The New Framework for International Commercial Arbitration in Australia

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THE NEW FRAMEWORK FOR INTERNATIONAL COMMERCIAL ARBITRATION IN AUSTRALIA[1]

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Introduction

In Australia, the *International Arbitration Act 1974* (Commonwealth of Australia) (the 'IAA', or 'the Act') establishes the basic parameters and framework for private international commercial arbitration.[4] It adopts and applies the UNCITRAL Model Law on International Commercial Arbitration of 1985[5] (the 'Model Law'), as well as applying the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958[6] (the 'New York Convention', or the 'Convention').[7]

A recent review of the IAA's international arbitration framework commenced with a Discussion Paper released by the Attorney-General of the Commonwealth Government.[8] The Paper was intended to stimulate discussion on the best way to make arbitration in Australia relatively more 'efficient, effective and economical', by ensuring that domestic procedure and the IAA are at the forefront of international arbitral best-practice. Over 30 submissions were received, from both domestic and international organisations. As a result, an amending Bill,

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[1] The authors would like to thank Drossos Stamboulakis, Associate to Justice Croft, for his invaluable assistance in the preparation of this paper.
[2] BEc LLM (Monash), PhD (Cantab).
[3] BA LLB (Syd), LLM (LSE).
[4] While the IAA also applies to investment disputes (Part IV, ss 31-38), this is outside the scope of this paper.
[5] United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration 1985 (as adopted by UNCITRAL on 21 June 1985). Adopted by the UN General Assembly 11 December 1985 (General Assembly Resolution 40/72), with revisions (as amended by UNCITRAL and adopted on 7 July 2006) adopted by the UN General Assembly on 4 December 2006 (General Assembly Resolution 61/33). The 2006 revisions have not been adopted by the Australian IAA.
[6] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).
[7] Provisions relating to the New York Convention and the Model Law, respectively, are contained in Part II (sections 3–14) and Part III (sections 15–30) of the IAA.
[8] Australian Attorney-General, the Hon Robert McClelland MP 'Review of the International Arbitration Act 1974', November 2008.

titled the International Arbitration Amendment Bill 2009, was recently introduced in Parliament.[9]

Amendments of the 2009 Bill

As the explanatory memorandum to the IAA Bill explains, the amendments to the IAA focus on four main areas:

1) the application of the Act and the Model Law;
2) amendments concerning the interpretation of the Act;
3) amendments to provide optional provisions to assist the parties to a dispute; and
4) miscellaneous amendments to improve the operation of the Act.

Each will be considered in turn. Focus will primarily be on the new provisions that the Bill provides, and the effect – intended or unintended – that they may have. Reference will also be made to a number of provisions that have not been amended or added, where doing so would serve to enhance Australia's position as an arbitral hub in the Asia-Pacific.

The IAA and the Model Law

Together with the New York Convention, the Model Law forms the 'bedrock' of international arbitration. While there is some degree of overlap between the Convention and the Model Law – particularly in relation to enforcement provisions – most critically, the Model Law is not a treaty. It is instead intended to be enacted by national governments as domestic legislation. However, it still represents international consensus as constructed by its UNCITRAL drafters. It is also updated more frequently, and is more recent, comprehensive and favourable to arbitration than the Convention. The Model Law allows parties to arbitration broad freedom to tailor arbitral procedure. Where applicable, the Model Law governs all stages of the arbitral process: from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, and through to the recognition and enforcement of the arbitral award. It aims to modernise and standardise arbitral procedure to best match the 'particular features and needs of international commercial arbitration'.[10]

The Australian IAA currently adopts the 1985 version of the Model Law. In 2006 an amended version of the Model Law was approved by UNCITRAL. To date, only four countries – Peru,

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[9] Introduced into Parliament on 25 November 2009. It is currently at the second reading stage, but will not have any chance to progress further until Parliament resumes sitting in 2010.
[10] The purpose of the Model Law, as stated by UNCITRAL on the Model Law website: <*http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html*>

Mauritius, New Zealand and Slovenia – have adopted the 2006 revisions.[11] If the Bill is passed in its current form, it would make Australia the 5th country to enact the 2006 version of the Model Law. The 2009 IAA Bill applies the 2006 amendments, and makes four major changes to its application:

1) Clarifying that interim measures, with the exclusion of 'preliminary' (that is, *ex parte*) orders, are governed by the 2006 UNCITRAL amended version of the Model Law
2) Enacting a provision that states that the Model Law 'covers the field'
3) Conferring (concurrent) jurisdiction on the Federal Court of Australia to be involved in the application of the Model Law
4) Outlining a prescribed appointing authority under the Model Law

A Interim measures (excluding ex parte orders)

Interim measures, also known as temporary measures of protection, are similar to restraining orders or injunctions. The current IAA, reflecting the 1985 Model Law, provides limited guidance to courts and arbitrators on when and what type of interim measures to grant. It also restricts an arbitrator's ability to grant such orders to the 'subject matter' of the dispute. Under the current regime, there is a fundamental flaw with orders granted by an arbitrator: absent voluntary compliance, there is no provision in the Model Law or the New York Convention for courts to enforce such orders. Unless an order can somehow be relabelled as an 'award', it will not benefit from the enforcement provisions of the Convention or the Model Law. Thus, in Australia, unless the interim order granted by the tribunal is 'finally determinative' of at least some issues, courts will not enforce it.

In a practical sense, this is generally not fatal, for two main reasons. First, parties are likely to voluntarily comply. It is not the wisest move to offside the arbitral body that is also deciding the merits of your dispute, by refusing to comply with an order granted by it. Second, while wasteful and inefficient, parties can simply approach a court and (re)seek the same order. However, it is at least arguable that seeking and obtaining an order from an arbitral tribunal gives rise to an issue of res judicata. That is to say, it is possible that a court may construe the fact that a tribunal has handed down an order as meaning the matter is already ruled upon, and thus will refuse to act. The contrary view is that a non-enforceable order cannot be said to represent a final determination. In a practical sense, absent voluntary compliance, no issue of res judicata would a rise. Nonetheless, if the former approach were taken, this would present significant problems where parties do not voluntarily comply, with the applicant for

[11] For current adoption status, see UNCITRAL website: <*www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html*>.

the order essentially being denied an enforceable right. As has been suggested elsewhere,[12] this uncertainty is likely to encourage parties to seek an order by a court, even where not entirely necessary, expeditious or cost-effective – for both the parties themselves, but also for judiciary.

The IAA Bill confronts this issue directly, adopting almost all the 2006 amendments to the Model Law, bar that of Article 17B (*ex parte* orders). These amendments clarify that an interim measure is 'temporary', and set out guidance as to the types of orders which can be granted (Article 17(2)). A broader mandate is granted to arbitrators, removing the need for interim orders to relate to the 'subject matter of the dispute' (Article 17). The provisions also explicitly allow an arbitral tribunal to require security or order costs relating to the measure, against the party requesting an interim measure of protection (Articles 17E and 17G). The power of courts to grant interim measures is also made more explicit. Courts are given the same power that they have in domestic proceedings, as long as the court 'exercise[s] such power in accordance with its own procedures in consideration of the specific features of international arbitration' (Article 17J).

Perhaps most importantly, in relation to enforcement, the new Article 17H states that an interim measure issued by an arbitral tribunal 'shall be recognized as binding' and 'enforced upon application to the competent court'. This resolves any potential need to attempt to relabel an interim measure as an award to benefit from the enforcement provisions of the Model Law or the Convention. This amendment will reinforce Australia's support for simple arbitrations – reducing the need for (and the consequent local-complexity of) judicial involvement, unless and until it is required.

B Ex parte orders

Section 18B of the IAA Bill, titled 'Article 17B - preliminary orders', expressly disallows *ex parte* orders:

> 'Despite Article 17B of the Model Law:
>
> a) no party to an arbitration agreement may make an application for a preliminary order directing another party not to frustrate the purpose of an interim measure requested; and
> b) no arbitral tribunal may grant such a preliminary order.'

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[12] Clyde Croft and Bronwyn Lincoln, 'International Commercial Arbitration / The role of the courts; enforcement of arbitration awards and anti-arbitration injunctions', Federal Court of Australia International Commercial Litigation and Dispute Resolution Conference (27 and 28 November 2009).

The submissions the Attorney-General received on whether or not to allow for ex parte measures were mixed. When such measures were first considered by UNCITRAL, they also proved extremely controversial. As discussed elsewhere,[13] given the limited options for enforcement pre-2006 Model Law, there was little practical rationale in allowing ex parte orders. However, if the IAA Bill amendments come into force, courts are bound to enforce arbitral orders. As a result, there does not seem to be any practical objection to their provision. The primary rationale expressed against ex parte orders is that they are contrary to the consensual nature of arbitration. This line of reasoning is open to question. Article 17B allows parties to opt out of such power being given to arbitrators, if so desired. This is fully consistent with the consensual nature of arbitration, and being set out as an 'opt out' provision is practically sensible. This will be discussed further below.

C Model Law covers the field

The IAA Bill repeals s 21 of the IAA. This is intended to clarify that adoption of arbitral rules by the parties does not constitute 'opting out' of the Model Law. That is to say, by adopting a set of procedural rules, parties cannot be held to have opted out of the provisions of the Model Law. This arises from the decision of *Eisenwerk v Australian Granites Ltd* [2001] 1 Qd R 461 ('Eisenwerk'). This case is generally regarded as wrongly decided, and it is unlikely the decision would be followed in any subsequent cases. The submissions to the IAA review largely echo this point.

However, by repealing s 21, the IAA Bill goes one step further – and perhaps too far. It removes entirely the ability of parties to exclude the Model Law. The reasoning for doing so as suggested by the explanatory memorandum, is that allowing such exclusion creates 'significant difficulties that cannot be easily remedied without complex litigation'. This too is open to question – particularly as many other arbitral jurisdictions do not see (or manage to deal with) this problem. In addition, the Australian States and Territories are also considering updating and modernising their Commercial Arbitration Acts ('CAA').[14] With s 21 repealed, cautious parties (a description which would befit most Australian lawyers when dealing with international arbitration) cannot choose to apply, for example, the (arguably) more familiar and close-to-home procedural provisions of the CAAs as a 'half way' measure. In addition, disallowing exclusion of the Model Law is contrary to the principle of party autonomy – something that the IAA review itself recognises as a valid rationale for not allowing arbitral tribunals to grant preliminary (ex parte) interim measures.

[13] Id.
[14] *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1990* (QLD).

A clearer and possibly more preferable position is put in Singapore's International Arbitration Act (the 'Singapore IAA'). Under s 15, parties can choose to exclude the Model Law, the domestic Arbitration Act, or particular Parts of the Singapore IAA, as long as 'expressly agreed'. In section 15(2) an express reference was made to clarify that in situations like that seen in Eisenwerk:

> 'For the avoidance of doubt, a provision in an arbitration agreement referring to or adopting any rules of arbitration shall not of itself be sufficient to exclude the application of the Model Law or this Part to the arbitration concerned.'

The solution employed in New Zealand also represents another possibly preferable solution. Under Article 19, 'parties are free to agree on the procedure to be followed by the arbitral tribunal'. If no agreement is forthcoming the arbitral tribunal may, subject to the provisions of the New Zealand Act, 'conduct the arbitration in such manner as it considers appropriate'. There is no reason why the Model Law should apply to all disputes as the applicable arbitral law. Parties should have the freedom to choose to apply whatever rules of procedure or substantive law (if such a distinction is helpful) to 'their' arbitral process. While this may create some complexities, they are matters which should be able to be resolved by the arbitrator.

The IAA Bill also introduces a new s 21. It clarifies that where the Model Law applies to an international commercial arbitration, State or Territory laws do not apply. This is, without a doubt, a necessary move. Doing so removes the uncertainty arising out of potentially conflicting domestic legislation. Where the Model Law applies, it is now clear that it applies to the exclusion of all other domestic legislation purporting to govern 'arbitration' (that is, in Australia, the CAAs) – whether it be during the course of the dispute itself, or during recognition and enforcement proceedings. However, there is no reason that this need come at the expense of being able to opt out of the Model Law altogether. The solution of the Singapore IAA, outlined above, is a more straightforward and easily accessible method of doing so.

D Court or authority for applying the Model Law

The IAA Bill repeals s 18 of the Act, and substitutes a new s 18. There are two major changes that this section introduces:

i. The federal court is given concurrent jurisdiction to perform judicial functions under the Model Law
ii. Provision is made for a prescribed authority to appoint arbitrators

i. Federal Court's jurisdiction

A clear aim of the IAA Review was to empower the Federal Court to perform functions under the Model Law. The discussion and submissions focused on whether this power should be concurrent with the role Supreme Courts in Australia already had – or if it should be exclusive to the Federal Court. The new Bill adopted a concurrent approach. The relevant part of the new section 18 reads:

> '(3) The following courts are taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in Articles 13(3), 14, 16(3) and 34(2) of the Model Law:
>
> (a) if the place of arbitration is, or is to be, in a State—the Supreme Court of that State;
> (b) if the place of arbitration is, or is to be, in a Territory:
> (i) the Supreme Court of that Territory; or
> (ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory;
> (c) in any case—the Federal Court of Australia.'

The second reading speech of the IAA Bill foreshadows that granting the Federal Court concurrent jurisdiction may only be a temporary path to exclusive jurisdiction: "the government has decided not to proceed with the conferral of exclusive jurisdiction on the Federal Court of Australia *at this time*' (emphasis added).[15] The intended rationale was to create more consistent jurisprudence in applying the IAA – particularly as the State and Territory courts had their own domestic CAAs, which may have confused the interpretation of the Model Law (which, as discussed further below, must be interpreted in its international context). Given, however, that there now appears an intention by States and Territories to adopt the Model Law as a basis for redrafting the domestic arbitration law, this rationale may be minimised. But there may always remain an inherent tension between domestic and international interpretation.

[15] Page 16 of the Attorney-General's second reading speech for the IAA Bill, delivered on 25 November 2009.

Either way, the provision of concurrent jurisdiction ensures that, to some extent, all commercial Courts in Australia become more familiar (beyond an enforcement context) with the provisions of the Model Law – and the particular intricacies and complex nuances of international arbitration. This assists in the effective administration of justice. This is particularly the case given the broad international scope of arbitration, requiring a significant and continued degree of engagement, background experience and centralised knowledge and understanding of not only domestic arbitration legislation and practice, but also the international and comparative context in which arbitration operates.

In the long run, concurrent jurisdiction allows courts to 'compete' for arbitral custom. Where parties have a choice, they can choose to go to the most efficient and effective court, ensuring that the judiciary remains at the forefront of international arbitral best practice. As envisaged by the Attorney-General, this process may be assisted by the creation of specialist Arbitration Lists. This approach has proven very successful in other Asia-Pacific arbitral jurisdictions, such as in Singapore. In addition, the creation of specific Practice Notes relating to arbitration may assist in consolidating knowledge and ensuring that both parties and the judiciary have a clear timeline and streamlined process. This will allow the judiciary to best handle the peculiarities of a dispute relating to arbitration. Both these procedural tools allow courts to assist arbitration, cognisant of the unique international policy and commercial underpinnings of arbitration.

ii. Prescribed authority under the Model Law

These provisions would replicate what Hong Kong and Singapore have successfully done – designating The Hong Kong International Arbitration Centre ('HKIAC') and the Chairman of the Singapore International Arbitration Centre ('SIAC'), respectively, as the competent authority to appoint arbitrators.[16] The relevant part of the new section 18 reads:

> '(1) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(3) of the Model Law.
>
> (2) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(4) of the Model Law.'

Thus, the IAA Bill presents the first step in the process of allowing an authority other than a court to exercise appointment functions. However, no body is yet prescribed and some

[16] Section 34C(3) Hong Kong Arbitration Ordinance; Article 8(2) Singapore IAA.

form of regulation would need to be made to empower a specific body to exercise these functions.

As a preliminary note, the wording of the new sub-sections 18(1) and (2) introduces an unexpected degree of complexity. Unlike the provisions in Hong Kong and Singapore, the drafters of the IAA Bill seek to take a middle ground – not (yet) ceding courts' right to appoint arbitrators under the Model Law. The sub-sections specify that "a court *or* authority competent" (emphasis added) can exercise appointment functions. How this works in practice is not made clear. Must the parties first approach the competent authority? Or go to a court? Or do both at the same time? If two appointments are made, one by a court, and one by the competent authority, which is to be preferred? Does the inclusion of the 'or' imply that the court has some sort of supervisory power over the competent authority's choice of arbitrator? If any of the above overlap or judicial oversight is intended, the desired impact should be made explicit.

Furthermore, it is difficult for a court to choose an appropriate arbitrator to hear a complex international dispute. Broadly speaking, there are a few ways courts can attempt to do this. First, by asking the parties to the dispute to generate a list of the arbitrators they would like (perhaps with a CV attached), and then picking from these lists. Secondly, by having a court-managed list of arbitrators that judges can choose from. Thirdly, by judges conferring with a body like the Australian Centre for International Commercial Arbitration ('ACICA'), which would provide recommendations for a suitable arbitrator. Each method has its own benefits and problems. First and foremost, it may be the case that the most suitable arbitrator is not necessarily the one with the most impressive CV. It is indeed difficult to asses the quality and suitability of a potential arbitrator without an extensive degree of background, expertise and knowledge of arbitrator's themselves. This is something in which a professional body will always have an advantage – compared with courts.

The most likely and experienced candidate in this field is a national organisation directed to international arbitration, such as, for example, ACICA. However, the submissions received by the IAA Review raised concerns about the transparency and suitability of a private organisation to handle the appointment of arbitrators. The best way to ensure that appointments by a body like ACICA occur transparently, fairly, and free from partiality, would be to ensure that any arbitral appointment was made public – for example, by publishing a list of all arbitral appointees on a publicly accessible website. This is something that a centralised body could easily do, especially as it developed expertise in the specific task of finding and appointing arbitrators.

Amendments concerning the interpretation of the Act

The IAA Bill introduces a significant number of amendments intended to assist in clarifying how the IAA should apply. Most are minor, procedural and uncontroversial. However, there are a number of important changes.

A Enforcement of foreign awards

Under the new IAA Bill, a foreign award can only be enforced in a court of a State or Territory (s (8)(2)), or in the Federal Court (s (8)(3)), 'with leave of that court'. It does not appear as if this is intended to have any procedural or substantive impact to the previous language of 'as if the award had been made [in that jurisdiction]'. It merely clarifies the process by which enforcement of a foreign award is to occur, and extends enforcement provisions of the Model Law to encompass the new concurrent power of the Federal Court.

The court's discretion – to allow or refuse leave to enforce an award – is constrained by the new s 8(3A), which states that: 'The court may only refuse leave to enforce the foreign award in the circumstances mentioned in subsections (5) and (7)'. They read as follows:

> (5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
>
> > (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him, under some incapacity at the time when the agreement was made;
> > (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
> > (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;
> > (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
> > (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
> > (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

> (7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:
>
> > (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
> > (b) to enforce the award would be contrary to public policy.

These subsections are almost identical to the provisions contained in the Article 34(2) of the Model Law and Article V of the New York Convention.

The addition of the requirement to seek leave to enforce an award may, however, create interpretative problems. Generally, an application for leave is undertaken in two stages. First, the applicant must satisfy the court that leave should be granted. Secondly, the court will consider the merits of the application – though the two applications may be 'wrapped up' together. However, the wording in this provision differs. It is unclear why the provision of leave is necessary at all. The court has no discretion in refusing leave – in order for the court to deny leave, it has to be satisfied that a s 8(5) or s 8(7) exception to recognition and enforcement apply. The only discretion the court has is once a valid ground is shown or found, it then has discretion to choose to enforce the award regardless. In other words, it is a one stage process – to deny leave to enforce requires a consideration of the potential exceptions to enforcement that may apply. Consequently, the wording and structure used is unduly convoluted. It would be better to simply state that awards are enforceable upon application to the court. Another sub-section could outline the only exception to this: namely, that the court only has *discretion* to choose not to enforce an award if the party against whom the award is invoked can prove to the satisfaction of the court that s 8(5) applies, or if the court finds a s 8(7) exception applies.

B Public policy

Courts are granted discretion to refuse enforcement of awards that are contrary to public policy. However, there is little guidance as to what exactly constitutes a breach of public policy. The present IAA in s 19 establishes 'for the avoidance of doubt' that an award will be in conflict with the public policy of Australia if fraud or corruption, or a breach of natural justice has occurred.[17] This provision is maintained (and extended to interim measures) in the IAA Bill, and further extended to apply to both the Convention and the Model Law enforcement provisions (in s 8(7A) IAA Bill). What is unclear is if this specification – unique to Australia - is helpful. It may create a risk that the judiciary may unduly focus on the wording

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[17] Section 19 IAA.

of these particular examples of conflict with public policy, and perhaps unintentionally construe public policy contrary to the prevailing international perspective on the New York Convention.

It is clear that interpreting 'public policy' broadly enough to constitute a merits review would be contrary to the spirit and intent of the pro-arbitration focus of both the Model Law and the Convention. However, it is nonetheless difficult to fix a precise definition to it. The concept of public policy is necessarily dynamic, and varies according to the values of a particular society (as reflected here by judicial interpretation) at a particular point in time. The sections referred to above set what seems to be a relatively high comparative standard for something to be deemed in conflict with the public policy of Australia. This is consistent with reading the proposed s 8(7A) and s 19 together with the proposed objects clause in s 2D (discussed below at D, 'New objects clause – s 2D'). Doing so shows clearly that the IAA intends to promote arbitration, and give effect to Australia's international obligations in the Model Law and the New York Convention. As a result, exceptions to enforceability should be construed narrowly. However, Parliament may also consider going further here: adding the word 'international' before public policy would expand enforceability prospects. It may also assist the interpretative process of courts, by narrowing the scope of definition, and further delineating the elusive concept of public policy.

C Matters to which the court must have regard

The new s 39 provides that any body exercising or performing functions under the Model Law must have regard to the objects of the Act. This also applies to the interpretation of the IAA or the Model Law, or any interpretation of an arbitral agreement or award to which the IAA applies. For the avoidance of doubt, s 39 expressly establishes when a court (or other appointing body) must have reference to the proposed objects of the act in s 2D. However, it is unclear if such precision is necessary. The section can perhaps be simplified by stating that a court charged with exercising a function under the IAA, or interpreting the IAA or any arbitration agreement or award, must consider the objectives under s 2D of the Act.

One potential problem is that courts are only required to 'have regard to' the objects. The IAA does not impose any obligation on courts to decide according to the objects – it is enough that the court considers their application. This appears to be the intended effect of the IAA Bill's drafters, and seems consistent with providing guidance to, but not prescribing the actions of, the judiciary.

D New objects clause

The IAA Bill creates a new objects section in 2D, as part of Schedule 1 – 'Encouraging international arbitration'. It reads:

> The objects of this Act are:
>
> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
> (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting; and
> (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
> (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

Read with s 39, it provides guidance to courts on how to exercise any function under, or interpret, the Model Law or any agreement under it (see new s 39(1) above). Under the new s 39(2):

> '(2) The court of authority must, in doing so, have regard to:
>
> (a) the objects of the Act; and
> (b) the fact that:
> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
> (ii) awards are intended to provide certainty and finality.'
>
> (emphasis added)

This interpretative guidance provides a solid foundation and a clear statement of parliament's intention, which also can be inferred from a close reading of the Act's theoretical underpinnings. This assists courts in deciding how to interpret the unavoidable ambiguities in legislation that must necessarily trade off between being all-encompassing, flexible and modern. One initial potential ambiguity is that it is not clear if these objects are intended to be exclusive. That is, it may be argued that the objectives of the act can only be found in s 2D and s 39(2)(b), and no further intention or objectives can be read in by courts.

Additionally, it seems odd that s 39(2)(b) is separated from s 2D – which is located at the beginning of the Act – and is placed in Part V right at the end. It would appear that the objective listed in s 39(2)(b) is no less valid, and no more special than any of the (a)-(f) of objects listed in s 2D. In the interests of certainty and completeness – and ensuring that s 39(2)(b) is not accidently overlooked, it may be an idea to merge the two sections.

Amendments to provide additional option provisions to assist the parties to a dispute

The IAA Bill amendments provide for a number of new optional measures. The new measures relate to:

- Ability to obtain subpoenas (s 23 IAA Bill)
- Consequences for failure to assist arbitral tribunal (s 23A IAA Bill)
- Default by party to an arbitration agreement (s 23B IAA Bill)
- Disclosure of confidential information (s 23C IAA Bill)
- Death of a party (s 23H)

None of these amendments are particularly controversial, and are indeed supportive of arbitration. In terms of content, these provisions are useful as forming part of a jurisdiction's arsenal to assist arbitration, and to encourage litigants to utilise a particular seat of arbitration (that is, within Australia). This paper focuses on only two aspects of the optional measures presented in the IAA Bill: first, and broadly, why are the provisions made 'opt in' and not 'opt out'? And secondly, does s 23C (containing provisions on confidentiality) go far enough to 'cure' the damage caused to Australia as an arbitral centre following from the controversial decision in *Esso Australia v Plowman* ('Esso')? [18]

A Why opt in only?

The new optional measures presented in the IAA Bill apply on an 'opt in' basis – that is, parties must choose to employ the above provisions for them to apply. It is true that parties can 'opt in' at any stage – whether before contracting, or at any stage of the dispute. In addition, the IAA Bill moves all remaining sections of Division 3 ('Optional Provisions') from an opt-out to an opt-in only basis: s 25 ('Interest up to making of award'), s 26 ('Interest on debt under award') and s 27 ('Costs'). No rationale as to why the basis for optional provisions has shifted to opt-in appears in the Bill or the Explanatory Memorandum. Furthermore, the provisions also do not shed any light on exactly what exactly constitutes opting in. Is it possible, for example, to opt in to only a particular part or subsection of the optional measures – that is, can the parties pick and choose which parts apply? It is unclear if this is

[18] *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

allowed, or each individually enumerated optional provision must be accepted in full. Further clarification is desirable.

More fundamentally, however, is the question of the utility of opt-in only measures. The IAA review and Bill do not touch on this. Parties commencing or continuing what at the time appears to be a successful commercial venture, rarely turn their minds to the intricate details of dispute resolution. In addition, once a dispute arises, parties are unlikely to agree to an adjudicatory body exercising greater power over them to their possible detriment. Parties may not be able to foresee the magnitude or scope of the potential dispute until well after the fact – for example, will optional provisions regarding the death of a party be suggested and agreed to, if all parties are fit and healthy? Thus, 'opt in' provisions severely test the boundaries of commercial relationships and foresight, and may have little practical application.

B The impact of confidentiality

The High Court in Esso set Australia down a divergent path to the traditional English common law position that parties will not disclose information provided in and for the purposes of arbitration. The High Court held that confidentiality is generally unachievable in arbitration because no obligation of confidentiality attaches to witnesses, and when court involvement is sought, this is generally public – in an open court, or via publication of the decision. However, the High Court was clear that in certain circumstances – for example, where documents were compulsorily produced by direction, similar to discovered documents in litigation – there were certain species of documents that could still generally attract confidentiality.

However, the broad impact of the Esso decision was that the High Court departed from the then right to the fundamental position that arbitration was both private and confidential. It has been suggested that the court failed to distinguish clearly between privacy and confidentiality, and that these are two overlapping but distinct concepts. This decision nonetheless represents the law in Australia. This made arbitration relatively less attractive in Australia, compared to other comparable jurisdictions which insist upon both or either privacy and confidentiality. New Zealand's Arbitration Act, clearly sets out a distinction between privacy and confidentiality, and has a series of provisions in Section 14A-14I. These include a section that declares arbitral proceedings must be 'private' (Section 14B) and that arbitration agreements are 'deemed to provide that the parties and the arbitral tribunal must not disclose confidential information' (Section 14B). The New Zealand Act also sets out particular circumstances where court proceedings under the Act must be public, and the

process by which an applicant can seek private proceedings (Section 14F-G). The importance of privacy and confidentiality for commercial parties is also demonstrated by the private Arbitration Appeal Tribunal system employed by the Arbitrators' and Mediators' Institute of New Zealand ('AMINZ').

Consequently, the solution of the IAA Bill – to the extent that it adopts a confidentiality provision – appears insufficient. First, the 'opt-in' nature of the provision, as outlined above, is problematic. Secondly, no distinction is made between the two distinct concepts of privacy and confidentiality. Thirdly, the Bill does not deal with situations where an arbitral dispute is before courts, and the extent of privacy that should be accorded. Finally, and perhaps most problematically, however, is that all these factors in combination are unlikely to be seen by the international business community as addressing the perceived deficiency in the Australian approach to arbitration confidentiality. More must be done to fully address this concern if Australia is to remain at the forefront of arbitral practice – section 23C of the IAA Bill on its own is not enough. In the meantime, parties might consider applying Article 18 ('Confidentiality') of the ACICA Arbitration Rules.

Miscellaneous amendments to improve the operation of the Act.

A Writing requirement changed

Procedural formalities in international arbitration traditionally required that the arbitral agreement was signed, or alternatively, recorded in writing. In practice, the major sources of law governing formal validity – the New York Convention, the 1985 Model Law, and various domestic national statutes – do not provide a determinative answer on exactly what form requirements are sufficient to evidence an arbitration agreement. Although the Convention does not strictly prevent arbitration from occurring, if an award is handed down that ignores formal validity, it may provide a bar to enforcement. Article II of the Convention establishes the requirements of formal validity, and is sufficiently broad to allow a range of interpretations. Although far from a preferred view, the Convention can potentially be read stringently to require an actual signature for formal validity, and hence recognition of an arbitration agreement for the purposes of the Convention.

By contrast, the 1985 Model Law provides than an 'arbitration agreement shall be in writing', and requires the agreement itself to be recorded in writing. The form requirements of the Model Law were amended in 2006 to better reflect the prevailing international practice. UNCITRAL encourages states to adopt these changes. Up until 2006, the Model Law was consistent with the approach of most states to formal requirements. However, the 2006

amendments to the UNCITRAL Model Law made it more liberal than the position of states. The amendments create two very liberal options a country can choose to enact.[19] Under the first, only a written *record* of agreement is required (regardless of the form of initial conclusion).[20] The second option essentially removes the requirement of writing altogether.

While most jurisdictions still lag behind even the first option of the 2006 Model Law, they, almost without exception, accept a lesser degree of formality than that which would be imposed by a stringent interpretation of the New York Convention. Consequently, a party seeking enforcement in a Model Law country that is signatory to the Convention can ask for the relatively liberal approach of domestic statute to be applied under the 'more favourable law provision' of Article VII(I) of the Convention. Australia has chosen to adopt Article I – the less liberal of the 2006 amendments. Nevertheless, this is consistent with the majority of international arbitral practice. In the long run, however, there appears to be no theoretical or underlying rationale why the more liberal Option II should not be adopted. Arbitration agreements are, in essence, simply a species of contract – the vast majority of which no longer require any formalities to be valid (excluding, perhaps, contracts involving land). Regardless of the liberality of the formalities required for arbitration, it will still remain in the best (evidentiary) interests of parties to record agreements signed and in writing.

B Discourage adjournments

The new IAA Bill amends s 8 of the IAA, adding in three new sub-sections at the end of s 8. They read:

> (9) A court may, if satisfied of any of the matters mentioned in subsection (10), make an order for one or more of the following:
>
> > (a) for proceedings that have been adjourned, or that part of the proceedings that has been adjourned, under subsection (8) to be resumed;
> > (b) for costs against the person who made the application for the setting aside or suspension of the foreign award;
> > (c) for any other order appropriate in the circumstances.
>
> (10) The matters are:
>
> > (a) the application for the setting aside or suspension of the award is not being pursued in good faith; and
> > (b) the application for the setting aside or suspension of the award is not being pursued with reasonable diligence; and

[19] Model Law: Article 7, Options I and II.
[20] This represents the relatively liberal approach under the Netherlands Arbitration Act 1986, Article 1020: while the arbitration agreement 'must be proven by an instrument in writing', it may be 'expressly or impliedly accepted by or on behalf of another party' (that is, the acceptance of the agreement does not need to be in writing).

> (c) the application for the setting aside or suspension of the award has been withdrawn or dismissed; and
> (d) the continued adjournment of the proceedings is, for any reason, not justified.

> (11) An order under subsection (9) may only be made on the application of a party to the proceedings that have, or a part of which has, been adjourned.

These provisions are intended to discourage adjournments and ensure that where possible valid arbitral proceedings remain on foot. They represent a worthwhile addition, and reinforce the judiciary's support for the arbitration process.

C Challenging appointment of an arbitrator

The IAA Bill introduces a new s 18A, titled 'Article 12—justifiable doubts as to the impartiality or independence of an arbitrator'. It reads:

> (1) For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration.
> (2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.

As the Explanatory Memorandum explains, this draws on the test set out in *R v Gough* [1993] AC 646, which outlines the English standard of 'real danger' for proving justifiable doubt about an arbitrator's bias or impartiality.

Further amendments not contained in the Bill

A 'Full opportunity of presenting' a case

Article 18 of the 1985 Model Law reads: '[t]he parties shall be treated with equality and each party shall be given a *full* opportunity of presenting his case' (emphasis added). It is clearly directed to <u>all</u> parties – <u>all parties</u> are to be given a full opportunity to present their case, and is intended to go towards 'fairness'. However, it is difficult to see how the word 'full' would work in practice. Given the enormous cost of arbitration or litigation, there must be some limit to what may otherwise become rampant 'party autonomy' – particularly where parties seek to thwart proceedings entirely, or prevent the opposing party or parties from presenting their case as a result of the cost, expense and delay generated.

Consequently, this connotes a balance; though this might be thought to be obscured by some of the terse and sometimes unhelpful language of the Model Law – particularly to our eyes nearly twenty-five years after its adoption by the General Assembly. In this respect, some allowance needs to be made for the genesis and status of the Model Law as an 'international instrument' and the difficulties inherent in its drafting; undertaken not merely by a committee, but by a vast assembly of States and non-governmental organisations at the United Nations. The most likely reading of Article 18 is that it is to operate as part of a cost effective 'international arbitration regime' and that the expression 'full opportunity' was, in this context, intended to be read as meaning 'reasonable opportunity'. Such a reading is only strengthened by s 39(2) of the new IAA Bill, where an Australian court interpreting the Model Law must have regard to the fact that arbitration is 'efficient, impartial and enforceable'. In order to resolve any interpretative issues, however, Parliament may consider enacting a provision that clarifies that Article 18 of the Model Law refers to a 'reasonable opportunity'.

B Immunity of arbitrators

Australia currently provides only limited exclusion of liability for arbitrators in international commercial arbitration. Section 28 of the IAA reads:

> An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator, but is liable for fraud in respect of anything done or omitted to be done in that capacity.

One rationale proposed in support of immunity is that an arbitrator should be free to perform his task without fear of being challenged through legal process. Elsewhere – particularly in the USA and England – this reasoning has been followed, and it has traditionally been suggested that arbitrators should be treated akin to judges. That is, they should be granted (full) immunity for their actions or omissions. In the USA, arbitrators are granted complete immunity. However, under the provisions of the English Arbitration Act 1996, an arbitrator's immunity does not extend to any acts or omissions that occur in bad faith. Thus, to make arbitration in Australia more attractive to arbitrators, Australia may wish to offer a greater form of immunity. Such a provision can be seen in a domestic context in s 10P of the *Family Law Act 1975* (Commonwealth of Australia):

> 'An arbitrator has, in performing his or her functions as an arbitrator, the same protection and immunity as a Judge of the Family Court has in performing the functions of a Judge. '

The NSW Attorney General's Department released a consultation draft in November of 2009 of the Commercial Arbitration Bill 2009, which includes a new section granting broader immunity to an arbitrator. This s 39 reads:

> (1) A matter or thing done or omitted to be done by an arbitrator does not, if the matter or thing was done or omitted in good faith for the purpose of executing the arbitrator's functions as an arbitrator (or as a mediator, conciliator or other non-arbitral intermediary under section 27D), subject the arbitrator personally to any action, liability, claim or demand.
> (2) A matter or thing done or omitted to be done by an arbitral tribunal or other institution or person designated or requested by parties to appoint an arbitrator does not, if the matter or thing was done or omitted in good faith for the purpose of executing the function of appointing the arbitrator, subject the arbitral tribunal, institution or person to any action, liability, claim or demand.

Whereas arbitral immunity in the IAA extends only to the narrow scope of negligence, the draft s 39 of the CAA Bill extends to 'any action, liability, claim or demand' arising out of acts or omissions carried out in good faith. Furthermore, the CAA Bill also explicitly clarifies that not only the arbitrator, but also the arbitral body and/or arbitral institution are absolved from any immune from any form of action (if they have acted in good faith for the purpose of arbitrating). Given the Commonwealth Attorney General's desire to standardise and harmonise the law across Australian arbitral jurisdictions, it may be desirable for the new IAA to adopt the wider-ranging provisions in the draft CAA Bill.

Conclusion

The IAA review and the recent Bill represent a fundamental change in thinking for the legislature and, ultimately, the judiciary and arbitration as a dispute resolution mechanism in Australia. It is now well-recognised that arbitral jurisdictions necessarily compete with each other internationally. The only way to establish and maintain comparative advantage is to remain at the forefront of arbitral best practice – both in terms of modern, up-to-date legislation, but also via a supportive, pro-arbitration judiciary, working in partnership with the arbitration process. Perhaps most importantly, the choice of jurisdiction is heavily influenced by long-term perception held by international businesspeople, as well as perceived levels of expertise and 'friendliness' to arbitration, and carefully managed and stable institutional relationships. Australia excels, or has the capacity to excel (with the right form of encouragement) in all these areas. Doing so will minimise what has often been regarded as Australia's greatest disadvantage as an arbitral jurisdiction – geography and the tyranny of distance. Which, in any event, modern global communications can now minimise. There is, however, still some way to go in Australia. As far as 'arbitral competition' in the Asia Pacific is

concerned, Hong Kong and Singapore are undoubtedly in the lead. These jurisdictions set the bar, and demonstrate that a supportive government, legislature and judiciary are critical to the success of arbitration.

In introducing the Bill, the Attorney-General highlighted its aim to 'emphasise the importance of speed, fairness and cost-effectiveness in international arbitration, while clearly defining and limiting the role of the courts in international arbitration without compromising the important protective function they exercise'. Undoubtedly, the Bill does this. On its own this is, of course, not enough, but it is a crucial and essential beginning. We also need to take advantage of our excellent arbitrators and legal practitioners, and our supportive legal environment, with its sophisticated legal system, independent judiciary and undoubted application of the rule of law. This also involves the provision of arbitration facilities and other incentives – matters which the Hong Kong and Singapore governments attend to with gusto, well aware of the broad economic benefits to trade and commerce that flow from flourishing international arbitration.

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Australian Centre for International Commercial Arbitration Conference

International Commercial Arbitration: Efficient, Effective, Economical?

Melbourne

4 December 2009

Mr Andrew Walter,

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contributed to the preparation of this paper.

ACKNOWLEDGMENTS

The Attorney-General, the Hon Robert McClelland MP, the Hon Michael Kirby AC CMG, the Hon Marilyn Warren AC, Chief Justice, Supreme Court of Victoria, the Hon Justice Middleton, Judge, Federal Court of Australia and the Hon Justice Clyde Croft, Judge, Supreme Court of Victoria.

INTRODUCTION

1. First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.

2. It is a great pleasure to speak to you today about the International Arbitration Amendment Bill 2009 which the Attorney-General introduced into the Federal Parliament on Wednesday of last week.

3. I should say at the outset that I am speaking today in my role as officer for the Attorney-General's Department, rather than as a director of the Australian Centre for International Commercial Arbitration.

4. The reforms contained in the Bill were developed following a Review of the *International Arbitration Act 1974* announced by the Attorney-General in November last year.

5. At that time, the Attorney also sought public comment on the issues raised in a discussion paper as well as on the Act more generally.

6. The quality of the submissions and comments received was particularly high and they were instrumental in developing the measures contained in the Bill.

FACTORS SHAPING THE BILL

7. Before discussing the features of the Bill in more detail, I want to touch briefly on the key factors that shaped its content.

8. First and foremost - as the Attorney-General acknowledged in his Second Reading Speech - the submissions received as part of the Review reflect a general consensus that the International Arbitration Act is working well.

9. There were no calls for radical change. However, changes were called for in response to particular problems. Accordingly, the Bill augments the provisions of the Act rather than making wholesale changes.

10. The second factor that shaped the content of the Bill was concern expressed about the interpretation of the Act by the courts. The Attorney-General has already highlighted the potential impact that judicial interpretation may have.

11. This was an issue raised consistently in submissions to the Review with a number of judgments being subjected to particular scrutiny. It suggested that courts needed further guidance from the Parliament as to how the Act is intended to operate. The Bill attempts to provide this guidance.

12. The third factor which shaped the content of the Bill was the importance of giving the parties the greatest possible choice in how they resolve their dispute. One of the unique features of arbitration as compared to court based dispute resolution is that it can be tailored to meet the particular needs of the parties.

13. The Bill seeks to balance certainty and clarity on the one hand with greater party choice on the other.

KEY FEATURES OF THE BILL

14. The key features of the Bill amend Part III of the Act which regulates the conduct of international commercial arbitration in Australia.

AMENDMENTS TO THE MODEL LAW

15. Part III of the Act gives the force of law to the UNCITRAL Model Law as the arbitral law governing international commercial arbitrations conducted in Australia.

16. In 2006, some 21 years after its initial adoption in 1985, UNCITRAL approved a number of amendments to the Model Law to improve its operation.

17. The Bill adopts the following amendments to the model law:

    - new Article 2A which promotes uniform interpretation of the Model Law
    - the definition of *arbitration agreement* provided in Option I of Article 7 which is a more expansive version of the definition included in 1985
    - the new, more extensive regime of interim measures, and
    - amendments to Article 35(2) to remove cumbersome authentication requirements and rationalise the obligations concerning the translation of awards.

18. The one amendment of the Model Law that the Bill does not incorporate is the new regime for preliminary orders.

19. Preliminary orders allow a party to the proceedings to apply, on an *ex parte* basis, for an interim measure and an order directing a party not to frustrate the purpose of the interim measure requested.

20. Under the Model Law, interim measures include an order to a party to maintain the status quo, preserve assets or preserve evidence.

21. The preliminary orders regime was the subject of much controversy when it was considered by UNCITRAL. The primary concern with the regime is that

preliminary orders are inconsistent with the consensual nature of arbitration in that they may be sought on an *ex parte* basis.

22. Given this concern and the limited support for these provisions during the Review, the Government has decided not to adopt the preliminary orders regime.

23. However, adopting all of the other 2006 amendments will cement Australia's position as a Model Law country and ensure that our arbitral law remains at the cutting edge of approaches internationally.

INTERPRETATION

24. The second set of amendments I want to discuss are the provisions concerning interpretation.

25. As I have already indicated, concerns about interpretation of the Act were a consistent theme in submissions made to the Review.

26. The Bill provides additional guidance to the courts as to how the Act should be construed.

27. This is done in a number of ways, the most prominent being the insertion of a new objects clause – proposed section 2D – and a new interpretation clause – proposed section 39.

28. The objects clause emphasises the important role arbitration plays in facilitating international trade and commerce.

29. New section 39 sets out the matters to which a court must have regard when exercising powers or functions under, or interpreting, the Act, the Model Law or an agreement or award to which the Act applies.

30. These matters include the objects of the Act and the fact that (a) arbitration is an efficient, impartial, enforceable and timely method to resolve commercial disputes, and (b) awards are intended to provide certainty and finality.

31. It is also worth noting that courts must also have regard to new Article 2A of the Model Law which will be given the force of law by the Bill.

32. Article 2A requires courts to have regard to the international origin of the Model Law and the need to promote uniformity in its application.

33. As the Attorney-General has said this morning, promoting uniformity of application is particularly important to ensure that Australia remains in step with interpretations of the Model Law commonly adopted overseas.

34. It is hoped that the courts will welcome the additional guidance provided by these provisions.

GREATER CHOICE

35. The third aspect of the Bill that I wish to discuss is the changes to Division 3 of Part III of the Act which enables the parties to choose a range of optional provisions to use in resolving their dispute.

36. These provisions recognise that the Model Law provides a basic framework for resolving disputes and that the parties to more complex arrangements may wish to supplement that framework.

37. The Bill includes a number of additional provisions that the parties will be able to use to resolve any dispute between them, including:

    - provisions based on those in State and Territory legislation allowing a party to seek assistance from a court in the form of a subpoena or other order
    - a confidentiality regime

- a new provision addressing the consequences of the death of a party to an arbitration, and
- amendments to section 27 giving the arbitral tribunal greater scope to limit the costs of an arbitration.

38. The Bill also clarifies that the optional provisions in Division 3 – including those relating to interest and costs – apply on an ‘opt in’ basis.

39. That is, the parties will need to select these provisions either in their original arbitration agreement or at a subsequent time.

40. Arbitration is not the same as litigation - it should be less formal and impose less onerous obligations on the parties.

41. Parties who choose arbitration have a legitimate expectation that this will be the case and should not be surprised to suddenly find themselves the subject of a costs order or a subpoena.

42. Once amended, the Act and the Model Law will provide a basic set of provisions directed at resolving everyday disputes.

43. Where more sophisticated mechanisms are required – for example in complex, multi-party transactions – these can be incorporated through the arbitration agreement or subsequent agreement.

NOMINATING AN APPOINTING AUTHORITY

44. The fourth issue I will discuss is the mechanism for nominating an arbitral institute to perform certain functions under the Model Law currently performed exclusively by the courts.

45. The Bill will allow regulations to be made prescribing a court or other authority to exercise the function of appointing an arbitrator where the parties or other arbitrators are unable to agree (see Article 6 of the Model Law).

46. The argument in favour of prescribing a professional association in this way is that they have detailed knowledge about the skills and expertise of particular arbitrators and would be in a good position to determine who would be the best arbitrator to resolve a particular dispute.

47. This is a matter the Attorney-General will give further consideration to in due course.

COVERING THE FIELD

48. The final aspect of the Bill I want to discuss is arguably the most significant reform contained in the Bill although this may not be obvious on first reading.

49. Section 21 of the Act allows the parties to an international commercial arbitration to opt out from using the Model Law to settle their dispute.

50. This provision has caused considerable difficulties.

51. The first problem is to determine in what circumstances the Model Law is displaced. The problem is illustrated by the decision of the Queensland Court of Appeal in *Eisenwerk*.

52. In that case, the court held that a contractual clause stating that any dispute between the parties should be settled in accordance with the arbitration rules promulgated by the International Chamber of Commerce had the effect of ousting the Model Law for the purposes of section 21 of the Act.

53. The second problem is to determine what happens once the Model Law has been displaced.

54. While it may be possible to nominate an alternative arbitral law under which the dispute is to be resolved – for example, one of the State' Commercial Arbitration Acts – this is far from straightforward.

55. Nominating a foreign law as the arbitral law is also fraught with difficulty. This leaves the murky and uncertain world of the common law. Ultimately, section 21 of the Act has the potential to create a legal lacuna that leaves the parties dangerously exposed.

56. Critically, by opting out of the Model Law, the parties may lose access to various protections, including provisions relating to the setting aside of an award and to enforcement.

57. As the Attorney-General has already stated, the Bill overcomes these problems by removing section 21 from the Act.

58. Consequently, it would no longer be possible to displace the Model Law as the arbitral law governing an international arbitration conducted in Australia.

59. However, the parties would continue to have freedom of choice with respect to the arbitral rules to be used by the arbitral tribunal and the substantive law applicable to the dispute.

EXLUSIVITY

60. This raises a broader question about the 'exclusivity' of the International Arbitration Act.

61. It is clear from the legislative history of the Act that Parliament's intention was for the Model Law to apply to all international commercial arbitrations conducted in Australia unless the parties chose otherwise.

62. Despite this intention, a number of judicial decisions have continued to find a role for State and Territory legislation in international commercial arbitration. The Bill addresses this issue by inserting a new section 21 which provides simply that where the Model Law applies to an arbitration, the law of a State or Territory does not apply.

63. Of course, State and Territory legislation will continue to govern domestic arbitration.

64. As the Attorney-General noted this morning, the Government has decided to retain the jurisdiction of State and Territory courts under the Act.

65. I note in passing that Parliament has now passed the Federal Justice System Amendment (Efficiency Measures) Bill 2009 which confers jurisdiction under the Act on the Federal Court in addition to that already conferred on State and Territory courts.

OTHER REFORMS

66. The Bill includes a range of other reforms, including to Part II of the Act which implements Australia's obligations under the New York Convention.

67. These reforms include providing a more expansive definition of *agreement in writing* for the purposes of the New York Convention and giving the courts more expansive powers to manage adjournments to enforcement proceedings.

CONCLUSION

68. In conclusion, I would like to reiterate how grateful the Department and the Attorney-General are to those who made submissions during to the Review of the International Arbitration Act.

69. As the Attorney-General has stated this morning, the measures contained in the International Arbitration Amendment Bill are the most significant reforms to the Act since the implementation of the Model Law in 1989.

70. We are confident that these measures will ensure Australia remains at the forefront of the regulation of international arbitration.