

INTERNATIONAL ARBITRATION IN AUSTRALIA IN 2020 - STATE OF PLAY

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Legal Briefings - By **Leon Chung, Guillermo Garcia-Perrote and Jesse Tizard**

We round up key developments in the increasingly eventful Australian arbitration sphere, including recent judgments and Covid-19's impact on hearings.

In this note we canvass some of the key developments in the international arbitration space in 2020, including:

- Recent judicial support for international arbitration and the enforcement of arbitral awards, reaffirming Australian courts' pro-arbitration stance.
- Australia's ratification of the Mauritius Convention, the recently announced review of Australia's 15 bilateral trade agreements, and investor-state arbitrations initiated by Australian companies.
- The impacts of Covid-19 and the associated prevalence of virtual hearings.
- The Singapore Convention, establishing an international regime for the enforcement of settlements reached through mediation, which came into force in September this year.

INTERNATIONAL COMMERCIAL ARBITRATION AND INVESTOR-STATE ARBITRATION - A FEW PRELIMINARY OBSERVATIONS

International commercial arbitration is gaining prevalence with Australian companies as a means of resolving international disputes. International commercial arbitration is a private, non-national system of dispute resolution between commercial entities by an impartial arbitral tribunal. It is based on the parties' agreement to submit their disputes to arbitration and, consequently, no court will have jurisdiction to determine the merits of any dispute within the scope of the arbitration agreement. Decisions in arbitration are referred to as 'awards', which are final and binding. Arbitral awards benefit from global enforcement around the world on a largely common basis by virtue of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Award (the 'New York Convention'), which currently has 165 state parties including Australia. In contrast, there is no equivalent treaty for court judgments which makes enforcement of court judgments around the world a far more difficult process.

There has also been an increase in the number of investor-state disputes brought by Australian companies, which are taking advantage of investor protections in treaties Australia has with other countries. Investor-state arbitration differs from arbitration between commercial entities in that it involves investors taking action against a state on the basis of trade and investment protection agreements (whether bilateral or multilateral) between states. These protections exist independently and in addition to any contractual rights the company may have negotiated in relation to its investment. Such protections attract foreign investors by assuring them that their investments will be protected, that any disputes with the host country regarding its treaty obligations will be resolved by independent arbitrators, and that any award will be enforceable against the state (rather than having to rely on domestic court procedures).

RECENT AUSTRALIAN COURT ACTION

ENERGY CITY QATAR HOLDING COMPANY V HUB STREET EQUIPMENT PTY LTD (AUGUST 2020)

In *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (ECQ v Hub)*,¹ the Qatari company, ECQ, sought enforcement of an arbitral award against the Australian counterparty, Hub. In granting enforcement in favour of ECQ, the Federal Court referred to well-known authorities favouring the enforcement of arbitral awards "*wherever possible*", even in the face of procedural imperfections.

The decision is a reminder that (1) Australian courts favour recognition of arbitration agreements and enforcement of arbitral awards (despite procedural imperfections), (2) that allegations of procedural unfairness will be closely scrutinised, and (3) that parties who ignore arbitral provisions in contracts will not find favour with the courts. For further detail, refer to our analysis [here](#).

TIANJIN JISHENGTAI INVESTMENT CONSULTING PARTNERSHIP ENTERPRISE V HUANG (MAY 2020)

The Federal Court enforced an award made by the China International Economic and Trade Arbitration Commission.² The respondent had argued that there was no basis upon which the court could be satisfied that it had “*duly certified*” copies of the agreement between the parties and the arbitral award. The Court considered there was sufficient evidence the copies were genuine and recognised the award in accordance with the objectives of the *International Arbitration Act 1974* (Cth), directing the parties to agree on orders including specific performance for the purchase of shares. Given the applicant had sought enforcement in Australia, the Court considered it was appropriate to convert the share purchase price into AUD. Further detail on this case can be found [here](#).

INGHAMS ENTERPRISES PTY LTD V HANNIGAN (MAY 2020)

In *Inghams Enterprises Pty Ltd v Hannigan*,³ the NSW Court of Appeal found that a claim for unliquidated damages for breach of contract could not be referred to arbitration as it was not within the scope of a narrowly drafted arbitration agreement. In particular, the Court distinguished between amounts payable under contract and remedies arising by operation of law. Whereas liquidated damages are recoverable by contractual right of recovery, unliquidated damages are assessed by reference to common law principles. The claim was thus outside the arbitration clause which referred to a “*monetary amount payable and/or owed ... under the Agreement*”. The case highlights the need for careful consideration around the drafting of arbitration agreements and notices of dispute. For further details, see our analysis [here](#).

DALIAN HUARUI HEAVY INDUSTRY INTERNATIONAL COMPANY LTD V CLYDE & CO AUSTRALIA (APRIL 2020)

A judgment from the Supreme Court of Western Australia, *Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia*,⁴ demonstrates the value of interim measures to provide security for an amount in dispute. However, the outcome of the case turned on the timing of the arbitral award, which ordered the “*immediate*” release of the trust funds, thus ‘perfecting’⁵ the security interest shortly before the award-creditor went into voluntary administration. While the award was favourable to the claimant, the case acts as a cautionary tale to parties who obtain interim measures providing security over assets (where Australia’s securities laws apply), that they should take steps to register their security interest to best preserve the protection they have obtained in the event of a voluntary administration or insolvency. A further discussion of the decision can be found [here](#).

INTERNATIONAL INVESTMENT ARBITRATION

AUSTRALIA RATIFIES THE MAURITIUS CONVENTION

In September 2020, Australia reinforced its commitment to enhancing transparency around global investments by signing the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the 'Mauritius Convention'). The ratification of the Mauritius Convention provides greater transparency around investor-state dispute settlement proceedings commenced under international treaties which were concluded prior to 1 April 2014. The effect is to align those agreements with transparency measures already adopted in Australia's more recent free trade agreements. The changes include required disclosure of parties to the dispute, and the treaty under which the claim is being made, information regarding the notice of dispute, and statements of claim and defence. Our brief analysis can be found [here](#).

AUSTRALIA REVIEWS BILATERAL INVESTMENT TREATIES

The Australian Department of Foreign Affairs and Trade ("**DFAT**") announced in July a review of the bilateral investment treaties ("**BITs**") it has with 15 other states,⁶ and invited submissions from any interested party. The BITs typically require Australia and the treaty counterpart to, among other things, treat foreign investors fairly and equitably, provide protection and security for investments, honour written agreements, and not expropriate an investment without adequate compensation. Reform may include a range of options, including, for example, full renegotiation of a BIT or replacement with a chapter in a fair trade agreement. Those with a potential claim might consider whether a claim could be affected by a change to the BIT. DFAT welcomed submissions to be submitted no later than Wednesday, 30 September 2020. We understand the Department is now in the process of considering those submissions. Our analysis of the review can be found [here](#).

RECENT AUSTRALIAN INVESTOR-STATE ARBITRATION

An increasing number of Australian companies are taking advantage of international treaty rights by commencing international investment treaty arbitrations in relation to investments overseas. The cases serve to highlight the importance for Australian companies of considering how to best structure their investment to allow themselves to take the benefit of these international treaty protections (in addition to any contractual rights they might have).

In September 2020, Australian company Prairie Mining Limited ("**Prairie**") announced it had served international arbitration notices on the Republic of Poland, alleging breaches of their obligations under the Energy Charter Treaty and the Australia-Poland BIT. The company claims that the government took action to block the development of Prairie's mines, depriving the company of its investments. The company's ASX announcement can be found [here](#).

In July 2020, Barrick (PD) Australia Pty Ltd ("**Barrick**"), an investor in the Porgera Mine in Papua New Guinea ("**PNG**"), gave notice to the state of PNG of a dispute arising under the BIT between PNG and Australia.⁷ Barrick claims the PNG Government's decision not to extend the Porgera Special Mining Lease violates the terms of the BIT and international laws governing foreign investment. Barrick seeks to recover damages it has already suffered and damages it may suffer in the future by virtue of the refusal to grant an extension. The dispute was referred to the International Centre for the Settlement of Investment Disputes ("**ICSID**") on 11 August 2020. Further information can be found [here](#).

In 2018, EnviroGold (Las Lagunas) Limited informed the Dominican Republic Government of a dispute arising under the Special Contract for the Evaluation, Exploitation and Profit from the Las Lagunas Tailings Dam.⁸ The claim alleges that the Government failed to meet its contractual obligation to provide a suitable dam site for storage of the repossessed tailings. The dispute was registered with ICSID on 2 April 2020. Please find further information [here](#).

Most recently, this month, an ICSID tribunal has refused to dismiss a third-party funded claim brought against Egypt by Australian mining investors, ruling that the treaty between Australia and Egypt contained the necessary advance consent to arbitration, and that the Australian company could bring its claim without needing Egypt to provide further consent. The dispute was initially referred to ICSID in June 2018, and relates to a mining venture for tantalum, a rare corrosion-resistant mineral used in electronic circuit boards. The Australian companies, Tantalum International Ltd and Emerge Gaming Ltd, are seeking compensation after Egypt allegedly withdrew from the mining project and sought to strip the companies of their right to exploit the mine. More information can be found [here](#).

EISER INFRASTRUCTURE LIMITED V KINGDOM OF SPAIN (FEBRUARY 2020)

A recent Australian court case arising out of an investor-state dispute was *Eiser Infrastructure Limited v Kingdom of Spain*.⁹ The Federal Court's key finding was that states cannot rely upon sovereign immunity to resist enforcement of awards issued in investor-state arbitrations conducted under the ICSID rules. In this regard, the Court recognised there was a tension between the *Foreign States Immunities Act 1985* (Cth), and the *International Arbitration Act 1974* (Cth), but reconciled this with its finding that Spain, as a signatory to the ICSID Convention, had consented to the courts of other contracting states recognising and enforcing arbitral awards against it. As such, the Court found that Spain waived any right to claim immunity under the *Immunities Act*. Notice of appeal to the Full Court of the Federal Court of Australia was filed on 20 March 2020. The appeal was [adjourned](#) on 24 August 2020.

It is important to note that on 11 June 2020, an ICSID ad-hoc committee decided to annul the award against Spain in its entirety which renders it void. Spain had been able to show that there was an undisclosed business relationship between the Eiser parties and their appointed arbitrator, rendering the constitution of the tribunal improper. The outcome marks the first time in its history that ICSID has annulled an award on these grounds. It appears that following the delivery of the annulment decision, Spain nonetheless proceeded to file submissions in respect of the appeal to the Full Court of the Federal Court of Australia on 6 August this year, and that Eiser filed an affidavit on 20 August 2020. Further information can be found from the Commonwealth Courts Portal [here](#).

IMPACTS OF COVID-19 ON ARBITRATIONS AND VIRTUAL HEARINGS

Prior to the outbreak of Covid-19 the use of video conferencing was primarily for marginal witnesses, or where there was a compelling reason for remote conferencing, and where the witness's credibility was not in question. The spread of Covid-19, and the realisation that travel restrictions would be around longer than first anticipated, hastened a transition to almost universal online arbitrations.

Covid-19 has been a catalyst for change that might otherwise have taken many years, perhaps even signalling a 'new normal' that will continue beyond the pandemic. In particular, there will be some desire to continue with virtual hearings, particularly due to the associated cost savings for participants, as well as concerns over sustainability and a desire for 'greener' arbitrations. The longer the situation imposed by Covid-19 persists, the more likely it is that participants will become accustomed to virtual or hybrid hearings as the norm.

A collaboration launched by Herbert Smith Freehills and other law firms seeks to establish a consistently applied protocol so that participants in international arbitrations can meet their obligations relating to data handling and cyber security. The protocol is currently being developed and is in draft form. A copy can be found [here](#).

SINGAPORE CONVENTION

On September 12, 2020 the United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention') came into force. The aim of the Singapore Convention is to establish an international regime for the enforcement of settlement agreements reached by mediation, similar to the international framework already in place for arbitration agreements. Increased reliability of enforcement has the potential to increase the attractiveness of mediation as alternative means of international dispute resolution, with the mediation community hoping the treaty will achieve for mediation what the 1958 New York Convention has done for international arbitration. Our earlier discussion of the Singapore Convention can be found [here](#).

Please feel free to contact us using the details below if you have any queries about these developments.

ENDNOTES

1. *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116.
2. *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767.
3. *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82.
4. *Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia* [2020] WASC 132.
5. For the purposes of the *Personal Property and Securities Act 2009* (Cth).
6. Australia has BITs in force with Argentina, China, Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, Philippines, Poland, Romania, Sri Lanka, Turkey

and Uruguay.

7. Barrick Serves Notice of Dispute Over Porgera' (Press Release, 10 July 2020), available [here](#).
8. Australian Stock Exchange, 'Las Lagunas Project to Pursue Damages Claim' (ASX Announcement, 24 May 2018), available [here](#).
9. *Eiser Infrastructure Limited v Kingdom of Spain* [2020] FCA 157.

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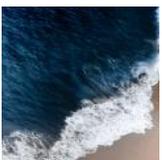


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KEY CONTACTS

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



LEON CHUNG
PARTNER, SYDNEY

+61 2 9225 5716
Leon.Chung@hsf.com



**GUILLERMO
GARCÍA-PERROTE**
SENIOR ASSOCIATE,
SYDNEY

+61 2 9322 4903
guillermo.garcia-
perrote@hsf.com