LAW INSTITUTE OF VICTORIA
ALTERNATIVE DISPUTE RESOLUTION CONFERENCE 2011

LATEST ISSUES IN ARBITRATION

The last couple of years have been rather significant in terms of arbitration in Australia.

Firstly, in 2010, the *International Arbitration Amendment Act (Commonwealth)* substantially amended the *International Arbitration Act 1974*, and secondly, in the same year, the Standing Committee of Attorneys-General (SCAG) agreed to modernise and update the uniform State and Territory Commercial Arbitration Acts. It is appropriate for me to deal with these matters separately, albeit that there are some common features.

INTERNATIONAL ARBITRATION

The 1974 Act, as amended from time to time, incorporated into Australian Law:-

1. The UNCITRAL Model Law on International Commercial Arbitration (**the Model Law**);

2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**the New York Convention**); and

3. The Convention on the Settlement of Investment Disputes between States and Nationals of other States **(the ICSID Convention**).

As a preliminary matter, I should mention that I do not intend to spend any time at all dealing with the ICSID Convention, other than to mention that we are presently seeing for the first time the threat of a claim against the Australian Government in relation to the plain packaging for cigarettes. I will deal only peripherally with the New York Convention, and will focus on the Act and the Model Law.

The Model Law was first developed by UNCITRAL in 1985 and was incorporated into Australian Law by 1989 amendments to the 1974 Act. In 2006, the Model Law itself was the subject of significant revision, and one of the features 2010 legislation has been the adoption of these 2006 amendments.

Before going on to highlight the significant features of the 2010 Act and its consequences, I rather think that it is useful to spell out the provisions of Section 2D of the Act, which are self-explanatory:

The objects of this Act are:

(a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and

(b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and

(c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and

(d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and

(e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and

(f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

The Model Law itself is effectively a code for the management and conduct of arbitrations, and while there is no time to conduct a detailed examination of its terms, I should draw to your attention the fact that while it was previously the foundation only for international arbitration in Australia, it will shortly be of importance to domestic arbitration as well. You will see from the following chapter headings that it 'covers the field':-

Chapter I - General Provisions

Chapter II - Arbitration Agreement

Chapter III - Composition of Arbitral Tribunal

Chapter IV - Jurisdiction of Arbitral Tribunal

Chapter IVA - Interim Measures and Preliminary Orders

Chapter V - Conduct of Arbitral Proceedings

Chapter VI - Making of Award and Termination of Proceedings

Chapter VII - Recourse against Award

Chapter VIII - Recognition and Enforcement of Awards

The most significant features of the new regime are as follows:

- The 2006 Model Law amendments contain a new definition of an arbitration agreement, which is required to be in writing, but not necessarily in a single signed document.
- While previously it was the State and Territory Supreme Courts which exercised powers granted under the Model Law, jurisdiction has also been granted to the

Federal Court, following a somewhat furious reaction by the Chief Justices of the State and Territory Supreme Courts to the original proposal that exclusive jurisdiction be granted to the Federal Court. The State and Territory Courts continue to have the jurisdiction which they previously had if the arbitration is or is to be in that State or Territory, while the Federal Court's jurisdiction exists no matter where in Australia the arbitration is or is to be.

- This jurisdiction extends also to enforcement of foreign arbitral awards, which may now be enforced in the Federal Court as well as in the State and Territory Courts.

- Whereas previously it was perfectly possible to undertake an international arbitration subject to one of the State or Territory Commercial Arbitration Acts, the 2010 amendment now makes it clear that all international arbitrations are to be subject to the Commonwealth Act and the Model Law, to the exclusion of the State and Territory Acts.

- While a (much criticised) decision of the Queensland Court of Appeal in *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461 held that where parties to an arbitration agreement who had stipulated for arbitration under the ICC Rules had thereby excluded the operation of the Model Law, it is now clear that this is not the position.

- While previously it was necessary for a court to become involved in the process of appointment of an arbitrator or arbitrators in the event that the parties were not able to agree, the legislation and the accompanying regulations have specified the Australian Centre for International Commercial Arbitration (ACICA) as the competent authority, and in turn, ACICA has set up a process for this purpose.

- There are broader provisions for the taking of interim measures and the making of preliminary orders by arbitrators, and for the recognition and enforcement of such interim measures and preliminary orders.

- While it had been held previously by the Supreme Court of Queensland in *Resort Condominiums Inc v Bolwell* [1995] 1 Qd R 406 (another much criticised decision) that the courts had a residual discretion to refuse enforcement of a foreign award on grounds other than those set out in the Model Law, that discretion has been removed. A party seeking to prevent the recognition and enforcement of a foreign award must now rely solely on the limited grounds set out in the Model Law.

Simultaneously with the 2010 legislation or in consequence of it, there have been a number of other matters of interest to report relating to international arbitration in Australia:

- The Australian International Disputes Centre was established in Sydney in 2010 with the assistance of both the Commonwealth and New South Wales governments. It is now the home of various organisations, such as ACICA, the Australian Branch of the Chartered Institute of Arbitrators, the Australian Maritime

and Transport Arbitration Commission and the Australian Commercial Disputes Centre. Steps are now in train to develop a similar infrastructure in Melbourne.

- The Federal Court and the Supreme Courts of both New South Wales and Victoria have moved to ensure that arbitration issues coming before those courts are dealt with by specialist judges. The Federal Court has Arbitration Coordinating Judges in each registry, the New South Wales Court has a Commercial Arbitration List, and here in Victoria, we have an Arbitration List presided over by Justice Croft, an acknowledged expert in arbitration, both domestic and international.

- The Honourable Murray Gleeson has been appointed as the chair of a judicial liaison committee, comprising representatives of the Federal Court and the Supreme Courts and ACICA. The stated objective of the committee is to promote uniformity in practices and procedures in the courts.

- Whereas Australian arbitration jurisprudence was previously regarded as relatively unfriendly to arbitration, and thus providing no incentive for international parties to accept Australia as a good location for dispute resolution, there have been a couple of 'arbitration friendly' decisions in our courts recently. In *Altain Khuder LLC v IMC Mining Solutions Pty Ltd* [2011] VSC 1, Justice Croft in the Supreme Court of Victoria refused to set aside a previous order enforcing in Victoria an arbitration award made in Mongolia, and in *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131, Justice Foster in the Federal Court did likewise in relation to an award made in Uganda. In doing so, he pointed out that the policy of the Act was to uphold arrangements made in international trade, and that there was no discretion to refuse enforcement of a foreign award on grounds other than those specified in the Model Law.

DOMESTIC ARBITRATION

As mentioned in my introduction, SCAG agreed in 2010 to modernise and update the uniform State and Territory Commercial Arbitration Acts. In doing so, SCAG produced a model Commercial Arbitration Bill.

Politics and state sovereignty being what they are, the publication of a model bill did not result in the automatic or timely adoption by the States and Territories of the bill. That having been said, I am pleased to report progress.

First cab off the rank, not surprisingly, has been New South Wales. I say 'not surprisingly', because the then Attorney-General in that state, John Hatzistergos, was a prime mover in the move to establish New South Wales, and Sydney in particular, as a major dispute resolution centre. The passing in New South Wales of the Commercial Arbitration Act 2010 and its coming into operation only a few months after the SCAG decision must surely have been a record of some sort for legislation not designed to garner votes!

Sadly, Victoria has been lagging, although the good news is that a draft Commercial Arbitration Bill is presently being considered by the Attorney-General. Tasmania has moved

with a degree of alacrity, and I believe that the Commercial Arbitration Bill will shortly become an Act. Bills are also presently before the parliaments of Western Australia, South Australia, and the Northern Territory, but as far as I am aware, nothing has yet emerged in Queensland or the Northern Territory.

As always, there will be some differences between the various Acts when they are in place, but hopefully, those differences will not be too great. For present purposes, I will work on the basis that by and large, we will have uniformity.

The most significant change to the practice of domestic arbitration as we have known it in the last 30 years will be the adoption for domestic arbitration purposes of the Model Law. Interestingly, while it will be apparent from what I have said earlier that the Model Law was developed for international arbitration purposes, it is now widely accepted that the Model Law, with suitable variations, can be adopted for domestic arbitration. For Australia, with its federal system resulting in nine separate jurisdictions, the convergence of practice and procedure in domestic arbitration with that of international arbitration can only be good.

What then are the major features of the prospective new legislation?

- It will now be mandatory for a court to stay any action brought despite an arbitration agreement unless the arbitration agreement is found to be null and void, inoperative, or incapable of being performed.
- Intervention in arbitration by a court is expressly precluded 'except where so provided by this Act'.
- The challenge procedure is based on the Model Law and requires parties seeking to challenge an arbitrator to do so very promptly
- The arbitral tribunal is free to rule on its own jurisdiction.
- The arbitral tribunal is now able to take interim measures which will be capable of being supported by the court.
- The arbitral tribunal will be able to order security for costs.
- The tribunal's discretion as to the conduct of an arbitration will, among other things, allow it to mandate for stop clock arbitration.
- There is a new - and controversial - provision covering the position of an arbitrator acting as mediator.
- The previous concept of misconduct no longer exists. Given that this concept was used regularly to attack awards, not because the arbitrator had done anything untoward, but because he or she had been guilty of what became known as 'technical misconduct' by, say, not giving adequate reasons for a decision, it is not before time that this is so.
- Whereas previously, an aggrieved party could seek leave to appeal on the basis of manifest error of law, as well as asserting misconduct, recourse against an

award is now limited, consistently with the proposition that arbitration decisions should be final and binding. Such recourse is limited to an application to set aside the award on various narrow grounds (e.g. the party was not given proper notice of the appointment of the tribunal, the party was under an incapacity, the award deals with matters not the subject of the arbitration agreement, etc.) or an appeal on a question of law if the parties agree that an appeal may be made and if the court gives leave.

- In order to overcome the effect of the High Court decision in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 (another much criticised decision, particularly internationally), confidential information in relation to an arbitration is not to be disclosed unless the parties agree that it is in order to do so.

I cannot conclude a discussion about latest issues in arbitration without reference to the pending decision of the High Court in an appeal from the New South Wales Court of Appeal decision in *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57, in which that court disagreed with the views of the Victorian Court of Appeal in the earlier case of *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255 as to the standard of reasons required from arbitrators. The *Gordian* appeal was heard early this year and surely we can expect to hear from the High Court soon. While the decision is anxiously awaited by the arbitration community, I suspect that when it is handed down, it will not result in great change - whichever way it goes, arbitrators will still be required to give reasons appropriate to the nature of the dispute, the amount involved in the dispute, the issues before the tribunal etc.

CONCLUSION

In the world of arbitration, we live in interesting times, as the Chinese would say.

After many years of hibernation, at least in terms of legislative involvement, I believe that we are on the cusp of a brave new world in both international and domestic arbitration. In the field of international arbitration, Australia is making a substantial effort to become a significant player, while on the domestic side, the modern legislative environment will surely encourage those in trade and commerce to think seriously about using arbitration as their preferred option for dispute resolution.

Ron Salter
21 July 2011