EVERYTHING MATTERS

The Maritime Law Association of Australia and New Zealand
36th Annual Conference 2009

The Australian Review of International Arbitration

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4 September 2009

Australian Review of International Arbitration

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- Review announced November 2008 by Commonwealth Attorney-General, and discussion paper published by his department.
- 24 submissions received from interested parties
- Process of drafting amending legislation has commenced, and Attorney-General's Department hoping to produce an exposure draft very soon.

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Question A

(i) Should the meaning of the writing requirement for an arbitration agreement, in Part II of the *International Arbitration Act* (subsection 3(1)), be amended?

(ii) If so, should elements of the amended writing requirement in article 7 (option 1) of the UNCITRAL Model Law, as revised in 2006, be used in the amended definition?

Responses

- Near unanimous ‘yes’ to A (i)
- Unanimous ‘yes’ to A (ii)

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Question B

Should the *International Arbitration Act* be amended to provide expressly that a court may refuse to recognise and enforce an arbitral award only if one of the grounds listed in subsections 8(5), 8(7) or 8(8) is made out?

Responses

- Widespread agreement with the proposition
- A number of suggestions that discretion of the court should be removed altogether.

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Question C

Should the *International Arbitration Act* be amended to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies?

Responses

- Generally, the response was in favour
- Some concern by a number of parties about the operation of Section 21 (the opt out provision), with suggestions that the section be amended to require opting out to be express.

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Question D

Should the *International Arbitration Act* be amended to reverse the Eisenwerk decision, by adopting a provision similar to subsection 15(2) of the *Singaporean International Arbitration Act*?

Responses

While there was some discussion as to the efficacy of the Singapore legislation, there was a unanimous affirmative response.

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Question E

(i) Should a number of drafting inconsistencies in Part III, Division 3 (sections 22 -27) of the *International Arbitration Act* be remedied?

(ii) If so, should it be clarified that sections 25-27 (relating to interest up to the making of the award, interest on the debt under the award, and costs) apply on an 'opt-out' basis (that is, applying unless the parties agree otherwise)?

Responses

- Again, relatively uncontroversial with a unanimous 'yes' to E(i) and a near-unanimous 'yes' to E(ii).

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Question F

(i) Should the *International Arbitration Act* be amended to adopt recent amendments to the UNCITRAL Model Law?

(ii) If article 7 of the revised Model Law (amending the definition of an 'arbitration agreement') is adopted, should option I (providing a broad interpretation of the writing requirement) or option II (removing the writing requirement) be adopted?

Responses

- General acceptance of the proposal in F(i).
- So far as F(ii) concerned, option 1 was preferred.
- Majority view *against* allowing ex parte preliminary orders.

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Question G

(i) Should the *International Arbitration Act* be amended to allow regulations to be made designating an arbitral institution to perform the functions set out in articles 11(3) and 11(4) of the UNCITRAL Model Law?

Responses

- Majority response to G(i) was in the affirmative, although by no means unanimous.
- Amongst those in favour, most suggested ACICA as the institution.

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Question G (continued)

Would it be appropriate for other functions referred to in article 6 of the UNCITRAL Model Law, such as hearing challenges to arbitrators under articles 13(3) and 14, to be performed by an arbitral institution similarly designated under the *International Arbitration Act*?

Responses

- Approximately 80% of those who considered this question answered in the negative.
- General view was that in practice, the arbitration agreement will cover most of the functions, and that if not, they are best handled by courts.

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Question H

Should the Federal Court of Australia be given exclusive jurisdiction for all matters arising under the *International Arbitration Act*?

Responses

- By far the most controversial issue.
- Passionate defence of territory by State and Territory judges.
- Given the Attorney-General's objective to ensure that the Act provides a 'comprehensive and clear framework governing international arbitration in Australia', it is likely that the draft bill, when produced, will vest exclusive jurisdiction in the Federal Court.

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Question I

Do you have any other comments or recommendations for improving the *International Arbitration Act*?

Responses

- Legislation should provide support for med-arb.
- Confidentiality of arbitration needs to be addressed.
- Foreign lawyers (already permitted to appear before an arbitral tribunal) should be permitted to appear in any court proceedings arising out of an arbitration.

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More detailed reading

http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_ReviewofInternationalArbitrationAct1974

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