



J O H N R U N D E L L

CHARTERED ACCOUNTANT - ARBITRATOR - MEDIATOR

16 January 2009

Mr Steven Bouwhuis
Assistant Secretary
Office of International Law
Attorney-General's Department
Barton ACT 2600

Dear Sir,

Re: Review of the *International Arbitration Act 1974* (C'th)

I acknowledge receipt of the Department's Discussion Paper of November 2008 and hereby provide a comment and submission in relation to that paper with the aim of assisting the Attorney-General's Department Office of International Law in a review of the *International Arbitration Act 1974*.

It is noted that the objects of the Review are to consider whether the Act should be amended to -

- (1) Ensure it provides a comprehensive and clear framework covering international arbitration in Australia.
- (2) Improve the effectiveness and efficiency of the arbitral process while respecting the fundamental consensual basis of arbitration and consider whether to adopt "best practice" developments in international arbitration law.

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Promoting Australia as a place for international arbitration

Reference should be made to my professional background and qualifications and experience. I have attached as an appendix to this submission my professional profile as appears on the Hong Kong International Arbitration Centre website.

Australian arbitrators practice internationally but within Australia the amount of international arbitrations are particularly limited. Unfortunately, there is a perception internationally, whether true or not, that if parties to an arbitration being conducted in Australia seek to refer matters to the Courts, the Courts are perceived to be more “interfering” than in other jurisdictions such as Singapore, Hong Kong, France and Switzerland which support and respect the sanctity of the Arbitral process.

The case of *Esso v. Ploughman* (1995) 183 CLR 10 is perceived as a case in which the High Court of Australia intervened and the confidentiality of the parties was not preserved by the Courts. This particular case was perhaps more related to public policy issues but that is not the perception internationally. Unfortunately, perceptions are reality when it comes to views on Australia as an appropriate seat for the conduct of international arbitration.

An important step improve the perception of Australia as a venue for the conduct of International Arbitration is to amend its *International Arbitration Act* to ensure alignment 2006 UNCITRAL Recommendations and adoption of the UNCITRAL Model Law as amended in 2006. If the Review achieves this alone it will assist and support international arbitration in Australia.

However, the role of the Courts which should be minimal and supportive of the arbitral process is a matter beyond the ability of an amendment and updating and modernisation of the Act.

QUESTIONS

A. *Meaning of the 'writing' requirement in Part 2 of the Act.*

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?*

Response

- (i) The meaning of the writing requirement for an arbitration agreement should be amended to have the broadest possible interpretation. However any amendment made should align with the UNCITRAL Model Law as revised in 2006. This infers a positive response to (ii).
- (ii) Yes.

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

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 sub-sections 8(5), 8(7) and 8(8) which aligns with Articles 5 and 6 of the New York Convention?*

Response

Yes. The particular case referred to in the discussion paper *Resort Condominiums International Inc. v. Bolwell & Anor.* [1995] 1 QDR 406 in the Supreme Court of Queensland sought to broaden the public policy grounds. Such interference by Courts seeking to override foreign awards should be limited and the basis should be interpreted as narrowly as possible with respect to public policy. Confidence in the enforceability of international commercial arbitration awards in Australia should be seen as of significant commercial value to Australia beyond this particular Review, particularly as Australia is a significant international trading nation. To continue to have the perception that our Courts interfere excessively in blocking the enforcement of international

commercial arbitration awards is harmful to the economic trading position of Australia internationally.

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

Question C:

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

Response

Yes.

There is currently some confusion as to whether the uniform Commercial Arbitration Act (e.g. Commercial Arbitration Act 1984 Vic) which is meant to apply only to domestic arbitrations may also apply to an arbitration conducted say in Victoria or whichever state is the seat of the arbitration then the state act would apply.

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

Question D

*Should the **International Arbitration Act** be amended to reverse the *Eisenwerk* decision, by adopting provisions similar to sub-section (15)(2) of the Singaporean International Arbitration Act?*

Response

The preferred judicial decision in *Eisenwerk* appears to have been caused by a failure of the Judge to understand the difference between the adoption of rules to be followed during an arbitral procedure as opposed to the applicability of UNCITRAL Model Law which includes the UNCITRAL Rules. The law provides the guidance for the arbitral process in the seat of arbitration within Australia. In my view in preparing this submission,, the adoption of rules such as the ICC Rules of itself does not constitute opting out of the UNCITRAL Model Law by the parties.

The *International Arbitration Act* should ensure greater clarity and allow the parties to select their own rules to be adopted or rules to be adopted by the arbitrator and agreed by the parties. I would recommend caution in adopting a specific provision such as that in sub-section (15)(2) of *SIAC* which seeks to vary the Model Law however the situation with *Eisenwerk* and Australian Granites Limited is a further example of judicial “interference” by seeking to vary the arbitral procedures to which the parties have already agreed. At the end of the day an arbitration is a process that belongs to the parties and the Courts should seek to support the arbitral process rather than be seen to interfere and obstruct the operation of the arbitration and the Arbitrator in performance of his/her role. Any Court decisions should be primarily aimed at supporting the arbitral process and the UNCITRAL Model Law as amended in 2006 should be consistently applied in amending the *International Commercial Arbitration Act*.

E. *Drafting inconsistencies in Part 3, Division 3 (ss. 22-27).*

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)?*

Response

- (i) Yes. The drafting inconsistencies should be removed and clarified and made consistent.
- (ii) Interest on the debt under the Award and costs (if awarded noting that the practice in most International arbitrations is for the parties to each meet their own costs) should apply unless all parties agree to “opt out”.

F. *The 2006 amendments to the UNCITRAL Model Law*

Question F:

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

Response

- (i) Yes, without any modifications.

- (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?*

Response

- (ii) Option I should be adopted providing a broad interpretation of the “writing requirement”. The enforceability of interim measures is a matter of some considerable controversy. For arbitrations to have greater relevance and to allow the parties to have recourse in a timely manner, the enforceability of interim measures and the timely support of the Courts is to be strongly encouraged. That such interim measures of themselves constitute an arbitral award is consistent with such a philosophy.

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

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 11.3 and 11.4 of the UNCITRAL Model Law?*

Response

The process that operates in Hong Kong and Singapore appears to work quite well in that both are well run independent arbitral institutions with an independent oversight committee. The current Australian proposed body ACICA is funded primarily by the major Australian law firms and its independence and process of selection of panel members for the ACICA Panel would need to be improved to meet the high standards and clarity in processes as has been demonstrated internationally by both Singapore and Hong Kong.

It should be noted that I am a member of the Panel of International Arbitrators in Hong Kong but not a member of the ACICA Panel in Australia. The process of being selected to the Panel in Hong Kong involved an independent review panel whereby a representative arbitral award was provided and reviewed by a High Court Judge familiar with International Arbitration. Further details on this point may be sought specifically at a later time, given that the only available arbitral body under consideration in this Review is currently ACICA. Further changes in this body should be required to achieve standards and operational practices currently met by both SIAC and HKIAC.

It is also understood that the Attorney-General's Department does in part fund ACICA rather than it being subject to separate funding from the Federal Government. By funding being channelled through the Attorney-General's Department this could be seen to perhaps limit the independence of ACICA.

(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 Article 13.3 and 14 be performed by an arbitral institution similarly designated under the International Arbitration Act?*

Response

Should bodies such as HKIAC be making an appointment of an arbitrator then any objections to the nominated or appointed arbitrator should initially be to the appointing/nominating arbitral institution. Should such challenges remain unresolved then perhaps ultimately this could be a matter for the Courts. However, if the nomination or appointment of Arbitrators by the arbitral institution is regularly being challenged in the Courts, then the operation of such appointing bodies (such as HKIAC or ACICA, in the case of Australia) could be seriously undermined by the ability of a party to easily frustrate the commencement of the arbitral process by initially seeking recourse in the Courts.

H. *Jurisdiction for matters arising under the Act*

Question H

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

Response

There are currently differences in approaches between various State Supreme Courts' jurisdictions in their approach to arbitral cases and matters. There is currently a difference in case law between the States. The suggestion that the Federal Court of Australia be given exclusive jurisdiction for matters under the *International Arbitration Act* has some merit. The perceived jurisdictional competition and variation in approach between the various State Supreme Courts is a matter of some concern internationally and further detracts from Australia being selected or viewed as a preferred seat for the conduct of international arbitrations particularly in Asia.

I. Other matters**Question 1**

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

Response

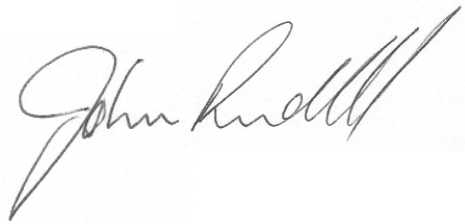
The *International Arbitration Act* should be amended and aligned completely with the 2006 UNCITRAL Model Law. If Australia does so in a timely manner, we will be seen to be demonstrating international best practice in arbitration law. To vary and modify the Model Law in a manner that diverges in any way from the 2006 UNCITRAL Model Law places Australia at risk of being seen as a place to be avoided as a seat for the conduct of international commercial arbitration.

As at the time of making this Submission Australia is not a seat of choice within Asia for the conduct of international arbitrations. Hong Kong and Singapore have a dominant position with respect to international arbitration within Asia. The Attorney-General's Department should look at the practices adopted by both Singapore and Hong Kong whereby there is minimal interference by the Courts and there is a clear pathway to the Courts for disputes and matters that arise during the conduct of an international arbitration. Both these jurisdictions are perceived to strongly support the arbitral process and also the enforcement of international commercial arbitrations. The poorer perception of Australia over other venues in Asia will be improved by adopting completely and without change the UNCITRAL Model Law and without further delays.

Concluding Comment

Should any further information be sought please do not hesitate to contact the writer directly on 03 9660 5701 or by email john@johnrundell.com.

Yours faithfully

A handwritten signature in black ink, appearing to read "John Rundell", written in a cursive style.

**John Warwick Rundell
Managing Principal**

Chartered Accountant + Arbitrator + Accredited Mediator

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- 1 A profile of the party making the submission is attached as Appendix 1 to this paper.