NEW COMMERCIAL ARBITRATION LEGISLATION FOR THE STATES

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HOW DOES IT AFFECT YOU?

If the Model Law is adopted for domestic arbitrations:

- Users of arbitration will have more freedom to agree on the procedures they will use to resolve their dispute so that they can choose to make arbitration more efficient and less expensive than litigation.
- State courts will have less power to intervene during an arbitration. After the close of proceedings, the grounds upon which the arbitral award may be set aside will be more limited than they are under the current system.

THE CURRENT SYSTEM

Australia has two streams of arbitration law at present: one set of state laws for domestic disputes, and a federal law for international matters. Domestic arbitrations are governed by the state *Commercial Arbitration Acts* (CAAs); disputes of an international nature fall under the International *Arbitration Act 1974* (Cth) (the IAA). The IAA is based on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). The CAAs are not based on the Model Law. Instead, the CAAs give the parties much more scope to apply to the courts for judicial supervision of an arbitration and for the setting aside of arbitral awards. Sophisticated users of arbitration tend to prefer the freedom of the Model Law, but their ability to adopt the Model Law provisions is limited where the dispute is not international. If the states adopt laws based on the Model Law, the procedural law applicable to domestic arbitration will be very similar to that applicable to international arbitration. This will make Australian law more like English law, where there is a single arbitration statute for domestic and international disputes.

UNCITRAL MODEL LAW

The Model Law is a template national law that was drafted in consultation with United Nations Commission on International Trade Law member states. It has been adopted by nearly 50 countries, including nearly all of the common law states of the Asia Pacific region. The first version of the Model Law was settled in 1985, and the template was revised in 2006. The IAA implements the 1985 version of the Model Law but the Federal Government is currently considering whether, and to what extent, the IAA should be amended to adopt the 2006 amendments to the Model Law.

The Model Law gives users of arbitration broad freedom to tailor the arbitral procedure to their needs. The Model Law also provides that local courts can only set aside arbitral awards where:

- there was no agreement to arbitrate or the dispute falls outside the scope of the arbitration agreement;
- there was an actionable breach of procedural fairness in the making of the award;
- the enforcement of the award would be against public policy.

Otherwise, the parties are bound by the decision of the arbitrators.

In contrast, the CAAs provide exhaustive grounds upon which judicial review of the award may be sought, including that the award contains a manifest error of law (CAA section 39(5)). Section 39 has impeded the development of domestic arbitration in Australia because it forces arbitrators to be like judges. With 'manifest error of law' hanging over their heads, the willingness of the arbitrator to conduct the dispute efficiently and flexibly is off–set by his or her fear that their award will be set aside. Manifest error of law has also reduced

the involvement of non–legally qualified arbitrators, with the result that the opportunity to have a dispute resolved by a technical expert is often lost. Anecdotal experience suggests that this has been most damaging to the practice of arbitration in the construction industry.

The way in which Australian courts have interpreted the CAAs also tends to encourage arbitrators to conduct domestic arbitrations like court proceedings. For example in *Oil Basins Limited v BHP Billiton* [2007] VSCA 255, the Victorian Court of Appeal set aside an arbitral award on the basis that the provision of inadequate reasons constituted a manifest error of law and that the arbitrators had engaged in technical misconduct under the CAA by failing to consider important evidence and submissions.

LIKELY MODIFICATIONS TO THE CAAS

The Standing Committee of State Attorneys–General has announced that the new draft legislation will be based on the Model Law supplemented by any additional provisions that are necessary or appropriate for domestic arbitration. The stated purpose is to provide a method of finally resolving disputes by commercial arbitration that is quicker, cheaper and less formal than litigation. There will be consultation with stakeholders before the states adopt the draft legislation.

Although it was originally drafted as a law for international arbitration, most of the Model Law's provisions are equally suited to domestic arbitration. In principle, comparatively few adjustments should be required to adapt the UNCITRAL template for domestic arbitration. However, the scope and application provisions of the Model Law will certainly need to be amended, and additional 'Model Law Plus' provisions will probably need to be drafted to address the interaction of the new domestic arbitration laws with the IAA.

Certain features of the outgoing CAAs may also be adopted although they are not in the Model Law. For example, a possible addition to the UNCITRAL template would be an equivalent of CAA section 27, under which the parties may authorise the arbitrator to act as a conciliator or mediator for the purposes of achieving settlement, and may not object to the arbitrator returning to the role of 'judge' and continuing with the arbitration if no settlement is reached. This provision is seen as promoting the practice of mediation–arbitration (or 'Med–Arb'), a hybrid method of dispute resolution used in other jurisdictions with good results.

CONSEQUENCES FOR USERS OF ARBITRATION

If the anticipated changes are made the new state arbitration laws will:

- reduce court intervention in domestic arbitral proceedings;
- give users of arbitration more freedom to adopt or create procedures that meet the needs of their dispute; and
- increase the finality of arbitral awards by limiting the grounds on which the losing party can seek orders setting the award set aside.

With the Model Law on the horizon, users of domestic arbitration may wish to get the benefit of the new framework in future disputes. But without the new acts in place, the parties cannot submit to them. The parties can, however, reduce the prospect of their dispute being governed by the outgoing CAAs. The best way to do this is by drafting the arbitration clauses in their commercial contracts to refer to the state arbitration law in force at the time the dispute arises. This way, once the new laws are passed the parties should not be stuck with the CAAs, even though they were in force at the time they contracted.

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