Article for the 'IAMA Pulse' (February 2013)

Australia's New Commercial Arbitration Acts: Useful But Under-Utilised?

By Professor Doug Jones

Professor Doug Jones joined IAMA in 1976, shortly after the Institute was founded in 1975. As one of our Foundation Fellows, we greatly appreciate his ongoing support of our mission and values.

Some of Professor Jones's involvements with IAMA include facilitating our Continuing Professional Development ('CPD') programmes, writing for various IAMA publications such as our journal, Arbitrators and Mediators and our newsletter, the 'IAMA Pulse'.

With the Queensland Government's recent introduction of the Commercial Arbitration Bill 2012 (Qld) into Parliament in October last year, Australia is now one step closer to a uniform nationwide domestic arbitration legislative regime. However, the Australian Capital Territory, which is yet to replace its Commercial Arbitration Act 1986 (which is part of the nearly completely superseded Uniform Acts), must also introduce the Bill before the Australian arbitration community can begin to breathe a collective sigh of relief.

Given the many and varied advantages of the Commercial Arbitration Acts (CAAs), their uptake by all Australian states is in the interests of both arbitration practitioners and users of arbitration alike. Of these advantages, five key points are of particular importance to the arbitration community and worthy of specific mention:

1. Recognition of the arbitration agreement - protecting the arbitral process

Prior to the existence of the CAAs, the Uniform Acts conferred a discretionary power on courts to stay curial proceedings where a claim had been made simultaneously in litigation and arbitration. Under s8 of the CAAs, however, provided there is a legally enforceable arbitration agreement and the subject matter of the dispute is capable of settlement by arbitration, courts must grant a stay of curial proceedings and allow arbitration to commence or continue upon a party's request to do so.

2. Mandatory confidentiality

Before enactment of the CAAs, the High Court of Australia held in *Esso Australia Resources v Plowman*[1] that confidentiality of arbitral proceedings was only an obligation if it was specifically agreed to by parties in their arbitration agreement. The CAAs now enforce confidentiality obligations that are presumed to apply unless the parties explicitly *opt out*.

3. Increased tribunal power to protect arbitrations

Section 1C of the CAAs, which addresses the Acts' paramount object, requires the Acts to be interpreted, and the functions of an arbitral tribunal to be exercised, to allow (as far as practicable) the fair and final resolution of commercial disputes without unnecessary delay or expense. Practically, this means that tribunals now have the power to override parties' procedural choices if they would lead to "unnecessary delay or expense". By s4A of the CAAs, tribunals may also issue interim measures to protect the proceedings and ensure that the arbitral process remains efficient and effective.

[1] *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

4. Limited judicial review

While the Uniform Acts permitted judicial review of awards on the ground that there occurred either a manifest error of law, or procedural unfairness to one or more parties resulting from arbitrator misconduct, the CAAs have narrowed the path to judicial review by requiring parties to agree that the award may be appealed on these grounds. In this way, it is seen that judicial review is generally limited to ensuring the structural integrity of proceedings.

The agreement to appeal must be made explicitly and should be included as a term in the arbitration agreement. While at first instance this might seem to operate to restrict parties' abilities to pursue their interests, this change provides greater autonomy for parties in deciding how they would prefer to resolve their disputes.

5. Easy and efficient enforcement of awards

The CAAs take a very strong pro-enforcement stance and provide very limited grounds for the non-enforcement of an award. By s34 of the CAAs, the only circumstances under which an award is not to be enforced are:

- where a party was under some incapacity, or the relevant arbitration agreement is otherwise invalid;
- where the party making the application for non-enforcement was not given proper notice of the arbitral process or unable to present its case;
- where the award deals with a dispute or matters beyond the scope of the arbitration agreement; and
- where the tribunal composition was against the Act or contrary to party agreement.

Finally, where a party can show that an award has been issued properly, the courts must enforce it unless it is contrary to public policy.

The CAAs ensure an efficient and effective means of dispute resolution through the above enhancements to the Australian domestic arbitration process, thus building commercial parties' trust in arbitration and, in turn, encouraging them to incorporate arbitration agreements into their dispute resolution clauses.

Considering the revolutionary changes brought about by the CAAs, one might have thought that arbitration would have exploded onto the business scene as the most utilised form of commercial dispute resolution. However, despite these benefits, we have not yet observed a significant increase in the number of Australian domestic arbitrations commenced. Only a handful of institutional arbitrations were administered in Australia up to 2009, and while this figure has not increased substantially in recent times, industry figures suggest that institutional arbitrations around the world have increased by between 50-100% over the past decade. One proposed reason for this has been the time lag between when parties agree to submit their disputes to arbitration and a dispute between them actually materialising.

It is true that commercial parties are now more aware of the 'fruits' of arbitration than they ever were, however it is the responsibility of dispute resolution centres and associations, practitioners and satisfied users of arbitration to educate potential clients and future practitioners on the mechanics of the CAAs and of the arbitral process and thus to ensure the sustained use of arbitration amongst Australia's commercial world. To this end, Australia's arbitration community should make a concerted effort to market effectively the key advantages of arbitration and possibly provide various model arbitration agreement clauses for insertion into a wide range of industry contracts.

With a strongly supportive judicial environment and an (almost) unified national domestic arbitration framework, Australia is now well placed to handle the high volume of arbitration it might expect to attract in the near future.

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