parties agree otherwise,[12] the following provisions apply by default to an arbitration agreement governed by Australian law:

- With the permission of the arbitral tribunal, a party may apply to the court to issue a subpoena.[13]
- The arbitral tribunal may make orders allowing a person to inspect, photograph and/or conduct experiments on relevant evidence in the possession of a party to the arbitral proceedings.[14]
- The arbitral tribunal may order security for costs.[15]
- The arbitral tribunal may make orders with respect to prejudgment and post-judgment interest, and costs (including an order that costs be fixed for a certain amount).[16]

The "Opt-In" Provisions. In addition, the Act contains a number of "opt-in" provisions that the parties to an arbitration agreement governed by Australian law may adopt if they wish. Most notably, the "opt-in" provisions provide a regime for dealing with confidentiality, and also consolidation of arbitral proceedings. Parties may agree to adopt the confidentiality regime provided by the Act—namely, that all information relating to arbitral proceedings will be treated as confidential information and may only be disclosed in limited circumstances, such as where disclosure is required by law, where disclosure is necessary to conduct litigation against a third party, or where disclosure is necessary to enforce the arbitral award.

In addition, the confidentiality regime provided by the Act allows the parties to the arbitration agreement to seek orders from the arbitral tribunal seeking permission to disclose confidential information. Both parties have certain rights to appeal to the Court in relation to such an application.[17]

Extending Jurisdiction in Arbitration Matters to the Federal Court of Australia. Prior to the implementation of the Act, only State Supreme Courts in Australia had jurisdiction with respect to international arbitration matters (State Supreme

12 *International Arbitration Act 1974* (Cth), s 22(2).

13 *International Arbitration Act 1974* (Cth), s 23.

14 *International Arbitration Act 1974* (Cth), s 23J.

15 *International Arbitration Act 1974* (Cth), s 23K.

16 *International Arbitration Act 1974* (Cth), ss 25–27.

17 *International Arbitration Act 1974* (Cth), ss 22(3), 23C–23G.

Courts in Australia are courts of first instance with a right of appeal to their respective Courts of Appeal). Where a party wished to enforce a foreign arbitral award, or where an issue requiring judicial resolution relating to an arbitration arose, the matter had to be brought before the relevant State Supreme Court. The Act now provides that the Federal Court of Australia and the State Supreme Courts have concurrent jurisdiction.[18] Accordingly, parties have a choice as to whether to bring matters relating to international arbitration before the relevant State Supreme Court or the Federal Court of Australia.

In conjunction with the recent amendments to the Act, a number of Australian Courts have established dedicated arbitration lists, including the Federal Court of Australia and the Supreme Courts of Victoria and New South Wales. These dedicated lists are intended to provide a streamlined process for the resolution of disputes arising in connection with arbitrations, and aim to facilitate the development of specialist judicial expertise with respect to arbitration matters.

OPENING OF THE AUSTRALIAN INTERNATIONAL DISPUTES CENTRE

On 24 May 2010, at the Conference of the International Council for Commercial Arbitration in Rio de Janeiro, the Permanent Court of Arbitration in The Hague ("PCA") and the Australian Centre for International Commercial Arbitration ("ACICA") announced an agreement that established a formal cooperation between the two institutions. ACICA became the fourth international arbitration institute to sign such an agreement with the PCA. The organisations agreed to "cooperate in the discharge of their respective functions" and "exchange information on subjects of mutual interest" in an effort to promote the more effective resolution of international disputes in the Asia-Pacific region.

18 *International Arbitration Act 1974* (Cth), s 18(3).

Importantly, the agreement facilitates Australia becoming a host country for PCA-administered arbitrations. In August 2010, the Australian International Disputes Centre, Australia's first international dispute resolution centre, opened in Sydney. The Centre is modelled on Singapore's premier arbitration facility, Maxwell Chambers, and provides the necessary infrastructure to accommodate an anticipated increase in international arbitrations conducted in Australia.

KEY IMPLICATIONS

The recent amendments to the *International Arbitration Act 1974* aim to further facilitate international trade and commerce by encouraging the use of arbitration to resolve disputes in Australia. This legislative change is supported on the ground by the recent opening in Sydney of the Australian International Disputes Centre.

As a result of these developments, parties to an arbitration agreement are likely to have greater certainty in relation to the resolution of international commercial disputes by way of arbitration in Australia, as well as the enforcement of foreign arbitral awards in Australia.

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