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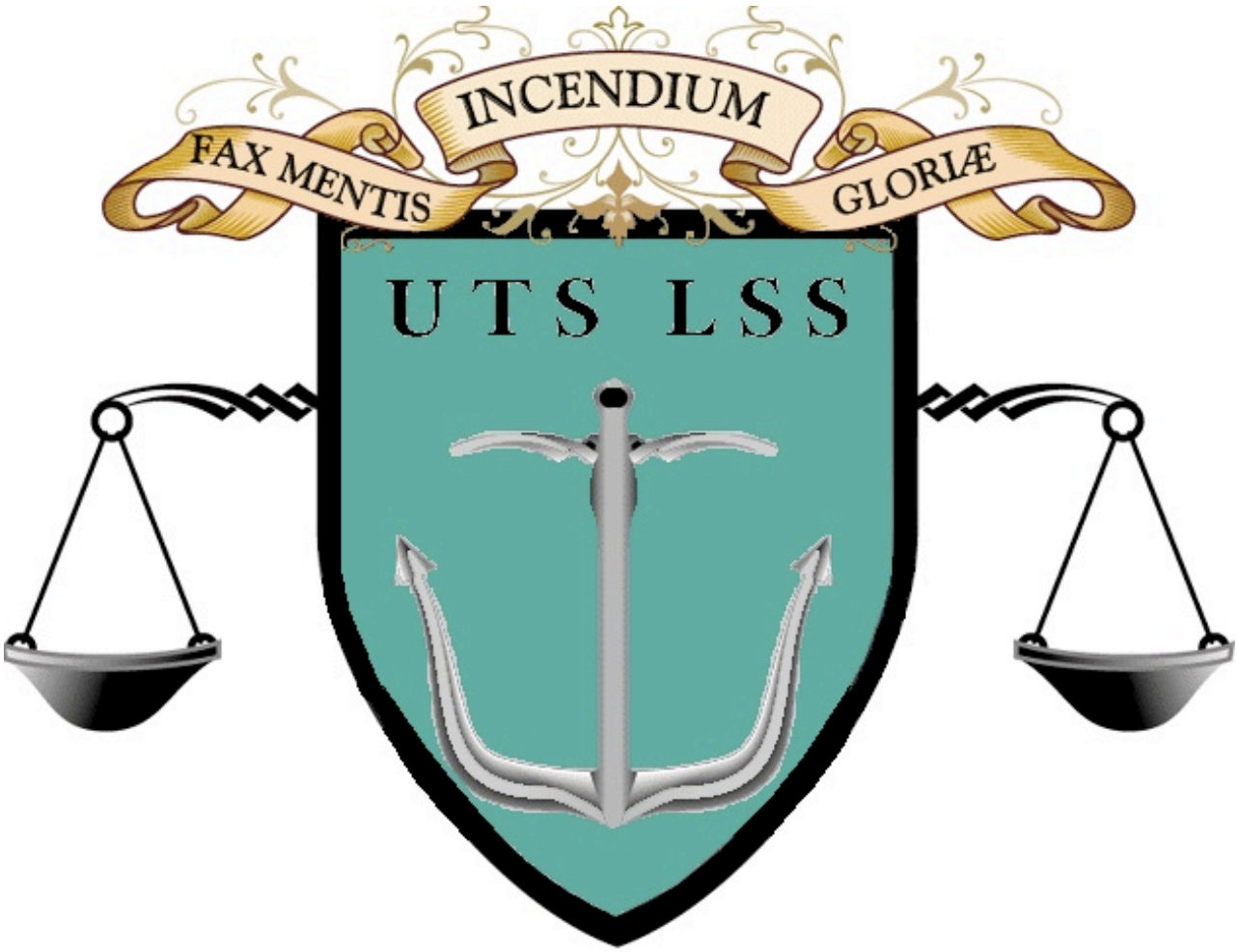
seven deadly sins:

confessions of the law



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Commercial Arbitration Act 2010

The *Commercial Arbitration Act 2010* (NSW) (the **2010 Act**) commenced on 1 October 2010. The 2010 Act repeals and replaces the *Commercial Arbitration Act 1984* (NSW) (the **1984 Act**) and represents a landmark change in the Australian domestic arbitration landscape. The legislation will bring Australia in line with international practice and standards and promote Australia's place in the increasing global trend towards resolving commercial disputes through arbitration. Significantly, the 2010 Act adopts the Model Law on Arbitration (the **Model Law**) developed by the United Nations Commission on International Trade Law (**UNCITRAL**). The adoption of the Model Law and other reforms introduced by the 2010 Act add an international flavour to Australia's domestic arbitration regime.

The 2010 Act - Rationale and Development

For the last quarter of a century, arbitration in Australia was governed by a set of largely identical Acts (often referred to as "the Uniform Acts") that had been enacted in different States and Territories to provide commercial parties with a more flexible alternative to litigation in resolving their disputes. Their overriding purpose was to allow parties to minimise procedural formality and have greater autonomy over the dispute resolution process. In New South Wales, the regime of the Uniform Acts was implemented by the enactment of the 1984 Act.

Despite this, arbitration practitioners and legal advisors remained inclined to replicate familiar processes from curial processes, many were becoming outdated even in the courts. The development of domestic arbitration under the Uniform Acts regime therefore remained bound by a high degree of formality, with parties all too often unable to sample the promised fruits of efficiency and economy that a more informal dispute resolution process would offer.

To overcome this situation, the Standing Committee of Attorneys-General (**SCAG**) resolved in April 2009 to draft a new domestic arbitration act, resulting in the release of the *Commercial Arbitration Bill 2009* as a consultation draft in November of that year. It was proposed that the Model Law form the basis of new uniform commercial arbitration legislation, supplemented where appropriate with provisions

relevant to Australia's domestic setting and provisions adopted from the United Kingdom's *Arbitration Act 1996* (the **UK Act**). These reforms were intended to give effect to key overriding principles of arbitration that had not been realised under the Uniform Acts - to provide a quicker, cheaper and less formal method than litigation of finally resolving disputes.

Following the consultation, the 2009 Consultation Draft Bill was amended and finalised and the model *Commercial Arbitration Bill 2010* was agreed to at the April 2010 SCAG meeting. The New South Wales parliament passed the *Commercial Arbitration Act 2010* (NSW) on 28 June 2010. To date, only New South Wales has enacted the legislation and Tasmania has introduced the bill into Parliament. All other States and Territories have agreed to enact the legislation, but as yet none of them have timetabled consideration of the model *Commercial Arbitration Bill 2010*.

Model Law as basis of the 2010 Act

The 2010 Act is based largely on the Model Law developed by UNCITRAL. UNCITRAL was established in 1966 by the United Nations General Assembly, with the aim of reducing obstacles to international trade.

The idea of the Model Law began with a proposal to reform the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (**New York Convention**). In 1978, the UNCITRAL Secretariat, the Asian-African Legal Consultative Committee, the International Council for Commercial Arbitration, and the International Chamber of Commerce gathered for a consultation process and were of the "unanimous view that it would be in the interest of international commercial arbitration if UNCITRAL would initiate steps leading to the establishment of uniform standards of arbitral procedure".[2] It was concluded that the preparation of a model law on arbitration would be the most appropriate way of achieving this uniformity.[3] Subsequently, the final text of the Model Law was adopted by resolution in Vienna in June 1985, and a recommendation of the General Assembly of the United Nations commending the Model Law to members states was adopted in December 1985.[4]

In 2006, significant amendments were made to the Model Law. Australia has adopted the 2006 version of the Model Law as the basis of the new 2010 Act. Australia is one of the few countries to adopt the 2006 Model Law, along with New Zealand, Ireland, Singapore, Malaysia, Hong Kong, India, Mauritius, Peru, Rwanda and the state of Florida in the United States of America.[5]

The adoption of the Model Law for the purposes of domestic arbitration in Australia is something for which the Model Law was not specifically designed as it was intended to apply to international arbitration. However, UNCITRAL has acknowledged that those states wishing to adopt the Model Law for domestic arbitration are free to do so.[6] Accordingly, 37 of the 80 states that have enacted the Model Law for the purposes of international arbitration have also chosen to adopt the Model Law as the basis for their domestic arbitration law.[7]

Implications of the 2010 Act for arbitration in Australia

One of the reasons why Australia has adopted the Model Law as a foundation for its domestic commercial arbitration framework is "the desirability of uniformity within the national laws regarding arbitration".[8] The 2010 Act also borrows from the United Kingdom's *Arbitration Act 1996* (the **UK Act**), which is not based on the Model Law, but due to the

popularity of London as a venue for international arbitration, the UK Act is also highly influential. In addition to strengthening support for the arbitral process, the 2010 Act adopts international practices in order to bring Australia in line with international developments and standards.

Some key areas of change introduced by the 2010 Act includes an expansion of the powers of the tribunal to grant interim measures of relief and security for costs (Part 4A); developing a regime for confidentiality which provides that the parties and the tribunal cannot disclose confidental information (s 27E), unless one of the exceptions under the 2010 Act applies (ss 27F-27I); limiting the grounds for court intervention in procedure (ss 18-19); curtailing the court's inherent jurisdiction (s 5); and narrowing the grounds upon which the award may be appealed (ss 34-34A). In particular, the only grounds available under s 34 are the same grounds provided in Article V of the New York Convention, which is necessary to ensure enforcement of Australian arbitral awards in foreign jurisdictions. Section 34A allows an award to be challenged on a point of law, however this provision sets a high threshold (the decision must be "obviously wrong" before the court may grant leave to appeal (s 34A (3)(c)(i)) or 'open to serious doubt' if the question is of general public importance (s 34A(3)(c)(ii)). The parties must specifically "opt in" to the operation of this provision, otherwise this ground of challenge is not available.

The overall effect of these reforms is that the 2010 Act strengthens the support framework for arbitration in New South Wales, where it has been implemented. Globally, under the aegis of the New York Convention and the adoption of the Model Law by many nations, arbitration is an increasingly attractive way of settling cross-border and multinational disputes. The 2010 Act reinforces recognises the particular characteristics of arbitration that distinguish arbitration from litigation, such as party autonomy, efficiency and procedural economy. Although the 2010 Act applies to domestic arbitration, it is a step toward nurturing a thriving environment for arbitration in Australia in tandem with global developments.

Endnotes

This paper is based in part on material prepared for the forthcoming publication entitled "Commercial Arbitration in Australia" by Professor Doug Jones AM, Partner of Clayton Utz (to be published by Lawbook Co. (Thomson Reuters) in January 2011). The author of this paper also gratefully acknowledge the assistance of Alice Zheng of Clayton Utz in the preparation of this paper. Any errors or omissions are the responsibility of the author.

[1] UNCITRAL, *Note by the Secretariat: Further work in respect of international commercial arbitration*, 12th sess, UN Doc A/CN.9/169 (11 May 1979) at [6].

[2] Ibid at [6]-[9].

[3] See A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (4th ed, Sweet and Maxwell, 2003) 69.

[4] UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> at 13 August 2010.

[5] UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration,* 18th sess, UN Doc. A/CN.9/264, (3-21 June 1985) ("Analytical Commentary") [22]. See also P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet and Maxwell, 2010) p 27.

[6] P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet and Maxwell, 2010) p 27.

[7] SCAG, *Reform of the Uniform Commercial Arbitration Acts: Issues Paper* (2009) p 2.