SHIFTING SANDS: CURRENT DEVELOPMENTS IN THE GLOBAL DISPUTE RESOLUTION LANDSCAPE

Deborah Tomkinson

Deborah Tomkinson is the Secretary General of ACICA and the Dispute Resolution Manager at the Australian Disputes Centre. She is a Fellow of the Chartered Institute of Arbitrators. Deborah has extensive commercial dispute resolution experience, having practiced as a Senior Associate in Australia and a Senior Legal Consultant in the United Arab Emirates prior to joining ACICA and ADC.Nicola is an Executive Consultant at Mahlab Recruitment (Vic). As a former lawyer, she thoroughly enjoys working in the profession, assisting lawyers who want to work in-house to secure great roles and build great careers.

Marina Kofman

Marina Kofman is the Dispute Resolution Case Manager at ACICA and the Australian Disputes Centre. She is the Vice Chair of the NSW Young Lawyers International Law Committee and a Master of International Law candidate at the University of Sydney.

With the expansion of global trade, Australian in-house counsel are increasingly required to navigate the challenges and risks to which international transacting gives rise, including the risk of potential disputes with international trading partners. The work of international and intergovernmental organisations to transform and enhance global commercial contracting practices and commercial dispute resolution mechanisms is improving the collective ability to make informed decisions about where and how to resolve international commercial disputes.

This article explores some recent important developments in the areas of international commercial dispute resolution and international contracting which will shape the transnational dispute resolution landscape in years to come. In-house counsel can add value to their organisation by keeping abreast of these developments.

Developments in transnational dispute resolution

Innovations in arbitration law and practice

In recent years international arbitration has been particularly ripe with innovation. New initiatives have been introduced to take into account the needs of users to make sure it remains a robust, flexible and efficient method of resolving transnational disputes. At the same time, key arbitral jurisdictions in the Asia Pacific region, especially Australia, have continued to display a strong pro-enforcement bias in relation to agreements to arbitrate and international arbitral awards.

Emergency arbitrator provisions

Emergency arbitrator provisions allow for the granting of emergency interim relief by an emergency arbitrator prior to the constitution of the arbitral tribunal. Such provisions began to be introduced into institutional rules in 2010[1] and are aimed at improving and streamlining the arbitration process. In the absence of agreement to such procedures, parties generally have to apply to national courts for emergency relief or await the tribunal's constitution. As such, this development has been welcomed by users of arbitration.[2]

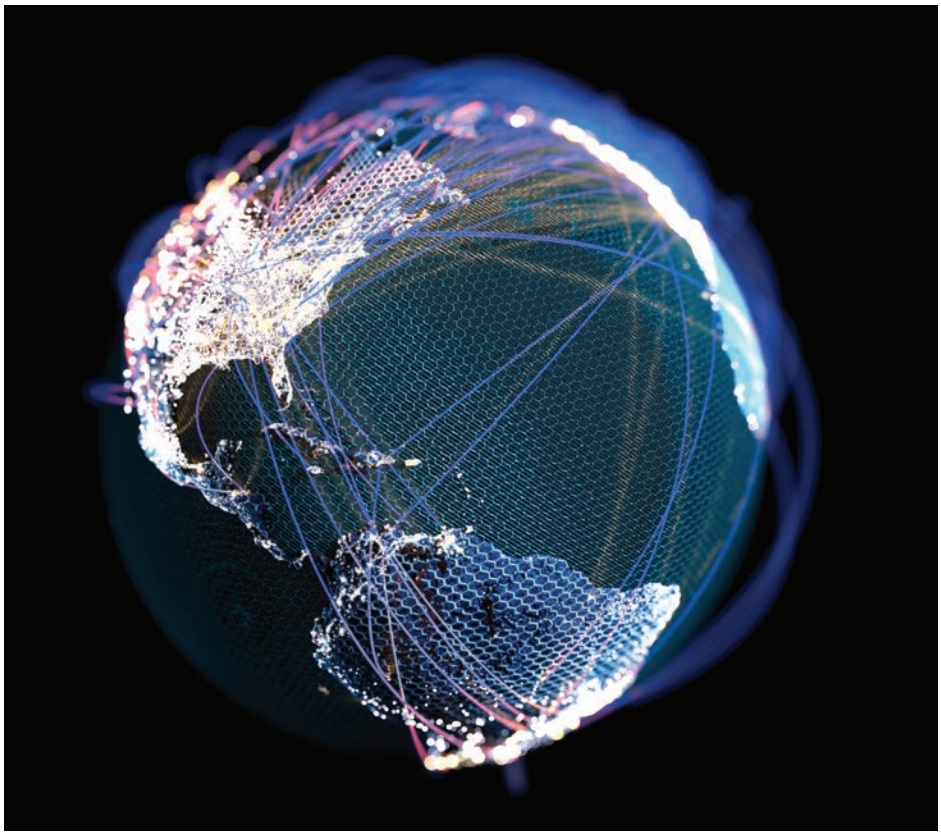
In Australia, the Australian Centre for International Commercial Arbitration (ACICA) included emergency arbitrator provisions in its 2011 Rules and these remain in the recently released 2016 edition. Under the ACICA Rules, a party may apply in writing to ACICA for emergency interim measures of protection prior to the constitution of the arbitral tribunal.[3] ACICA is required to appoint an emergency arbitrator within one business day from the receipt of the application,[4] and the emergency arbitrator is required to issue a decision no later than five business days from the date upon which the application was referred.[5]

There remain some inherent limitations to the emergency arbitrator process including concerns in relation to the enforceability of such decisions in certain jurisdictions (where they may not be considered final and binding) and the requirement for notice to be given to the other party of the application. As such, parties should give consideration to whether it may be more appropriate in certain circumstances to seek interim orders in support of the arbitration through the court system.

Consolidation and Joinder provisions

The prevalence of multi-party, multi-contract transactions has created a need to make provision for these complex contractual arrangements within the agreed dispute resolution procedure. There are now provisions in many institutional rules providing for consolidation and joinder in arbitral proceedings.[6] These provisions vary across institutions and ought to be considered carefully to determine suitability to the particular circumstances of the relevant contractual arrangements.

The ACICA Rules 2016 provide for consolidation of two or more arbitrations upon a request by a party if the parties have agreed to the consolidation; all the claims in the arbitrations are made under the same arbitration agreement; or where 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.[7] The Rules now also provide



for the joinder of an additional party to the arbitration by the Arbitral Tribunal upon request (or by ACICA if the request is made prior to the constitution of the tribunal) provided that, prima facie, the additional party is bound by the same arbitration agreement as between the existing parties to the arbitration.[8]

Parties involved in multi-contract and multi-party transactions should take care at the drafting stage to ensure that the dispute resolution provisions throughout the contractual matrix allow the joinder of necessary parties and the consolidation of arbitrations in an appropriate manner that reflects the parties' expectations of how disputes would be best resolved. A failure to do so may result in fragmentation or multiplication of proceedings, significant cost and delay and jurisdictional challenges. Carefully selected institutional rules and compatible dispute resolution clauses in all contracts within a complex contractual arrangement will reduce the risk of duplication of proceedings and applications to set aside or resist enforcement after an award is issued on the ground the tribunal lacked jurisdiction.

Transparency in commercial arbitration

In March 2015, the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (*Mauritius Convention*) opened for signature. The Convention allows Parties to investment treaties concluded before 1 April 2014 to express their consent to apply the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*. The *Rules on Transparency* themselves are a set of procedural rules for making publicly available information on investor-State arbitrations arising under investment treaties.[9]

These rules do not apply to international commercial arbitration which retains its hallmark features of being a private process which can be confidential by agreement of the parties. The *Mauritius Convention* has, however, brought the issue of transparency to the forefront and prompted further discussion about the potential need for transparency in certain areas of international commercial arbitration. In 2016, the International Chamber of Commerce International Court of Arbitration (ICC) introduced some novel measures aimed at increased transparency, including publishing on its website the names of the arbitrators sitting in ICC cases, their nationality, as well as whether the appointment was made by the Court or by the parties and which arbitrator is the tribunal chairperson. It is likely that further developments in this area will be seen in years to come.

Online Dispute Resolution and use of technology

Online Dispute Resolution (ODR) Technologies have exciting potential, with respect to allowing increased efficiencies in proceedings and cost savings for parties to transnational disputes. In recognition of this, ACICA introduced a Draft Procedural Order for Use of Online Dispute Resolution Technologies in ACICA Rules Arbitrations in 2014. The Draft Order provides guidance to parties in circumstances where they wish to make use of such technology throughout the arbitral proceedings.

The UNCITRAL Online Dispute Resolution Working Group has continued its work on a non-binding descriptive document on ODR process by releasing a draft of Technical Notes in February 2016.[10] The Technical Notes are a non-binding guideline and will assist with the online resolution of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. Among other things, it states that it is desirable that both the ODR administrator and the ODR platform be specified in the dispute resolution clause.[11] The Hague Conference on Private International Law (Hague Conference) is also working on a guide to good practice on the use of video link and other technologies in the taking of evidence abroad, including country profiles.[12]

Working towards international enforcement of mediated settlement agreements and foreign court judgments

Arbitral awards rendered in international commercial arbitrations are globally enforceable pursuant to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention*)[13] in the 156 states that are currently signatories. This advantage is unique to international commercial arbitration. The settlement of disputes by other methods may however be appropriate in the circumstances of the case and work is being undertaken at an international level in an effort to achieve international enforceability of mediated settlements and court judgments. Developments in these areas will be watched with interest.

UNCITRAL

UNCITRAL Working Group II (Arbitration and Conciliation) has commenced work on the topic of enforcement of settlement agreements in international commercial conciliation/mediation. The current lack of a harmonised enforcement mechanism is a disincentive for businesses to proceed with conciliation.[14] This is reflected in the low number of international mediations currently being administered by global arbitral institutions.[15] UNCITRAL's work seeks to develop solutions to issues in this area, including the possible preparation of a convention, model provisions or guidance texts.[16] The form of the instrument has yet to be decided but the prevailing preference is for a convention.[17]

Hague Conference Judgments Project

The Hague Conference Judgments Project is concerned with harmonising the rules applicable to transnational disputes in civil and commercial matters in particular in respect of the international jurisdiction of courts and the recognition and enforcement of their decisions abroad.[18] The project has so far produced the *Hague Convention of 30 June 2005 on Choice of Court Agreements*[19] (*Choice of Court Convention*), which came into force on 1 October 2015 and currently binds 28 states, with about a dozen others, including Australia, now giving consideration to it.[20] The basic model is that the chosen court must in principle hear the case,[21] any court not chosen must in principle decline to hear the case,[22] and a judgment rendered by the chosen court must be recognised and enforced in other Contracting States,[23] except where a ground for refusal applies.[24]

In October 2015, the Working Group on the Judgments Project submitted a Proposed Draft Text for a convention on the recognition and enforcement of foreign judgments in civil and commercial matters.[25] The Proposed Draft Text is complementary to the *Choice of Court Convention* and concerns the recognition and enforcement in a Contracting State, of judgments rendered in civil and commercial matters in another Contracting State. The architecture provides for recognition and enforcement set out in a list of jurisdictional bases. It then sets out the only grounds upon which recognition and enforcement may be refused. A Special Commission will prepare a draft convention beginning in June 2016.[26] The success of the judgments project will turn on attracting ratifications and accessions in the coming years.

Developments in International Contracting

In addition to developments in international dispute resolution, recent years have seen significant work being undertaken in the area of international contracting. A number of these are discussed below.

Principles on Choice of Law in International Commercial Contracts

The Hague Conference has developed its first soft law instrument. The Principles on Choice of Law in International Commercial Contracts[27] (Hague Principles) were launched in March 2015. They provide a guide to choice of law in international commercial contracts including a comprehensive commentary. As with other authoritative soft law principles like the UNIDROIT Principles on International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL), the influence of the Hague Principles will be felt in different ways. They may assist legal advisors to draft clear and enforceable choice of law clauses and may prove persuasive at the dispute resolution stage when making submissions on applicable law.

International Sales Law

The Hague Conference, UNIDROIT and UNCITRAL secretariats will jointly commence work this year on an explanatory text on the interaction of instruments in the area of international commercial contracts with a focus on sales.[28] This will bring welcome clarity for legal advisors navigating overlapping regimes both at the drafting and dispute stages.

UNIDROIT Principles on International Commercial Contracts

The UNIDROIT Principles on International Commercial Contracts Working Group on Long-Term Contracts has in March 2016 released a draft of amendments to the PICC incorporating considerations relevant to long-term contracts.[29] The addition to the preamble confirms the increasing global importance of more complex transactions – in particular long-term contracts.

The PICC are ever growing in influence as an authoritative statement on international contract law since the first edition of the Principles in 1994. They are utilised by courts and especially by arbitral tribunals. The PICC are useful to practitioners not only at the dispute resolution stage but especially when drafting, so are worth becoming familiar with. The amendments making provision for long term contracts are likely to influence the outcome of decisions on cross-border disputes in years to come.

The amendments include:

- controversial new provisions on termination for 'compelling reasons';
- additions to make the existing provisions on open terms in a contract more suited to the characteristics of long term contracts;
- further and more explicit clarification of the meaning of good faith and best efforts in long-term contracts;
- recognition in the official comment of the importance especially in long term contracts of subsequent conduct as a guide to interpreting the contract;
- suggesting that parties to long term contracts may wish to explicitly adopt mechanisms for variations and adjustments of the contract in the course of performance;
- additions to the official comment suggesting parties make provision for the continuation, whenever possible, of their business relationship in the event of *force majeure*;
- an illustration suggesting that parties could make provision for the establishment of a pre-arbitration or litigation dispute resolution body;[30]
- emphasising the heightened importance of the duty of cooperation to long-term contracts; and
- a clarification of the different types of post contractual duties present in the context of long term contracts and suggestion that parties may wish explicitly state such obligations in their contracts.

Important contracting considerations

- Give consideration to the enforceability of outcome under the chosen dispute resolution mechanism – international arbitration presently offers the greatest certainty.
- Consider the types of disputes that may arise under a particular contract and if emergency relief may be required within the arbitration context –reference to institutional rules containing emergency arbitrator provisions may be appropriate.
- Complex multi-party or multi-contract situations – require careful drafting and legal advice on the structuring of the dispute resolution clauses throughout the suite of contractual documents. Consideration may be given to incorporating reference to institutional rules that provide for consolidation and joinder.
- The use of ODR technologies is becoming more common and can provide significant efficiencies to international proceedings – make use of available resources for guidance.
- When involved in international and long term contracting – be aware of and review the soft law that is available for guidance.

In-house counsel are on the front line when it comes to international contracting. It is important to ensure that drafting, including of dispute resolution provisions, is appropriate for the relevant transaction to ensure adequate protections are in place. In-house counsel can add value by thinking ahead to the dispute resolution needs of their businesses for tomorrow and beyond. The steady pulse of global developments in dispute resolution can provide the tools to guide in-house counsel in drafting appropriate dispute resolution clauses and in best practice dispute resolution. The initiatives discussed in this article have produced useful resources and frameworks that are either now in use or are currently under development. Keeping up to date with these developments into the future can bring clarity when considering the contracting and dispute resolution architecture to negotiate for the specific needs of your business.

Footnotes

1 *Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules 2010; Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules 2010.*

2 *QMUL White & Case 2015International Arbitration Survey: Improvements and Innovations in International Arbitration, 29 < http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.*

3 *ACICA Rules 2016 Schedule 1, art 1.1.*

4 *Ibid art 2.1*

5 *Ibid art 3.1*

6 *ICC Rules of Arbitration, arts 7, 10; 2013 HKIAC Administered Arbitration Rules, arts 27-28; LCIA Arbitration Rules (2014) art 22.1.*

7 *ACICA Rules 2016 art 14.*

8 *Ibid art 15.*

9 *<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html> Parties to investment treaties concluded prior to 1 April 2014 can agree to their application; <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html>*

10 *<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/089/59/PDF/V1508959.pdf?OpenElement>.*

11 *Ibid.*

12 *Permanent Bureau of the Hague Conference on Private International Law, 'Council on General Affairs and Policy of the Conference (15-17 March 2016) Conclusions & Recommendations adopted by the Council,' 2-3 <https://assets.hcch.net/docs/679bd42c-f974-461a-8e1a-31e1b51eda10.pd>.*

13 *New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958 (entered into force on 7 June 1959) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.*

14 *United Nations Commission on International Trade Law 'Sixty-fourth session New York, 1-5 February 2016 Settlement of commercial disputes International commercial conciliation: enforceability of settlement agreements Note by the Secretariat,' (A/CN.9/WG.II/WP.195), 3 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/086/28/PDF/V1508628.pdf?OpenElement>.*

15 *London Court of International Arbitration Registrar's Report 2015, 1. <http://www.lcia.org//media/download.aspx?MediaId=500>.*

16 *United Nations Commission on International Trade Law, 'Forty-ninth session New York, 27 June-15 July 2016, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, 1-5 February 2016)', (A/CN.9/867, 10 February 2016), 2 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/008/00/PDF/V1600800.pdf?OpenElement>.*

17 *United Nations Commission on International Trade Law, 'Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7-11 September 2015), (A/CN.9/861, 17 September 2015), 16-17 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/065/85/PDF/V1506585.pdf?OpenElement>.*

18 *The Judgments Project, Hague Conference on Private International Law <https://www.hcch.net/en/projects/legislative-projects/judgments>.*

19 *Hague Convention of 30 June 2005 on Choice of Court Agreements, concluded 30 June 2005 (entered into force 1 October 2015).*

20 *<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>; Permanent Bureau of the Hague Conference on Private International Law, 'Ongoing Work in the Area of Judgments,' (Prel. Doc No 7B, The Hague Conference on Private International Law, January 2016) 2.*

21 *Choice of Court Convention, art 5.*

22 *Ibid art 6.*

23 *Ibid art 8.*

24 *Ibid art 9.*

25 *Report of the Fifth Meeting of the Working Group on the Judgments Project and Proposed Draft Text Resulting From the Meeting, above n22, annex.*

26 *Permanent Bureau of the Hague Conference on Private International Law, 'Council on General Affairs and Policy of the Conference (15-17 March 2016) Conclusions & Recommendations adopted by the Council,' 2-3 <https://assets.hcch.net/docs/679bd42c-f974-461a-8e1a-31e1b51eda10.pd>.*

27 *<https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.*

28 *Permanent Bureau of the Hague Conference on Private International Law, above n28, 4.*

29 *UNIDROIT Secretariat, 'Principles of International Commercial Contracts Working Group on Long-Term Contracts Second session Hamburg, 26 – 29 October 2015 Report' (Study L – Misc. 32 English only January 2016) <http://www.unidroit.org/english/documents/2016/study50/s-50-misc32-e.pdf>.*

30 *Practitioners may find the 2015 ICC Dispute Board Rules useful in this endeavour <http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/dispute-board-rules/>*