

**ISSUES AFFECTING AUSTRALIA'S INTERNATIONAL
PERFORMANCE
IN
INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION**

***REPORT of the TASK FORCE on INTERNATIONAL COMMERCIAL DISPUTE
RESOLUTION***

COMMISSIONED by the INTERNATIONAL LEGAL SERVICES ADVISORY COUNCIL

Attorney-General's Department
Department of Industry, Science and Technology
Department of Foreign Affairs and Trade

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Introduction

Background

In 1991, ILSAC considered future prospects for Australian providers of international commercial dispute resolution ('ICDR') services. It was noted that while it is likely that European and North American ICDR service providers will continue to attract the majority of work in this area, increasing international commercial activity in the Asia Pacific Region provides significant opportunities for Australia to increase its share of the market.

It was considered that the existence of competing centres in Australia may not be the best way to maximise Australia's share of the ICDR market. The increasing number of dispute resolution centres in Australia was contrasted with the situation in a number of countries, such as the United Kingdom, Singapore, Hong Kong, Sweden and Japan, which have a single, prominently identified, international commercial dispute resolution centre.

In assessing whether Australia has been successful in exporting ICDR services, the Task Force formed the view that it was necessary to have regard to more than simply the numbers of international arbitrations held in Australia. Such an assessment may include consideration of issues such as:

- the process by which Australian arbitrators or mediators are nominated to resolve disputes in other countries;
- whether Australians are employed to represent parties in ICDR proceedings in other countries; and
- whether Australians, from either the public or the private sector, are employed as consultants to assist in the development of ICDR service provision in other countries.

At the Eighth Meeting of ILSAC on 26 July 1994, it was resolved that the ILSAC members from the Department of Industry, Science and Technology, the Department of Foreign Affairs and Trade, and the Attorney-General's Department each nominate the appropriate person from their agency to participate in a Task Force considering issues possibly relevant to Australia's performance as a provider of international commercial dispute resolution services. Austrade was to assist as required. The Task Force was to meet as necessary and to make its final report and recommendations to the Ninth ILSAC meeting on 30 November 1994.

Terms of Reference

The Terms of Reference of the Task Force were to assess Australia's performance in exporting ICDR services, and investigate factors that had a bearing on that performance, including the existence of a number of competing agencies. In particular, the Task Force was asked to assess what impediments to the export of ICDR services warranted attention.

In addition to assessing impediments to the export of ICDR services, the Task Force was asked to examine models for government promotion of ICDR centres and to suggest options for improving Australia's performance.

The Terms of Reference are set out at Attachment A.

Methodology

In order to obtain information concerning international commercial arbitration practice in Australia, a number of avenues were pursued:

- a short questionnaire was prepared (Attachment B) and forwarded to
 - 22 major exporters, including both large and small firms
 - 13 Australian law firms and 2 practitioners with relevant experience or interest in the subject matter
 - the Office of Commercial Law, Commonwealth Attorney-General's Department
 - State and Territory Governments
 - Telecom
 - QANTAS
 - International Development Program of Australian Universities and Colleges
 - marketing corporations, including the Wine and Brandy Corporation and the Wheat Board;

- 18 industry associations were asked to provide information on inquiries concerning dispute resolution and the type of information provided in response to such inquiries;
- a number of overseas posts, including Hong Kong, Singapore, Washington/New York, Kuala Lumpur, Jakarta, Brussels and Tokyo were asked to provide advice on whether or not they had been approached by Australian firms seeking advice on dispute resolution and to seek information relating to local dispute resolution centres;
- the British Law Unit, British Department of Trade and Industry was asked to provide information on the Departmental Advisory Committee on Arbitration Law;
- the Centre for Legal Education was asked to provide information on courses covering international commercial dispute resolution provided by Australian law schools.

A number of responses were received and the general conclusions are set out below with reference to the relevant Terms of Reference. Responses to questionnaires are analysed at Attachment C and include the number of responses received in respect of each question.

Report Summary

This document presents a number of findings of the Task Force on issues affecting Australia's performance in international commercial dispute resolution.

The Task Force was charged with considering the actual and potential significance of international commercial dispute resolution services for Australia's international arbitration and dispute resolution centres and other providers of such services, and Australia's performance as a provider of international commercial dispute resolution services. The Task Force was also asked to recommend ways to improve Australia's performance.

The Task Force made the following findings:

1. The global number of cases referred to international arbitration annually appears to be relatively small, with only a proportion of those referred being resolved by the issue of a final award.
2. The number of international cases referred to arbitration in Australia is small and for a variety of reasons, is unlikely to significantly increase in the future.
3. A number of factors are potentially responsible for limiting Australia's share of the ICDR market Some of these factors cannot be changed:
 - trade flows through Australia are a relatively small percentage of world trade flows and it is not a major international centre of commercial activity. Accordingly, there is little opportunity for providing dispute resolution services in respect of disputes concerning international commercial transactions arising from the trade passing through Australia;
 - the costs associated with travelling to Australia are higher than for most countries with which Australia is competing for market share;
 - many foreign parties prefer ICDR to be subject to their own or a third party's legal system;

- there are several North American and European ICDR centres that have established reputations for excellence over many years which, when combined with other factors (eg. geographic proximity to major global centres of commercial activity), have a competitive advantage in the provision of ICDR services.
- 4. From the information obtained by the Task Force, it is apparent that the factors which are *largely* determinative of Australia's small market share are those factors that cannot be changed.
- 5. Some of the factors limiting Australia's share have the potential to be changed, and it is important to ascertain their significance:
 - Australia's reputation as a provider of quality ICDR services;
 - the level of awareness among Australian businesses and lawyers of ICDR facilities provided in Australia;
 - the number of centres offering both domestic and international dispute resolution services in Australia and the collaborative arrangements between them;
 - the scope that exists for promoting Australian ICDR services in the broader sense, such the nomination of arbitrators, training and other related services.
- 6. The Task Force found no evidence to suggest that the number of competing centres providing ICDR services in Australia limits Australia's share of the ICDR market. Moreover, there may be difficulties in establishing a single national centre for the provision of such services, if to do so would involve imposing a restriction on competition.
- 7. The Task Force found evidence to suggest that there is a low level of awareness in the business community and the legal profession of the ICDR services available in Australia and of ICDR processes in general.
- 8. The Task Force believes that, while a significant expansion of Australia's share of the ICDR market is unlikely in the near future, there are several matters which could be pursued:
 - raising the level of awareness of the ICDR services available in Australia in both the legal profession and the business community;
 - improving the availability of information on topics such as the international conventions relating to ICDR and the various ICDR options available;
 - encouraging the exploitation of the potential advantages enjoyed by ICDR providers in Australia as a result of Australia's growing role as a base for multinationals seeking an Asia-Pacific regional base. (There is an element of feedback in this area, since the provision of high quality, competitively priced legal services, of which dispute resolution services are an integral part, will attract regional headquarters.)

Recommended Action

These matters will be referred by the Task Force to the International Legal Services Advisory Council for further consideration and possible action in the following areas:

- the possible inclusion of ICDR in the syllabus of undergraduate legal courses, and postgraduate legal diplomas in practical legal training;

- improving the awareness within the legal profession and the business community of ICDR options generally, and, in particular, those available in Australia;
- examining possible links between promoting ICDR services and Australia's regional headquarters and investment promotion initiatives.

TERM OF REFERENCE 1

The actual and potential significance of international commercial dispute resolution (ICDR) services for Australia's international arbitration and dispute resolution centres or other service providers.

1.1 This Term of Reference addresses the issue of whether the provision of ICDR services is (and may potentially be) 'significant' in terms of income, work, reputation and so on for Australia's ICDR centres.

1.2 The major issue of concern is how the question of "significance" should be judged. Is it merely a consideration of the number of referrals to Australian centres as a percentage of the total internationally, or are there a number of other factors of significance? These factors might include:

- a. whether Australia has established an international reputation as providing a high quality of appropriate dispute resolution services;
- b. whether Australian businesses dealing internationally are aware of the facilities that Australia can provide in this regard; and
- c. the relevance to Australian dispute resolution centres of dispute resolution services which may be termed "export services" - that is, providing a number of highly skilled Australian arbitrators who can work both in Australia and internationally, and advising overseas clients on the provision of training in the development and delivery of dispute resolution services.

1.3 Australia has a number of dispute resolution centres offering a range of services from international arbitration to conciliation, mediation, early neutral evaluation and other consensual forms of dispute resolution. In the international sphere, arbitration is still the most widely used method of commercial dispute resolution and while it would appear that the number of cases being referred to arbitration is increasing, the number of cases in which an award is given is still extremely small. A rough calculation from the figures below at point (4) suggests that the level of cases referred to arbitration in 1993 was in the vicinity of 1200, of which probably only 30-40% would actually result in an award. As an overall figure for the number of disputes resolved by arbitration, this is a very low level of activity in proportion to the number of international transactions being negotiated annually.

1.4 While the number of international arbitration proceedings remains relatively low, the number of centres around the world offering international arbitration services has increased markedly over the last ten years. Within the Asia-Pacific region there are now, for example, centres in Singapore, Hong Kong, Taiwan, Malaysia, China, Japan, USA, Canada, Australia and Korea. In addition, there are the international centres such as the International Chamber of Commerce (ICC) in Paris and the London Court of International Arbitration (LCIA) and other centres which in the past were often used on the basis of their neutrality by countries which did not have their own arbitration centres and which may remain a choice in instances where third country arbitration is preferred. Based on numbers of cases handled, the majority of international dispute resolution work is conducted by the

ICC, the LCIA, the American Arbitration Association (AAA) and the China International Economic Trade Arbitration Commission (CIETAC) [see below].

1.5 Even though the number of disputes is low, it could be expected that Australian dispute resolution services would be involved in dealing with some of those cases and this would appear to be borne out by the figures indicated below. But as the total number is low, the number dealt with here in Australia is also low. ACICA, the principal body handling international arbitration in Australia, advises that in 1993 it provided administration and facilities for 31 international arbitrations held in Australia.

TERM OF REFERENCE 2

Is Australia achieving the optimal outcome in terms of export of ICDR services through the existence of a number of competing agencies within Australia, and are there any impediments to the export of ICDR services which are of sufficient significance to warrant action?

2.1 While the most visible feature of international commercial dispute resolution in the last decade has been the development of a number of regional and national centres, Australia also has seen the development of an increasing number of centres offering a range of dispute resolution services. In the last twelve months alone, we have seen the announcement or opening of the National Disputes Centre, the Conflict Management Centre in Melbourne, the Australian Chapter of the London Court of Arbitration and two centres in Queensland, one in Brisbane and the other in Cairns. These latter centres are an initiative of the Queensland Bar Association and the Institute of Arbitrators, with the support of the Queensland Government. One issue which has attracted much attention in the last few years is whether this increase in the number of centres offering dispute resolution services serves Australia's interests internationally in comparison with, for example, the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC). Both of these centres are national centres promoted and financially supported by their respective governments with a view to attracting increasing numbers of international disputes.

2.2 This concern can be addressed in a number of different ways. Part of the answer is that a number of the Australian centres will not focus on delivering international arbitration services, but rather on providing domestic dispute resolution services. In part also, the answer may be that Australia's share of the international arbitration "pie" is, in the circumstances, probably reasonable. It is unlikely to increase dramatically for a number of reasons that have nothing to do with the quality of the services offered, but more to do with geographical location, directions of trade, the location of international trade centres, the preferences of our trading partners and similar factors. Accordingly, there will not be a large amount of international work for which these centres can realistically compete, and this is consistent with any realistic analysis of the existing statistics. As a further consideration, by concentrating solely on success in attracting international arbitration to Australia as a measure of "optimal" outcome, Australia may be failing to give attention to other avenues which could be developed successfully. These avenues may include the use of the services of Australian arbitrators overseas or the provision of advice and assistance on development of dispute resolution services and training of arbitrators, conciliators and other facilitators in other countries.

2.3 A number of the questions included in the questionnaire are relevant in considering the provision and level of use of ICDR services in Australia.