

## **IAA REVIEW – COMMENTS**

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

### **Answer A**

- (i) **The current form is broad enough to cover what's construed as 'an arbitration agreement'. So I see no reason to fix it. However, if the consensus is for an amendment in line with the UNCITRAL Model Law, as revised in 2006, then Option I should be adopted as it's the better option covering précised interpretation of 'an arbitration agreement' in line with the hallmark of common law – precision.**

### **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 subsection 8(5), 8(7) or 8(8) is made out?*

### **Answer B**

**The ideology of 'thinking outside the square' should not be applied under Section 8. Court should interpret the Act accordingly to reflect its intention. Nevertheless, the Act could be further enhanced by amending Section 8 to expressly state that **only and if one of the grounds listed in subsections 8(5), 8(7) or 8(8) is made out then a court may refuse to recognise and enforce an arbitral award. Constancy and uniformity in interpretation enhances the stature of our court as a true beacon of light for justice.****

### **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?*

### **Answer C**

**Yes. With certainty, it's going to attract more offshore commercial disputants to our shore and choose Australia as their preferred arbitration seat.**

### **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?*

### **Answer D**

**Yes and by introduction of a new subsection 21(1) makes the Act more in line with what other major arbitration States are doing, providing greater certainty for arbitration users.**

**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 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)?*

**Answer E**

- (i) **Yes, this part should be amended for better clarity.**
- (ii) **It should be clarified as an 'opt-out' basis unless the parties agree otherwise. This will do away with those unnecessary arbitral award challenges.**

**Question F**

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

**Answer F**

- (i) and (ii) **Please refer to Answer A above.**

**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?*

**Answer G**

- (i) **No, articles 11(3) and 11(4) of the UNCITRAL Model Law should remain 'status quo'. Challenges of arbitrators should be referred to the Court (Federal Court).  
My opinion is that, it's not appropriate to have the challenges of arbitrators referred to a particular arbitral institution in Australia. For example, an offshore disputant may not like his appointment of an arbitrator from say the MLAANZ Panel of Arbitrators be challenged in a different arbitral aegis such as ACICA (no offence intended). Court will always be regarded as the true fountain of justice.**

**Question H**

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

**Answer H**

**Yes, it's about time that this be corrected. It's not a controversial move but rather a logical one, the Federal Court of Australia should be bestowed with the exclusive jurisdiction for all the matters arising under the Act. This move is in line with what other major arbitration States are providing. With the amendment, it will provide not only greater certainty but also clearer direction to international arbitration users.**

**Question I**

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

**Answer I**

The current arrangement of the parts of the Act seems to be rather messy, not easy to refer to or cross reference with. I would like to recommend that the International Arbitration Act be further simplified making it more user-friendly, such as in the case of the Singaporean International Arbitration Act (Chapter 143A) for example.

**My recommendation is that, Part IV – Application of the Convention on the Settlement of Investment Disputes between States and Nationals of other States and Schedule 3 – Convention on the Settlement of Investment Disputes Between States and Nationals of Other States be taken out of the Act and a new separate Act could be enacted to deal with the investment disputes, such as in the case in UK under the ‘Arbitration (International Investment Disputes) Act 1966’ . That way, all the investment disputes could be better dealt with under the principles of ICSID.**

This is because though IAA and ICSID arbitrations under UNCITRAL are basically the same yet they are two separate governing entities, one on trade and the other on investment. No wonder some States (such as Canada and Mexico) are already voicing their support for ICSID Investor-State arbitration to move away from one of the traditional pillars of arbitration – privacy/confidentiality. Canada has recommended to the UNCITRAL Working Group II (Arbitration and Conciliation) that UNCITRAL Arbitration be amended for greater ‘transparency’ [1] and Mexico has voiced its support for ‘open hearings’ [2] on ICSID arbitrations under the NAFTA FTC. The rationale behind this move for arbitrations under ICSID to be more open is that, the outcome of an ICSID arbitration will impact greatly on regulations and public policy implications, such as tax laws, environmental laws, health regulations and natural resources laws etc not salient in commercial arbitration [3].

So ideally, the International Arbitration Act 1974 (Cth) should consist of just 3 essential parts and in the following order:

- 1). International Commercial Arbitration;
- 2). First Schedule – UNCITRAL Model Law on International Commercial Arbitration;
- 3). Second Schedule – Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded at New York on 10<sup>th</sup> June 1958.

This new arrangement in my opinion will make the Act more comparable, compatible and defined in line with what International Arbitration Laws of other major States are offering. Thus producing a more conducive and attractive environment for international commercial arbitration in Australia.

Final comment – ‘The Act is a tool; it is up to the users to make it work’ [4] is indeed well said. However, tool needs regular fine-tuning and sharpening to make it easier and better to work with. And as such, I would like to congratulate the Attorney-General and the team for initiating this important review on the Act. Well done, guys!

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[1] & [3] UNCITRAL – 41<sup>st</sup> Sessions, NY 16 June - 03 July 2008 on Settlement of Commercial Disputes, Revision of the UNCITRAL Arbitration Rules A/CN.9/662 – Observations by the Government of Canada, pages 2-3.

[2] UNCITRAL – 41<sup>st</sup> Sessions, NY 16 June – 03 July 2008 on Settlement of Commercial Disputes, Revision of UNCITRAL Arbitration Rules A/CN.9/662 – Observations by the Government of Canada, page 5.

[4] Survey Report on the UK Arbitration Act 1996 in Nov 2006 by Bruce Harris and his team – Para. 92.