

15 January 2009

By Email: iaa.review@ag.gov.au

Mr Stephen Bouwhuis
Office of International Law
Attorney General's Department
BARTON ACT 2600

Dear Sir

The Attorney General's Review of the *International Arbitration Act 1974*

We refer to the discussion paper dated November 2008 released by the Attorney General dealing with the review of the *International Arbitration Act 1974*.

We support the Attorney General efforts in promoting Australia as a place for international arbitration.

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

Question A has asked whether the meaning of an "*agreement in writing*" in Part II of the *International Arbitration Act* (section 3 (1)) be amended.

Article II of the New York Convention defines¹ "*agreement in writing*" such that the requirement will be met if there is a document in existence or capable of being brought into existence (if it is electronically stored) that evidences the agreement. While in our view it is appropriate that the agreement in writing concept adopted by the *International Arbitration Act* reflects the meaning the concept has in the New York Convention², further guidance can be given.

We support the explanatory words in Article 7 (Option 1) of Chapter 2 of the UNCITRAL model law as revised in 2006, which we believe provide useful assistance to a Court having to consider the meaning of an agreement in writing.

In our view Questions A (i) and (ii) should be answered in the affirmative.

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

Question B raises whether the grounds upon which a Court may refuse to recognise a foreign arbitral award are limited to those found in sections 8 (5), 8 (7) or 8 (8) of the *International Arbitration Act*, reflecting articles V and VI of

¹ The definition itself is a inclusive definition, therefore capable of further clarification.

² Convention on the Recognition Enforcements of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration 1958

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the New York Convention, or whether there are additional grounds upon which an Australian court may refuse to enforce a foreign arbitral award.

Doubt as to the recognition and the enforcement of the final arbitral award leads to a diminishing in confidence in the suitability of the arbitral process. This was the original rationale for the New York Convention.

We believe the New York Convention by its terms properly balances the certainty and recognition/enforcement of the award with the need to ensure that the arbitral process is legal, consistent with the parties' agreement and fair. In our view there has not been clearly expressed an argument as to why those provisions are in themselves inadequate to create a need to have in the courts a residual discretion to refuse to recognise an arbitral award. The existence of an ephemeral discretion will potentially dissuade users from utilising the arbitral process with an Australia seat for the arbitration or Australia as the place of enforcement of the award.

In our view Question B should be answered in the affirmative.

C Exclusive application of the UNCITRAL model Law to international commercial arbitration taking place in Australia.

The *International Arbitration Act* as it presently stands does not cover the field as a source of law in Australia for intentional arbitrations such that the largely uniform *Commercial Arbitration Acts* of the States and Territories can apply to international arbitration conduct in the State or Territory³.

This multiple sources of law for international arbitration can be confusing to foreign practitioners and a disincentive to selecting an Australian seat for the arbitration.

However the provisions of the *Commercial Arbitration Acts* of the States and Territories can also include provisions such as section 17 of those Acts⁴ which may be brought to the assistance of international arbitration⁵.

As such provisions may be of assistance to the efficient conduct of arbitration we recommend consideration being given to inclusion of similar provisions in the *International Arbitration Act*. With that proviso our view is that Question C should be answered in the affirmative.

D. Reversal of the Eisenwerk decision.

We are of the view that the adoption of a set of rules for the conduct of an arbitration should not be seen in itself as sufficient to exclude the application of the Model Law. The adoption of arbitral rules is a not uncommon aspect of the conduct of an arbitration and we believe has little bearing as to whether the parties wish to exclude the Model Law which is a separate consideration.

³ Subject to the application of section 109 of the *Australian Constitution*

⁴ Something akin to section 18 is then also required to deal with default in compliance with section 17. However in section 18 (1) it may be more advantageous if the defaulting party were to attend before the tribunal rather than the Court, although the Court has the power of contempt and the tribunal does not.

⁵ *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC. 175 at paragraphs [114] – [115] provide such an example

The wording utilised in subsection 15 (2) of the Singapore Act appears to us to be appropriate.

In our view Question D should be answered in the affirmative.

E. Drafting inconsistencies in Part III, Division 3.

The drafting of Part III, Division 3 and in particular the tension between section 22 compared with sections 25 to 27 inclusive should be remedied. The arbitral tribunal's powers provided for in sections 25 to 27 inclusive are the type of powers that Australian parties would, in our view, expect to be available to the arbitral tribunal. Nevertheless permitting parties to "opt-out" of such powers would be consistent with the concept of party autonomy inherent in arbitration.

In our view Questions E (i) and (ii) should be answered in the affirmative.

F. 2006 amendments to the UNCITRAL Model Law.

This question covers a series of amendments made to the UNCITRAL Model Law in 2006 which are not reflected in the Model Law in Schedule 2 to the *International Arbitration Act*.

Dealing with the issues in turn as per the discussion paper:

- In our view Article 2A's policy of highlighting the international aspects and the desire for consistent jurisprudence should be supported as a further guide to an arbitral tribunal or Court considering the Model Law.
- In our view, as stated above, the approach of option I of Article 7 is appropriate and consistent with the policy and text of the New York Convention. Option II of Article 7 arguably reaches beyond Article II of the New York Convention and is not supported.
- We support the policy of Chapter IVA in permitting the arbitral tribunal to make orders to preserve or restore the status quo pending determination, or in other circumstances as set out in Article 17.

We note the controversy surrounding the provisions contained in the new chapter IVA on ex parte interim measures and the Government's position that it does not intend to implement the provisions. We would welcome the opportunity to address on this particular issue in more detail at a later time should the Government wish to consider the advantages and disadvantages of adopting such measures. The manner in which section 23 deals with Article 17 of the Model Law could be applied in a like manner to Chapter IVA, on an opt-in basis, empowering the parties to adopt ex parte provisions should they wish to do so.

- We support the new Article 35 (2) which permits and empowers the Court to request the party to supply a translation thereof into such a language reducing the technicality of requirements and placing the issue with the discretion of the Court.

In our view Question F (i) should be answered in the affirmative (noting that the ex parte preliminary orders provisions will not be implemented) and Question F (ii) should be answered by adopting option I.

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

The UNCITRAL Model Law in Article 6 permits certain functions to be performed either by a Court or other authority. The Articles referred to in Article 6 involve different considerations.

Articles 11 (3) and 11 (4) deal with the process of nomination and appointment of arbitrators. This is a function that can be conferred on an institution or institutions that assess and grade arbitrators. In Australia there are a number of arbitral bodies which would be capable of discharging this function each of which have unique benefits.

Article 13 (3) deals with challenges to arbitrators. Article 14 deals with the deciding whether an arbitrator's mandate should be terminated. Article 16 (3) deals with the jurisdiction of the arbitral tribunal. Article 34 deals with setting aside an arbitral award. In our submission these are all judicial functions and should be performed by the Courts.

In our view Question G (i) should be answered in the affirmative and Question G (ii) should be answered in the negative.

H. Jurisdiction for matters arising under the Act.

We do not support the approach mooted in the discussion paper of granting exclusive jurisdiction to the Federal Court to the exclusion of the State and Territory Supreme Courts. We are concerned in the complications this may create especially in applications under the Act. Is it envisaged that the Federal Court would have exclusive power to enforce arbitration agreements? If a State or Territory Court is seized of a matter in which an arbitration agreement is alleged would that mean a party seeking a stay would need to make that application in the Federal Court? If there was in issue whether the applicable legislation was the *International Arbitration Act* or the *Commercial Arbitration Act* the party may need to bring applications in both the State Court seized of the matter and the Federal Court. This potential tension will create difficulties which will not aid the promotion of international arbitration.

The issue of recognition of foreign awards is less likely to create such a difficulty⁶ – especially given the proposal in question B.

We support the provisions granting concurrent jurisdiction contained in *Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008*.

In our view Question H should be answered in the negative.

I. Other matters

The support of Australia as a venue for international arbitration can be lead by Australians but to be successful must ultimately be maintained by foreign arbitrators and counsel. We ask the Government to consider what steps can be taken to ensure that Australia can assist and support such foreign nationals in conducting arbitrations in Australia with the minimum necessary inconvenience.

⁶ It is possible a defendant in a State or Territory Court would plead an arbitral award as part of a defence of a claim, but in considering the question of recognition of an award it is far less likely a Court will already be seized of a dispute.

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Such issues for foreign nationals include visa entry requirements, the rights to practice and appear and taxation obligations, which while they must be dealt with them we suggest could be streamlined. A single portal could be established to enable foreign nationals to identify their obligations in coming to Australia and while in Australia as either arbitrator or counsel in an international arbitration. The relevant material directed to the foreign nationals' perspective could be collated and links provided to relevant sites at a central web site such as the International Commercial Dispute Resolution page (<http://www.icdr.gov.au/>).

It is in Australia's interests to be open and attractive to those persons as it those foreign nationals who will be dealing with the selection of the seat.

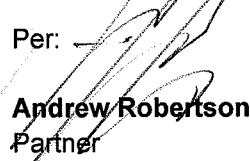
We thank the Attorney-General for the opportunity to make this submission.

Yours faithfully
Piper Alderman

Per: 

Gordon Grieve
Managing Partner

Yours faithfully
Piper Alderman

Per: 
Andrew Robertson
Partner