International Dispute Resolution in the Asia-Pacific – Arbitration in Australia Revisited

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1. Introduction – APRAG and Beyond

On 27 to 28 March 2014, international dispute experts converged on Melbourne, Australia to celebrate the 10th Anniversary of the Asia-Pacific Regional Arbitration Group (APRAG) Conference. APRAG is a regional federation of arbitration associations comprised of more than 30 members. The conference was very well attended and attracted a range of eminent speakers including: The Honourable Chief Justice Marilyn Warren AC, The Honourable Chief Justice James Allsop AO, The Honourable Justice Clyde Croft, The Honourable Justice Judith Prakash, Dato' Justice Mary Lim Thiam Suan, The Honourable Madam Justice Mimmie Chan, Yu Jianlong, Datuk Sundra Rajoo, Doug Jones AO, Professor Michael Pryles, Professor Richard Garnett, Robert Dick SC, Jonathon Redwood, Campbell Bridge SC, Philip Yang and Michael Hwang SC.

The decision to hold this conference in Australia not only acknowledges the birthplace of APRAG in Australia a decade ago, but also provides recognition of

Australia's ever increasing presence within the international arbitration community. The anniversary also provides a timely opportunity to examine how far arbitration in Australia has come over the past decade and recent developments aimed at ensuring that Australia remains a world class venue for international commercial arbitration in the Asia-Pacific Region in the years to come.

2. Legislative Support for Arbitration

Australia has a 'dual track' system for international and domestic commercial arbitrations. International arbitrations are governed by the International Arbitration Act 1974 (Cth) (IAA), whereas domestic arbitrations are governed by State or Territory-based arbitration legislation.[fn]The domestic arbitration legislation is often referred to as the 'uniform arbitration legislation' on the basis that all States and Territories with the exception of the ACT have now adopted arbitration legislation that is substantially uniform.[/fn]

The IAA adopts and applies the key international Conventions and regulatory instruments in this area, namely, the UNCITRAL Model Law on International Commercial Arbitration (Model Law), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

In 2010, the IAA was significantly amended in order to improve its operation and more closely align the Act with international best practice. Some of the important changes introduced were:

(a) clarification that the Model Law is the mandatory 'supervisory procedural law' and 'covers the field' with respect to all international arbitrations in Australia (there is no longer any ability to 'opt out' of the Model Law by reference to the domestic arbitration legislation).
(b) providing that the parties have the following rights unless they agree to 'opt-out': a right to request that subpoenas be issued (and to apply to a Court for relief in the event of non-compliance), a right to seek security for costs and a right to apply to a Court for relief in the event that the respondent refuses to participate.
(c) in contrast with the uniform domestic arbitration regime which includes an 'opt out' regime for confidentiality, providing that parties are required to 'opt in' to the confidentiality regime set out in sections 23C to 23G (inclusive) of the IAA.

Relevantly, section 23C prohibits parties and the arbitral tribunal from disclosing confidential information except as provided for by the Act.
(d) the inclusion of provisions specifically aimed at minimising delay in enforcement proceedings and further clarifying the operation of the Model Law with respect to challenges to the appointment of an arbitrator.

At a domestic level, the uniform arbitration legislation is also based on the Model Law (see, for example, the Commercial Arbitration Act 2011 (Vic)). This means that the domestic and international arbitration regimes are now more closely aligned and comply with international best practice.

3. Judicial Support for Arbitration

Recent cases handed down by the Australian Courts in the area of international arbitration over the past year have demonstrated a supportive approach to arbitration. For example:

(a) in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 295 ALR 596, the High Court of Australia confirmed the constitutional validity of the IAA and rejected a challenge to the enforcement of international arbitration awards in Australia.[fn]For further discussion of this case, refer to: http://kluwerarbitrationblog.com/blog/2013/03/19/finality-confirmed-constitutionality-upheld-major-victory-for-international-arbitration-community-in-australia/.[/fn]
(b) in *Eopply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356, the Federal Court held that an arbitral award made in China could be enforced against an Australian company in liquidation.
(c) in *Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd* [2013] FCAFC 107, the Full Federal Court held that a voyage charterparty was not a "sea carriage document" within the meaning of section 11 of the Carriage of Goods By Sea Act 1991 (Cth) and therefore upheld the validity of an arbitration clause in that charterparty.
(d) in *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109, the Full Federal Court dismissed an appeal seeking to resist enforcement of an arbitral award under the IAA on the grounds of an alleged denial of procedural unfairness.[fn]For further discussion of this case, refer to: http://kluwerarbitrationblog.com/blog/2013/10/25/australian-courts-aligned-with-the-uk-in-reluctance-to-depart-from-decisions-of-the-seat-court-on-asserted-

procedural-defects-when-enforcing-foreign-arbitral-awards/.[/fn] Further, the Full Federal Court commented that it would be generally inappropriate for the Court of enforcement to arrive at a conclusion on an issue of asserted procedural defect inconsistent with that of the Court at the seat of the arbitration.

The Victorian Supreme Court has also demonstrated its ongoing support for arbitration in a number of additional ways. The Honourable Chief Justice Warren of the Supreme Court of Victoria has been a strong advocate for international arbitration and has presented a number of extra-judicial speeches and writings promoting the many advantages of the "Australian brand" of arbitration. In recognition of the need for specialist judicial expertise in this area, the Victorian Supreme Court also created a specialist list for arbitration cases in 2010. The specialist arbitration list not only provides access to experienced arbitration judges such as The Honourable Justice Clyde Croft but also allows parties to take advantage of a more efficient and flexible system of case management (including 24/7 access to the Courts where necessary and hearings occurring outside of ordinary hours as required). A similar approach has been adopted by other State Supreme Courts and the Federal Courts of Australia (each Federal Court Registry has appointed an Arbitration Co-ordinating Judge with responsibility for the management of matters under the IAA).

By demonstrating its support for arbitration, the State Supreme Courts and Federal Courts of Australia are sending a powerful message to commercial parties that the Courts are prepared to facilitate and promote the effective resolution of disputes via this dispute resolution method provided there is a valid arbitration agreement.

4. Dedicated World Class Facilities

In 2010, the first dedicated world class arbitration hearing venue in Australia, the Australian International Disputes Centre (AIDC), opened in Sydney. The centre is centrally located in the Sydney CBD and features high quality communication systems, tribunal facilities, conference rooms and access to translation and transcription services. Arbitral institutions such as the Australian Centre for International Commercial Arbitration (ACICA), the Chartered Institute of Arbitrators and the Australian Commercial Disputes Centre (ACDC) are also located within the centre.

A similar venue, the Melbourne Commercial Arbitration and Mediation Centre, has

recently opened in the Melbourne CBD and will link up with the Sydney centre (another centre is also reportedly being planned for Perth).

The development of infrastructure tailored to the international arbitration community is a welcome development that will enhance Australia's competitiveness as a venue for international arbitrations.

In addition to the dedicated infrastructure referred to above, there are a number of high quality facilities and hearing venues located throughout Australia meaning that parties who wish to arbitrate in Australia have a range of options available to them.

5. Leading Arbitration Institutions

There are a number of highly professional arbitration institutions with extensive experience in facilitating and supporting the conduct of arbitrations in Australia. In particular, ACICA and the Institute of Arbitrators and Mediators Australia (IAMA) are prominent international dispute resolution bodies in Australia that have:

(a) released arbitration rules that may be adopted by the parties with a view to supplementing the Model Law and improving the efficiency and management of the arbitral process; and
(b) mechanisms in place for the appointment of arbitrators.

ACICA has demonstrated its preparedness to adopt mechanisms to facilitate international best practice in arbitration procedures by, for example, incorporating Emergency Arbitrator Provisions into its 2011 Arbitration Rules. These provisions are designed to provide parties with greater flexibility in their arbitration process by including an option to seek urgent interim measures of protection from an emergency arbitrator before the arbitral tribunal is constituted. ACICA's arbitration rules also incorporate a set of rules providing for expedited arbitration (referred to as the ACICA Expedited Arbitration Rules). In addition, in 2011, ACICA was appointed as the sole default appointing authority for the purpose of undertaking the arbitrator appointment functions under the amended IAA. To facilitate this process in circumstances where the arbitration is not being conducted under the ACICA Arbitration Rules or ACICA Expedited Arbitration Rules, ACICA developed the Appointment of Arbitrators Rules 2011 which establishes a streamlined process through which a party can apply to have an arbitrator appointed to an arbitration seated in Australia.

IAMA has also released a set of arbitration rules referred to as the IAMA Arbitration Rules. These Rules also include the IAMA Fast Track Arbitration Rules providing for the option of an expedited set of procedural rules as part of an additional framework for managing any given arbitration.

6. Conclusion

Australia has many features that make it an attractive venue for international arbitration. As discussed above, recent legislative and judicial support for arbitration has further strengthened Australia's position in this area. As observed by The Honourable Chief Justice James Allsop AO and The Honourable Justice Clyde Croft in their paper presented at the APRAG Tenth Anniversary Conference, "Australian courts are moving to a significantly more positive, pro-arbitration, position."[fn]The Honourable Chief Justice James Allsop AO and The Honourable Justice Clyde Croft (2014). "Judicial Support of Arbitration", Paper presented at the APRAG Tenth Anniversary Conference – Melbourne, 4.[/fn] The proximity of Australia to Asia, particularly in terms of its strong economic and trade links, means that Australia is well placed to further develop its international arbitration presence over the coming years.