ARBITRATION INSIGHTS: AUSTRALIA

INTRODUCTION TO ARBITRATION REGIME IN AUSTRALIA AND APPROACH OF AUSTRALIAN COURTS TO ARBITRATION AGREEMENTS

Over the past ten years, there has been a substantial change in the arbitration landscape which has both strengthened domestic arbitration and has allowed Australia to position itself as a credible alternative to the major arbitration centres in Asia for international arbitration.

Over the course of the next ten weeks, Nick Longley, Partner and Chris Cho, Associate will provide short, easy to read briefings on arbitration in Australia, providing both an overview of the legal framework and practical tips. This first briefing provides an introduction to the arbitration regime in Australia.

> **"Despite the liberal approach of Australian courts in interpreting arbitration agreements, parties should therefore take care in the drafting an arbitration agreement."**

The Arbitration Regime in Australia

Australia is a Model Law country with a bifurcated arbitration regime. Separate statutes regulate international and domestic arbitration.

International arbitration is governed by the International Arbitration Act 1974 (Cth). Domestic Arbitration is governed by a series of Commercial Arbitration Acts in each State or Territory. These Commercial Arbitration Acts in each state and territory are substantially the same and are known as the Uniform Arbitration Acts. New South Wales was the first state to introduce the new Uniform Arbitration Act in 2010 and the Australian Capital Territory was the last state to adopt the Uniform Arbitration Act in 2017.

However both the International Arbitration Act and the Uniform Arbitration Acts follow the UNCITRAL Model Law very closely. The International Arbitration Act simply adopts the Model Law. The Uniform Arbitration Acts set out the terms of the Model Law, using the same numbering system that international arbitration practitioners will be familiar with (including all of sections between Section 17 and Section 17J). Where the Uniform Commercial Arbitration Acts add additional provisions, they do so at convenient places using the system of inserting clauses with a letter suffix, so as not to disturb the Model Law numbering system. For instance provisions providing for freedom for representation allowing anyone to represent parties in arbitration have been inserted as Section 24A immediately after the Model Law provision dealing with hearings.

Where relevant the equivalent Model Law reference for any section is included in the section heading.

Finally it should also be noted that both the International Arbitration Act (Section 17) and the Uniform Arbitration Acts (Section 2A) contain provisions which acknowledge the International nature of the Model Law and allow courts to take into account documents relating to the Model Law of UNCITRAL and its working groups.

Main Arbitration Centres

The Australian Centre for International Commercial Arbitration, known as ACICA is the main centre for international arbitration. Its headquarters are currently in Sydney but it has committees in other states. ACICA's role is similar to the Hong Kong International Arbitration Centre or the Singapore International Arbitration Centre, in that it acts as appointment authority for arbitrations (maintaining a panel of arbitrators), publishes its own rules for the conduct of arbitration and administers arbitrations.

The Resolution Institute is the primary body for domestic arbitrations. The Resolution Institute resulted from a merger between IAMA (Institute of Arbitrators and Mediators Australia) and LEADR and it is common to find Resolution Institute arbitration clauses (or indeed IAMA arbitration clauses) in standard form contracts, particularly in the building industry.

Approach of the Australian Courts

Australian courts have generally taken a pro-arbitration approach to interpreting arbitration clauses. In *Rinerhart v Hancock Prospecting Pty Ltd* [2019] HCA 13, the High Court of Australia, the Australia's highest appeal court, confirmed that arbitration clauses are to be construed widely, taking into account the language used, the surrounding circumstances and the purposes of the contract. Where there is an arbitration agreement in a contract, the courts are obliged to refer the dispute to arbitration. Further although the Uniform Arbitration Acts only relate to commercial arbitration, the courts have taken a wide interpretation of the meaning of "commercial" (*Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170).

Parties should, however, be aware that courts will still consider the "natural and ordinary meaning" of the words used in an arbitration agreement. The Fiona Trust approach to the interpretation of arbitration clauses has not been adopted in Australia.

Consequently if the parties have agreed to a narrowly drafted arbitration agreement, that may result in only specified disputes being referred to arbitration. This was precisely the case in *Inghams Enterprises Pty Limited v Hannigan* [2020] NSWCA 82, where the New South Wales Court of Appeal held that an arbitration clause covering "any monetary amount payable and/or owed by either party to the other *under this Agreement*" precluded an unliquidated damages claim from the scope of arbitration, as the unliquidated damage claim was not an amount payable or owed under the agreement.

Despite the liberal approach of Australian courts in interpreting arbitration agreements, parties should therefore take care in the drafting an arbitration agreement.

In our next briefing, we will write on the topic of considerations in drafting arbitration clauses.

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