

Recent Developments in Arbitration

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Summary

- Arbitration?
 - Traditional litigation is seen as expensive, uncertain and time consuming.
 - Perceived benefits (some illusory) of arbitration include:
 - confidentiality,
 - privacy,
 - expertise of arbitrators,
 - reduced costs,
 - speedier final resolution,
 - flexibility,
 - preservation of continuing business relationships and
 - avoidance of crowded court lists.



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Summary (cont.)

- International Arbitration?
 - Globalisation inevitably produces cross border disputes – arbitration is the only realistic neutral tribunal.
 - Party autonomy in choosing the place, the law and the arbitrator
 - Australian Courts adopting a pro-arbitration approach, yielding harmony, consistency, implicitly ceding of national sovereignty to party autonomy
- In the region:
 - Commercial (including construction) arbitration becoming more accepted in Asia-Pacific region.
 - Improvements in the arbitration rules of regional arbitral institutions



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Pro-Arbitration Approach by Australian Courts

- Decisions applying updated commonwealth and state arbitration legislation
 - International Arbitration Act 1974 (Cth)
 - State Commercial Arbitration Acts
- Courts at state and federal level giving effect to arbitration agreements
- Court proceedings being stayed in favour of arbitration
- Enforcement of arbitral awards



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Recent Judicial Comments

- Rares J of Federal Court of Australia in April 2015
 - Arbitration is an essential mechanism that underpins international commercial relationships.
 - The parties can choose in their contract first, the law that will govern their relationship, secondly, the law of the seat governing any arbitration and thirdly, the procedural rules that will regulate any arbitration.
 - Any arbitral award will be readily enforceable against the losing party or its assets, in any States Party to the Convention or Model Law



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Recent Australian Decisions

- *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10
 - Contract for installation of underground gas transmission pipelines in Western Australia
 - Arbitration clause in terminated agreement
 - Supreme Court proceedings commenced in WA
 - Court adopted broad approach to existence of enforceable arbitration agreement
 - Proceedings stayed and matters referred to arbitration



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Recent Australian Decisions

- *Elders International Australia Pty Ltd v Beijing Be Green Import & Export Co Ltd* [2014] FCAFC 185
 - Elders sought stay of enforcement decision in Federal Court of CIETAC award in China in favour of Chinese company.
 - Elders based the stay on alleged cross claim and set off from unrelated contract which arbitration in China refused to entertain.
 - Full Court (Allsop CJ) held there was a “clear, express and demonstrated public policy of the Australian Parliament” contained within the [International Arbitration Act] for the facilitation of the enforcement of international arbitral awards. That facilitation means their proper, efficient and timely facilitation and recognition. To grant a stay would delay enforcement.
 - Once an Australian Court had decided to enforce an arbitral award, a stay whilst not impossible was unlikely, because it was productive of delay

Recent Australian Decisions

- *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163
 - Case involved costs in rectifying a leak to an annulus (gas lift) hub connector and a production flowline hub connector on a subsea tree at the Puffin 8 well that formed part of the Puffin Field in the Timor Sea.
 - Case of domestic state arbitration legislation – Vic Commercial Arbitration Act
 - the Victorian Parliament has expressed its own intention that the application of the Model Law to domestic arbitrations should be in line with its application to international arbitrations.
 - Confirmed a limited role for curial intervention in arbitral awards

Party Autonomy vs National Sovereignty

- These decisions implicitly recognise a policy to cede jurisdiction from Courts to a tribunal chosen by the parties.
- Party choice favours the perception of confidence in an adjudicator favourably disposed to their case without the appearance of bias.
- Party autonomy sits in tension with national sovereignty through court systems

Not Judges

- Arbitrators are fundamentally more powerful than judges, because unlike judges, their decisions usually cannot be overturned on the basis of fact or law.
- Arbitration does not necessarily promote consistency or certainty because arbitral decisions are not the subject of scrutiny by appeal.
- The skill, experience and knowledge of the arbitrators will therefore have a significant impact on the quality of the process and of the award.

Cultural Sensitivities

- Arbitrators require cultural sensitivities, which local judges may or are obliged to ignore-
 - managing the process where lawyers are from different legal cultures such as common law vs civil law
 - the role of religion in different legal cultures
 - differing notions of “truth” in different cultures.

Rise in Regional Commercial Arbitration

- Growth in prominence of Asian arbitral seats and institutions
 - Hong Kong (HKIAC)
 - Australia (ACICA)
 - Singapore (SIAC)
 - China (CIETAC)

Improvements to Regional Arbitration Rules

- Emergency arbitrator provisions
 - Provide parties with emergency relief before Tribunal is constituted
- Revised HKIAC Rules (2013): new emergency arbitrator procedure
- ACICA Arbitration Rules (2011): already incorporated emergency arbitrator provisions



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Improvements to Regional Arbitration Rules

- New and more flexible rules providing for expedited arbitrations
 - HKIAC Rules (2013)
 - CIETAC Rules (2012)
 - ACICA Expedited Arbitration Rules (2011)
- Expedited procedures commonly used in:
 - Construction arbitration
 - Arbitration involving limited amounts in dispute



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Arbitration Clauses in Australian Trade Agreements

- Korea-Australia Free Trade Agreement
 - Investor-state dispute resolution provisions
 - Change in Australian government position
- Japan-Australia Free Trade Agreement
 - No investor-state dispute resolution provisions
- Trans-Pacific Partnership
 - Ongoing TPP negotiations
 - Inclusion of investor-state arbitration?



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Enforcement Issues

- Ready enforcement is a central plank of the arbitration process.
- Differences among States Parties to the Convention or Model Law on the question of enforcement is a problem.
- Some states such as Indonesia have a track record of preferring national sovereignty to arbitral outcomes



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