AUSTRALIA AND INTERNATIONAL ARBITRATION: RISING TO THE CHALLENGE OF IMPROVING REGIONAL COMPETITIVENESS

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International commercial arbitration is a multi-billion dollar venture. Cities such as London, for instance, handle cases with a combined value of USD 40–50 billion each year.¹ Not surprisingly, numerous countries have recognised the benefits of being a preferred venue for arbitration proceedings, sparking increasing global competition for this business.

Australia is one country that is seeking to promote its profile as a seat for international commercial arbitration, especially in the Asia-Pacific. A number of legislative and practical steps have been taken in order to work toward this goal. However, further measures can and should be taken, though whether these will be sufficient to overcome the inevitable competitive disadvantage that Australia faces due to its geographical location has been questioned.²

This essay discusses three steps which Australia can take in order to improve its international reputation and make it more competitive as a seat in the rapidly growing Asia-Pacific region. The first is further amending the International Arbitration Act 1974 (Cth) (‘IAA’) so as to clarify ambiguities left following the 2010 amendments. The second concerns legislative responses to increasingly popular procedures such as arb-med and emergency arbitrations. Broad future reforms that can be implemented to ensure Australia maintains international best practice are also discussed.

I SUMMARY OF RECENT AUSTRALIAN DEVELOPMENTS

Australia has been relatively proactive in its approach to international commercial arbitration. In the past five years, it has enhanced its arbitration legislation and practical infrastructure following a review commenced by the Commonwealth Attorney-General in November 2008.³

In terms of legislation, the IAA was amended in 2010 and uniform Commercial Arbitration Acts (‘CAAs’) have been progressively implemented in each State. Both these reforms have implemented the 2006 version of the United Nations Commission on International Trade Law (‘UNCITRAL’) Model Law on International Commercial Arbitration (‘Model Law’), in light

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of the legislature’s intention to provide a ‘strong legal framework’ for arbitration that draws
upon internationally accepted practice.4

In general, these reforms have been welcomed for their potential to increase Australia’s
popularity as an arbitral seat.5 Some of the positive changes include the clarification of
ambiguities caused by previous provisions such as the former IAA s 21 (which permitted
parties to opt-out of the Model Law),6 the promotion of greater uniformity between the
international and domestic regimes,7 and the increased emphasis upon the international
character of the IAA.8 Practical changes have also aimed at increasing procedural consistency, expediency and
expertise.9 These include the creation of specialist Arbitration Lists in jurisdictions such as
the Federal Court and the Equity Division of the New South Wales Supreme Court, and the
establishment of the Australian International Disputes Centre (‘AIDC’) in Sydney in 2010
and more recently the Melbourne Arbitration and Mediation Centre (‘MCAMC’) in
Melbourne in 2014.

Australian arbitration practitioners are rightfully positive about the measures that have been
taken.10 Yet the legislative amendments can cause potential pitfalls for parties arising from
matters such as the ambiguity concerning the operation of the amended s 21. Further,
according to some commentators, their scope remains ‘limited and unadventurous’.11 If
Australia is to become an attractive alternative seat in the Asia-Pacific region, further steps
are necessary.

II  STEP 1: FURTHER AMENDMENTS TO THE IAA

Australia’s ‘formal legal infrastructure’, which encompasses factors such as national
arbitration law, neutrality and impartiality of the legal system, is a highly influential factor in
determining its popularity as a seat.12 The recent focus has been on improving Australia’s

4 See Clyde Croft, ‘Recent Developments in Arbitration in Australia’ (2011) 28(6) Journal of International
Arbitration 599; Hon Robert McClelland, ‘International Commercial Arbitration: Efficient, Effective,
Economical?’ (Speech delivered at the Australian Centre for International Commercial Arbitration’s Conference,
Melbourne, 25 November 2009).
5 James Whittaker, Colin Lockhart and Jin Ooi, ‘Australia’ in James Carter (ed), International Arbitration
7 Ibid, above n 3, 600.
10 Between August 2010 and 2013, 30 new arbitrations were filed with the Australian Centre for International
Commercial Arbitration (‘ACICA’), which was a marked increase from the seven that were filed with ACICA
between 2003 and 2007: Whittaker, Lockhart and Ooi, above n 4, 40.
11 Garnett and Nottage, ‘A New Dawn for Australia’, above n 5, 29; Albert Monichino and Alex Fawke,
Journal 208, 208.
12 This factor was rated as the most influential in determining choice of seat according to 62% of respondents to
International Arbitration Survey: Current and Preferred Practices in the Arbitral Process
national arbitration law, following twenty-five years of legislative inertia and case law that compromised some of its operation. However, there are three further amendments that would assist in clarifying and facilitating the intended effect of the recent amendments to the IAA.

A Confidentiality of Proceedings

The ability to maintain the confidentiality of proceedings is arguably one of arbitration’s key attractions. In fact, it is commonly assumed that both confidentiality and privacy are an automatic feature of international commercial arbitration proceedings. However, the High Court decision of Esso Australia Resources Ltd v Plowman caused disquiet when it held that arbitrations were private, but not confidential.

Sections 23C-23G of the IAA were introduced to address this perceived deficiency, outlining a basic right of confidentiality in international arbitrations seated in Australia. However, its status as an opt-in provision and the ‘public interest’ defence in s 23G has provoked criticism that this amendment merely gives ‘the appearance of substance but in fact [makes] little change to the current law’.

Given the relative importance of confidentiality in arbitration, these provisions should be made a feature of international arbitrations seated in Australia on an opt-out basis (as is the case in the new uniform domestic Acts). Moreover, the scope of the ‘public interest’ exception in s 23G should be narrowed and specifically defined. Adopting both proposals would follow the current practice in many institutional rules and arbitration legislation, but it would also align the IAA with the CAAs.

B Section 21 and the ‘Legislative Black Hole’

The new IAA s 21 gives the Model Law exclusive application to international arbitrations seated in Australia. It was introduced, in part, to deal with the uncertainty in the case law following Eisenwerk v Australian Granites (‘Eisenwerk’). In particular, the amendment was necessary in order to clarify that selecting institutional rules to govern an arbitration seated in Australia does not amount to an implied agreement to exclude the application of the Model Law. The other purpose of the new s 21 was to remove the uncertain application of the uniform domestic Acts to international arbitrations seated in Australia.

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13 Croft, above n 3, 599.
15 Ibid.
16 (1985) 183 CLR 10.
18 Ibid 38–9.
21 [2001] 1 Qd R 46.
However, concern has been voiced about the uncertain application of the new s 21 to arbitration agreements entered into before it came into force on 6 July 2010.\textsuperscript{22} It is ambiguous whether the new s 21 has retrospective effect, particularly given the presumption against legislation applying retrospectively unless there is a clear contrary intention.\textsuperscript{23} This presents an issue for international arbitration agreements entered into before 6 July 2010 that selected the CAA as the relevant arbitral law. If the new s 21 has prospective effect only, parties’ choice to exclude the Model Law in pre 6 July 2010 arbitration agreements (by selecting a CAA) remains valid. The problem is that the old CAAs have been progressively repealed with the introduction of the new CAAs, such that the arbitral law selected by the parties no longer exists. As a result, the agreement is left with no arbitration procedural law, an issue dubbed the ‘legislative black hole’.\textsuperscript{24}

To rectify this situation, Monichino recommends that the new s 21 be amended to clearly state that it has retrospective operation, subject to certain exceptions.\textsuperscript{25} A Bill has recently been introduced into the Federal Parliament to address the the temporal operation of the new s21 insofar as it applies to arbitrations commenced after the enactment of the Bill.

\textbf{C Specifying the ‘Competent Court’}

Article 35 of the Model Law (given the force of law by s 16 of the IAA) provides that non-foreign awards are enforceable by a ‘competent court’, but fails to identify the specific court(s) that may fulfil that role. This issue is also present in Article 17H of the Model Law, which fails to expressly nominate the ‘competent court’ for dealing with the recognition and enforcement of interim measures. The ambiguity in Article 35 was raised in \textit{Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Company Ltd}\textsuperscript{26} (‘\textit{Castel}’) and \textit{Rizhao Steel Holding Group Company Ltd v Koolan Iron Ore Pty Ltd}\textsuperscript{27} (‘\textit{Rizhao}’).

\textit{Castel} and \textit{Rizhao} managed the issue respectively by holding that the Federal Court and Supreme Court of Western Australia have jurisdiction to enforce non-foreign awards under the IAA. However, the process to reach this result is described by Justice Rares as ‘[sifting] through a legislative morass’, which is at odds with the ‘efficient and inexpensive’ tenets of arbitration.\textsuperscript{28}

To address this uncertainty, the IAA could be simply amended to expressly provide that both the Federal Court and the State or Territory Supreme Courts have jurisdiction for the purposes of Article 17H and Chapter VIII of the Model Law.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{22} Garnett, above n 18.
\item \textsuperscript{23} \textit{R v Kidman} (1915) 20 CLR 425.
\item \textsuperscript{24} Garnett and Nottage, ‘A New Dawn for Australia’, above n 5, 48.
\item \textsuperscript{26} (2012) 201 FCR 209.
\item \textsuperscript{27} [2012] WASCA 50.
\item \textsuperscript{28} Justice Steven Rares, ‘The Federal Court of Australia’s International Arbitration List’ (Paper presented at the Senior Counsel Arbitration Seminar of the New South Wales Bar Association, New South Wales, 14 September 2011).
\item \textsuperscript{29} Monichino, ‘Beware of the Black Hole’, above n 24, 31.
\end{itemize}
Arbitration is constantly changing in order to maintain its key features as an efficient and cost-effective method of dispute resolution, developing new procedures and options to ensure it can provide a service that is more than just ‘litigation-lite’.\textsuperscript{30} Two procedures that have recently gained increased prominence are ‘Arb-Med’ and emergency arbitrations, which have become increasingly popular and relevant in Asia.\textsuperscript{31} Introducing provisions to the IAA that support such procedures can help Australia’s legal infrastructure maintains relevance and better alignment with popular seats in the Asia-Pacific.

\textbf{A Arb-Med}

Arb-Med is a procedure where the arbitral tribunal assumes the role of a mediator in order to actively facilitate settlement.\textsuperscript{32} It is popular in parts of Europe, Mainland China and Japan, and seats such as Hong Kong and Singapore specifically provide a legislative framework for this process.\textsuperscript{33} In fact, the CAAs also include provisions for Arb-Med, though Nottage and Garnett comment that these particular provisions are inappropriate for the IAA.\textsuperscript{34}

The IAA’s current lack of any Arb-Med provisions raises the risk that courts may refuse enforcement of awards made following a failed Arb-Med attempt.\textsuperscript{35} This detracts from the attractiveness of such procedures, even though they may appeal to Chinese and Japanese parties in particular. To mitigate such a risk and promote the use of Arb-Med to the benefit international parties, the IAA should recognise that Arb-Med is permissible, and provide options for different models of Arb-Med that parties may elect, based on their preferences for processes such as private caucusing.\textsuperscript{36} Such an amendment to the IAA would reflect a willingness to encourage a more global approach to arbitration that is culturally tolerant to international parties’ needs.\textsuperscript{37}

\textbf{B Emergency Arbitrations}

Many institutional rules, including the ACICA Arbitration Rules, allow for the appointment of an ‘emergency arbitrator’ before the tribunal is fully formed.\textsuperscript{38} To complement such procedures, Hong Kong and Singapore have both recently amended their arbitration legislation to ensure that emergency relief granted by an emergency arbitrator is enforceable.

\textsuperscript{30} McClelland, above n 3.
\textsuperscript{32} Ibid 41.
\textsuperscript{34} Garnett and Nottage, ‘A New Dawn for Australia’, above n 5, 42.
\textsuperscript{35} Nottage, above n 33, 489.
\textsuperscript{36} Nottage and Garnett, ‘Top 20 Things to Change’, above n 33, 36.
\textsuperscript{37} Nottage and Garnett, ‘Top 20 Things to Change’, above n 33, 35.
\textsuperscript{38} The Emergency Arbitrator Provisions came into force on 1 August 2011.
in their jurisdictions. Australia should consider including such provisions within the IAA, as allowing for emergency arbitrations would increase the effectiveness of international arbitrations seated in Australia and assist in meeting the vision of delivering ‘swift and cost-competitive outcomes’ in a form that is ‘innovative and creative’.

IV STEP 3: POTENTIAL RESHAPING OF AUSTRALIA’S ARBITRATION FRAMEWORK

The earlier discussion has focused primarily on legislative amendments that can be made to improve Australia’s standing as an arbitral seat. However, legislation is not the only factor that parties consider when choosing a seat. Other important factors, for instance, includes the convenience and ‘arbitration-friendliness’ of a seat. Australia can promote a more arbitration-friendly culture. Maintaining a court system that is supportive and not overly interventionist in its attitude to arbitration is a recognised factor in achieving this culture. Other measures include critically examining and streamlining the Australian framework, to mitigate the complexities arising from Australia’s federal system of government. Further, there must be commitment from and collaboration between the government and bodies such as ACICA to maintain the relevance and effectiveness of Australia’s arbitration framework.

A Streamlining the Arbitration Framework

De Fina describes Australia’s federal system of government as a ‘distinct disadvantage’. It causes the potential for inconsistent rulings on arbitration matters from differing jurisdictions, and increases the perception of cumbersome complexity in the Australian system arising from an excess of supervising jurisdictions. This is exacerbated by the bifurcated domestic and international legislative regimes, which remains an issue despite the exclusive applicability of the IAA for international arbitrations.

Yet the key reason the Australian system currently presents an encumbrance is perhaps not how the system functions per se, but how the international community perceives the system. Monichino illustrates this point by examining the possibility of inconsistent judicial rulings. He argues that though Australia’s integrated judicial system supports consistent judgments, outside parties would still perceive that such a risk remains. In any case, it is not

40 McClelland, above n 3.
41 ‘Convenience’ encompasses a number of factors, such as location, the language and culture of the seat, and the efficiency of court proceedings: White & Case, above n 12.
43 Rares, above n 29.
44 De Fina, above n 42, 170.
45 Ibid; Monichino, above n 42.
46 Monichino, above n 42, 33.
47 Ibid.
48 Ibid.
an unsubstantiated worry; there have been past conflicts between intermediate courts of appeal upon matters such as the interpretation of s 29 of the CAA.49

One option would be for the Federal Parliament to enact a single arbitration Act covering both international and domestic arbitration.50 This proposal, when raised during the consultation process in respect of the reform of the IAA, enjoyed support from both IAMA and CIArb, as stated in their joint submissions concerning the CAA Bill made on 12 February 2010, and follows a global trend of enacting unified arbitral legislative regimes based on the Model Law.51 The experience of other countries can also be taken as a framework for amendments, such as Hong Kong’s 2011 Arbitration Ordinance. Following Hong Kong’s successful experience, a smooth transition to a unified system can be facilitated by retaining key features of the CAAs in a series of ‘opt-in’ provisions. Additionally, unless parties agree otherwise, the opt-in provisions can automatically apply to arbitration agreements entered into before or within a number of years after the commencement of the new unified regime which provide that the arbitration is a ‘domestic arbitration’.52

Uniformity may also be promoted by conferring exclusive jurisdiction to the Full Federal Court in relation to IAA-related appeals, including appeals from State and Territory courts.53 This could promote not only consistency, but also the efficiency of IAA proceedings.54 It would also match the approach taken by countries in the Asia-Pacific Region, such as Singapore.55 Further, as noted by Keane CJ (as he then was), such an approach is ‘not without precedent’ in Australia.56 For instance, a comparable approach is introduced by s 24(1)(c) of the Federal Court of Australia Act 1974 (Cth) which, in conjunction with other legislation, confers jurisdiction on the Federal Court to hear and determine appeals from single judge decisions of State and Territory Supreme Courts in some intellectual property matters.57

Such streamlining of the legislative regime has the potential to enhance the confidence of foreign parties and practitioners in choosing Australia as the seat of arbitration. Taking Hong Kong as a benchmark once more, the introduction of the new Arbitration Ordinance in 1 June 2011 has supported the continued popularity of Hong Kong as a seat for international arbitrations, with international arbitrations growing as a percentage of all arbitration matters handled by the Hong Kong International Arbitration Centre (‘HKIAC’).58 Therefore, a move

49 This is in relation to the requirement for domestic arbitrators to state the reasons for their award. See, eg, Gordian Runoff Ltd v Westport Insurance Corporation [2010] NSWCA 57; Oil Basins Limited v BHP Billiton Ltd & Ors [2007] VSCA 255.
50 Monichino, ‘Arbitration Reform in Australia’, above n 42, 46.
51 This includes New Zealand, Hong Kong, Malaysia and Scotland: Ibid.
52 Fan, above n 31, 716.
53 Nottage, ‘What’s New and What’s Next’, above n 34.
55 Nottage, ‘What’s New and What’s Next’, above n 34.
57 Ibid.
to unify the current legislative regimes would likely be a desirable step for Australia in adopting ‘international best practice’.  

B Support and Collaboration in the Australian Community

Fundamentally, commentators have highlighted the need to continue pushing for a broader ‘cultural reform’ with respect to international arbitration in Australia. Though it was hoped that this would be achieved through the 2010 reforms, Nottage has expressed scepticism about their effectiveness based on the fact that indicators such as disposition times for IAA judgments have not reflected any material improvement since the amendments (albeit the data set was limited).

Further, a more dynamic approach to legal reform and closer collaboration between ACICA, Ciarb and and the Federal government is required. The IAA and CAAs should not be allowed to stagnate for another 25 years. Future decisions detrimental to Australia’s international arbitration reputation, such as Eisenwerk, cannot remain unaddressed for years.

Rather, the approach taken by foreign governments of prominent seats in managing their international arbitration frameworks should be emulated. The Singaporean government, for example, has made a commitment to resolve international arbitration issues that can be solved legislatively within three to six months. This approach was applied to a situation in Singapore that was similar to the Eisenwerk conundrum, resulting in two prompt amendments to the Singaporean International Arbitration Act. Hong Kong has also increased the collaboration between Hkiac and its government, with Hkiac and the Hong Kong Department of Justice working closely for the purposes of drafting complementary amendments to the Arbitration Ordinance in 2013. With this cooperation, the Arbitration (Amendment) Bill 2013 was introduced into the Legislative Council of Hong Kong and passed in a span of only four months. This is in comparison with the amendments to the IAA, which resulted in an 18-month consultation period before it came into force on 6 July 2010.

There is no set path for fostering this collaborative culture within Australia. However, there is potential for Australia to adopt ideas such as Singapore’s ‘Arbitration Dialogue 2011’. This event enabled various arbitration practitioners and academics to voice their views on proposed changes to the Singaporean IAA, encouraging engagement from key stakeholders within the arbitration community and providing a platform for richer networks and contributions. Coordinating events such as these holds potential for Australia to demonstrate its commitment to develop and improve its international arbitration community, as well as further enhancing communication between stakeholders.

60 Nottage, above n 33, 465.
61 Nottage, above n 33, 476.
62 Yeo and Yu, above n 39; Wilske and Fox, above n 1, 411.
64 Sanger, above n 39.
65 It is noted that the amendments to the IAA were more extensive than those made in 2013 to Hong Kong’s Arbitration Ordinance: Whittaker, Lockhart and Ooi, above n 4, 36.
66 Yeo and Yu, above n 39.
V CONCLUSION

Turning Australia into a ‘hub’ for international arbitration is an objective worth aiming for. Recent measures employed by stakeholders including the government and ACICA have demonstrated a positive trajectory in working toward this goal. Arbitration-friendly judgments such as *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*\(^{67}\) have also reinforced the pro-arbitration attitude taking hold in Australia.

However, more can be done in order to compete with the popularity of Hong Kong and Singapore in the Asia-Pacific Region. This requires not only clear and unambiguous arbitration legislation and practical changes such as the introduction of specialist Arbitration Lists. There needs to be promotion of a more dynamic approach to international commercial arbitration, which includes legislative responses to its unique features such as Arb-Med and emergency arbitrations. Most broadly, there must be a tangible commitment to provide an arbitration framework that is tailored to the needs of the parties and their commercial interests.

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\(^{67}\) [2013] HCA 5.