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International Arbitration Amendment Bill 2009

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Law and Bills Digest Section

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International Arbitration Amendment Bill 2009

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House: House of Representatives

Portfolio: Attorney-General

Commencement: Royal Assent, apart from items 6, 8, 13 and 25 in Schedule 1. Commencement of these items is tied to commencement of the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009*.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

To amend the *International Arbitration Act 1974* ('the IAA') so as to:

- clarify and update the application of the IAA by adding provisions from the 2006 revision of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (**Model Law**); and a set of non-Model Law (**Model Law Plus**)[1] provisions
- provide greater guidance to the courts in interpreting the IAA
- provide additional option provisions to assist the parties to a dispute, and
- improve the overall operation of the IAA

Background

By the 1960s, it had become apparent that the widespread increase in global trade would continue and remain a dominant feature of commercial life. In this context, the efficacy of ongoing reliance on inconsistent national and regional regulations to govern international trade demanded a re-think. A global set of standards and rules designed to harmonize the law of international trade was required.

1. These so-called Australian made Model Law Plus provisions have been developed from a careful assessment of international jurisprudence on international arbitration, and the Australian common law.

UNCITRAL was established by the United Nations General Assembly by its Resolution 2205 (XXI) of 17 December 1966. It is 'the core legal body of the United Nations system in the field of international trade law'.[2] The mandate of UNCITRAL is:

> to remove legal obstacles to international trade by progressively modernizing and harmonizing trade law. It prepares legal texts in a number of key areas such as international commercial dispute settlement, electronic commerce, insolvency, international payments, sale of goods, transport law, procurement and infrastructure development. UNCITRAL also provides technical assistance to law reform activities, including assisting Member States to review and assess their law reform needs and to draft the legislation required to implement UNCITRAL texts.[3]

A model law refers to a legislative draft that is recommended to States for enactment as part of their national law. The Model Law is intended to be used by commercial parties in negotiating international commercial transactions. Model laws are developed by UNCITRAL in consultation with member states, and are generally finalised and adapted by UNCITRAL, at its annual session.

The Model Law was prepared by UNCITRAL, and adopted by the United Nations Commission on International Trade Law on 21 June 1985. Its aim is to provide parties in a commercial dispute with the maximum amount of freedom to expeditiously and with finality settle their disputes, while limiting the circumstances in which courts may intervene in and draw out such arbitral proceedings.[4] In 2006 the Model Law was amended – see below.

The IAA incorporates the Model Law. It also implements the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[5] which provides for the international enforcement of arbitration agreements and awards made in other states; and the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington

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2. United Nations Information Service (UNIS), *UN Commission on International Trade Law to Hold 42nd Session in Vienna, 29 June-17 July 2009*, media release, 26 June 2009, viewed 1 December 2009, http://www.unis.unvienna.org/unis/pressrels/2009/unisl129.html.
3. Ibid.
4. United Nations Commission on International Trade Law (UNCITRAL), 'UNCITRAL Model Law on International Commercial Arbitration', UNICTRAL website, p. 18, viewed 9 December 2009, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.
5. The so-called 'New York Convention' is 'widely recognised as the foundation instrument of international arbitration': UNCITRAL, '1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention', UNICTRAL website, viewed 10 December 2009, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

Convention) which provides for a special system of arbitration for disputes between States and foreign investors.[6] In general terms, the aim of the IAA is:

> to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes. The Act does this by facilitating the use of arbitration agreements to manage disputes – particularly by giving force to the Model Law – and by facilitating the enforcement and recognition of foreign arbitration agreements and awards by giving effect to the New York Convention.[7]

Basis of policy commitment

On 21 November 2008, Attorney-General, Robert McClelland announced a major review of the IAA to consider whether it should be amended to:

- ensure it provides a comprehensive and clear framework governing international arbitration in Australia
- 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 national arbitral law from overseas.[8]

This announcement coincided with the release of a discussion paper[9] which outlined key areas for review 'to ensure that the IAA is able to provide the most optimal support to Australian businesses involved in cross border trade'.[10] Submissions received in response to the discussion paper are available via the Attorney-General's Department website.[11]

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6. Text of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States is available at: http://www.jurisint.org/en/ins/105.html. Australia signed this Convention on 18 March 1965.
7. Explanatory Memorandum, International Arbitration Amendment Bill 2009, p. 3.
8. Attorney-General's Department, 'Review of International Arbitration Act 1974', Attorney-General's Department website, viewed 27 May 2010, http://www.ag.gov.au/internationalarbitration
9. Attorney-General's Department, 'Review of International Arbitration Act 1974 – Discussion Paper', Attorney-General's Department website, November 2008, viewed 5 February 2010, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.pdf/$file/Review+of+the+International+Arbitration+Act+1974+-+Discussion+Paper.pdf.
10. R McClelland, *Australian Government Moves to Modernise International Arbitration*, media release, Canberra, 21 November 2008, viewed 5 February 2010,

The impetus for the review was problematic decisions by Australian courts which created unsustainable uncertainty, and particular overseas developments that demanded acknowledgement and response. For example, the decision in *Eisenwerk v Australian Granites Ltd*[12] resulted in uncertainty regarding the operation of section 21 of the IAA, where it held that the adoption of arbitral rules constituted opting out of the Model Law. Model Law only applies to 'international commercial arbitration' as defined in Article 1 of the Model Law. Once a law can be characterised as 'international' and 'commercial' in nature, the Model Law will apply.[13] Thus, the vast majority of foreign arbitration agreements will be captured by the scope of the Model Law.[14] However, in circumstances where an agreement to arbitrate does not satisfy Article 1 of the Model Law, then the arbitration agreement is governed by a commercial arbitration act. The significance of this lies in the fact that typically, commercial arbitration acts provide far greater opportunity for judicial intervention than is permitted under the Model Law. The outcomes for the parties may be more divergent than what would have been envisaged under the terms of the Model Law.

The present terms and operation of section 21 of the IAA provide that the parties may agree that 'any dispute that has arisen between them is to be settled otherwise than in accordance with the Model Law'. In the case of *Eisenwerk v Australian Granites Ltd*, basically the issue arose as to whether an arbitration agreement that incorporated the rules of an arbitral institution, such as the 1976 UNCITRAL Rules, amounts to an exclusion of the Model Law under section 21 of the IAA. The Queensland Court of Appeal decided that it did, and in doing so invited the question which, if any, procedural law was to govern the arbitration in such circumstances. In the cases of both *Eisenwerk* and *American Diagnostica v Gradipore*[15], the courts decided that every arbitration taking place in Australia (and not covered by the Model Law) must be governed by a procedural law. Thus, the provisions of the arbitration act would problematically apply as already indicated above. This issue is addressed by the amendment relating to section 21, at item 18 of the Bill.

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http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_FourthQuarter_21November2008-AustralianGovernmentMovestoModerniseInternationalArbitration.

11. Attorney-General's Department, 'Review of International Arbitration Act 1974', Attorney-General's Department website, viewed 27 May 2010, http://www.ag.gov.au/internationalarbitration

12. *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461.

13. Generally speaking, the jurisprudence indicates that the terms 'international' and 'commercial' enjoy quite a generous breadth in terms of their capture: UNCITRAL, 'UNCITRAL Model Law on International Commercial Arbitration', op. cit., p. 17.

14. This is assuming of course, that arbitration agreements were entered into after 12 June 1989 or before that date where the parties have expressly agreed that the Model Law will apply.

15. *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312.

In 2006 the UNCITRAL Model Law was revised. Significantly, the 2006 version of the Model Law uses an expanded definition of 'agreement in writing' (Article 7, Option 1) and provides more comprehensive rules for the granting of interim measures of protection (Chapter IV(A)).[16] The amendments in the Bill also address these developments. However, the Bill does not include an amendment dealing with *ex parte* orders as provided for in the 2006 amendments.

In addition to the above, the Government's review can also be located within its broader and explicit agenda of facilitating and promoting more 'effective resolution of commercial disputes, including through alternative dispute resolution'.[17] And, it is intended to raise Australia's standing in the international community so as to promote Australia as location of choice for parties around the world to resolve their disputes.

The Government relied on the discussion paper,[18] associated submissions, academic literature and reflections on overseas practice in order to identify aspects of the legislation which were in need of amendment.[19] And in his second reading speech, the Attorney-General, Robert McClelland stated that:

> It was very clear from the submissions received as part of the Review, that [...] in particular, there was strong support for the retention of the UNCITRAL Model Law as the arbitral law governing international commercial arbitrations conducted in Australia.[20]

It is therefore intended that:

16. UNICTRAL, '1985 - UNCITRAL Model Law on International Commercial Arbitration, op. cit.
17. R McClelland, 'International Commercial Arbitration in Australia: More Effective and Certain', Speech to the Australian Centre for International Commercial Arbitration (ACICA) Conference, December 2009, viewed 5 January 2010, http://www.acica.org.au/downloads/conference-2009/opening_address.pdf.
18. However, not every proposal in the discussion paper was taken up as an amendment. For example, the Federal Court will have concurrent jurisdiction with the State and Territory Supreme Courts for matters arising under the IAA. The amendments do not give the Federal Court exclusive jurisdiction. Also, authority for functions such as the appointment of, and challenge to, arbitrators has not been removed from the courts and given to an arbitral institution.
19. R McClelland, 'Second reading speech: International Arbitration Amendment Bill 2009', House of Representatives, *Debates*, November 2009, p.12791.
20. Ibid.

> The reforms contained in the International Arbitration Amendment Bill will ensure the Act remains at the forefront of international arbitration practice.[21]

Financial implications

The Explanatory Memorandum states that there will be no financial impact from this Bill.[22]

Main provisions

Schedule 1—Encouraging International Arbitration

Part I –Amendments

Preliminary

Item 1: proposes to insert a **new subsection 2D** which would state and clarify the objects of the IAA, providing guidance for the courts in exercising their powers and interpreting the IAA. The new 'objects' section of the IAA is buttressed by **item 26 (proposed section 39**) which mandates and directs the court to have regard to the objects of the IAA when performing functions or exercising powers under the IAA or the Model Law, when performing functions or exercising powers under an agreement or award to which the IAA applies, or when interpreting the IAA or the Model Law or interpreting an agreement or award to which the IAA applies.

Enforcement of Foreign Awards

Items 2 to 10 amend Part II of the IAA. This Part gives effect to Australia's obligations under the New York Convention to enforce and recognise foreign arbitration agreements.

Item 4: Subsection 3(1) of the IAA provides that ***arbitration agreement*** means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention. The definition provided by the New York Convention of an 'agreement in writing' is inclusive. However, the trend of the jurisprudence by national legislators and courts of an apparent narrowing of the meaning of this term has caused a deal of concern among State Parties and commercial players. Given the standard and routine use of electronic communications in international trade, concern was raised about the practice of construing 'agreement in writing' unhelpfully narrowly. The 2006 revisions to the Model Law addressed this by way of recommendation that the circumstances described in sub-article 1 of Article II, not be considered exhaustive. **Proposed subsection 3(4)** clarifies that 'agreement in writing' is to be afforded a sensibly broad interpretation, so as to account

21. Ibid.

22. Explanatory Memorandum, op. cit., p. 2.

for advances in communication methods. Furthermore, an 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'.

Item 5: Subsection 8(2) of the IAA provides that 'a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory'. The amendment proposed to **subsection 8(2)** would clarify that the enforcement of a foreign award does not need to be made under State or Territory arbitration legislation. To date, the jurisprudence in Australia reflected the opposite. The concern with the way in which **subsection 8(2)** has been interpreted is that it may permit a court to decline to enforce that foreign award, based on the grounds provided for in the State or Territory legislation. Combined with the amendment proposed by **item 7**, this amendment operates to erase any application of the laws of the States and Territories in enforcing a foreign award.

Item 6: This item repeals subsection 8(3) and replaces it with a provision that enables the Federal Court to enforce a foreign arbitral award 'as if the award were a judgement or order of that court'. This will apply to proceedings to enforce a foreign award brought on or after the item's commencement.[23]

Item 7: The New York Convention provides the party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement which are listed in Article V(1) which are intended to be exhaustive. The first category of grounds relates to 'matters that go to the circumstances in which the award was made and whether the award, is in fact, binding on the parties'.[24] The second category of refusal relates to the nature of the award and whether it is indeed capable of settlement under the law of the country itself.[25] The court may on its own motion refuse enforcement for reasons of public policy as provided in Article V(2).

Subsections 8(5) and **8(7)** of the IAA are intended to mirror the two categories for refusal to recognise and enforce and award which appear in Article V of the New York Convention. However, the review of the IAA revealed concern that Australian courts do not necessarily treat the aforementioned grounds as being exhaustive. Hence, **proposed subsection 8(3A)** clarifies that the grounds listed in **subsections 8(5)** and **8(7)** are indeed exhaustive.

Item 9: The New York Convention provides that a court may on its own motion refuse enforcement of an arbitral award for reasons of public policy (Article V(2)). **Subsection 8(7)** of the IAA contains a similar provision. Existing section 19 of the IAA defines

23. Ibid., p. 6.

24. Ibid., p. 7.

25. Ibid., p. 7.

'public policy' grounds as they relate to sections 34 and 36 of the IAA. However the use of the term 'public policy' is left without similar explanation for the purposes and operation of subsection 8(7), thus potentially leading to a different interpretation. To avoid this, the definition of 'public policy' in section 19 of the IAA is replicated in **proposed subsection 8(7A)**.

Item 10: Article VI of the New York Convention and subsection 8(8) of the IAA are both intended to ensure that an award that is adjourned not be enforced in circumstances, where in time, it may in fact be practically unenforceable.[26] However, as it is currently drafted, without any effective qualifications or safeguards, subsection 8(8) may be used to thwart the enforcement of an award. **Proposed subsections 8(9) and 8(10)** provide that the adjournment of an award be lifted in one of four circumstances: where the application for adjournment is not done in good faith, with reasonable diligence, has been withdrawn or dismissed, or is for any other reason, not justified.

The court may also order costs against the party who made the application for setting aside or suspension of the award.[27]

International Commercial Arbitration

Item 11: repeals **subsection 15(1)** which provides the meaning of Model Law, and substitutes it with a list of definitions for:

> *Confidential information* in relation to arbitral proceedings, means information that relates to the proceedings or to an award made in the proceedings and includes:
>
> (a) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party to the proceedings
>
> (b) any evidence (whether documentary or other) supplied to the arbitral tribunal
>
> (c) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal
>
> (d) any transcript of oral evidence or submissions given before the arbitral tribunal
>
> (e) any rulings of the arbitral tribunal; and
>
> (f) any award of the arbitral tribunal.

26. Ibid., p. 9.

27. **Proposed subsection 8(9)**.

Disclose in relation to confidential information, includes giving or communicating the confidential information in any way.

Item 12: inserts a **new subsection 16(2)** which states that 'arbitration agreement' has the same meaning given in Option 1 of Article 7 of the Model Law'. Article 7 of the Model Law defines the term 'arbitral agreement'. Option 1 provides that such an agreement may be concluded orally, through conduct or other means, provided that its content is recorded in some form. Also, the use of electronic communication for the purposes of concluding an agreement is acknowledged and recognised.

Item 13: repeals section 18 of the IAA, substituting it with a new provision which enables a court or authority to be prescribed as competent to perform the functions referred to in Articles 11(3) and (4) of the Model Law relating to the failure to appoint arbitrators. **Proposed subsection 18(3)** provides that the following courts are taken to be competent to perform those functions:

- if the place of arbitration is, or is to be in a State or Territory, the Supreme Court of that State or Territory
- If there is no Supreme Court established in that Territory, the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory
- in any case, the Federal Court of Australia.

Item 14: Article 12 of the Model Law provides that the appointment of an arbitrator may be challenged and provide the grounds on which this may occur. **New section 18A** of the IAA provides that the test of whether there are 'justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as an arbitrator' is whether 'there is a real danger of bias'.[28]

Item 15: repeals section 19 (an interpretive provision) and substitutes it with a **new section 19** that provides for the recognition and enforcement of interim measures under Article 17H of the Model Law. It also clarifies that an award is in conflict with public policy if (a) the making of the award was induced or affected by fraud or corruption, or (b) a breach of rules of natural justice occurred in connection with the making of an award.

Item 16: Section 21 of the IAA provides that the parties may agree that 'any dispute that has arisen between them is to be settled otherwise than in accordance with the Model Law'. In the case of *Eisenwerk v Australian Granites Ltd*, basically the issue arose as to whether an arbitration agreement that incorporated the rules of an arbitral institution, such as the 1976 UNCITRAL Rules, amounts to an exclusion of the Model Law under section 21 of the IAA. The Queensland Court of Appeal decided that it did, and in doing so invited the question which, if any, procedural law was to govern the arbitration in such

28. As articulated by Lord Goff of Chieveley in *R v Gough* [1993] AC 646 at 670.

circumstances. In the cases of both *Eisenwerk* and *American Diagnostica v Gradipore* (1998) 44 NSWLR 312, the courts decided that every arbitration taking place in Australia (and not covered by the Model Law) must be governed by a procedural law. Thus, the provisions of the arbitration act would problematically apply as already indicated above. This issue is addressed by the amendment relating to section 21, ensuring that the Model Law covers the field.

Item 18: proposes amendments relating to optional provisions which parties may choose to adopt in order to assist them with resolving their disputes more effectively and fairly.

The amendments proposed are in relation to:

- The obtaining of subpoenas: **new section 23**
- Action in relation to a party's failure to attend or assist a tribunal: **new section 23A**
- Default by a party to an arbitration agreement: **new section 23B**
- Rules relating to the non disclosure of confidential information: **new section 23C**
- Circumstances relating to disclosure of confidential information: **new section 23D**
- Circumstances in which an arbitral tribunal may allow disclosure of confidential information in relation to proceedings: **new section 23E**
- Circumstances in which the court may prohibit disclosure of confidential information: **new section 23F**
- Circumstances in which the court may allow disclosure of confidential information: **new section 23G**
- Consequence of death of a party to an arbitration agreement: **new section 23H**

Item 22: controlling costs is an important element in maintaining the attractiveness of arbitration. **New subsection 27(2A)** states that where a tribunal intends to provide a direction limiting costs, then it is obliged to give the parties sufficient notice, so that they are able to factor this into managing their decisions and costs.[29]

Application of the Washington Convention

Item 24: Existing section 35 of the IAA provides for the enforcement of awards made under the Washington Convention. This item repeals subsection 35(2) and replaces it with a **new subsection 35(2)** which provides that 'an award may be enforced in the Supreme Court of a State or Territory with the leave of that court as if the award were a judgement or order of that court'. This is done for the same rationale as provided in **item 5**.

Item 25: The current provision in **subsection 35(4)** is repealed and is substituted with a provision which allows the Federal Court of Australia to enforce a foreign award 'as if that

29. Ibid., p. 22.

award were a judgement or order of that court'. Whereas, the current situation is that the enforcement of foreign awards is only by State or Territory courts.

Matters to which the courts and other authorities must have regard

Item 26: proposes that a Part V be inserted in the IAA, which deals with matters to which the courts must have regard when:

- exercising powers or performing functions under the IAA and the Model Law
- exercising powers or performing functions under an agreement or award to which the IAA applies
- interpreting the IAA or the Model law, and
- interpreting an agreement or award to which the IAA applies.

While the role of the courts in assisting arbitration is recognised as being important, it is intended that their role would be confined to needs basis.[30]

As already discussed with **item 1**, **proposed section 39** mandates that that courts must have regard to the objects of the IAA. It also requires the courts to have regard to Article 2A which was inserted into the 2006 revised Model Law. That article basically states that when the courts are interpreting the Model Law, they must have regard to 'its international origin and the need to promote uniformity in its application and observance of good faith'.

Requiring that the Model Law is interpreted consistently with general state practice internationally, is pivotal in promoting Australia as a location for conducting international arbitration.

Part 2—Application

This part of the Bill basically provides for the application of amendments listed in Part 1.

30. Ibid., p. 24.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2404.