Australia's International Arbitration Act Amendments: Rejuvenation by a Thousand Cuts?

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On 22 March 2017, with minimal fanfare, the Civil Law and Justice Amendment Legislation Bill 2017 ("2017 Bill") was introduced into the upper house of the federal Parliament. Buried within this omnibus Bill were four proposed reforms to the International Arbitration Act (IAA), renamed as such in 1989 when Australia was one of the first jurisdictions to adopt the UNCITRAL Model Law (after having incorporated the New York Convention in 1974). This follows other amendments to the IAA enacted in 2015 through two other omnibus Bills.

The series of recent amendments raises the question of whether law reform in this field is better achieved through such a piecemeal process, or instead in a more comprehensive fashion involving greater public consultation.

The 2015 Amendments

The Civil Law and Justice Legislation Amendment Act 2015 had basically filled a "legislative black hole" for certain pre-existing international arbitration agreements. This complexity arose from the interaction of the 2010 IAA amendments with new uniform Commercial Arbitration Acts (CAAs) made applicable only to domestic arbitrations.

The Civil Law and Justice (Omnibus Amendments) Act 2015 addressed another problem with the 2010 IAA amendments highlighted soon after the new CAAs were enacted over 2010-17. The former had added provisions providing for confidentiality in international arbitrations, but on an opt-in basis, unlike almost all other provisions added to the Model Law framework. By contrast, the CAAs had provided a similar confidential regime for domestic arbitrations, but on an opt-out basis.

Commentators soon queried this inconsistency, against the backdrop of significant survey and more anecdotal evidence that confidentiality was perceived as one (mid-level) attraction of international arbitration over litigation of commercial disputes. It also seemed ironic that the new CAAs in effect had reversed the decision of the High Court of Australia in *Esso v Plowman* [1995] HCA 19 (arising from a domestic arbitration) that there was no presumption of confidentiality, yet the IAA in 2010 did not equally create a presumption of confidentiality for international arbitrations seated in Australia. The Civil Law and Justice (Omnibus Amendments) Act 2015 belatedly aligned the IAA with the CAA position, by making confidentiality similarly available on an opt-out basis. This set of legislative reforms in 2015 also made two other less practically significant amendments, which simply aligned the IAA more closely with the New York Convention regime for enforcing foreign arbitral awards.

The 2017 Bill

Practitioners and commentators on international arbitration in Australia were mostly caught by surprise by the 2015 amendments. Nor was there much forewarning of the third and latest tranche of legislative amendments. The federal Attorney-General's Explanatory Memorandum for the 2017 Bill explains (at para 10) that these: (i) specify the 'competent court' for Model Law purposes, (ii) "clarify procedural requirements" for foreign award enforcement, (iii) modernise arbitrators' powers to award costs, and (iv) deal with confidentiality related to arbitrations subject to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

The first amendment corrects another drafting error dating back to when Part III of the IAA gave force of law to the Model Law from 1989. Namely, Section 18 still does not specify that the Federal Court (in addition to the State and Territory Courts) is a "competent court" for the Model Law award enforcement regime under

Articles 35 and 36 (or to assist tribunals in taking evidence under Article 27). Nor is the Federal Court specified for the recognition and enforcement of interim measures under Article 17H, added in the 2010 amendments.

The Explanatory Memorandum (at para 307) notes that this omission "has led to costly and confusing litigation as to which courts have jurisdiction". This presumably refers to the protracted *TCL v Castel* saga, where the Federal Court had to invoke instead the Judiciary Act to deal with a challenge to enforcement of an Australia-seated international arbitration award (see more here). Such awards remain relatively rare, but now that Australia is belatedly attracting some international arbitrations, it is high time to fix this drafting problem.

The second proposed amendment also responds to calls to align the IAA regime with the New York Convention, by amending s8(1) to clarify that a foreign award is binding between the "parties to the award" rather than between the "parties to the arbitration agreement" pursuant to which it is made. The Explanatory Memorandum notes (paras 293-5) that:

> *"In Altain Khuder [(2011) 282 ALR 717] the Victorian Court of Appeal held that [s8(1)] may require the award creditor seeking to enforce an award against a non-signatory to the arbitration agreement to do more than simply produce the award and the putative arbitration agreement in an application to enforce a foreign award, for the onus to shift onto the award debtor to demonstrate why the award should not be enforced. … In Dampskibsselskabet [(2012) 292 ALR 161] Foster J declined to follow the Victorian Court of Appeal in Altain Khuder, holding that the simple evidential onus cast upon the award creditor by sections 8 and 9 of the Act is to produce the award and the putative arbitration agreement without more, even if the award debtor is not named in the arbitration agreement relied on. This decision is in line with international practice and represents the approach which should be adopted in all Australian jurisdictions."*

This is again a welcome reform, as commentators have criticised the approach adopted by the Victorian Court of Appeal.

Regarding the third proposed amendment, the Memorandum notes (at para 318) that IAA s27 currently

> *"refers to an arbitral tribunal's power to make an award as to costs and to tax or settle the amount of costs to be paid and to award costs as between party and party or solicitor and client. The references to taxing costs on a party and party or solicitor and client basis are outmoded and inflexible in contrast to current practice in international arbitration."*

Lastly, the Memorandum explains (from para 311) that s22 will be amended to exclude the opt-out confidentiality provisions where parties to an Australia-seated arbitration have agreed to apply the UNCITRAL Transparency Rules. The Memorandum explains at paras 312-3 that:

> *"Australia is not presently a party to the Transparency Convention. However, should the parties to an investment arbitration, which is to be conducted subject to the Transparency Convention, agree that the seat of the arbitration should be in Australia, this amendment would prevent any conflict between the IAA and the Transparency Convention. This broadens the scope of arbitration work which can be conducted in Australia under the IAA."*

The Attorney-General does not indicate that his Department from at least 2 March 2017 was undertaking informal consultations as to whether Australia should ratify the Convention (which will enter in force six months after Switzerland's ratification on 18 April 2017). Ratification is important to give the revised s22 more "bite", since Australia has many earlier BITs allowing arbitration under UNCITRAL Rules but lacking transparency provisions, including the failed challenge by Philip Morris Asia.

Nonetheless, even Australia's recent treaties allowing investor-state arbitration have not adopted the Transparency Rules – preferring instead to build in specific transparency provisions. Some commentators on the Bill have referred to the Korea-Australia FTA, signed on 8 April 2014. However, Side Letters exchanged on that date confirm that both countries will consult as to the future application of the Transparency Rules, but until any separate agreement they will not apply. There are similar Side Letters for the China-Australia FTA, signed on 17 June 2015.

Concluding Remarks

Overall, the latest set of IAA amendments usefully completes rectification of

various legislative drafting errors and uncertainties associated with Australia's incorporation of international arbitration instruments. The 2010 amendments had already added s8(3A) to clarify that the listed grounds for refusing enforcement of foreign awards were exhaustive, as envisaged by the New York Convention.

Yet at least some of these problems seem to have arisen because of insufficient public consultation. Only the 2010 amendments involved the Attorney-General releasing an Issues Paper and eventually uploading an initial round of public submissions. Even then, the government made further changes to its own Bill, without it being referred to a select committee. That step could have allowed another round of submissions, as well as oral hearings, to permit deeper analysis (including how best to deal with confidentiality, including associated court proceedings). Nor have the three subsequent sets of amendments been referred to a select committee, or even subject to a prior departmental issues paper or exposure draft. The respective Attorneys-General also have not taken the opportunity to task the Australian Law Reform Commission (ALRC) to examine such issues, in contrast for example to New Zealand in 2013.

Australia is now left with calls to deal with several more difficult IAA reform questions, reiterated by Albert Monichino SC in 2015. The government should therefore heed a recent call from the NSW Law Society to engage the ALRC for a more comprehensive review of "laws that hamper Australian courts and arbitrators being able to efficiently and effectively deal with cross-border disputes".