The legislative context for international and domestic commercial arbitration in Australia

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The legislation which regulates both *international* and *domestic* commercial arbitration in Australia is based on the Model Law.[1] The Model Law is a template for legislation for an arbitration law (a *lex arbitri*) which may be enacted by individual States. It draws heavily from the New York Convention[2] (NYC) and the 1976 UNCITRAL Arbitration Rules[3] and has been adopted in 67 countries and 99 separate jurisdictions to date.[4] Regional legislation based on the Model Law has been enacted in India, Sri Lanka, Bangladesh, Japan, Republic of Korea, Malaysia, Singapore, Thailand, Philippines, Cambodia and New Zealand. Australia's adoption of the Model Law can only strengthen its image as an arbitration friendly country.

Australia's international arbitration law is the International Arbitration Act 1974 (Cth)(IAA),[5] and domestically there are the various State Commercial Arbitration Acts (CAA).[6] The major provisions of both the international and domestic legislative regime will be discussed in this article.

International commercial arbitration

The IAA was the "fulfilment of Australia's obligations arising from accession to the (New York) Convention (NYC)".[7] The NYC is one of the most successful UN conventions or treaties ever made with some 149 State parties having acceded to it.[8]

The two primary matters with which the NYC is concerned are:

- the recognition of, and giving effect to, *arbitration agreements*; and
- the recognition, and enforcement, of *international (non-domestic) arbitral awards*—
  which it does by:
  - — requiring a court of a Contracting State to refer a dispute which has come before it, and which falls within the scope of an arbitration agreement, to arbitration;[9] and
  - — enabling the successful party to an arbitration to enforce the award if the losing party will not voluntarily comply with it[10] (there being only a limited number of grounds by which enforcement of an award may be refused).

Among the IAA's stated objects are to give effect to Australia's obligations under the NYC, the Model Law and the ICSID Convention[11] (each of which are annexures to the IAA).

By virtue of s 16 of the IAA the Model Law has the force of law in Australia and under s 21 of the 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.[12]

The domestic situation

In the domestic context, at the Standing Committee of Attorneys-General (SCAG) meeting held on 7 May 2010, it was agreed to implement the model Commercial Arbitration Bill 2010 based on the Model Law as uniform domestic arbitration legislation. The previous legislative regime of uniform Acts in force in Australian States and Territories[13] had several marked differences to the Model Law.[14]

The paramount objective of the CAA is "to facilitate the fair and final resolution of commercial disputes without unnecessary delay or expense" (s 1C CAA). The CAA is to be interpreted "so that (as far as practicable) the paramount object is achieved" (s 1C(3) CAA).

New South Wales was the first state or territory to enact the model Bill as the Commercial Arbitration Act 2010 (NSW).[15] The Victorian legislation, the Commercial Arbitration Act 2011 (Vic)[16] came into operation on 17 November 2011.[17] The other States and Territories (except for the ACT have followed suit).[18]

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The IAA and the CAA each deal with the two principal matters addressed by the NYC:

- the enforcement of foreign arbitration agreements — by s 7 of the IAA and s 8 of the CAA; and
- the recognition, and enforcement, of foreign awards — by s 8 and 9 of the IAA and ss 35 and 36 of the CAA.

Stay of proceedings

Under s 7 of the IAA, if:

- proceedings are instituted by a party to an arbitration agreement (to which the section applies) against another party to the agreement; and
- the proceedings involve the determination of a matter that under the agreement is capable of settlement by arbitration,

the court must, on application of a party to the agreement, stay the proceedings (or that part which falls within the scope of the agreement). This is the case provided that in substance, the arbitration agreement, or one of the parties has a connection to Australia or a Convention country,[19] and is applicable unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Section 8 of the CAA is in similar terms providing that:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Enforcement of awards

Section 8 of the IAA provides that (subject to Pt II), a foreign award:[20]

- is binding for all purposes on the parties to the arbitration agreement in pursuance of which it was made; and
- may be enforced in a court of a State or Territory or the Federal Court, as if the award were a judgment or order of that court.

The equivalent CAA provision is s 35 which is to the effect that an arbitral award, wherever made in Australia, is to be recognised as binding and, on application in writing to the Court, is to be enforced subject to the provisions of this section and s 36.

Limited grounds for refusing to enforce a foreign/domestic award

For foreign awards, the court may only refuse enforcement in the circumstances mentioned in subss (5) and (7) of s 8 of the IAA, which are similar to, and drawn from, the grounds referred to in Art V(1) and (2) NYC and Art 36(1) and (2) of the Model Law.[21] The comparable provision of the CAA listing the grounds upon which recognition and enforcement of an award may be refused is s 36 (based on Art 36 of the Model Law) which is replicated in s 34 of the CAA which provides for the setting aside of awards.

Enforcement of foreign, and "non-foreign", and domestic award

The procedure for seeking enforcement of a foreign award is set out in s 9 of the IAA, and is similar to Art IV of the NYC and Art 35 of the Model Law. The comparable provision of the CAA is s 35.[22]

Surprisingly, there is no provision of the IAA which specifically vests jurisdiction in any court to enforce a *non-foreign award* made in an international commercial arbitration under the IAA and the Model Law, that is, an award made by an arbitral tribunal in an international commercial arbitration in Australia, as opposed to in a country other than Australia. However by virtue of s 39B(1A)(c) Judiciary Act 1903 (Cth), it has been held that the Federal Court has original jurisdiction in relation to such awards as the relevant matter arises under a law made by Federal Parliament.[23]

Setting aside a foreign award

Jurisdiction to set aside an arbitral award is pursuant to Art VI of the NYC and Art 34(2) of the Model Law which of course is given force of law by s 16 of the IAA. Such jurisdiction is vested in the Federal Court of Australia, or if the place of arbitration is in a State, or Territory, the Supreme Court of that State or Territory, s 18 of the IAA.[24] An application to set aside a foreign award pursuant to Art VI of the NYC or Art 34 of the Model Law, as far as possible, must comply with the requirements of Ch II, rr 9.04 and 9.05.[25]

Domestically an application to set aside an award is made under s 34 of the CAA, or under s 34A by way of an appeal to a court on a question of law arising out of an award if the parties agree (before the end of the appeal period referred to in s 34A(6) that an appeal may be made under such section).

Curial assistance to the arbitration process

Under both the IAA and the CAA, Australian courts provide assistance to the arbitration process in various ways, including by referring a matter to arbitration (s 7 of the IAA; s 8 of the CAA; Model Law, Art 7); recognition and enforcement of interim measures issued by the arbitral tribunal (Art 17H of the Model Law; s 17H of the CAA); application to the court to set aside the award (Art 34 of the Model Law; s 34 of the CAA); appeal to the court on a question of law arising out of an award if the parties agree; and application to the court for recognition and enforcement of awards (s 9 of the IAA and Model Law, Arts 35 and 36; ss 35 and 36 of the CAA).

Conclusion

Australia has been enhanced as an arbitration friendly venue by the recent amendments to the IAA[26] and introduction around Australia of the CAA. Superior courts have established specialist arbitration lists to facilitate the resolution of disputes by arbitration. The Australian International Disputes Centre (AIDC) has been established in Sydney as Australia's leading dispute resolution venue. Recently the Melbourne Commercial Arbitration and Mediation Centre (MCAMC)[27] was launched as part of a national arbitration grid of excellence. The recent High Court decision in the TCL case, confirming in emphatic terms the constitutional validity and juridical basis of the IAA, and the increasingly sympathetic attention to international and domestic arbitration by the Federal Court and State Supreme Courts can only serve to assist in this process.

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Footnotes

1. The 1985 UNCITRAL Model Law on International Commercial Arbitration which was revised in 2006.
2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York on 10 June 1958 commonly known as the "New York Convention".
3. M Holmes and C Brown *The International Arbitration Act 1974: A Commentary* LexisNexis Butterworths, Australia 2012 at pp 3–5.
4. see: www.uncitral.org for a full list of Model Law countries.
5. The IAA's constitutionality was confirmed in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 295 ALR 596; 87 ALJR 410; [2013] HCA 5 (TCL); BC201301035.
6. For further reading on the IAA, see above, n 3; D Jones *International Commercial Arbitration and Australia* 2–3 March 2007, available at www.claytonutz.com; and on the CAA, see D Jones *Commercial Arbitration in Australia* (2nd edn) Lawbook Co 2013. See also, D Byrne QC and D Bailey "Arbitration" in *Court Forms Precedents and Pleadings — Victoria* Lexis Nexis, and JK Arthur "Australia: Hub for international arbitration" available at: www.gordonandjackson.com.au; www.disputescentre.com.au; www.acica.org.au.
7. *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; 238 ALR 457; [2006] FCAFC 192; BC200610833 at [39] per Allsop J.
8. New York Arbitration Convention, New York Convention Countries, 2009, www.newyorkconvention.org.
9. Article II NYC.
10. Article IV NYC.
11. International Centre for Settlement of Investment Disputes, the primary purpose of which is to provide facilities for conciliation and arbitration of international investment/investor-State disputes, see: www.icsid.worldbank.org.
12. Until amendments to the IAA under s 21 IAA the parties were free to exclude the Model law by agreement in writing. But note s 20 IAA which provides that where, but for this section, both Ch VIII of the Model Law and Pt II of (the IAA) would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.
13. For example, in the Commercial Arbitration Act 1984 (Vic).
14. Under the previous regime, the courts had a far greater role in the appointment, challenge and removal of arbitrators (for misconduct, s 42 Victorian Act) and in the review of awards.
15. Repealing the Commercial Arbitration Act 1984, was assented to on 28 June 2010.
16. Which repealed the Commercial Arbitration Act 1984.
17. Ss 1AA-47 on 17 November 2011: SG (No 369) 15 November 2011 p 1.
18. South Australian Commercial Arbitration Act 2011, commenced on 1 January 2012. In the Northern Territory, the Commercial Arbitration (National Uniform Legislation) Act 2011 commenced on 1 August 2012. In Tasmania, the Commercial Arbitration Act 2011 was assented to on 16 October 2011 and came into force on 1 October 2012 (Stat Rule 2012, No 77). In Queensland, the Commercial Arbitration Act 2013 commenced on 17 May 2013 (2013 SL No 65). In Western Australia, the Commercial Arbitration Act 2012 was assented to on 29 August 2012 and came into force on 7 August 2013. Only the Australian Capital Territory has no bill yet introduced. See, D Jones *The new Commercial Arbitration Acts: five points to remember*, 8 November 2012, accessed 27 February 2013, www.claytonutz.com.
19. See s 7(1) IAA.
20. A "foreign award" means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.
21. Which are also virtually identical to the grounds for setting aside an award in Art 34 Model Law. See, *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535; 291 ALR 99; [2012] FCA 276; BC201201492 at [108]; *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161; [2012] FCA 696; BC201204809 per Foster J.
22. Various States and Territories have Court Rules to give effect to these provisions (for example, rr 9.04 and 9.05 of Ch II of the Supreme Court (General Civil Procedure) Rules 2005.
23. *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214; BC201208661.
24. See for example *Castel Electronics*, above at [35]. In Victoria, an application to set aside a foreign award pursuant to Art VI

of the NYC or Art 34 of the Model Law (see Pt II and ss 16 and 20 IAA), as far as possible, must comply with the requirements of Ch II, rr 9.04 and 9.05 and see *Civil Procedure Victoria*, Lexis Nexis at [II 9.04.10].

25. For example, in Victoria see *Altain Khuder LLC v IMC Mining Inc* (2011) 276 ALR 733; 246 FLR 47; [2011] VSC 1; BC201100150 which was reversed on appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717; 253 FLR 9; [2011] VSCA 248; BC201106268.

26. International Arbitration Amendment Act 2010 (Cth) see, R Kovacs "Putting Australia on the arbitration map" (2012) 86 LIJ 36.

27. See R Salter "Melbourne Commercial Arbitration and Mediation Centre Launched" in *ACICA June 2014 Review* Australian Centre for International Commercial Arbitration 2014, available at www.acica.org.au.