Internationalising the *International Arbitration Act*

By Erika Williams[1]

Abstract

On 25 October 2018, the Civil Law and Justice Legislation Amendment Act 2018 (Cth) received assent, which amongst other things, made four key amendments to the International Arbitration Act 1974 (Cth) Erika Williams explores these amendments, noting how they bring this legislation in line with best practice in international arbitration, which will continue to enhance the promotion of Australia as an arbitration friendly jurisdiction.

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On 25 October 2018, the *Civil Law and Justice Legislation Amendment Act 2018* (Cth) (**Act**) received assent. This Act has been a long time coming, with the bill having been introduced and read in the Senate for the first time in March 2017. It was not until September 2018 when the Senate agreed to the third reading before the bill made its way to the House of Representatives, where it finally passed both houses on 17 October 2018. The provisions relating to the *International Arbitration Act 1974* (Cth) (**IAA**) commenced on 26 October 2018.

The object of the Act is to 'make minor and technical amendments to civil justice legislation' and it amends various Commonwealth legislation including the IAA. A closer inspection of the amendments to the IAA reveals that they are anything but 'minor and technical'.

There are four key amendments to the IAA. These are succinctly and somewhat deceptively summarised in the explanatory memorandum to the Act as:

1. clarifying the procedural requirements for enforcement of an arbitral award;

2. specifying expressly the meaning of competent court for the purpose of the UNCITRAL Model Law;[2]

3. clarifying the application of the confidentiality provisions to certain investor-state arbitrations; and

4. modernising the provisions governing arbitrators' powers to award costs in international commercial arbitration proceedings.

In relation to these amendments, Senator the Honourable George Brandis QC stated in his second reading speech that the Bill:

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[2] 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) (**Model Law**).

> '*reflects the Government's commitment to maintain its place in the international legal environment by amending the International Arbitration Act to help ensure that Australian arbitral law and practice stay on the global cutting edge, so that Australia continues to gain ground as a competitive arbitration friendly jurisdiction*.'

The following analysis of the four amendments identifies the significance of these changes to the IAA.

(a) Clarifying procedural requirements for enforcement

This summary is probably the most understated of the four amendments. The Act amends the language in sections 8(1) and 8(5)(f) of the IAA to clarify that a foreign award is binding between the 'parties to the award', rather than to the 'parties to the agreement pursuant to which the arbitration award is made', which is the current language in section 8.

The reference to enforcing an award against a party to the arbitration agreement, as opposed to the parties to the award, is in contrast to equivalent legislative provisions in leading international arbitration jurisdictions such as the United Kingdom, Singapore and Hong Kong.

The previous wording of this provision resulted in contradicting Australian case law. The Victorian Court of Appeal held that section 8(1) as it was previously formed imposed a legal onus on the party seeking to enforce the award (**Award Creditor**) to prove that the party which must pay the award (**Award Debtor**) is a party to the arbitration agreement.[3] However, Justice Foster, the Arbitration Co-ordinating Judge in the Sydney Registry of the Federal Court of Australia held that the Award Creditor need only produce the award and the alleged agreement upon which it relied in order to meet the evidential requirements of section 9(1), even if the Award Debtor is not a named party to the arbitration agreement.[4]

This amendment addresses the emergence of joinder and consolidation in arbitration proceedings where there are multi-party or multi-contract proceedings. Many arbitration institute rules have recently been revised to accommodate joinder and consolidation. The recognition and enforcement of an award between parties to the award, as opposed to the parties to the agreement, is a practical and sensible approach.

This clarification should be welcomed as it acts to remove a potential unnecessary procedural step which would require the Award Creditor to demonstrate that the award does in fact bind the Award Debtor where the Award Debtor is not named on the arbitration agreement. It brings the IAA into line with international best practice and reinforces the approach taken by Justice Foster as the approach to be adopted throughout all Australian jurisdictions.

Unlike the remainder of the amendments to the IAA, now that this Act has entered into force, this amendment applies to arbitral proceedings regardless of whether those proceedings commenced before these amendments were enacted. The other amendments to the IAA only apply to arbitration proceedings were commenced after 26 October 2018, the date the relevant provisions in the Act commenced.

(b) Specifying the meaning of 'competent court'

Article 6 of the Model Law requires the functions referred to in certain Articles of the Model Law to be performed by the court(s) as specified by each State enacting the Model Law. Australia has specified the

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[3] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303.
[4] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161.

courts for the purposes of Article 6 as the supreme court of the state or territory which is, or is to be, the place of the arbitration, or in any case, the Federal Court of Australia.

This specification works well for articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) which are identified in article 6 of the Model Law and all use the phrase 'the court or authority specified in article 6' to designate power to the relevant Australian court.

However, the following articles do not refer to 'the court or authority specified in article 6' and instead designate power to 'the competent court':

a) article 17H – recognition and enforcement of interim awards;

b) article 27 – court assistance in taking evidence;

c) article 35 – recognition and enforcement of awards; and

d) article 36 – grounds for refusing recognition or enforcement of awards.

There is no definition of 'competent court' in the IAA or the Model Law which has caused the question of jurisdiction to arise when a party has sought to engage the court's power in relation to these provisions.[5]

The Act introduces amendments which would clarify this ambiguity by stating that if the taking of evidence or the recognition or enforcement of awards (interim or otherwise) is to take place in a state or territory, then the supreme court of that state or territory is a competent court, or in any case, the Federal Court of Australia is a competent court.

This is another welcome amendment which applies to arbitration proceedings commenced from 26 October 2018. For arbitral proceedings commenced prior to the enactment date, parties seeking to rely on these provisions will need to rely on the common law to establish that the relevant court is a competent court to exercise jurisdiction.

(c) Clarifying the application of confidentiality provisions

The amendments to the confidentiality provisions in the IAA exclude the application of these provisions where the Transparency Rules[6] apply. The application of the Transparency Rules is governed by the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014)* (**Mauritius Convention**). This update to the application of the confidentiality provisions in the IAA indicates that Australia is taking steps towards implementing transparency in investor-state arbitration.

In July 2017, Australia was the first country in the Asia-Pacific region to become a signatory to the Mauritius Convention. Parties to the Mauritius Convention agree to apply the Transparency Rules where both the State and the claimant investor's State are parties to the Mauritius Convention or where the investor agrees to their application. The Mauritius Convention entered into force on 18 October 2017. Australia is however, yet to ratify the Mauritius Convention.

Once Australia ratifies the Mauritius Convention, investor-state arbitrations between Australia and consenting investors or investors from States party to the Convention will become subject to the Transparency Rules regardless of when the treaty underpinning the arbitration was concluded, or the applicable arbitration rules. Similarly, Australian investors engaging in arbitration against foreign States

[5] See, for example, *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209.
[6] United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration (**Transparency Rules**).

party to the Convention should be wary that the Transparency Rules may apply. As more countries sign up to the Mauritius Convention, transparency will automatically apply to more investor-state arbitrations.

One way in which the clarifications to the confidentiality provisions could have a role to play now is where parties to an investor-state arbitration, to which the Transparency Rules apply, agree to Australia as the seat of the arbitration. The IAA then provides the appropriate framework in which the Transparency Rules could operate.

The amendments affecting the applicability of the confidentiality provisions apply to arbitration proceedings commenced after 26 October 2018. It is important to note that these clarifications to the confidentiality provisions only apply to investor-state arbitrations and not international commercial arbitrations so private parties who have agreed to international arbitration as a means of resolving their dispute still have the protection of the confidentiality provisions in the IAA, unless they agree to opt out.

(d) Modernising arbitrators' powers to award costs

Finally, the Act removes reference to the taxation of costs in international arbitration. The Explanatory Memorandum states that references to taxing costs are 'outmoded and inflexible in contrast to current practice in international arbitration'.

Instead, the IAA simply provides that the tribunal may, in making an award, settle the amount to be paid by whom and in what manner.

This is a 'minor and technical' amendment that applies to arbitration proceedings commenced after 26 October 2018 and allows a tribunal to settle costs in a manner it deems appropriate.

What this all means

Now that the Act is in force and the provisions relevant to the IAA have commenced, the IAA is now in line with best practice in international arbitration which will assist with the promotion of Australia as an arbitration friendly jurisdiction.