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International Commercial Arbitration and Australia

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1. Introduction

Arbitration has been described as the private enterprise counterpart of the Court system.² It derives its existence and force from the agreement between two or more parties to submit their dispute to the final and binding determination of a third party agreed upon between them or appointed pursuant to their agreement by some other party. The inclusion of an arbitration clause will constrain the parties from recourse to the courts, where they would otherwise be able to go without restraint. Commonly, an agreement to arbitrate is entered into as part of a contract and provides that in the event of disagreement between the parties to that contract, some or all of the disputes arising between them in respect of the agreement will be referred to arbitration (a general agreement to arbitrate). For arbitration to occur under a general agreement to arbitrate, the clause providing for arbitration in the agreement must be triggered by a dispute arising out of the contract between the parties, with one of the parties invoking the machinery provided for in the clause.

The considerable growth in the use and popularity of commercial arbitration as a means of resolving a vast array of commercial disputes is tribute to a growing recognition amongst the business community that it provides a flexible and effective alternative to costly and time-consuming litigation. Not only is arbitration a useful tool for the resolution of domestic disputes, it has become the method of choice for resolving commercial disputes of an international nature. However, arbitration is not without its complications, and the decision to include an arbitration clause in a contract, or to rely on arbitration in the case of a dispute involving an investment, should be an informed commercial choice, with due consideration given to the nature of the transaction, the nationality of the assets of last resort, the place(s) where resort may be had to the courts, and the process of arbitration being considered for adoption.

¹ The author gratefully acknowledges the assistance provided in the preparation of this paper by Catherine Mann, Paralegal, Clayton Utz.

² Such sentiment was expressed by Sir John Donaldson in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd & Anor* [1984] 2 All E.R. 175 at 189 - "Arbitration is usually no more and no less than litigation in the private sector. The arbitrator is called on to find the facts, apply the law and grant relief to one or other of the parties".

This paper aims to illuminate the nature and status of international commercial arbitration in Australia. Australia has forged strong business relationships with its neighbours, particularly in South-East Asia. With the increasing use of arbitration in Asia following the expansion and opening up of the Asian economies in the mid 90's, Australia is also developing a strong arbitration culture, both domestically and internationally. As a Western nation in the Asia-Pacific region, Australia is in the unique position of being familiar with law and legal practice in both Asia and Europe. This paper therefore examines the features of arbitral law in Australia and the treatment of arbitration by Australian courts. It highlights the role of the Australian Centre for International Commercial Arbitration (ACICA) and explains the distinctive characteristics and advantages of the ACICA Arbitration Rules.

Finally, this paper aims to provide some insights into recent developments in the law and practice of international arbitration in the context of investment disputes, and, in particular, to examine the relatively recent phenomenon of investor-state arbitration and its relevance to Australia.

2. **The nature and status of arbitration in Australia**

Australia offers an established and hospitable environment for international commercial arbitration. Australia has been a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") since 1975 and was one of the first countries to adopt the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") in 1989. Australian legislation has incorporated the Model Law, but parties may opt out of this law if desired. Australia is also a party to a number of Free Trade Agreements (FTAs), such as the Singapore-Australia Free Trade Agreement, and many bilateral investment treaties (BITs) which provide for arbitration.³ On a domestic level, arbitration is common across all major industries and business sectors. Court-annexed compulsory arbitration and Alternative Dispute Resolution (ADR) for commercial disputes are also commonly used.

Parties to an arbitration in Australia enjoy a high degree of confidentiality and freedom to determine the arbitral process. Australian courts have not only demonstrated their support for arbitration by being prepared to grant stays in order to give maximum effect to arbitration agreements, but also have an excellent record of enforcing awards that have been properly arrived at. Arbitration in Australia also entails low infrastructure costs: fees for Australian lawyers are highly competitive, hotel and arbitral venues are competitively priced, and general

³ See below, section 4.

prices are reasonable due to the exchange rate. Additionally, unlike some Asia-Pacific jurisdictions, Australia provides a venue for international arbitration which is both legally and politically neutral. Australia also has the benefits of a stable political environment and economy. These factors, combined with the fact that Australia is a Western country with a strategic position in Asia and growing expertise in international arbitration, mean that Australia has become a very attractive venue for international arbitrations. International acknowledgement of Australia as a significant centre for international commercial arbitrations has escalated with the hearing of a number of major international arbitration cases in Australia.

International commercial arbitration in Australia is well-supported by legislation, the courts and the presence of local and international arbitral institutions and bodies.

2.1 *Arbitral legislation and rules*

Australia is a federation with legislative powers divided between the Commonwealth, as the federal entity, and six States. In addition there are two federal Territories with their own governments. The following conventions, statutes and treaties are relevant in Australia:

- *International Arbitration Act 1974* (Cth);
- UNCITRAL Model Law on International Commercial Arbitration;
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (New York Convention);
- Washington Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention); and
- *Commercial Arbitration Acts* (Victoria 1984, New South Wales 1984, South Australia 1986, Western Australia 1985, Tasmania 1986, Queensland 1990, Northern Territory 1985, Australian Capital Territory 1986)

International arbitrations are governed by the *International Arbitration Act 1974* (Cth) (*IAA*). There are three annexes to the *IAA*: the New York Convention, the Model Law and the ICSID Convention. Australia's accession to the New York Convention is without reservation and extends to all external Territories other than Papua New Guinea. Section 32 of the *IAA* states that subject to any variation within Part IV of the *IAA*, Chapters II to VII of the ICSID Convention have the force of law in Australia. Section 16 of the *IAA* provides that the Model Law has the force of law in Australia. Unless parties have excluded the Model Law by an agreement in writing, as permitted under section 21 of the *IAA*, the Model Law will apply to

international arbitrations seated in Australia. If parties exclude the Model Law, the arbitration will still be governed by the *IAA* as the curial law. However, the arbitral procedural law will then be the law the parties have chosen or, in the absence of a choice, the *Commercial Arbitration Act (CAA)* of the State or Territory in which the arbitration takes place.

Following amendments made in 1984 and 1993, the *CAAs* of the States and Territories are now largely uniform. However, the *CAAs* are significantly different from the Model Law. For example:

- There is a greater degree of judicial supervision under the domestic arbitration legislation. Thus, the *CAAs* allow for greater court intervention in the appointment and challenge/removal of arbitrators, and specifically permit the court to remove arbitrators for misconduct, which is not restricted to procedural irregularity and therefore provides a wider basis for review than that contained in the Model Law.
- Under the *CAAs*, there is the possibility of appeals from awards on issues of law in limited circumstances. The Model Law on the other hand does not provide for review of errors of law.
- The right to representation is conditional under the *CAAs*, but automatic under the Model Law.
- The default number of arbitrators under the Model Law it is three; under the *CAAs* it is one. Further, in domestic arbitrations the court retains a residual power to fill a vacancy on an arbitral tribunal.

There are a number of features of arbitral law and procedure that set Australia apart from other jurisdictions:

- **Option to opt-out of Model Law.** Under section 21 of the *IAA*, parties can agree to exclude the UNCITRAL Model Law.
- **Additional optional provisions.** The *IAA* supplements the Model Law in several respects. Sections 22 to 27 contain optional provisions to which the parties may agree in writing. These include enforcement of interim measures, consolidation of arbitration proceedings and the payment of interest and costs. Other supplements to the Model Law include provisions on interpretation (section 17) and a definition of "public policy" (section 19).
- **Federal and State arbitration legislation.** As a federation, Australia has arbitration legislation at both federal and State levels. For this reason, arbitration clauses should be drafted with care to ensure that the arbitral procedural law that is

actually applied to the arbitration is that which was originally intended by the parties.

2.2 *Attitude of Australian courts*

Australian courts support the autonomy of international arbitration and will stay court proceedings in the presence of a valid arbitration agreement covering the dispute. Section 7 of the *IAA* governs applications to stay court proceedings if:

- the procedure in relation to arbitration under an arbitration agreement is governed by the law of a country that is a party to the New York Convention (a "Convention country");
- the procedure in relation to arbitration under an arbitration agreement is governed, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;
- a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or
- a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country.

In all other cases article 8 of the Model Law will apply instead.

Section 7(2)(b) of the *IAA* implements Australia's obligations under article II(3) of the New York Convention. It provides that the court must stay proceedings if there is a valid arbitration agreement and the dispute "involves the determination of a matter that, in pursuance of the arbitration agreement, is capable of settlement by arbitration". Courts will refuse a stay only if they find the arbitration agreement is null and void, inoperative or incapable of being performed.⁴

If section 7(2)(b) does not apply, article 8 of the Model Law may apply as long as the stay is requested no later than the date the applicant submits its first statement on the substance of the

⁴ *International Arbitration Act* s 7(5).

dispute. As in section 7(2)(b), the court must refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

2.3 *Arbitrability of disputes*

Australian courts have taken a positive attitude towards the arbitrability of international commercial disputes and consequently there are few restrictions on the types of disputes that can be submitted to arbitration.

Questions about whether a dispute is arbitrable usually arise in the context of applications to stay court proceedings. "Matter" capable of settlement by arbitration for the purposes of section 7(2)(b) of the *IAA* has been interpreted as "any claim for relief of a kind proper for determination in a court".⁵ However, there are some exceptions:

- The *IAA* is expressly subject to section 11 of the *Carriage of Goods by Sea Act* 1991 (Cth), which declares void an arbitration agreement in a bill of lading or similar document relating to the international carriage of goods to or from Australia, unless the arbitration agreement provides that the place of arbitration is in Australia.
- Section 8 of the *Insurance Contracts Act* 1984 (Cth) may affect the arbitrability of insurance-related disputes.

Courts have also refused stay applications where the dispute involves antitrust, bankruptcy or insolvency.⁶ However, the courts have not stated that these matters are inherently incapable of settlement by arbitration. Rather, they have focused on whether the scope of the arbitration agreement is broad enough to cover such disputes. These situations often arise in relation to the *Trade Practices Act* 1974 (Cth) ("*TPA*"), Australia's antitrust and consumer protection legislation. In *IBM Australia Ltd v National Distribution Services Ltd*,⁷ the New South Wales Court of Appeal held that some issues relating to consumer protection under the *TPA* are capable of settlement by arbitration. More recently the NSW Supreme Court in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*⁸ and the Federal Court in *Hi-Fert Pty Ltd v*

⁵ *Elders CED Ltd. v. Dravo Corporation* (1984) 59 ALR 206.

⁶ Concerning the arbitrability of insolvency matters, see *Tanning Research Laboratories Inc. v. O'Brien* (1990) 64 ALJR 211, reported in Yearbook Comm. Arb'n XV (1991) at 521-529.

⁷ (1991) 22 NSWLR 466.

⁸ (1996) 39 NSWLR 160.

*Kiukiang Maritime Carriers*⁹ confirmed that disputes based on section 52 of the *TPA* (relating to misleading and deceptive conduct) are arbitrable.

There is also the theoretical possibility that public policy could be invoked to limit the autonomy of parties wishing to submit their disputes to arbitration. This possibility is clearly recognised at the international level. Article V(2) of the New York Convention provides that the recognition and enforcement of an arbitral award may be refused by the courts of a country if to do otherwise "would be contrary to the public policy of that country."

At the domestic level, the Australian jurisprudence relating to public policy limitations on arbitrability is not nearly as well developed as, for example, that of the United States, but its importance has been recognised. In *Commonwealth v Cockatoo Dockyard Pty. Ltd*¹⁰ Kirby P said:¹¹

"Allowing that a large circle will be drawn within which the arbitrator may make procedural orders, the circle is not without limit. ... The rule of law requires that the court, protective of other competing public and private interests, will define and, where necessary and appropriate, declare the limits beyond which the purported powers in pursuit of private arbitration intrude into competition with other legitimate public and private rights and duties."

In summary, an arbitral tribunal should proceed with caution where it appears likely that the award will have more than an incidental impact on the rights and/or interests of third parties.

Obviously, an arbitral award has a multitude of possible consequences for third parties. For example, it may bring about the bankruptcy of the party against whom it is entered, with major repercussions for that party's creditors. It is not suggested that this should form the basis for the invocation of public policy limits on arbitrability. The dearth of case law on this issue makes it very difficult to predict the circumstances in which the exception will or should be invoked. On the authorities as they currently stand, the only advice which may be given is that one must follow one's instincts as to which effects on third parties are fair and which are not, bearing in mind that the public policy exception to arbitrability will rarely be invoked.

2.4 *Enforcement of arbitral awards*

⁹ (1998) 159 ALR 142.

¹⁰ (1995) 120 FLR 171.

¹¹ *Commonwealth v Cockatoo Dockyard*, above n 10, at 183.

Australia is a signatory to the New York Convention. Section 8 of the *IAA* is based on Article V of the New York Convention and provides that a foreign award may be enforced in the courts of a State or Territory as if the award had been made in that State or Territory in accordance with the laws of that State or Territory. However, article 8 of the *IAA* only extends to awards made in a Convention Country outside Australia. Where the New York Convention does not apply, enforcement may be possible under article 35 of the Model Law.

It should be noted that section 20 of the *IAA* expressly excludes the possibility of both Part II of the Act and the Chapter VIII of the Model Law (Recognition and Enforcement - including article 35) applying to an award. Where the parties are both Convention countries (attracting the operation of section 8 of the *IAA*) and the Model Law also applies to the agreement (including, normally, article 35), section 20 of the *IAA* states that Part II of that Act shall prevail.

Where enforcement of awards is covered neither by the New York Convention (ie, foreign awards) nor the Model Law (eg, domestic awards), section 33 of the *CAAs* will apply. Section 33 operates similarly to section 8 of the *IAA*.

Australian courts have an excellent record for enforcing foreign arbitral awards. However, parties should be aware that interlocutory or procedural orders of the tribunal may not be characterised as an "award" for the purposes of enforcement. This comes down to the interpretation of the term "award" by Australian courts in relation to arbitral proceedings. There is not a great deal of authority on this point; however, what authority there is suggests that an "interim award" will only be enforceable as a "foreign award" under section 8 of the *IAA* (and consequently under the New York Convention) where it deals with a "difference" between the parties, that is, a "dispute". It appears that it will not be enforceable where the "interim award", so called, is merely "some interlocutory or procedural direction or order which does not resolve the disputes referred."¹² To this end, the test appears to be whether the award is "final and binding", that is, whether it finally determines the rights of the parties.

2.5 *Arbitral institutions - strong local and international representation*

International and local arbitral institutions facilitate international commercial arbitration practice in Australia. The following international institutions are represented in Australia:

- the London Court of International Arbitration (LCIA) has an Australian Chapter as part of its Asian-Pacific Users Council;

- the International Chamber of Commerce (ICC) has offices in Sydney and Melbourne; and
- the Chartered Institute of Arbitrators has an Australian Chapter.

On a national level there is the Australian Centre for International Commercial Arbitration (ACICA) and the Australian Commercial Disputes Centre (ACDC), which focuses on domestic arbitration.

The ACICA provides a range of arbitration-related services and is active in the promotion of international arbitration and the dissemination of related information. The objectives of ACICA are to support and facilitate international arbitration. ACICA maintains a panel of international arbitrators and a list of experienced arbitration practitioners. It supplies information on arbitration agreements, arbitration rules and law and can assist with hearing rooms, transcription and information technology services. In addition ACICA is involved with a range of educational activities including holding seminars and conferences to enhance knowledge and understanding of international arbitration. Members of ACICA's Board of Directors include nominees of leading organisations in Australia as well as arbitration experts from Australia and abroad. ACICA enjoys the support of Australia's leading law firms, who participate as corporate members, as well as support from the Commonwealth Government. ACICA operates in close co-operation with the ACDC, which provides ACICA with administrative support and provides administrative and other services in relation to domestic arbitration and ADR.

The work of the ACICA is significant in its promotion in the Asia-Pacific region of arbitration as a means of settling disputes of an international nature. Such is the expanding recognition of Australia as a nexus for international arbitration between the Asia-Pacific and Europe, due to familiarity with the principles of law of these regions, that recent developments have included the nationalisation of its arbitration bodies. In April 2003, the ACICA and ACDC signed a Memorandum of Understanding providing for cooperation between the two bodies in order to further facilitate promotion and education in international arbitration and mediation. The ACICA has now relocated its offices to Sydney, where the ACDC provides it with administrative personnel and facilities. The ACICA continues to work closely with the Institute of Arbitrators and Mediators Australia (IAMA) and the CIArb in the education of alternative dispute resolution professionals.

¹² *Resort Condominiums International Inc v Bolwell* [1995] 1 QDR 406 at 419, per Lee J.

3. The ACICA Arbitration Rules

In July 2005, ACICA released its own set of arbitration rules.¹³ These rules provide an advanced, efficient and flexible framework for the conduct of arbitrations. They are based on the UNCITRAL Arbitration Rules but have been updated and refined, and are heavily influenced by the new Swiss Rules of International Arbitration.¹⁴ They thus provide a simple and user-friendly system for the conduct of international arbitrations founded on well-tested arbitration rules that have worldwide currency and usage.

Notable features of the ACICA Rules include the following:

- **Appointment of Arbitrators.** Absent agreement between the parties ACICA will determine the number of arbitrators - either one or three depending on the circumstances of the dispute (Article 8). This flexibility can help minimise costs, particularly where the size and complexity of the dispute are not known when the arbitration agreement is drafted.
- **Multi-party Disputes.** Where there are multiple parties (either multiple claimants or multiple respondents) they must act jointly when appointing arbitrators (Article 11).
- **Interim Measures.** There are detailed provisions in Article 28 governing interim measures, which draw on recent UNCITRAL Working Group deliberations. They provide for, *inter alia*:
 - an expanded definition of "interim measures";
 - criteria which must be established before an interim measure can be ordered; and
 - provisions for the modification, suspension and termination of an interim measure.
- **Confidentiality.** In *Esso v Plowman*¹⁵ the High Court of Australia held that arbitration proceedings are private, but not confidential, unless the parties expressly agree otherwise. In response, Article 18 of the ACICA Rules makes any arbitration

¹³ Available at http://www.acica.org.au/arbitration_rules.html

¹⁴ Enacted by the Swiss Chambers of Commerce and Industry on 1 January 2004, and available at <http://www.swissarbitration.ch/rules.php>

¹⁵ *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

private and confidential. The parties, the arbitral tribunal and ACICA are all required to treat as confidential all matters relating to the arbitration (including the existence of the arbitration), the Award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain. There are exceptions for:

- applications made to competent courts, including for enforcement;
 - disclosure of information/documents pursuant to the order of a court of competent jurisdiction;
 - obligations under any mandatory laws considered applicable by the arbitral tribunal; and
 - compliance with regulatory bodies (such as a stock exchange).
- **Evidence.** Procedural rules usually provide little guidance regarding the rules of evidence to be applied by the arbitral tribunal. Under Article 27.2 of the ACICA Rules, subject to contrary agreement of the parties, the tribunal must have regard to, but is not bound to apply, the International Bar Association's specialised *Rules on the Taking of Evidence in International Commercial Arbitration*.
 - **Preservation of Model Law.** A number of jurisdictions that have enacted the UNCITRAL Model Law allow parties to "opt-out" of the Model Law regime. In *Australian Granites v Eisenwerk*¹⁶ the Queensland Court of Appeal held that by agreeing to arbitration in accordance with the ICC Rules of Arbitration the parties intended to exclude the Model Law. This was subsequently followed in Singapore but has since been overturned by legislation in that State. Article 2.3 of the ACICA Rules clarifies the position by providing that the selection of procedural rules does not amount to opting-out of the Model Law.
 - **Arbitrators' Fees.** Under Article 40, the parties and arbitrators are encouraged to agree on an hourly rate for the arbitrators' remuneration; where they cannot, ACICA will determine an hourly rate taking into account the nature of the dispute and the amount in dispute (insofar as it is aware of them) and the standing and experience of the arbitrator.
 - **ACICA's Fees.** ACICA's fees, stipulated in Appendix A of the rules, compare favourably with those of national and international arbitration institutions.

3.1 *Role of ACICA under the ACICA Rules*

Under the ACICA Rules, there is a greater degree of administration by ACICA than that which exists under the UNCITRAL Model Law, but it is not as extensive as in, for example, the ICC Rules. ACICA is involved in administration of the arbitration in the following ways:

- ACICA can extend periods of time prior to the constitution of the arbitral tribunal (Article 3.4);
- ACICA receives the Notice of Arbitration and the Answer (Articles 4 and 5). If the Notice of Arbitration does not comply with the Rules it is not sent to the Respondent but instead ACICA may request the Claimant to remedy the defect (Article 4.5);
- ACICA is directed to make available facilities such as hearing rooms, secretarial assistance and interpretation facilities, and provide assistance at the request of the parties (Article 7);
- If the parties do not agree on the number of arbitrators then ACICA decides (Article 8);
- ACICA has a significant role in the appointment of arbitrators (Articles 8, 10 and 11);
- ACICA determines challenges to arbitrators (Article 14.4);
- ACICA has a role in determining the fees of arbitrators, as discussed above (Article 40.2); and
- ACICA maintains a Trust Account and arbitrators may take advantage of this facility and lodge the parties' deposits in the ACICA Trust Account (Article 42.5).

3.2 *The ACICA Model Arbitration Clause*

ACICA also has a model arbitration clause, for although parties can at any stage agree to arbitration over litigation, once a dispute has arisen, reaching an agreement on any issue can be difficult. Therefore when negotiating a contract careful consideration should be given to

¹⁶ *Australian Granites Ltd v Eissenwerk Hensel Bayreuth & Dipl-Ing Burkhardt GmbH* [2001] Qld Rep 461

inserting an arbitration clause. The following ACICA clause is suitable for all types of commercial contracts:

Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [**or choose another city**]. The language of the arbitration shall be English [**or choose another language**]. The number of arbitrators shall be one [**or three, or delete this sentence and rely on article 8 of the ACICA Arbitration Rules**].¹⁷

Commercial disputes often lead to complex and costly dispute resolution. It is in the interests of parties to such disputes to adopt an efficient, flexible and fair method for their resolution. The ACICA Arbitration Rules aim to provide such a framework. They are based on the UNCITRAL Arbitration Rules and have been designed with simplicity, flexibility and enforceability in mind. They are suitable for domestic or international disputes and can be incorporated into contracts easily using the ACICA arbitration clause.

4. **Investor-state arbitration**

This section of the paper concerns a whole new area of so-called "international arbitration", although it is not really arbitration in the pure sense because it lacks the fundamental element, common to both domestic and international arbitrations, of agreement between two parties to submit their disputes to a binding mechanism of dispute resolution. Rather, investor-state arbitration arises from the pursuit of claims by individuals against states in the context of bilateral investment treaties (BITs) and free trade agreements (FTAs). The capacity to use these agreements, and the potential impact of such use on the practice of international arbitration and the enforcement of rights is potentially huge, as the increase in such arbitrations in Europe and North America is already beginning to indicate. This has relevance for Australia, not only as a party to BITs but as a potential venue for such arbitration.

Investor-state arbitration permits investors who feel that they have been poorly treated by states, or by state emanations, to take these up these issues by means of a mechanism which uses the **procedures** of international arbitration, such as arbitration rules or international bodies created specifically to deal with such disputes. The best known of these is the International Centre for the Settlement of Investment Disputes (ICSID), of which ACICA is

¹⁷ Article 8 provides for ACICA to determine the number of arbitrators, taking into account all relevant circumstances.

the local representative in Australia, providing local support and services for the resolution of ICSID disputes.

The advantages of direct investor-state arbitration, in contrast with litigation and state-to-state dispute resolution, include:

- avoiding politicisation of the dispute;
- the investor has control over the manner of pursuing the claim;
- overcoming the problem of states' unwillingness to submit to the courts of other states; and
- overcoming foreign investors' reluctance to settle disputes in the state's own courts.

However, recent developments have demonstrated the importance of the status of the states involved in dispute resolution procedures in investment agreements. Free trade agreements between developed nations have highlighted that the primacy of investor-state arbitration as a method of dispute resolution has been based on the fact that the investment situation was not reciprocal. The practical context of BITs was often investment flowing from a developed nation into a developing one. This meant that the only claims that were made were against the **developing** state. Therefore, when the North American Free Trade Agreement (NAFTA) was concluded between the United States, Canada and Mexico, and included a dispute resolution mechanism modelled on its BITs which allowed investors to bring claims directly against a state party, Canada and the United States were for the first time permitting investors to make claims against them.¹⁸

The negative experience of this aspect of NAFTA, and the claims it produced, is one reason for the different dispute resolution process used in the Australia-United States Free Trade Agreement (AUSFTA).¹⁹ In contrast to modern trends, AUSFTA does not allow direct investor-state claims, only state-to-state settlements. In this and other free trade agreements the United States has concluded, the choice of whether to allow direct investor-state arbitration has been determined by the level of investment of the developing country in the developed one, and thus the risk of claims against it.²⁰ Moreover, NAFTA and AUSFTA prohibit domestic courts from hearing claims under the agreement itself, representing a return to diplomatic protection as a means of resolving disputes, at least for developed countries with

¹⁸ WS Dodge, "Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement" (2006) 39 *Vanderbilt Journal of Transnational Law* 1, at 16.

¹⁹ [2005] ATS 1; WS Dodge, above n 18, at 22.

²⁰ WS Dodge, above n 18, at 23-24.

For example, Australia's BITs with both Romania²⁸ and Lithuania²⁹ provide that either party may either commence litigation, submit the dispute to ICSID for conciliation or arbitration (if both contracting parties are party to the ICSID Convention), or refer the dispute to an arbitral tribunal constituted in accordance with Annex B of the treaty, or by arrangement to any other arbitral authority. If the dispute is referred to ICSID and the parties cannot agree upon whether conciliation or arbitration is the more appropriate procedure, the investor may choose between the two. If the arbitral tribunal is constituted in accordance with Annex B, the rules of procedure will be the ICSID Rules, subject to the provisions of any agreement between the parties to the dispute. The provisions of the Australia-Czech Republic BIT are identical,³⁰ except that an arbitral tribunal constituted under Annex B shall use the UNCITRAL Rules, subject to the provisions of any agreement between the parties to the dispute.

In contrast, under Australia's BITs with Hungary³¹ and Poland,³² if the dispute does not arise out of expropriation or nationalisation, local remedies must be exhausted before it can be submitted to arbitration. If the dispute does arise out of expropriation or nationalisation, it is not necessary to exhaust local remedies first. Either way, the dispute may be referred to ICSID (if both contracting parties are party to the ICSID Convention), or to an arbitral tribunal constituted in accordance with Annex B. If the dispute goes to ICSID, the investor has the right to choose between conciliation and arbitration in the event of disagreement. An arbitral tribunal constituted under Annex B uses the ICSID Rules, subject to the provisions of any agreement between the parties to the dispute.

Under Article 13 of the Australia-Turkey BIT (not yet in force),³³ if the dispute cannot be resolved through consultation and negotiation within 6 months, the investor may elect to do one of the following:

²⁸ *Agreement between the Government of Australia and the Government of Romania on the Reciprocal Promotion and Protection of Investments*, opened for signature 21 Jun 1993, [1994] ATS 10 (entered into force 22 April 1994), article 9.

²⁹ *Agreement between the Government of Australia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments*, opened for signature 24 November 1998 [2002] ATS 7 (entered into force 10 May 2002), article 13.

³⁰ *Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments*, opened for signature 30 September 1993, [1994] ATS 18 (entered into force 29 June 1994), article 11.

³¹ *Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments*, opened for signature 15 August 1991, [1992] ATS 19 (entered into force 10 May 1992), article 12.

³² *Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments*, opened for signature 7 May 1991, [1992] ATS 10 (entered into force 27 March 1992), article 13.

³³ *Agreement between Australia and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments*, opened for signature 16 Jun 2005, [2003] ATNIF 9 (not yet in force).

- refer the dispute to ICSID for conciliation or arbitration (if both contracting parties are party to the ICSID Convention);
- refer the dispute to an ad hoc tribunal in accordance with the UNCITRAL Rules, subject to 7 provisions set out in the BIT; or
- by agreement, refer the dispute to any other party.

Electing arbitration in one of these ways waives any right to commence or continue litigation.

Other BITs that Australia has concluded have different provisions. For example, article 10 of the Australia-Hong Kong BIT of 1993³⁴ binds parties to arbitration under the UNCITRAL Rules in the event of a failure to agree, but does not specifically provide for the submission of disputes to ICSID. Interestingly, the Australia-India treaty of 2000 provides first that parties unable to settle an investment dispute amicably may agree to submit the dispute to international **conciliation** under the UNCITRAL Conciliation Rules. Where the parties do not so agree, or where conciliation is unsuccessful, the parties may then refer the dispute to arbitration. Article 12 sets out the arbitral procedure, providing that where both parties are also parties to the ICSID Convention they may agree to refer the dispute to ICSID under the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings. Alternatively, they may agree to submit the dispute to *ad hoc* arbitration under the UNCITRAL Rules, subject to the provisions set out in Article 12(3)(c).

The FTAs to which Australia is a party contain similar variations. For instance, the Singapore-Australia FTA of 2003³⁵ (SAFTA) allows either party to submit investment disputes to ICSID for conciliation or arbitration, or to arbitration under the UNCITRAL Arbitration Rules. The Australia-Thailand FTA of 2005, on the other hand, provides for the resolution of investment disputes by an *ad hoc* arbitral tribunal under the UNCITRAL Rules, but not under the ICSID Convention.

5. Conclusion

Commercial arbitration as a means of resolving international disputes continues to be a preferred option for many parties, both in the context of contractual agreements generally, and in the specific context of investment disputes arising between an investor and the host state. Although the omission of an arbitration clause in the 2005 Australia-United States Free Trade

³⁴ *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, opened for signature 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

³⁵ *Singapore-Australia Free Trade Agreement*, opened for signature 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003).

Agreement indicates that investor-state arbitration may not be the preferred method of dispute resolution for agreements between developed nations with high levels of reciprocal investment, it is apparent that the use of BITs and FTAs as a gateway to the arbitration of investor-state disputes with developing nations has the potential to have a huge impact on international arbitration (at least with respect to agreements with developing nations) and this on foreign investment more broadly.

In this context, Australia has an important role, and not only as a party to BITs and FTAs. As a location for international commercial arbitration it has many advantages, including a supportive court system and legislation, as well as a stable political and economic environment. Now, it also has the ACICA Rules, which have the benefits of being based on the well-tested and international UNCITRAL Rules, combined with greater flexibility and administrative support. Given Australia's strategic position in Asia and its familiarity with both Europe and Asia, Australia is a wise choice of venue for international commercial arbitration.

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Appendix

BITs and FTAs to which Australia is currently a party³⁶

Bilateral investment treaties in force

Agreement with Romania on the Reciprocal Promotion and Protection of Investments [1994] ATS 10

Agreement with the Arab Republic of Egypt on the Promotion and Protection of Investments [2002] ATS 19

Agreement between Australia and Uruguay on the Promotion and Protection of Investments [2003] ATS 10

Agreement with the Republic of Chile on the Reciprocal Promotion and Protection of Investments [1999] ATS 37

Agreement with the Republic of the Philippines on the Promotion and Protection of Investments [1995] ATS 28

Agreement with Hong Kong concerning the Promotion and Protection of Investments [1993] ATS 30

³⁶ Available at <http://www.info.dfat.gov.au/Info/Treaties/Treaties.nsf/HomeForm?OpenForm>.

Agreement with the Czech Republic on the Reciprocal Promotion and Protection of Investments [1994]
ATS 18

Agreement with the Republic of Indonesia concerning the Promotion and Protection of Investments
[1993] ATS 19

Agreement with the Republic of India on the Promotion and Protection of Investments [2000] ATS 14

Agreement with the Lao People's Democratic Republic on Reciprocal Promotion and Protection of
Investments [1995] ATS 9

Agreement with the Republic of Peru on the Promotion and Protection of Investments [1997] ATS 8

Agreement with the Argentine Republic on the Promotion and Protection of Investments [1997] ATS 4

Agreement with the Independent State of Papua and New Guinea for the Promotion and Protection of
Investments [1991] ATS 38

Agreement with the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of
Investments [1991] ATS 36

Agreement with Republic of Poland on the Reciprocal Promotion and Protection of Investments [1992]
ATS 10

Agreement with the Republic of Hungary on the Reciprocal Promotion and Protection of Investments
[1992] ATS 19

Agreement with the People's Republic of China on the Reciprocal Encouragement and Protection of
Investments [1988] ATS 14

Agreement with the Islamic Republic of Pakistan on the Promotion and Protection of Investments [1998]
ATS 23

Agreement with the Republic of Lithuania on the Promotion and Protection of Investments [2002] ATS 7

Trade and Investment Agreement with the Government of the United Mexican States [1997] ATS 15

Bilateral investment treaties not yet in force

Agreement with the Government of the Republic of Turkey on the Reciprocal Promotion and Protection
of Investments

Agreement with the Government of the United Mexican States on the Promotion and Reciprocal
Protection of Investments

Agreement with the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments

Free trade agreements

Australia-US Free Trade Agreement [2005] ATS 1 (NB: no direct investor-state arbitration)

Australia New Zealand Closer Economic Relations - Trade Agreement [1983] ATS 2 (NB: no direct investor-state arbitration)

Australia-Thailand Free Trade Agreement [2005] ATS 2

Singapore-Australia Free Trade Agreement [2003] ATS 16

Multilateral treaties

The Energy Charter Treaty

Convention establishing the Multilateral Investment Guarantee Agency [MIGA] [1998] ATS 24

Convention of Settlement of Investment Disputes between States and Nationals of Other countries [ICSID under the auspices of the IBRD] [1991] ATS 23