AUSTRALIA'S NEW ARBITRATION REGIME: FIVE YEARS ON

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2015 marks five years since the *International Arbitration Act 1974* (Cth) (IAA) was amended to ensure – in the words of the then Commonwealth Attorney-General Robert McClelland – that the "Act remains at the forefront of international arbitration practice". Concurrently, in the domestic context, New South Wales introduced the *Commercial Arbitration Act 2010* (CAA) to facilitate the "fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense" (s 1C(1)).

These initiatives occured at the time of the joint Federal and NSW establishment of the Australian International Disputes Centre in Sydney (AIDC). The then NSW and Federal attorneys general said respectively of the centre that it would "position Sydney as the new regional hub for international dispute resolution" and that "Australia will be the place to come to when businesses want their problems fixed, and fixed fast and fairly".

This article considers the extent to which the objectives underpinning the introduction of amending federal and new state legislation have been effective, if they have not, why not, and what further steps can now be taken to engender the necessary culture of arbitration to promote a competitive and sustainable arbitration environment in Australia.

Arbitration v litigation: what are the benefits?

To begin, it would be useful to say something about the nature of Arbitration. It is nothing more than the consensual submission of a dispute by its parties to a third party for a determination by which they agree to be bound. The process is an alternative to the court system and, subject to any mandatory local law, the parties control the process by which the dispute will be determined. It is said to have a number of benefits when compared with court litigation. These include:

Snapshot

- Australia enjoys a sophisticated regime for the efficient conduct of international and domestic arbitration, supported by the courts and reinforced by amendments to IAA and CAA over the last five years.
- While arbitration figures in Australia are improving, they are still outshone by other centres in our region.
- Challenges facing the development of a thriving arbitration culture lie in legal education and maintaining a competitive advantage with traditional litigation by reducing costs

1. **Privacy**. The IAA (subject to opting in) and CAA make proceedings confidential. With few exceptions (eg where there is a court challenge), arbitration decisions and the names of the parties are not published.
2. **Neutrality**. In international arbitration both the identity of the arbitrator or arbitrators and venue can be neutral from the perspective of the domicile of the parties.
3. **Flexibility**. The parties are free to choose where the arbitration takes place and what law or institutional rules will govern the arbitration and procedure.
4. **Timing**. Arbitration proceedings can be brought on relatively quickly for hearing subject to the availability of the parties and the arbitrators and necessary preparation time. Having said this, federal and state courts in New South Wales have through case management regimes implemented in recent years gone a long way to reducing the delays before hearing.
5. **Limited right of Appeal.** Court proceedings at first instance might be amenable to one or possibly two levels of appeal. Arbitration is final, subject to very limited rights of appeal. Under the CAA for example, an appeal can only be made on a question of law on very limited grounds if the parties 'opt in' and agree no later than three months from the making of the award to preserve appeal rights and obtain leave of the court.
6. **Enforceability**. In international arbitration, a real advantage is the operation of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (the New York Convention), which provides for the recognition and enforcement of foreign arbitral awards in 153 countries. This is in contrast with the enforcement of foreign court judgments in Australia pursuant to the *Foreign Judgments Act 1991* (Cth) (limited to 36 jurisdictions), or at common law.
7. **Cost.** Although this is said to be a benefit, in reality, where arbitration is conducted like traditional litigation, costs are likely to be no cheaper (and taking into account additional costs of the arbitrator's fees and room hire, are likely to be more expensive) than traditional litigation.

Meeting the market

An extensive 2010 survey identified that the main factors influencing choice of the seat of arbitration are: the jurisdiction's formal legal infrastructure – its national arbitration law, track record in enforcing agreements to arbitrate and arbitral awards and its neutrality and impartiality (62 per cent); law governing the substance of the dispute (46 per cent); and other matters including the efficiency of court proceedings (45 per cent) (White & Case LLP and Queen Mary, University of London, '2010 International Arbitration Survey: Choices in International Arbitration', 2010). These criteria of choice are clearly satisfied in Australia.

A look at the federal and state regimes

The 2010 amendments to IAA included the following : clarification that the *United Nations Committee on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration* (Model Law) , contained in Schedule 2 of the Act , applies to international arbitrations in Australia rather than state commercial arbitration acts; the introduction of a stricter 'real danger' test for challenging arbitrators on the basis of bias; rules for the disclosure of confidential information; clarification of the circumstances in which a foreign arbitral award may not be enforced on the grounds that it offends public policy; new rules for issuing subpoenas; and more detailed costs rules. The CAA which was ultimately introduced in similar form by other states (with the exception of the ACT) also adopted the provisions of the Model Law. The legislative structure gives both uniformity and best practice to the regime for the conduct of international and domestic arbitration in Australia.

Boundaries of judicial intervention

The boundaries of court intervention are limited. Article 5 of the Model Law and s 5 of the CAA expressly prohibit any court intervention beyond the express provisions of the relevant law. Further provisions also limit the boundaries of judicial intervention to the following:

- Staying court proceedings when there is a valid arbitration agreement governing the parties' dispute (Model Law art 8; IAA s 7(2); CAA s 8);
- Providing parties with interim measures of protection(Model Law art 9; CAA s 9);
- Assisting with the appointment of an arbitral tribunal (Model Law art 11, 13 and 14; CAA s 11, 13 and 14);
- Determining the jurisdiction of an arbitral tribunal (Model Law art 16; CAA s 16);
- The recognition and enforcement of interim measures issued by an arbitral tribunal subject to a number of grounds for resistance (Model Law art 17H and 17I; CAA ss 17H and 17I; IAA s 19);
- Assisting in taking evidence (Model Law art 27; CAA s 27);
- Determining whether an arbitral award can be set aside (Model Law art 34; CAA s 34); and
- Confining grounds for refusing to enforce an arbitral award (Model Law art 35 and 36; CAA ss 35 and 36; IAA s 8(5)).

Court enforcement of arbitration agreements

The international and domestic regimes for the conduct of arbitration in Australia are supported by the courts. As Allsop CJ and Croft J have suggested "[f]rom an economic point of view, a country where the courts are inconsistent in their approach and unpredictable in their treatment of international arbitral processes and awards does not, and is not likely to, attract any significant arbitration work." (Chief Justice James Allsop and Justice Clyde Croft, 'Judicial support of arbitration' (FCA) [2014] FedJSchol 5, 28 March 2014).

Australian courts will enforce arbitration agreements by staying any commenced court proceedings *(Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332). Further, Australian courts may grant "anti-suit injunctions" to restrain parties to an arbitration agreement from bringing court proceedings in breach of that agreement *(CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 392). The general approach of the courts is to interpret arbitration clauses widely *(Comandante Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [165]).

There is a tendency to enforce arbitral awards in order to uphold contractual arrangements in international trade and to support certainty and finality in international dispute resolution *(Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 at [126]). If a party fails to challenge an award within the jurisdiction of the courts at the seat of the arbitration, it cannot then resist enforcement in later enforcement proceedings in Australia *(DampskibsselskabetNorden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696). Australian courts will give great weight to prior decisions of courts at the seat of arbitration dealing with the same issues, and it would generally be inappropriate for an enforcement court applying the New York Convention to reach a different conclusion from the court at the seat of the arbitration *(Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109). The public policy ground does not confer broad discretion to refuse enforcement *(Traxys Europ SA v Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 at [105]).

The provisions of the IAA which require courts to enforce an international award were recently challenged as being inconsistent with Chapter III of the *Australian Constitution*, requiring Australian courts to exercise independent judicial power on the basis that enforcement of an award in the manner envisaged by the IAA meant the court was exercising judicial power without any independent judicial process *(TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5). The High Court rejected this argument, unanimously holding that arbitral power is not judicial power, which operates regardless of the parties' consent, whereas arbitral power is dependent on it. Thus, in enforcing an arbitral award, a court is merely enforcing an agreement between the parties.

To further confidence in court support of arbitration, the Supreme courts in NSW and Victoria have introduced separate arbitration lists to provide specialist expertise when dealing with arbitration matters. The Federal Court registries each have an arbitration co-ordinating judge to manage matters under the IAA.

Additional procedural rules

In addition to the legislative regime and court support, the local appointing authority under IAA – the Australian Centre for International Commercial Arbitration (ACICA) – has moved to introduce practical yet efficient procedural rules which might be adopted by parties. In 2011, it released the ACICA Expedited Arbitration Rules and a revised version of the ACICA Arbitration Rules. The expedited rules have an overriding objective to provide arbitration that is quick, cost effective and fair, considering the amounts in dispute and complexity of issues or facts involved. The revised ACICA Arbitration Rules provide for competitive best practice including emergency interim measures of protection before the arbitral tribunal has been constituted.

Australia therefore both internationally and domestically enjoys a sophisticated regime for the efficient conduct of international and domestic arbitration, which is supported by the courts and has been reinforced by the amendments to IAA and CAA over the last five years. The question is whether this supportive environment has of itself been sufficient for the promotion and the development of arbitration as a means of alternative dispute resolution in Australia.

How do we compare to our Asia Pacific neighbours?

Arbitration is, by nature, private. As such, figures for the number of international and domestic arbitrations being conducted are not readily available, particularly in respect of those arbitrations not conducted by

institutions. Since AIDC opened in 2010, close to 40 cases have been registered with ACICA. The caseload has doubled in the last two years, compared to the two years before that. In 2013/2014, approximately 90 per cent of ACICA cases involved at least one foreign party. More than two thirds of these cases involved two foreign parties with no other connection to Australia[1]. This compares with 259 new arbitrations in 2013 conducted by the Singapore International Arbitration Centre [2], 156 cases in 2013 conducted by the Kuala Lumpur Regional Centre for Arbitration [3], 260 new cases in 2013 conducted by the Hong Kong International Arbitration Centre [4], and more than 1000 cases each year since 2007 by the China International Economic and Trade Arbitration Commission [5].
The figures in Australia are improving but well outshone by the Arbitration Centres in our near region. No figures are available for Australian domestic arbitration under the CAA post 2010. However in the 12 months since 1 September 2012, there were 25 arbitration related judgments in Australian courts, including 19 cases concerning domestic arbitration [6]. This reflects at least some take up of the domestic regime by parties.

Factors inhibiting growth

In 2011, Croft J suggested that "[b]uilding, and maintaining, a reputation as a strong arbitral jurisdiction requires constant reinforcement, with positive and proactive measures by legislatures, governments, arbitral bodies, arbitration practitioners, as well as the judiciary" (Justice Clyde Croft, 'The Future of International Arbitration in Australia– a Victorian Supreme Court Perspective', Law Institute of Victoria seminar – "The Future of International Arbitration in Australia", 6 June 2011). Australia does provide a politically stable, neutral and court supported environment in which international and domestic arbitration might be undertaken by parties adopting world best practice enshrined in the IAA and CAA and local institutional rules. His Honour did however identify the nub of the problem, going on to say that "... this will all be for nothing if legal advisors do not start making use of Australia's competitive advantages to capture some of the dispute resolution work in the region".

Lawyers or their clients may be unaware of the availability of arbitration or, being aware, they have declined to adopt arbitration either for reasons of unsuitability or perception of lack of advantage when compared with the court system. Insufficient legal education then remains one significant factor inhibiting the growth of a thriving arbitration culture in Australia. Although alternative dispute resolution including arbitration has been taught in universities at post graduate level for some years it is only comparatively recently that specialist arbitration course modules have been available to undergraduates. This has meant that many practitioners (outside ADR specialists) may have little or no understanding of arbitration law and practice. The consequence is that arbitration clauses are not included in many suitable commercial agreements. If they are, a precedent might be used which is not appropriate to the circumstances of the parties resulting, in the international context, in an arbitration being seated or subject to institutional control outside Australia.

One particular aspect of education is related to the question whether arbitration can be perceived by potential users as offering real benefits when compared with court litigation. The issues of privacy, neutrality and particularly enforceability are important in international arbitration and those benefits are well known. Neutrality and enforceability are not such an issue in domestic arbitrations nor is timing where court lists are run efficiently and matters can be brought on for hearing quickly. In a recent survey interviewees expressed concerns over the "judicialisation" of international arbitration, the increased formality of proceedings and their similarity with litigation. Parties are reluctant to undertake arbitration where there is a perception that it is less timely, no cheaper and indeed could be more expensive than traditional litigation [7].

Cost is of course a function of time spent. There might be a tendency amongst common law lawyers to run an arbitration like a trial requiring general discovery and wide ranging cross examination. If such procedure is adopted the cost will be no less. Parties and their advisors should be aware that arbitration does offer the option to adopt a procedure more tailored to the circumstances of the dispute. One way is to consider using institutional rules (for example the ACICA rules) which focus on the possibility of savings of time and thereby cost. Parties can of course go further by limiting general discovery or cross examination and/or adopting some other procedures more well known in the civil law system to reduce costs when compared with traditional litigation. In order to achieve this the parties and their lawyers will need to adopt a more flexible approach having been satisfied of course that the procedure is one with which they are comfortable. As a starting point they need to be aware that such an approach is available. The education issue is gradually being addressed. Currently in Australia, arbitration is offered at undergraduate level in 21 law schools and at postgraduate level in 10 law schools. Additionally, arbitration is being promoted by regional law societies, and by peak arbitration bodies including ACICA and the Chartered Institute of Arbitrators running courses and workshops. Education with the support of the stakeholders identified by Croft J is fundamental to the development of a thriving arbitrations culture.

The development of Australia's arbitration culture

The dynamics of the market for arbitration in Australia are subject to a number of variables. Significant regional competition for international arbitration is found in PRC, Hong Kong, Singapore and Malaysia. Individual centres are subject to different levels of public or private funding, legislative structure, court support and commercial viability. What they share is an established arbitration culture. Based upon usage, arbitration and its benefits are not as well known in Australia. Where other user criteria are clearly met, the challenge facing the development of a thriving arbitration culture within Australia lies in legal education. An understanding of arbitration and its potential advantages including the saving of costs is at the heart of maintaining a real and competitive advantage to the traditional court system. Unlike the court system, the parties to an arbitration can, properly informed, adapt their own procedure resulting in a saving of costs. Whether parties and their lawyers are prepared to modify their approach to alternative dispute resolution in appropriate cases to allow this to occur, will determine the extent to which arbitration can develop as a real alternative - both internationally and domestically in Australia. **LSJ**

Endnotes

1. ACICA caseload figures at the time of this article.
2. Singapore International Arbitration Centre, 'Total Number of Cases Handled by the SIAC as of 31 December 2013'.
3. Kanishk Verghese, 'Arbitration in Asia: The next generation?', Asian Legal Business, 1 July 2014.
4. Ibid.
5. Ibid.
6. Albert Monichino SC and Alex Fawke, 'International arbitration in Australia: 2012/2013 in review' (2013) 24 ADRJ 208, p 209-210.
7. Queen Mary, University of London and PricewaterhouseCoopers, 'Corporate Choices in International Arbitration: Industry Perspectives', 2013