Review of the
International Arbitration Act 1974

Discussion Paper

November 2008

Comments / submissions

Comments/submissions on this paper are sought by **16 January 2009**.

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INTRODUCTION

Review of the International Arbitration Act 1974

1. On 21 November 2008, the Attorney-General, the Hon Robert McClelland MP, announced the Government's intention to review the *International Arbitration Act 1974*. The Act:

   a) provides for the recognition and enforcement of international arbitration agreements and foreign arbitral awards, consistently with the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958[1] (the New York Convention)

   b) regulates international commercial arbitration in Australia, including by implementing the UNCITRAL[2] Model Law on International Commercial Arbitration (the UNCITRAL Model Law), and

   c) implements for Australia the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*[3] (the ICSID Convention).

2. The objects of the review are to consider whether the Act should be amended to:

   a) ensure it provides a comprehensive and clear framework governing international arbitration in Australia

   b) improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration, and

   c) consider whether to adopt 'best-practice' developments in national arbitral law from overseas.

3. We outline areas of review in this discussion paper. Comments are sought on these areas of review and any related matters.

Promoting Australia as a place for international arbitration

4. Australia is an attractive venue for international arbitration. Australian arbitrators and arbitration practitioners are internationally renowned. Australia has adopted the UNCITRAL Model Law and Australian courts are both efficient and of the highest integrity and quality. This review will ensure that the International Arbitration Act best supports international arbitration in Australia.

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[1] Australian Treaty Series 1975 No 25, entry into force for Australia on 24 June 1975. Available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1975/25.html?query="foreign%20arbitral%20awards".

[2] United Nations Commission on International Trade Law.

[3] Australian Treaty Series 1991 No 23, entry into force for Australia on 1 June 1991. Available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1991/23.html?query="Settlement%20of%20Investment%20Disputes%20between%20States%20and%20Nationals".

QUESTIONS

A. Meaning of the 'writing' requirement in Part II of the Act

Part II of the International Arbitration Act provides for the enforcement of foreign arbitration agreements consistently with the New York Convention. Relevantly:

- the Act provides that an '… "arbitration agreement" means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention' and that the term '… "agreement in writing" has the same meaning as in the Convention' (subsection 3(1)), and
- the Convention provides that '…[t]he term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters' (sub-article 2 of Article II).

The New York Convention writing requirement has been subject to different interpretations in foreign jurisdictions. This led UNCITRAL, in 2006, to recommend that the requirement should be interpreted broadly by recognising that sub-article 2 of Article II of the Convention provides a non-exhaustive list of ways in which an arbitration agreement may be made 'in writing'.[4]

In Australia, the New York Convention writing requirement, as contained in Part II of the Act, has been interpreted broadly. For example, in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, the Full Federal Court held that the writing requirement in Part II of Act may be satisfied by clear, mutual documentary exchange showing the terms of, and the parties' assent to, the arbitration agreement.

This broad interpretation of the New York Convention is consistent with international best-practice as reflected in the 2006 UNCITRAL Recommendation on interpreting the writing requirement. However, it would be possible to amend the definition of the writing requirement in Part II of the Act to make the common law position clearer on the face of the legislation. One option for amendment would be to use elements of the definition of an 'agreement in writing' adopted in the 2006 amendments to article 7 of the UNCITRAL Model Law (option I, extracted in the **Annex**).

Question A

(i) Should the meaning of the writing requirement for an arbitration agreement, in Part II of the International Arbitration Act (subsection 3(1)), be amended?

(ii) If so, should elements of the amended writing requirement in article 7 (option 1) of the UNCITRAL Model Law, as revised in 2006, be used in the amended definition?

[4] *Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session* (the 2006 UNCITRAL Recommendation), available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html.

B. Grounds on which a court may refuse to enforce a foreign arbitral award

Section 8 of the International Arbitration Act provides that a court may refuse to recognise and enforce a foreign arbitral award if one or more specific grounds (listed in subsections 8(5), (7) and (8)) is satisfied. These provisions reflect Articles V and VI of the New York Convention.

In *Resort Condominiums International Inc v Bolwell and Another* [1995] 1 Qd R 406, the Queensland Supreme Court found that the general rule is that valid foreign awards will usually be enforced if all the grounds listed in section 8 are satisfied. However, the Court decided that it retains a general discretion whether to enforce a foreign arbitral award even if none of the grounds for refusing to recognise a foreign award in section 8 is made out.

This decision has been considered controversial because it could be seen to allow a broader discretion for Courts to refuse to enforce foreign arbitral awards than is provided for in the Convention.

> ***Question B***
>
> *Should the International Arbitration Act be amended to provide expressly that a court may refuse to recognise and enforce an arbitral award only if one of the grounds listed in subsections 8(5), 8(7) or 8(8) is made out?*

C. Application of the UNCITRAL Model Law to international commercial arbitrations taking place in Australia

The International Arbitration Act gives the UNCITRAL Model Law the force of law in Australia (section 16). The Model Law therefore applies to international commercial arbitrations where the place of arbitration is Australia (subject to section 21).

The Act could be clarified to provide expressly that it governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies. This would exclude any potential application of the State and Territory Commercial Arbitration Acts to international commercial arbitrations subject to the Model Law. Such an amendment would not affect the laws applying to arbitrations not subject to the Model Law.

> **Question C**
>
> *Should the International Arbitration Act be amended to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies?*

D. Clarify that adoption of arbitral rules by the parties does not constitute 'opting out' of the UNCITRAL Model Law

Section 16 of the International Arbitration Act applies the UNCITRAL Model Law in Australia. Section 21 allows the parties to agree that a dispute between them is to be settled otherwise than in accordance with the UNCITRAL Model Law.

The application of this provision was considered in *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461. In this case, the parties had agreed to settle their dispute in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC). The Court found that, by adopting the ICC Rules, the parties had opted out of the UNCITRAL Model Law.

This decision has been criticised on the grounds that the parties' choice to adopt *procedural rules* of arbitration (eg the ICC Rules) in an arbitration agreement, is different from, and should have no direct bearing on, the *arbitral law* (eg the UNCITRAL Model Law as implemented by the International Arbitration Act). This is because procedural rules of arbitration and the arbitral law can both apply to and govern an arbitration.

The Eisenwerk decision was followed in a Singaporean decision concerning a provision in the Singaporean *International Arbitration Act* (Chapter 143A) similar to section 21 of the Commonwealth Act (*John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262). However, the effect of this decision was subsequently reversed by an amendment to the Singapore Act to provide in subsection 15(2) that:

> For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned.

Question D

Should the International Arbitration Act be amended to reverse the Eisenwerk decision, by adopting a provision similar to subsection 15(2) of the Singaporean International Arbitration Act?

E. Drafting inconsistencies in Part III, Division 3 (sections 22 – 27)

Division 3 of Part III of the Act contains provisions dealing with the enforcement of interim measures made by an arbitral tribunal, consolidation of related arbitral proceedings, interest up to making of the award and on the debt under the award, and costs.

Section 22 provides that these provisions (sections 23 – 27) apply only if the parties themselves have agreed to this. However, sections 25 – 27 (relating to interest up to the making of the award, interest on the debt under award, and costs) are stated to apply unless the parties agree otherwise. This implies that the provisions apply on an 'opt-out' basis, whereas section 22 states that they apply on an 'opt-in' basis.

Question E

(i) Should these drafting inconsistencies in Part III, Division 3 of the International Arbitration Act be remedied?

(ii) If so, should it be clarified that sections 25 – 27 (relating to interest up to the making of the award, interest on the debt under the award, and costs) apply on an 'opt-out' basis (that is, applying unless the parties agree otherwise)?

F. 2006 amendments to the UNCITRAL Model Law

The International Arbitration Act applies the UNCITRAL Model Law in Australia, unless the parties agree otherwise. The Model Law was amended in 2006. The amendments were:

- adoption of a new Article 2A, designed to promote a uniform interpretation of the UNCITRAL Model Law:

  (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

  (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

- amendment of the definition of an 'arbitration agreement' in article 7 (as per the **Annex**), including two alternative definitions that States implementing the UNCITRAL Model Law must choose between when adopting the revised article:

  - option I provides that an 'arbitration agreement' must be in writing, and specifies that an arbitration agreement is in writing 'if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means', and

  - option II removes the writing requirement such that an 'arbitration agreement' does not need to be made or recorded in any written form.

- Adoption of more extensive provisions on 'interim measures and preliminary orders' in a new chapter IVA. The new chapter, among other matters:

  - provides for the recognition and enforcement by courts of interim measures made by an arbitral tribunal (section 4), and

  - allows arbitral tribunals to make preliminary orders on the application of one party, without the other party being notified (section 2), although such *ex parte* orders are not enforceable by a court.

- amendment of article 35(2) to remove the requirement that the person relying on an award must supply a 'duly authenticated' original award and, if required, a 'duly certified' translation'. New article 35(2) provides:

  > The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

Further details of the amended UNCITRAL Model Law are contained at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

The provisions allowing preliminary orders to be made without the other party being notified were particularly controversial as, in some quarters, this is seen to conflict with the consensual basis of arbitration. The UNCITRAL Model Law could be implemented without including the provisions on ex parte preliminary orders. At this stage, the Government does not intend to implement the provisions allowing for ex parte preliminary orders.

Implementation of the provisions for recognition and enforcement of interim measures may render section 23 of the Act redundant by making such recognition and enforcement automatic. Section 23 has the effect that, if the parties so choose, Chapter VIII of the Model Law (dealing with recognition and enforcement of arbitral awards) applies to interim measures made by an arbitral tribunal as if the interim measure was an arbitral award.

Question F

(i) Should the International Arbitration Act be amended to adopt recent amendments to the UNCITRAL Model Law?

(ii) If article 7 of the revised Model Law (amending the definition of an 'arbitration agreement') is adopted, should option I (providing a broad interpretation of the writing requirement) or option II (removing the writing requirement) be adopted?

G. Court or other authority to perform functions under the UNCITRAL Model Law

Article 6 of the UNCITRAL Model Law provides that certain functions may be performed by a court or other authority designated for that purpose. These functions include, among others, appointing arbitrators (articles 11(3) and 11(4)) and hearing challenges to arbitrators (articles 13(3) and 14).

Currently, in Australia, all the functions referred to in article 6 of the UNCITRAL Model Law are to be performed by designated courts. This is also the case in some other Model Law jurisdictions such as Canada. In other jurisdictions, including Singapore and Hong Kong, the function of appointing arbitrators in articles 11(3) and (4) has been conferred instead on a national arbitration centre (in Singapore, the Singapore International Arbitration Centre, and in Hong Kong, the Hong Kong International Arbitration Centre).

In Australia, an institution (in particular, the Australian Centre for International Commercial Arbitration) could be designated to perform these functions in regulations made under the International Arbitration Act.

> ***Question G***
>
> *(i) Should the International Arbitration Act be amended to allow regulations to be made designating an arbitral institution to perform the functions set out in articles 11(3) and 11(4) of the UNCITRAL Model Law?*
>
> *(ii) Would it be appropriate for other functions referred to in article 6 of the UNCITRAL Model Law, such as hearing challenges to arbitrators under articles 13(3) and 14, to be performed by an arbitral institution similarly designated under the International Arbitration Act?*

H. Jurisdiction for matters arising under the Act

Currently, the following courts have jurisdiction under the International Arbitration Act:

- the Federal Court of Australia and the State / Territory Supreme Courts have jurisdiction under Part II, which implements the New York Convention, and
- the State / Territory Supreme Courts have jurisdiction under Parts III and IV, which implement the UNICTRAL Model Law and the ICSID Convention respectively.

The Government is presently proposing to amend the Act to give the Federal Court concurrent jurisdiction with the State and Territory Supreme Courts under Parts III and IV, and to clarify the Federal Court's jurisdiction under Part II (these amendments are expected to be contained in the Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008). It would also be possible to give the Federal Court exclusive jurisdiction under the Act, while removing jurisdiction from the State and Territory Supreme Courts. One advantage is that this may lead to more consistent jurisprudence in applying the Act.

> **Question H**
>
> *Should the Federal Court of Australia be given exclusive jurisdiction for all matters arising under the International Arbitration Act?*

I. Other matters

> **Question I**
>
> *Do you have any other comments or recommendations for improving the International Arbitration Act?*

Annex
Article 7 of the revised UNCITRAL Model Law
as adopted by UNCITRAL in 2006

Option I
Article 7. Definition and form of arbitration agreement
(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II
Article 7. Definition of arbitration agreement
(As adopted by the Commission at its thirty-ninth session, in 2006)

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.