ARBITRATION IN AUSTRALIA

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Several recent reforms to Australia's International Arbitration Act 1974, and the establishment of a local maritime dispute resolution body, have resulted in Australia becoming an attractive alternative seat for arbitration. Members trading to Australia and the Asia-Pacific region, or undertaking projects in Australia's burgeoning offshore oil and gas industry, might therefore wish to bear Australia in mind as an arbitral forum when negotiating arbitration agreements in their contracts.

LEGAL FRAMEWORK

International arbitration in Australia is regulated by the International Arbitration Act 1974 (IA Act), which incorporates the UNCITRAL Model Law on International Commercial Arbitration into Australian law. Each of Australia's seven States, and its two Territories, also have their own Commercial Arbitration Acts, which govern domestic arbitration.

RECENT REFORM

Prior to 2010, there was some confusion in Australia regarding the interaction between the IA Act and the State and Territory Commercial Arbitration Acts, and whether international disputes could be resolved under the latter. There was also wider scope for a court to refuse to enforce foreign arbitral awards. This hampered Australia's efforts to become an attractive centre for arbitration.

Recent reforms, however, have made it clear that the IA Act is now the exclusive law governing international arbitration in Australia. Furthermore, the amended IA Act now provides a narrow and exhaustive list of grounds upon which a court may refuse to enforce an arbitral award, namely:

- the party challenging the award was under some incapacity at the time the arbitration agreement was made,
- the arbitration agreement is not valid under the law of the country where the award was made,
- no proper notice of the appointment of the arbitrator or the arbitration proceedings was given to the challenging party,
- the award is beyond the scope of the arbitration agreement,
- the composition of the arbitral tribunal was not in accordance with the arbitration agreement,
- the award has not yet become binding on the parties or has been set aside or suspended, and
- to enforce the award would be contrary to public policy.

Parties now have more certainty and can feel comfortable that an arbitral award will not be set aside by a court in Australia unless one of the conditions above can be satisfied. This engenders confidence that international arbitration in Australia will offer finality of result and will not merely be the first step in a protracted dispute resolution process that goes on to be fought out in court.

ARBITRATORS' POWERS

Another feature of the new IA Act is the ability of parties to opt to have arbitration proceedings consolidated, thereby reducing costs, and to only disclose confidential information in limited circumstances. Unless the parties otherwise agree in their arbitration agreement, arbitration tribunals can also now:

- order a party to pay security for costs,
- order a party to pay interest if the amount of the arbitral award is not paid by a certain date,
- limit the amount of costs that a party is to pay to a specified amount,
- make orders allowing a party to inspect, photograph or conduct experiments on evidence, and
- allow a party to apply to a court to obtain subpoenas requiring a person to produce documents to the tribunal or to appear for examination before the tribunal.

Parties should therefore consider these various 'opt-in' and 'opt-out' provisions when negotiating arbitration agreements in their contracts in order that their choices are clearly reflected. In addition, the new IA Act gives Australia's international arbitration institution, the Australian Centre for International Commercial Arbitration (ACICA), the power to appoint an arbitrator in cases where:

- a party fails to appoint an arbitrator within 30 days of a request to do so, or
- the parties cannot agree on the appointment of an arbitrator, or
- an arbitration panel is to be made up of three arbitrators and the two appointed arbitrators cannot agree on the appointment of the third arbitrator, or
- an arbitral institution fails to appoint an arbitrator as required.

The previous practice had been to give this function to the courts. Giving ACICA these powers avoids the additional costs and delay in having to apply to court.

LOCAL DISPUTE RESOLUTION BODIES

Both the Australian Maritime and Transport Arbitration Commission (AMTAC) and the Maritime Law Association of Australia and New Zealand (MLAANZ) maintain registers of maritime arbitrators, have their own arbitration rules and model arbitration clauses. They each provide an expedited and streamlined service, known as the 'rocket docket' procedure, for disputes involving sums of less than A$100,000 and can deliver a final arbitral award within three months from the commencement of arbitration proceedings.

COSTS

Costs can be awarded to the winning party, but these are subject to the tribunal's discretion.

COMMENTARY

Australia is an alternative place for arbitration with sufficient numbers of suitably qualified lawyers and arbitrators. Sound infrastructure is now in place for maritime dispute resolution in the form of ACICIA, AMTAC and MLAANZ. There are also strong indications that the amendments to the IA Act are already leading to more certainty for parties who arbitrate in Australia and are lowering costs. For example, Australian courts have recently:

- upheld arbitral awards made as far afield as Uganda,
- shown a clear intention to uphold even widely drafted arbitration clauses, and
- ordered indemnity costs against a party who sought to oppose the enforcement of an arbitral award made against it.

Parties can therefore be more confident that arbitration in Australia will offer finality of result in settling their disputes.