International Arbitration Amendment Bill 1988

Date Introduced: 3 November 1988
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

Digest of Bill

Purpose
To establish in Australia a system of arbitration for international commercial transactions.

Background
Arbitration today plays an important role in international trade. In many contracts affecting international trade it is provided that, should some dispute arise under the contract, it will be settled by arbitration. A substantial part of Australia's overseas trade takes place under long-term contractual arrangements, e.g., for the export of various minerals. Parties to these arrangements have an interest in maintaining the arrangement, even though disputes may arise in the course of specific transactions. It is often more important to maintain the arrangement than to insist on the specific rights of a party to the contract. Once litigation commences, it often signals a permanent breakdown of the arrangement between the parties. Arbitration offers a means of dispute settlement that is usually private, quick, and cheaper than litigation. In addition, arbitration enables the participants in international trade to develop and apply rules governing commercial relationships which are independent of the laws imposed by any single country, and to enforce those rules without the substantial involvement of the judicial machinery of a country.

The United Nations (UN) has taken a special interest in the promotion of commercial arbitration as means of promoting the growth of international trade. The United Nations Commission on International Trade Law (UNCITRAL) has produced a set of international arbitration rules (the Model Law), which this Bill gives effect to, for use in international commercial arbitration. At present the International Chamber of Commerce (the ICC) has a set of Rules which are widely used but which appear to be accepted only in some countries. For example, businesses in Japan, Asia, the Soviet Union, Eastern Europe and the United States have been reluctant to submit matters for arbitration under the ICC Rules. The Model Law has been prepared so as to be acceptable to such countries. To date, the Model Law has been adopted by Canada, Cyprus and California, and is being considered by the United Kingdom, Hong Kong and New Zealand.
The Commonwealth has the constitutional power to enact the Model Law as the sole law governing international commercial arbitration in Australia. A law of the Commonwealth in the form of the Model Law would have a firm foundation in either the external affairs power (section 51(xxix)), or the trade and commerce power (section 51(i)) of the Constitution. Such a law, when applied to international commercial transactions would override the provisions of any State law on the subject by reason of section 109 of the Constitution.

Main Provisions

Clause 7 will insert a new Part III into the Arbitration (Foreign Awards and Agreements) Act 1974 (the Principal Act), which will establish a system of arbitration for international commercial transactions.

The Model Law will have effect in Australia and the external Territories (proposed section 16).

State or Territory Supreme Courts will perform the functions of arbitral tribunals (proposed section 18).

The Model Law will not apply where parties have agreed that any dispute between them is to be settled other than in accordance with the Model Law (proposed section 21).

The optional provisions of proposed sections 23 – 27 will only apply where parties have agreed in writing to their use (proposed section 22).

Article 17 of the Model Law provides that, unless the parties to an arbitration agreement have otherwise agreed, an arbitral tribunal will have power to make interim orders requiring parties to provide security or otherwise to protect the subject matter of the dispute. Proposed section 23 will provide that such orders are enforceable.

Unless the parties to an arbitration agreement have otherwise agreed, a party may apply to an arbitral tribunal for a consolidation of arbitral proceedings. Applications may be made on the ground that there is a common question of law or fact in those proceedings; that the rights to the relief claimed arose out of the same transaction or series of transactions; or that there is some other reason that makes a consolidation desirable (proposed section 24).

Unless otherwise agreed, arbitral tribunals will have the power to make an order for the payment of interest on money payable under an award (proposed section 25).

Unless otherwise agreed, an arbitral tribunal will be able to award costs of an arbitration. The arbitral tribunal may direct the manner in which costs are to paid, by whom, and to whom (proposed section 27).
Arbitrators will not be liable for negligence in respect of acts done their capacity as arbitrators, but will be liable for fraud (proposed section 28).

The Bill will not exclude the operation of State and Territory laws which are capable of operating concurrently with this Bill (proposed section 29).

Proposed Part III of the Principal Act will not apply to international commercial arbitration agreements that were concluded prior to the commencement of the Part, unless the parties have otherwise agreed (proposed section 30).

Proposed Schedule 1 sets out the text of the Model Law.

References


For further information, if required, contact the Law and Government Group.

3 January 1989

Bills Digest Service
Legislative Research Service

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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