Enhancing arbitration

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Disputes arising from commercial bargains are unavoidable and part of the activity of commerce itself. The existence of such disputes and the means by which they are resolved can also amount to a hidden cost of the underlying transaction. This is especially so of shipping and international trade, where the carriage of goods by sea can be risky, and the arrangements underpinning such carriage and the employment of ships for that purpose can be complex, involving multiple countries and legal systems.

With a view to minimising, if not avoiding, these risks, uncertainties and their associated costs, commercial parties often deal with the possibility of the occurrence of disputes between them and the means by which such disputes are to be resolved in advance and in the terms of the agreement between them. In the context of international commerce and more particularly shipping, this is usually done by the parties choosing arbitration as their agreed method of dispute resolution.

The past few years have seen a reinvigoration of commercial arbitration in Australia and a strong push for its promotion as a means of commercial dispute resolution, especially in international trade and commerce. This includes by governments at both the State and Federal levels and in the context of both domestic and international arbitrations conducted in Australia, as well as the enforcement in Australia of arbitral awards made overseas.

The most recent development in this regard is the *Civil Law and Justice Legislation Amendment Act* 2018 (Cth) ***(the Act)***, an omnibus Act that amends various Commonwealth Acts relating to law and justice, for the purpose of improving their operation and clarity. Amongst the Acts so amended is the *International Arbitration Act* 1974 (Cth) ***(the IAA)*** which regulates both international arbitrations conducted in Australia, as well as the enforcement in Australia of awards produced by international commercial arbitrations conducted overseas. The former Commonwealth Attorney General, Senator Brandis, stated that the amendments to the IAA introduced by the Act reflect *"the Government's commitment to maintain its place in the international legal environment by amending the International Arbitration Act to help ensure that Australian arbitral law and practice stay on the global cutting edge, so that Australia continues to gain ground as a competitive arbitration friendly jurisdiction"*.

The Act introduces four key amendments to the IAA, of which three are likely to have some application to arbitrations in a shipping context. The first is to specify the meaning of the expression *"competent court"* where it is used in the UNCITRAL Model Law on International Commercial Arbitration ***(Model Law)***. Pursuant to the provisions of the IAA, the Model Law has force of law in Australia and governs both international commercial arbitrations conducted in Australia, as well as the enforcement of some overseas awards. Although the Model Law provides for certain supervisory powers to be conducted by *"the*

competent court", neither the Model Law nor the IAA specified which courts within Australia fell within that description. In the past, this lack of definition has allowed challenges to the jurisdiction and powers of courts which have been asked to exercise these supervisory powers. This amendment which expressly identifies the courts falling within this description eliminates the potential for such satellite disputes and litigation associated with the arbitral process, and the additional costs that this imposed on the parties. It also expressly includes amongst the courts within this description the Federal Court of Australia, which has adopted a pro-arbitration attitude in recognition of the public interest in international commercial arbitration and its promotion.

Secondly, the amendments clarify the procedural requirements for enforcement of an arbitral award under Part II of the IAA, which implements Australia's adoption of the Convention for the Recognition and Enforcement of Arbitral Awards 1958 (***the New York Convention***). That Convention and its widespread adoption throughout the world has been described as one of the single most important pillars on which the edifice of international arbitration rests. This is because of the Convention's facilitation of the enforcement, in the more than one hundred countries that are a party to it, of an award that is the product of the parties' agreement to refer their disputes to arbitration, especially via its adoption of a pro-enforcement bias or policy for the recognition and enforcement of arbitral awards. It is both the New York Convention's ready enforcement of awards throughout the world and its pro-enforcement bias that has provided arbitration with one of its greatest advantages over domestic court proceedings as a means of dispute resolution, especially in connection with international transactions and trade.

In particular, the Act amends s.8 of the IAA to clarify that a foreign award is binding between the *"parties to the award"*, rather than to the parties to the agreement pursuant to which the award was made (as s.8 originally stated). This amendment brings both the language of s.8 and scheme for the enforcement of foreign arbitral awards in Part II of the IAA in line with the terms of both the New York Convention (which s.8 was enacted to give effect to) and equivalent legislative provisions in other leading international arbitration jurisdictions. Importantly, this amendment also eliminates an area of potential challenge to the enforcement of a foreign award in Australia, namely by insisting as a pre-condition to the enforcement of an award that the party enforcing that award first prove that the party bound to pay the award was a party to the arbitration agreement under which the award was made. This may be especially relevant where the award sought to be enforced results from a multi-party, multi-contract or consolidated arbitration. Following this amendment, a party wishing to enforce an award need only produce to the Court the award itself and the underlying arbitration agreement. As such, this amendment improves the efficiency of recognition and enforcement proceedings and brings the enforcement of an arbitral award under Part II of the IAA in line with the New York Convention and international practice.

Thirdly, the amendments introduced by the Act modernise the provisions of the IAA governing the arbitrators' powers to award costs in international commercial arbitrations. This is by removing the existing reference in s.27 of the IAA to taxation of the costs of an international arbitration and by providing that in settling the amount of costs to be paid in relation to an award, an arbitral tribunal is not required to use any scale or other rules used by a court for the purposes of making orders for costs. As the Explanatory Memorandum states, references to taxing costs on a party/party or solicitor/client basis are outmoded and inflexible, in contrast to current practice in international arbitration. This amendment is intended to align Australian practice with international standards and provide Australian arbitral tribunals with more flexibility in making costs awards, in particular by leaving it to the tribunal to settle an appropriate approach to awarding costs.

Whilst these amendments to the IAA are not in themselves extensive, they are nevertheless significant. They also build upon the previously extensive pro-arbitration amendments made to the IAA in 2010, and thereby enhance one of the many advantages that arbitration in Australia offers international parties seeking to resolve their disputes, namely a modern and transparent legislative framework based on the IAA and Model Law.

Those advantages also include an independent and supportive judiciary, expert arbitrators, a sophisticated legal profession and strong institutional and administrative support through organisations such as AMTAC, ACICA and a network of dispute centres that provide world class hearing and logistical support for arbitration proceedings. Of these, AMTAC is an innovative provider of maritime and transport dispute resolution services, catering to the specific needs of the maritime and transport industry in the Asia Pacific region. It maintains a panel of Australian and overseas-based arbitrators with specialist expertise in maritime and transport disputes. It also provides Rules that the parties a dispute can adopt (whether as part of their arbitration agreement or on an ad hoc basis) which not only supplement the provisions of the IAA and Model Law but do so in a way that provides an effective, efficient, economical and fair arbitral process. This is particularly so of AMTAC's Rocket Docket procedure, which is suitable for less complex and lower value claims and which can yield an award upon a documents only determination within a guaranteed short period and for a reasonable cost.

The above advantages and these most recent legislative enhancements offer participants in the shipping industry a means by which the hidden costs and potential uncertainties associated with disputes and their impact on their business can be efficiently managed and reduced. Moreover, by supporting arbitration in Australia, those participants can also further enhance the arbitral process and the benefits that it can offer to their industry in the long term.