International Arbitration

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ARBITRATION IN AUSTRALIA: DEVELOPMENTS ARISING FROM THE NEW STATE COMMERCIAL ARBITRATION ACTS

Significant changes have been made to domestic arbitration legislation in Australia since 2010, in the form of the new Commercial Arbitration Acts (CAAs)[1]. Essentially, the CAAs bring domestic arbitration laws in line with Australian international arbitration laws, which are provided for in the *International Arbitration Act 1974 (Cth)* (IAA).

Domestic Arbitration

A key change adopted by the CAAs is that they apply exclusively to domestic arbitrations[2]. An arbitration is domestic where the parties have their places of business in Australia, they have agreed that any dispute will be settled by arbitration, and it is not an arbitration to which the UNCITRAL Model Law applies.

International Arbitration

On the other hand, an arbitration is international where the parties to an arbitration agreement have their places of business in different States (which, in this context means countries, i.e. arbitrations between parties in different Australian states or territories will be domestic in nature)[3].

1 Commencement dates: New South Wales (1 October 2010), Victoria (17 November 2011). South Australia (1 January 2012), Northern Territory (1 August 2012), Queensland (17 May 2013), and Western Australia (7 August 2013). No bill has been introduced to the Parliament of the Australian Capital Territory, however this is expected in due course.

2 E.g. Section 1 (1) Commercial Arbitration Act 2012 (WA).

3 Article 1, UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) and Section 16(2) IAA.

The Black Hole

The IAA was amended in 2010 in order to promote Australia as a major centre for international dispute resolution. Before the amendments came into effect on 6 July 2010, parties had the choice of opting out of the Model Law, which would allow the parties in an international arbitration context to have any dispute arising referred to arbitration under the applicable state CAA. The effect of the 2010 amendments changed this position: following 6 July 2010, no opt out is available to the parties[4].

The effect of this amendment may have serious consequences on parties who concluded arbitration agreements before 6 July 2010, and where they opted out of the Model Law by selecting the Commercial Arbitration Act of a state in which a new CAA is now in force, and where a dispute arises after 6 July 2010. It is possible in this scenario that no arbitration statute applies to the arbitration agreement. The Court of Appeal of Western Australia considered this issue in the leading case of *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*[5], in which Holman Fenwick Willan acted for Rizhao Steel.

Parties should resist the temptation to cut and paste their stock arbitration clauses into new contracts. They should check the wording and confirm that it now takes account of the new CAAs.

Some parties have tried to provide for this scenario by including in their contracts appropriate wording to allow for any future amendments to the relevant CAA, however, this leaves the parties in a potentially difficult situation because the new CAAs now exclusively apply to domestic arbitration. This is what has been recently described as the "Black Hole"[6].

There are two other potential scenarios if we consider the same facts above. First, if the arbitration has commenced before 6 July 2010, then the arbitration agreement remains valid and the relevant CAA applies. Second, if an arbitration commenced after 6 July 2010 but before the relevant CAA has come into force (for example, in the Australian Capital Territory), then it is questionable whether the opt out is valid.

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Clauses referring to repealed legislation

But what happens if an arbitration clause contains provisions which conflict with the requirements laid down in statute, or the clause refers to repealed legislation? This is a major issue facing parties who choose to cut and paste stock clauses at the last minute into time-pressured contracts. Consider the example of a contract between a Western Australian company and an international company, where the parties selected the CAA 1985 (WA) ("or any statutory modification") with certain reservations as to its application, such as providing leave for appeal to the Supreme Court of Western Australia in a wide range of circumstances. In this scenario, as the new CAA has come into force (and has repealed the old CAA), there would be a number of problems. First, despite the specific reference to "or any statutory modification" the CAA cannot apply to international arbitrations. Second, even if the new CAA were to apply, the specific reservations as to the application of the CAA would be questionable. Under the new CAA, there is an extremely limited appeal from an arbitration award regardless of any separate agreement by the parties. Third, most importantly the parties would be left in a difficult position at the outset as to how to agree a resolution of the dispute. This would be a real disadvantage to the claimant.

4 Section 21 IAA: *"if the Model Law applies to an arbitration the law of a State or Territory relating to arbitration does not apply to that arbitration".*

5 (2012) 262 FLR 1.

6 A. Mochino and L. Nottage, Blowing hot and cold on the International Arbitration Act, LSJ 56, May 2013.

How can parties protect themselves?

Parties should resist the temptation to cut and paste their stock arbitration clauses into new contracts. They should check the wording and confirm that it now takes account of the new CAAs. Parties would also be well advised to carry out an audit of all existing contracts subject to Australian arbitration laws to check whether they fall within this legislative black hole. If they do, then consideration should be given to entering into a contractual addendum, so that both parties can be certain that if a dispute were ever to arise the matter would still be capable of referral to arbitration.

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Commercial Arbitration Act (WA) 2012 – Key Changes

The CAA (WA) 2012 came into force on 7 August 2013, repealing the CAA (WA) 1985. These are the key changes:

1. The new CAA applies exclusively to domestic arbitrations.
2. Primacy of the arbitration agreement: mandatory stay of Court proceedings commenced in breach.
3. Court intervention will be permitted in specified circumstances only.
4. The scope to challenge or remove an arbitrator has been reduced: an arbitrator may only be removed if there is a real danger of bias on the part of the arbitrator conducting the arbitration.
5. The arbitral tribunal has a greater power to order interim measures.
6. The arbitral tribunal may order “Stop Clock Arbitrations”.
7. Confidentiality: this is now an “opt out” regime.
8. Appeals are only permitted in limited circumstances.
9. Setting aside an award or resisting enforcement is permitted only in limited circumstances.

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