International Arbitration and Dispute Resolution: The India-Australia Perspective

Mr Khory McCormick on Arbitration

In February 2015, AIDC, the Australian Centre for International Commercial Arbitration (ACICA) The International Centre for Alternative Dispute Resolution (ICADR), together with the Australian Government Attorney-General's Department organised two conferences in India entitled "International Arbitration and Dispute Resolution: The India-Australia Perspectives".

The conferences aimed to build a deeper understanding between the two countries of their respective arbitration frameworks and challenges, as well as showcasing the benefits and opportunities for Indian and Australian entities to consider a neutral venue for international arbitration. They were held in New Delhi on 14 February 2015 and in Hyderabad on 17 February 2015. Vice President of ACICA, Khory McCormick discussed his thoughts on arbitration and Michael Talbot, Chairman of AIDC shared his views on mediation. Similar presentations were also made on 16 February 2015 for the Vice Chancellor, Registrar, Law Faculty and students of at the Rajiv Gandhi National University of Law.

Each one of these events was directed at a different audience. In New Delhi, the audience was comprised of arbitration practitioners, and in particular members of the ICADR. At the Rajiv Gandhi National University of Law, in Punjab, the focus was on giving law students an understanding of the importance of mediation and arbitration for the legal profession and contextualizing it for them in relation to Australia-India trade and legal frameworks. The following is an overview of Khory McCormick's presentations focusing on Arbitration. In our next Bulletin we will discuss mediation in more detail.

Overview of the Australian legal framework

In his presentations, Khory McCormick first provided the audience with a useful overview of the Australian legal framework and court system. He notably dealt with the system of Government, the Australian Constitution, the legislation and the adoption by Australia of the 2006 UNCITRAL Model Law amendments in the 2010 amendments to the International Arbitration Act 1974 (Cth) (IAA).

Khory pointed out the fact that both Australian and overseas-based practitioners are permitted to practice in international arbitration proceedings seated in Australia.

Australia: a safe and neutral arbitration seat

In outlining the elements which make Australia a safe and neutral arbitration seat, Khory focused on:

- the application of the rule of law
- political stability
- an independent, impartial judiciary
- judicial supervision of arbitral awards and enforcement
- availability of tribunal-granted interim measures of protection
- confidentiality of the arbitral process
- safe enforcement proceedings
- right to representation by counsel of choice
- modest comparative cost
- well-established, reputable facilities and easily accessible logistical support
- recognised tendency of the courts to adopt a sensible, commercial approach

In discussing the various functions of Australian Courts in the context of arbitration, Kory emphasised the supportive approach of the Australian judiciary with regards to international arbitration. He highlighted the fact that Australian courts endorse a broad approach to the question of arbitrability, and adopt a ‘pro-enforcement’ attitude towards foreign arbitral awards.

Recent cases involving Indian companies

Khory presented and analysed recent Australian case law. Several of the cases he discussed involved Indian companies. This recent case law is indicative of the increasing importance of Indian trade in international arbitration.

He notably commented on several cases illustrating the Australian courts' pro-enforcement approach when dealing with foreign arbitral awards.

In *Traxys Europ SA v Balaji Coke Industry Pvt Ltd* (No 2) [2012] FCA 276, the court ruled that there was no prerequisite to establish proof of assets in the jurisdiction for the rendering of a judgment or the making of an order enforcing an award. It also stated that "*...The public policy ground for refusing enforcement [cannot] be allowed to be used as an escape route...[and] should not be made available too readily, lest it undermine the purpose of encouraging and facilitating the enforcement of foreign arbitral awards embodied in the Convention and in the IAA.*"

Khory commented on *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636 as another illustration of this pro-enforcement attitude. In this case, three awards were rendered (in London) in favour of a Singaporean company (Armada), against an Indian company (Gujarat), which the former then sought to enforce in the Federal Court of Australia. Gujarat resisted enforcement on several grounds, notably arguing that to enforce an award for future contractual loss, would be contrary to public policy.

Whilst not prepared, per se, to give effect to any declaration made in respect of future shipments, the court would grant Armada liberty to apply to amend its Originating Application to seek enforcement of any additional awards relating to Gujarat's failure to perform subsequent shipments.

According to the court, "*the mere fact that enforcing such a declaration might not be consistent with principles developed in Australia for the exercise of an Australian court's discretion to make declarations would not, of itself, be sufficient to constitute a reason for refusing to enforce the award on the grounds that to do so would be contrary to public policy*."

Presentation on ACICA

Khory wrapped up his presentation with details of ACICA, its history and its arbitration rules and expedited procedure. These details were of particular interest to the arbitration focused professionals attending in both New Delhi and Hyderabad.

Building India-Australia Dialogue

Following each presentation there was an opportunity for discussion with the audience to further share thoughts and ideas. Also following each presentation there was a social gathering to further engage with attendees. In New Delhi; a luncheon, in Punjab; a morning tea, and in Hyderabad a high tea. Each of these events created the opportunity to build India-Australia dialogue and connections between arbitration practitioners, students and ADR organizations.