CORRS IN BRIEF

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AUSTRALIAN INTERNATIONAL ARBITRATION REFORM

Asian and overseas economies continue to provide growth for Australian businesses resulting in an increasing number of commercial agreements with international parties. Providing a fair, cost-effective, efficient dispute resolution process to Australian and overseas entities on cross-border transactions is imperative for continued growth.

Parties in international business transactions generally prefer to resolve any dispute by arbitration rather than through litigation in national courts. Broadly, by agreeing to an arbitration provision the parties to an agreement can choose a neutral venue for the determination of any dispute and the applicable law that governs the interpretation of the agreement. The parties also have greater freedom to choose the process that will be followed during the arbitration hearing. Further, international arbitration awards are enforceable in most countries in the world by reason of the 1958 New York Convention and other treaties.

In an ongoing effort to overhaul the Australian International Arbitration framework, the government has announced significant amendments to the *International Arbitration Act 1974* (**IA Act**) which have passed both Houses of Parliament and will soon enter into force.

Broadly, the IA Act applies to international arbitration disputes to be determined in Australia. This includes disputes under arbitration agreements that have been entered into between an Australian party and a party in another country or where parties in countries outside of Australia have chosen to have their dispute determined in Australia.

For the most part, the amendments follow recommendations made by the United Nations Commission on International Trade Law (**UNCITRAL**) to reform the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**).

AMENDMENTS TO THE IA ACT

The IA Act amendments will improve the efficiency and certainty of international arbitration in Australia. The amendments broaden the circumstances in which arbitral agreements will be recognised as having been formed and improve the legal framework supporting the conduct of international arbitrations in Australia and the enforcement of international arbitral awards. We highlight some of the key provisions below.

Recognition of international arbitration agreements

The IA Act reflects Article II of the 1958 New York Convention on International Commercial Arbitration, which provides that an "agreement in writing" under which the parties have agreed to arbitrate all or certain disputes between the parties, will be recognised as an agreement to arbitrate.

Courts in certain jurisdictions have given a narrow interpretation to this provision. The amendments which mirror the changes to the equivalent provisions in the Model Law, will modernise and provide greater certainty to the recognition of international arbitration agreements by introducing a more expansive definition of an "agreement in writing". The amendments provide that an agreement will be in writing if "its content is recorded in any form" regardless of whether the agreement or contract to which it related "has been concluded orally, by conduct or by other means". Further, an agreement will be taken to have been made "in writing" if "it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference".

Conduct of international arbitrations

The amendments will improve the legal framework supporting the conduct of international arbitrations by implementing measures that include the following.

(a) Requiring the Model Law to be used to resolve international commercial disputes in Australia.

- The IA Act will provide parties with the freedom to choose both the procedure and applicable substantive law for their dispute (as provided in Article 19 and Article 28 respectively of the Model Law). However parties will not be free to oust the Model Law as the applicable arbitral law (as provided for in the previous IA Act).

(b) Providing tribunals with broader powers to order interim measures during the course of an arbitration. Further, an interim measure made by an arbitral tribunal will have the force of an award.

(c) Requiring courts to take into account the following factors when interpreting, or exercising powers and functions under the IA Act, the Model Law, an arbitration agreement or an arbitration award:

- that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes;
- that arbitral awards are intended to provide certainty and finality; and
- article 2A of the Model Law. Article 2A states that the Model Law is to be interpreted consistently with approaches taken internationally.

(d) Incorporating additional optional provisions that parties can expressly apply to, or remove from, their arbitration agreement. These provisions include the following.

- Allowing the parties to seek, with the permission of the arbitral tribunal, court orders (such as a subpoena) to assist with the arbitration.
- Allowing the parties to provide for greater confidentiality protections through their arbitration agreement and prescribing circumstances in which a tribunal may prohibit or permit disclosure of confidential information.

Certainty and enforcement of international arbitral awards

The amendments will confine the circumstances in which the court can:

- set aside an arbitral award; or
- refuse to enforce an arbitral award due to an application for the setting aside or suspension of the award having been made in the country under the law of which the award was made.

There have been decisions of Australian courts where it has been suggested that the courts retain a discretion to set aside an arbitral award even if the grounds specifically enumerated in the IA Act have not been made out. The amendments provide that a court may only refuse to enforce an arbitral award in the circumstances expressly enumerated in the IA Act.

The amendments also introduce a new provision which allows adjourned proceedings to be resumed where an application for setting aside or suspending an award is not being pursued in good faith, or with reasonable diligence. The aim of this amendment is to prevent parties from frustrating the enforcement of a foreign award in Australia by commencing an action in the country where the award was made on illegitimate grounds or with the intention of delaying its enforcement.

SUMMARY

The amendments to the IA Act will soon enter into force. Parties should be aware of the provisions in the IA Act when entering into international agreements that choose an Australian venue for the resolution of a dispute by arbitration. Further, by adopting international best standards on international arbitration and seeking to improve the efficiency and effectiveness of arbitration, the amendments will assist in promoting Australia as a choice of forum for the resolution of international disputes.

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