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Australian Domestic Arbitration: One Country United under the Model Law

Janet Walker, Doug Jones · Thursday, September 1st, 2022

A little over a decade has passed since the introduction of the Model Law on International Commercial Arbitration in Australia as the framework for uniform domestic arbitration legislation. Before this, the various enactments of domestic legislation in the Australian states and territories had followed English Acts. For example, the New South Wales 1902 Arbitration Act was based on the *Arbitration Act 1889* (UK).

However, in the 1960s, there emerged a movement for reform to adopt a uniform legislative framework for domestic arbitration. This was achieved for the first time between 1984 and 1990 when all Australian states and territories enacted the draft Arbitration Bill 1976 (Cth).

This regime of uniform Acts was criticised for enabling undue judicial intervention and for failing to accord with international best practice. Following further efforts to reform the legislation, it was decided in 2010 to depart from the practice of relying on English legislation and to adopt the Model Law.

Amendments made to the Model Law

The Model Law was adapted slightly for the purpose of domestic arbitration in Australia. For example, provisions were introduced to facilitate court assistance for obtaining subpoenas. In place of the presumption of a three-person tribunal where the number of arbitrators was not specified in the arbitration agreement, the legislation adopted a presumption of one arbitrator.

Further, while the Model Law states that court decisions, such as those relating to the termination of an arbitrator's mandate "shall be subject to no appeal", the domestic arbitration Acts provides for a limited avenue for review. This right to review is, however, qualified to where the decision was not within the limits of the Court's authority.

Another significant amendment was the provision for appeals on a question of law in s 34A of the uniform domestic legislation. This is largely modelled on s 69 of the *Arbitration Act 1996* (UK), but there is a key difference between the Australian and English approaches. Namely, Australian domestic legislation requires the parties to agree in advance to permit appeals and requires leave of the Court, whereas party agreement and leave are alternatives under the English approach. Cases such as *Ashjal Pty Ltd v Elders Toepfer Grain Pty Ltd* and *ASC AWD Shipbuilder Pty Ltd v*

Ottoway Engineering Pty Ltd confirm that the parties' agreement is critical and will not readily be implied.

Advantages of adopting the Model Law

Apart from these amendments, the Commercial Arbitration Acts remain largely consistent with the framework provided by the Model Law, and this is the true genius of the uniform domestic legislation.

Section 2A of the Acts promotes uniformity between the application of the domestic arbitration legislation and the application of the provisions of the Model Law. Moreover, s 2A(3), an addition to the model statute, provides that reference may be made to documents related to the Model Law, including documents produced by UNCITRAL and the working groups. Indeed, the provisions of Australia's domestic arbitration legislation have been regarded by courts as having an "international provenance". The effect is that there is now a gateway for every Australian practitioner and every Australian court into the leading jurisprudence in the field from around the world.

Several recent Australian cases exemplify how guidance can be drawn from other Model Law jurisdictions.

For example, in *Spaseski v Mladenovski*, Martin J described statements of principle by Menon CJ of the Singapore Court of Appeal regarding the policy of minimal curial intervention in *AKN v ALC* as "particularly apposite" when considering s 18 of the uniform domestic arbitration legislation. *AKN v ALC* was also referred to in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd*, where Croft J took the same position as the Singapore Court of Appeal, that the right of parties to be given a full or reasonable opportunity to present their case is not breached where a party chooses not to pursue a point.

Australia's contribution to growing international jurisprudence

Just as Australian practitioners can take guidance from international jurisprudence, Australian courts have contributed to the debate and discussion on issues arising under the Model Law framework, which can influence international arbitral practices.

One example is the Victorian Supreme Court case of *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd*, which discussed two main issues.

First, the case looked at the power of the Court to order interim measures in relation to arbitration proceedings. Lyons J held that the circumstances in which this power will be exercised are limited to where such an order is effectively the only means of protecting the position of the party before the tribunal is convened.

The second issue discussed in *Transurban v CPB Contractors* concerned the obligation of courts to refer matters to arbitration unless they find that the arbitration agreement is null and void, inoperative, or incapable of being performed. Affirming the jurisdiction of the arbitral tribunal,

Lyon J found that questions about the validity, enforceability and applicability of a clause, which prevented a related dispute from progressing, were proper matters for determination by the arbitral tribunal.

Conclusion

The publication by the authors of this post[1)] of the third edition of *Commercial Arbitration in Australia* – now renamed to emphasise its foundation in the Model Law – seeks to capture the influence of international best practice in the field and highlight options for the way forward in a number of key areas. Indeed, Australian practitioners are now faced with an opportunity to develop and export arbitration legal services, and to promote Australia as a seat for international arbitration as the domestic and international regimes for arbitration are clearly and closely aligned.

References

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