ThomsonsLawyers

Construction Alert
Commercial Arbitration Bill 2012 (Qld)

November 2012

On Tuesday, 30 October 2012, Attorney-General Jarrod Bleijie presented the *Commercial Arbitration Bill 2012 (Qld)* to the Legislative Assembly. The purpose of the Bill is to provide for the conduct of commercial arbitration in Queensland and to repeal the *Commercial Arbitration Act 1990 (Qld)*.

The proposed reforms to the domestic arbitration regime will greatly benefit commercial dispute resolution in Queensland and are intended to result in a simpler and more cost effective process. The *Commercial Arbitration Bill 2011 (Qld)* (the **2011 Bill**) was previously introduced into the Legislative Assembly in November 2011 with the same intent. The 2011 Bill lapsed on 19 February 2012 and has now been replaced by the *Commercial Arbitration Bill 2012 (Qld)* (the **Queensland Bill**).

Background

Over recent years, there has been significant criticism that the current domestic system of arbitration has become too litigious (under the *Commercial Arbitration Act 1990 (Qld)* and its equivalent in other States). The former Standing Council of Attorneys-General (**SCAG**) responded to such criticisms by updating the Uniform Acts to reflect international best practice and by committing to re-establishing and promoting arbitration as an efficient and cost effective alternative to litigation.

SCAG agreed upon a Model Bill to be introduced in each jurisdiction, based on the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration*, in line with the *International Arbitration Act 1974 (Cth)* (the Model Bill). The Model Bill was drafted to promote uniformity and consistency in both domestic and international commercial arbitration. Additional provisions were added to the Model Bill so as to enable the UNCITRAL Model Law to apply to domestic commercial arbitration. However, the Model Bill only applies to domestic commercial arbitrations. All international commercial arbitrations will continue to be governed by the *International Arbitration Act 1974 (Cth)*.

The Queensland Bill introduces the provisions of the Model Bill in Queensland and, once passed, will bring Queensland into line with the majority of other Australian jurisdictions, which have already enacted the equivalent provisions of the Model Bill.

Objects of the Bill

Ultimately, the object of the Queensland Bill is to make commercial arbitration a more attractive option to parties to disputes by enabling the private, fast and fair resolution of disputes, determined by an impartial arbitrator, without excessive legal costs. It also promotes the autonomy of parties by enabling them to dictate the structure of proceedings: the arbitrator will only step in if the parties cannot agree on how to proceed or are making decisions that will result in undue delay to the process. The result of conducting a commercial arbitration under the Queensland Bill will be an award which is enforceable in any court of law.

What does the Bill encompass?

The Queensland Bill provides for:

- the form and scope of arbitration agreements;
- the selection, appointment and challenge of arbitrators;
- an arbitrator's powers;
- a confidentiality regime with an optional opt-out provision;
- the making of awards and termination of proceedings, including costs and settlement;
- the preconditions for applications to a court to have an award set aside or to appeal on a question of law;
- the recognition of interstate awards as being binding (and provisions allowing applications to a court for their enforcement); and
- the expeditious conduct of an arbitration, including specific provision that the parties cannot act with undue delay.

Significant provisions and effect

Procedural changes

One major difference between the Queensland Bill and the *Commercial Arbitration Act 1990 (Qld)* is that the Queensland Bill will dictate certain procedural matters that were not previously covered. Such matters include the requirement that the parties provide a statement of claim and defence when commencing proceedings, and also an arbitrator's power to make an award on settlement and to appoint experts. Relevantly, the ability of the parties to determine the way in which the arbitration will proceed is fettered by section 24B, as set out below.

Expeditious conduct of arbitration and no undue delay

Section 24B of the Queensland Bill provides that a party to arbitration cannot act with undue delay. Under the new section, the parties to arbitration are obliged to do all things necessary for the proper and expeditious conduct of the arbitral proceedings. The purpose of this section is to ensure that arbitration as a method of dispute resolution delivers the time and cost savings that are frequently sought by parties, and which were originally thought to be achievable through arbitration. However, it is possible that once the Bill is enacted, parties will attempt to use section 24B as a method of gaining judicial intervention in the arbitration process by claiming that a party has caused unnecessary delay.

Confidentiality regime

Australian case law has previously dictated that confidentiality is only an obligation on parties to arbitration where that is specified to be the case in the arbitration agreement. This is contradictory to the established international position, where confidentiality is recognised as being a key feature of the arbitral process. The Queensland Bill now recognises the international position (since it is based on the UNCITRAL Model Law), which will give parties greater confidence in the domestic process.

Specifically, the Queensland Bill now assumes that confidentiality obligations apply to all parties to arbitration and is based on an opt-out rather than an opt-in regime. This is of enormous benefit, particularly to corporate entities, which may otherwise encounter issues of reputational harm if the subject matter of an arbitration became public knowledge. Further, regardless of reputational damage, resolution of an issue in dispute will usually require both parties to disclose information that is commercial-in-confidence or otherwise sensitive information, and the introduction of a presumed obligation of confidentiality will assist in overcoming concerns regarding the disclosure of such information.

Involvement of the courts

Under the Queensland Bill, there are a number of provisions restricting the involvement of the courts in the arbitration process. Further, in terms of judicial involvement in reviewing arbitral awards, there are limited circumstances under the Queensland Bill in which a challenge can be made to a court. Such provisions strengthen the finality and binding nature of an arbitrator's decision with regard to discovery, preservation of evidence, provision of security for costs and the award itself.

An application to set aside an award can only be made on the grounds of incapacity, invalidity, breach of natural justice, public policy and the legality of arbitrating certain subject matter. The parties are only able to challenge the appointment of an arbitrator based on issues of impartiality, independence or lack of qualifications, either by agreement or before the court. Furthermore, an appeal on a question of law cannot be made without the parties' consent and the leave of the court.

In addition to the provisions noted above, if parties have commenced litigious proceedings but a valid arbitration agreement exists between the parties, then, if either party requests that the matter be resolved by arbitration, the court will stay the litigious proceedings until the matter has been arbitrated.

ThomsonsLawyers

Sydney
Melbourne
Brisbane
Adelaide

The future of arbitration in Queensland

One of the major implications of the Queensland Bill is that it brings Queensland in line with the majority of other Australian jurisdictions. This makes the arbitration process more appealing to companies because having a uniform process will likely result in a more efficient process. Adopting this new process will also ensure that other States' commercial arbitration processes, which are already based on the UNICITRAL Model Law, will not be considered more favourable than Queensland's regime.

By giving the parties to a dispute greater control over the arbitration process, and returning certain levels of control that will assist in reducing the time and costs associated with arbitration, it is likely that more companies will favour domestic commercial arbitration over other methods of dispute resolution. Parties are likely to find the idea of dictating procedural rules and appointing arbitrators very favourable. Furthermore, since an award can be enforced in any jurisdiction, the result of arbitration has the same binding effect as the decision of a court.

Written by:

Andrew Kelly
Partner
+61 7 3338 7550
akelly@thomsonslawyers.com.au

Pip McGrath
Associate
+61 7 3338 7541
pmcgrath@thomsonslawyers.com.au

For further information, please click here to contact our national Construction team.

www.thomsonslawyers.com.au