

## APPENDIX 1 – EXCERPTS FROM ILA RESOLUTION

### Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002

#### Recommendation 1: General

1(a) The finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances.

1(b) Such exceptional circumstances may in particular be found to exist if recognition or enforcement of the international arbitral award would be against international public policy.

1(c) The expression “international public policy” is used in these Recommendations to designate the body of principles and rules recognised by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account of either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy.)

1(d) The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “*lois de police*” or “public policy rules” and (iii) the duty of the State to respect its obligation towards other States or international organisations.

1(e) An example of a substantive fundamental principle is prohibition of abuse of rights. An example of a procedural fundamental principle is the requirement that tribunals be impartial. An example of a public policy rule is anti-trust law. An example of an international obligation is a United Nations resolution imposing sanctions. Some rules, such as those prohibiting corruption, may fall into more than one category.

1(f) Whether the seat of the arbitration was located within the territory of the forum or abroad is not a consideration which should be taken into account by a court when assessing an award’s conformity with international public policy.

1(g) If the court refuses recognition or enforcement of the arbitral award, it should not limit itself to a mere reference to Article V2(b) of the New York Convention 1958 or to its own statute or case law. Setting out in detail the method of its reasoning and the grounds for refusing recognition or enforcement will help to promote a more coherent practice and the development of a consensus on principles and rules which may be deemed to belong to international public policy.

1(h) If any part of the award which violates international public policy can be separate from any part which does not, that part which does not violate international public policy may be recognised or enforced.

**Recommendation 2: Fundamental principles**

2(a) A court verifying an arbitral award's conformity with fundamental principles, whether procedural or substantive, should do so by reference to those principles considered fundamental within its own legal system rather than in the context of the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.

2(b) Nevertheless, in order to determine whether a principle forming part of its legal system must be considered sufficiently fundamental to justify a refusal to recognise or enforce an award, a court should take into account, on the one hand, the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration (international conventions may evidence the existence of such a consensus). When said consensus exists, the term "transnational public policy" may be used to describe such norms.

2(c) Where a party could have relied on a fundamental principle before the tribunal but failed to do so, it should be entitled to raise said fundamental principle as a ground for refusing recognition or enforcement of the award.

**Recommendation 3: Public policy rules**

3(a) An award's violation of a mere "mandatory rule" (ie a rule that is mandatory but does not form part of the State's international public policy so as to compel its application in the case under consideration) should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.

3(b) A court should only refuse recognition or enforcement of an award giving effect to a solution prohibited by a rule of public policy forming part of its own legal system when: (i) the scope of the said rule is intended to encompass the situation under consideration; and (ii) recognition or enforcement of the award would manifestly disrupt the essential political, social or economic interests protected by the rule.

3(c) When the violation of a public policy rule of the forum alleged by a party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the facts of the case, the court should be allowed to undertake such reassessment of the facts.

3(d) When a public policy rule of the forum enacted after the rendering of the award prohibits the solution implemented by said award, a court should only refuse the award's recognition or enforcement if it is plain that the legislator intended the said rule to have effect as regards awards rendered prior to its enactment.

**Recommendation 4: International obligations**

A court may refuse recognition or enforcement of an award where such recognition or enforcement would constitute a manifest infringement by the forum State of its obligations towards other States or international organisations.

## APPENDIX 2 – EXCEPRTS FROM THE IAA

### International Arbitration Act 1974 (Cth)

#### Part II – Enforcement of foreign awards

##### Section 3: Interpretation

3(1) *foreign award* means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

*Convention country* means a country (other than Australia) that is a contracting State within the meaning of the Convention.

3(2) In this Part, when the context so admits, *enforcement*, in relation to a foreign award, includes the recognition of the award as binding for any purposes, and *enforce* and *enforced* have corresponding meanings.

##### Section 4: Accession to Convention

Approval is given to accession by Australia to the Convention without any declaration under sub-article 3 of Article I but with a declaration under Article X that the Convention shall extend to all the external Territories other than Papua New Guinea.

##### Section 8: Recognition of foreign awards

8(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

8(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory.

8(4) Where:

- (a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and
- (b) the country in which the award was made is not, at that time, a Convention country;

subsections (1) and (2) do not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.

8(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:

- (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him, under some incapacity at the time when the agreement was made;
- (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
- (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceeding;
- (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

8(6) Where an award in which paragraph 5(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

8(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

- (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force of that State or Territory in which the court is sitting; or
- (b) to enforce the award would be contrary to public policy.

8(8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

## **Section 12: Effect of this Part on other laws**

12(1) This Part applies to the exclusion of any provisions made by a law of a State or Territory with respect to the recognition of arbitration agreements and the enforcement of foreign awards, being provisions that operate in whole or in part by reference to the Convention.

12(2) Except as provided in subsection (1), nothing in this Part affects the right of any person to the enforcement of a foreign award otherwise than in pursuance of this Act.

### **Part III – International commercial arbitration**

#### **Section 16: Model Law to have force of law**

16(1) Subject to this Part, the Model Law has the force of law in Australia.

16(2) In the Model Law:

*State* means Australia (including the external Territories) and any foreign country.

*this State* means Australia (including the external Territories).

#### **Section 19: Articles 34 and 36 of the Model Law – public policy**

Without limiting the generality of subparagraphs 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is hereby declared, for the avoidance of any doubt, that, for the purposes of those subparagraphs, an award is in conflict with the public policy of Australia if:

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

#### **Section 20: Chapter VIII of Model Law not to apply in certain cases**

Where, but for this section, both Chapter VIII of the Model Law and Part II of this Act would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.

#### **Section 21: Settlement of dispute otherwise than in accordance with Model Law**

If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

**APPENDIX 3 – EXCERPTS FROM THE NEW YORK CONVENTION****Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958****Article I**

I(1) This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

I(2) The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

I(3) When signing, ratifying or acceding to this Convention, or notifying extensions under Art X thereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

**Article III**

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition and enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

**Article IV**

IV(1) To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to article II or a duly certified copy thereof.

**Article V**

V(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II where, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

V(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition and enforcement of the award would be contrary to the public policy of that country.

**Article VII**

VII(1) The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

**APPENDIX 4 – EXCERPTS FROM THE MODEL LAW****UNCITRAL Model Law on International Commercial Arbitration 1985****Article 1: Scope of application**

I(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

I(2) The provision of this Law, except articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of this State.

I(3) An arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

**Article 4: Waiver of right to object**

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

**Article 5: Extent of court intervention**

In matters governed by this Law, no court shall intervene except where so provided in this Law.

**Article 18: Equal treatment of parties**

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

**Article 19: Determination of rules of procedure**

19(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.



19(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

#### **Article 28: Rules applicable to substance of dispute**

28(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of law rules.

28(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

28(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it do to so.

28(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

#### **Article 34: Application for setting aside as exclusive recourse**

34(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

34(2) An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
  - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.

### **Article 35: Recognition and enforcement**

35(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

### **Article 36: Grounds for refusing recognition or enforcement**

36(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

## APPENDIX 5 – EXCERPTS FROM THE CAA

### Commercial Arbitration Act 1990 (Qld)

#### Section 4: Definitions

“misconduct” includes corruption, fraud, partiality, bias and a breach of the rules of natural justice.

#### Section 22: Determination to be made according to law or by reference to considerations of general justice and fairness

22(1) Unless otherwise agreed in writing by the parties to the arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.

22(2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.

#### Section 33: Enforcement of award

An award made under an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect, and where leave is so given, judgment may be entered in terms of the award.

#### Section 38: Judicial review of awards

38(1) Without prejudice to the right of appeal conferred by subsection (2), the court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

38(2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.

38(3) On the determination of an appeal under subsection (2) the Supreme Court may by order –

- (a) confirm, vary, or set aside the award; or
- (b) remit the award, together with the Supreme Court’s opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration, or where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for reconsideration.

38(4) An appeal under subsection (2) may be brought by any of the parties to an arbitration agreement –

- (a) with the consent of all the other parties to the arbitration agreement; or
- (b) subject to section 40, with the leave of the Supreme Court.

38(5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that –

- (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more parties to the arbitration agreement; and
- (b) there is – (i) a manifest error of law on the face of the award; or (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add or may be likely to add, substantially to the certainty of commercial law.

#### **Section 42: Power to set aside award**

42(1) Where –

- (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings; or
- (b) the arbitration or award has been improperly procured;

the court may, on the application of a party to the arbitration agreement, set the award aside either wholly or in part.

42(2) Where the arbitrator or umpire has misconducted the proceedings by making an award partly in respect of a matter not referred to arbitration pursuant to the arbitration agreement, the court may set aside that part of the award if it can do so without materially affecting the remaining part of the award.

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