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THE QUEEN'S AWARDS
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Arbitration in Australia



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Australia has a long-standing tradition of embracing arbitration as a means of alternative dispute resolution. While on a domestic level this is reflected by court-annexed and compulsory arbitration which is prescribed for certain disputes, arbitration has become equally common in international disputes. Traditionally arbitration was largely confined to areas such as building and construction disputes. However, the strong and steady growth of the Australian economy over the last decade and the opening of the Asian markets in the mid-1990s has further advanced the use of arbitration in other areas, in particular in the energy and trade sectors. From an Australian perspective the opening of foreign markets, particularly in Asia, is dramatically increasing the significance of foreign investment protection under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID). While the number of investment arbitrations with Australian participation is expected to significantly increase over the next few years, the level of awareness about the different options of investment protection that is available under investment treaties still needs to be raised.

Australia is a party to 18 bilateral investment treaties (BITs)¹ and further treaties are currently being negotiated with Turkey, Mexico and Sri Lanka. Most of these BITs designate ICSID arbitration for the resolution of disputes.

In addition to Australia's existing free trade agreements (FTAs) with New Zealand, Singapore, Thailand and the United States, further FTAs are currently under negotiation with China, Malaysia, Japan and ASEAN.

The use of arbitration clauses in international contracts has grown steadily and the majority of Australian companies prefer arbitration over litigation when it comes to cross-border agreements. While this might be slightly different in a purely domestic context, largely due to the bad reputation of domestic arbitration in the 1990s, there is a trend towards adopting more efficient and flexible procedures based on what is good and common practice in international arbitrations (for example, the *Anaconda* arbitration in 2002).

Another milestone in the promotion of international arbitration in Australia was the re-invigoration of the Australian Centre for International Commercial Arbitration (ACICA) and the launch of its new institutional arbitration rules in 2005. The ACICA arbitration rules are to a large degree based on the UNCITRAL Arbitration Rules 1985 and were amended and modified to allow for administrative support through ACICA, but also provide some additional features. The rules have been well received by users and are now referred to in many of the standard form agreements in Australia and the Asia-Pacific.

Primary sources of arbitration law

Legislative powers in Australia are divided between the Commonwealth of Australia, as the federal entity, and six states. Furthermore, there are two federal territories with their own legislatures.

Matters of international arbitration are governed by the International Arbitration Act 1974 (Cth) (IAA) which in section 16

adopts the UNCITRAL Model Law. It is possible for the parties to opt-out of the application of the Model Law by express choice in writing (section 22 of the IAA). The Model Law provides for a flexible and arbitration-friendly legislative environment, granting the parties ample freedom to tailor the procedure to their individual needs. The adoption of the Model Law does of course also provide users with a high degree of familiarity and certainty as to the operation of those provisions, which makes it an attractive choice.

The IAA supplements the Model Law in several respects. Division 3 of the IAA, for example, contains optional provisions such as for the enforcement of interim measures or the consolidation of arbitral proceedings. Another helpful provision is section 19 of the IAA, which specifies the otherwise debatable term 'public policy' for the purpose of articles 34 and 36 of the Model Law.

Part II contains the implementation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Australia has acceded to the New York Convention without reservations and it extends to all external Territories except for Papua New Guinea.

Australia is also a signatory to ICSID, the implementation of which is contained in part IV of the IAA.

Domestic arbitration has traditionally been a matter of state law and is governed by the relevant Commercial Arbitration Act (CAA) of each state or territory where the arbitration takes place. Following amendments made in 1984 and 1993, the CAAs of the states and territories are largely uniform. While the CAA primarily deals with domestic arbitration proceedings, parts of it may also apply in international arbitrations where the parties have chosen to opt out of the Model Law.

Arbitration agreements

Form requirements

For international arbitrations in Australia, both the Model Law and the New York Convention require the arbitration agreement to be in writing. While article II(2) of the New York Convention qualifies writing as either signed by both parties or contained in an exchange of letters or telegrams, the Model Law is more expansive in its definition of writing and includes any means of telecommunication which provides a permanent record of the agreement. In the rare situation that an arbitration agreement is subject to enforcement under the IAA rather than the Model Law (ie, where the parties have opted-out of the Model Law) the IAA refers to the New York Convention for the definition of 'agreement in writing'.

In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 the Federal Court has recently confirmed its position that an arbitration clause contained in an exchange of letters is sufficient to fulfil the writing requirement.

For domestic arbitrations the CAA also requires an arbitration agreement to be in writing. However, there is no requirement for the agreement to be signed.

There is generally no distinction between submission of an existing dispute to arbitration and an arbitration clause referring future disputes to arbitration. However, the distinction is impor-

tant in the context of statutory provisions, such as those relating to insurance contracts. These will be discussed further below.

Under Australian law arbitration agreements are not required to be mutual, ie, they may confer a right to commence arbitration to one party only (see *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* [1995] HCA 36). Some standard form contracts, particularly in the construction industry and the banking and finance sector, still make use of this.

Severability of the arbitration agreement

Australian courts acknowledge the notion of severability of the arbitration agreement from the rest of contract. There is authority from the High Court of Australia in relation to domestic arbitrations that suggests that the notion of severability does not apply in circumstances where there is a dispute concerning the initial existence of the underlying contract or the arbitration agreement itself (see *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337). However, this issue has been resolved at least in New South Wales. In *Ferris v Plaister* (1994) 34 NSWLR 474 it was held that the arbitrator has jurisdiction to determine that the relevant contract was void ab initio as long as there was a general consensus. However, an arbitrator may not possess jurisdiction to determine a claim that no arbitration agreement has in fact been concluded. In those circumstances the arbitrator will usually adjourn the arbitration proceedings pending the court's determination of the issue.

In contrast, for international arbitrations article 16(1) of the Model Law expressly provides that the tribunal may also consider objections as to the existence of the arbitration agreement.

Stay of proceedings

Provided the arbitration agreement is drafted widely enough, Australian courts will stay proceedings in face of a valid arbitration agreement. For domestic arbitrations section 53(2) of the CAA provides that a stay application has to be made before the party has delivered pleadings or has taken any other steps in the proceedings other than filing of an appearance, unless with the leave of the court. For international arbitrations section 7(2) of the IAA incorporates Australia's obligations under the New York Convention and provides for a stay of court proceedings if the proceedings involve the determination of a matter that is capable of settlement by arbitration. Applications for stay are limited to those types of arbitration agreements listed in section 7(1) of the IAA. The primary purpose of this section is to ensure that a stay of proceedings is not granted under the New York Convention for purely domestic arbitrations.

For international arbitrations under the Model Law, article 8 provides for a stay of proceedings where there is a valid arbitration agreement. A party must request the stay before it makes its first substantive submissions. Although the issue of the relationship between article 8 of the Model Law and section 7 of the IAA has not been finally settled by the courts, the prevailing opinion among arbitration practitioners is that a party can make a stay application under either of the two provisions (this also seems to be the position of the Federal Court in *Shanghai Foreign Trade Corporation v Sigma Metallurgical Company Pty Ltd* (1996) 133 FLR 417).

The IAA is expressly subject to section 11 of the Carriage of Goods By Sea Act 1991 (Cth) which renders void an arbitration agreement contained in a bill of lading or similar document relating to the international carriage of goods to and from Australia, unless the designated seat of the arbitration is in Australia. Furthermore, there are statutory provisions in Australia's insurance legislation (section 43 of the Insurance Contracts Act 1984 (Cth) and section 19 of the Insurance Act 1902 (NSW)) which render void an arbitration agreement unless it has been concluded after the dispute has arisen.

A recent decision by the New South Wales Supreme Court clarified that this limitation applies to both insurance and reinsurance contracts (*HIH Casualty & General Insurance Limited (in liquidation) v Wallace* (2006) NSWSC 1150). A similar provision is also contained in section 7C of the Home Building Act 1989 (NSW).

The issue of which disputes are arbitrable and which are not has not yet been finally resolved. Especially in relation to competition, bankruptcy and insolvency matters (with regard to insolvency matters see *Tanning Research Laboratories Inc v O'Brien* (1990) 64 ALJR 211, reported in *Yearbook Commercial Arbitration XV* (1991), pp521-529) courts have occasionally refused to stay proceedings though without expressly holding that these matters are inherently not arbitrable. Instead, most court decisions have considered whether the scope of the arbitration agreement is broad enough to cover such dispute (see for example *ACD Tridon Inc v Tridon Australia* [2002] NSWSC 896).

Considerations such as these commonly arise in relation to the Trade Practices Act 1974 (Cth), Australia's competition and consumer protection legislation. In *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466, the New South Wales Court of Appeal held that certain matters of consumer protection under the Trade Practices Act are capable of settlement by arbitration. More recently, the New South Wales Supreme Court in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 and the Federal Court in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers* (1998) 159 ALR 142 confirmed that disputes based on misleading and deceptive conduct under section 52 of the Trade Practices Act are arbitrable.

However, in *Petersville Ltd v Peters (WA) Ltd* (1997) ATPR 41-566 and *Alstom Power Ltd v Eraring Energy* (2004) ATPR 42-009, the Federal Court took a slightly different position and held that disputes under part IV of the Trade Practices Act (anti-competitive behaviour) are more appropriately dealt with by the court, irrespective of the scope of the arbitration agreement. These decisions show that courts may be reluctant to allow the arbitrability of competition matters and seek to preserve the courts' jurisdiction to hear matters that have a public dimension.

An issue that courts have had to deal with more regularly in recent times is when multiple claims are brought by one party including some which are capable of settlement and others which are not. So far the courts have approached this issue by staying court proceedings for only those claims it considers to be capable of settlement by arbitration (see *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers* (1998) 159 ALR 142, *Tanning Research Laboratories Incorporated v O'Brien* (1990) 169 CLR 332).

The arbitral tribunal

Appointment and qualification of arbitrators

Australian laws do not impose any special requirements with regard to the arbitrator's professional qualification, nationality or residence. However, arbitrators will need to be impartial and independent. Article 12 of the Model Law requires an arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence. This duty continues during the course of the arbitration.

Where the parties fail to agree on the number of arbitrators to be appointed, section 6 of the CAA provides for a single arbitrator and article 10 of the Model Law for a three-member tribunal to be appointed. The appointment process for arbitrators will generally be provided in the institutional arbitration rules or within the arbitration agreement itself. For all other circumstances article 11 of the Model Law and section 8 of the CAA prescribe a procedure for the appointment of arbitrators.

It should be noted that the arbitration law in Australia does not

prescribe a special procedure for the appointment of arbitrators in multi-party disputes. If multi-party disputes are likely to arise under a contract it is advisable to agree on a set of arbitration rules that contain particular provisions for the appointment of arbitrators under those circumstances, such as the ACICA arbitration rules (article 11).

Challenge of arbitrators

For arbitrations under the Model Law a party can challenge an arbitrator if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. This standard has also been applied in domestic arbitrations (*Gascor v Ellicott* [1997] 1 VR 332).

The parties are free to agree on a procedure for challenging arbitrators. Failing such agreement article 13(2) of the Model Law prescribes the procedure. Initially the party is required to submit a challenge to the tribunal, but may then apply to a competent court if the challenge has been rejected (article 13(3) of the Model Law).

For domestic arbitrations the courts have exclusive jurisdiction to remove arbitrators. Pursuant to section 44 of the CAA any party can make an application to the court to remove an arbitrator or umpire where it is satisfied that there has been misconduct by the arbitrator, undue influence has been exercised in relation to the arbitrator or an arbitrator is unsuitable or incompetent to deal with the particular dispute. Also, its involvement in the appointment of an arbitrator does not bar a party from later on alleging the arbitrator's lack of impartiality, incompetence or unsuitability for the position (section 45 of the CAA).

Liability of arbitrators

Both the CAA (section 51) and the IAA (section 28) provide that arbitrators are not liable for negligence in respect of anything done or omitted to be done in their capacity as arbitrators. But they remain liable for fraud. This is also reflected in article 44 of the ACICA arbitration Rules. There are no known cases where an arbitrator has been sued in Australia.

Procedure

Under Australian law parties are generally free to tailor the procedure for the arbitration to their particular needs as long as they comply with fundamental principles of due process and natural justice such as equal treatment of the parties, the right of a party to present its case and the giving of proper notice of hearings. This applies to domestic arbitrations as well as to international arbitrations.

Court involvement

Australian courts have a good history of supporting the autonomy of arbitral proceedings. Courts will generally interfere only if specifically requested to do so by a party or the tribunal and only where the applicable law allows them to do so.

The courts' powers under the Model Law are very restricted. However, courts may:

- grant interim measures of protection (article 9);
- appoint arbitrators where the parties or the two party-appointed arbitrators fail to agree on an arbitrator (articles 11(3) and 11(4));
- decide on a challenge of an arbitrator if so requested by the challenging party (article 13(3));
- decide, upon request by a party, on the termination of a mandate of an arbitrator (article 14);
- decide on the jurisdiction of the tribunal, where the tribunal has ruled on a plea as a preliminary question, and a party has

requested the court to make a final determination on its jurisdiction (article 16(3));

- assist in the taking of evidence (article 27); and
- set aside an arbitral award (article 34(2)).

With regard to domestic arbitration courts have some additional powers. In particular, courts have discretion to stay proceedings (section 53 of the CAA) as well as power to review an award for errors of law (section 38 of the CAA) and to issue subpoenas under section 17 of the CAA upon application by a party.

Party representation

There are much greater flexibilities with regard to legal representation in international arbitration than there are in domestic arbitrations. Under section 29(2) of the IAA a party may represent itself or may choose to be represented by a duly qualified legal practitioner from any legal jurisdiction or, in fact, by any other person of its choice. This applies to all international arbitrations irrespective of whether the Model Law applies or not (in case the parties chose to opt-out). For domestic arbitrations the requirements are more restrictive. Section 20(1) of the CAA sets out a comprehensive list of circumstances and requirements under which a party may be represented in arbitral proceedings. While the provision is broad enough to also allow representation by a foreign legal practitioner in certain circumstances, representation by a non-legal practitioner is very limited.

Confidentiality of proceedings

Australian courts have taken a somewhat controversial approach to confidentiality of arbitral proceedings. In the well-known decision of *Eso Australia Resources Limited v Plowman* (1995) 183 CLR 10 the High Court of Australia held that while arbitral proceedings and hearings are private in the sense that they are not open to the general public, that does not mean that all documents voluntarily produced by a party during the proceedings are confidential. In other words, confidentiality is not inherent in the fact that the parties agreed to arbitrate. However, the court noted that it is open to the parties to agree that documents are to be kept confidential. From an Australian perspective it is therefore advisable to provide in the arbitration agreement, either expressly or by reference to a set of arbitration rules containing confidentiality provisions, that the arbitration and all documents produced during the proceedings are to be confidential.

Evidence

Evidentiary procedure in Australian arbitrations is largely influenced by the common law system. Arbitrators in international and domestic arbitration proceedings are not bound by the rules of evidence and may determine the admissibility, relevance, materiality and weight of the evidence with considerable freedom (article 19(2) of the Model Law and section 19(3) of the CAA).

Although arbitrators enjoy great freedom in the taking of evidence, in practice arbitrators in international proceedings will often refer to the IBA Rules on the Taking of Evidence. The ACICA arbitration rules also suggest the adoption of the IBA Rules absent any express agreement between the parties and the arbitrator.

The situation is slightly different with regard to domestic arbitrations. Despite the liberties conferred by section 19(3) of the CAA many arbitrators still conduct arbitrations in a way not dissimilar to court proceedings, ie, witnesses are sworn in, examined and cross-examined. Nevertheless, there has been some development lately and more arbitrators are adopting procedures that suit the particular circumstances of the case and which allow for more efficient proceedings.

For arbitrations under the Model Law, article 27 allows an arbitrator to seek the court's assistance in the taking of evidence. In such case, a court will usually apply its own rules for the taking of evidence.

Interim measures

With regard to arbitrations under the Model Law the arbitral tribunal is generally free to make any interim orders or grant interim relief as it deems necessary in respect of the subject matter of the dispute. Article 9 states that it is not incompatible with the arbitration agreement for a party to request, before or during arbitral proceedings, interim measures from a court and for a court to grant such measures. There is currently debate about whether an Australian court is entitled to grant interim measures of protection in support of foreign arbitrations, as article 1(2) of the Model Law expressly allows for the application of article 9 in arbitrations with a foreign seat. While the position in Australia is yet to be tested it is possible that Australian courts will follow the decision of the High Court of Singapore in *Front Carriers Ltd v Atlantic Shipping Corp* [2006] SGHC 127, granting such interim measure of protection (in that case an asset preservation order) in support of foreign arbitration proceedings in England, as Singapore's arbitration laws are very similar to those in Australia.

Parties may also choose to opt in to section 23 of the IAA (additional provisions) which allows a court to enforce interim measures of protection under article 17 of the Model Law in the same way as awards under chapter VIII of the Model Law. Although of great benefit, this provision is hardly ever noticed at the time the arbitration agreement is drafted.

Under the CAA the arbitrator has freedom to conduct the arbitration as he or she thinks fit. In particular, section 23 of the CAA allows the arbitrator to make interim awards unless the parties intention to the contrary is expressed in the arbitration agreement. Furthermore, section 47 of the CAA confers on the court the same powers of making interlocutory orders for arbitral proceedings as it has with regard to court proceedings.

Form of the award

The proceedings are formally ended with the issuing of a final award. Neither the Model Law nor the CAAs prescribe time limits for the delivery of the award. However, there are certain form requirements awards have to meet. According to article 31 of the Model Law an award must be in writing and signed by at least a majority of the arbitrators. It must contain reasons, state the date and place of the arbitration and must be delivered to all parties to the proceedings. This date will be relevant for determining the period in which a party may seek recourse against the award.

The form requirements for domestic awards are similar. The award needs to be in writing, signed and contain reasons (section 29 of the CAA). Although there is no express requirement for the award to state the date and place of the arbitration it is recommended to do so. The parties may also choose for the award to be delivered orally with a subsequent written statement of reasons and terms by the arbitrator (section 29(2) of the CAA). With regard to the content of the award, there are currently no restrictions as to the remedies available to an arbitrator. Whether the award of exemplary or punitive damages is admissible, however, is yet to be tested in Australia.

There are no statutory time limits, neither in domestic nor international proceedings, for the making of an award. Where the arbitration agreement itself contains a time limit to this effect, a court would have the power to extend the time limit with regards to domestic proceedings (section 48(1) of CAA). The effect of such time limit in Model Law proceedings is unsettled. Under article 32 of the Model Law delays in rendering an award do not result in the termination of the arbitral proceedings. Instead, one option is for a party to apply to a court to determine that the arbitrator loses his mandate under article 14(1) of the Model Law on the basis that he is "unable to perform his function or for any other reason fails to act without undue delay".

Under article 29 of the Model Law any decision of the arbitral tribunal shall be made by a majority of its members. In contrast, the

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CAA provides that the decision of a presiding arbitrator shall prevail if no majority can be reached (section 15 of the CAA). The Model Law allows a similar power of the presiding arbitrator only with regard to procedural matters (article 29 of the Model Law).

Recourse against the award and enforcement

Appeal and setting aside proceedings

Most important to a party that is unhappy with the outcome of the arbitration is whether it is possible to appeal or set aside the award. The only available avenue for recourse against international awards is to set aside the award (article 34(2) of the Model Law). The grounds for setting aside an award mirror those for refusal of enforcement under the New York Convention and basically require a violation of due process or breach of public policy. The term 'public policy' in article 34 of the Model Law is qualified in section 19 of the IAA and requires some kind of fraud, corruption or breach of natural justice in the making of the award. The Model Law does not contemplate any right to appeal for errors of law.

The CAA allows for broader means to attack an award. An appeal to the Supreme Court is possible on any question of law (section 38(2)) with either the consent of all parties or where the court grants special leave (section 38(4)) – section 38 is worded slightly different in the Northern Territory and Tasmania. However, the Supreme Court will not grant leave unless it considers the determination of the question of law concerned to substantially affect the rights of one or more parties to the arbitration agreement. Furthermore, the court will have to be satisfied that there is either a manifest error of law on the face of the award or strong evidence exists that the arbitrator made an error of law and that the determination of that question may add substantially to the certainty of commercial law (section 38(5) of the CAA). Guidance as to how a court might interpret these provisions can be taken from *Giles v GRS Constructions Pty Ltd* (2002) 81 SASR 575 and *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724, though the latter case has been criticised to some regard in more recent decisions.

All the aforementioned rights to appeal may be excluded by the parties by way of an exclusion agreement (section 40), subject to the limitations set out in section 41 of the CAA. Further recourse is available under section 42 of the CAA in the form of setting aside the award on the grounds that the arbitrator misconducted the proceedings or the award has been improperly procured.

Enforcement

The most crucial moment for a party that has obtained an award is often the enforcement stage. Australia is a signatory to the New York Convention. Section 8 of the IAA implements Australia's obligations under article V of the New York Convention and provides for foreign awards to be enforced in the courts of a state or territory as if the award had been made in that state or territory in accordance with the laws of that state or territory. However, section 8 of the IAA only applies to awards made outside of Australia. For awards made within Australia, either article 25 of the Model Law, for international arbitration under the Model Law, or section 33 of the CAA with regard to domestic awards apply.

Australian courts have an excellent record for enforcing foreign arbitral awards. They rarely refuse enforcement. However, it should be noted that interlocutory or procedural orders made by an arbitral tribunal may not fulfil the requirements for an award and therefore courts may refuse enforcement of such interim measures (see *Resort Condominiums International Inc v Bolwell* (1993) 118 ALR 655). For this purpose parties may wish to apply section 23 of the IAA (optional provisions) which allows for the enforcement of interim measures under part VIII of the Model Law.

Notes

- 1 China (1988), Vietnam (1991), Papua New Guinea (1991), Poland (1992), Hungary (1992), Indonesia (1993), Romania (1994), Czech Republic (1994), Philippines (1995), Laos (1995), Argentine (1997), Peru (1997), Pakistan (1998), Chile (1999), India (2000), Egypt (2002), Lithuania (2002) and Uruguay (2003).