

CLAUSE NOTES

Commercial Arbitration Bill 2010

Overview of Bill

The paramount object of this Bill is to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense.

The Bill encourages the use of arbitration as a means of resolving domestic commercial disputes and harmonises the procedures for resolution of such disputes with those applicable to the resolution of international commercial disputes under the *International Arbitration Act 1974* of the Commonwealth (the **Commonwealth Act**).

The Bill facilitates the use of arbitration agreements to manage domestic commercial disputes by adopting the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the **Model Law**), taking into account the Commonwealth Act and with appropriate modifications for domestic commercial arbitration.

The Bill also contains a number of additional provisions supporting the arbitration process and some optional provisions which may be used by the parties to an arbitration agreement should a dispute arise between them. These include provisions relating to assistance from the Supreme Court (or another court nominated by the parties), the consolidation of arbitral proceedings, the disclosure of confidential information and the awarding of interest and costs.

The Bill also provides for the issue of subpoenas, and the recognition and enforcement of awards with respect to domestic commercial arbitrations.

In addition, the Bill:

(a) repeals the Commercial Arbitration Act 1986, and

(b) enacts provisions of a savings and transitional nature.

The places where the Bill and the Model Law differ (in other than minor technical respects) are identified in the Bill by notes. The Bill's section numbering reflects the numbering of the Model Law and, as a consequence, to ensure consistency with the numbering in it, the new sequence in the new Act contains gaps in numbering and use of alphanumerical numbering.

Outline of provisions

Part IA Preliminary

Clause IA sets out the name (also called the short title) of the proposed Act.

Clause IB provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause IC states that the paramount object of the proposed Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.

Clause ID provides that the Crown will be bound by the Act

Part I General provisions

Clause I applies the proposed Act to domestic commercial arbitrations. An arbitration is a **domestic arbitration** if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in Australia and have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled by arbitration. It is not a domestic arbitration if it is an arbitration to which the Model Law (as given effect by the Commonwealth Act) applies as that Act covers the field with respect to international commercial arbitrations.

Clause 1 (5) also makes it clear that the proposed Act is not intended to affect any other Act that provides that certain disputes may not be submitted to arbitration or may only be submitted according to provisions which are different to those of the proposed Act.

Clause 2 defines certain words and expressions used in the proposed Act. In particular, it defines **confidential information**, **disclose**, **Model Law** and **party**. The clause also contains provisions for interpreting various phrases in the proposed Act, including provisions relating to the meaning of a reference to the fact that the parties have agreed and that a reference to leaving the parties free to determine an issue includes the right of the parties to authorise a third party (including an institution) to determine the issue.

Clause 2A makes it clear that in interpreting the proposed Act regard should be had to promoting uniformity between the application of the proposed Act to domestic commercial arbitrations and the application of the Model Law (as given effect by the Commonwealth Act) to international commercial arbitrations.

Clause 3 deems written communications to have been received by a party in specified circumstances.

Clause 4 waives the right of a party to object to non-compliance with a provision of the proposed Act or of an arbitration agreement if the party proceeds with arbitration but fails to object to that non-compliance either without delay or within any time-limit.

Clause 5 makes it clear that a court is not to intervene in matters governed by the proposed Act, except as provided by the Act.

Clause 6 specifies the functions of arbitration assistance and supervision to be performed by the Supreme Court, or by the Magistrates Court if the parties so provide in the arbitration agreement, under the proposed Act.

Part 2 Arbitration agreement

Clause 7 defines an *arbitration agreement* as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement must be “in writing”.

The proposed section makes it clear that “in writing” has an expanded meaning. An agreement may be concluded orally, by conduct or other means, provided that its content is recorded in some form, including electronic communication. An agreement will also be in writing if it is contained “in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other”.

Clause 8 requires a court before which an action is brought in a matter that is the subject of an arbitration agreement to refer the matter to arbitration if a party so requests in the circumstances specified in the proposed section. It also enables an arbitration to be commenced or continued while the issue is pending before the court.

Clause 9 enables a party to obtain an interim measure of protection from a court, before or during arbitral proceedings.

Part 3 Composition of arbitral tribunal

Clause 10 enables the parties to determine the number of arbitrators and specifies that, in the absence of agreement between the parties, the default number of arbitrators is one.

Clause 11 allows the parties to agree on the procedure for appointing arbitrators. It provides a default procedure with ultimate recourse to the Supreme Court (or another court agreed by the parties under section 6) if agreement cannot be reached or the agreed procedure is not followed.

Clause 12 sets out the grounds on which the appointment of an arbitrator may be challenged. It obliges proposed arbitrators

to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence, an obligation which starts when a person is approached to be an arbitrator and continues throughout the person's appointment as an arbitrator.

Sub-clauses 12 (5) and (6) provide that the test for whether there are justifiable doubts as to the impartiality or independence of an arbitrator is whether there is a real danger of bias. This is based on the test for bias applied by the House of Lords in *R v Gough* [1993] AC 646.

Clause 13 provides that the parties are free to determine the procedure for challenging an arbitrator and provides a default procedure for challenging the appointment or continued appointment of an arbitrator in the absence of agreement for such a challenge. It also provides that if a challenge fails, a party may have recourse to a court to determine the matter.

Clause 14 provides for the termination of the mandate of an arbitrator in certain circumstances.

Clause 15 requires the appointment of a substitute arbitrator according to the appointment procedure and any other eligibility requirements that were applicable to the arbitrator being replaced.

Part 4 Jurisdiction of arbitral tribunal

Clause 16 makes it clear that an arbitral tribunal is competent to make a determination as to whether or not it has jurisdiction to arbitrate a commercial dispute. It also makes it clear that an arbitration agreement may be severed from the contract in which it is contained (if applicable) so that it may stand independently.

The clause expressly provides that any determination that the contract is invalid does not mean that the arbitration clause is invalid. The provision also enables a party to seek a ruling from the Supreme Court (or another court agreed by the parties

under section 6) from a determination of the tribunal that it has jurisdiction.

Part 4A Interim measures

Division I Interim measures

Clause 17 confers power on an arbitral tribunal to grant interim measures (unless otherwise agreed by the parties) similar to the ex parte orders that could be obtained from a court during litigation prior to the final determination of a dispute for purposes such as maintenance of the status quo and preservation of assets and evidence.

Clause 17A requires a party requesting certain interim measures to satisfy the arbitral tribunal (to the extent the arbitral tribunal considers appropriate) that if the measure concerned is not ordered then harm not adequately reparable by an award of damages is likely to result and that there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

Division 2 Preliminary orders

Articles 17B and 17C of the Model Law are not adopted by the proposed Act but the clause numbering is retained to maintain consistency with the numbering of the Model Law.

Division 3 Provisions applicable to interim measures

Clause 17D enables an arbitral tribunal to modify, suspend or terminate an interim measure either on the application of any party or, in exceptional circumstances and having given prior notice, on the tribunal's own initiative.

Clause 17E enables an arbitral tribunal to require a party that requests an interim measure to provide appropriate security.

Clause 17F enables an arbitral tribunal to require any party to disclose any material change in the circumstances on the basis of which an interim measure was requested or granted.

Clause 17G imposes a liability on a party that requests an interim measure for any costs and damages caused by the measure to any party to the arbitration agreement, if the tribunal subsequently determines that it should not have granted that interim measure.

Division 4 Recognition and enforcement of interim measures

Clause 17H provides for the recognition and enforcement of an interim measure issued under a law of Tasmania, or an interim measure issued under a law of another State or Territory of Australia, in certain circumstances.

Clause 17I outlines the circumstances in which the recognition or enforcement of an interim measure may be refused.

Division 5 Court ordered interim measures

Clause 17J makes it clear that the Supreme Court (or another court agreed by the parties as referred to in proposed section 6) has the same power to issue an interim measure in arbitration proceedings as it has in relation to proceedings in courts.

Part 5 Conduct of arbitral proceedings

Clause 18 makes it clear that parties must be given a fair hearing.

Clause 19 provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal and enables the arbitral tribunal to conduct the arbitration in such manner as it considers appropriate in the absence of such agreement. The clause specifies the powers conferred on the arbitral tribunal and provides that, by leave of the Supreme Court (or another court agreed by the parties under section 6), an arbitral tribunal's order or direction may be enforced by a judgment being entered in terms of the order or direction.

Clause 20 provides that the parties are free to agree on the place of arbitration and enables an arbitral tribunal to determine the place of arbitration in the absence of such agreement.

Clause 21 provides for arbitral proceedings to commence on the date that a request for the referral to arbitration is received by the respondent. The clause applies unless otherwise agreed by the parties.

Clause 22 provides that the parties are free to agree on the language or languages to be used in arbitral proceedings. Failing such agreement the arbitral tribunal is to determine the language or languages to be used. The agreement or determination applies to written statements and any hearing, award, decision or other communication of the arbitral tribunal unless otherwise agreed by the parties. The proposed section also enables an arbitral tribunal to make an order for documentary evidence to be accompanied by an appropriate translation.

Clause 23 sets out requirements with respect to statements of claim and defence. The clause applies unless otherwise agreed by the parties and is subject to directions of the arbitral tribunal.

Clause 24 sets out the procedure for the conduct of the arbitral proceedings. Unless otherwise agreed by the parties, the arbitral tribunal is enabled to decide whether to hold an oral hearing or to make a decision on the papers and other materials submitted. The discretion to make a decision on the papers is limited in so far as the arbitral tribunal must hold an oral hearing if requested by a party, provided that they have not agreed beforehand that no hearings are to be held. The proposed section makes it clear that documents sought to be relied upon must be communicated to another party to the arbitration.

Clause 24A enables a party to appear in person or be represented by any person of their choice in oral hearings of the tribunal.

Clause 24B imposes a duty on the parties to do all things necessary for the proper and expeditious conduct of arbitral proceedings.

Clause 25 states the powers of an arbitral tribunal in the event of a party's failure to communicate a statement of claim or a statement of defence or to appear at a hearing or produce documentary evidence. The clause applies unless otherwise agreed by the parties.

Clause 26 empowers an arbitral tribunal, unless otherwise agreed by the parties, to appoint experts to report on specific issues determined by the tribunal, and if necessary to appear at a hearing for the purpose of examination. It also empowers the arbitral tribunal, unless otherwise agreed by the parties, to require a party to give information or to provide access in order to inspect documents, goods or other property.

Clause 27 enables a request to be made to the Supreme Court (or another court agreed by the parties as referred to in proposed section 6) by an arbitral tribunal or a party with the approval of an arbitral tribunal, for assistance in taking evidence.

Clause 27A enables the Supreme Court (or another court agreed by the parties as referred to in proposed section 6) to issue a subpoena requiring a person to attend the arbitral proceedings for examination, or to produce documents, on the application of a party made with the consent of the arbitral tribunal. The clause is based on section 18 of the *Commercial Arbitration Act 1986*.

Clause 27B provides that, unless otherwise agreed by the parties, on application to the Supreme Court (or another court agreed by the parties as referred to in proposed section 6) by a party or the arbitral tribunal the court may order a person in

default to comply with a subpoena or a requirement of the arbitral tribunal and may make consequential orders as to the transmission of evidence or documents to the arbitral tribunal. The clause is based on section 18 of the *Commercial Arbitration Act 1986*.

Clause 27C enables the consolidation of certain arbitral proceedings. The clause applies unless otherwise agreed by the parties. The clause is based on section 26 of the *Commercial Arbitration Act 1986*.

Clause 27D provides that an arbitrator can act as mediator in the proceedings if the parties so agree. It also outlines the circumstances in which mediation can be terminated. This includes where any party withdraws their consent to the mediation. It also prohibits an arbitrator who has acted in mediation proceedings that have been terminated from conducting subsequent arbitration, unless the written consent of all the parties to the arbitration has been obtained.

Clause 27E provides for the protection of confidential information. **Confidential information** is defined in proposed section 2 as information that relates to arbitral proceedings or to an award made in those proceedings and covers documents associated with the proceedings such as statements of claim and pleadings, evidence supplied to the arbitral tribunal, transcripts of evidence, submissions and rulings and awards of the arbitral tribunal. The clause applies unless otherwise agreed by the parties. It prohibits the disclosure of confidential information by either the parties to the arbitration or the tribunal, except as allowed by proposed sections 27F–27I. **Disclose** is defined in proposed section 2 to include publishing or communicating or otherwise supplying confidential information. The provisions are adapted (with modifications) from similar provisions of the *Arbitration Act 1996* of New Zealand.

Clause 27F sets out the general circumstances in which confidential information can be disclosed by a party to the

proceedings or the arbitral tribunal. These circumstances include where all the parties have consented, it is necessary for the establishment or protection of the legal rights of a party, disclosure is required by subpoena or a court order or where disclosure is authorised or required by another relevant law (including a law of the Commonwealth or of another State or Territory) or for the purposes of enforcing an arbitral award.

Clause 27G allows an arbitral tribunal to authorise the disclosure of confidential information in circumstances other than those mentioned in proposed section 27F at the request of one of the parties and only once the other parties have been heard.

Clause 27H outlines the circumstances in which the Supreme Court (or another court agreed by the parties as referred to in proposed section 6) may make an order prohibiting the disclosure of confidential information on the application of a party and after giving all parties an opportunity to be heard. It requires consideration of whether or not the public interest would be served by disclosure or non-disclosure and whether disclosure is more than reasonable for the purpose. The proposed section deals with the situation where consent of all the parties has not been obtained under proposed section 27F (2) or where the arbitral tribunal refuses to make an order under proposed section 27G.

Clause 27I outlines the circumstances in which the Supreme Court (or another court agreed by the parties as referred to in proposed section 6) may make an order allowing the disclosure of confidential information and sets out the matters the court must take into consideration before making an order.

Clause 27J enables a party to make an application to the Supreme Court (or another court agreed by the parties as referred to in proposed section 6), and confers jurisdiction on the court, to determine a question of law that arises in the course of arbitration, unless otherwise agreed.

Part 6 Making of award and termination of proceedings

Clause 28 enables the parties to choose the substantive law to be applied to the particular facts of the matter in dispute (as opposed to determining the arbitral law under which the dispute is resolved). It makes it clear that an arbitral tribunal is to make a determination in accordance with the terms of the contract, taking into account the usages of the trade applicable to it.

Clause 29 specifies that a majority of arbitral tribunal members (if there is more than one arbitrator) is necessary to constitute a decision of the tribunal unless otherwise agreed by the parties.

Clause 30 provides for the recording of a settlement between the parties in the form of an award.

Clause 31 prescribes the form and content of an award.

Clause 32 describes the circumstances in which arbitral proceedings are terminated.

Clause 33 enables the correction or interpretation of a provision of the award, or the making of an additional award. It makes it clear that any interpretation of the tribunal forms part of the award.

Clause 33A enables an arbitrator to make an order for specific performance of a contract in circumstances where the Supreme Court would have power to do so, unless otherwise agreed by the parties.

Clause 33B allows the arbitral tribunal (unless otherwise agreed by the parties) to determine costs (including the fees and expenses of the arbitrator or arbitrators) at its discretion and to direct that they be limited to a specified amount. A direction limiting the amount must be given sufficiently in advance for the parties to take it into account in managing their own costs.

Clause 33C applies Division 11 (Costs assessment) of Part 3.2 (Costs disclosure and assessment) of the *Legal Profession Act 2007* to the assessment of costs by a court exercising jurisdiction under proposed section 33B.

Clause 33D enables the Supreme Court (or another court agreed by the parties as referred to in proposed section 6), to make orders with respect to the costs of an abortive arbitration. It is based on section 36 of the *Commercial Arbitration Act 1986*.

Clause 33E provides for the imposition (unless otherwise agreed by the parties) by the arbitral tribunal of interest in an award for payment of money for the period before the making of the award.

Clause 33F provides for the imposition (unless otherwise agreed by the parties) by the arbitral tribunal of interest on the debt under an award.

Part 7 Recourse against award

Clause 34 outlines the circumstances in which an application to the Supreme Court (or another court agreed by the parties as referred to in proposed section 6) may be made for the setting aside of an award, or an appeal against an award, and the criteria to be applied. In particular it requires the court to find either that the subject matter of the dispute is not capable of settlement by arbitration under a law of New South Wales, or that the award is in conflict with public policy. Section 19 of the Commonwealth Act declares that, for the purposes of the application of the Model Law by that Act, an award is in conflict with public policy if the making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award.

Clause 34A enables an appeal to the Supreme Court (or another court agreed by the parties as referred to in proposed section 6) on a question of law, if the parties have agreed prior

to the commencement of arbitration that such appeals may be made and the court grants leave.

Part 8 Recognition and enforcement of awards

Clauses 35 and 36 establish a framework for the recognition and enforcement of arbitral awards.

Part 9 Miscellaneous

Clause 37 outlines the effect that the death of a party has on an arbitration agreement. It is based on section 52 of the *Commercial Arbitration Act 1986*.

Clause 38 makes provision for relief by way of interpleader. It is based on section 54 of the *Commercial Arbitration Act 1986*.

Clause 39 confers immunity on an arbitrator acting in good faith.

Clause 40 enables rules of court to be made making further provision for giving effect to the proposed Act.

Clause 41 enables the making of regulations.

Clause 42 refers to Schedule I which makes savings and transitional provisions covering question of the application of the Act to existing agreements and commenced arbitration proceedings.

Clause 43 assigns responsibility for the Act to the Minister for Justice and the Department of Justice

Clause 44 repeals the *Commercial Arbitration Act 1986*.

Schedule I Savings, transitional and other provisions

Clause 1 enables the making of regulations of a savings and transitional nature,

Clause 2 covers the application of the Act to existing arbitration agreements (usually contracts with an arbitration clause) and to arbitral hearings which have already commenced.