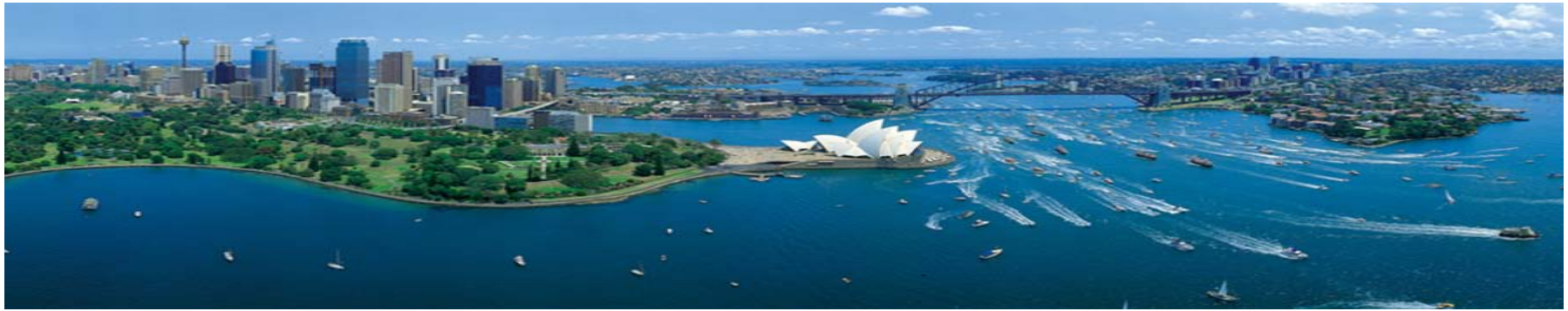
International Arbitration: An Overview
An Australian Perspective

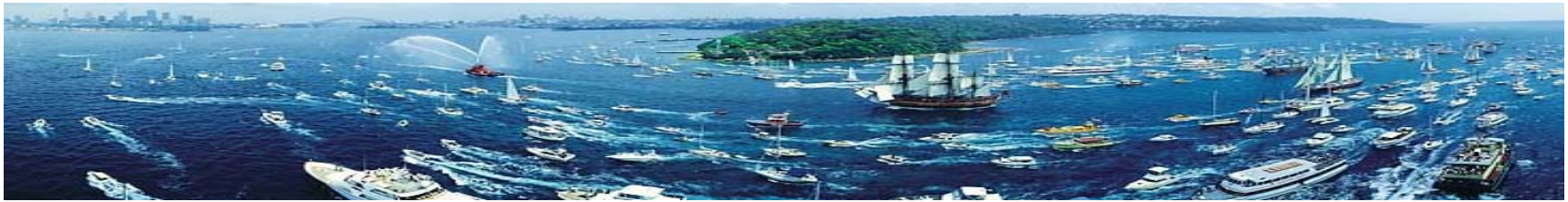


Ian Davidson SC BEc LLB (Hons) (ANU); LLM (Harvard) Chair ADR Committee NSW Bar Association, Eight Selborne Chambers, Sydney

Director of ACICA

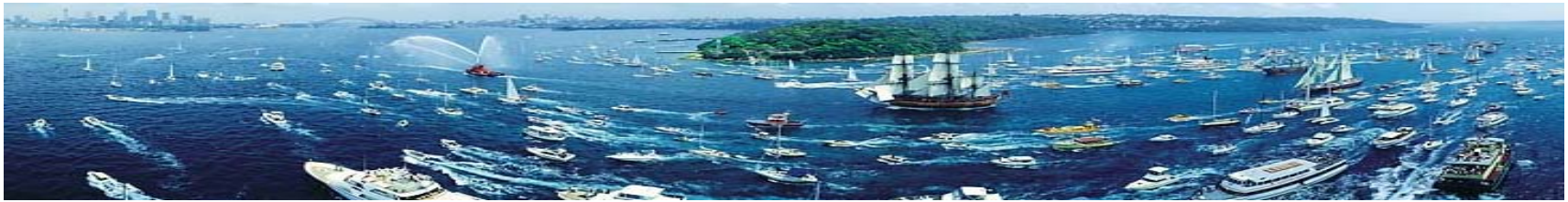
Overview

- Australian Legal Framework
- The Australian Court System
- Australia as an Arbitral Seat
- Australian Courts Favour International Arbitration
- Mediation and other Alternative Dispute Resolution Processes



Overview

- Australian Legal Framework
- The Australian Court System
- Australia as an Arbitral Seat
- Australian Courts Favour International Arbitration
- Mediation and other Alternative Dispute Resolution Processes



Australian Legal Framework

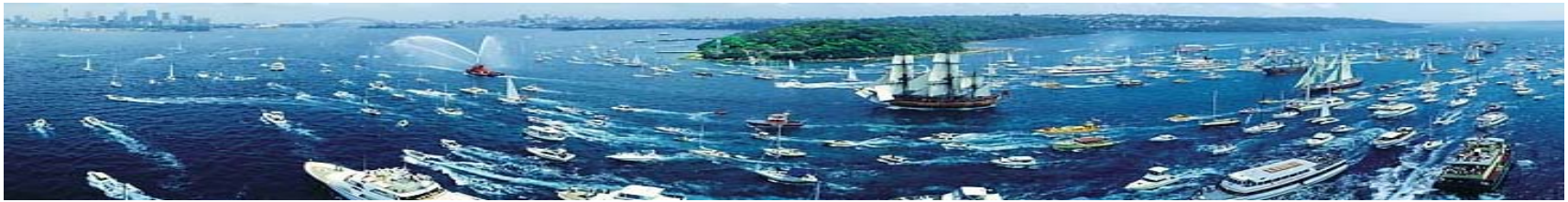
- System of Government
  - On 1 January 1901, Australia gained independence from Britain and became a federation of six States (it also has two self-governing Territories).
  - Australia is a constitutional monarchy with a federal division of powers.
  - Separated into three branches:
    - the legislature: bicameral Parliament, the Senate and the House of Representatives;
    - the executive: government Ministers and employees (the public service); and
    - the judiciary: High Court and other Federal, State and Territory Courts.
- Australian Constitution
  - State and Territory Parliaments have the power to pass laws for any purpose, except for those specifically reserved for the Commonwealth Parliament.
  - Relevantly, the Commonwealth is granted treaty power pursuant to s51(xxix) of the Constitution, see also s61 (source of authority for adoption of New York Convention).

Australian Legal Framework

- UNCITRAL Model Law
  - The 2010 amendments to the *International Arbitration Act 1974* (Cth) (IAA) – the federal legislation which governs international commercial arbitration - largely adopted the 2006 amendments to the UNCITRAL Model Law (under further review).
  - It has been implemented under domestic arbitration legislation across the various States and Territories (*Uniform Commercial Arbitration Acts 2010*).
- Australian and International Practitioners
  - The Australian legal profession is a ‘split profession’ (barristers and solicitors).
  - Generally someone must be registered in Australia in order to practice, however, overseas-based registered practitioners are permitted to practice in international arbitration proceedings.

Overview

- Australian Legal Framework
- The Australian Court System
- Australia as an Arbitral Seat
- Australian Courts Favour International Arbitration
- Mediation and other Alternative Dispute Resolution Processes

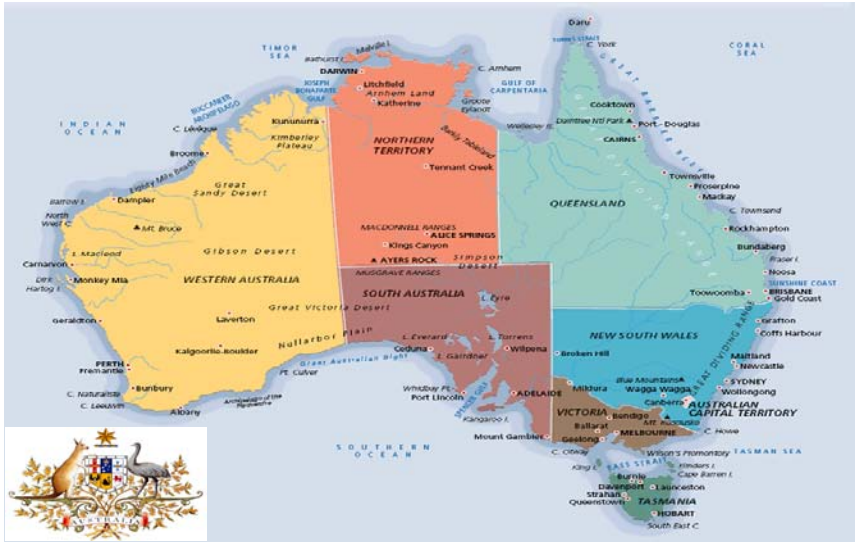


The Australian Court System

- The High Court of Australia: Australia's 'Highest' Court
  - Comprised of seven judges (Kiefel CJ and Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)
  - Hears appeals from the Federal Court and the State and Territory Supreme Courts (including in arbitration matters).
  - Parties wishing to appeal to the High Court must be able to show that there are special reasons justifying the appeal [organic common law approach one common law promotes consistency].
- The Federal Court: Family Court of Australia, Federal Circuit Court and the Federal Court of Australia
  - Deals with matters involving federal legislation, predominantly family, administrative, tax, bankruptcy, competition, corporations and securities, privacy, industrial and intellectual property law.
  - Both the Federal Court and State and Territory Courts have jurisdiction over arbitration. An attempt to give Federal Court exclusive jurisdiction over international arbitration was ultimately politically unsuccessful. The Federal Court and State and Territory Supreme Courts all support arbitration.

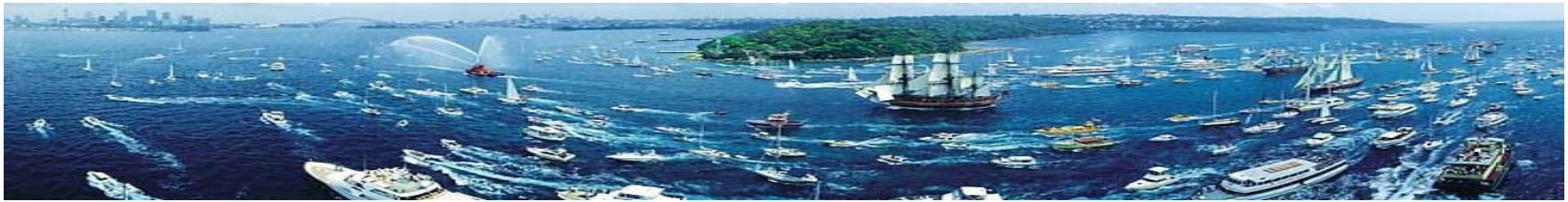
The Court System

- State and Territory Court System
  - Each State and Territory has its own Supreme Court, District or County Court and Local or Magistrates Court.
  - The Supreme Court has both first instance and appellate functions.
  - Monetary thresholds determine exactly which of these courts will hear a particular civil claim.
  - Where the parties have a valid arbitration agreement courts are required to grant a stay of proceedings so that the agreement is able to be honoured.
  - In circumstances such as this, there are limited avenues for court intervention beyond this grant.



Overview

- Australian Legal Framework
- The Australian Court System
- Australia as an Arbitral Seat
- Australian Courts Favour International Arbitration
- Mediation and other Alternative Dispute Resolution Processes



Australia as an Arbitral Seat

- Arbitrability
  - Generally, if a dispute falls within an arbitration clause then an award made by an arbitrator will be valid, unless the subject matter of the dispute is not capable of settlement by arbitration or, in other words, is not arbitrable.
  - The Courts' broad approach to this question is said to be "...underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places".
    - (*Comandate Marine Corp v Pan Australia Shipping Ltd (2006) 157 FCR 45;* [2006] FCAFC 192).
- Interim Measures
  - Empower the arbitral tribunal to assist parties at the interlocutory stage of proceedings.
  - Courts are able to intervene if the arbitral tribunal is unable or unwilling to act
  - Modern Rules like the ACICA Arbitration Rules assist the arbitral tribunal to provide interim relief
- Confidentiality
  - High Court previously ruled a term imposing a general obligation of confidentiality was not implied into an arbitration agreement (*Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10*).
  - The position is now that, unless the parties stipulate otherwise, proceedings arising from all arbitration agreements concluded from 14 October 2015 onwards will remain confidential - an 'opt out' regime (ss23G-23C IAA).

Australia as an Arbitral Seat

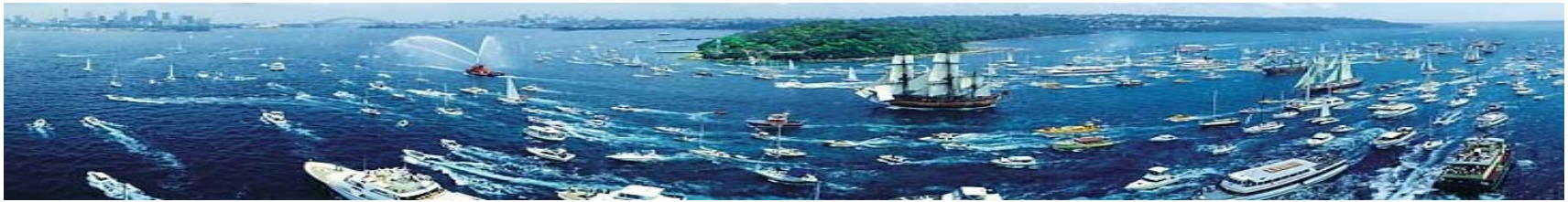
- Arbitration Lists
  - Established in Federal and State Supreme courts to ensure experienced judges sit on cases involving arbitration with special processes in place to prevent unnecessary delay due to court involvement (NSW and Victoria Supreme Courts, Federal Court).

- Stay of Proceedings, Recognition and Enforcement
  - "The pro-enforcement bias of the Convention and its domestic surrogate, the IAA, requires that this Court weigh very carefully all relevant factors when considering whether to adjourn a proceeding...The discretion must be exercised against the obligation of the Court to pay due regard to the objects of the IAA and the spirit and intendment of the Convention."
    - (*ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905).
  - A foreign award is to be enforced by a State Court or the Federal Court as if the award was a judgment of that Court, without the need to reopen the substance of the dispute in court.
    - (*Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131) [either Court].

- Grounds for Challenge
  - The same grounds for setting aside a foreign arbitral award apply domestically (although the uniform arbitration legislation, the Commercial Arbitration Acts (CAAs) which are also based on the 2006 Model Law and in operation in all states and territories except for the Australian Capital Territory, provide for the appeal of an award on a question of law in limited circumstances (section 34A)).
  - Foreign arbitral awards will be recognised and enforced, subject to the very limited statutory grounds of refusal set out in ss8(5)-8(8) of the iAA.

Overview

- Australian Legal Framework
- The Australian Court System
- Australia as an Arbitral Seat
- Australian Courts Favour International Arbitration
- Mediation and other Alternative Dispute Resolution Processes



High Court Rejects Challenge to International Arbitration

TCL v The Judges of the Federal Court of Australia (2013) 251 CLR 533; [2013] HCA 5

- TCL submitted before the High Court of Australia that the provisions of the IAA were contrary to the Constitution because:
  - The Model Law does not permit a court to refuse enforcement of an arbitral award by reason of an error of law; and
  - The Model Law applies exclusively as the law applicable to arbitrations seated in Australia.
- TCL also argued that the IAA undermined the institutional integrity of the courts by denying the Federal Court the capacity to refuse to enforce an award containing an error of law.
- The High Court unanimously dismissed the application on the basis that it failed to take into account the consensual foundation of private arbitration and held that the absence of a specific power to review an award for error of law does not distort judicial independence when a court determines the enforceability of an award.
- This decision has reinforced a pro international arbitration focus for all Australian courts

High Court Rejects Challenge to International Arbitration

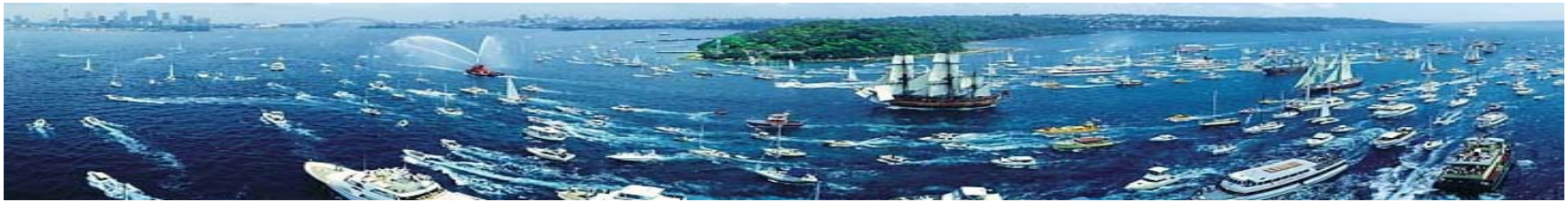
In the matter of Infinite Plus Pty Ltd [2017] NSWSC 470 (27 April 2017)

Hui v Esposito Holdings Pty Ltd [2017] FCA 648 (9 June 2017)

Hui v Esposito Holdings Pty Ltd (No 2) [2017] FCA 728 (26 June 2017)

Overview

- Australian Legal Framework
- The Australian Court System
- Australia as an Arbitral Seat
- Australian Courts Favour International Arbitration
- Mediation and other Alternative Dispute Resolution Processes



Mediation

- Accreditation of Mediators under the NMAS
  - Since 2008 the former National Alternative Dispute Resolution Advisory Council (NADRAC) was instrumental in establishing a national system for accrediting mediators, the National Mediator Accreditation System (NMAS). NADRAC has now ceased operation but the NMAS remains.
  - It is a non-mandatory, industry-based scheme that relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards (Recognised Mediator Accreditation Bodies (RMAB), for example the NSW Bar Association).
- Domestic: Federal Court of Australia Act 1976 (Cth)
  - The Court may refer proceedings (or any part of them or any matter arising out of them) to a suitable ADR process, including mediation, pursuant to s53A(1) of the *Federal Court of Australia Act 1976* (Cth), with or without the parties' consent. (Various States have similar provisions.)

Mediation

- Court ordered mediation the norm (origins in 1980's)
- Facilitative non evaluative the norm
- Settlements reached at a mediation are enforced as a contract
- Widely expected by parties (high success rate)
- Lawyer dominated in the commercial transaction space bespoke mechanism design eg Mining tenement, environmental law, etc increasing in frequency
- Australia participating in UNCITRAL Working Group 2: Arbitration & Conciliation: Recognition and Enforcement of Conciliated Settlements

Thank you for your attention.