International Commercial Arbitration in Asia-Pacific: A Comparison of the Australian and Singapore Systems

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1. Introduction

The benefits of international arbitration for resolving an ever-increasing number of cross-border disputes are significant. Over the past decade there has been an increasing number of significant cross-border transactions and investments carried out across Asia-Pacific. Some of these transactions have inevitably given rise to cross-border disputes, which involve multinational organisations from across the globe. Parties to these transactions favour international arbitration as the dispute resolution mechanism, principally because of the ease of cross-border enforcement. The parties to such agreements also require confidence that disputes can be resolved in an open, neutral and cost-effective forum.

In the 2010 International Arbitration Survey, carried out by the Queen Mary University of London School of Arbitration, it was confirmed that the choice of arbitral seat is mostly influenced by the "formal legal infrastructure", the law governing the contract and the convenience of the seat to the parties. The survey also confirmed that the parties expect arbitral institutions to have a strong reputation and widespread recognition.

This paper considers the developments of international arbitration in Australia and Singapore, and compares the two forums across a number of criteria.

2. Economy and Growth of International Arbitration

The past decade has seen a great increase in the number of international arbitrations with Singapore as the seat of arbitration. In Australia, however, the increase has not been so significant. Geographical location is one of the main reasons often considered relevant to the lack of any significant growth in international arbitration in Australia. We suggest, however, that other factors may also have influenced a party's choice of forum for international arbitration in Asia-Pacific.

Singapore is located in the heart of Asia and remains a hub for world trade and international commerce. Singapore's leading industries now include petrochemicals, manufacturing and biomedical services, tourism, rubber processing and financial services. In 2009 Singapore's GDP was US $182,232,000,000,[1] and in July 2010 the Singapore Ministry of Trade and Industry confirmed that it expected the economy to grow by a further 13 to 15 per cent in 2010.[2] Australia is also a leading economy and was one of the only major world economies to escape recession during the recent economic downturn. Over the past decade the Australian economy, with leading industries in tourism, natural resources

[1] Figures taken from World Bank: *http://data.worldbank.org/country*. [Accessed December 2, 2010.]
[2] Singapore Ministry of Trade and Industry Press Release dated July 14, 2010.

and financial services, grew to a substantial GDP of US $924,843,000,000 in 2009.[3] In 2009 Singapore was ranked third and Australia eighth in the Transparency International Corruption Perceptions Index.[4]

In addition to its geographical location, Singapore government initiatives, such as the liberalisation of legal services, allowing foreign firms in Singapore to conduct international arbitration; highly advantageous tax incentives; and from 2008 an exemption from the need to obtain a work visa for those conducting arbitration activities; have all helped Singapore to become a leading international arbitration centre in Asia. The restrictions on foreign lawyers representing parties in arbitration in Singapore where Singapore is the governing substantive law were removed in 2004, following an amendment to the Legal Profession Act.[5] Before the 2004 amendment, foreign lawyers were entitled to represent parties in arbitration in Singapore only where Singapore was not the governing substantive law. Over the past few years, legislative changes in Singapore have enabled foreign law firms to practise in Singapore. As at October 1, 2010 a total of 101 foreign law firms practise in Singapore,[6] and nine out of ten of the world's top law firms now have offices in Singapore.[7] Many of these firms have established international arbitration practices. From May 2002, income derived by an individual who is not a resident of Singapore and acts as an arbitrator in an arbitration held in Singapore is exempt from tax.[8]

Over the last few years there has also been a push by the Australian government to promote Australia as a key centre for international arbitration in Asia-Pacific, including allowing foreign lawyers to represent parties to an international arbitration conducted in Australia. The Australian government also hopes that recent changes to the legislation governing international arbitration will assist in promoting Australia as a venue for international arbitration.

3. Arbitration Institutions

The Australian International Disputes Centre (AIDC),[9] Australia's first international dispute resolution centre, was established in Sydney in 2010 and now houses Australia's premier international dispute resolution institutions and organisations including the Australian Centre for International Commercial Arbitration (ACICA),[10] the Chartered Institute of Arbitrators[11] and the Australia Commercial Disputes Centre.[12] The number of international arbitrations conducted in Australia is expected to increase with the establishment of the AIDC. In May 2010 the Permanent Court of Arbitration in The Hague (PCA)[13] and the ACICA agreed to establish a formal cooperation agreement, which has allowed Australia, like Singapore, to become a host country for PCA-administered arbitrations.

In 2007 the PCA set up the court's first Asian centre in Singapore. In 2009 Singapore's Maxwell Chambers[14] was established as a dedicated world-class dispute resolution complex. As well as housing prominent arbitration counsel, it also houses the Singapore International Arbitration Centre (SIAC),[15] the American Arbitration Association,[16] the PCA, the International Chamber of Commerce (ICC)[17] and the International Centre for the Settlement

[3] Figures taken from World Bank: *http://data.worldbank.org/country*. [Accessed December 2, 2010.]
[4] *http://www.transparency.org*. [Accessed December 2, 2010.]
[5] Legal Profession Act s.35.
[6] Of the 101 law firms, 89 are foreign law firms, 6 are Joint Law Ventures and 6 are Qualifying Law Practices.
[7] *www.agc.gov.sg/lps/docs/Foreign_Law_Practices_Oct_2010.pdf* [accessed November 3, 2010].
[8] Income Tax Act (Cap.134) s.13(1)(r).
[9] *http://www.disputescentre.com.au*. [Accessed December 2, 2010.]
[10] *http://www.acica.org.au*. [Accessed December 2, 2010.]
[11] *http://www.ciarb.org*. [Accessed December 2, 2010.]
[12] *http://www.acdcltd.com.au*. [Accessed December 2, 2010.]
[13] *http://www.pca-cpa.org*. [Accessed December 2, 2010.]
[14] *http://www.maxwell-chambers.com*. [Accessed December 2, 2010.]
[15] *http://www.siac.org.sg*. [Accessed December 2, 2010.]
[16] *http://www.adr.org*. [Accessed December 2, 2010.]
[17] *http://www.iccwbo.org*. [Accessed December 2, 2010.]

of Investment Disputes (ICSID).[18] Maxwell Chambers is now also home to the only World Intellectual Property Organisation (WIPO)[19] centre in Asia. The SIAC, which independently oversees and assists in the administration of international arbitrations in Singapore, is now one of Asia's most eminent arbitration institutions, providing a neutral and highly reliable service with a panel of 280 arbitrators from over 30 countries. In addition to the SIAC, the Singapore Institute of Arbitrators (SIArb),[20] which is also wholly independent, undertakes training and accreditation of arbitrators. There are now also over 4,000 international shipping companies in Singapore, and in 2004 the Singapore Chamber of Maritime Arbitration (SCMA)[21] was launched to administer maritime disputes in Singapore.

The ACICA, the most prominent arbitration institution in Australia, administers international arbitrations conducted under the ACICA Arbitration Rules 2005, based on the Swiss Rules of International Arbitration[22] and the LCIA Rules.[23] The ACICA Rules[24] specifically provide that by selecting them parties do not intend to exclude the operation of the Model Law, as in effect do parties selecting the SIAC Rules. Whereas the SIAC is an independent organisation, Australian law firms pay a membership fee to the ACICA, which in turn allows them the right to nominate a board member of the ACICA, giving them some degree of management control.

As in Australia, in Singapore arbitrators require no specific qualifications, with the result that a broad range of individuals from various disciplines are attracted to the profession. One advantage of Australian arbitrators and arbitration practitioners is that, whilst they are highly skilled, their fees are generally lower than those in other jurisdictions.

The SIAC Rules are based largely on the UNCITRAL Arbitration Rules and the LCIA Rules. The new SIAC-administered arbitration rules, effective from July 1, 2010, were released following a detailed consultation with arbitration practitioners and other stakeholders. They include an expedited procedure similar to that under the ACICA Rules in 2008. The parties to arbitration in Singapore governed by the SIAC Rules can apply to have their case resolved under the expedited procedure where the dispute does not exceed S $5 million. As with the ACICA procedure, the time limits for the arbitration can be shortened (under the SIAC procedure the award must be made within six months of the tribunal being constituted, whereas under the ACICA procedure it must be made within four months, or five months where there is a counterclaim). It is hoped that the new SIAC procedure will increase both the speed and efficiency of lower-value arbitrations in Singapore in a similar manner to the ACICA procedure.

A further amendment to the SIAC Rules, which some may view as less favourable to the promotion of international arbitration, is the removal of r.32, which provided that, where the seat of arbitration was Singapore, the law of the arbitration under the SIAC Rules was the Singapore International Arbitration Act (Singapore IAA).[25] The removal of r.32 potentially means that, whilst the parties adopt the SIAC Rules, many of the previous SIAC arbitrations, which automatically fell under the Singapore IAA by virtue of r.32, will now fall under the Singapore domestic Arbitration Act, which allows for greater intervention by the courts. The SIAC has, however, included r.28.9, which provides that the parties submitting to arbitration under the SIAC Rules irrevocably waive their rights to any form of appeal, review or recourse to any state court or other judicial authority. Therefore parties to arbitrations under the SIAC Rules will still not be able to appeal awards on a question of law, which is otherwise available under the domestic Arbitration Act.

[18] *http://icsid.worldbank.org*. [Accessed December 2, 2010.]
[19] *http://www.wipo.int*. [Accessed December 2, 2010.]
[20] *http://www.siarb.org.sg*. [Accessed December 2, 2010.]
[21] *http://www.scma.org.sg*. [Accessed December 2, 2010.]
[22] *https://www.sccam.org*. [Accessed December 2, 2010.]
[23] *http://www.lcia.org*. [Accessed December 2, 2010.]
[24] ACICA Arbitration Rules art.2.3.
[25] *http://statutes.agc.gov.sg*. [Accessed December 2, 2010.]

As at December 31, 2009 the total number of new cases handled by the SIAC had increased by 60 per cent on 2008 cases to 160, of which 132 were administered by the SIAC, representing an increase of 64 per cent on the 2008 SIAC-administered arbitrations.[26] Of the 160 cases, 86 per cent were international, involving parties from 41 countries. In 2010, the SIAC had, at the time of writing (October 2010), already handled 130 cases, including new claims worth S $1.13 billion. Anecdotal evidence suggests that in addition to the cases conducted under the SIAC Rules there is a similar number of cases where the seat of arbitration is Singapore but the arbitration is ad hoc, often under the UNCITRAL Rules, or conducted by other arbitral institutions, such as the ICC.

The ACICA conducted fewer than 20 arbitrations in 2009, but it should be mentioned that it only published its institutional rules in 2005, and that the SIAC also took some time to build institutional momentum. Based on the SIAC's 2009 figures set out above, however, the ACICA has a considerable promotional task ahead of it to achieve comparable figures.

4. Legislation and Courts

Both former British colonies, Australia and Singapore are stable democracies with well-established common law jurisdictions with an existing doctrine of judicial precedent, where statutes are interpreted by reference to both local case law and that of other common law jurisdictions. Both Australia and Singapore are viewed as offering a neutral seat for international arbitration. The judiciaries of both Australia and Singapore are highly skilled, and the courts are seen as open, efficient and dependable.

Over the years the courts in both Australia and Singapore have clearly shown their support for the arbitral process. In accordance with the Model Law[27] the courts in both Australia and Singapore will automatically stay proceedings in the face of a valid international arbitration agreement, unless the court finds the agreement is void, or the dispute is not one capable of settlement by arbitration. The overall amount of interference with the international arbitral process by the courts in Australia and Singapore has, however, differed over the years.

The Singapore court system consists of the Supreme Court and subordinate courts. The Supreme Court is made up of the High Court and Court of Appeal, the subordinate courts being the district and magistrates courts. Unlike Australia, only one court in Singapore, the High Court, hears applications arising from arbitrations under the Singapore IAA. Since November 1, 2004, three Singapore High Court judges have been designated to hear all applications to the High Court arising from arbitrations under both the Singapore IAA and the domestic Arbitration Act. This has had the effect of ensuring that judges dealing with arbitration matters are suitably experienced, and promotes a consistency of approach.

The Australian court system is made up of a hierarchy of courts, state and federal. Although the High Court is the supreme federal court and its decision is final, both state and federal courts deal with cases involving international arbitration. Although there have been a number of changes to the law governing international arbitration in Australia, the Federal Court does not have exclusivity to review cases involving international arbitration. The fact that a number of courts can deal with international arbitrations may partly explain why there has been more court intervention in international arbitrations in Australia than in Singapore, which has a single court dealing with all matters arising from international arbitrations.

[26] This data has been taken from the SIAC website: *http://www.siac.org.sg* [accessed December 2, 2010], and the Asia Pacific Regional Arbitration Group (APRAG): *http://www.aprag.org*. [Accessed December 2, 2010.]

[27] Model Law art.VII(1).

The Singapore IAA came into force on January 27, 1995. It demonstrated Singapore's acceptance of international best practice for international arbitration by the adoption of the Model Law[28] and the New York Convention,[29] save for Model Law Ch.VIII, which is specifically excluded to avoid any conflict with the provisions of New York Convention s.3(1). In January 2010 Singapore's International Arbitration (Amendment) Act 2009[30] came into force, implementing many of the amendments to the Model Law made by UNCITRAL in 2006. The amending Act now allows the Singapore courts to grant interim orders (such as disclosure and the freezing of assets) in arbitrations outside Singapore. Although the Singapore courts have limited involvement in cases involving international arbitration and have adopted a "hands-off approach", allowing them to grant interim orders in arbitrations outside Singapore emphasises the Singapore government's support for international arbitration.

In addition to the Singapore IAA, the Arbitration (International Investment Disputes) Act[31] empowers the High Court to recognise and enforce awards made under the International Convention on the Settlement of Disputes between States and Nationals of Other States (ICSID).

The Australian International Arbitration Act (Australian IAA) enacted in 1974, 20 years before the Singapore IAA, governs international arbitrations in Australia. The Australian legislation for international arbitration has not previously been completely aligned with the Model Law. Until recently Australia did not have a single Act governing international arbitrations, as there were also a number of state and territory Commercial Arbitration Acts. These state and territory Arbitration Acts have meant that, over the years, different arbitration laws have applied depending upon the state in which the parties chose to arbitrate. Under the Australian legislation, there was no provision allowing the parties to opt in or elect that the provisions of the Australian IAA would automatically apply. The Australian IAA[32] provided that international arbitrations were governed by the Model Law, unless the parties had agreed in writing to expressly exclude it. If they did so, the relevant Commercial Arbitration Act would apply.

The Australian government has now implemented changes to the country's international arbitration legislation to give parties greater confidence when choosing Australia as a forum for international arbitration in Asia-Pacific and to promote greater consistency in the Australian arbitration process. Before the legislative amendments to the Australian IAA, the parties to an arbitration agreement governed by Australian law could choose whether to entirely opt out of the Model Law where one of the Commercial Arbitration Acts in force in a particular Australian state or territory allowed them to do so. Many therefore viewed the legislative framework for international arbitration in Australia as ambiguous and uncertain for parties coming from outside Australia. Unlike Singapore, Australia had no single uniform law governing international arbitration.

Following the legislative changes which came into force in July 2010, the Australian IAA incorporates the 2006 changes to the Model Law. Following the change to Australian IAA s.21, the Model Law covers all international arbitrations conducted in Australia, and state or territory Arbitration Acts are now expressly excluded. The legislative changes also incorporate a range of provisions that the parties to arbitration may opt in to, including a regime for dealing with confidentiality, which the parties may adopt under the new "opt in" provisions, in that all information relating to arbitral proceedings will be treated as confidential information and may only be disclosed in limited circumstances, such as where the disclosure is required for the enforcement of the award. This opt in provision arose following *Esso Australia Resources Ltd v The Honourable Sidney James Plowman (The*

[28] In Singapore IAA Sch.1.
[29] In Singapore IAA Sch.2.
[30] *http://statutes.agc.gov.sg*. [Accessed December 2, 2010.]
[31] *http://statutes.agc.gov.sg*. [Accessed December 2, 2010.]
[32] Australian IAA s.16.

Minister for Energy and Minerals),[33] where the High Court held that confidentiality is not implied simply because the parties agree to arbitrate. It is surprising that under the new provisions the parties can opt in to the confidentiality provisions, when many commercial parties see confidentiality as a key benefit to arbitration. It is also curious that, in order to prevent disputes arising in relation to issues of confidentiality, the amended Australian IAA does not automatically bind the parties to the confidentiality provisions. Indeed, the ACICA Rules r.18 expressly requires confidentiality in all matters relating to an arbitration.

Before the legislative amendments to Australian IAA s.21, the Queensland Court of Appeal in 2001 ruled in *Australian Granites Ltd v Eisenwerk Hensel Bayreuth*[34] that, following the incorporation of the ICC Rules in an arbitration clause, Australian IAA s.21 permitted the parties to opt out of the Model Law where local state arbitration laws allowed them to do so, and that the procedural rules of the ICC were an alternative to the Model Law. The decision in *Eisenwerk* seems to have been caused by the judge's failure to appreciate the difference between the adoption of rules to be followed during arbitration and the applicability of the mandatory provisions of the Model Law. *Eisenwerk*, although not followed in later cases, arguably remained good law in Australia for a number of years until the amendment to Australian IAA s.21 came into force.[35]

In Singapore also there have been questionable decisions on the interactions between the parties' selected rules and the Model Law. The High Court soon followed *Eisenwerk* in *John Holland v Toyo Engineering Corp (Japan)*[36] and *Dermajaya Properties v Premium Properties*.[37] The judge in *John Holland* held that:

> "the parties had agreed that the Model Law would not apply, or in the words of s.15, that the arbitration be settled or resolved otherwise than in accordance with the Model Law."

The Singapore legislature reacted swiftly and amended s.15. In *Dermajaya*, the parties had entered into an agreement that provided that any dispute should be referred to arbitration under the UNCITRAL Rules, and the court was asked to consider whether, where the place of arbitration was Singapore, the Singapore IAA or the domestic Arbitration Act applied. The court found that if the curial law of Singapore applied and the arbitration was an international one, then it was a requirement that the parties expressly agree to exclude the Model Law or Singapore IAA Pt II, and that the mere adoption of the rules of an arbitral institution was not sufficient to exclude the Model Law.

Whilst the Singapore legislature wished to respect party autonomy in the choice of rules adopted, after *Dermajaya* it passed a bill inserting a new s.15A into the Singapore IAA. This confirmed that the rules of arbitration agreed or adopted by the parties will prevail, but only to the extent that they are not inconsistent with the mandatory provisions of the Model Law (the international standard for international arbitration) or the Singapore IAA. The Singapore legislature's reaction to *John Holland* and *Dermajaya* demonstrated the Singapore government's desire to ensure a degree of certainty in the way in which the Singapore IAA and the parties' selected arbitration rules are interpreted.

During the past decade, the parties to international arbitration in Singapore could, in an international arbitration, elect for the domestic Singapore Arbitration Act to apply, which arguably gave them less uncertainty than that afforded to parties in international arbitrations in Australia, where different Commercial Arbitration Acts could be applied depending upon the state where the arbitration was to be held.

[33] [1994] 1 V.R. 1.
[34] [2001] 1 Qd R. 461.
[35] See now N. Rudge and C.A. Miles, "More Than an Empty Gesture: The Reversal of Eisenwerk" (2011) 77 *Arbitration* 43.
[36] [2001] S.G.H.C. 48.
[37] [2002] 2 S.L.R. 164.

Under the old regime for international arbitration in Australia, the parties could not always obtain the finality they sought after an international arbitration, because of the appeal and review powers contained in the state and territory Commercial Arbitration Acts. It should be noted, however, that individual states in Australia are considering or have already begun amending state Commercial Arbitration Acts in order to incorporate the Model Law and provide consistency between the Australian IAA and the state Commercial Arbitration Acts. New South Wales has already introduced the new Commercial Arbitration Act 2010.

In an effort to give uniformity to the decisions rendered by the courts having jurisdiction under the Australian IAA, the Federal Court now has jurisdiction under the Australian IAA. Although this is not exclusive jurisdiction, the Act sets out guidelines for all the courts exercising jurisdiction under the Australian IAA. In conjunction with the amendments to the Australian IAA, a number of Australian courts, including the Federal Court of Australia, have established dedicated arbitration lists. The Federal Court and the New South Wales and Victoria Supreme Courts have assigned dedicated judges to handle international arbitration cases. Other state courts are likely to follow suit. The aim is to provide a streamlined process. The potential for differing decisions remains, however, as the Federal Court still does not have exclusivity to review all cases involving international arbitrations.

Over the years the Singapore High Court has built up a substantial body of case law on international arbitration. It has clearly shown its support for the international arbitral process and confirmed it is reluctant to intervene in international arbitrations. In the landmark ruling in *AJU v AJT*,[38] for the first time the Singapore High Court set aside an award under Model Law art.34(2)(b)(ii) after finding it conflicted with Singapore public policy. Although it is at the time of writing going to appeal, the case confirms that the Singapore High Court will respect the "finality" of the award and only on very rare occasions will it set aside an award where it considers the parties have abused the use of arbitration.

5. Choice and Selection of Arbitrator

Both the Australian and Singaporean systems allow the parties considerable flexibility with regard to the composition of the tribunal. This flexibility is further shown by the fact that neither jurisdiction prescribes the type and level of qualifications required by arbitrators. The Singapore IAA adopts Model Law art.12(1), which provides that when individuals are approached to be arbitrators they must disclose circumstances likely to give justifiable doubts as to their independence or impartiality. The Australian IAA, whilst also adopting art.12(1), now provides[39] that the test for "justifiable doubts" is whether there is a "real danger of bias" by the arbitrator. We must ask, however, whether reference to a "real danger of bias" will actually give rise to any different decision than would be made in cases involving the interpretation of "justifiable doubts", or under the common law test for bias in Australian law, which considers whether a fair-minded objective person would reasonably apprehend that the arbitrator may not be impartial.

6. Interlocutory Orders

The Singapore IAA[40] gives tribunals powers to make interlocutory orders, for example on security for costs, disclosure and the preservation of property. In accordance with the Singapore IAA,[41] tribunals may award any remedy or relief awarded by the court if the dispute had previously been the subject of civil proceedings in the court. Tribunals may

[38] [2010] S.G.H.C. 201.
[39] Australian IAA s.18A.
[40] Singapore IAA s.28.
[41] Singapore IAA s.12(5)(a).

determine references to the remedy and relief in accordance with the laws chosen by the parties[42]; whether this allows the parties to agree on remedies not otherwise available under Singapore law is, however, open to doubt.

The amendments to the Australian IAA do not, unlike the Singapore IAA, adopt Model Law art.17B, which provides for tribunals to make ex parte interlocutory orders; allowing them to make such orders arguably gives them full control of the arbitration without court interference and allows the parties to deal with all matters relating to the arbitration in the same forum.

In Singapore the parties should only seek interlocutory relief from the court where it is more expedient to do so. The court's role is, however, supportive only, and any orders it makes will lapse once a tribunal makes an order on the same subject matter.

7. Enforcement of Awards

Both Australia and Singapore are signatories to the New York Convention,[43] and awards made in Australia and Singapore can now be enforced in over 140 countries around the world. The grounds on which the courts may refuse to enforce a foreign award are now equally limited. The Australian IAA provides a list of factors upon which enforcement of a foreign award may be challenged. This provision is consistent with the Model Law and the New York Convention.

8. Conclusion

Although the Australian IAA came into force 20 years before its counterpart in Singapore, Singapore's straightforward legislative regime, the adoption of the Model Law, minimal interference by the courts, the government's support for international arbitration and its favourable geographical location have allowed it to become the "forum of choice" for international arbitrations in Asia.

It remains to be seen whether the recent legislative changes in Australia and the development of the new AIDC will attract more international arbitrations to Australia. Parties to international arbitration in Asia-Pacific come from a wide geographical area, including China, Thailand, Malaysia, Vietnam, Indonesia and India, and it is not clear why Asian parties would select Australia as a neutral venue in preference to Singapore, which is more conveniently located. As we discussed in the Introduction, the 2010 International Arbitration Survey indicates that location is a key factor when parties select a seat of arbitration. They are looking for a neutral venue in Asia-Pacific close to their own jurisdiction and within a similar time zone.

Australia is a major trading partner of many countries in Asia, and its companies have numerous contracts with organisations in Asia. Some Australian companies may have sufficient commercial power to insist upon Australian arbitration agreements, but their counterparts are unlikely to view Australia as a neutral venue vis-à-vis both parties. In addition, a number of large Australian companies may regard a neutral venue in Asia such as Singapore as a more convenient place for arbitration of their disputes.

[42] Singapore IAA s.12(5)(a), which is subject to Model Law art.28.

[43] Australia: date of accession March 26, 1975, coming into force on June 24, 1975. Singapore: date of accession August 21, 1986, coming into force on November 19, 1986.