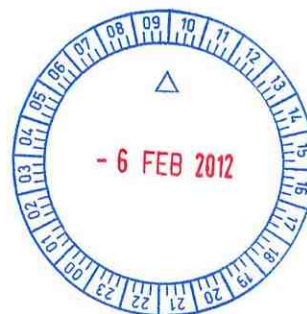




Treasurer; Attorney General

Our Ref: 36-17897

Hon Adele Farina MLC
Chair
Legislative Council Standing Committee on
Uniform Legislation & Statute Review
Parliament House
PERTH WA 6000



Dear Chair

Adele

COMMERCIAL ARBITRATION BILL 2011 (WA)

Thank you for your letter dated 2 November 2011 enclosing a copy of the report of the Legislative Council Standing Committee on Uniform Legislation and Statutes Review into the Commercial Arbitration Bill 2011 (WA).

The Bill had passed the Assembly. The Bill has now also passed all stages in the Council but with amendments and a message has been sent to the Assembly seeking agreement to some Government amendments. It has previously been recommended that the Assembly agree to the Bill as amended by the Council.

The Committee made a total of three recommendations regarding the Bill which are dealt with under.

Recommendation 1: 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.

Government response: 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 *Family Court Act 1997* (WA), 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.

Recommendation 2: 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.

Government response: 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 *International Arbitration Act 1974* (Cth) 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: The Committee recommends that the Commercial Arbitration Bill 2011 be amended in the following manner:

Page 61, in the Table, Item 14, row 7 - To delete -“14(4)” and insert -

14(3)

Government response: It is agreed that the figure “14(4)” should have been “14(3)”. An amendment was moved in Committee to make the amendment.

Yours sincerely



Hon C. Christian Porter MLA
TREASURER; ATTORNEY GENERAL

3 FEB 2012

