Australia's (In)Capacity in International Commercial Arbitration

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With some fanfare, on the sidelines of the ICCA Congress hosted in Sydney over 15-18 April, the Australian Trade and Investment Commission (Austrade) unveiled a glossy brochure entitled "Australia's Capability in International Commercial Arbitration". This blog posting explains its key contents, identifying both convincing and unconvincing aspects. Our later blog posting will compare Japan as another Asia-Pacific jurisdiction that is also still struggling to attract many international commercial arbitration (ICA) cases.

Australia's ICA Capacity

The Austrade brochure's Introduction first summarises the general advantages of ICA: flexibility of process, final and binding outcomes, global enforceability under the New York Convention, neutrality of forum, a process "private and confidential by agreement", and "time and cost efficiency". The ensuing Industry Overview then argues for Australia as a compelling "neutral forum for ICA between trading partners in the Asia-Pacific region" as "the ICA landscape has evolved considerably" over the last 5-10 years, through:

- legislative reforms (including the 2006 revisions to the UNCITRAL Model Law, enacted in 2010 for international arbitration);
- a supportive and independent judiciary (reiterating elsewhere that the World Bank in 2018 ranked "Australia's judicial processes as the world's best": p3);
- expert arbitrators and more ICA specialisation among law firms (including a growing number of global firm offices) and barristers;
- new arbitration centres and support facilities; and
- "increased education and skills training offerings, from university level through to arbitrator training" (p5).

Regarding further reasons as to "why arbitrate in Australia?", a summary diagram adds "proximity to Asia and time zone advantages" as well as "stable political environment and resilient economy".

The last point may surprise readers even vaguely familiar with Australia's convoluted and unstable federal politics over the last decade (and indeed last month, resulting in another change of Prime Minister). Such political uncertainty might even be linked to Australia's piecemeal approach to amending ICA legislation evident since 2015. Readers may also wonder about the added complexity of State and Territory politics, which makes it harder and slower to implement uniform legislation

nation-wide (such as Commercial Arbitration Acts now also based largely on the revised Model Law for domestic arbitrations, enacted over 2010-2017).

Yet it is true Australia's institutions for passing, implementing and interpreting legislation are basically sound. The Austrade brochure, under the next heading of "An esteemed judicial system and modern legislative framework" (p7), adds that "Australia ranks 13th out of 180 countries on Transparency International's corruption perception index" and more generally that "Australia is ranked 15th out of 190 economies for ease of doing business" (p10 instead states that it is ranked "14th").

The brochure also remarks that "7 Australian universities are among the world's Top 50 for law" (p7) – at least on the QS rankings. Later, under the heading "World-class expertise, lawyers and infrastructure" (p8), it includes (Professor) Jeffrey Waincymer as one of Australia's "leading international arbitrators" (along with six lawyers and one former judge). Under "Building capacity through quality education and training", the brochure notes that "many leading Australian universities offer ICA courses as part of their undergraduate or post-graduate legal degrees" (p11). Many readers may also be aware of the strong involvement and achievements of Australian law students in the Vis Moot and other more recent competitions developing and displaying ICA-related knowledge and skills.

Australia's ICA Incapacity

Ironically, however, mooting experience may encourage some students later as lawyers to attempt overly ambitious or innovative arguments in ICA-related court proceedings in Australia. This could explain why case disposition times have not changed before and after the 2010 amendments even in the Federal Court, arguably generating the most consistently pro-arbitration judgments over the last decade (spurring on most State and Territory courts). However, a more direct cause is probably the lack of an indemnity cost principle (as in Hong Kong) for failed challenges regarding ICA agreements and awards, despite several calls for reform. Generally, delays and costs remain major disincentives to choosing and especially later pursuing ICA. This may be particularly true for a country like Australia following the adversarial common law tradition, and with a growing population of lawyers.

A related challenge, not well addressed in the Austrade brochure, is Australia's geographical inconvenience. Why should Asian parties come to Australia's main cities for ICA when very popular regional venues like Singapore and Hong Kong are so much closer, as well as having all the advantages listed by Austrade? Matters could be resolved instead say in Darwin, but that northerly Australian city lacks ICA-experienced local counsel, facilities and (if matters end up in court) judges. An alternative would be to promote ICA for where the geography of Australia's larger cities becomes an advantage, for example transactions between South America and Asia (including China's new Belt and Road Initiative). Further niche marketing should focus on areas like the resources sector, where Australia has special expertise and the amounts in dispute are often large so travel time and expense is not such an issue. (It is therefore unfortunate that the brochure does not mention the Perth Centre for Energy and Resources Arbitration.) Another way to combat 'the tyranny of distance' would be to focus more on e-arbitrations and/or expedited proceedings (without hearings), especially for smaller-value disputes.

A further challenge for seating ICA in Australia is the Australian Consumer Law. It sets mandatory rules not only for transactions involving individual "consumers" in the narrower sense used abroad, but also (indeed increasingly) for business-to-business transactions. Yet there is little legislative and even case law guidance as to their scope regarding forum selection, governing law and award enforcement. Statutory reform has fallen between the cracks (namely the Treasury with consumer law regulators, and the federal Attorney General's Department) and remains unlikely.

A final disincentive for legal advisors considering Australia as a seat for ICA may be the country's

ambivalence about Investor-State Dispute Settlement (ISDS) since 2011. It may be seen as reflecting or potentially reviving ambivalence about arbitration generally, even though the Chief Justice of the Federal Court emphasised for the ICCA Congress audience that ICA and ISDS arbitration have some significant differences.

Conclusion

Where does this leave Australia overall? The proof should be in the pudding. As another positive change over the last 5-10 years, Austrade asserts an "increased case load and use of Australian seats for ICA" (p5). No sources are given and no statistics are published by ACICA (Australia's main ICA institution). However, a Board member's publication in 2015 suggested that on average ACICA had attracted 8 cases per annum since the 2010 amendments. This is indeed an increase over 1-4 over 2008-9, but it is still a very small caseload. The same is true for Australia-seated ICC arbitrations: only one filed on average over 2005-9, but almost four annually since 2010. The four ICC arbitrations filed in 2017 compare with 38 in Singapore, 18 in Hong Kong, six in Korea and four in Japan.

It is also interesting to compare this Austrade brochure with another (and related website, archived here) published in 2003 with support from six major Australian law firms, promoting the "Sydney Arbitral Advantage" and replete with gorgeous photos. As well as listing similar advantages such as a supportive legislative framework for ICA, it contrasted Sydney's mild sunny weather compared to other traditional and regional arbitral venues, and competitive hotel room rates. It also mentioned (tongue-in-cheek!) the exciting restaurant options available after "a hard day of arbitration", and even the comparatively low price of a dozen oysters (pp12-13 of the PDF here).

The more conventional recent Austrade brochure remains another useful effort to put Australia on the map for ICA, perhaps especially for businesspeople or in-house counsel. But like most marketing initiatives, the brochure (over-)emphasises the positives. Acknowledging negatives such as geographical inconvenience could help suggest (partial) counter-measures or niche markets. A more distinctive and realistic assessment may also be more effective in persuading legal specialists, or those already familiar with Australia, to give it a go.