Australia's arbitral advance

Legislative changes to foster growth

The last decade has seen rapid growth in global investment, cross-border transactions and, perhaps inevitably, global disputes.

Procedural and cost advantages and confidence in an entrenched and tested legal framework have led commercial parties to increasingly favour international arbitration to resolve their disputes.

Parties to an arbitration agreement generally elect for proceedings to be conducted by a recognised international arbitral institution, such as the International Court of Arbitration, the London Court of International Arbitration or, in Australia, the Australian Centre for International Commercial Arbitration (ACICA).

Australia has grown as an arbitration venue in the Asia-Pacific because of the efficiency, flexibility and certainty, and consequent cost advantages, of its arbitral process, as set out in the *International Arbitration Act 1974* (Cth) (IAA) and the ACICA's Arbitration Rules (Rules) and Expedited Arbitration Rules (Expedited Rules).

Recent amendments to the IAA, the Rules and the Expedited Rules, in particular the IAA's new 'opt-out' confidentiality process and the new consolidation and joiner provisions in the Rules, are consistent with international best practice and are likely to enhance Australia's status as an arbitration hub in the Asia-Pacific.

With continued growth in international arbitration expected in Australia in coming years, it is crucial for practitioners to be aware of the nature and commercial implications of the amendments to properly advise and protect the interests of their clients.

Amendments to the IAA

The *Civil Law and Justice (Omnibus Amendments) Act 2015* (Cth) (amending Act) entered into force on 13 October 2015. The amending Act makes key changes to the IAA relating to the recognition and enforcement of foreign arbitral awards and the confidentiality of the arbitral process which will have a significant impact on all arbitral proceedings conducted in Australia.

Recognition and enforcement of foreign arbitral awards

To date, the international framework contained in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (convention) has been adopted by 156 contracting states, including Australia.

Key amendments to legislation and procedural rules will enhance the growth of international arbitration in Australia. Report by **Dr Kai Luck.**

Papua New Guinea and East Timor, which represent some of the key operating markets for Australian businesses, particularly in the energy, resources and mining sectors, are among the states that have not yet ratified the convention.

Previously, a party to an arbitration agreement could not apply to an Australian court for the recognition and enforcement of a foreign award unless the award was made in a country which had ratified the convention or the party was otherwise domiciled or ordinarily resident in Australia or a country which had ratified the convention.[1]

However, the amending Act removed this restriction so that all foreign arbitral awards will now be recognised and enforced in Australia, subject to limited statutory grounds of refusal set out in the IAA,[2] irrespective of the country where the award was made.

With one exception, before the amending Act was passed the statutory grounds of refusal were co-extensive with the uniform provisions contained in the convention[3] and the Model Law on International Commercial Arbitration (model law),[4] an international instrument of the United Nations Commission on International Trade Law adopted by 70 contracting states including Australia.

The exception related to circumstances in which a party to an arbitration agreement was under some incapacity at the time the agreement was executed. Previously, the IAA only allowed an Australian court to refuse recognition and enforcement of a foreign award if the party resisting recognition and enforcement was incapacitated. However, the amending Act corrected this discrepancy so that recognition and enforcement can now be refused if either the party resisting or the party seeking recognition and enforcement was incapacitated when the arbitration agreement was executed.[5]

Incapacity is unlikely to be a frequent basis for objection to the recognition and enforcement of a foreign award and indeed has not been the subject of a decision to date by an Australian court. Nevertheless, the amendment is still important because it eliminates an unprincipled distinction and ensures that Australia's arbitration framework remains consistent with international best practice. That is a persuasive factor for parties in selecting an arbitration venue and the rules that will govern proceedings.

Confidentiality of the arbitral process

One of the key advantages of arbitration not offered by cross-border litigation is the potential for the parties to keep confidential both arbitral proceedings and arbitral awards. Indeed, this has proven to be one of the primary motivations for parties choosing to enter into an arbitration agreement as part of their commercial relationship,[6] allowing the parties to limit public exposure and publicity that could be highly damaging to enterprise value and continued business operations.

Nevertheless, the High Court in *Esso Australia Resources Ltd v Plowman* (*Esso*)[7] declined to follow English authority supporting an implied duty of confidentiality and held that arbitral proceedings and outcomes will only be confidential if expressly agreed to by the parties.

The amending Act changed the default confidentiality position under the IAA, originally introduced in 2010 to overcome the adverse effect of the *Esso* decision on Australia's popularity as an arbitration venue, from an 'opt-in' position to an 'opt-out' position. As a result, arbitral proceedings and outcomes in Australia will now be confidential (subject to limited carve-outs which preserve the parties' enforcement rights and ensure compliance with their legal obligations) unless the parties agree to the contrary.[8] This is consistent with the position in leading arbitration venues in the Asia-Pacific such as Hong Kong[9] and Singapore.[10]

While confidentiality was already the default position (absent an agreement by the parties to the contrary) under the Rules before the passage of the amending Act,[11] the revised IAA position is highly beneficial when the parties elect for arbitral proceedings to be conducted in Australia under alternative institutional procedural rules or in accordance with their own ad hoc rules.

The confidentiality amendment is therefore expected to play a significant role in continuing to drive Australia's growth as an international centre of arbitration, removing the competitive advantage previously enjoyed by Australia's Asia-Pacific neighbours.

Amendments to the Rules

It is very common for cross-border transactions to involve multiple contracts between multiple parties. If a party has not executed an arbitration agreement, disputes involving that party cannot be referred to arbitration. However, even if a party does enter into an arbitration agreement, it may only apply to particular aspects of a transaction and it may be materially different to other arbitration agreements executed by the party and/or other parties in relation to the transaction. This creates the prospect of wasted costs and inconsistent arbitral awards arising from multiple arbitral proceedings.

Section 24 of the IAA allows an arbitral tribunal in Australia to make an order consolidating separate arbitral proceedings, potentially involving multiple contracts and/or multiple parties, if:

- a common question of law or fact arises in all the proceedings
- the rights to relief claimed in all the proceedings are in respect of or arise out of the same transaction or series of transactions, or
- there is some other desirable reason for an order to be made.[12]

Significantly, a consolidation order can be made even if the separate proceedings are being conducted before different arbitrators and/or under different arbitral rules.

Nevertheless, the utility of section 24 is limited by the fact that it only applies to a dispute if the parties to an arbitration agreement expressly agree.[13]

The Rules did not previously provide any basis for an arbitral tribunal to consolidate separate arbitral proceedings. However, under the revised 2016 Rules, an arbitral tribunal can now consolidate two or more arbitrations being conducted under one or more arbitration agreements executed on or after 1 January 2016[14] if:

- the parties have agreed to the consolidation
- all the claims in the arbitrations are made under the same arbitration agreement, or
- the claims in the arbitrations are made under more than one arbitration agreement but the arbitrations are between the same parties, a common question of law or fact arises in the arbitrations, the rights to relief claimed are in respect of or arise out of the same transaction or series of transactions, and the arbitration agreements are compatible.[15]

Although the Rules provide an arbitral tribunal with less discretion than the IAA and, unlike the IAA, only allow for the consolidation of separate arbitrations being conducted under the Rules (and not the procedures of another arbitral institution or those agreed to by the parties on an ad hoc basis), it is significant that the Rules permit consolidation even without the parties' express agreement. That, along with the new power in the Rules for an arbitral tribunal to order the joinder of additional parties to a proceeding (provided the parties are bound by the same arbitration agreement between the existing parties to the proceeding),[16] offers additional flexibility, certainty and significant cost savings to disputing parties beyond that contained in the IAA.

The new consolidation and joinder provisions bring the Rules into line with those of other major regional arbitral institutions[17] and are likely to further increase the status of Australia as an international arbitration venue for commercial parties.

Law governing the arbitration agreement

It is prudent for the parties to specify in their arbitration agreement:

- the procedural laws and rules that will govern the conduct of the arbitration
- the substantive laws that will govern the resolution of the underlying dispute
- the laws that will govern the arbitration agreement itself, including its interpretation and enforceability.

Reference by the parties in an arbitration agreement to the 'place' or 'seat' of the arbitration is taken to mean not just the physical venue of the arbitration but also the jurisdiction providing the arbitration's procedural laws and rules.[18] While the matter is not without doubt, the preferred approach, outlined by the English Court of Appeal in *Weissfisch v Julius*,[19] has generally been that the law of the place or seat of the arbitration will also govern the arbitration agreement if the parties have not expressly agreed otherwise.

This position has now been confirmed in an amendment to the Rules.[20] The amendment is of great value to contracting parties because, absent an express choice of law clause in an arbitration agreement, it avoids the potential for ambiguity and wasted costs on matters unrelated to the substance of the dispute.

Expedited arbitral proceedings

Previously, the Rules only allowed expedited arbitral proceedings to be conducted if all parties agreed in writing. However, the amended Rules now allow an arbitral tribunal to order expedited proceedings at the request of a single party in cases of exceptional emergency or where the amount in dispute is less than $5 million.[21] Given the significant time and cost savings that accrue to the parties from using the Expedited Rules' fast-tracked process, this amendment will further enhance Australia's appeal as an international arbitration venue.

Other amendments

The new Rules contain several other provisions which reflect international best practice, including:

- changing the exchange rate at which claims expressed in a foreign currency are to be converted into Australian dollars from the exchange rate applicable on the day ACICA receives a notice of arbitration to the day ACICA receives the relevant claim (being the time at which either a statement of claim or any applicable counterclaim or set-off defence is received).[22] Because the day a claim is received may post-date the notice of arbitration,[23] this amendment may have a significant impact on the final nominated value of a claim.
- allowing notice to be provided by electronic means rather than physical delivery[24]
- requiring the parties, rather than ACICA, to assume responsibility for serving a Notice of Arbitration and Answer to Notice of Arbitration[25]
- providing ACICA with the power to appoint one or more independent experts to report on specific issues.[26]

Conclusion

Australia is likely to see even greater growth in international arbitration in future years following recent amendments to the IAA and ACICA's Rules and Expedited Rules which protect confidentiality and ensure greater efficiency and reduced costs in the arbitral process.

As a result, practitioners should have a sound understanding of Australia's international arbitration legal framework and should keep abreast of new developments as the framework continues to evolve to meet the demands of a dynamic and often unpredictable regional economy.

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Notes

1 IAA, former s8(4) (now repealed).
2 IAA, ss8(5)-8(8).
3 Convention, art. V.
4 Model law, arts 34(2), 36(1).
5 IAA, s8(5)(a) (as amended).
6 Malcolm Holmes, 'Drafting an Effective International Arbitration Clause' (2009) 83 *Australian Law Journal* 305, 306; John Wakefield and Katrine Narkiewicz, 'Australia's New Arbitration Regime: Five Years On' (2015) 2(1) *Law Society Journal* 72.
7 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.
8 IAA, ss22(2)(ca)-22(2)(ce), 23C-23G.
9 Hong Kong Arbitration Ordinance (Cap.609).
10 Singapore, like the United Kingdom, relies on a judicially-recognised implied duty of confidentiality: see *Myanma Yaung Chi Oo Co Limited v Win Win Nu* [20003] SGHC 124.
11 See new Rules, art. 22.
12 IAA, ss24(1), 24(2)(a).
13 IAA, s22(5).
14 Rules, art. 2.5 (but note the parties can agree for an arbitration agreement executed before 1 January 2016 to be subject to the new consolidation and joinder provisions).
15 Rules, art. 14.1.
16 Rules, art. 15.
17 See, for example, arts 27-28 of the Hong Kong International Arbitration Centre Rules.
18 *Dubai Islamic Bank v Paymentech Merchant Services Inc* [2000] EWHC 228 (Comm).
19 [2006] App LR 03/08.
20 Rules, art. 23.5.
21 Rules, art. 7.1.
22 Rules, appendix A, art. 2.2(c).
23 Rules, arts 25-26.
24 Rules, art. 4.1.
25 Rules, arts 5.5, 6.4.
26 Rules, art. 32.1.