

7-1-2012

The Commercial Arbitration Act of 2011: Australia's Attempt at Arbitration Eminence

Laura Mangotta

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Laura Mangotta, *The Commercial Arbitration Act of 2011: Australia's Attempt at Arbitration Eminence*, 4 225 (2012).

This Student Submission - Recent Developments in Arbitration and Mediation is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

THE COMMERCIAL ARBITRATION ACT 2011: AUSTRALIA'S ATTEMPT AT ARBITRATION EMINENCE

Laura Magnotta*

I. INTRODUCTION

On November 17, 2011, the Commercial Arbitration Act 2011 (CAA) was enacted in Victoria, Australia to become the State of Victoria's guiding law on domestic arbitration.¹ The Act, based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law) and supplemented to more accurately apply to domestic commercial arbitration, was enacted to replace the existing Commercial Arbitration Act 1984 (1984 Act).² The goal of the Standing Committee of Attorneys-General in encouraging the passage of the new law was to align domestic arbitration laws with international arbitration laws to make Australia the center of commercial arbitration in the Asia-Pacific region.³ The CAA was also created to make Victoria's commercial arbitration laws consistent with similar laws previously passed in New South Wales and Tasmania furthering the national trend towards creating a unified domestic arbitration scheme.⁴ This article discusses how the CAA has amended the prior Australian domestic arbitration law to align with current best practices, the path the Act took towards enactment, and how the changes to Australian domestic arbitration law will affect how lawyers represent their clients.

II. COMMERCIAL ARBITRATION ACT 2011

Like most other arbitration legislation, the Commercial Arbitration Act 2011 was enacted "to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense."⁵ The CAA repeals and replaces the 1984 Act, which was seen as limiting the recourse to arbitration by making the process similar to court proceedings and

* Laura Magnotta is Associate Editor of The Yearbook on Arbitration and Mediation and a 2013 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

¹ See Doug Jones, *Commercial Arbitration Act: What Are the Key Reforms and What Will This Mean for Your Clients?*, THE NEW COMMERCIAL ARBITRATION ACT 2011 SEMINAR, 1, Nov. 30, 2011, available at <http://www.justice.vic.gov.au/resources/b/6/b69b730048feeb88b4c4fcf1556a9148/professordougjonespapercommercialarbitrationactseminar30november2011.pdf>.

² See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, Parliament of Victoria, 15 September 2011 Council, at 3205, available at

<http://www.justice.vic.gov.au/home/the+justice+system/justice+-+commercial+arbitration+act+2011+second+reading+speech+and+statement+of+compatibility+-+%28weblink%29>.

³ See Albert Monichino, *Arbitration Law in Victoria Comes of Age*, VICTORIAN DEPARTMENT OF JUSTICE "THE NEW COMMERCIAL ARBITRATION ACT 2011" SEMINAR, Nov. 30, 2011, at 1, available at <http://www.justice.vic.gov.au/resources/c/7/c7e47f8048feeb88b4c6fcf1556a9148/monichino2011commercialarbitrationact.pdf>.

⁴ See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.

⁵ See *Explanatory Memoranda*, Commercial Arbitration Bill 2011, at 1, available at www.legislation.qld.gov.au/Bills/53PDF/2011/CommArbitB11Exp.pdf.

effectively failing to make arbitration a more efficient and cost effective method of dispute resolution.⁶ The intent was that the CAA would “minimise [sic] judicial intervention in the arbitral process and ... affirm and promote party autonomy with regard to the arbitral procedures.”⁷

The CAA is based on the UNCITRAL Model Law on Commercial International Arbitration, which was adopted in 1985 and amended in 2006.⁸ While the drafters of the CAA included supplements to the Model Law to bring it more in line with domestic arbitration needs, the original format and numbering of the Model Law was maintained to assist those who are familiar with the Model Law to be able to navigate the new Victorian law. The Model Law was created, among other reasons, to bring uniformity to the law of arbitration and address “the specific needs of international commercial arbitration practice.”⁹ The creators of the Model Law, understanding that national arbitration laws were often inappropriate for international cases, drafted the laws to take into account the needs of international arbitration.¹⁰ Additionally, the drafters wanted to create a set of laws that could be adopted by various countries allowing parties from one country or jurisdiction to easily adjust to the laws of another country because of their similarities to the Model Law.¹¹

In enacting the CAA, Victorian legislators changed a number of key areas that were deemed to be lacking in the 1984 Act. These include “changes to the power of an arbitral tribunal to order interim measures of protection, the obligation of confidentiality in arbitral proceedings, procedural requirements for the conduct of arbitrations, and also the grounds for challenging the appointment of an arbitrator or an award.”¹²

The CAA codified a requirement that both the parties and the arbitral tribunal must not disclose confidential information regarding the proceedings.¹³ Under the CAA, the parties may mutually decide to opt out of this provision and disregard the confidentiality requirement.¹⁴ This provision on confidentiality clarifies an issue that was left unanswered by the 1984 Act.¹⁵ Before the CAA, parties were left to look to common law solutions when questions of confidentiality arose.¹⁶

In the 1984 Act, there were no clear powers granted that allowed arbitrators to issue procedural orders.¹⁷ Even if arbitrators issued such orders, there were no provisions to enforce them.¹⁸ Seeking to remedy this deficiency, the CAA includes provisions that expressly grant

⁶ See Monichino, *supra* note 3, at 1.

⁷ See Monichino, *supra* note 3, at 5.

⁸ See generally 40/72, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, G.A. Res 40/72, U.N. Doc.A/RES/40/72 (2006).

⁹ See 40/72, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, G.A. Res 40/72, U.N. Doc.A/RES/40/72, ix (2006).

¹⁰ See *Explanatory Memoranda*, *supra* at note 5, at 2.

¹¹ See *Explanatory Memoranda*, *supra* at note 5, at 4.

¹² See Jones, *supra* at note 1, at 1.

¹³ See *Commercial Arbitration Act 2011* (Vic.) pt 4A (Austl.).

¹⁴ See *id.* at pt 4A div 1(17)(1).

¹⁵ See Jones, *supra* at note 1, at 3.

¹⁶ See *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 (Austl.) (parties must expressly agree to confidentiality provisions since so such confidentiality obligations are implied by law or fact of creation of the arbitration agreement).

¹⁷ See Jones, *supra* at note 1, at 7.

¹⁸ See Jones, *supra* at note 1, at 7.

jurisdiction to both arbitrators and the courts to order interim measures.¹⁹ The result is that parties no longer need to resort to the courts to request an order—they can do so through the arbitrators. In this scenario, the courts take action only where “the tribunal is unable or unwilling to act”.²⁰

The CAA also made amendments to the 1984 Act’s grounds for challenging an arbitrator. Before the CAA, the three possible grounds for challenging an arbitrator were: misconduct, the exercise of undue influence by the arbitrator, or if the arbitrator was proven to be incompetent or unsuitable.²¹ In particular, the misconduct ground raises problems because of its broadness.²² To remedy these issues, the CAA restricts the grounds for challenging an arbitrator to those instances where “circumstances give doubt as to the arbitrator’s impartiality or independence or where the arbitrator does not possess the qualifications agreed to by the parties.”²³

Issues with misconduct as a tool for judging the arbitrators’ actions also arise when a party challenges an award. Under the 1984 Act, parties could challenge an arbitration award for an error of law or for misconduct by the arbitrator.²⁴ Using misconduct—a vague standard—as a ground for vacating an arbitral award, “jeopardizes the finality of arbitral decisions by supplying a very broad scope for parties to challenge an arbitral award.”²⁵ The CAA removed the vague standard by allowing for arbitral awards to be set aside only for specific and narrowly defined procedural defects.

III. DISCUSSION

Legislators and politicians in Australia wanted to amend the domestic arbitration laws primarily to align the country’s domestic and international arbitration law in an attempt to make Australia a “hub for dispute resolution in the Asia-Pacific Region”.²⁶ To do so, they had to overcome two perceived problems with existing domestic arbitration laws in Australia. The first was the similarity between domestic arbitration proceedings and court proceedings. This was counterintuitive to the widely understood purpose of arbitration – a cost effective and efficient alternative to courtroom trial processes.²⁷ The second was the lack of finality of arbitral decisions as a result of broad grounds for review of arbitral awards and challenges to arbitrators.²⁸ These two problems invited the courts into a process that was created to achieve the opposite result. By preventing unnecessary judicial intervention into the arbitration process, the finality and authority of the arbitrators’ decisions will be strengthened and the parties will have a more limited recourse to the courts during and after the arbitral proceedings.²⁹

¹⁹ See *Commercial Arbitration Act 2011* (Vic.) pt 4A, divs 1(17)(1) & (3) (Austl.).

²⁰ See Jones, *supra* at note 1, at 3.

²¹ See *Commercial Arbitration Act 1984* (Vic.) s 44 (Austl.).

²² See Jones, *supra* at note 1, at 10 (courts had difficulty determining the limits of misconduct because it included not only “issues of moral turpitude,” but also technical misconduct and breach of procedure issues as well).

²³ See *Commercial Arbitration Act 2011* (Vic.) pt 3(11) (Austl.).

²⁴ See *Commercial Arbitration Act 1984* (Vic.) s 42 (Austl.).

²⁵ See Jones, *supra* at note 1, at 10.

²⁶ See Monichino, *supra* note 3, at 1.

²⁷ See Monichino, *supra* note 3, at 2.

²⁸ See Monichino, *supra* note 3, at 2.

²⁹ See *See Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205 (statement by Hon. G.K. Rich-Phillips).

To fulfill these goals and remedy these problems, the federal Attorney General called for a review of the International Arbitration Act of 1974.³⁰ The review would begin the process of aligning domestic commercial arbitration with the International Arbitration Act of 1974.³¹ Such an alignment was crucial because the domestic commercial arbitration laws at the time still reflected outdated English arbitration acts.³² The changes from the 1984 Act discussed above are intended to update the domestic arbitration laws and make them comparable with more recent legislation.

In support of the attempt at aligning domestic and international arbitration, chief justices of the various states and territories of Australia released a statement noting “any attempt to hold out Australia as a centre for international arbitration will not succeed if the domestic arbitration system does not operate consistently with the international arbitration regime.”³³

The adoption of the UNCITRAL Model Laws was proposed by then Chief Justice Spiegelman as a way to “send a clear message to the international commercial arbitration community that Australia is serious about a role as a centre for international arbitration”.³⁴ With this recommendation in mind, the Standing Committee of Attorneys-General decided to draft new laws for commercial arbitration in Australia based on the Model Law.³⁵ The Parliament of Victoria cited several reasons for adopting the Model Law. Primarily, the Parliament relied upon the fact that the Model Law had provided “an effective framework for the conduct of international arbitrations in many jurisdictions, including Australia, for over 25 years”.³⁶ In addition, the Model Law had a widely understood framework to deal with common arbitration issues that could be easily adapted to the domestic arbitration scheme and would provide consistency between domestic and international law.³⁷ Because the model law would create consistency with other jurisdictions, case law from other Australian states and abroad could assist in interpreting and applying the Model Laws provisions.³⁸

The Parliament agreed that the Model Act would need to include supplementary provisions to adjust the international nature of the Model Law to reflect the needs of domestic arbitration proceedings.³⁹ The main change was the addition of a “paramount objective clause,” the absence of which was seen as a weakness by those stakeholders who reviewed the proposed law.⁴⁰ A draft of the proposed law, including the supplementary language, was circulated and met little opposition.⁴¹ The Commercial Arbitration Act 2011 of Victoria, Australia was enacted and became law on November 17, 2011.⁴²

³⁰ See Monichino, *supra* note 3.

³¹ See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.

³² See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.

³³ See Monichino, *supra* note 3 at 3.

³⁴ See Monichino, *supra* note 3 at 3.

³⁵ See Monichino, *supra* note 3 at 3-4.

³⁶ See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.

³⁷ See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.

³⁸ See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3205.

³⁹ See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3206.

⁴⁰ See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3206.

⁴¹ See *Commercial Arbitration Bill 2011 Second Reading and Statement of Compatibility*, *supra* note 2, at 3206.

⁴² See *Commercial Arbitration Act 2011* (Vic.) pt 4A (Austl.).

IV. CONCLUSION

In an attempt to modernize Victoria, Australia's domestic arbitration law and bring it into alignment with the country's international arbitration laws, the Commercial Arbitration Act 2011 was enacted. The CAA, which repealed the 1984 arbitration act, was based on the UNCITRAL Model Law and supplemented to adjust for domestic arbitration needs. The drafters of the CAA hope that by aligning both domestic and international arbitration laws creating a strong arbitration regime in Australia, the country can become the arbitration hub of the Asia-Pacific region.