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AMENDMENTS TO THE INTERNATIONAL ARBITRATION ACT 1974

On 26 October 2018, small but important amendments to the International Arbitration Act 1974 (Cth) came into force. Nick Longley, Partner and Chris Cho, Associate examine the changes.

The amendments will "help ensure that Australian arbitral law and practices stay on the global cutting edge"

On 26 October 2018, the *Civil Law and Justice Legislation Amendment Act* 2017 (Cth) (the "Act") came into force. The Act amended a number of laws but of particular relevance, the Act made four amendments to the *International Arbitration Act 1974* (Cth) (the "IAA"). Although the explanatory memorandum states the object of the Act is to 'make minor and technical amendments to civil justice legislation', the amendments to the IAA may have quite an effect.

The amendments to the IAA deal with:

- identifying the competent courts for the purposes of the Model Law
- the enforcement of Arbitral Awards
- the arbitral tribunal's powers to award costs
- confidentiality in Investment Arbitrations

We summarise the amendments below.

"Competent Courts"

The Model Law designates certain functions to a 'competent court'. These functions are significant and include assistance with the taking of evidence and the recognition and enforcement of arbitration awards.

However neither the Model Law nor the IAA defined what was a competent court.[1] The lack of a definition has lead to disputes on questions of jurisdiction.[2]

The Act addresses this by amending section 18 of the IAA to expressly provide that both the Federal Court and the Supreme Courts of the States and Territories to be 'competent courts'. This is a clear and welcome amendment.

The Enforcement of Arbitration Awards

The Act amends section 8(1) of the IAA to clarify that a foreign award is binding and can be enforced upon 'parties to the award'. Previously, section 8(1) was written to state that foreign awards were binding only on 'parties to the agreement pursuant to which the arbitration award is made'.

This subtle but vital distinction has resulted in conflicting judgments. In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*,[3] the Victorian Court of Appeal held that a party seeking to enforce the award had the burden of proving that the award debtor was a party to the arbitration agreement. In *Dampskilibsselskabet Norden v Beach Building*,[4] the Federal Court in Sydney however held that a party enforcing an award only had to produce the award and the arbitration agreement and could enforce the award even if the award debtor was not named in the arbitration agreement.

Unlike other amendments included in the Act which only apply to arbitration proceedings commenced after 26 October 2018, this amendment applies retrospectively to all arbitral proceedings, whether commenced before or after 26 October 2018.

This amendment brings Australia into line with International practice. The removal of the unnecessary step of showing that the debtor is a party to the arbitration agreement will make it easier to enforce arbitration awards in Australia, particularly in cases where there has been a joinder of parties.

Arbitrator's Power to Award Costs

Under section 27 of the IAA, an arbitral tribunal has the power to award costs. The wording of that power reflects the common law traditions of "taxation of costs" and

1. For example, Articles 17H, 27, 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration
2. *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209
3. *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717
4. *Dampskibsselskabet Norden v Beach Building & Civil Group* (2012) 292 ALR 161

provides for examples of basis of costs assessment which common lawyers will be familiar with.

The IAA has now been amended to delete the reference to "taxation" of costs and to add a new subsection 27(2) which provides that:

> *"in settling the amount of costs to be paid in relation to an award, an arbitral tribunal is not required to use any scales or other rules used by a court when making orders in relation to costs".*

The amendment gives more flexibility on arbitral tribunals to award costs at its discretion, whilst at the same time deleting the outmoded and old fashioned language previously used in the IAA.

Confidentiality Provisions in Investment-Arbitration

Sections 23C to 23G of the IAA sets out a code regulating confidentiality in international arbitration. Under this code, arbitration proceedings are confidential unless the parties agree otherwise.

The amendments to the IAA adds Section 22(2), which in effect states that this code on confidentiality does not apply in relation to arbitral proceedings to which the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration apply. This amendment brings Australian arbitration law into line with Australia's obligations under the Mauritius Convention on Transparency, which Australia signed on 18 July 2017.

The Transparency Rules:

1. require prompt and mandatory disclosure of new arbitrations;
2. establish a regime for the disclosure of arbitration documents;
3. allow for third parties to make submissions on matters relevant to the dispute; and
4. create a default rule that all hearings are public.

This is an important amendment to increase confidence in investor-state arbitrations, which has suffered in recent times and to ensure Australia's compliance with its obligations under international law once the Mauritius Convention is ratified.

However it should be noted that this amendment does not apply to private commercial arbitration and parties to commercial arbitration may take advantage of the confidentiality code if they so wish.

Conclusion and Comments

When presenting the bill at the Senate, the Hon George Brandis QC said that the intention of the bill amendments was to "help ensure that Australian arbitral law and practice stay on the global cutting edge." Certainly all of the amendments are to be welcomed and all will ensure that Australian arbitration law remains in line with

For further information, please contact the authors of this briefing:

NICK LONGLEY
Partner, Melbourne
T +61 (0)3 8601 4585
E nick.longley@hfw.com

CHRIS CHO
Associate, Melbourne
T +61 (0)3 8601 4514
E chris.cho@hfw.com

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