

## **Review of the International Arbitration Act 1974**

**To:** Attorney General's Department

**From:** International Chamber of Commerce Australia  
Level 3, 486 Albert Street, East Melbourne, Vic 3002  
03 9668 9950 / [www.iccaustralia.com.au](http://www.iccaustralia.com.au)

**Date:** 13 January 2009

### **Introduction**

*ICC Australia is the Australian National Committee of the International Chamber of Commerce which is headquartered in Paris. ICC Australia was founded in 1927 and is active in international arbitration through its Arbitration Committee.*

*ICC Australia is pleased to provide the following comments on the Discussion Paper "Review of the International Arbitration Act 1974" provided by the Attorney-General's Department.*

*ICC arbitration administered by the ICC International Court of Arbitration and its Secretariat is generally acknowledged as the premier system of international commercial arbitration and is certainly one of the most widely used.*

### **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?*

ICC Australia supports the expansion of the meaning of the writing requirement for an arbitration agreement. ICC Australia supports the writing requirement as contained in article 7 of the UNCITRAL Model Law, as revised in 2006 (option 1). This is in line with current developments and international practices which give a broad and expansive definition of the requirement of an agreement in writing.

## **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?*

ICC Australia believes that the grounds for refusing recognition and enforcement of a foreign arbitral award as set out in articles V and VI of the New York Convention should be exclusive and that courts should not retain a residual discretion to deny recognition and enforcement.

It would be a repudiation of the accepted obligations of comity for Australia, as a party to the New York Convention, to add a discretionary power in a Court to decline to enforce an award other than upon the Convention's ground for refusal. International commerce mandates that Australia faithfully confine the grounds for non-enforcement to those of the Convention.

Further, it is suggested that there is scope for narrowing and clarifying the definition of public policy in section 19 of the Act along the lines of the 2002 ILA Report to provide that an award is in conflict with the public policy of Australia only if "it is manifestly contrary to widely accepted principles of public policy." International public policy in this regard is not to be confused with "transnational public policy": see Pryles, *Reflections on Transnational Public Policy* (2007) 24 *Journal of International Arbitration*, 1.

## **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?*

ICC Australia believes that the International Arbitration Act should exclusively govern international commercial arbitration in Australia and that it is inappropriate for the State legislation, which was primarily drafted having regard to domestic arbitrations, to apply to international arbitrations.

## **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?*

ICC Australia believes that there is a fundamental distinction between the law governing an arbitration and the rules applicable to an arbitration. The former is a legislative provision while the latter is in the nature of a contractual agreement. It is a mistake, therefore, to assume that the adoption of a particular set of rules constitutes an exclusion of the UNCITRAL Model Law.

## **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)?*

In the opinion of ICC Australia, it would be desirable to clarify that sections 25 to 27 of the International Arbitration Act apply on an opt-out basis.

## 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?*

ICC Australia supports the adoption of the recent amendments to the UNCITRAL Model Law. As regards article 7, concerning an arbitration agreement, we prefer Option I providing a broad interpretation of the writing requirement to Option II removing the writing requirement. If there is no written evidence of an arbitration agreement it may be difficult to prove. Hence a requirement of some evidence in writing is desirable.

We support for the time being excision of the proposal to enable ex parte interim measures.

## 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?*

- (i) ICC Australia believes that it would be desirable for an arbitral institution, with expertise, to perform the functions set out in articles 11(3) and 11(4) of the UNCITRAL Model Law. This practice has been adopted in Singapore and works well. It has the obvious advantage of ensuring that a body with a requisite knowledge and experience performs these functions.
- (ii) ICC Australia also believes that the functions referred to in article VI of the UNCITRAL Model Law, such as hearing challenges to arbitrators, should be performed by an arbitral institution with the necessary skills and experience. This would promote uniformity in approach and would ensure that decisions are taken by a body which has the necessary skills and experience.
- (iii) We support the designation of the Australian Centre for International Commercial Arbitration (ACICA) to perform these functions.

## **Question H**

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

ICC Australia is aware of the fact that there is an uneven record amongst the Australian state courts in relation to arbitration in general and the enforcement of arbitration agreements and arbitral awards under the International Arbitration Act. For this reason it would be highly desirable to ensure that these responsibilities are performed by only one court which has the necessary expertise and understanding of international arbitration. Not only will this lead to uniformity, but it should also enhance the status of Australia as a jurisdiction hospitable to international arbitrations.

Further, it is suggested that opportunity be taken to reverse the Oil Basins at BHP decision of the Court of Appeal of the Supreme Court of Victoria to the effect that failure to express reasons to a judicial standard may constitute misconduct justifying removal. This decision is controversial to the extent that it is perceived as a negative factor for parties contemplating an Australian jurisdiction for their disputes.

### **Other Proposals**

ICC Australia suggests that section 25 of the International Arbitration Act be amended to make it clear that an arbitral tribunal can award compound interest. This is necessary because the section is not clear and there is an increasing tendency, on the part of arbitral tribunals to award compound interest.

\* \* \*