HERBERT SMITH FREEHILLS

INSIDE ARBITRATION: A VIEW FROM SYDNEY

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Legal Briefings

With the proliferation of Australian investment in South East Asia and further afield, effective means of resolution of cross-border disputes have become paramount. In this view from Sydney, partners Brenda Horrigan, Leon Chung and Elizabeth Macknay consider the growth of arbitration in Australia and Australia's efforts to promote itself as a seat for arbitration.

Australia is one of Australasia's most politically and economically developed countries. After its colonisation in the 19th century, six Australian states formed the Commonwealth of Australia in 1901. Since then, Australia has had a stable liberal democratic political system. Similarly, Australia's economy has been strong over the decades. This is reflected in Australia's GDP, which in the year to March 2017 was at A$1,684.2 billion (for a nation of ca 24 million citizens) (Source: Australian Bureau of Statistics).

In addition to having a well-developed political and economic system, Australia has a strong judicial and legal system. Its law at both federal and state level is largely based on and has developed alongside the English common law system and courts exist at both state and federal level and their decisions are independent and fair. As a result, Australian companies have for some time relied almost exclusively on the Australian court system to resolve their disputes.

However, Australian corporates are increasingly also looking at alternative dispute resolution mechanisms. "The main impetus for this change is the rapid development of Australia's modern economy and its increasing inter-connectedness with global markets." states Brenda Horrigan, Sydney partner and Head of International Arbitration (Australia). Already a significant part of Australia's economy today relates to foreign trade. For example, Australia has a significant direct investment presence abroad, with the stock of investment valued at A$554.9 billion at the end of 2016 (Source: Australian Bureau of Statistics). It is expected that this trend will continue. One third of the top two thousand Australian companies on average hold investments in four to five jurisdictions outside Australia, and it is estimated that a good 85% of those are looking to increase their geographic footprint (Source: Austrade).

INCREASE FOR DEMAND FOR ARBITRATION IN AUSTRALIA

Sydney partner and arbitration specialist, Leon Chung, observes: "As Australian companies engage in more trade and investment in the region, arbitration as the preferred choice of dispute resolution mechanism becomes more and more attractive. There is much more demand for arbitration clauses in contracts than, say, 10 years ago."

Australia is only at the beginning of this development. Australian parties are not as highly represented in the statistics of the international commercial arbitration institutions as some of their competitors based in other countries. However, the numbers are increasing. All of the major global arbitration institutions are reporting an increase of Australian- or Australian-related arbitrations. SIAC, for example, ranked Australia as the 15th most common nationality of a party in 2010, whereas it was ranked 5th in 2015. Similarly, the HKIAC ranked Australian parties at 6th place in 2015, when it did not even make the top 10 in 2014.

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There are good reasons for this development. Australian companies recognise in particular that in dealing with companies based in other Australasian countries, Australian court judgments are generally not enforceable, whereas arbitration awards are. Hence, opting for arbitration significantly decreases their counterparty risk. Brenda Horrigan adds: "The presence of a workable dispute resolution clause – which for most cross-border disputes means an arbitration clause – is not only relevant when legal proceedings are inevitable. To the contrary, we assist many of our clients in early negotiations with respect to a budding dispute. The parties' bargaining position is significantly improved if the underlying threat of legal proceedings, which can actually be enforced against the counterparty, is not an empty one."

In addition, another draw card for arbitration which is often relied on by Australian companies is the private and confidential nature of the proceedings. Large multinationals based in Australia do not want to expose their business to competitors through a public court process.

Companies also refer to the finality of the proceedings as a factor in favour of arbitration. Court proceedings can invariably drag on, especially if an appeal process is included. Arbitration, on the other hand, provides finality and certainty, which is a factor in its favour.

Thus, with the trend of increasing cross-border investments and trade, Australian companies are looking to arbitration more and more as an effective dispute resolution mechanism. As Liz Macknay, a partner in Perth, observes: "Large multinationals have been using arbitration for a while now. Smaller companies, which are now branching out into the AsiaPacific region, are becoming increasingly aware of it and giving it serious consideration when choosing the appropriate dispute resolution mechanism."

AUSTRALIA AS THE SEAT OF ARBITRATION

This does not mean that arbitrations necessarily take place in Australia. Other regional hubs, such as Hong Kong or Singapore, are often the preferred choice of seat for arbitrations involving Australian parties. This may be the case for a number of reasons. Location plays a role. Often, the Australian party initially suggests in the negotiations an Australian seat, but the counterparty pushes back with a request for a 'mid-point' jurisdiction such as Hong Kong or Singapore. In particular, Singapore and Hong Kong have strong reputations for being arbitration-friendly jurisdictions. Australian parties are generally accepting of those jurisdictions as they are also based on common law.

Having said that, Australia is working hard to increase its attractiveness as a seat. The government is very supportive of arbitration. In 1974, Australia enacted the International Arbitration Act 1974 (the IAA), which incorporated the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, later, the UNCITRAL Model Law on International Commercial Arbitration into Australian law. Since then, the IAA has been amended to keep pace with developments in international arbitral practice. In fact there are currently proposed reforms underway which are intended to deal with uncertainty created by some case law. Similarly, all six Australian states have adopted the Model Law in their state-level arbitration acts (the last one, the Australian Capital Territory, in March this year.)

In addition, Australian courts generally produce steady and reliable pro-arbitration decisions. The Chief Justice of the Federal Court, Allsop CJ, put it succinctly that "the bedrock of an "arbitration-friendly" jurisdiction, both domestically and internationally, remains whether domestic courts are supportive or interventionist in their approach to arbitration" and that Australia delivers in that regard. In particular, through decisions such as the recent TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd. case, the judiciary has made it clear that it subscribes to the pro-enforcement principle of the New York Convention and the Model Law.

The same goes for the private sector.

In 1985, the Australian Centre for International Commercial Arbitration (ACICA) was established as a not-for-profit organisation. ACICA is the preeminent arbitration institution in Australia catering for cross-border dispute resolution.

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ACICA has its headquarters at the Australian International Disputes Centre (AIDC) in Sydney, and also has registries in Melbourne and Perth. The number of international arbitration cases registered every year by ACICA varies greatly, but does not go beyond the double-digits. However, although ACICA might not (yet) have the case load of other recognised institutions in the region (such as the Singapore International Arbitration Centre (SIAC) or the Hong Kong International Arbitration Centre (HKIAC), ACICA has a good and up to date set of arbitration rules and an able and dedicated case administration team. It is a real alternative to other established institutions in the region.

Arbitration organisations that have been active in promoting the use of international arbitration by Australian parties also include the Australia branch of the Chartered Institute of Arbitrators and more specialist organisations such as the Australian Maritime and Transport Arbitration Commission (AMTAC) and the Perth Centre for Energy and Resources Arbitration (PCERA). AMTAC is a specialist commission of ACICA set up to provide services to the shipping and transport industry in the efficient resolution of disputes. AMTAC is widely used for shipping disputes.

PCERA is a relatively new institution set up in 2014 to assist with disputes in the energy and resources sector, Perth being home to a concentration of energy and resources companies. It maintains a panel of expert arbitrators with particular expertise in the energy and resources sector. PCERA publishes a modified version of the UNCITRAL Arbitration Rules that, along with the accompanying PCERA Arbitration Principles, are particularly suited to the cost and time efficient resolution of energy and resources disputes. Whilst PCERA is still young, we are seeing an increasing number of companies operating in the energy and resources sector nominating PCERA in arbitration clauses.

As use of arbitration by Australian parties continues to increase, we expect to see growth in both the number of arbitrations seated in Australia and the number of cases heard by institutions in other seats, but involving Australian parties.

CONCLUSION

Whether the seat of the arbitration is in Australia or elsewhere, ultimately, makes little difference to Australian clients. "Other than the few days of the hearing, the proceedings can be, and are, conducted from Australia. This is often the easier solution for the Australian-based client, when witnesses, documents and instructing counsel are located in Australia" explains Brenda Horrigan. Brenda has recently relocated from Shanghai, where she headed the HSF office, to Sydney in recognition of the growing demand for arbitration specialists in Australia. "It is an exciting move. All my career, I have worked in emerging markets, in particular, the countries of the Former Soviet Union and China. Australia is quite different in that it has a well-established economy and court system, but the use of international arbitration in Australia is nevertheless in an emerging phase, as many Australian companies are only recently beginning to appreciate the advantages of arbitration for their cross-border dealings."

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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