
Australia as a seat for international commercial arbitration — a secure neutral option in the Asia-Pacific region

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The Australian economy has experienced a major shift in the focus of its foreign trade throughout the last half century. The Department of Foreign Affairs and Trade (DFAT) reports that *outward* Australian investment to key Asian economies, including China, India, Japan, the Republic of Korea, Taiwan and ASEAN countries, has more than tripled in the ten years from 2003 to 2013, to a total of \$203.1 billion.¹ As of 2014, 70% of Australia's trade is with Asia-Pacific Economic Cooperation (APEC) countries.²

After the United States and the United Kingdom, Japan, Singapore and Hong Kong are the largest *inward* investors in Australia, with the total value of investment from these countries recently reaching \$242.8 billion. Investment from China and India has also increased since 2005.³

Australia is not the only nation that views the Asia-Pacific as a growth region. Africa's trade with Asia is growing at a faster rate than trade with its traditional trading partner Europe,⁴ and the enthusiasm with which the United States has pursued negotiations related to the Trans-Pacific Partnership demonstrates its recognition of the economic value of trade with Asia.

Growth in trade inevitably gives rise to the potential for greater commercial disputes between trading partners. As a preferred means of international commercial dispute resolution,⁵ international arbitration provides an efficient mechanism for the resolution of transnational disputes that offers greater certainty, given the enforceability of awards globally under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), and flexibility of process. International arbitration allows parties to determine the procedures applicable to their dispute and increases the potential for a common sense commercial outcome and the preservation of long-term business relationships.

It is unsurprising then that Australia has experienced a rise in the use of international commercial arbitration⁶ and this trend is expected to continue. This article will provide a summary of the key advantages of choosing Australia as a seat for international arbitration for contracting parties in the Asia-Pacific region.

Australia's advantages

Growth in trade throughout the Asia-Pacific, including with the United States and Africa, uniquely position Australia as an attractive venue for international commercial arbitration between trading partners in this region. It is Australia's neutrality in these circumstances that acts as an important draw card, providing an alternative for parties from the United States, Europe, Africa, the Pacific and Asia to the traditional seats of Singapore and Hong Kong, particularly where the circumstances of a case give rise to concerns as to the independence of those seats.

Australia's geographical proximity to Asia and the Pacific, multiple time zone advantages, multicultural society and reputation as a liberal democracy and transparent economy puts Australia in a convincing position to offer high quality dispute resolution services to the international market. Add to this a contemporary legislative framework, modern institutions, a sophisticated legal profession and an independent and supportive judiciary, and Australia presents a compelling option as a safe and neutral forum for international commercial arbitration.

Legislative framework

The legislative framework supporting arbitration in Australia has undergone significant reform since 2010, both at an international and domestic level, to implement pro-enforcement, streamlined arbitration regimes that reflect international best practice.

International arbitrations seated in Australia are exclusively governed by the International Arbitration Act 1974 (Cth) (IAA). The IAA, as amended in 2010, gives effect to the 2006 United Nations Commission on International Trade Law (UNCITRAL) Model Law⁷ (Model Law) and implements Australia's obligations under the New York Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). In doing so, the IAA aims to "facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes".⁸

By giving the Model Law the force of law in Australia, the IAA implements a favourable system in which to practice international arbitration and provides parties with the flexibility to agree on the best process for dealing with their particular dispute. Key elements of the amendments to the IAA include “opt in” provisions on confidentiality and consolidation of proceedings and “opt out” provisions related to, among other things, tribunal powers to award costs, security for costs and interest.⁹ With these amendments in effect, the IAA provides parties with a high level of autonomy and flexibility in their arbitral proceedings.

The IAA also limits the scope for judicial intervention in arbitral proceedings, including the scope for resisting the recognition and enforcement of arbitral awards, according greater certainty of process and finality to parties arbitrating in Australia.

A parallel reform process has been undertaken by Australian states and territories, with a Model Commercial Arbitration Bill (Model Bill) applicable to domestic arbitration agreed to by the Standing Committee of Attorneys-General in 2010. The Model Bill has now been enacted into legislation by the majority of states and territories in Australia,¹⁰ harmonising domestic arbitration legislation throughout Australia. The Model Bill also adopts the 2006 Model Law provisions, ensuring uniformity across the domestic and international legislative frameworks.

Judicial support

Courts may be called on to determine questions related to arbitration proceedings in a number of different circumstances; including in a supervisory capacity as the courts of the seat of an arbitration (for example, applications for interim orders or applications to set aside non-foreign awards), in relation to applications brought in aid of foreign-seated arbitrations and for the recognition and enforcement of foreign arbitral awards. As such, it is crucial that the courts of the seat are supportive of the legislative framework governing arbitration in that jurisdiction, understand the global context in which international arbitration operates and are committed to preserving the integrity of the arbitral process.

At all levels the Australian judiciary has demonstrated an appreciation of the objectives of the 2010 legislative amendments, of the international arbitration system in which it is a part and of the important role that courts play in ensuring that Australia provides a safe and certain venue for arbitration. Most notably in this regard, in 2013 the High Court of Australia rejected a constitutional challenge to the IAA in the case of *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*,¹¹ sending an unequivocal message of support for the amended legislation.

Australian courts have been willing to apply the provisions of the IAA in support of local and foreign arbitrations, providing valuable guidance to arbitration practitioners in key areas. In 2014, the Full Court of the Federal Court released judgment in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*,¹² the appeal by TCL against the Federal Court’s decision¹³ to enforce the award made against it (this followed judgment of the High Court on the constitutional point mentioned above). In its application to set aside and refuse enforcement of the award, TCL argued that the rules of natural justice had been breached in the making of the award due to a failure by the arbitrators to accord TCL procedural fairness during the proceedings. It was submitted that, as a result of this failure, the award was contrary to Australian public policy and should be set aside and refused enforcement under Arts 34 and 36 of the Model Law. The Full Court held unanimously that an international award will not be set aside or refused enforcement on the basis of a breach of natural justice unless real unfairness or true practical injustice in the conduct of the proceedings can be demonstrated.¹⁴ Further, the court made it clear that it saw TCL’s application as “a disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice”¹⁵ and noted that in the majority of cases, a party claiming a breach should be able to demonstrate unfairness or injustice without the need for a detailed re-examination of the facts.

In 2011, the Federal Court of Australia in *ENRC Marketing AG v OJSC “Magnitogorsk Metallurgical Kombinat”*¹⁶ issued freezing orders in aid of an arbitration seated in Zurich. The Federal Court noted that Australian courts have the power under Art 17J of the Model Law to order interim measures *ex parte* against a third party to the arbitration agreement as the court finds appropriate.¹⁷ This power extends to issuing freezing orders against any person (including a bank or financial institution) whose assets are located in Australia.

In *ESCO Corp v Bradken Resources Pty Ltd*,¹⁸ the Federal Court considered an application from Bradken to adjourn enforcement proceedings brought by ESCO in the Federal Court until the final determination of the US District Court proceedings in which Bradken was appealing the US court’s decision to confirm the award made against it. The Federal Court allowed a short adjournment and ordered Bradken to provide security to ESCO. Noting that there are only limited circumstances in which such an adjournment will be ordered, the court confirmed that the discretion to adjourn enforcement proceedings must be:¹⁹

... exercised against the background that a foreign arbitral award is to be enforced in Australia unless one of the grounds in s 8(5) of the IAA is made out ... or unless the public policy of Australia requires that the award not be enforced.

More recently, the Full Court of the Federal Court dismissed an appeal from a decision of the Federal Court to enforce an award made in London in circumstances where the award debtor's application to the English High Court to set aside the award had previously been refused. In *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd*²⁰ the Full Court of the Federal Court noted that it is:²¹

... generally inappropriate in any event for ... the enforcement court of a [New York] Convention country, to reach a different conclusion on the same question as that reached by the [supervising] court at the seat of arbitration.

The above are examples of a line of pro-arbitration decisions in Australia²² demonstrating the judiciary's commitment to maintain the right balance between court support and court intervention in arbitral processes. The cases provide a level of predictability to the manner in which applications to the courts in Australia will be dealt with and promote confidence in the choice of Australia as a seat of arbitration.

Modern institutions

Arbitrations seated in Australia benefit from strong institutional and administrative support through the Australian International Disputes Centre (AIDC) and Australian Centre for International Commercial Arbitration (ACICA).

The AIDC was established in Sydney in 2010 to provide parties with high-class dispute resolution services, hearing and logistical support for proceedings. The AIDC may be utilised by parties conducting arbitrations under all institutional rules as well as ad hoc arbitrations, mediations and other ADR processes. The AIDC provides a hub for alternative dispute resolution, housing leading ADR providers including ACICA, the Australian Maritime and Transport Arbitration Commission (AMTAC), the Australian Commercial Disputes Centre (ACDC) and the Chartered Institute of Arbitrators Australian Branch.

ACICA has provided support for international commercial arbitration in Australia since its inception in 1985. In 2005 ACICA began administering cases, launching the ACICA Arbitration Rules (ACICA Rules). The ACICA Rules were amended in 2011 and are regularly reviewed in order to ensure that they continue to reflect international best practice. It is anticipated that ACICA will launch further amendments to its rules during 2015. The ACICA Rules address key procedural issues, including mandatory provisions on confidentiality of arbitral proceedings, and incorporate emergency arbitrator provisions to provide parties with the option to seek urgent interim measures of protection from an emergency arbitrator prior to the constitution of the tribunal. The ACICA Expedited Rules, also revised in 2011, set out a

simplified procedure for swift, cost effective and fair arbitration proceedings aimed at less complex or lower value disputes. Since the opening of the AIDC and the release of the updated ACICA Rules, ACICA has experienced notable growth in its caseload. Significantly, the number of cases involving foreign parties with no connection to Australia, other than it being the choice of seat, has grown.

In 2011, ACICA was appointed by the Australian government as the sole default appointing authority competent to perform tribunal appointment functions under the IAA.²³ Arbitrator appointments made by ACICA in this capacity are made in accordance with the Appointment of Arbitrators Rules 2011 (Appointment Rules) which apply to disputes seated in Australia in circumstances where the arbitration is not being conducted under the ACICA Rules or Expedited Rules.

ACICA enjoys significant support throughout the Asia-Pacific region. Most recently, ACICA seminars, providing information on the advantages of Australia as venue for arbitration and the facilities available for the running of proceedings, have been welcomed in India, South Korea, Indonesia and the United States. ACICA's recent success in its bid to bring the 2018 International Council for Commercial Arbitration (ICCA) Congress to the Oceania region for the first time is also indicative of the increasing importance of Australia and the region on the international arbitration stage.

Legal expertise

Home to five of the world's top twenty law schools,²⁴ Australia has been producing a high-calibre legal workforce for many years. The standard of legal training offered in Australia is well-recognised by foreign law firms who often draw from the Australian legal pool in their recruitment drives. In addition, Australia's increased trade activity in the Asia-Pacific region has bolstered a trend in the expansion of international law firm operations in Australia,²⁵ despite the volatility in the world's financial markets over the past few years. As a result, there is a wealth of talent in Australia with significant local and international arbitration expertise.

Australia's highly regarded, quality legal service with a growing field of recognised arbitration specialists, has the capacity to provide international, multi-disciplinary services to clients across the globe. Australian legislation supports a party's right to representation of choice and foreign lawyers may also appear in arbitrations conducted in Australia. As such, parties have the freedom to engage a legal team of their choosing.

Australia is home to a significant number of internationally recognised and respected arbitrators with substantial experience conducting arbitrations worldwide. The depth of this expertise is of increasing importance to

parties seeking to draw from a wider pool of arbitrators to ensure tribunal members are available to deal with matters expeditiously. ACICA maintains a panel of prominent global arbitrators to which it can refer in making appointments under the ACICA Rules.

Conclusion

Increasing levels of global trade with nations in the Asia-Pacific region give rise to a need for the provision of quality international dispute resolution services to deal with the issues that inevitably arise in the context of trading relationships. Competition between the providers of these services is strong; however Australia is well positioned to provide a neutral, supportive and sophisticated venue for international arbitration to parties dealing in the Asia-Pacific region and beyond. Given its advantages as a safe and neutral seat and as trade in this region grows, especially with Africa and the USA, indications are that Australia will continue on its current course to see a further rise in the use of international arbitration and Australia as a seat.



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Footnotes

1. See DFAT, *Australia and foreign investment: What is foreign investment?*, www.dfat.gov.au.
2. See DFAT, *Australia and the World: Trade*, www.dfat.gov.au.
3. See DFAT, *Australia and foreign investment: Which countries invest in Australia?*, www.dfat.gov.au.
4. See TE Mutambara “Africa-Asia trade versus Africa’s trade with the North: trends and trajectories” (2013) 4(2) *African Review of Economics and Finance* 273 available at www.african-review.com.
5. See School of International Arbitration-Queen Mary University of London and PriceWaterhouseCoopers *International Arbitration: Corporate attitudes and practices* (2008) available at www.arbitration.qmul.ac.uk.
6. For example, the number of arbitrations filed with Australian Centre for International Commercial Arbitration (ACICA) in 2013 and 2014 was double that of the two years prior.
7. See IAA, ss 16(1) and 21.
8. Above, n 7, s 2D.
9. Above, n 7, ss 22–7.
10. See Commercial Arbitration Act 2010 (NSW), Commercial Arbitration Act 2011 (SA), Commercial Arbitration (National Uniform Legislation) Act 2011 (NT), Commercial Arbitration Act 2011 (Tas), Commercial Arbitration Act 2012 (WA), Commercial Arbitration Act 2011 (Vic) and Commercial Arbitration Act 2013 (Qld).
11. *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; 295 ALR 596; [2013] HCA 5; BC201301035.
12. *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387; [2014] FCAFC 83; BC201405606.
13. See *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214; BC201208661.
14. Above, n 12, at [55].
15. Above, n 12, at [54].
16. *ENRC Marketing AG v OJSC “Magnitogorsk Metallurgical Kombinat”* (2011) 285 ALR 444; [2011] FCA 1371; BC201109333.
17. Above, n 16, at [1]–[2].
18. *ESCO Corp v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905; BC201105961.
19. Above, n 18, at [85].
20. *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468; [2013] FCAFC 109; BC201313301.
21. Above, n 20, at [58].
22. See also *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415; [2011] FCA 131; BC201100586; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535; 291 ALR 99; [2012] FCA 276; BC201201492; *Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd* (2013) 216 FCR 1 469; [2013] FCAFC 107; BC201313043; *Armada (Singapore) Pte Ltd (under Judicial Management) v Gujarat NRE Coke Ltd* [2014] FCA 636; BC201404683.
23. ACICA is also the statutory appointing authority under the Water Management Act 1999 (Tas), the Water Industry Act 1994 (Vic) and the Construction Industry Long Service Leave Act 1997 (Vic).
24. See TopUniversities.com, *QS World University Rankings by Subject 2014 — Law*, www.topuniversities.com.
25. For example, Allen & Overy, Ashurst, Clifford Chance, Clyde & Co, Jones Day, K&L Gates and Norton Rose Fulbright, among others, now have a full-scale operation in Australia.