COMMERCIAL ARBITRATION BILL 2011

Second Reading

Resumed from 22 September.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [3.31 pm]: I rise to indicate that the opposition will support the Commercial Arbitration Bill 2011.

The bill before us repeals the Commercial Arbitration Act 1985 and replaces it with a new regime for the resolution of domestic commercial disputes. It arises from a Standing Committee of Attorneys-General agreement to give effect to the international agreements reached through the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. The policy intent is to provide certainty to commerce that effectively wherever they conduct their business, the method by which disputes are resolved is consistent. The view is that by Australia doing that at a national level for international commercial disputes and with each state jurisdiction within Australia doing the same for domestic disputes, we become an even safer and more attractive place to do business.

The bill provides for impartial arbitration by tribunals without undue delay or expense. The scope is domestic disputes, which are defined as those in which the parties have their place of commerce in Australia and have agreed to use the process. It requires the parties to enter an arbitration agreement in writing—although there is a fairly liberal interpretation of what constitutes a written agreement—to submit to the arbitration process. The tribunal that hears the arbitration is deemed competent to make a determination.

The Commercial Arbitration Bill that is before the Western Australian Parliament differs from the SCAG model in that at several clauses—namely, clauses 11, 13, 14 and 16—there is a proposed subsection 3A, 5A or 10A, which goes to a matter that has been before the courts since the first model was drafted. The Standing Committee on Uniform Legislation and Statutes Review's sixty-seventh report sets out the background to that on page 14. Essentially, there was a High Court decision last year in Kirk v Industrial Court of New South Wales that held that we cannot legislate to exclude a court's ability to review matters. The clauses that have been added to the Western Australian bill make clear that the power to do a judicial review is not limited.

The opposition supports the bill. Using the arbitration process is much less onerous on the parties, they are not constrained by things like court waiting lists and there will be lower costs. The outcome of the arbitration can be declared confidential. Therefore, once the dispute is resolved, that of itself can be useful for disputes that are about sensitive commercial matters or technical matters and operations that if revealed will have commercial consequences, unintended, perhaps, beyond the two parties involved in the dispute.

I note that the Standing Committee on Uniform Legislation and Statutes Review's report raises a couple of queries and asks for the government's explanation, on one item in particular; however, generally, I indicate that we support the bill.

HON LYNN MacLAREN (South Metropolitan) [3.35 pm]: The Greens support the Commercial Arbitration Bill 2011.

HON SIMON O'BRIEN (South Metropolitan — Minister for Finance) [3.35 pm] — in reply: I thank honourable members for their brevity, as well as their support for the Commercial Arbitration Bill 2011. I do not know whether I will be able to emulate the former whilst pursuing the latter, but I will give it a go.

The contribution of members was sufficiently positive that it does not give a great deal of scope for a second reading response, except to acknowledge that the synopsis given by Hon Sue Ellery is accurate that, in effect, the commercial arbitration system was enshrined in a 1985 act as regards Western Australia. The Standing Committee of Attorneys-General considers this and other matters. It identified a couple of years ago a system that was in use for the settling of international commercial disputes that had been provided by the United Nations Commission on International Trade Law—a group called UNCITRAL. That model law was investigated by SCAG to possibly form the basis for a model law in Australia to replace the model law that already existed. We have had uniform legislation on this matter in Australia at least since 1985, but here was a proposal to exchange the model law as it currently exists and is shared across jurisdictions with a model law that is taken from the international domain. The advantage of that is obvious in that the same rules would basically apply regardless of whether a business was prosecuting a dispute in the domestic scene or with another party from another country.

The honourable member also pointed out quite accurately that because of its nature, the bill was referred to the Standing Committee on Uniform Legislation and Statutes Review, which tabled its sixty-seventh report, which was on the bill, and which I have here. The report picks up on a number of matters for discussion. I think those involved in helping draft the report found it a stimulating intellectual exercise and I am sure that the members of the committee did as well. I certainly appreciated the provision of the report. The committee, of course, made

some recommendations. I know that Hon Sue Ellery has been absolutely on the edge of her seat, ever since the report was tabled on 8 November, waiting to hear the government response to these recommendations, so I will not make her wait any longer. Recommendation 1 states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney General provide clarification as to what may constitute "exceptional circumstances" in clause 17D when an arbitral tribunal modifies, suspends or terminates an interim measure it has granted.**

In the absence of the parliamentary secretary on urgent parliamentary business—indeed, he is; on behalf of all of us, he is representing us as a Parliament in another forum as a Commonwealth Parliamentary Association representative—I have been given the management of this bill on behalf of the government, so I will respond on his behalf, and I will do so in these terms: the term "exceptional circumstances" is used in many statutes. However, it is very rarely defined. There are examples of laws in which the term is used, including the Adoption Act 1994, the Criminal Procedure Act 2004 and the Inspector of Custodial Services Act 2003, to name but a few. It appears, though, that the only law in which any attempt is made to explain what exceptional circumstances might be is the Western Australian Family Court Act 1997, in section 85A relating to parenting orders. Subsection (2) states —

> The court may, in exceptional circumstances, include in a parenting order a provision that the parenting order, or a specified provision of the parenting order, may only be varied by a subsequent order of the court (and not by a parenting plan).

Subsection (3) states —

> Without limiting subsection (2), exceptional circumstances for the purposes of that subsection include the following —

It then gives a couple of circumstances. The use of the word "include" in subsection (3) indicates that the term cannot be defined in detail. Of necessity, an exceptional circumstance is one that is unique and unlikely to arise more than once. Therefore, it is pointless to clarify what an exceptional circumstance might be or to attempt to define it. However, a court will be able to identify an exceptional circumstance in the rare case in which it arises. In summary, therefore, an exceptional circumstance is one that is unique or rare and unlikely to occur very often.

The committee also produced a second recommendation, called recommendation 2, which I thought was logical. It states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney General explain whether it is the intent that the word "copy" in clause 35(2) is intended to be read as meaning a certified or notarised copy. If so, to explain why this is not expressly provided for in the Bill.**

Clause 35(2) provides for the recognition and enforcement of awards made in other states or territories. A party relying on an award must supply the original award or a copy of the award if it wishes to enforce the award in another jurisdiction. Clearly, the best evidence is the original award, and this is the primary requirement of the court. However, it is open to a party seeking to enforce an award to supply the court with a copy. Whether the copy is acceptable will then be for the court to determine, depending on its own rules and requirements. It is noted that section 9 of the commonwealth International Arbitration Act 1974 provides that a person seeking to enforce an international arbitration is required to provide to the court both the duly authenticated original award or a duly certified copy, and the original arbitration agreement under which the award was made. The authentication is separately stated to be that required to the satisfaction of the court. Therefore, in effect, the standard required is that which the court sets according to its own requirements. A higher standard is often required in international matters to ensure that the genuine document is provided for enforcement. It is not proposed to change clause 35(2) to refer to a certified or notarised copy of an award as this is a matter that will have to be satisfied to the standards set by the relevant court.

Recommendation 3 was for the bill to be amended. In effect, at page 61 there is a typographical error. The figure "14(4)" should have been "14(3)". We agreed. We can move an amendment in committee to do that, although I have obtained the Clerk's advice that this having been noted in the committee report and it also being accepted by me now on behalf of the government as in fact a typo, it can be done as a Clerk's amendment or a drafting amendment, without the need for a supplementary notice paper for that.

I have only just received some other minor amendments that are now contemplated, and these have been circulated on a supplementary notice paper; that is, supplementary notice paper 205, issue 1. The amendments in that are probably best explained in a Committee of the Whole. With the support of the house, I look forward to proceeding to that forthwith.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chairman of Committees (Hon Ken Travers) in the chair; Hon Simon O'Brien (Minister for Finance) in charge of the bill.

Clauses 1 to 10 put and passed.

Clause 11: Appointment of arbitrators (cf. Model Law Art 11) —

Hon SIMON O'BRIEN: I move —

> Page 13, lines 11 to 16 — To delete the lines and insert —
>
> (5) A decision within the limits of the Court's authority on a matter entrusted by subsection (3) or (4) to the Court is final.

In her remarks during the second reading debate, Hon Sue Ellery observed, among other things, that the committee in its report had raised a question, which appeared in six places in identically worded terms. This was addressed using the example of clause 11(5A), as discussed by the committee in its report from paragraph 7.32 onwards. The response of the government to this question is contained in the amendment that we are dealing with now and in the following half-dozen or so amendments that we propose to move. The proposed amendments will make this bill consistent with all the other jurisdictions and deal with the initial drafting considerations that concerned the drafters of our bill. The matters that were canvassed by the committee in its report have been considered, and further advice has been obtained. We believe that the way ahead that we have proposed, not only here but in a number of other clauses, is the appropriate response; and, indeed, we have borrowed it from the other jurisdictions. We are looking at replacing a uniform law with another uniform model law, because in that way it will be consistent when our businesses have to engage in international arbitration, for which we need to have a uniform law. For all those reasons, I think this is the right way to go, and I seek support for this amendment and the others that will follow.

Hon ADELE FARINA: I do not know that the minister actually explained to members the reason for the change in wording and how the amendments that he proposes to move will fix the problem. It is not clear to me from the wording of this amendment whether a Supreme Court decision will be final or whether there will be a right of appeal to the High Court. The proposed amendment reads —

> A decision within the limits of the Court's authority on a matter entrusted by subsection (3) or (4) to the Court is final.

That is great. But it does not actually say anything. It does not provide a huge amount of guidance to anyone who needs to implement this piece of legislation. I therefore ask for some clarification of why the government is proposing this change and how this will resolve the constitutional uncertainty.

Hon SIMON O'BRIEN: I draw some comfort from the fact that the gentleman advising me is the same person, I think, who advised the committee, so we should have some consistency here.

The DEPUTY CHAIRMAN (Hon Ken Travers): Minister, I am sure you are not supposed to bring your advisers into the debate.

Hon SIMON O'BRIEN: I am just saying that the sources of information are consistent.

The committee saw fit to raise this matter and observed in its report that the clauses that I am seeking to replace were absent from both the model bill and a New South Wales enactment. I understand that the alternative wording is in fact consistent with all the other wording. The difference between the two is pretty subtle, and to some it might even seem obscure, but it is a matter that the committee has seen fit to comment on, and obviously it is a matter that the drafters of this bill saw as important to include. It flows from the Kirk decision in New South Wales, as explained in the report. The committee reminds us that on that occasion —

> It was held by the whole Court that:
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> > *State legislation which would take from a State Supreme Court power to grant relief for jurisdictional error on the part of inferior courts and tribunals is beyond State legislative power.*

Quite clearly, the amendment that I am proposing includes the important words "within the limits of the court's authority". That makes sure that any final decision can be adjudged to be final and not appellable only if it is made within the limits of the court's authority. The New South Wales act, to which both the committee and I

have referred, contains this provision in identical terms. That is the reason for it. I do not know whether it has been of any great benefit to depart from the model bill in order to go through this exercise because what we have ended up with is what I am proposing, which is to put those words back into the model bill, but that is the question that the committee raised and we are restoring the bill to the way it was. I hope that is satisfactory to members and that we do not tread uncomfortably or unproductively on any judicial toes by way of this construction. Because we are going back to the model bill that everyone has adopted, I think that should do the trick.

Hon ADELE FARINA: I think it is important to put on the record that the Standing Committee on Uniform Legislation and Statutes Review in no way expressed dissatisfaction with the provisions in the Commercial Arbitration Bill 2011 as they currently stand. The committee simply provided comment on the provisions because it is a matter of constitutional significance that members of this chamber ought to be made aware of when considering the bill. That is all we have done. We then said it was possible that the efforts being made to address that constitutional issue, with the provisions as they are currently drafted, may not be successful and that we will not know that until the court makes a judgement. We understand there are a number of cases pending before the courts. The committee did not make a recommendation on this point at all and did not express any dissatisfaction with the provisions as they are currently drafted. In fact, the committee believes that it is a credit to Western Australia that it tried to look at provisions to address the issue rather than just accept what had been adopted in the model bill. I am at a loss to understand why these amendments have come forward now. For the minister to say that it is in response to the committee is just inaccurate, because the committee made no recommendation and expressed no dissatisfaction with the existing provisions. We noted that this was an effort to deal with constitutional issues and that until the courts make a judgement, we will not know whether or not it has been dealt with satisfactorily. The committee in no way expressed any dissatisfaction with the provisions in the bill.

Hon SIMON O'BRIEN: I hope I have not indicated that the committee did anything other than to raise this matter for discussion as a point of interest. As I acknowledged in my second reading response, there is an interesting intellectual side to some of the matters that are discussed in the report, if one is involved in those matters. What I can tell members is that, as Hon Adele Farina surmises, this was an attempt in the bill to deal with an identified legal question. At length, and as a result of the inquiries of the committee, advice was sought from the State Solicitor's Office to the effect that we needed to remove the offending clauses and replace them with what we have proposed. That advice came through only yesterday, which is why the amendments on the supplementary notice paper have arrived so late. It is a valid point for the committee members to raise. If we go down the path of amending the bill along the lines that have been proposed—I do intend to go along that path—we will never know what might have happened if the originally drafted clause had been tested in the High Court. Whether or not members will lose much sleep over that I do not know, but that is the way we are proposing to head. However, we do it on the basis of advice, which in turn was sought on the basis of the point raised through the committee.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 12 put and passed.

Clause 13: Challenge procedure (cf. Model Law Art 13) —

Hon SIMON O'BRIEN: I move —

Page 15, lines 17 to 21 — To delete the lines and insert —

(5) A decision of the Court under subsection (4) that is within the limits of the authority of the Court is final.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 14: Failure or impossibility to act (cf. Model Law Art 14) —

Hon SIMON O'BRIEN: I move -

Page 16, lines 9 to 13 — To delete the lines and insert —

(3) A decision of the Court under subsection (2) that is within the limits of the authority of the Court is final.

Again, this amendment is the same as the last two amendments, in effect. The only difference is that it sits in a slightly different way in the structure of the clause.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 15 put and passed.

Clause 16: Competence of arbitral tribunal to rule on its jurisdiction (cf. Model Law Art 16) —

Hon SIMON O'BRIEN: I move —

Page 18, lines 4 to 8 — To delete the lines and insert —

(10) A decision of the Court under subsection (9) that is within the limits of the authority of the Court is final.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 17 to 27G put and passed.

Clause 27H: The Court may prohibit disclosure of confidential information in certain circumstances —

Hon SIMON O'BRIEN: I move —

Page 40, lines 9 to 13 — To delete the lines and insert —

(5) An order of the Court under this section that is made within the limits of the authority of the Court is final.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 27I: The Court may allow disclosure of confidential information in certain circumstances —

Hon SIMON O'BRIEN: I move —

Page 41, lines 9 to 13 — To delete the lines and insert —

(4) An order of the Court under this section that is made within the limits of the authority of the Court is final.

This amendment is in identical terms to the previous amendments; the theme is the same.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 27J to 44 put and passed.

Clause 45: Acts amended —

Hon SIMON O'BRIEN: I move —

Page 61, the Table item 14 the 1st row — To delete "14(4)," and insert —

14(3),

This is an amendment picked out by the Standing Committee on Uniform Legislation and Statutes Review, which I acknowledged in my report and responded to. It could have been done as a Clerk's amendment, but we thought, as we are going into committee, we would do it ourselves. The amendment relates to a provision of the Petroleum Act 1936; a statute with which many of us are familiar. It is proposed that references to the sections indicated within the Arbitration Act 1895 be deleted and replaced with the words "Commercial Arbitration Act 2011" which is, of course, what we hope this bill will be in the very near future. That replaces a provision in an act from the century before last, when we were a young colony. It is not something we get to do very often, but we are doing it now.

The DEPUTY CHAIRMAN (Hon Ken Travers): While we seem to have the will of the house, shall we put the motion, minister?

Hon SIMON O'BRIEN: Are you scared, Mr Deputy Chairman, that I might talk them out of it if I proceed any longer?

The DEPUTY CHAIRMAN: It is your call, minister!

Hon SIMON O'BRIEN: I will give it a rest!

Amendment put and passed.

Clause, as amended, put and passed.

Title put and passed.

Bill reported, with amendments.