Kluwer Arbitration Blog

Moving Beyond Rhetoric: Positioning Australia as an Upcoming Regional Arbitration Hub

Jonathan Mackojc (Corrs Chambers Westgarth) · Sunday, October 29th, 2017 · Young ICCA

Overview

In 2015, the Chief Justice of the Supreme Court of Victoria highlighted the importance of positioning Australia as one of the next significant regional commercial hubs. Her Honour reiterated this position in a 2017 speech. Interestingly, similar, yet more subtle, comments were featured in a speech in 2009. Other Australian courts have made similar remarks over the years: a speech delivered by Justice Douglas in 2015, a speech delivered by Chief Justice Martin AC in 2014, and in a speech delivered by Chief Justice Bathurst in 2016. These are only several, among many, references that indicate Australia has for a significant period sought to establish itself as a leading hub for international dispute resolution services. However, it has struggled to move beyond rhetoric, which can be attributed to the lack of collaboration across the legal industry. The judiciary, alone, cannot drive such change without significant input from other stakeholders.

This post serves a four-fold purpose. The first is to identify the end goal. The second is to demonstrate that Australia must carefully position itself against a realistic target. The third is to outline Australia's strengths in international arbitration. The fourth is to propose a list of action points, if Australia is to be recognised as an upcoming Regional Arbitration Hub by 2020.

Identifying the End Goal

Over the last few years, several buzzwords have dominated the arbitration landscape. These terms are often used interchangeably, loosely, and thus incorrectly. It is important to understand the differences, as this will help inform Australia's desired position in the international arbitration arena. While four key terms are discussed, they must not be relied upon as technical definitions. They include: *Global Commercial Hub, Global Dispute Resolution Hub, Global Arbitration Hub, and Regional Arbitration Hub.*

A Global Commercial Hub (GCH) is the broadest of the three terms and is often referred to alongside the notion of a World City or Global City. Along with a strategic geographic position and world-class infrastructure, each is regarded as a global financial centre, capable of facilitating cross-border trade and investment with ease. The top five jurisdictions include: London, New York, Singapore, Hong Kong and Tokyo. Each of these are economically powerful cities.

On the other hand, a Global Dispute Resolution Hub (GDRH) can be defined as being highly

capable of administering and enforcing cross-border commercial and investor-state disputes – whether this be via litigation or arbitration. Features of a GDRH include a strong and independent judiciary, a highly specialised international pool of legal professionals, and a hub which understands the importance of deference and comity.

A Global Arbitration Hub (GAH) is a more specific term, as its focuses solely on the administration of international arbitration. Such hubs include London, New York, Paris, and Geneva. Hong Kong and Singapore are two cities that have fought long and hard to achieve the title of GAH, and are probably now there. While global forces have assisted, the key drivers have been universities, arbitral centres and their respective judiciary and government. As former Chief Justice of the Federal Court of Australia observed, their commitment to the development of international arbitration has been 'energetic and unequivocal', and they are now reaping the rewards as a result of their diligence.

As the title suggests, a Regional Arbitration Hub (RAH) is one which caters for a specific region, yet works diligently in the hope that it will soon transition to a GAH. A current example of a RAH is Malaysia, which has sought to differentiate itself from Singapore in that it provides cost-effective arbitration, targets diverse stakeholders, and promotes innovation. As such, it can be said that Malaysia has been punching above its weight, considering that Singapore has been a popular arbitration destination within the last decade.

This then begs the question – where exactly does Australia fit into the picture?

A Positioning Exercise

This largely depends on where Australia sees itself in 2020. Three years is a fair amount of time for a jurisdiction to refine (or even overhaul) its approach to dispute resolution, particularly international arbitration. If Australia seeks to immediately claim the title of GCH or GAH, it will face disappointment. A GCH requires time, a strong economy, and a significant investment in infrastructure. Chief Justice Warren highlighted the need for the latter in a speech delivered in 2011, commenting that Melbourne ought to model its development on the Singapore International Arbitration Centre, which is situated in modern premises, and in a convenient location. The same can be said about other leading arbitral institutions such as the Hong Kong International Arbitration Centre, where parties can arrive at the arbitral centre in under 30 minutes when travelling from the Hong Kong International Airport. In short, significant commercial hubs require outstanding infrastructure.

Similarly, a GAH requires time, and parties will need to be convinced that world-class services are on offer. In the author's view, a jurisdiction is most unlikely to achieve the status of a GAH until it has been recognised as a RAH.

A GDRH is equally difficult to achieve as it requires a multitude of stakeholders to promote cross-border legal services on a larger scale. Flexibility in domestic laws is also important. Victorian judges have discussed the need to establish an International Commercial Court, but it is likely that international parties would rather see an improvement in international arbitration offerings in Australia.

Thus, from a dispute resolution perspective, if the end goal is to be considered a GDRH or GAH, the clear first step is for the development of Australia as an upcoming RAH. In order to do so, the entire Australian legal profession must move beyond rhetoric to a plan of action.

Australia's Strengths

Australia is already regarded as a significant economy in the Asia-Pacific region, and is respected internationally. It is also an important conduit for investment between countries in the Asia-Pacific region, acting as an intermediary in important transactions.

Australian lawyers are highly respected by clients and lawyers in overseas jurisdictions. Australia has always had a strong emphasis on training and retention, yet has inevitably lost a significant number of local lawyers who have chosen to advance their careers in other common law jurisdictions. Many of these lawyers now practice in international arbitration.

Australian judges are highly regarded abroad. Several retired Australian judges now sit on the Singapore International Commercial Court as 'International Judges'. One of these judges includes The Honourable Justice Dyson Heydon, who retired from the High Court of Australia in 2013. Other retired Australian judges now sit as Non-Permanent Judges in the Hong Kong Court of Final Appeal, the most recent being The Honourable Mr Justice Robert French AC, former Chief Justice of the High Court of Australia.

Australia has a strong understanding, respect for, and application of the rule of law. This is important to parties who are seeking to have their disputes heard in a jurisdiction which boasts of an impartial, independent, and arbitration-supportive judiciary at a state and federal level. Regarding the latter, one recent example is in *Lahoud v The Democratic Republic of Congo* [2017] FCA 982, where the Federal Court of Australia recognised and enforced two decisions of the International Centre for Settlement of Investment Disputes (ICSID), which involved a foreign state. Other cases demonstrating a pro-arbitration stance include: *Uganda Telecom Ltd v High-Tech Telecom Pty Ltd* [2011] FCA 131; *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; *Ultrapetrol SA v Jindal Steel & Power (Mauritius) Ltd* [2015] FCA 1091; *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326; and *Sanum Investments Ltd v ST Group Co., Ltd* [2017] FCA 75.

Recent developments in Australia include The Civil Law and Justice Legislation Amendment Bill 2017, which proposes several amendments to the International Arbitration Act 1974 (Cth) to further assist with the recognition of foreign awards in Australia. As of 1 July 2017, Australia now has uniform laws across all States and Territories, with respect to domestic commercial arbitration.

The Australian Centre for International Commercial Arbitration (ACICA) has also played a significant role in promoting Australia. The 2016 ACICA Rules are a modern set of institutional rules, which are in line with the rules of other leading arbitral centres and now offer parties emergency arbitration, expedited procedure, and interim measures.

Critics will, however, continue to argue that Australia is restrained due to its geographic position. Frankly, this is an argument that lacks substance, as parties are increasingly able to utilise electronic means for most steps in an arbitration and most are more than willing to travel in order to have their disputes resolved efficiently, and by highly skilled, impartial, and respected legal professionals. In 2016, ACICA published a Draft Procedural Order regarding the use of technology such as video conferencing and WebEx for preliminary conferences as well as interim and final arbitration hearings. Such developments clearly demonstrate ACICA's willingness to embrace technology in order to assist parties who may be otherwise unable to attend an international arbitration hearing in person.

Vision 2020

Australia is not alone in the race to establish an arbitration hub. Other jurisdictions include Saudi Arabia, India, and Scotland.

The following is a list of 10 target areas that will help Australia achieve the status of a RAH by 2020:

1. lawyers (both private practice and in-house) must move beyond the default position of recommending litigation as the first instance/primary dispute resolution mechanism – parties must understand the benefits of arbitration. The first step involves ensuring that consideration is given to inserting an arbitration clause into new contacts, where applicable and appropriate;
2. reform at a grassroots level – universities must further promote and develop their international arbitration offerings. They must also be willing to revise their course guides, and work together with international partner universities to further promote Australia as an attractive place to study arbitration;
3. a harmonised and unified approach across all Australian courts that avoids competition and promotes collaboration;
4. educating private practitioners and in-house counsel of the advantages that flow from the procedures involved in choosing and conducting international arbitration;
5. continuing legal education – law firms and universities training a new generation of arbitration professionals, with learned skills and knowledge;
6. world-class infrastructure – public transport, rail connectivity, airport transfers, and easily accessible modern arbitral centres;
7. focus on leading in investment arbitration, as this area has significant growth prospects;
8. repatriation of Australian lawyers currently working as arbitration lawyers abroad to help build Australia as an upcoming hub, by sharing their insight and experience. This involves creating a competitive legal environment;
9. push for a greater number of strong Australia-based arbitration associations, which promote international engagement and diversity; and
10. all stakeholders must lobby state and federal governments for greater recognition of, and funding for, international arbitration.

While the action points above require time, the first step necessarily involves self-promotion. In 2015, Justice Croft, another strong supporter of international arbitration and the Judge in Charge of the Arbitration List at the Supreme Court of Victoria, highlighted why Australia has struggled to emerge as a contestant in the international arbitration arena:

> ‘We are not out there enough telling people about the arbitration-friendly environment in Australia…’

The views expressed in this article are solely those of the author.

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