CLIFFORD
CHANCE

PCERA
Perth Centre for Energy & Resources Arbitration

Briefing note August 2015

Australian Parliament considering amendments to the *International Arbitration Act 1974* (Cth)

The Australian Federal Parliament is currently considering proposed amendments to the *International Arbitration Act 1974* (Cth) (**IAA**). The recent *Civil Law and Justice (Omnibus Amendments) Bill 2015* (**Bill**) seeks to amend four key aspects of the IAA.

Enforcement of awards from non-New York Convention countries

First, the Bill proposes to repeal section 8(4) of the IAA. Section 8(4) provides that where a foreign arbitral award has been made in a country that is not, at that time, party to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (**New York Convention**), a person may only enforce that award under Part II of the IAA (which regulates the enforcement of foreign awards in Australia) if he or she is, at that time, domiciled or ordinarily resident in Australia or in a country that is a party to the New York Convention.

The effect of repealing section 8(4) will be to allow a foreign award to be enforced in Australia, irrespective of the country where the tribunal was seated. This will enable a broader range of foreign awards to be enforced under the IAA.

To put the amendment into practical context, if an Australian company and a Papua New Guinean company resolve a dispute by arbitration in Port Moresby, and the Papua New Guinean company prevails, the Papua New Guinean company will be able to enforce the award in Australia under Part II of the IAA – it being irrelevant that (i) the award was made by a tribunal seated in Papua New Guinea (a non-New York Convention country) and (ii) the Papua New Guinean company lacks Australian domicile.

It is notable that, if it is adopted, the new position will apply to the enforcement of a foreign award on or after the date the amendment commences, regardless of when the award was made.

Incapacity of a party to an arbitration agreement

Second, the Bill seeks to amend section 8(5)(a) of the IAA. Currently, section 8(5)(a) allows an award debtor to apply to resist enforcement on the basis that he or she was, under the law applicable to him or her, under some incapacity at the time the arbitration agreement was made. If the Bill is passed, the same award debtor will be able to argue against enforcement on the basis that *any* party to the arbitration agreement was under some incapacity at the time the agreement was made.

This lack of personal restriction on the ability to raise the issue of capacity is found in the New York Convention (Article V(1)(a)) and the United Nations Commission on International Trade Law *Model Law on International Commercial Arbitration* (**Model Law**) (Article 34(2)), both of which underpin the IAA.

Consider a situation in which a foreign technology company enters into a software licence (containing an arbitration agreement) with two young technology entrepreneurs: one aged eighteen and the other seventeen. A dispute arises and the foreign technology company obtains an award in its favour. If the technology company seeks to enforce the award

Key issues

- The Bill proposes to make non-New York Convention awards enforceable under Part II of the IAA
- An award debtor may become able to resist enforcement under section 8(5) of the IAA on the basis of the incapacity of *any* party to the arbitration agreement (not just the incapacity of the award debtor itself)
- The Bill seeks to reverse the confidentiality regime under the IAA such that it will apply unless the parties agree otherwise (opt-out)
- Part III of the IAA may soon apply to pre-1989 arbitration agreements.

against the eighteen year old, under the current legislation, he or she may only use section 8(5)(a) to apply to resist enforcement on the basis of his or her *own* incapacity.

However, if the amendment is passed, that eighteen year old may use section 8(5)(a) to apply to resist enforcement of the award on the basis of: (a) his or her own incapacity; (b) the incapacity of the seventeen year old partner; and, if relevant (c) the incapacity of the technology company (for example, due to its insolvency). Thus, the eighteen year old may resist enforcement of the award on the basis his or her partner was not of sufficient age to contract – irrespective of the fact the technology company is not seeking enforcement against the seventeen year old.

An important element of section 8(5)(a) is that proof of incapacity will not, of itself, prevent enforcement. Instead, it will merely engage the court's discretion to refuse enforcement. While similar provisions exist under the Commercial Arbitration Acts of most Australian domestic jurisdictions, the relevant sections have not yet been the subject of detailed judicial analysis. It would be reasonable to expect Australian courts to follow – or at least consider – the approach adopted by courts of other Model Law and New York Convention jurisdictions, such as Hong Kong and Singapore.

Confidentiality

Third, the Bill seeks to change the confidentiality provisions under the IAA – sections 23C to 23G – from being opt-in provisions to *opt-out* provisions. That is, currently, the confidentially provisions only apply where the parties have so agreed in writing ("opted-in"). If the amendment is passed, the rule will be reversed: the confidentiality provisions of the IAA will apply unless the parties have agreed to *exclude* their application ("opt-out").

The explanatory memorandum to the Bill states that the amendment is to (a) enhance the privacy and confidentiality of arbitral proceedings, which is seen as one of the most attractive features of arbitration; and (b) align the position with respect to confidentiality in international commercial arbitration proceedings with that under the State and Territory Commercial Arbitration Acts.

While enhanced privacy and confidentiality will likely be welcomed by users of international commercial arbitration, the response may be different for those active in investment treaty arbitration. This is because there is currently a trend towards greater transparency – and increased public participation – in treaty-based arbitration.[1] If the new confidentiality regime is adopted, it may apply to *ad hoc* investor-State arbitrations conducted in Australia (unless the applicable rules, underlying treaty or investment agreement provides otherwise).[2] Thus, this aspect of the Bill may be at odds with Australia's objective of promoting itself as a seat for international arbitration, a strategy that includes arbitrations involving States.

One solution could be to treat investor-State arbitrations differently under the IAA by keeping the opt-in rule for this limited class of arbitral proceedings. This might help Australia better position itself as a host for investor-State arbitrations under the new generation of trade and investment treaties (such as the Trans-Pacific Partnership Agreement, the negotiations for which are ongoing). Such a rule might also give comfort to those sections of the community that have voiced concern as to the role of "secret" tribunals in Investor-State Dispute Settlement (**ISDS**).[3]

Application of IAA to pre-1989 arbitration agreements

Fourth, the Bill seeks to repeal section 30 of the IAA. Section 30 states that Part III of the IAA (which gives effect to the Model Law and implements certain additional provisions) does not apply in relation to an international commercial arbitration between parties to an arbitration agreement that was concluded before "*the commencement of this Part*", unless the parties have agreed otherwise. This provision was introduced by amendments to the IAA in 1989 and was intended to exclude the application of the (then newly adopted) Model Law based Part III of the IAA to

[1] See for example the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014 (the "**Mauritius Convention on Transparency**").

[2] Depending on the applicable treaty's date of conclusion, the parties to certain *ad hoc* investor-State arbitrations may be taken to have opted-out of this new confidentiality regime by virtue of the new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

[3] See, for example, the submissions made to the Foreign Affairs, Defence and Trade Legislation committee in support of the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*.

arbitration agreements entered prior to that date. However, Part III of the IAA underwent further amendment in 2010. As a result, it has not been entirely clear whether the words "*the commencement of this Part*" are a reference to 1989 or 2010. The repeal of section 30 will remove this uncertainty. One consequence of this will be that any arbitration agreements entered prior to 1989 will now change from being governed by the pre-1989 (English-based) arbitration legislation to being governed by Part III of the IAA in its current form. This could be significant for parties to legacy long-term contracts, such as those that are found in the energy and resources sector.

In addition to these substantive amendments, the Bill will also change the heading of Part II of the IAA from "Enforcement of foreign awards" to "Enforcement of foreign arbitration agreements and awards". While somewhat minor, the change better reflects the content of Part II and should assist users to navigate the legislation with greater ease.

Clifford Chance Contacts

Ben Luscombe
Partner
T: +61 8 9262 5511
E: ben.luscombe@cliffordchance.com

Cameron Hassall
Partner
T: +852 2825 8902
E: cameron.hassall@cliffordchance.com

Jenni Hill
Partner
T: +61 8 9262 5582
E: jenni.hill@cliffordchance.com

Tim Grave
Partner
T: +61 2 8922 8028
E: tim.grave@cliffordchance.com

Dr Sam Luttrell
Counsel
T: +61 8 9262 5564
E: sam.luttrell@cliffordchance.com

Dr Romesh Weeramantry
Counsel
T: +852 2825 8938
E: romesh.weeramantry@cliffordchance.com

Peter Harris
Associate
T: +61 8 9262 5581
E: peter.harris@cliffordchance.com

Isuru Devendra
Associate
T: +61 8 9262 5528
E: isuru.devendra@cliffordchance.com

PCERA Contact

The Secretariat
T: +61 8 9220 0588
E: thesecretary@pcera.org