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THE ACICA REVIEW

June 2016

ACICA
Australian Centre for International Commercial Arbitration

Leader in international dispute resolution

THE ACICA REVIEW June 2016 | Vol 4 | No 1 | ISSN 1837 8994

ACICA
Australian Centre for International Commercial Arbitration

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The ACICA Review June 2016

Alex Baykitch ACICA President

President's Welcome

Welcome to the sixth edition of the ACICA Review, and to our new members since the last edition.

ICCA 2016 Mauritius

ACICA has just returned from a very successful ICCA Congress in Mauritius which was held from 8-11 May 2016. It was lovely to see so many ACICA Members there.

ACICA had a booth at the Congress venue to promote the ICCA Congress in Sydney in 2018 and the add-on event in Queenstown. The dates for the Sydney Congress are 15-18 April 2018.

At the stand in Mauritius, Business Events Sydney arranged a virtual harbour bridge climb thanks to some wonderful technology. The goggles were a great success and the booth was extremely busy with everyone wanting to have the virtual tour.

The Congress was successful in terms of generating great interest in Sydney. We were able to secure further sponsorships including the platinum sponsorship which was taken up by our Brazilian colleagues at CAM-CCBC. We look forward to working with our sponsors to promote Sydney 2018 and make it the best ICCA Congress ever!

ACICA / ICCA 2018 Team in Mauritius

Also while in Mauritius, ACICA signed a Cooperation Agreement with the MCCI Arbitration & Mediation Centre (MARC) to promote arbitration in Australia and Mauritius.

ICCA 2018 Sydney booth – *Alex Baykitch, ACICA President; Her Excellency Susan Coles, the High Commissioner to Mauritius; Sam Wakefield, ACICA Executive Assistant and Deborah Tomkinson, ACICA Secretary General*

Amendments to the International Arbitration Act

ACICA has been liaising with the Commonwealth Attorney General's Department in relation to further amendments to the IAA which were the subject of a joint discussion paper prepared with the Chartered Institute of Arbitrators (Australia). It is likely that those amendments will be passed by Parliament during this calendar year.

Alex Baykitch
President

Deborah Tomkinson
ACICA Secretary General

Secretary General's Report

ACICA at ICCA 2016

The 23rd International Council for Commercial Arbitration (ICCA) Congress was held in Mauritius from 8-11 May 2016. The successful Congress marked the first occasion in ICCA's 50-year history that this conference was held in Africa and demonstrated recognition of the important role that international arbitration now plays across the African continent.

As a host of the next ICCA Congress which will be held in Sydney in 2018, with a follow-on event in Christchurch, ACICA sponsored a booth at the Congress to promote Australia and New Zealand to delegates. We receive significant interest both with regard to the 2018 Congress and ACICA's activities.

The ICCA 2018 Sydney website is now live - www.icca2018sydney.com. If you wish to receive updates about the Congress, you may register online.

ICCA 2018 Sydney booth in Mauritius

Launch of the ACICA Council

In April 2016, ACICA announced the establishment of the ACICA Council as a part of the recent release of the latest edition of the ACICA Arbitration Rules and Expedited Arbitration Rules, which came into effect on 1 January 2016 (2016 Rules). The ACICA Council will act in a general advisory capacity with regard to initiatives undertaken for the advancement of ACICA's objectives, including its role in promoting Australia as a neutral venue for arbitration, and apply local and international expertise in the implementation of some of the new features introduced in the 2016 Rules.

The ACICA Council consists of leading international arbitration practitioners from Australia and around the world. Current members of the Council, who will serve a renewable three year term commencing March 2016, include:

- Alan Anderson (Alan Anderson Law Firm LLC, Minneapolis)
- John Beechey (John Beechey Arbitration, London)
- Justin D'Agostino (Herbert Smith Freehills, Hong Kong)
- Paul Friedland (White & Case, New York)
- Emmanuel Gaillard (Shearman & Sterling, Paris)
- Lord Peter Goldsmith (Debevoise & Plimpton, London)
- Simon Greenberg (Clifford Chance, Paris)
- Malcolm Holmes QC (Eleven Wentworth, Sydney)
- Michael Hwang SC (Michael Hwang Chambers, Singapore)
- Neil Kaplan CBE QC SBS (Arbitration Chambers, Hong Kong)
- Kap-You (Kevin) Kim (Bae, Kim & Lee, Seoul)
- Peter Megens (Pinsent Masons, Melbourne)
- Tim Nelson (Skadden, Arps, Slate, Meagher & Flom, New York)
- Jan Paulsson (Three Crowns LLP, London)
- Lucy Reed (Director of the Centre for International Law and Law Faculty Professor, National University of Singapore)

- David W. Rivkin (Debevoise & Plimpton, New York)
- John Savage (King & Spalding, Singapore)
- Laurence Shore (Herbert Smith Freehills, New York)
- Michelle Sindler (Independent Arbitrator, Sydney)
- Hiroyuki Tezuka (Nishimura & Asahi, Tokyo)
- Albert Jan van den Berg (Hanotiau & Van Den Berg, Brussels)

NSW Young Lawyers International Law Committee Inaugural International Negotiation and Dispute Resolution Series

On 23 June 2016, the NSW Young Lawyers International Law Committee will launch its first International Negotiation and Dispute Resolution Series in conjunction with ACICA and the Australian Disputes Centre (ADC). This exciting new initiative, which will focus on giving participants an insight into the real experience of working in diverse areas of international negotiation and dispute resolution, will be launched by the Solicitor-General of the Commonwealth of Australia, Mr Justin Gleeson SC.

Other Events

AMTAC Seminar - Perth
As a part of AMTAC's 10th anniversary celebrations, we held an industry-focused event in Perth on 18 May 2016 exploring current and recurring legal issues confronting the shipping community on a daily basis. The expert panel consisted of Dr Patricia Saraceni (Director, Litigation and Dispute resolution, Clifford Chance) who presented on *Insolvencies in the charter party chain*, Gemma Stabler (Senior Counsel Shipping/marketing, FMG) who presented on *Letters of Indemnities – an industry perspective* and Peter McQueen, Chair of AMTAC who spoke on *Drafting an Effective Arbitration Clause.*

Meeting with CAJAC and AFSA
On 13 May 2016 I met with representatives from the China Africa Joint Arbitration Centre and the Arbitration Foundation of South Africa in Johannesburg to exchange information about the work undertaken by our respective centres to develop and promote international arbitration and mediation.

Delegation visit from CIETAC and CCPIT
On 5 May 2016, ACICA welcomed a delegation from the China International Economic and Trade Arbitration Commission and the China Council for the Promotion of International Trade at ACICA, to exchange views on the development of international arbitration in Australia and China.


CIETAC/CCPIT delegation with ACICA representatives

International Arbitration and Jurisprudential Clashes of the New World Titans – Australia, Singapore and Hong Kong – Dr Dean Lewis
ACICA and the Chartered Institute of Arbitrators (Australia) welcomed guests to hear Dr. Dean Lewis, Partner at Pinsent Masons Hong Kong, speak on the topic of 'International Arbitration and Jurisprudential Clashes of the New World Titans: Australia, Hong Kong and Singapore' on 19 April 2016. The event was hosted at the ADC in Sydney with video-links to the Melbourne Commercial Arbitration and Mediation Centre and, due to popularity, an overflow room at the NSW Bar Association.

Dr Lewis presented a highly engaging comparative analysis exploring the manner in which the three jurisdictions have adopted the UNCITRAL Model Law and the interpretation that has been given to the Model Law in relevant case law. Dr Lewis spoke to the Model Law's international underpinnings and the requirement to have regard to its international origin and the promotion of uniformity when considering the meaning of an international interpretation of the Model Law. In practical terms, decisions from other jurisdictions are considered persuasive and guidance drawn from them. Dr Lewis compared how in practice the courts in Australia, Singapore and Hong Kong have approached interpretation over the course of the last twenty years. He further analysed the extent to which, in the 350+ cases he studied, the internationalism underpinning the Model Law was upheld by the courts.

Dr Lewis concluded that judgments of Australian courts in recent years have exhibited highly sophisticated internationalist judgments and been exceptionally strong in their display of internationalism when interpreting the Model Law. Dr Lewis noted that of the cases he identified between 2011 and 2015 in Australia, a strong internationalist interpretation to the Model Law was engaged in close to half of all cases. Dr Lewis confirmed his finding that this staggering statistic was not one reflected in either of the other jurisdictions and demonstrates a "real buy-in to the Model Law".

Dr Lewis' presentation was based on his newly released book titled: 'The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Focusing on Australia, Hong Kong and Singapore' which is available for purchase through Wolters Kluwer.

Dr Dean Lewis

Mauritius seminar - ICCA Congress and Growth in International Arbitration

On 18 April 2016, ACICA hosted a seminar at the ADC to explore the opportunities for Australian practitioners arising out of the ICCA Congress in Mauritius. Our Guest Speakers on the night included Roger de Robillard, Barrister and Ambassador for ICCA 2016; His Excellency Lapologang C. Lekoa, High Commissioner for the Republic of Botswana and His Excellency Patrick Cavalot, High Commissioner for Mauritius.

Mr de Robillard gave a keynote presentation focused on the market potential for continued growth in arbitration and the opportunities available for Australian arbitration practitioners in Africa resulting from increasing international trade and investment ties with Africa and African trading partners, including China. He pointed also to favourable business conditions in the region, especially within the nations making up the Organization for the Harmonization of African Business Law (OHADA) bloc. He noted that OHADA uniform instruments have significantly enhanced legal certainty and improved trade conditions in the region. Mr de Robillard focused attention in particular on the role of Mauritius as a flourishing bilingual African jurisdiction, a party to major regional and multilateral business treaties and a track record of reliable institutions, including recourse to the English Privy Council as the ultimate Appeal Court for entities working in Africa through a Mauritius-based entity.

His Excellency Lapologang C. Lekoa, speaking on behalf of the Dean of the African Heads of State in Canberra, discussed the growing commercial opportunities available in Africa, including Botswana, highlighting the entrepreneurial spirit in Africa which has advanced its Open for Business strategy. His Excellency Patrick Cavalot considered the advantages of doing business in Africa using Mauritius, with its reliable legal and business architecture, as a regional hub.

The seminar was well received, with guests staying on for networking drinks after the event.

(L-R) Deborah Tomkinson, Roger de Robillard, Excellency Lapologang C. Lekoa, His Excellency Patrick Cavalot, Professor Andre M.N. Renzaho and Andrea Martignoni

Dispute Resolution Trends – Focus on the Resources Industry – Adelaide

The South Australian branch of AMPLA, in conjunction with CIArb Australia and ACICA held a successful lunchtime seminar on national and cross-border Dispute Resolution Trends in the Resources Industry in Adelaide on 13 April.

Speakers Leah Ratcliffe (Associate General Counsel – Dispute Resolution at BHP Billiton), Anna Douglas (Special Counsel – Dispute Management at Santos) and Julia Dreosti (Principal, Lipmann Karas) provided their expert insights, focusing on dispute resolution trends in the current resources downturn, common dispute resolution processes used by industry participants, guidance on ensuring enforceable dispute resolution processes in contracts and dispute risk minimisation and management techniques. We thank Piper Alderman for hosting the event at their offices.

(*L-R)* *Deborah Tomkinson, Anna Douglas, Leah Ratcliffe, Julia Dreosti*

Arbitral Women

On 15th March, an ArbitralWomen breakfast panel discussion supported by ACICA, was held at the ADC exploring the topic of "How to build a practice as a Sydney-based female arbitrator". The panel consisted of Jo Delaney (Special Counsel and Arbitrator, Baker & McKenzie), Daisy Mallet (Senior Associate and Arbitrator, King & Wood Mallesons) , Julie Soars (Barrister, Mediator and Arbitrator, 7 Wentworth Selborne) and Erika Williams (Associate and Arbitrator-in-Training, Baker & McKenzie). The panel reviewed current statistics in terms of women's participation in the legal profession and arbitration in Australia, considered the options available for networking and mentoring and discussed the ways in which female lawyers can obtain experience in arbitration and look to obtain appointments. The panel discussion was followed by a special pre-recorded contribution from Amanda Lees of Counsel, Simmons & Simmons Asia LLP and comment from Malcolm Holmes QC.

ACICA Cooperation Agreements

In March 2016, ACICA signed a ***Cooperation Agreement with the BANI Arbitration Center (Badan Arbitrase Nasional Indonesia)*** in Indonesia, renewing the cooperative arrangement already in place between the two organisations.

While in Mauritius ACICA in May 2016 signed a ***Cooperation Agreement with the MCCI Arbitration & Mediation Center (MARC)*** with the aim of jointly promoting arbitration in the two countries.

Signing of the Cooperation Agreement with MARC with special guests his Honour Chief Justice Allsop AO and Her Excellency Susan Coles, the High Commissioner to Mauritius

ACICA Prizes

Miss Cinthia Lima was awarded the 2015 ACICA prize for best achieving student in International Commercial Arbitration at the University of Canberra's Prize Giving Ceremony on 4 April 2016. Congratulations to Cinthia for her achievement.

Sydney University held its annual Prize Giving Ceremony on 5 May 2016. ACICA congratulates Constanze Wedding on winning the 2015 ACICA Keith Steele Memorial Prize for the highest mark achieved in the postgraduate unit of study in International Commercial Arbitration.

ACICA and ADC Volunteer Intern Program

We have had a fantastic group of interns working at the Centre throughout the first half of 2016, volunteering their time to learn more about alternative dispute resolution in practice:

Angela Metri

Sheliza Nasser

Allan Chu

Thomas Guy

Alexander Diab

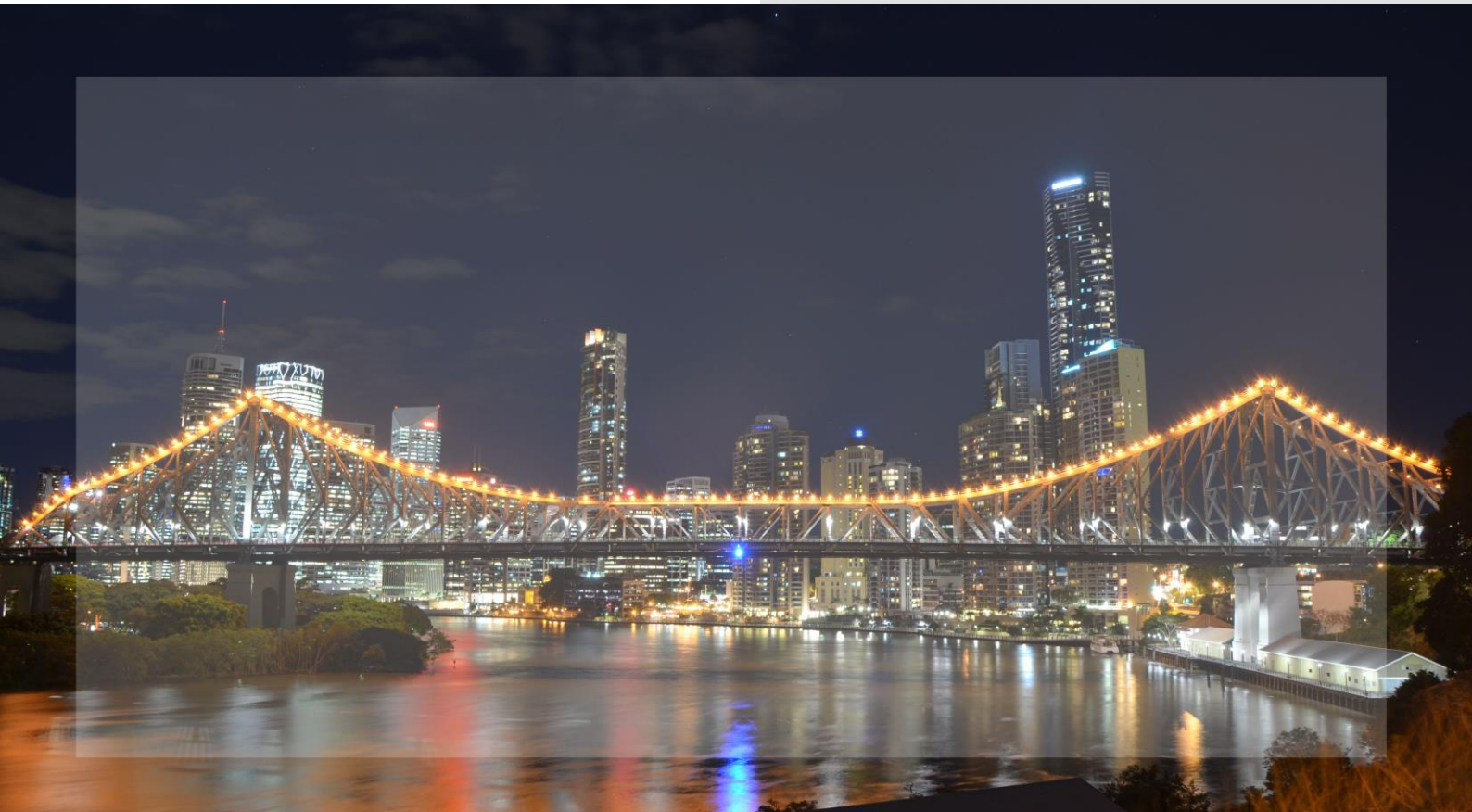
We thank all our interns for their enthusiasm and assistance.

Marina Kofman, who formerly interned with us, recently joined the ACICA and ADC teams as a Dispute Resolution Case Manager. We are excited to have Marina on board.

Marina Kofman

CIArb Asia Pacific Diploma in International Commercial Arbitration Course: 20 – 28 August 2016

The Chartered Institute of Arbitrators (CIArb) Asia Pacific Diploma in International Commercial Arbitration Course will be held in Singapore between 20 and 28 August 2016. Successful completion offers a pathway to CIArb Fellowship and accreditation that carries a global qualification in the growing practice of international arbitration. Places are strictly limited. For further information and to register visit: https://www.ciarb.net.au/training/diploma2016/



Peter McQueen
AMTAC Chair

AMTAC Chair's Report

2016 – AMTAC 10th Anniversary Events

AMTAC is celebrating its 10th anniversary this year. The Commission was launched on 26 April 2007 with a Steering Committee constituted by Justice James Allsop of the Federal Court, Michael Pryles of ACICA, Stephen Bouwhuis of the Commonwealth Attorney General's Department, Malcolm Holmes QC of CIArb and Peter McQueen of Blake Dawson Waldron.

Various events to celebrate AMTAC's 10th anniversary will be held around Australia. The AMTAC Executive will be assisted in the organisation of these events by the AMTAC Anniversary Sub-Committee , which is constituted by Julie Soars (Chair) of the Sydney Bar , Shane Bosma of Ashurst, Brisbane, Hazel Brasington of Norton Rose Fulbright, Melbourne, Richard Edwards of DLA Piper, Perth, Matthew Harvey of the Victorian Bar and Angus Stewart SC of the Sydney Bar.

The first event was held in Perth on 18 May 2016 at the offices of CBH. Fifty ship operators, managers and brokers enrolled for the event, which was chaired by Tony Pegum, a Vice Chair of AMTAC. An attentive and engaged audience heard industry focused presentations on insolvencies in the charterparty chain, letters of indemnity and the drafting of effective arbitration clauses, by Dr Patricia Saraceni of Clifford Chance Gemma Stabler of Fortescue Metals Group and Peter McQueen respectively.

Further events will be held during the year in Brisbane in July, in Melbourne in September and in Sydney in November during Sydney Arbitration Week.

International Maritime Law Arbitration Moot (IMLAM) Competiton 2016 – University of Exeter and London, England 3-8 July 2016

Murdoch University, in conjunction with the University of Exeter, is organising the 17th IMLAM Competition. Twenty-six university teams from 13 countries , including 3 teams from Australia, will be competing.The general rounds will take place in Exeter and the semi-finals and the final will take place in London.

As in past years AMTAC will be sponsoring the "Spirit of the Moot" award, which this year will include a prize for both the winning team or team member and that team's university.

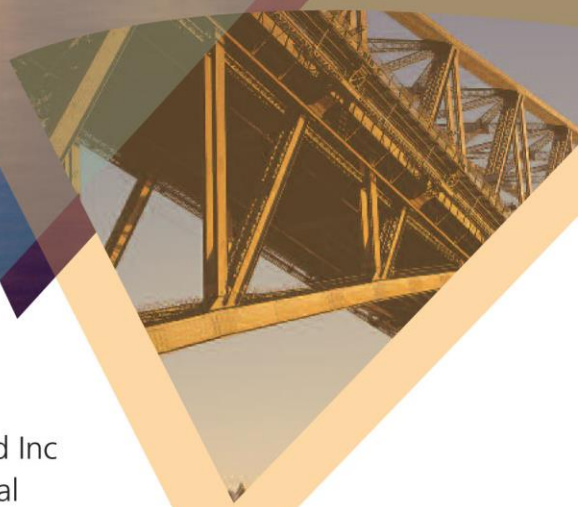
AMTAC will be represented by Peter McQueen, who will arbitrate, and Professor Sarah Derrington, a vice Chair of AMTAC, who will again coach the University of Queensland team.

AMTAC 10th Annual Address – 7 September 2016

This year's Address will be presented by Malcolm Holmes QC, an ACICA Fellow and Board member and also a member of the AMTAC Panel of Arbitrators. The Address will be broadcast from the Federal Court of Australia in Sydney on 7 September 2016 and will be followed by a special 10th Anniversary Dinner to be held at the Sydney offices of Ashurst LLP.

SAVE THE DATES

We look forward to seeing you in Sydney & Queenstown in 2018



The Australian Centre for International Commercial Arbitration (ACICA) and The Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) is bringing the International Council for Commercial Arbitration (ICCA) Congress to Sydney in 2018.

We are very proud to be hosting this premier bi-annual international arbitration conference which has never before been staged in Oceania.

The Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) looks forward to hosting you in Queenstown for the add-on event to the 2018 Congress.

Put the dates in your diary now!

SYDNEY 15-18 April 2018

QUEENSTOWN 20 April 2018

ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ACICA

AMINZ

ICCA2018
Sydney Australia 15-18 April 2018

www.icca2018sydney.com

NEWS IN BRIEF

New ACICA Council Members, Fellows, and Associates

We introduce **ACICA Council members**: Alan Anderson (USA), John Beechey (UK), Justin D'Agostino (Hong Kong), Paul Friedland (USA), Emmanuel Gaillard (France), Lord Peter Goldsmith (UK), Simon Greenburg (France), Malcolm Holmes QC (Australia), Michael Hwang SC (Singapore), Neil Kaplan CBE QC SBS (Hong Kong), Kap-You (Kevin) Kim (Korea), Peter Megens (Australia), Tim Nelson (USA), Jan Paulsson (UK), Lucy Reed (Singapore), David Rivkin (USA), John Savage (Singapore), Laurence Shore (USA), Michelle Sindler (Australia), Hiroyuki Tezuka (Japan), Albert Jan Van Den Burg (Belgium).

We welcome new **ACICA Fellows**: Jayems Dhingra (Singapore), Bridie McAsey (UK), Robert Gemmell (QLD), Anthony Lo Surdo SC (NSW)
ACICA Associates: David Smallbone(NSW), Kate Grimley (QLD), and
ACICA Overseas Associates: Elliot Smith (Singapore)

Björn Gehle's move to Reed Smith

Global law firm Reed Smith has today announced the appointment of disputes and arbitration partner Björn Gehle to its UAE offices. Björn joins the firm from Pinsent Masons in Dubai.

Björn Gehle

The Twenty-third Annual Willem C. Vis International Commercial Arbitration Moot

The Twenty-third Annual Willem C. Vis International Commercial Arbitration Moot was held in Vienna in April 2016. This year, 311 teams from 67 countries participated in this major event. There were 700 registgered team coaches and about 900 registered arbitrators. Eleven Australian teams took part in the Moot: Deakin University, Edith Cowan University, La Trobe University, Monash University, Queensland University of Technology, The University of Queensland, University of New South Wales, University of Notre Dame, University of Notre Dame (Sydney), University of Sydney and Victoria University, Melbourne. Several Australian teams made it into the top 64 teams who took part in the elimination rounds. Ms Rebecca Lennard of the University of Notre Dame, Sydney) won the Martin Domke Award for Best Oralist. The University of Queensland won an Honourable Mention for Best Memorandum for the Claimant and an Honourable Mention for Best Memorandum for the Respondent. Reflections on the Moot by the University of Queensland team are published on page 12.

Gabriël Moens and Daniel Meltz Appointment

- Professor Gabriël Moens, Deputy Secretary General of ACICA, has been elected as a Fellow of the International Academy of the Belt and Road (a Chinese Academy).
- Daniel Meltz (ACICA Fellow) has been appointed as Adjunct Professor at UTS in international arbitration. UTS will offer a new international arbitration course from 2017.

Professor Chester Brown nominated for election to the International Law Commission

In May 2016, the Australian Government announced the nomination of Professor Chester Brown (ACICA Fellow) for election as a member of the International Law Commission (ILC) for the term 2017-21.

Professor Chester Brown

Professor Brown is co-nominated by Canada and New Zealand. Professor Brown is a renowned international legal expert with extensive experience as a government legal adviser, academic and private practitioner. He has made a significant contribution to the teaching and practice of international law, with work spanning: international dispute settlement; State responsibility; State immunity and international environmental law. The news can be accessed at: http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160506b.aspx

The Willem C. Vis International Commercial Arbitration Moot: Reflections from The University of Queensland

The Willem C. Vis International Commercial Arbitration Moot aims to educate students on arbitration and international sales law. The Moot, held annually in Vienna, is one of the largest in the world; teams from 311 law schools competed in 2016. In the Moot, students apply a set of arbitral rules and the Convention on the International Sale of Goods (CISG) to an international business dispute. This year, students were asked to apply the Vienna International Arbitral Centre (VIAC) Rules of Arbitration and Mediation.

In the months leading up to the Moot, students are required to research and submit two 35-page Memoranda, for the Claimant and the Respondent. These are judged separately from the oral stage of the competition. The second stage of the competition is the oral rounds, which take place in Vienna. In the round-robin component of the oral rounds, each team participates in four moots. The 64 highest-scoring teams from these rounds proceed to the knock-out rounds, culminating in a Grand Final. Each team has 30 minutes to present its oral arguments, and must be able to adapt to the arguments their opponents make. Being an arbitration, the two teams competing against each other must determine the order of speakers and issues together or the decision will fall to the arbitral panel, so flexibility is of utmost importance. Further, teams are asked to represent each side twice in the round-robin stage. For a team to be successful they must have effectively developed both sets of arguments and be able to transition between them.

The 2016 Moot Problem involved an international dispute between a fictitious wine merchant and vineyard. The claim was made on the assumption that there was a breach of a written Framework Agreement that entitled the Claimant to 10,000 bottles of the vineyard's wine. In a Procedural Order that was released as a part of the Problem, teams were asked to address three issues. First, whether the Claimant could claim the additional profits made by the Respondent in selling the wine to a third party. Second, whether there was a right to document production to quantify these additional profits. Finally, the Claimant sought reimbursement for the costs of litigation brought in relation to this dispute. The issue was whether the litigation was brought in breach of the arbitration agreement and whether litigation costs are recoverable under the CISG.

(L-R) *Samuel Bullen, Professor Gabriël Moens, Benjamin Teng, Matthew Paterson, Madeline Rodgers and Sangeetha Badya*

In 2016, The University of Queensland (UQ) was represented by Benjamin Teng, Sangeetha Badya, Samuel Bullen, Madeline Rodgers and Matthew Paterson, and coached by Professor Gabriël Moens. After nearly six months of hard work, the UQ team was awarded an Honourable Mention prize for both their Memorandum for the Claimant and for their Memorandum for the Respondent. Honourable Mentions are generally awarded to the top 30 ranked Memoranda in each category. In oral rounds, the team mooted against Palacký University, University of Münster, University Ss. Cyril and Methodius, and China University of Political Science and Law. The team's success in these four general rounds saw them break through to the elimination rounds, and receive an Honourable Mention award in recognition of the quality of their performance. Unfortunately, UQ was knocked out in their first elimination moot, against the University of Belgrade.

The Vis Moot was an incredible learning experience for the UQ team. Through the intensive process of drafting Memoranda the team was able to investigate international commercial law to a unique level of depth. The students were able to learn not only from their opponents, but also from their arbitrators in each round. Amongst others, they were arbitrated by Hew Dundas, former President of CIArb, and Mark Walter, the Managing Director of Trade Policy at Nathan Associates Inc. The Vis Moot offers an invaluable opportunity for competitors and arbitrators to share their knowledge and passion for arbitration. In combination, these factors made the Vis Moot an empowering and rewarding opportunity for the entire UQ team.

Dr Sam Luttrell
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Clifford Chance LLP (Perth)

Priscilla Lua
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Clifford Chance Asia (Singapore)

Peter Harris[1]
Senior Associate
Clifford Chance LLP (Perth)

Variations on a theme: common law approaches to the incorporation of arbitration clauses

The law on incorporation of arbitration clauses from one agreement into another continues to evolve in the common law world. As other commentators have noted, there is little guidance on this issue to be found in the *Model Law*[2] and the *New York Convention.*[3] As a consequence, this is an area that is largely governed by case law. [4]

A question underlying this debate is whether arbitration clauses are so unique that they should be accorded special treatment. A long line of English shipping cases suggests that it would be unfair and contrary to legal certainty for an arbitration clause contained in a contract between A and B to be incorporated into a third contract between B and C unless there exists clear wording evidencing that this was B and C's intention. The key case around which this rule is based is over a hundred years old and focuses on particular circumstances relating to bills of lading.[5] This ruling makes sense given its historical and factual context.

A century ago, the *New York Convention* did not exist and arbitration was a much less mature form of dispute resolution than it is today: "barebones" arbitration clauses incorporated into bills of lading may well have forced parties into *ad hoc* arbitrations in ports the courts of which had little or no concept of arbitration. In such circumstances, the English Courts may well have been preferable to arbitration, even with the uncertainties of conflict of laws.

Times have changed. Modern arbitration is a principled process generally supported by dedicated supervising institutions and rules underpinned by international treaties and conventions. The courts of other common law jurisdictions, including Australia and Singapore, are tending towards a consensus that arbitration clauses should be treated no differently to any other clause that parties agree to incorporate. As Gary Born puts it: "*the parties' reference to an instrument that contains an arbitration clause should be interpreted to include that provision, just as it includes choice of law and similar provisions that have been developed to support the underlying commercial provisions in question*".[6]

It may surprise some readers that currently, in England and Wales, the position is that, unless there are clear words evidencing the parties' intention to incorporate the external arbitration agreement in a second contract, it cannot be incorporated. Incorporation by general reference is not sufficient. In Australia and Singapore, a more arbitration-friendly approach is being taken by national courts. This article considers recent case law developments in these three jurisdictions.

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[1] Dr Sam Luttrell is Australia qualified Counsel in the International Arbitration Group, Clifford Chance LLP (Perth); Priscilla Lua is a Singapore qualified Senior Associate in the International Arbitration Group, Clifford Chance Asia (Singapore) and Peter Harris is an England and Wales qualified Senior Associate in the International Arbitration Group, Clifford Chance LLP (Perth). The views expressed in this article are those of the authors alone and shall not be attributed to Clifford Chance LLP.

[2] *UNCITRAL Model Law on Commercial Arbitration* (21 June 1985 *International*).

[3] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (7 June 1959).

[4] S Alisson & K Dharmananda SC note that: "*There is little guidance on the question of incorporation by reference in the applicable international regimes*". See "Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience" in *Arbitration International*, Vol 30, No.2 (LCIA, 2014)

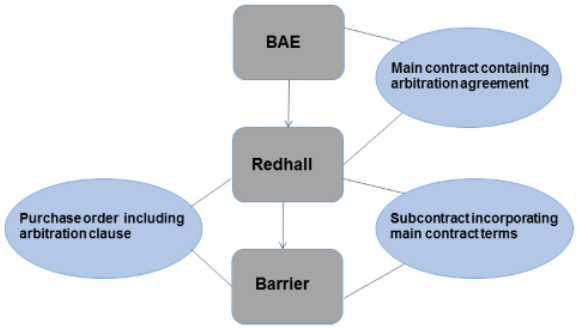
[5] *Thomas & Co Ltd v Portsea Steamship Co Ltd (The Portsmouth)* [1912] A.C. 1.

[6] G Born, *International Commercial Arbitration* (Kluwer Law International, 2009) Vol I, p.700.

The English approach

The recent English case of *Barrier Limited v Redhall Marine*[7] is a classic example of how English law applies to the incorporation of arbitration clauses by reference. Redhall was the main contractor for BAE systems in relation to a project for the construction of submarines for the UK Ministry of Defence. The main contract contained an arbitration clause providing that disputes between BAE and Redhall were to be submitted to arbitration.

Redhall subcontracted painting works to Barrier. The subcontract incorporated the terms of the main contract into the subcontract by the following clause: "*The terms of the* [Main] *Contract shall be incorporated into this Agreement so as to bind Barrier to perform its terms save only where inconsistent with the express terms of this Agreement*". Separately, a purchase order between Redhall and Barrier purported to incorporate Redhall's standard terms of business. This contractual matrix is represented below.



The judge had to consider whether the arbitration clause in the main contract between BAE and Redhall was successfully incorporated into the subcontract between Redhall and Barrier. Alternatively, the Court had to consider whether the arbitration clause in the purchase order was incorporated.

Behrens J first turned to the case of *Aughton Ltd v MF Kent Services Ltd*. In *Aughton's case* Sir John Megaw and Gibson LJ formulated different tests to consider whether or not an arbitration clause should be incorporated. In summary, Gibson LJ said the Court had to consider whether the wording of incorporation displayed such an intent for the arbitration clause in the contract between A and B to be incorporated into the contract between B and C that the court is required to modify its terms so that it can be applicable to disputes between B and C. Sir John Megaw however said that express words would be needed to incorporate the arbitration clause. English case law has synthesised and developed these two discordant positions including through the cases of *Habas Sinai v Sometal* [8] and *TTMI SARL v Statoil.* [9] The consensus is that to incorporate an arbitration clause from a second contract "clear words" are needed. The reasoning behind this is that arbitration clauses are ancillary agreements not directly relevant to the main subject of the contract. They are also severable agreements, must be made in writing and constitute the only source of an arbitral tribunal's jurisdiction. They therefore require special treatment.

Applying the "clear words" approach, Behrens J found that the lack of express wording incorporating the arbitration clause meant that the arbitration clause from the main contract was *not* incorporated. Interestingly however, in *Barrier,* Redhall's standard terms of business were held to be incorporated and these terms included the arbitration clause, even though Barrier had not seen them. This finding is consistent with the decision in *Habas Sinai* where, in a moment of commercial clarity, the Court held that it would be odd for a business

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[7] *Barrier Limited v Redhall Marine Limited* [2016] EWHC 381 (QB).

[8] *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AA v Sometal SAL* [2010] EWHC 29 (Comm).

[9] *TTMI SARL v Statoil* [2011] EWHC 1150 (Comm). It is interesting that in *TTMI v Statoil,* although the court concurred that clear words are required to incorporate an arbitration clause, in this particular case the clear words were in emails that formed a second contract that were incorporated by general reference. This is arguably a relaxation of the application of the clear words requirement if not a substantive relaxation of the approach itself.

person to agree to the incorporation of all terms but not the arbitration clause. [10]

In summary, English law maintains that clear words are needed for incorporation of an arbitration clause from a contract between A and B into a contract between B and C. Where the dispute about incorporation relates to standard terms to be incorporated into one contact (a "**single contract case**" as opposed to a "**multi-contract case**"[11]) no special rules apply and a regular "battle of the forms" approach can be taken to all terms including the arbitration clause.

Australia

The position in Australia is that the incorporation of an arbitration clause is subject to the same rules as any other purportedly incorporated term. In the 1997 case of *Carob Industries Pty Ltd (In Liquidation) v Simto Pty Ltd*,[12] Malcolm CJ concluded that the arbitration clause in the general conditions of the head contract (between Carob and Robe River Mining Company) was incorporated into a subcontact (between Carob and Lief) by reference.

The Chief Justice's reasoning acknowledged the pro-arbitration policy embodied by the *Commercial Arbitration Act*[13] and considered the strict English approach as limited to cases relating to bills of lading.[14]

Malcolm CJ was also assisted by the wording of the incorporation clause which stated that the terms of the second contract "*will be deemed to apply between the Main Contractor and Sub-Contactor*". The use of "*deemed to apply*", rather than simply "*apply*", is more flexible and allows for some mutation of the wording. The question of the court needing to amend the clause if incorporated did not arise.

Before *Carob* it does not appear that the Australian courts had been given the opportunity to consider this point. Indeed, in the first instance decision in *Lief v Conagara*, the trial judge was not aware of *Carob* and concluded that despite his instinct to allow incorporation of an arbitration clause: "*the weight of* [English law] *authority and demand for certainty is too great to enable me, sitting at first instance, to give effect to the view I prefer*". However, the appellate court *was* aware of the judgment in *Carob* and endorsed Malcolm CJ's approach in *Carob*.[15]

The position in Australia is therefore clear and no special rules apply to the incorporation by reference of arbitration clauses than to any other type of clause.

Singapore

The Singapore courts have also taken a decidedly pro-arbitration stance in straying from the strict English position in relation to the incorporation of arbitration clauses, as seen from the recent Court of Appeal decision in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130.

In that case, International Research Corp, Lufthansa and Datamat entered into Supplemental Agreements, which were expressly stated to be annexed to and made a part of the Cooperation Agreement, which had been entered into only by Lufthansa and Datamat. One of the questions that arose for the Singapore Court of Appeal's consideration was whether International Research Corp was bound by the arbitration agreement contained in the Cooperation Agreement.

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[10] *Habas Sinai v Sometal*, per Clarke J at paragraph 51: "*I do not accept that, in a single contract case, the independent nature of the arbitration clause should determine whether it is to be incorporated. A commercial lawyer would probably understand that an arbitration clause is a separate contract collateral to another substantive contract and that the expression "arbitration clause" is, on that account, something of a misnomer for "the arbitration contract which is ancillary to the primary contract". But a businessman would have no difficulty in regarding the arbitration clause (as he would call it) as part of a contract and as capable of incorporation, by appropriate wording, as any other term of such a contract; and it is, as it seems to me to a businessman's understanding that the court should be disposed to give effect. A businessman who had agreed with his counterparty a contract with ten specific terms under various headings and then agreed with the same counterparty terms 1–5 under the same headings as before and, as to the rest, that all the terms of the previous contract should apply, would, I think, be surprised to find that "all" should be interpreted so as to mean "all but the arbitration clause"*.

[11] The "single contract"/"two contract" distinction was framed by Langley J in *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Athena)* [2006] EWHC 2530 (Comm). This article refers to single contract and multi-contract situations.

[12] *Carob Industries Pty Ltd (In Liquidation) v Simto Pty Ltd* (1997) 18 WAR 1.

[13] The influence of the clear arbitration policy behind the *Commerical Arbitration Act*, as evidenced by the interpretive provisions of the Model Commercial Arbitration Bill, was predicted by the authors in S Luttrell, S McComish and C Miles *Understanding Australia's New Domestic Arbitration Regime: A Comparison of the Australia State Commercial Arbitration Act and the new Model Commercial Arbitration Bill* (CIArb, 2010)

[14] *Carob Industries Pty Ltd v Simto Pty Ltd* (1997) 18 WAR 1 per Malcolm CJ with whom Pidgeon and Murray JJ agreed.

[15] *Lief Investments Pty Ltd v Conagra International Fertilisers Co* (Unreported, New South Wales Court of Appeal, 16 July 1998).

Significantly, the Singapore Court of Appeal examined the rationale for the strict rule in England and found that such concerns were no longer as relevant in today's context. In particular, the Singapore Court of Appeal found that "*the notion that to oust the jurisdiction of the court is something odious and, therefore, has to be established by proof of the requisite intention to a higher degree is an outdated one*"; further that, "*while, as a matter of legal technicality, it is correct to state that an arbitration clause is an independent and self-contained contract* […] *to place such significant weight on this distinction seems unfounded*".

As such, the Singapore Court of Appeal ultimately decided that the strict rule applied in England had been "*overextended impermissibly from its original application*", and preferred to approach the issue as to whether an arbitration agreement had been incorporated as a matter of contractual interpretation i.e. whether the parties intended to incorporate the arbitration agreement in question by referring, in their contract, to it or to a document containing it. This question was to be answered with regard to the context and the objective circumstances attending the entry into the contract.

On the facts, the Court found that parties had not intended that the arbitration agreement in the Cooperation Agreement was to be incorporated as part of the Supplemental Agreements, principally because International Research Corp had not undertaken any obligation under the former agreement, and could not be held to the arbitration clause in that agreement.

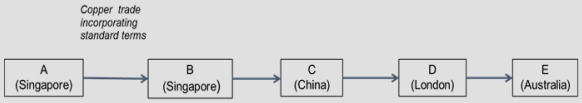
This judgment laid down by the highest court in Singapore reinforces its "*unequivocal judicial policy of facilitating and promoting arbitration*".[16]

Discussion

In common law jurisdictions, there is a trend away from according special treatment to arbitration clauses when it comes to incorporation. While in England and Wales the courts still require clear wording in a multi-contract situation, it is well established that no such wording is required in a single contract case, for example, where the arbitration clause is located in one party's standard terms.

The authors expect that in the medium term, English Courts will shift more towards the position that prevails in Australia and Singapore. In the meantime, there are implications for those using standard form agreements containing terms that get passed down contractual chains. Typically such contractual chains arise in transport, construction, finance and commodities and the issue takes on additional complexity when the transaction in question is cross border.

For example, A and B are companies based in Singapore. A enters into a copper trade with B and incorporates the London Metals Exchange (LME) rules which include the LME arbitration provisions.[17] The contract is then traded to party C in China who then sells it on to party D in London, who then sells it on to party E in Australia. A diagram of this trade is below:



Wherever a dispute arises in this chain, provided that the governing law is Australian or Singapore law, and it is clear that the parties intended the terms of the initial contract between A and B to be applied in subsequent contracts, the courts are most likely to find that the arbitration clause is also incorporated. However, if the governing law is not specified, or English law is selected (or becomes) the applicable governing law of the contract, there is a significant risk that the arbitration clause will not carry through (unless there are clear words evidencing the intention to apply the arbitration clause specifically). Where no governing law is specified and the contract is subject to conflict of laws, it may even be that at some point in the chain the arbitration clause will drop out even if the jurisdiction of the dispute is Australia or Singapore.

Taking this into account, best practice is to think carefully about governing law and, where English law applies, or could be deemed to apply, the language of incorporation should specifically refer to the arbitration clause (if arbitration is desirable). Parties to contracts incorporating standard or general terms should also make the effort to obtain and read those provisions and satisfy themselves they are clear and adequate. Failure to do so can lead to uncertainty over the forum for dispute resolution and the additional expense that entails. This is particularly important in international contexts.

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[12] See *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 at [27], citing its comments made in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732.

[17] For example, the LME contract specification for copper contracts requires that "*in the case of unresolved disputes, arbitration is effected via the LME arbitration procedure, and/or by other body agreed by the parties*." LME copper contracts will often simply state that the LME Rules apply. Other commodities contracts may allow parties to elect which of the applicable standard form provisions or rules that they want to apply.

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Dispute resolution clauses for China-related contracts: what you need to know

Business dealings between Australia and China have steadily increased over the past decade[1] and, no doubt, will strengthen further in the wake of the China-Australia Free Trade Agreement (ChAFTA) which came into force on 20 December 2015. The increased commercial ties between the two countries brings about, inevitably, an increased risk of Australian parties becoming involved in disputes arising out of China-related contracts.[2] In that context, as discussed in this article, there are some features of the dispute resolution landscape in China that Australian practitioners should be aware of when guiding their clients through these transactions and the disputes that might arise.

What you need to know: 'onshore' vs 'offshore

In this context, 'onshore' means *mainland* China excluding Hong Kong, Macao and Taiwan, whereas 'offshore' includes those regions as well as any foreign country.

Although part of China, Hong Kong operates under a different system of law. This means:

1. in so far as it is mandatory for a type of contract to be governed by (mainland) Chinese law or, if litigated, litigated in an onshore Chinese Court, a choice of Hong Kong law or Hong Kong litigation is invalid; and
2. the special considerations raised below in relation to onshore arbitration in mainland China do not apply to arbitrations seated in Hong Kong.

What you need to know: governing law clauses

The basic rule is that only 'foreign-related' contracts can be governed by a foreign law.[3] Fortunately for Australian parties, a contract is 'foreign related' if at

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[1] The most recent Australia-China Trade Report commissioned by the Australia China Business Council (ACBC) found that two-way trade between China and Australia has increased almost five-fold since 2009. ACBC, "The 2014 Australia-China Trade Report Synopsis" Available online: http://acbc.com.au/admin/images/uploads/Copy2ACTradeReport_Synopsis_WEB_v1.pdf (accessed 13 May 2016).

[2] A 'China-related' contract being, for this purpose, one or more of the parties is Chinese and/or some or all of the contract is to be performed in China.

[3] See Article 126, Contract Law of the People's Republic of China 1999 (1999 Contract Law) and Article 3, Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations 2010 (2010 Foreign-Related Civil Relations Law).

least one of the parties is foreign.[4] However, it's important to note that, in the context of companies, this test turns strictly on the place of incorporation. Vehicles commonly used by foreign parties, such as a Wholly Foreign Owned Enterprise (a "WFOE"), are not a foreign party for this purpose. A contract may still be 'foreign-related' even if all parties are incorporated under the laws of China where, for example, a party is 'habitually resident' outside of China or where the subject matter of the contract is outside of China or where the 'occurrence, modification or termination' of the relationship takes place outside of China.[5] However, the application of these latter tests can be nuanced and expert legal advice is recommended.

Importantly, there are some occasions where a choice of Chinese law is mandatory or strongly advisable, even for a foreign-related contract. These categories of contracts include contracts for sino-foreign equity joint ventures and co-operative joint ventures as well as contracts for sino-foreign co-operative exploration or exploitation of natural resources.[6] In addition, foreign law cannot govern a contract if doing so would damage 'the social and public interests' of the PRC or impermissibly avoid mandatory laws or prohibitions.[7] Again, expert legal advice may be necessary to confirm whether a contract falls within an exception to the basic rule.

[4] See Article 1 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Law of the Peoples Republic of China on the Application of Laws to Foreign-Related Civil Relations 2012 (**2012 Foreign-Related Civil Relations Interpretation**) and Article 522 of the Interpretation of the Supreme People's Court of China on the Application of the Civil Procedure Law of the Peoples Republic of China 2015 (**2015 Interpretation on the Civil Procedure Law**).

[5] See, generally, the 2010 Foreign-Related Civil Relations Law and the 2012 Foreign-Related Civil Relations Interpretation. See also Article 522 of the 2015 Interpretation on the Civil Procedure Law.

[6] Article 126 of the 1999 Contract Law.

[7] Articles 4 and 5 of the 2010 Foreign-Related Civil Relations Law. In addition, Article 10 of the 2012 Foreign-Related Civil Relations Interpretation identifies some examples of legislative areas which involve the 'social and public interest', including matters such as protection of workers' rights and interests, food or public health safety, and anti-monopoly or anti-dumping.

What you need to know: dispute resolution options

Litigation vs arbitration

Litigation is unlikely to be the preferred dispute resolution mechanism for Australian parties entering into China-related contracts for at least three reasons:

1. Australian Court decisions are not enforceable in mainland China.
2. Chinese litigation would require Australian parties to retain mainland Chinese lawyers and the proceedings will be conducted in Chinese language pursuant to procedures which are likely to be unfamiliar to an Australian party.
3. Where parties opt for litigation (as opposed to arbitration), Chinese law requires that certain types of disputes must be litigated in a mainland Chinese Court even though the dispute qualifies as 'foreign-related'.[8] That restriction does not apply to arbitration: the same types of disputes which, if litigated, would need to be litigated in China, could be resolved by arbitration seated offshore.

Onshore vs offshore arbitration

Australian parties are naturally likely to prefer arbitration seated at home or in one of the region's recognised arbitration hubs.

China is a signatory to the New York Convention and, generally speaking, now has a reasonably good record of enforcing offshore arbitral awards from New York Convention countries (such as Australia). A recent review of enforcement decisions in China found:

> *Chinese judges are getting more experienced and sophisticated in dealing with enforcement applications. They are able to articulate their views and reasoning, and come to sensible and logical conclusions in cases involving complex issues.*[9]

Historically, foreign parties have faced practical difficulties enforcing offshore arbitral awards in China. Although reports of some persistent issues remain, these difficulties have been mitigated, to some extent, by the reporting system

[8] Specifically, disputes arising from sino-foreign equity and co-operative joint ventures and from sino-foreign co-operative exploration/exploitation of natural resources in mainland China. See Article 266 of the Civil Procedure Law of the People's Republic of China (**2012 Civil Procedure Law**).

[9] Teresa Cheng SC and Joe Liu, "Enforcement of Foreign Awards in Mainland China: Current Practices and Future Trends" (2014) 31 (5) *Journal of International Arbitration* 31, 651 at 671.

introduced by China's leading Court, the Supreme People's Court.[10] In short, before a regional Chinese court can refuse enforcement of an offshore arbitral award, the case must be reported up, first to the intermediate level, and ultimately to the Supreme People's Court for sanction.

Having said that, Chinese Courts are not likely to enforce a foreign seated arbitral award relating to a purely domestic dispute (i.e. between two Chinese parties relating to Chinese subject matter).[11] Generally speaking, Chinese Courts take the view that only 'foreign-related' disputes can be arbitrated offshore (using the term 'foreign-related' in the same sense as discussed above in relation to governing law, mutatis mutandis).

Moreover, anecdotal evidence and experience suggests that Chinese parties are increasingly using their bargaining power to push for arbitration seated onshore.

Onshore seated arbitrations are subject to the supervisory jurisdiction of Chinese Courts and to the provisions of Chinese Arbitration Law, which may add an uncomfortable element of uncertainty for Australian parties. Oftentimes, compromises can be found to avoid formally seating an arbitration onshore. For example, Australian parties may wish to consider proposing arbitration under their preferred rules and seat (say, ACICA arbitration seated in Melbourne) but with provision for oral hearings to take place in the home town of the Chinese counterparty. Arbitration seated in Hong Kong is also a common c**o**mpromise.

Special considerations for onshore arbitration

The arbitration framework in China is improving. Notably, the reporting system mentioned above in relation to offshore arbitral awards also applies to any 'foreign-related' arbitral awards made in China. The grounds for refusing enforcement of 'foreign-related' onshore awards are narrower than the grounds for refusing enforcement of purely domestic awards and largely mirror the New York Convention grounds.[12] An Australian party may also find comfort knowing that foreign lawyers can represent parties in onshore seated arbitrations, although some familiarity with the Chinese landscape may be useful and local representation would be required for any ancillary proceedings in the Chinese Courts.

To be enforceable in China, an onshore arbitration clause must specify an arbitral institution (ad hoc arbitration is not recognised under Chinese law).[13] Further, there remains ongoing debate and uncertainty about the capacity for a foreign arbitral institution (such as ACICA) to administer an arbitration seated onshore in mainland China. For the time being, therefore, it remains advisable to choose a mainland Chinese arbitration commission for onshore arbitration. There are many Chinese arbitration commissions but most cater for the domestic arbitration market and only a relatively small number of them have noteworthy experience administering international arbitrations. The principal arbitration commission with international experience is CIETAC, based in Beijing.

In 2012, the Shanghai and Shenzhen sub-commissions of CIETAC broke-away to form SHIAC and SCIA respectively. The fallout has resulted in a number of disputes at the enforcement stage – with the losing party asserting, for instance, that an arbitration seated in Shanghai administered by the incoming institution, SHIAC, (rather than CIETAC) did not proceed in accordance with the parties' agreement. Although there are now rulings from Chinese Courts largely clarifying the situation, for the time being, it remains advisable to seat CIETAC arbitrations in Beijing rather than Shanghai or Shenzhen where possible and, otherwise, to seek up-to-date specialist advice.

Finally, there are some special considerations that practitioners should take account of when drafting onshore arbitration clauses. In particular:

- The default position under many Chinese arbitral rules (including CIETAC's rules) is that parties must nominate an arbitrator from the institution's panel. Parties should consider expressly permitting "off-panel" appointments.
- Chinese arbitration commissions commonly appoint a Chinese lawyer as the presiding arbitrator, which, from an Australian party's perspective, can create an imbalance in the constitution of the tribunal. Parties should consider expressly requiring that the presiding arbitrator be of a nationality different from the parties.
- The default position under many Chinese arbitral rules (including CIETAC's rules) is that arbitrations will be conducted in Chinese. Australian parties would be well advised to insist that the language of the arbitration shall be English, or, failing that, 'English and Chinese.'

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[10] See the Supreme People's Court's Notification concerning the Handling of Issues Regarding Foreign-related Arbitration and Foreign Arbitration Matters by the People's Courts, 1995.

[11] Article 128 of the 1999 Contract Law, for example, permits parties to foreign-related contracts to submit disputes to arbitration either offshore or onshore. There is no equivalent provision permitting parties to purely domestic contracts to submit disputes to offshore arbitration.

[12] Contrast Article 237 of the 2012 Civil Procedure Law to Article 274 of the 2012 Civil Procedure Law. Notably, for domestic arbitration, the grounds for resisting enforcement include that 'evidence has been forged' or that 'the opposing party has withheld evidence.'

[13] Article 16 of the Arbitration Law of the People's Republic of China 1995.

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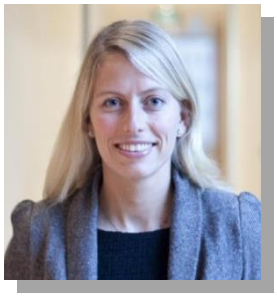

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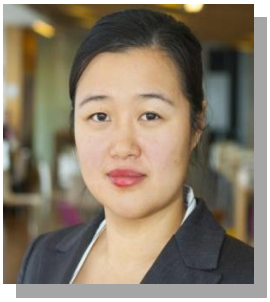

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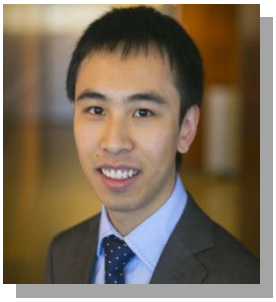

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Philip Morris v Australia: lessons for structuring investments

The reasons for the decision[1] in Philip Morris' billion dollar challenge to Australia's plain packaging legislation were recently released. The reasons confirm that companies should structure their investments to take advantage of these treaty protections at the time they make their investment, and may not be protected if they restructure their investment only when a dispute is looming.

Background

Philip Morris' billion dollar challenge to Australia's plain packaging legislation failed, with an international investment treaty arbitration Tribunal dismissing the claim. Philip Morris' complaint was against Australian laws which banned the sale of branded tobacco products. These laws had the effect of requiring all vendors of tobacco in Australia, including Philip Morris, to sell their products, such as cigarettes, without any of their trademarks. Instead, all tobacco products are required to be sold in plain packages, marked with graphic health warnings. Philip Morris' case was that these laws extinguished its intellectual property rights, and therefore impaired the value of its investment in Australia.

The cornerstone of Philip Morris' case, whether Australia's regulatory acts done in the interests of public health were nonetheless acts which require the Australian government to compensate it, is a question of great interest to business and governments globally. States want to encourage foreign investment through offering investment protection, but want to safeguard their right to regulate in the public interest (for example in relation to health, the environment etc) without those regulatory measures resulting in the state having to compensate foreign investors in a way that it would not have to compensate domestic players.

How did Philip Morris attempt to bring its investment treaty claim?

Philip Morris' claim was made pursuant to the bilateral investment treaty between Hong Kong and Australia, which gives Hong Kong incorporated investors the right to initiate claims directly against the Australian government for breaches of the investment protections in the treaty. Philip Morris Asia Limited ("**PM Asia**") is a limited liability company incorporated in Hong Kong. By the time of the arbitration, PM Asia owned all the shares in Philip Morris (Australia) Limited ("**PM Australia**") which is incorporated in Australia. PM Australia in turn owned all the shares in Philip Morris Limited ("**PML**") which is also incorporated in Australia.

The restructure of the ownership of the Australian subsidiaries to bring them under the umbrella of PM Asia was formally completed on 23 February 2011.[2]

Why did Philip Morris' claim fail?

The first important finding that the Tribunal made was that, prior to the restructuring, PM Asia did not have a substantial interest in the Australian subsidiaries and PM Asia did not exercise management control of any significance in respect of the Australian subsidiaries.[3] Consequently before 2011, the Hong Kong entity did not have "control" with a "substantial interest" over the Australian investments to meet the treaty requirements.[4]

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[1] *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia* (Award on Jurisdiction and Admissibility, Permanent Court of Arbitration, Case No. 2012-12, 17 December 2015) ("**Award on Jurisdiction and Admissibility**").

[2] Award on Jurisdiction and Admissibility at [163].

[3] Award on Jurisdiction and Admissibility at [502] and [506].

[4] Award on Jurisdiction and Admissibility at [509].

The Tribunal agreed that it could be legitimate for an investor to structure its investment through a particular jurisdiction in order to take advantage of an investment treaty between that jurisdiction and the place in which the investment is located. Indeed, the Tribunal found that there is a high threshold for establishing an abusive initiation of an investment claim.[5] But it found that bringing claims pursuant to an investment treaty, after changing its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable was an abuse of rights and not permissible. The standard for determining whether a dispute was foreseeable was when there is a reasonable prospect that a measure which may give rise to a treaty claim will materialise.[6]

The Tribunal found that this reasonable prospect threshold was met on 29 April 2010 once the then Prime Minister Kevin Rudd and Health Minister Nicola Roxon announced the Australian government's intention to introduce plain packaging measure.[7] Only after this announcement did Philip Morris re-structure its investment in Australia so that the investment was owned by a Hong Kong incorporated entity.

[5] Award on Jurisdiction and Admissibility at [539].
[6] Award on Jurisdiction and Admissibility at [554].
[7] Award on Jurisdiction and Admissibility at [566]

Further, the Tribunal found that the principal, if not sole, purpose of the corporate restructuring was to gain protection under Australia's bilateral investment treaty with Hong Kong.[8] It was not material that the Philip Morris restructuring occurred before the legislation was actually passed. Indeed, there was a 19 month period between the government announcement and the enactment of the laws.[9]

Lessons Learned

This claim can be seen as a vindication of states' rights to regulate in the public interest, as Australia will not be required to compensate Philip Morris, despite it no longer being permitted to use its intellectual property on tobacco products in Australia. While it is true Australia will not be required to compensate Philip Morris, the issue of whether Australia's public health regulations breached the investment protections in the treaty was not actually tested.

Rather, this case demonstrates that businesses should consider how to structure an investment to obtain potential benefits of bilateral investment treaties at the time of investment. Failure to consider this until political changes are announced may be too late to enable the company to take advantage of potential protections available under investment treaties.

[8] Award on Jurisdiction and Admissibility at [588].
[9] Award on Jurisdiction and Admissibility at [567].

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Interim Measures – an effective strategy or a toothless tiger?

2016 ACICA Review

Interim measures can play a crucial role in the preservation of the status quo or prevention of irreparable harm pending the outcome of a dispute. In an international arbitration, a party seeking to apply for interim measures will generally have at least two options; either apply to the arbitral tribunal or apply to the national courts of the country where enforcement is sought. In addition, in many cases where urgent relief is required (depending upon the applicable arbitral rules), a party may also have the option to seek interim measures from an emergency arbitrator before the arbitral tribunal is constituted.

There are many factors to consider in deciding which option to pursue. Chief among these are:

- the degree of urgency;
- the type of relief sought;
- whether the application needs to be on an *ex parte* basis e.g. an application for a freezing order;
- whether relief against third parties is needed; and
- the powers of and likely attitude of the national courts to awarding interim relief in the country in which enforcement is sought.

This article aims to provide some brief guidance on how the various options may be weighed against each of these factors.

Interim relief from the arbitral tribunal

Almost all international arbitration rules provide for broad powers of arbitral tribunals to award interim relief.[1] Many rules also provide for urgent relief through an emergency arbitrator before the arbitral tribunal is constituted.[2] The power to award interim relief may also be impacted by national arbitration legislation. Such powers may be conferred under the *lex arbitri* (generally the law of the seat). Where the UNCITRAL Model Law (the ***Model Law***) has been adopted, in particular with revisions incorporated in 2006, the power to award interim relief is very broad.

Interim relief from national courts

The 2006 revisions to the Model Law provide for courts to have the same powers to award interim measures in relation to arbitration proceedings as they have under the national laws applicable to court proceedings.[3] Many countries have arbitration laws which permit this in any event. The 2006 revisions also provide for recognition and enforcement of interim measures made by arbitral tribunals, with limited prescribed grounds for refusing enforcement.[4]

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[1] See, for example, Article 33 of the 2016 ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions, Rule 26 of the 2013 SIAC Rules, Article 23 of the 2013 HKIAC Arbitration Rules, Article 25 of the 2014 LCIA Arbitration Rules and Article 28 of the 2012 ICC Arbitration Rules.

[2] See for example Article 33.1 of the 2016 ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions, Rule 26.2 of the 2013 SIAC Rules, Article 23.1 of the 2013 HKIAC Arbitration Rules, Article 9B of the 2014 LCIA Arbitration Rules and Article 29 of the 2012 ICC Arbitration Rules.

[3] See Article 17J of the Model Law.

[4] See Article 17H and 17I of the Model Law.

Degree of urgency

Where urgent relief is required, the best option will usually be to apply to the national courts, provided they have sufficiently broad powers to award interim relief and quick, just and efficient procedures for obtaining interim relief. This may well be the case in most Australian jurisdictions, even where Australia is not the seat of arbitration.[5] Where there may be doubts about the effective availability of interim measures through national courts where enforcement may be necessary, the emergency arbitrator procedures prescribed under many institutional rules may be the best available option. This will often be the case where enforcement would be required in a country which is not the seat of the arbitration.[6]

Types of relief

Some rules specify the categories of interim relief that an arbitral tribunal may grant.[7] Others are less prescriptive and provide that the arbitral tribunal may award any form of relief that it deems "necessary"[8] or "appropriate"[9].

In practice a wide variety of interim orders can be made. The following general categories of relief have been sought by parties in arbitral proceedings:

- orders to safeguard the enforcement of an award e.g. an order that the responding party not jeopardise, during the course of an arbitration, funds necessary to fulfil payment obligations under the parties' contract;[10]
- orders to preserve the status quo e.g. an order restraining any dealing with any assets the subject of the dispute that the responding party refrain from calling on bank guarantees;[11]
- orders to avoid the aggravation of the dispute e.g. an order that a shipper be permitted to sell a shipment of coal that was deteriorating but which was the subject of the dispute;[12]
- anti-suit injunctions e.g. an order that the responding party refrain from commencing litigation in a national court in breach of an arbitration agreement and restraining the party from breaching the confidentiality provisions in the contract;[13]
- orders for interim payments e.g. an order that the responding party make an immediate payment with a right for the applicant to seek reimbursement following the final award; and
- orders requiring security for legal costs.

If the relief sought requires immediate coercive enforcement e.g. an order freezing the responding parties' bank account, the applicant should consider making the application in the national courts. The ex parte nature of this application, its degree of urgency and the involvement of a third party (i.e. the bank) are likely to create jurisdictional as well as practical impediments to effective relief from an arbitral tribunal.

Ex parte interim relief

The majority of national laws and arbitration rules are silent as to whether an application for interim measures can be granted *ex parte*. However, most national laws and institutional arbitration rules provide that both parties should be given a fair and equal opportunity to present their case.

While Article 17B(1) of the Model Law permits a party to make an ex parte request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure, Article 17C(5) states that such measures are binding only between the parties and are not enforceable by a court. Moreover, very few jurisdictions have adopted the ex parte provisions in Articles 17B and 17C.[14] In practice, emergency arbitrators and arbitral tribunals will be very reluctant to grant interim orders on an ex parte basis given the possibility of exceeding jurisdiction and the

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[5] See Greenberg, Kee and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge: Cambridge University Press, 2011), at 7.200.

[6] See Greenberg, Kee and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge: Cambridge University Press, 2011), at 7.197 to 7.204.

[7] See Article 33.2 of the 2016 ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions, Article 23.3 of the 2013 HKIAC Arbitration Rules and Article 25.1 of the 2014 LCIA Arbitration Rules..

[8] See Article 21(1) of the ICDR Rules.

[9] See Article 28(1) of the ICC Rules.

[10] Carlevaris and Feris, "*Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*" [2014] ICC International Court of Arbitration Bulletin Vol 25 No 1.

[11] Bose and Meredith, "*Emergency Arbitration Procedures: A Comparative Analysis*" [2012] Int.A.L.R, Issue 5.

[12] Bose and Meredith, "*Emergency Arbitration Procedures: A Comparative Analysis*" [2012] Int.A.L.R, Issue 5.

[13] Carlevaris and Feris, "*Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*", (2014) ICC International Court of Arbitration Bulletin Vol 25 No 1.

[14] The New Zealand *Arbitration Act 1996* and the 2011 Hong Kong Arbitration Ordinance (Cap. 609) adopt Articles 17B and 17C of the Model Law.

risk that a national court would refuse to enforce the orders because the responding party was not given proper notice of the proceedings or was unable to present its case.

Given these difficulties, if the relief sought is such that it needs to be granted ex parte, the national courts are likely to be the preferred option.

Third parties

Another area of difficulty is if the relief sought is against a third party i.e. against a party that is not a party to the arbitration agreement. The jurisdiction of an arbitral tribunal is generally limited to the parties before it and consequently an arbitrator can only grant interim relief against one of those parties.

At the very least, an arbitral tribunal may have the authority to order the responding party to take certain steps as regards the third party. For example, if the responding party has some control over the third party, the arbitral tribunal could order the responding party to direct the third party to take certain actions e.g. to order a company to direct its subsidiary company to refrain from taking certain steps.[15]

However, in most situations, where the assets in dispute are in the possession of a third party, the national courts are likely to be the most effective forum in which to request interim measures effecting the third party.

Powers and likely attitude of national courts

Where enforcement of interim measures is required in countries where national courts may not be an efficient option, the arbitral tribunal is likely to be the best option, at least as a first recourse. Ultimately, it may be necessary to seek assistance from the national courts to enforce any interim measures ordered by the tribunal, but only if there is not voluntary compliance.

[15] See Born, *International Commercial Arbitration* (2nd Edition, Kluwer Law International 2014), page 2445.

In urgent matters, whilst there is evidence that the use of emergency arbitrators is on the increase, the provisions for emergency arbitrators are still relatively new. Moreover, most provisions do not retrospectively apply to arbitration agreements entered into before the provisions came into effect, unless the parties' arbitration agreement expressly adopt whichever rules are in force at the time of the arbitration. This means we should expect to see greater use of emergency arbitrators over time as more disputes relate to arbitration agreements entered into after the emergency arbitrator provisions came into effect.

There is considerable debate as to the enforceability of interim awards or "orders" made by emergency arbitrators. Both Hong Kong and Singapore have incorporated a specific provision in their arbitration laws for enforcement of interim awards of emergency arbitrators.[16] Absent similar legislation in other jurisdictions (such as Australia), it is prudent to assume that enforceability is uncertain at best. However, in practice failure to comply with an order of an emergency arbitrator would amount to a breach of contract and is likely to reflect unfavourably before the subsequently constituted arbitral tribunal.

Leaving aside the question of enforceability, three significant issues which have arisen in practice in relation to the application of emergency arbitrator provisions are[17]:

- What law or standards determine the principles to be applied in deciding whether to grant interim measures?

Most arbitral rules give broad discretion to emergency arbitrators. This includes for example, a discretion to grant such measures as they consider "appropriate" or "deemed necessary".[18] It may be contended that emergency arbitrators should have regard to the principles applicable in the national courts where enforcement is sought, particularly if that is part of the law governing the contract. In practice, emergency arbitrators are not so constrained and have regard to international arbitral practice.

[16] Under section 2 of the Singapore International Arbitration Act 2012, "arbitral tribunal" is defined to include emergency arbitrators. Under section 12(6), all orders or directions made by arbitral tribunals are enforceable in Singapore in the same way as an order made by the court. to include "emergency arbitrator". Section 22A and 22B of the 2011 Hong Kong Arbitration Ordinance (Cap. 609) permit the Hong Kong courts to enforce relief granted by an emergency arbitrator.

[17] Carlevaris and Feris, "*Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*", (2014) ICC International Court of Arbitration Bulletin Vol 25 No 1.

[18] See Article 21(1) of the ICDR Rules and Article 28(1) of the ICC Rules.

Difficult conflicts may arise where a national court has made a determination in parallel proceedings, particularly where the court has applied standards out of line with international practice or has failed to apply the applicable standards correctly. In practice, emergency arbitrators have considered whether there is a *prima facie* case and a risk of irreparable harm. The balance of convenience may also be taken into account. The first of these two factors is expressly made relevant in Australia by the adoption of the 2006 revisions to the UNCITRAL Model Law.[19] The ACICA rules also effectively prescribe each of these three factors as relevant considerations to be taken into account by emergency arbitrators.[20]

- Where a multi-tiered dispute resolution clause applies, must the pre-arbitration steps be taken before an emergency arbitrator can assume jurisdiction?

- It is not uncommon for dispute resolution clauses to provide for procedures such as informal meetings, discussions and/or a formal mediation, to take place before either party may proceed to appoint an arbitrator. These steps typically take at least several weeks to be completed. If these preconditions had to be complied with before an emergency arbitrator could be appointed, it would in practice undermine the purpose of appointing an emergency arbitrator. In at least one ICC case, the emergency arbitrator held that the multi-tiered procedure did not apply to the appointment of emergency arbitrators.[21] In doing so, the emergency arbitrator noted that to hold otherwise would deprive the parties of the possibility of obtaining interim relief when it was most needed (after the dispute had arisen but before the arbitral tribunal was constituted). However, a tension may often exist between the terms of the multi-tiered dispute resolution procedure and the emergency arbitrator provisions. This is worth addressing at the drafting stage.

- Should emergency arbitrator provisions apply retroactively where the arbitration agreement contains a provision to the effect that the relevant rules in force at the time of the arbitration shall apply?

  Emergency arbitrator provisions are a substantial additional element in the dispute resolution process which is unlikely to have been envisaged at the time of the arbitration agreement. For that reason they are generally expressed not to operate in respect of arbitration agreements entered into before the provisions came into effect. However, the better view is that they should apply retroactively in such circumstances where the parties have specifically stated (as is sometimes the case) that whatever rules apply at the time the dispute arises shall govern the dispute.

Conclusions

Generally, where it is expedient to do so, the best option for a party seeking interim measures is to apply to national courts of countries where the interim measures would need to be enforced. This avoids the need for separate enforcement proceedings and provides confidence that there will be effective sanctions for non-compliance. Having said that, orders from arbitral tribunals are in practice more than a toothless tiger, and the option of approaching an arbitral tribunal (or emergency arbitrator if the tribunal has not yet ben constituted) can in many circumstances be an effective strategy.

[19] See section 18B the Australian *International Arbitration Act 1974* (Cth).
[20] Article 3.5 of Schedule 1 of the 2016 ACICA Arbitration Rules incorporating the Emergency Arbitrator Provisions.
[21] Carlevaris and Feris, "*Running in the ICC Emergency Arbitrator Rules: The First Ten Case*", (2014) ICC International Court of Arbitration Bulletin Vol 25 No 1, page 5.

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Gutnick v Indian Farmers Fertiliser Cooperative Ltd: Another strong example of Australian Court's pro-enforcement attitude

As most arbitration practitioners and observers in Australia would know, recent decisions from our State and Federal courts display a pro-enforcement attitude towards foreign arbitral awards. Whilst there certainly may have been periods (a decade or so ago) where many international observers criticised Australian courts for being too interventionist in their approach to enforcement of foreign awards, practitioners can take comfort in a number of recent decisions that have shown that our courts are not too keen to refuse enforcement of awards. One such example comes from a recent decision of the Victorian Court of Appeal in *Gutnick & Anor v Indian Farmers Fertiliser Cooperative Ltd & Anor* [2016] VSCA 5.

The Appellants, Mr Gutnick and another party called Legend International Holdings, sought leave of the Court to appeal an order of Justice Croft acceding to the enforcement of a foreign award.[1] The foreign award was made by a three member arbitral tribunal conducted under the Arbitration Rules of the Singapore International Arbitration Centre. Chief Justice Warren, and Justices Santamaria and Beach, refused to grant leave, determining the application had no real prospects of success. The case raised some interesting points about the "public policy" defence to resist enforcement.

The Arbitration

The Facts of the Arbitration concerned a transaction between Indian Farmers, Mr Gutnick, and Legend. Indian Farmers and Legend entered into a Share Option Agreement, which allowed Indian Farmers an option to purchase shares in Legend. Indian Farmers and Mr Gutnick also entered into a Shareholders Agreement in order to regulate their relationship as shareholders in Legend. Pursuant to these agreements, Indian Farmers purchased a number of shares in Legend to the value of $40 million US dollars. The parties later fell into dispute, and the matter was referred to arbitration.

The Tribunal ultimately found that Mr Gutnick and Legend had induced, by fraudulent misrepresentation, Indian Farmers to enter into the agreements and the subsequent purchase of the shareholding in Legend. The Tribunal made a declaration that the Shareholders Agreement and the Share Option Agreement were rescinded, the purchase price for the shares be repaid with interest, and awarded costs in favour of Indian Farmers.

Indian Farmers sought to enforce the award in Australia, and the application was listed before Justice Croft, who granted the application. Justice Croft rejected the (correctly, in the humble author's opinion) the argument of Mr Gutnick and Legend that allowing enforcement would be contrary to public policy.

Somewhat displeased with his Honour's ruling, Mr Gutnick and Legend appealed.

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[1] Indian Farmers Fertiliser Cooperative Ltd v Gutnick [2015] VSC 724 (21 December 2015)

The Appeal

Mr Gutnick and Legend argued that Justice Croft was wrong to reject their contention that allowing enforcement of the award would be contrary to public policy. The applicants relied on section 8(7)(b) of the *International Arbitration Act 1974* which states that a court *may* refuse to enforce a foreign arbitral award if it finds that enforcing the award would be contrary to public policy.

The breach of public policy in this case, the Applicant argued, was that Indian Farmers was essentially getting "double recovery" from the Applicants. This is because the Tribunal ordered a declaration that the agreements were rescinded (and thus an order that the purchase price for the shares be repaid to Indian Farmers), but did not make a consequential order that the shares be returned to the Applicants. The consequence being (according to the Applicants), that Indian Farmers had received a refund of the purchase price for the shares, but still retained them.

The Applicant's Arguments

The Applicants submitted that the Tribunal erred by not restoring the parties to their pre-transaction state, a task which was said to be the Tribunal's most important role. The Applicants argued that, having made the declaration that the two agreements were rescinded, it was then incumbent on the Tribunal to make consequential orders restoring the parties to their pre-contractual position, which in this case meant creating an obligation on Indian Farmers to return the shares to the Applicants. The Applicants contended that there could be no valid rescission unless there was complete restoration or restitution.

The Applicants accepted that an error made by the Tribunal in the application of the law ought not to play any part in the decision as to whether or not to enforce an award. However in this case, in the absence of consequential orders that returned the parties to their pre-contractual positions, the award was, according to the Applicants, contrary to public policy'.

Indian Farmers argued that it was irrelevant that the Tribunal did not expressly order it to return the shares because this was inherent in the declaration that the contract was validly rescinded.

The First Instance Decision

Justice Croft held, firstly, that an award that did permit double recovery would in fact be contrary to public policy, which may form a valid ground for not allowing enforcement of an award under the *International Arbitration Act.* However, he held that the award in question did not permit double recovery.

Justice Croft held that rescission is an act of the party, not the court, or the arbitral tribunal. If rescission is effective in equity, then equitable title re-vests upon the rescission. Put another way, his Honour stated that upon declaring that the Shareholders Agreement and Share Options Agreement were validly rescinded by Indian Farmers, equitable title in the shares re-vested in, and was held by Mr Gutnick and Legend. His Honour further stated that: "[r]*estitution in equity has been achieved. To suggest that legal ownership must also pass in order for the declaration of rescission to be effective is to overlook the fact that 'restitution in integrum' is complete in equity".*

The Court of Appeal's Decision

The Court cited with approval Justice Croft's reasoning as to the Court's limited role when it came to the enforcement of awards, and that the Court was not permitted to determine whether the Tribunal had correctly applied the doctrine of rescission under the applicable governing law. The Court of Appeal restated the function of a court faced with an application to enforce an award, where it stated that "[i]*n an application to enforce an award, it is not open to the Court to repair the award or to supply anything which is otherwise defective in it*".[2]

The Court also noted that Section 39 of the *International Arbitration Act* requires a court considering exercising its power to enforce (or not enforce) an award to have regard to the "objects of the Act"[3] and "the fact that... awards are intended to provide certainty and finality".[4]

The Court noted that, in line with the recent Full Court of the Federal Court decision in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd,* the reference to 'public policy' in the *International Arbitration Act* was to be construed narrowly as referring to the most basic, fundamental principles of morality and justice of the forum.[5]

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[2] Reasons, para 18

[3] Those objects being, *inter alia,* to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to the UNCITRAL Model Law, and to facilitate the use of arbitration agreements made in relation to international trade and commerce.

[4] *International Arbitration Act 1974* (Cth) s 39(2)(b)(ii)

[5] (2014) 232 FCR 361

The Court agreed with Justice Croft's statement that in any event the award did not permit double recovery. On rescission, the Court stated:

> *"Rescission is an act of the parties. A court order is not a condition precedent to the effectiveness of rescission. As much as a court does is to 'confirm' the act of the rescinding party: to declare that the anterior act of rescission was justified and is valid."*[6]

The Court noted that the Applicants accepted that as a result of the declaration of rescission, they had acquired rights, enforceable in equity, in respect of the shares. The act of rescission, confirmed in the award, had the effect of vesting equitable rights to the shares to Mr Gutnick and Legend, this meant that no further consequential order was required to be made by the Tribunal, and there was no basis for the Applicants to argue that the declaration of the rescission was a nullity until their legal title to the shares had been restored.

[6] Reasons, para 23

In a final and fatal blow to Mr Gutnick and Legend's application, the Court noted at the end of its reasoning that "[f]*ar from being contrary to public policy, we consider that the award conforms with the public policy of Australia".*[7]

Conclusion

The Victorian Court of Appeal has in this case added to the lexicon of pro-enforcement decisions regarding foreign arbitral awards that we have seen in Australia in recent years. The case provides yet another interesting example of circumstances in which a court may find that enforcement of an award would be in breach of public policy. Arbitration practitioners should take significant comfort in the fact that this case shows such an argument is not one made easily or accepted readily by our courts.

[7] Reasons, para 30

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The Yukos Saga Continues

On 20 April 2016, the District Court of the Hague (**Court**) set aside the US$50 billion arbitration awards issued in favour of the former majority shareholders of the Yukos Oil Company (**Yukos**). The arbitrations were brought against the Russian Federation (**Russia**) under the Energy Charter Treaty (**ECT**). The Court held that the Tribunal lacked jurisdiction to hear the case. As Russia had signed but not ratified the ECT, the ECT had provisional application only. The Court found that Russia was only bound by those provisions of the ECT which were not inconsistent with Russia's laws. This did not include the arbitration provisions in Article 26 of the ECT.

Background

1. The arbitrations were commenced by three former shareholders of Yukos, a major oil producer in Russia, against Russia under the ECT. The shareholders claimed unlawful expropriation of most of Yukos' assets as a result of various measures taken by Russia, including substantial taxation assessments and enforcement measures taken by the Russian tax authorities on the basis of alleged tax evasion. These measures resulted in the bankruptcy of Yukos.

2. The arbitrations were conducted under the UNCITRAL Arbitration Rules and administered by the Permanent Court of Arbitration (**PCA**). The seat of arbitration was The Hague. The Tribunal consisted of Yves Fortier (Chair), Charles Poncet and Stephen Schwebel.

3. One of the key issues in the arbitration was whether or not the Tribunal had jurisdiction under the ECT. When the arbitrations were commenced in October 2005, Russia had signed but not ratified the ECT. This meant that under Article 45 of the ECT, the ECT only had provisional application with respect to Russia. Article 45 provides that the ECT may apply "provisionally pending its entry into force … to the extent that such provisional application is not inconsistent with [that State's] constitution, laws or regulation."

4. Subsequently, in October 2009, Russia formally gave notice that it did not intend to become a party to the ECT. Even though this terminated the provisional application of the ECT with respect to Russia, investments made prior to the notice (such as those made by the shareholders of Yukos) continued to be covered for a further 20 years.

5. The Tribunal issued an interim award on jurisdiction holding that the ECT provisionally applied to Russia. The Tribunal considered the treaty as a whole and found that the right to refer disputes to international arbitration in Article 26 of the ECT was consistent with Russian law.

6. Accordingly, the Tribunal had jurisdiction to hear the dispute. The Tribunal proceeded with the arbitration and awarded damages to the shareholders of more than US$ 50 billion, the total amount being the largest amount issued in an international arbitration to date.

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[1] I gratefully acknowledge the assistance if Nick Kraegen, Associate, Baker & McKenzie, in preparing this article.

Set aside proceedings

1. Russia sought to set aside the awards in the Dutch Court on a number of grounds. The main ground for challenge was that the Tribunal lacked jurisdiction to hear the claims due to the provisional application of the ECT.

2. The Court accepted Russia's arguments that the provisional application of the ECT meant that the Treaty did not apply as a whole but that only some of the provisions applied if those particular provisions were compatible with Russian laws.

3. The question was whether or not Article 26 of the ECT, which gave the shareholders the right to bring a claim for expropriation in international arbitration, was compatible with Russian law. The shareholders argued that Article 26 was only inconsistent with Russian law if it was prohibited by Russian law. The Court did not accept that interpretation.

4. The Court held that Article 26 was inconsistent with Russian law if there was no legal basis for that form of dispute resolution in Russian law. The Court considered the expert evidence of two Russian legal experts to determine what type of claims could be brought in arbitration under Russian law. The Court found that Russian law provided a mechanism for disputes involving Russian public law to be referred to the Russian courts. There was no mechanism to refer public law disputes to arbitration. There was only a mechanism for referring private law disputes to arbitration.

5. In the present case, the claims brought by the shareholders arose from a public law relationship between the shareholders and the Russian state bodies and involved an assessment of the exercise of public law by those Russian state bodies, particularly the Russian tax authority. Such claims could not be referred to arbitration under Russian law. This meant that Article 26 was not compatible with Russian law and did not apply with respect to Russia. Accordingly, the Tribunal had no jurisdiction to hear the claim.

6. As the Court set aside the awards on this basis, the Court did not consider the other grounds on which the challenge had been brought.

Next steps?

7. The shareholders have indicated that they will appeal the Court's decision. Meanwhile, enforcement proceedings in several jurisdictions, including France, Belgium, Germany, the US, the UK and India, are continuing. Courts have enforced awards that have been set aside by the court of the seat of the arbitration. The setting aside of the award is only one of the grounds that the enforcing court may consider when determining whether or not to enforce the award under Article V(1)(e) of the New York Convention. It does not necessarily mean that the awards cannot be enforced.

8. No doubt questions as to the meaning and consequences of the provisional application of the ECT will continue to arise given the uncertainty created by the Court's decision. This may raise interesting issues for Australian investors, or indeed the Australian Government, as Australia is one of the States that has signed but not ratified the ECT and thus, is subject to the provisional application of the ECT.

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ACICA Launches New Arbitration Rules

The Australian Centre for International Commercial Arbitration (**ACICA**) has launched the latest edition to its arbitration rules and expedited arbitration rules, which took effect on 1 January 2016. The New Rules and New Expedited Rules replace the previous edition of the ACICA Rules which have been in effect since 2011.

Commentary

The new ACICA Arbitration Rules (**New Rules**)[1] introduce a number of key changes to the ACICA Arbitration Rules 2011 (**2011 Rules**)[2], taking into consideration the latest changes in international arbitration and strengthening ACICA's position as a leading provider of international arbitration services in the Asia Pacific region.

Those key changes include:

- Parties may, in certain cases, apply to ACICA for arbitral proceedings to be conducted in accordance with the ACICA expedited rules of arbitration (Article 7.1)
- Parties to use best endeavours to ensure their legal representatives comply with the International Bar Association Guidelines on Party Representation in International Arbitration (Article 8.2)
- Consolidation of arbitrations and joinder (Articles 14 and 15)
- Default rule that the law of the arbitration agreement is the same as the law of the seat, unless the parties have expressly agreed otherwise and that agreement is not prohibited by an applicable law (Article 23.5)

These key changes are summarised below.

ACICA Expedited Rules of Arbitration

A party can now apply for expedited arbitration proceedings where the amount in dispute does not exceed A$5,000,000.[3] This threshold is consistent with other rules in the region such as SIAC (S$5,000,000)[4] and HKIAC (HK$25,000,000)[5] and reflects the growing popularity of the expedited procedures.

A party may also make such an application if all parties agree, or in the case of exceptional urgency.[6]

Party representatives

Each party must use its best endeavours to ensure that its legal representatives comply with the International Bar Association Guidelines on Party Representation in International Arbitration.[7] This change in the New Rules seeks to manage the circumstances where a party seeks to replace their counsel and where there may be a conflict of interest between the proposed counsel and one or more of the arbitrators[8].

Consolidation

The New Rules seek to address some of the practical issues that arise in disputes involving multiple parties or multiple issues between the same parties.

For instance, the 2011 Rules are silent on whether the separate arbitration proceeding could be consolidated with the main proceeding if they arise out of the same arbitration agreement.

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1 ACICA Arbitration Rules 2016 <http://acica.org.au/acica-services/acica-rules-2016>.

2 ACICA Arbitration Rules 2011 <http://acica.org.au/acica-services/acica-arbitration-rules>.

3 Article 7.1(a) of the 2016 ACICA Arbitration Rules.

4 Article 5.1 of the 2013 SIAC Rules.

5 Article 41.1 of the 2013 HKIAC Rules.

6 Article 7.1(b) and (c) of the 2016 ACICA Rules.

7 Article 7.1(a) of the 2016 ACICA Arbitration Rules.

8 See, for instance, Guideline 5 of the International Bar Association Guidelines on Party Representation in International Arbitration.

In order to address these issues, the New Rules permit any party to request ACICA to consolidate two or more arbitrations pending under the New Rules into a single arbitration in circumstances where:[9]

1. the parties have agreed to the consolidation;
2. all the claims in the arbitration are made under the same arbitration agreement; or
3. the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and ACICA finds the arbitration agreements to be compatible.

ACICA has a wide discretion to take into account any circumstances it considers to be relevant for the purposes of deciding whether to consolidate the arbitrations.[10]

If ACICA decides to consolidate the arbitrations, the parties will have an opportunity to agree on the identity of the arbitrators to be appointed to the consolidated arbitration failing which ACICA will revoke the appointment of any arbitrators already appointed and appoint each member of the arbitral tribunal for the consolidated arbitration.[11]

In making those appointments, ACICA will have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.[12]

The parties are also deemed to waive (insofar as such a waiver can validly be made) any objection, on the basis of ACICA's decision to consolidate the arbitration proceedings, to the validity and/or enforcement of any award made by the arbitral tribunal in the consolidated proceedings.[13]

Joinder

Under the 2011 Rules, a respondent could only counter-claim against the claimant[14] and would have to commence separate arbitration proceedings if it wished to claim against a co-respondent. It was silent as to the circumstances in which the arbitral tribunal could join parties.

The New Rules make it clear that, upon request by a party or third party, the arbitral power has the power to allow an additional party to be joined to the arbitration provided that, *prima facie*, the additional party is bound by the same arbitration agreement between the existing parties to the arbitration.[15]

If such a request is made before the constitution of the arbitral tribunal, then ACICA may join the additional party to the arbitration if ACICA decides, *prima facie*, that the additional party is bound by the same arbitration agreement between the existing parties to the arbitration.[16]

If an additional party is joined before the constitution of the arbitral tribunal, all parties will have an opportunity to agree on the identity of the arbitrators of the arbitral tribunal failing which ACICA will revoke the appointment of any arbitrators already appointed and appoint each member of the arbitral tribunal for the arbitration.[17]

Similar to the new consolidation provisions, ACICA will have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator[18] and the parties are deemed to waive any objection, on the basis of any decision to join an additional party to the arbitration, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration.[19]

Law of the arbitration agreement

The New Rules introduce the presumption that the law of the seat shall be the governing law of the arbitration agreement, unless the parties have expressly agreed otherwise and that agreement is not prohibited by an applicable law.[20]

This default rule addresses the uncertainty that arises where the parties have not expressly stipulated a governing law of the arbitration agreement and minimises the likelihood of satellite disputes being commenced by parties for the purpose of ascertaining the applicable law governing the arbitration agreement.

Conclusion

The New Rules provide additional powers to ACICA and the arbitral tribunal to streamline the case management of any arbitration proceedings commenced under these rules, and further strengthens ACICA's position as a reputable provider of international arbitration services in the Asia Pacific region.

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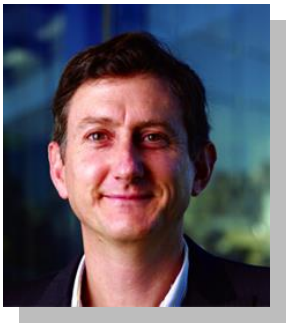
9 Article 14.1 of the 2016 ACICA Arbitration Rules.
10 Article 14.2 of the 2016 ACICA Arbitration Rules.
11 Article 14.4 of the 2016 ACICA Arbitration Rules.
12 Article 14.4 of the 2016 ACICA Arbitration Rules.
13 Article 14.5 of the 2016 ACICA Arbitration Rules.
14 Article 5.3 of the 2011 ACICA Arbitration Rules.
15 Article 15.1 of the 2016 ACICA Arbitration Rules.
16 Article 15.8 of the 2016 ACICA Arbitration Rules.
17 Article 15.11 of the 2016 ACICA Arbitration Rules.
18 Article 15.11 of the 2016 ACICA Arbitration Rules.
19 Article 15.13 of the 2016 ACICA Arbitration Rules.
20 Article 23.5 of the 2016 ACICA Arbitration Rules.



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The TPP Investment Chapter: JSCOT Parliamentary Inquiry

Submissions were due by Friday 11 March 2016 to the Joint Standing Committee on Treaties (JSCOT) inquiry into ratification of the Trans-Pacific Partnership (TPP)[1]. This mega-regional free trade agreement (FTA) was signed by Australia and 11 other Asia-Pacific economies on 5 February 2016, and the JSCOT inquiry commenced 4 days later.[2] By 11 March, only 27 Submissions had been uploaded on the JSCOT inquiry website,[3] much fewer than for other parliamentary inquiries related to FTAs over past years. However, there must have been a large number already received by the Committee but not yet accepted for uploading, or received late, because 175 Submissions were listed as of 22 April. Authors include the usual suspects, including Dr Matthew Rimmer (with another blockbuster 357-page critique of this and other FTAs, Submission #175); but interestingly also Planet Mining Pty Ltd (#174), a mining company subsidiary that is presently pursuing an investor-state dispute settlement (ISDS) claim under the Australia-Indonesia bilateral investment treaty.[4]

One early Submission (#21 from Mr Ryan Robinson) is noted on the JSCOT website as an "example of 4 form submissions with similar content". It voices concerns because:

> "There has been not democratic process at any stage of the development of the TPP. To sign such a significant agreement without democratic mandate is a direct attack on Australia's sovereignty."

More specific objections include the following:

> "The TPP is not mainly about trade, but about restricting future governments from regulating in the public interest. The TPP allows the US to "set the rules for the region." But what benefits US corporate interests is not necessarily in the interests of most Australians.
>
> The Productivity Commission and the ACCC have said that the TPP gives foreign investors special rights to sue governments over domestic laws, and also strengthens monopoly rights on medicines and copyright at the expense of consumers.
>
> The TPP allows foreign corporations to bypass domestic courts and sue governments over changes to domestic law in unfair international tribunals which have no independent judiciary, no precedents and no appeals. Cases against tobacco regulation can be excluded, but 'safeguards' for other health, environment, labour rights and public interest regulation are weak and will not prevent future cases."

Below, I set out my own abridged Submission (#7) to the JSCOT inquiry, which puts such concerns about the Investment Chapter in broader perspective.[5] It will be interesting to follow whether and how TPP ratification proceeds especially in Australia and the US, both facing elections this year.

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* ACICA special associate; Professor of Comparative and Transnational Business Law, University of Sydney Law School. This paper also draws on support from an Australian Research Council Discovery Project (DP140102526) for 2014-2016, jointly with Dr Shiro Armstrong and Professors Jurgen Kurtz and Leon Trakman.

1 On its economic impact (notably from increased foreign investment and reduced non-tariff barriers), see Petri, Peter and Michael Plummer, 'The Economic Effects O the Trans-Pacific Partnership: New Estimates' (2016) WP 16-2 Peter Institute for International Economics - Working Paper via http://www.iie.com/publications/interstitial.cfm?ResearchID=2906.

2 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016.

3 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/9_February_2016/Submissions.

4 See generally: Nottage, Luke R., Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis of *Planet Mining v Indonesia* and Regional Implications (April 14, 2014). Transnational Dispute Management, Vol. 12, No. 1, pp. 1-18, 2015. Available at SSRN: http://ssrn.com/abstract=2424987

5 See further (including an elaboration of Submission **Appendices A and B**): Nottage, Luke R., The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification (April 20, 2016). Sydney Law School Research Paper No. 16/28. Available at SSRN: http://ssrn.com/abstract=2767996..

From an Australian (treaty practice) perspective, this Chapter is "mostly more of the same", regarding both:

- substantive protections for foreign investors (as outlined in the previous issue of this Review)[6]; and
- the option of investor-state dispute settlement.[7]

Perceptions about whether this is a good or bad thing will no doubt vary, based unfortunately in part on political and media differences which have intensified over recent years, especially regarding ISDS.[8] These have undermined longstanding bipartisan support for more liberal trade and investment regimes.[9]

Over 2011-13, the Gillard Government (but not the earlier Rudd Government) took the unusual step of eschewing ISDS completely in Australia's future treaties. Since 2014 the Coalition Government has resumed the practice of including them on a case-by-case assessment, with increasing safeguards for host state regulatory space. That has also been the approach taken by several other countries that have reassessed the pros and cons of ISDS-backed investment treaty protections, especially those subjected to their first ISDS claim (like Australia with respect to the unsuccessful claim by Philip Morris).[10]

Those countries include current TPP treaty partners such as Vietnam (an FDI-importer),[11] as well potential further candidates such as Korea[12] and Thailand[13] (FDI-exporters).

Australia's recent domestic politics should not obscure this broader international and historical context for investment treaties, especially as we cannot expect much objective analysis and debate by US leaders and policy-makers during their country's election year. There are aspects of the TPP's investment chapter that arguably could be improved (as indicated in my **Appendices A and B**). But some can be addressed even before the TPP comes into force (eg detailed criteria for arbitrator behaviour), and overall this chapter should not become a deal breaker.

The Australian government should rather focus now on recommendations by various commentators since 2014 (including myself, Chief Justice Robert French, and Senate committees)[14] to develop a model investment chapter or treaty or at least provisions. These could even include multiple options regarding ISDS procedures, including (a variant of) the recent EU proposal to the US for a permanent investment court for their (TTIP) FTA currently under negotiation. This concept has already found its way into the recent EU-Vietnam FTA.[15] It may appeal especially in Australia's ongoing bilateral FTA negotiations with India and Indonesia, which have been developing significantly more pro-host-state model investment treaty provisions, partly in the wake of BIT claims brought by Australian investors. In the longer run, this may lead to a broader Asia-Pacific FTA regime (beginning with the ASEAN+6 or RCEP FTA already under negotiation) that combines EU-style innovations with the more US-inspired provisions of the TPP investment chapter.

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6 Luke Nottage, "The TPP Investment Chapter: Mostly More of the Same", *ACICA Review* (December 2015) pp32-24 (based on http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment.html), included as **Appendix A** in my Submission to the JSCOT inquiry.

7 Luke Nottage, "ISDS in the TPP Investment Chapter: Mostly More of the Same", 20 *KLRCA Newsletter* (October-December 2015) via http://klrca.org/newsletters/, based on http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment_isds.html, included as **Appendix B** in my Submission to the JSCOT inquiry.

8 Luke Nottage and Leon Trakman, "As Asia embraces the Trans-Pacific Partnership, ISDS opposition fluctuates**" (20 November 2015)** https://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-isds-opposition-fluctuates-50979, with a longer version included as Appendix C in my Submission to the JSCOT inquiry.

9 See David Uren, *Takeover: Foreign Investment and the Australian Pysche* (Black Inc., 2015), discussed at: http://blogs.usyd.edu.au/japaneselaw/2015/10/foreign_investment_regulation.html

10 Leon Trakman and David Musayelyan, "The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration" 31(1) ICSID Review 194-218 (2016).

11 Thanh Tu Nguyen and Thi Chau Quynh Vu, "Investor-State Dispute Settlement from the Perspective of Vietnam: Looking for a "Post-Honeymoon" Reform" TDM 1 (2014) http://www.transnational-dispute-management.com/article.asp?key=2041.

12 Luke Nottage, "Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea?" 25(3) Journal of Arbitration Studies 185-226 (2015); Sydney Law School Research Paper No. 15/66. Available at SSRN: http://ssrn.com/abstract=2643926

13 Luke Nottage and Sakda Thanitcul, "The Past, Present and Future of International Investment Arbitration in Thailand" (unpublished 50-page manuscript, 11 March 2016, available on request and forthcoming via http://ssrn.com/author=488525).

14 http://blogs.usyd.edu.au/japaneselaw/2015/06/senates_report_treaties.html

15 http://trade.ec.europa.eu/doclib/press/index.cfm?id=1449

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Climate Change Disputes: The PCA, The Paris Agreement and Prospects for Future Arbitrations

In December last year, world leaders and thousands of negotiators from governments, civil society and business, met in Paris for COP21, the 21st meeting of the Conference of Parties to the United Nations Framework Convention on Climate Change ('UNFCCC')).[1] At the opening of the event, French President Francois Hollande acknowledged that essentially, what was at stake at the conference, was peace.[2] Over 116 years ago, peace was also on the minds of world leaders at a multilateral gathering in Europe. That was the 1899 Hague Peace Conference, convened at the initiative of Tsar Nicholas II to discuss means to avert the impending threat of war. It resulted in the 1899 Hague Convention for the Pacific Settlement of International Disputes, which recognised arbitration as the "most effective" and "equitable" means of settling legal disputes where diplomacy has failed, and established the Permanent Court of Arbitration ('PCA').[3] COP21 resulted in the Paris Agreement, which opened for signature on 22 April 2016.

This article, developed from a speech given at a COP21 side event jointly hosted by the PCA, IBA, ICC Court of Arbitration and Stockholm Chamber of Commerce,[4] explores what scope there is for international arbitration to be used in the realm of climate change. The article (1) provides a snapshot of the PCA's experience with international arbitration involving the environment and climate change,[5] (2) sets out how that experience intersects with possible disputes that could arise under the UNFCCC framework, and (3) presents concrete examples of how arbitral procedures might be adapted in the future to account for special characteristics of climate change related disputes. As a preliminary point, however, bear in mind that arbitration is just one part of the legal landscape for resolving climate f change related disputes, which might also include national court litigation, complaints before human rights commissions and commercial fraud investigations.[6]

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[1] *United Nations Framework Convention on Climate Change* 1771 UNTS 107 (signed 4 June 1992, entered into force 21 March 1994) ('UNFCCC').

[2] *"Oui, ce qui est en cause avec cette conférence sur le climat, c'est la paix."* H.E. Mr. François Hollande, President of France, Opening of the Leaders Event, COP21, Paris, France, 30 November 2015, (video, 04:23): http://unfccc6.meta-fusion.com/cop21/events/2015-11-30-11-00-opening-of-the-leaders-event/h-e-mr-laurent-fabius-president-of-cop21-cmp11.

[3] *1899 Hague Convention for the Pacific Settlement of International Disputes* (opened for signature 29 July 1899, entered into force 4 September 1900), Articles 16, 20-29 ('1899 Hague Convention').

[4] The author thanks Nicola Peart for research on the speech given at the December 2015 event (http://www.iccwbo.org/Training-and-Events/All-events/Events/2015/COP21-2015-Climate-Change-Related-Disputes-A-Role-for-International-Arbitration-and-ADR/) and PCA Assistant Legal Counsel Sarah Castles for research and editing of the article, a more comprehensive version of which shall appear as a chapter in a forthcoming book to be published by the ICC (Wendy Miles (ed.)).

[5] See generally address of Secretary-General Hugo Siblesz to COP21 High Level Segment, 8 December 2015, as reported at http://globalarbitrationreview.com/news/article/34424/pca-intervenes-cop21/. https://pca-cpa.org/wp-content/uploads/sites/175/2015/12/PCA-Press-Release-dated-8-December-2015.pdf

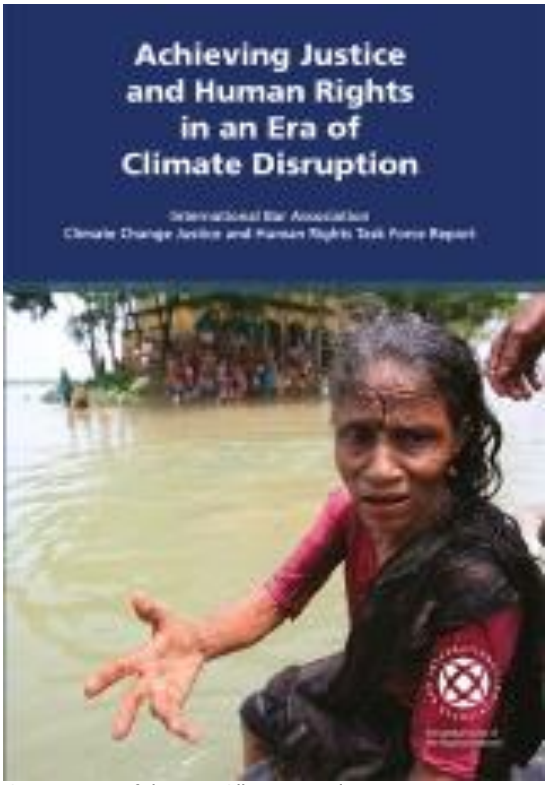
[6] See for example, *Stichting Urgenda v. The Netherlands* (Hague District Court, 24 June 2015, case no. C/09/456689 / HA ZA 13-1396, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196; Greenpeace Southeast Asia's Petition to the Philippines' Commission on Human Rights requesting investigation of responsibility of carbon majors for human rights violations resulting from impacts of climate change: http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights-Complaint.pdf; and financial fraud investigations against oil majors Exxon Mobil, originally by New York State Attorney-General and now part of a coalition of 20 states in the USA: http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across.

PCA Senior Legal Counsel Martin Doe and Judith Levine at COP21

Judith Levine, speaking on arbitration and climate change at the ICC/IBA/PCA/SCC side event to the COP21 on 5 December 2016 in Paris

Members of the PCA delegation to COP21: Martin Doe, Nicola Peart, Judith Levine

Secretary General of the PCA, Hugo Siblesz, addresses COP21



Cover page of the IBA Climate Justice Report

1. PCA Cases on Environmental Issues

The PCA is currently administering 113 cases, over half of which relate to energy. Within each category of case that the PCA administers—inter-State, investor-State and contract disputes—issues of sustainable development and environmental law have been noticeably on the rise.

First, in the **inter-State context**, PCA cases have established or applied key principles of international sustainable development law. For example, in the *Iron Rhine* (Belgium/Netherlands) about resumed use of a railway line, the tribunal noted that even 19th century treaties may be subject to a dynamic and evolutive interpretation in light of modern standards of international environmental law.[7] In the more recent *Kishenganga* case concerning the downstream environmental impact of a hydroelectric plant in the Kashmir area between India and Pakistan, the tribunal referred to States' obligations not to cause transboundary harm, and their need "to manage natural resources in a sustainable manner."[8]

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[7] *Iron Rhine Arbitration (Belgium v. Netherlands)*, Award of 20 September 2005, PCA Case No. 2003-02. Information about all PCA cases mentioned in this article is available at www.pca-cpa.org.

[8] *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Award of 20 December 2013, PCA Case No. 2011-01.

Of the 13 PCA-administered cases under the UN Convention on the Law of the Sea, several have touched on sustainable development issues.[9] For example, a case brought by the Netherlands against Russia concerned the arrest of the Greenpeace ship *Arctic Sunrise* during its protest over arctic drilling.[10] In *Bangladesh v. India*, the tribunal was tasked with drawing a sea boundary in the Bay of Bengal, an area with highly unstable coastlines subject to the effects of sea level rise. The tribunal determined that if the coastline were to change in the future, this would not affect the allocation of maritime jurisdiction established by the Award.[11]

Second, the PCA currently administers 71 **investment-State treaty disputes**, a growing number of which concern environmental issues.[12] The recent NAFTA decision in *Bilcon v. Canada*, which concerned measures preventing the expansion of a quarry, illustrates debates about the extent of States' regulatory freedoms with respect to environmental protection.[13] The trend today towards investment in renewable and low-carbon energy has also given rise to a growing number of PCA arbitrations under the Energy Charter Treaty and bilateral and multilateral investment treaties relating to solar and wind energy investments.

Thirdly, the PCA currently administers over 30 **contract disputes.** The PCA has administered nine confidential contract-based arbitrations connected with the Kyoto Protocol, relating to 'Clean Development Mechanisms' and 'Joint Implementation Projects'.[14] Most of these were brought under the PCA's Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources ('PCA Environmental Rules'), which were adopted by the PCA in 2001.[15]

[9] 1833 UNTS 3 (signed 10 December 1982, entered into force 16 November 1994). For more on PCA and UNCLOS Annex VII arbitrations see: https://pca-cpa.org/en/services/arbitration-services/unclos/.

[10] *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award of 14 August 2015, PCA Case No. 2014-02.

[11] *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, PCA Case No. 2010-16.

[12] Examples include: *Allard v. Barbados*, PCA Case No. 2012-06; *Antaris Solar GmbH (Germany) & Dr. Michael Göde (Germany) v. The Czech Republic*, PCA Case No. 2014-01; *Guaracachi America Inc. (USA) & Rurelec plc (UK) v. Plurinational State of Bolivia*, Award of 31 January 2014, PCA Case No. 2011-17; *Windstream Energy LLC (USA) v. Canada*, PCA Case No. 2013-22; *Mesa Power Group LLC (USA) v. Canada*, PCA Case No. 2012-17.

[13] *Bilcon of Delaware et al. v. Canada*, Award of 10 March 2015, PCA Case No. 2009-04.

[14] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, UN Doc. FCCC/CP/1997/7/Add.1 (opened for signature 16 March 1998, entered into force 16 February 2005), Articles 4, 12 ('Kyoto Protocol'). These cases are confidential, but include under the PCA's Environmental Rules of 2001, a CDM dispute in 2015, three disputes about Emissions Reductions Units (ERUs), and a JI related dispute in 2009; and three CDM disputes under the UNCITRAL Arbitration Rules.

[15] Available at: https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf.

2. Arbitration and the UNFCCC Framework

The UNFCCC, signed in Rio in 1992 and ratified by over 190 States, creates a structure under which future agreements may be established to implement the Convention's overall objective of stabilising greenhouse gas emissions to "avoid dangerous climate change, allow ecosystems to adapt, and enable sustainable economic development."[16] To this end, in 1997, States signed the Kyoto Protocol, which focused on greenhouse gas reduction by developing countries. The Paris Agreement takes this further, by developing a system in which major emerging and developing economies also reduce emissions.

Disputes could arise in the context of the UNFCCC and its follow-up instruments at many different levels. Article 14 of UNFCCC itself provides that if the States Parties dispute questions of the treaty's interpretation or application, arbitration may be chosen as an appropriate form for dispute settlement, in accordance with procedures to be adopted by the COP in an arbitration annex. The same provision is mirrored in Article 24 of the Paris Agreement. A report of the International Bar Association recommends that the "UNFCCC COP should adopt the PCA as the UNFCCC's preferred arbitral body."[17] Pending the adoption of such an annex, and prioritisation of other aspects of the Paris Agreement, inter-State arbitration under the UNFCCC is not likely to arise in the short term. Of more practical relevance now, is how mixed arbitrations involving private parties and States might arise under the Kyoto and Paris Agreements.

Under the Kyoto Protocol, Article 3, each developed country State Party has an "Assigned Amount" of emissions reductions within a particular commitment period, which may be achieved through a number of flexible mechanisms created by the Kyoto Protocol. The first is the Clean Development Mechanism ('CDM'), where the developed country agrees to fund a project in a developing country that will help reduce emissions, and in return receive credits for the carbon tonnage that might otherwise have been emitted. The second mechanism, Joint Implementation ('JI'), is a similar offsetting scheme conducted between developed countries.[18] Cases involving both CDMs and JIs have come to the PCA, including under arbitration clauses based on the International Emissions Trading Association's Model Emissions Trading Agreements.[19]

[16] UNFCCC, Article 2.

[17] International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*, Climate Change Justice and Human Rights Task Force Report (July 2014), pp. 13, 28, 139-144.

[18] Kyoto Protocol, Articles 4, and 4. For further information see C. Brown 'International, Mixed, and Private Disputes Arising Under the Kyoto Protocol' (2010) 1(2) *Journal of International Dispute Settlement*, pp. 447-473; K. Miles, 'Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes' (2010) 1 *Climate Law*, pp. 63-92.

[19] Available at: http://www.ieta.org/Trading-Documents.

Mitigation remains a key feature of the Paris Agreement. Similar trading mechanisms, yet to be defined under the Agreement, may also lead to legal arrangements featuring arbitration clauses (see Arts. 3, 4, 6). Beyond mitigation, the Paris Agreement includes transparency provisions that will allow for monitoring of action by States towards complying with their "nationally determined contributions" (Art. 13). It also deals with technology and capacity-building (Arts 10-11); "adaptation" (Art. 7) which refers to strategies (such as construction of sea walls) to reduce the vulnerability, particularly of developing countries, to the impacts of climate change; and more controversially with "loss and damage" (Art. 8), which addresses impacts (like several natural disaster) for which it is impossible to adapt. One critical element of the Paris Agreement is finance (Art. 9). The primary finance body connected with the UNFCCC is the Green Climate Fund ('GCF'). Arbitration agreements already appear in a number of different GCF-related legal instruments, such as Contribution Agreements between States and the GCF, the interim trustee arrangement for the GCF, and in model arbitration clauses suggested for the grants for financing green projects.[20]

3. Adapting Arbitration Procedures for Future Disputes

How should arbitration adapt for climate change disputes in the future? This can be done through (a) greater accessibility, (b) greater expertise, and (c) greater flexibility.

Greater accessibility may entail opening up the arbitration process to non-State actors, increasing transparency, and involving non-parties where appropriate. One case that illustrates some of these features is the *Abyei Arbitration*, a post-civil war intra-State dispute between a government (Sudan) and a people's liberation movement within the same state.[21] After violence re-erupted in 2008, the parties agreed to refer their dispute over the oil-rich Abyei region to arbitration at the PCA. The arbitral proceedings were able to adapt to the tight timeframes set by the parties (1 year), their increase in transparency (with published pleadings and webcast hearings) and tailored financial arrangements (including access to the PCA's Financial Assistance Fund). Another way in which arbitration is becoming more accessible is by giving non-parties a voice. An example is the investment arbitration of *Eureko v. Slovak Republic*, where the tribunal with the consent of the Parties invited comments from the European Commission on issues of European law.[22]

It may be that a non-party itself applies to make an *amicus* submission, has been done in recent cases administered by the PCA under the UNCITRAL Rules.[23] Even when an *amicus* application fails, the non-party might have its voice heard as a witness, as with the Greenpeace activists who were called by the Netherlands in the *Arctic Sunrise* case. Finally, non-parties might play a more passive role, such as observers. In the *Philippines v. China* arbitration, which includes among many claims, environmental destruction in the South China Sea, seven interested States (including Australia) had their requests granted to observe the hearings and receive copies of pleadings.[24]

Through **greater expertise,** arbitration may adapt to the technical needs of climate change disputes. In the *Kishenganga* case, the treaty provided that one of the members of the tribunal would be a "highly qualified engineer" to address issues concerning water flow. The tribunal conducted two site visits in Kashmir to inspect the water effects of the dam. Site visits were also organised by the PCA in *Bangladesh v. India* to observe first-hand the tidal features and changing waters of the Bay of Bengal, and in an investor-state arbitration for the parties to show the tribunal their positions on alleged environmental damage in a jungle area. As recommended in the IBA report, a further way to adapt arbitration to climate change disputes is for institutions to develop rules and expertise specific to the resolution of environmental disputes, just as the PCA did with its Environmental Rules in 2001.[25]

Greater flexibility in procedure, including ADR, is the subject of increased interest from parties. For example, one case that started under the PCA's Environmental Rules was referred to (and successfully resolved under) conciliation under the PCA's Environmental Conciliation Rules.[26] In 2015, the PCA administered (within a few months and at low cost) a conciliation under the UNCITRAL Rules between an inter-governmental organisation and an NGO relating to project funding.

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[20] See http://www.greenclimate.fund/home.

[21] *Abyei Arbitration (Government of Sudan v. The Sudan People's Liberation movement/Army)*, Final Award of 22 July 2009, PCA Case No. 2008-07. See further, B. Daly 'The Abyei Arbitration: Procedural Aspects of an Intra-State Border Arbitration' (2010) 23 *Leiden Journal of International Law* 801.

[22] *Achmea B.V. (formerly known as "Eureko B.V.") v. Slovak Republic*, Award of 7 December 2012, PCA Case No. 2008-13.

[23] Discretion to allow amicus briefs has been held to be within the general powers over the conduct of proceedings in Art. 15 of the 1976 UNCITRAL Rules and Art. 18 of the 2010 UNCITRAL Rules (see also Art. 17 of 2012 PCA Rules). More recently rules have been drafted specifically to regulate amicus briefs. See e.g., ICSID Rules (2016), Rule 37; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2013) and UN Convention on Transparency in Treaty-based Investor-State Arbitration (2014).

[24] *Philippines v. China*, Award on Jurisdiction and Admissibility of 29 October 2015, PCA Case No. 2013-19, see, e.g. PCA Press Release No. 9 (30 November 2015).

[25] IBA Report, p. 14.

[26] PCA, *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment*, available at: https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Conciliation-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf.

In the context of business and human rights, an innovative mechanism to cope with a disaster is the *Accord on Fire and Building Safety in Bangladesh*, signed by global clothing brands and trade unions in the wake of the Rana Plaza building collapse.[27] That Accord includes in paragraph 5, a dispute clause referring to UNCITRAL Rules. Another novel proposal to establish arbitral rules tailored to business and human rights disputes has also been published by an NGO, Lawyers for Better Business.[28] The proposal includes a roster of experts in human rights, a registry to administer the proposed arbitrations (they suggest the PCA), and a fund to lower the costs. Finally, there is the possibility of review panels. In one PCA case, Russia initiated a treaty-based mechanism for reviewing a decision of the South Pacific Regional Fisheries Management Organisation (SPRFMO), a body that allocates fish catch limits.[29]

The PCA worked with the parties, including five States, one inter-governmental organisation, and the fishing entity of Chinese Taipei, to tailor a procedure to the needs of the particular dispute. The dispute was resolved within six weeks, involved a fully transparent hearing conducted in four languages, and cost under €100,000. Russia has reportedly accepted the Review Panel's recommendation. This example is particularly pertinent for climate change in light of the treaty-based review mechanisms envisaged under the Paris Agreement.

4. Conclusion

The new architecture for a green economy envisaged by the UNFCCC and its Paris Agreement has the scope for diverse and complex legal relationships amongst a mix of private and public stakeholders. Within those relationships, there is potential for the use of international arbitration and flexibly adapted dispute resolution mechanisms. However, climate change related arbitration is more than just an abstract future possibility. In the PCA's experience, it is already a reality.

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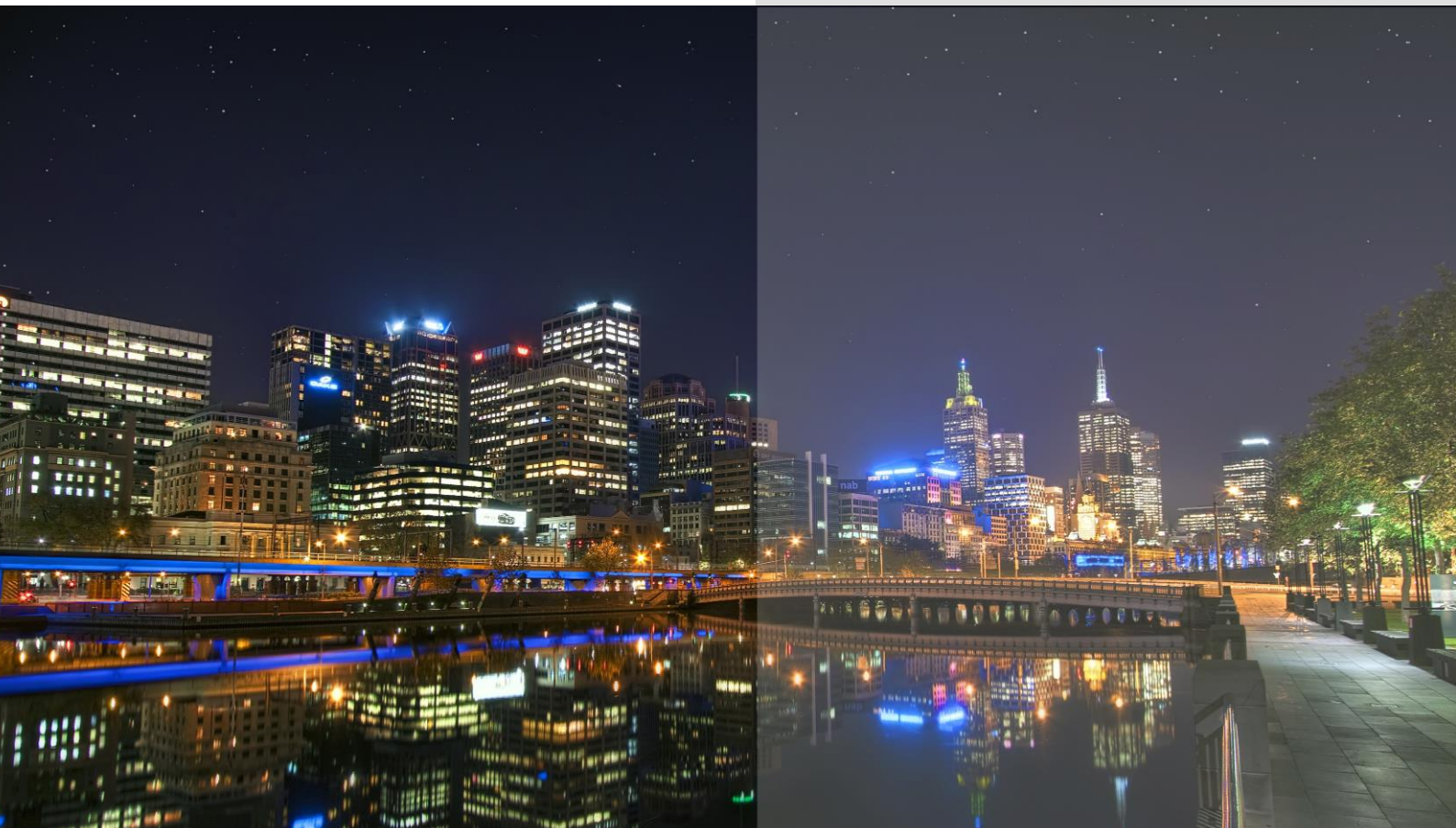
[27] *Accord on Fire and Building Safety in Bangladesh* (13 May 2013), available at: http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf.

[28] C. Cronstedt and R. C. Thompson, *An International Arbitration Tribunal on Business and Human Rights* (Version 5, 13 April 2015), available at: http://www.I4bb.org/news/TribunalV5B.pdf.

[29] *See* S. Grimmer and N. Peart, "Pro Bono in International Proceedings at the Permanent Court of Arbitration," (2015) 3 *Pro Bono Committee News: Newsletter of the International Bar Association Public and Professional Interest Division*, pp. 11-12.



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Australian Centre for International Commercial Arbitration

The Australian Centre for International Commercial Arbitration (ACICA) is Australia's only international arbitral institution. A signatory of co-operation agreements with over 50 global bodies including the Permanent Court of Arbitration (The Hague), it seeks to promote Australia as an international seat of arbitration. Established in 1985 as a not-for-profit public company, its membership includes world leading practitioners and academics expert in the field of international and domestic dispute resolution. ACICA has played a leadership role in the Australian Government's review of the International Arbitration Act 1974 (Cth) and on 2 March 2011 the Australian Government confirmed ACICA as the sole default appointing authority competent to perform the arbitrator appointment functions under the new act. ACICA's suite of rules and clauses provide an advanced, efficient and flexible framework for the conduct of international arbitrations and mediations. Headquartered at the Australian Disputes Centre in Sydney (www.disputescentre.com.au) ACICA also has registries in Melbourne and Perth.

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The ACICA Review is published in June and December. Contributions are welcome and may be sent to secretariat@acica.org.au or gmoens@acica.org.au
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