

INTERNATIONAL COMMERCIAL ARBITRATION: THE AUSTRALIAN LEGAL REGIME

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The object of this paper is to examine the legislative framework in Australia with respect to international arbitration. International arbitration in Australia is currently regulated by two legal regimes: the Commonwealth *International Arbitration Act* 1974 (“the IAA”) and the Uniform State legislation (in Victoria the *Commercial Arbitration Act* 1984) (“the CAA”) with the Commonwealth Act being the more significant.

1. The New York Convention

In considering the Commonwealth legislation, some legislative history is important. The *International Arbitration Act* was first enacted in 1974 to give effect to the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards. The Convention now has 133 state parties and has effectively become a universal global law.

The Convention is attached to Schedule 1 of the Act and enacted in two important provisions: section 7 which provides for the mandatory staying of judicial proceedings brought in breach of an arbitration clause or agreement and section 8, which provides for the enforcement of foreign arbitral awards in Australia.

Broadly speaking, section 7 imposes an obligation on an Australian court to stay local court proceedings brought in breach of an arbitration agreement where the place of arbitration is a member state of the New York Convention or a party to the arbitration agreement is incorporated or has its principal place of business in such a country.

Section 7 creates a mandatory stay procedure: generally speaking, a party cannot rely on mere arguments of convenience to avoid its obligation to arbitrate. In practice, a party has only two real arguments to defeat an arbitration clause: that it does not cover the claims as a matter of construction or the clause is invalid; see *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 90 FCR 1.

So, for example, a Chinese party could apply to stay proceedings brought in the Supreme Court of Victoria by an Australian party where the parties had entered an agreement providing for arbitration in London. The fact that foreign arbitration would be more costly or burdensome than local litigation for the Australian party is irrelevant.

The aim of this provision therefore is to reinforce the arbitral process by limiting the scope for parties to escape their contractual obligations to arbitrate.

Under section 8 of the IAA, a foreign arbitral award is enforceable in Australia if it was made in a New York Convention Country or any other country if the party seeking enforcement is incorporated or has its principal place of business in a Convention country (including Australia).

Again this provision restricts the range of available defences to enforcement to ensure that awards circulate freely throughout the world with minimal obstruction by national courts or laws. Generally it will only be where a serious procedural irregularity has occurred in the process (for example a denial of natural justice by the tribunal) or a breach of local public policy that enforcement will be denied.

2. The UNCITRAL Model Law

In 1989 the Commonwealth Parliament amended the IAA by enacting the 1985 UNCITRAL Model Law on International Commercial Arbitration in section 16 and Schedule 2 of the Act.

The Model Law was developed by the United Nations as a curial law or law of arbitral procedure to be adopted by member States for the conduct of arbitrations within their territories. It was intended to be a vehicle for global harmonisation of arbitration law on the basis of the principle of party autonomy and reduced judicial interference in the arbitral process. Unlike a treaty, whose provisions have to be enacted in full, the idea behind the Model Law was to allow States freedom to enact those provisions which they wanted and ignore the rest.

In practice, however, most countries that have adopted the Model Law have largely enacted it in full or with only minor modifications. Most countries have been mindful of the need to ensure uniformity in the area of arbitral procedure law.

The Model Law now has wide acceptance, having been adopted in over 30 countries, including Australia, Canada, Germany, Hong Kong, India, Iran, Ireland, Mexico, New Zealand, Russian Federation, Singapore, Sri Lanka, Scotland and four states of the United States (including California).

A number of other countries' laws (eg the 1996 English *Arbitration Act*) while not adopting its principles directly nevertheless show strong signs of its influence (for example in the implicit recognition of amiable composition in Article 46 (1)(b)).

Australia enacted the Model Law because it was felt that this would assist the country in becoming a centre for international arbitration as foreign parties would be attracted to arbitrating under an internationally agreed framework with no parochial or peculiar provisions of domestic law to trap or deter them. The Australian Working Group felt that enhancing party autonomy and limiting judicial intervention in the arbitral process would be good selling points to foreign parties.

As mentioned above, the Model Law embodies the progressive continental European tradition of arbitration, which is to minimise judicial intervention and maximise party autonomy. Its provisions are framed to allow parties great freedom in their choice of arbitral rules and procedures with only a few mandatory requirements such as the obligation on the arbitrator to treat both parties equally; (Article 18) and the requirement that each party supply the other with all information provided to the tribunal (Art. 24(3)). Where parties have not agreed on arbitral rules the Model Law gives the tribunal power to conduct the arbitration as it considers appropriate; Art 19(2).

The grounds for challenge of arbitrators and setting aside of awards are also significantly reduced under the Model Law (for example no general right of removal/setting aside for arbitrator misconduct) as compared to the CAA.

The Model Law also contains provisions for enforcement of agreements (Art 8) and awards (Arts 35 and 36) closely modelled on the terms of the New York Convention, although in the case of awards, enforcement is not limited to foreign awards but would encompass an award made in Australia in a Model Law arbitration.

3. The Scope of Application of the Model Law in Australia

An important issue to consider is when the provisions of the Model Law apply to an international commercial arbitration in Australia. The key point to note at the outset is that the Law does not apply to all such arbitrations. First, it will only apply to arbitration agreements entered into after 12 June 1989 or before that date where the parties have expressly agreed that the Law will apply.

“International Commercial”

Next, the Model Law only applies to “international commercial arbitration” as defined in Article 1 para 3 of the Law. An arbitration is defined as “international” where:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of their agreement, their places of business in different countries;
- (b) one of the following places is situated outside the country in which the parties have their place of business:
 - (i) the place of arbitration
 - (ii) any place where a substantial part of the contractual obligations is to be performed or the place most closely connected with the subject matter of the dispute; or
- (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

As can be seen, the drafters of the Model Law provided a broad definition of the term “international”. The effect of paras (b) and (c), in particular, is that parties can convert an otherwise domestic agreement into an international one by merely selecting a foreign place of arbitration under (b)(i) or by making a declaration that the subject matter of the arbitration relates to more than one country (under (c)).

Courts have also taken an expansive view of (b)(ii), namely any place where a substantial part of the obligations is to be performed”. In a Hong Kong case (*Fung Sang Trading Ltd v Kai Sun* [1992] 1 HKLR 40) there was a contract for the sale of goods between two parties with their places of business in Hong Kong which provided for delivery of the goods in China. The delivery in China was found by the Hong Kong court to be a substantial part of the parties’ obligations and so the arbitration was “international”.

As well as being “international”, for an arbitration to come within the scope of Article 1, it must also be “commercial”. There is included in Article 1 a footnote that provides a large list of relationships considered commercial. The list includes supply contracts for goods and services, agreements for distribution, agency, leasing, construction, financial services, joint ventures, mineral concessions and transport contracts. The use of the word “commercial” was therefore intended to be a broad concept, covering almost all situations in international trade.

The Working Group engaged in drafting the Model Law did suggest that employment and consumer claims be excluded from the scope of the term. The use of the word “commercial” was also not intended to exclude state parties from the coverage of the Law and allow them to plead sovereign immunity.

In a recent Canadian case involving an arbitration under Chapter XI of the NAFTA treaty (*Mexico v Metalclad* [2001] BCTC 664) the court found a dispute between the Mexican Government and a US company over a permit to operate a waste dump to be “commercial”. While the matter did involve issues of government regulation and policy, the essence of the dispute was an investment and the treatment of investors under the NAFTA treaty.

In practice, therefore, given the wide breadth of the terms “international” and “commercial” in Article 1 there will be few arbitration agreements with a foreign element that will not fall within the terms of the Model Law. However, where an agreement to arbitrate in Australia does not satisfy Article 1, then the provisions of the *Commercial Arbitration Act* will govern the arbitration.

It is important to note that this outcome may have significant consequences for the parties because there are provisions in the commercial arbitration acts that provide for significantly greater judicial intervention in the arbitral process than the Model Law. For example, there is a right to appeal to a court on an error of law in the award unless the parties have entered an exclusion agreement, there are wider powers for courts to award interlocutory measures in the arbitration and greater scope for removal of arbitrators and setting aside of awards.

Excluding the Model Law

Once the parties' agreement is found to fall within Article 1, the Model Law will apply to govern the procedure of the arbitration. However, the Australian legislation then proceeds to give the parties a choice as to whether they wish to have the Model Law apply.

Under section 21 of the IAA, the parties may agree that "any dispute that has arisen between them is to be settled otherwise than in accordance with the Model Law". The intention of the drafters in enacting section 21 appears to have been to grant further flexibility to the parties by allowing them to choose a procedural law other than the Model Law to govern their arbitration.

For example, the parties may choose the uniform State arbitration legislation or the curial law of another country, such as the English *Arbitration Act* 1996. However choice of a foreign procedural law while theoretically possible would be practically unwise and complicate the process enormously.

An example of an agreement where parties were found to have excluded the Model Law in favour of the uniform legislation arose in the NSW case of *Aerospatiale Holdings Australia Ltd v Elspan International Ltd* (1992) 28 NSWLR 321. In that case, the Court had to construe the following clause:

"Any dispute . . . shall be referred to arbitration for determination by a single arbitrator to be agreed between the parties or failing such agreement by a single arbitrator appointed by the President of the Institution of Engineers in accordance with the Commercial Arbitration Act NSW . . ."

After first finding that the parties' agreement fell within the definition of "international commercial arbitration" in Article 1 of the Model Law, the court then determined that the parties, by their reference to the NSW commercial arbitration legislation, had excluded the Model Law under section 21 of the IAA.

Therefore, after this case, it would seem that courts are likely to construe any reference to the *Commercial Arbitration Act* in the parties' agreement as an exclusion of the Model Law. However mere silence as to the procedural law would not likely amount to an exclusion. A clause, for example, which provides for "arbitration in Melbourne" would mean that the Model Law would apply.

However, would an arbitration agreement that incorporates the rules of an arbitral institution, such as the ICC, or *ad hoc* rules such as the 1976 UNCITRAL Rules, amount to an exclusion of the Model Law under section 21? Recent authority and commentary has concluded that such an arbitration agreement would constitute an opt out of the Model Law; see the Queensland Court of Appeal decision in *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461.

However, the conclusion that a choice of arbitral rules amounts to an exclusion of the Model Law raises another problem. If the Model Law is not applicable as the procedural law of the arbitration, what is the procedural law? In a number of cases such as *Eisenwerk* and the NSW decision *American Diagnostica v Gradipore* (1998) 44 NSWLR 312 the view has been expressed that every arbitration taking place in Australia must have a procedural law. (This is in contrast to the position to European countries such as France which recognise the concept of "delocalised" arbitration—that is an arbitration conducted entirely according to the terms of the parties' agreement).

Consequently where the parties have made a choice of institutional or *ad hoc* rules in their arbitration agreement, the Model Law will be excluded, but the provisions of the *Commercial Arbitration Act* will not. Hence, the mandatory provisions of this legislation (eg those allowing access to the court to challenge an arbitrator's jurisdiction or to remove him or her for bias) will apply to the arbitration.

The issue is significant because of the important differences that exist between the Model Law and the institutional rules, on the one hand and the provisions of the *Commercial Arbitration Act* which allow for wider judicial intervention in the arbitral process. Parties are therefore likely to receive a very different arbitration than they originally envisaged.

4. Other Provisions in the IAA

Apart from the New York Convention and the Model Law, the IAA also contains other important provisions. First, there are the “opt-in” provisions contained in sections 23 to 27 of the Act which govern matters such as court enforcement of tribunal-ordered interim measures, the power of a tribunal to consolidate two or more arbitration proceedings and the power to award costs and interest.

These provisions are optional and can be made part of the procedural law of the arbitration where parties agree to do so in writing, but only where the procedural law of the arbitration is the Model Law (see s 22 IAA). Again, the purpose here is to encourage flexibility and to give the parties maximal control over their arbitration.

The IAA also contains provisions governing the liability of arbitrators (only for fraud not negligence) (s 28) and rights of representation in arbitrations (not limited to lawyers) (s 29).

5. ICSID Arbitrations

A final point to note about the Australian legal regime for international arbitration is the ICSID Convention (International Convention on the Settlement of Investment Disputes) which has been enacted in Schedule 3 of the IAA with the rules of the Convention to have the force of law in Australia; see section 32 IAA.

The objective of the ICSID Convention is to encourage private investment and promote confidence between states and private investors. The ICSID Convention was concluded in 1965 and has over 130 state parties. The Convention has its own centre in Washington where administrative support is provided for arbitrations conducted under its auspices.

To arbitrate under the ICSID Convention there must be an investment dispute between a contracting country and a national of *another* contracting country. The term “investment” is not defined. Recourse to arbitration is voluntary; neither the country nor the national is obliged to arbitrate without its consent in writing; see Art 25.

Another important provision in the Convention is that all contracting countries, whether or not parties to the dispute in question are bound to recognise and enforce awards given under the Convention. There are only limited grounds available to resist enforcement or to apply for annulment of the award under Art 52, which loosely correspond to those under the New York Convention, for example, corruption, excess of jurisdiction, denial of natural justice. An award will not be annulled simply because the tribunal erred on the merits; see *Kloeckner v Cameroon* (1986) 11 *Ybk Com Arb* 161.

In Australia, the mechanism for enforcement of an ICSID award is that provided by section 33 of the *Commercial Arbitration Act*.