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THE ACICA REVIEW

December 2016

ACICA
Australian Centre for International Commercial Arbitration

Leader in international dispute resolution

THE ACICA REVIEW December 2016 | Vol 4 | No 2 | ISSN 1837 8994

ACICA
Australian Centre for International Commercial Arbitration

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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

It has been a busy time since our fifth edition of the ACICA Review.

Together with Khory McCormick and Caroline Kenny QC we held a seminar in conjunction with our ICCA 2018 Platinum sponsor, the Beijing Arbitration Commission (BAC), highlighting the importance of trade between Australia and China, why Australia is a safe seat and updating delegates on the current state of preparations for ICCA 2018, including the Queenstown add on event. The event was held at the BAC's premises in Beijing and included presentations by a judge of the Supreme People's Court, the Secretary General of BAC and senior representatives from the Australian Embassy and Austrade.

Sam Wakefield and Deborah Tomkinson, together with our conference organiser attended the recent IBA conference in Washington D.C. as an exhibitor to promote ACICA, the ICCA Congress in Sydney in 2018 and the Queenstown add on event. The booth was very popular and generated significant interest in ACICA's services and the ICCA Congress 2018.

Given the interest generated in Washington D.C., ACICA will be exhibiting at the IBA Arbitration Day event in Milan in March 2017. If you are attending Arbitration Day do drop by and say hello to the team.

I would like to remind members that the ICCA Super Early Bird registration has been extended to 31 March 2017, so if you would like to take advantage of this great discount please register before the closing.

To register click on the link:
http://www.icca2018sydney.com/registration.php

Arbitration Week 2016

Arbitration Week held from 21 to 25 November 2016, was a very busy but exciting week and I hope that everyone who attended the sessions enjoyed them.

I would like to wish all members and their families and loved ones the very best for the festive season and a happy New Year.

Alex Baykitch
President

Deborah Tomkinson
ACICA Secretary General

Secretary General's Report

Arbitration Week 2016

Sydney Arbitration Week 2016, held this year from 21 to 25 November 2016, is an increasingly busy and lively event on the arbitration calendar. The growing number of events provides a week packed with interest and fantastic networking opportunities.

ACICA provided a relaxed start to the week, co-hosting an event on Monday, 21 November, with King & Wood Mallesons, supported by the Australian Disputes Centre (ADC). Guests joined leading international arbitration practitioners, Judith Levine, Alex Baykitch and Andrea Martignoni to explore current trends and experiences in arbitration, with a focus on the Asia-Pacific region. The engaging conversation moved seamlessly through a variety of interesting topical developments, including efficiency in international arbitration, third party funding, transparency and climate change disputes.

(L-R) Judith Levine, Andrea Martignoni, Deborah Tomkinson, Alex Baykitch

On Monday evening, **AMTAC** and New Chambers hosted the **AMTAC Seminar**, chaired by Gregory Nell SC (Barrister, New Chambers). The full line up of experienced speakers included Angus Stewart SC (Barrister and Arbitrator, New Chambers), Julie Soars (Barrister, Mediator and Arbitrator, 7 Wentworth Selborne Chambers), Chris Sacré (Special Counsel, HWL Ebsworth Lawyers), Stuart Hetherington (Partner, Colin Biggers & Paisley Lawyers and President, Comité Maritime International (CMI)) and Catherine Gleeson (Barrister, New Chambers). The event was followed by networking drinks hosted by New Chambers out on its beautiful terrace overlooking Sydney CBD.

(L)-(R) Gregory Nell SC, Stuart Hetherington & Angus Stewart SC

Peter McQueen, AMTAC Chair

The cornerstone event of the week, the **Fourth International Arbitration Conference**, hosted by the Business Law Section of the **Law Council of Australia, CIArb Australia and ACICA** was held on Tuesday 22 November. The Conference successfully explored New Horizons in International Arbitration with a topical programme touching on issues such as ethics in international arbitration, the relationship between courts and arbitration, the development of regional arbitration jurisprudence, procedural and time considerations and privilege in international arbitration. The conference was followed by the **Annual Dinner of CIArb Australia** at Sydney Tower with guest speaker Gary Born (Partner, Wilmerhale & President SIAC Court of Arbitration).

Other events during the week included The Great Debate: Retired Judges make the Best Arbitrators hosted by **Resolution Institute**, the Launch of the **CIArb Australia Young Members' Group** at Jones Day, with guest speaker the Hon Michael Kirby AC CMG exploring International Arbitration, Young Players and Critical Intelligence and a seminar hosted by **12 Wentworth Selborne Chambers and the International Law Association** at which guest speaker Michael Hwang SC discussed The UNCITRAL Model Law on Arbitration – a model for legal convergence in the Asia Pacific?.

ICC Asia together with **CIArb Australia** held a half day conference on 23 November with two panel discussions highlighting the latest policy changes at the ICC and CIArb and providing an insight into the ICC arbitral appointment process. Elliot Geisinger (Partner, Schellenberg Wittmer) provided an insightful talk entitled **International Arbitration and Independence – Off the Beaten Track**, which considered the duty of independence of other participants in international arbitration (beyond the arbitrator) at the **Clayton Utz / University of Sydney International Arbitration Lecture.**

(L)-(R) Professor Chester Brown (University of Sydney), Elliot Geisinger & Frank Bannon (Partner, Clayton Utz)

On 24 November, **ArbitralWomen** held a well-attended breakfast panel event focused on *Arbitration in China and the Asia-Pacific region* and the **47th AFIA Symposium** was held at DLA Piper. On the final day of Arbitration Week the **Young ICCA Workshop**, hosted at Allens in conjunction with ACICA and the ADC, provided young practitioners with a robust discussion on the New York Convention and the **RAIF Conference: Building Arbitration through innovation** was held at the Intercontinental Hotel.

ArbitralWomen breakfast panel event

AFIA Symposium

Young ICCA Workshop

ACICA in Washington

ACICA and its ICCA 2018 team exhibited at the International Bar Association (IBA) Annual Conference held in Washington from 18-23 September 2016. 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 IBA Conference to promote Australia and New Zealand to delegates. As was done at ICCA Mauritius earlier this year, visitors to the booth were able to enjoy a "virtual tour" of the Sydney Harbour Bridge care of Business Events Sydney, to provide a taste of what is to come in 2018! Sponsored afternoon drinks at the booth each day also provided an opportunity for visitors to sample Australian wines.

For more information about ICCA 2018 Sydney and the current Super Early Bird registration fee, please see the website: www.icca2018sydney.com.

ACICA / ICCA 2018 Sydney booth at the IBA Conference in Washington

(L)-(R) Deborah Hart (AMINZ), Alex Baykitch (ACICA) and John Walton (AMINZ)

APRAG 2016

On behalf of ACICA, I attended the highly successful APRAG Conference 2016, hosted by BANI Arbitration Center of Indonesia from 6-8 October 2016. The Conference, themed the Rise of International Commercial Arbitration and Development in Investment Treaty Arbitration: Asia's Response, was held in beautiful Bali. In a series of sessions on the first day, preeminent speakers addressed key questions under the following headings: Diversity and Unification of Arbitration Practice in Asia, Third Party Funding and Costs in Investment and Commercial Arbitration, Investment Arbitrations in Asia and Prospects for harmonization of commercial and investment arbitration within the new ASEAN Economic Community. On the second day, representatives from member organisations, including ACICA & ADC, provided Members Updates and Collaboration Perspectives in a session chaired by Yu Jianlong, the (now) Immediate Past President of APRAG and Vice Chairman and Secretary General of the China International Economic and Trade Arbitration Commission (CIETAC). The conference provided an exciting and invigorating exchange of ideas and a fantastic networking opportunity for delegates.

APRAG Conference Gala Dinner

Launch of New Websites: acica.org.au & amtac.org.au

ACICA and AMTAC launched new websites in mid-2016. Both websites now include new features and greater functionality for ACICA & AMTAC members and website visitors, as a part of ACICA's commitment to provide enhanced services to arbitration and mediation practitioners and users in Australia and the region. The ACICA website now includes a special membership section which website allows ACICA Panellists to update their profile and information and provides for membership renewals to be processed online. The ACICA & AMTAC Panellist directories are able to be utilised by website visitors as a resource for party-nominations and are searchable by name, nationality, language skills and specialisations.

ACICA Signs Equal Representation in Arbitration Pledge

On 20 June 2016, ACICA President Alex Bayktich, signed the Equal Representation in Arbitration Pledge on behalf of the institution. The two key objectives of the Pledge, which was launched in May 2016, are to improve the profile and representation of women in arbitration, and to appoint women as arbitrators on an equal opportunity basis. Those involved in drafting the Pledge recognise the need to support an increase in diversity in all forms in the field of arbitration and commentary to the Pledge notes that the intention is not to exclude other diversity initiatives. Rather, the Pledge aspires to be "*a first step in the direction of achieving more equal representation of all under-represented groups in our arbitration community*" (commentary to the Pledge). ACICA added its signature to those of other leading arbitral institutions, law firms, organisations and individuals around the world, to demonstrate its commitment to the aspirations and objectives of the Pledge and support efforts to improve diversity in all areas.

Alex Baykitch signed the Pledge on behalf of ACICA

ACICA encourages its members and others involved in the arbitration community to sign up to the pledge at http://www.arbitrationpledge.com/.

ACICA Seminar Program

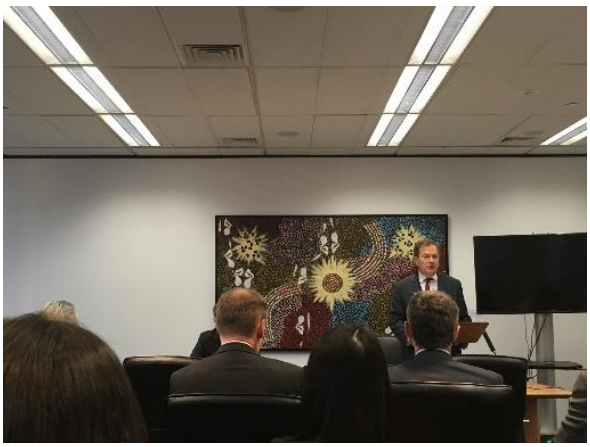
Singapore International Commercial Court ("SICC") – A viable option for international dispute resolution?

On 20 October 2016, ACICA welcomed guests to hear Mohan Pillay and Toh Chen Han, Partners in the Singapore office of Pinsent Masons MPillay speak on the topic of the Singapore Commercial Court. The event was hosted at the ADC in Sydney. In the seminar the speakers considered the SICC's genesis, its rules and procedures and explored its key points of difference from arbitration, the opportunities it creates for international disputes practitioners, and the impact of the SICC on international arbitration. The speakers kindly stayed on to speak to interested guests over drinks following the event.

Mohan Pillay and Toh Chen Han are the authors of the recently published "*The SICC Handbook – A Guide to the Rules and Procedures of the Singapore International Commercial Court*" (Sweet & Maxwell, 2016), which can be ordered through Sweet & Maxwell.

Brexit & Its Implications for International Arbitration

At an evening seminar hosted by ACICA at the ADC on 24 October 2016, Lord Goldsmith QC, PC (Partner, Debevoise & Plimpton, former UK Attorney General and ACICA Council Member) considered the outcome of the British referendum in 2016, in which 51.9% of the British public voted in favour of leaving the European Union, and its implications for current and future international commercial arbitrations and the impact that Brexit may have on investment treaty arbitration. The seminar was well attended with guests staying on after the event for drinks and networking.



Lord Goldsmith QC PC

ACICA Rules Events
ACICA held mock arbitration case events in Sydney (hosted by the ADC) and Melbourne (hosted by the Melbourne Commercial Arbitration and Mediation Centre) in July and August 2016. The panels at both events were comprised of preeminent international arbitration practitioners acting in the roles of party participants, arbitrators and moderators. The aim of the interactive sessions is to explore some of the new features of the ACICA Rules 2016 through a case study. Participants were provided a practical understanding of the 2016 Rules and the practice of international commercial arbitration.

Event at MCAMC (L)-(R): Caroline Swartz-Zern, Deborah Tomkinson, Chad Catterwell, Monique Carroll & Robert Heath

Similar events are planned for Brisbane, Perth and Adelaide in 2017.

ACICA looks forward to again running a busy and exciting events and seminar program in 2017. To keep track of what is on offer, visit the Events section of the ACICA website.

CIArb / ACICA Inaugural Tribunal Secretaries Course
On 29 and 30 October 2016, ACICA was pleased to co-present the inaugural CIArb/ACICA Tribunal Secretaries course. This two-day course has been designed to provide an intensive introduction to the provision of administrative assistance to arbitral tribunals for participants who have a basic knowledge of international commercial arbitration.

The course was led by Professor Doug Jones AO. Drawing on Doug's expertise, as well as that of a wonderful group of volunteer course tutors with extensive experience acting as tribunal secretaries, the course covered:

- The role of the Tribunal Secretary
- The rules and guidelines
- The protocols of establishing an Arbitration
- Administering the procedure
- Managing hearings
- Supporting the Tribunal following the hearing

I had the pleasure of moderating this fascinating discussion over the course of the weekend. By the conclusion of the course, our enthusiastic participants had gained a detailed and practical understanding of the role and responsibilities of a Tribunal Secretary.

AMTAC 10th Anniversary Year Events

Following the success of the event held in Perth in May, AMTAC has continued to present seminars focusing on the conduct of maritime arbitration, throughout Australia, in celebration of its 10th anniversary. These included seminar events in Brisbane (6 July), Melbourne (17 November) and Sydney (21 November) as well as AMTAC's signature event, the AMTAC Annual Address, which was held in Sydney on 7 September 2016. The Address was followed this year by a celebratory Anniversary Dinner held at Ashurst Australia.

Other Events

Visit from Hong Kong Secretary for Justice
In August 2016, ACICA was pleased to welcome Mr Rimsky Yuen, the Hong Kong Secretary for Justice, and some of his colleagues to our offices. We were also joined by representatives from the Hong Kong Economic and Trade Office (HKETO). The meeting produced a stimulating and informative exchange with regard to the development of international dispute resolution and some of the current challenges faced in the region.

(L)-(R) Mr Arthur Au (Director, Hong Kong Economic & Trade Office, Sydney), Deborah Tomkinson, Mr Rimsky Yuen (Secretary for Justice), Alex Baykitch (ACICA President), Khory McCormick (ACICA Vice President) & Georgia Quick (ACICA Vice President)

Supported Events

In addition to supporting events held around the world through our cooperative relationships with other institutions, ACICA was pleased to support the following events held in Australia in the second half of 2017:

"Penalties Doctrine in international construction contracting: where to from here?"
13 July 2016
Speaker: Professor Doug Jones AO
Venue: Melbourne Law School
Link to the recording available through the ACICA website:
https://acica.org.au/2016/07/21/event-wrap-penalties-doctrine-international-construction-contracting/

"Managing Disputes - private dispute resolution for disputes involving Chinese and Australian parties"
1 September 2016
Speakers: Deborah Lockhart (CEO, ADC), Greg Steinepreis (Partner, Squire Patton Boggs) and Edwina Kwan (Senior Associate, King & Wood Mallesons)

ArbitralWomen Seminar – "International developments for women in arbitration"
5 October 2016
Speaker: Rashda Rana SC (President, ArbitralWomen & barrister, mediator and arbitrator, 39 Essex Chambers)

46th AFIA Symposium Perth
28 October 2016
Speakers: Michael Feutrill (Barrister, Francis Burt Chambers), Deborah Tomkinson, Duncan Watson (Partner, Quinn Emmanuel), Mark Darian-Smith (Partner, King & Wood Mallesons), Ashley Hill (Partners, GRT Lawyers) and Sam Luttrell (Counsel, Clifford Chance)
Guest Speaker: Brenda Horrigan (Partner, Herbert Smith Freehills)

ACICA and ADC Volunteer Intern Program

We have again been lucky to host an energetic and talented group of interns at the Centre throughout the second half of 2016, volunteering their time to learn more about alternative dispute resolution in practice:


Agata Kosmicki & Thanveer Gagguturu


Megan Williams


Munir El-Omar


Cindy Wong

Jesse Liebermann

Katie Latimer

Sophie Wong

Anna-Louise Hammar

and Alexandra Duckett.

We also welcomed Andrej Dalinger from Frankfurt as an international intern in August 2016. Andrej was with us for three months, assisting with a number of ACICA and ADC initiatives.

Andrej Dalinger

Our great thanks all our interns for their dedication, hard work and enthusiasm!

Peter McQueen
AMTAC Chair

AMTAC Chair's Report

AMTAC Executive Elections

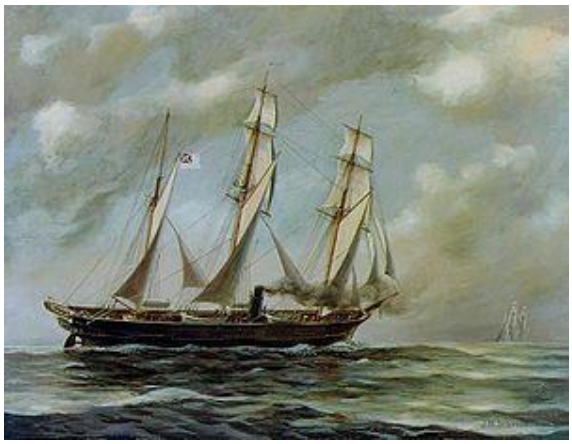
At a General Meeting of AMTAC held on 7 September 2016 a new AMTAC Executive was elected, namely Peter McQueen as Chair, and Tony Pegum, John Reid and Julie Soars as Vice Chairs. Professor Sarah Derrington, who had been a Vice Chair since the establishment of AMTAC in 2007, did not stand for re-election**.**

AMTAC 10th Annual Address and Anniversary Dinner – Sydney 7 September 2016

The Address, which was entitled "Maritime Arbitration, Old & New", was presented by Malcolm Holmes QC and was video-cast from the Federal Court of Australia in Sydney around Australia. An audience of around 100 was entertained by an inspiring account of the history of the *Alabama Claims Arbitration,* which has been considered as the birth of modern arbitration and which was held in Geneva in 1871-1872. The full Address, which is at amtac.org.au, concludes:

91. The Alabama Arbitration took place at a time when the means of travel and communication were far different from today. To gather the parties, their representatives and the Tribunal members and their staff in Geneva without the benefit of air travel would have been a major exercise. Photocopying, faxing and emailing were non existent. It is therefore remarkable that despite the voluminous documents presented, a carefully reasoned award was announced some seven days after the hearing concluded. And the whole process took little over nine months from the first meeting of the Tribunal.

92. Considering all the circumstances, this was a very efficient Tribunal, which worked well with only the eleven articles of the Treaty of Washington to guide them. The lessons to be learnt from the arbitration procedure and the award are as relevant today, as they were when the award was handed down on 14 September 1872, that is almost 144 years ago to today



CSS Alabama

The Address was followed by the Anniversary Dinner, which held at the Sydney offices of Ashurst Australia. Those present were entertained by a fascinating presentation by Dr. Kevin Sumption, Director and CEO of the Australian National Maritime Museum, on the Museum's exhibition "Ships, Clocks and Stars, the Quest for Longitude".

Further AMTAC 10th Anniversary Seminars – Sydney and Melbourne November 2016

Further seminars to celebrate AMTAC's 10th anniversary and organised by the AMTAC Anniversary Sub-Committee were held in Melbourne on 17 November and in Sydney on 21 November during Sydney Arbitration Week. The following papers were presented:

Melbourne Seminar – 17 November 2016

- James a'Beckett, Braemar ACM Shipbroking
  The State of the Freight Market

- Hazel Brasington, Partner, Norton Rose Fulbright
  "Sam Hawk" – enforcement of maritime claims in Australia

- Peter McQueen, Arbitrator, Chair of AMTAC
  Drafting effective arbitration clauses

Sydney Seminar – 21 November 2016 – Chaired by Gregory Nell SC, Barrister, New Chambers

- Angus Stewart SC, Barrister & Arbitrator, New Chambers
  The recent Sam Hawk decision – implications and possible applications

- Julie Soars, Barrister, Mediator and Arbitrator, 7 Wentworth Selborne Chambers & Chris Sacré, Special Counsel, HWL Ebsworth Lawyers
  Charter party "string" or "chain" disputes – joinder, consolidation and other issues – practical case studies

- Stuart Hetherington, Partner, Colin Biggers & Paisley Lawyers and President, Comité Maritime International (CMI) & Catherine Gleeson, Barrister, New Chambers
  Maritime Arbitration – update on recent cases

Copies of the papers will be made available at amtac.org.au.

ICMA XX 2017 Copenhagen

The International Congress of Maritime Arbitrators (ICMA) will hold ICMA XX 2017 in Copenhagen between 25 and 29 September 2017.

The Topics and Agenda Committee of ICMA XX, which is chaired by Peter McQueen, has published the following Call for Papers, which includes a List of Suggested Categories for Topics. These categories are set out below.:

1. Contemporary shipping problems including insolvencies, arrest, attachment and priorities of claims including those of third party suppliers eg bunker suppliers

2. Charterparty and bills of lading/sea waybills issues

3. Sale and purchase/commodity contractual and documentary credit issues

4. Arbitration procedural issues covering all aspects of the arbitral process from commencement of arbitration through to enforcement of awards

5. Contractual issues including measure of damages

6. Ship sales, shipbuilding and offshore issues

7. Insurance issues

Further information relating to the Conference, including registration, is at www.icma2017copenhagen.org .

ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ICCA 2018

Sydney 15-18 April 2018

www.icca2018sydney.com

NEWS IN BRIEF

ICCA 2018 Sydney Super Early Bird Registration extended to 31 March 2017; Congress Theme Announced!

Super Early Bird Registration for the 24th International Council for the Commercial Arbitration 2018 Congress (ICCA2018) is now open for a limited time!

The theme for the 2018 Congress has also been chosen: "Evolution and Adaptation: The Future of International Arbitration". The theme has been chosen to highlight arbitration as a "living" organism which has proven adaptable in the past to new substantive and practical challenges, and that today – under attack from various quarters – will need to demonstrate its adaptability again. Under this theme, a range of programmes will be developed to address the evolving needs of users (both commercial and investor-State), the impact of the rapidly changing face of technology on the practice of arbitration, the expectations of the public, and the convergence or divergence of legal traditions and cultures.

To keep up to date with planning for the 2018 Congress, register your interest at: http://www.icca2018sydney.com/. You can also follow ICCA 2018 Sydney on LinkedIn.

Publication of New Commentary on the ACICA Rules 2016

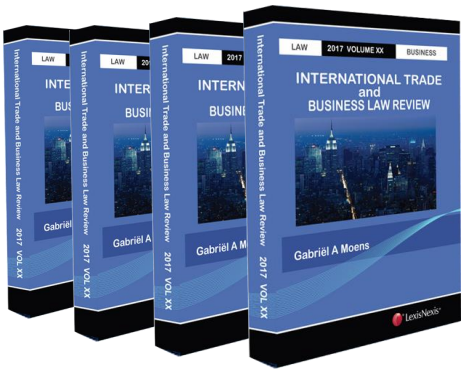
Holmes, Malcolm and Nottage, Luke R. and Tang, Robert, The 2016 Rules of the Australian Centre for International Commercial Arbitration: Towards Further 'Cultural Reform' (May 31, 2016). Sydney Law School Research Paper No. 16/49. Available at SSRN: http://ssrn.com/abstract=2786839.

Lexis Nexis Dispute Resolution Law Guide 2017

LexisNexis has released its latest Dispute Resolution Law Guide exploring DR practices around the world. The Guide features an article "Promoting efficacy in arbitration practice: Australia's pro-arbitration regime and key developments in the ACICA Arbitration Rules". A copy may downloaded from the ACICA portal (https://acica.org.au/publications-and-papers/).

International Trade and Business Law Review, Volume XX

Volume XX of International Trade and Business Law Review, published by LexisNexis contains an article on "Consumer Dispute Settlement in the European Union and the United States" written by Anastasia Konina, and the Memorandum for the Respondent, 23rd Annual Willem C. Vis International Commercial Arbitration Moot, prepared by the University of Queensland. This Memorandum received an Honourable Mention, Best Memorandum.



New ACICA Fellows, and Associates

We welcome new **ACICA Fellows**: Anthony Lo Surdo (NSW), Wayne Muddle SC (NSW), Nicholas Floreani (SA), Duncan Watson (Hong Kong),

ACICA Associates: Chad Catterwell (VIC), Andrus Must (NSW), Kieran Hickie (VIC), Jennifer Beck (NSW), Martin Cairns (NSW)

ACICA Overseas Associates: Jesse Kennedy (USA)

ACICA Student members: Katie Latimer (NSW), Stipe Drinovac (QLD), George Pasas (NSW), Paarth Arora (NSW), Jordan English (Qld), Nicholas Lindsay (Qld), Cindy Wong (NSW), Isabella Deveza (SA), Thomas Creedon (VIC), Mohammud Jaamae Hafeez-Baig (QLD), Jesse Liebermann (Switzerland), Agata Kosmicki (Switzerland)

Leon Chung
Herbert Smith Freehills
ACICA Board Member

Phoebe Winch
Herbert Smith Freehills

Indemnity costs and the enforcement of arbitral awards in Australia

Australia is generally regarded as a 'pro-arbitration' jurisdiction. One question that has arisen in this context is whether there should be a default rule providing that indemnity costs should be awarded against a party who unsuccessfully seeks to set aside or resist enforcement of an arbitral award. This is the approach taken by Hong Kong courts. Supporters of such a rule contend that it would act as a deterrent to unmeritorious challenges to awards and further entrench Australia as a 'pro-arbitration' jurisdiction.

To date, the question of whether there should be a default rule has not been settled in Australia. The issue has however received increasing judicial attention and support.

Hong Kong approach

The Hong Kong courts adopt a default rule that when an award is unsuccessfully challenged, indemnity costs will be granted in the absence of special circumstances. This approach was outlined by Reyes J in *A v R*[1]. Reyes J concluded that a party who unsuccessfully makes an application to appeal against or set aside an award or for an order refusing enforcement, should 'in principle expect to have to pay costs on a higher basis…because a party seeking to enforce an award should not have had to contend with such type of challenge.'[2]

This approach has since been confirmed, providing welcome certainty to the Hong Kong position.[3] The courts of Hong Kong have since applied this principle in other contexts, including to set-aside cases,[4] to an unsuccessful challenge to an arbitration agreement,[5] and most recently, to actions that delay enforcement of arbitral awards.[6]

Australian approach

The Hong Kong approach is in contrast to a number of other jurisdictions including Australia where there is no default position that costs should be awarded on an indemnity basis for unsuccessful challenges to arbitral awards. The position in Australia has been the subject of some debate.

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[1] [2009] 3 HKLRD 389.
[2] Ibid at [68].
[3] *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)* [2012] 1 HKC 491; See also 'Hong Kong Court of Final Appeal confirms robust approach to costs in unsuccessful set aside applications', Justin D'Agostino, 23 December 2013 (Kluwer Arbitration Blog).
[4] *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd* 2013 WL 7052 (CFA).
[5] *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* (HCA 2416/2014), 3 December 2015.
[6] *Peter Cheung & Co v Perfect Direct Limited & Yu Guolin* (HCMP 2493/2012); and *New Heaven Investments Limited & Rondo Development Limited v Yu Guolin* (HCA 115/2013).

The Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v Atlain Khuder LLC* [2011] VSCA 248 declined to follow the Hong Kong approach. In doing so, the Court of Appeal disagreed with Croft J at first instance, who awarded indemnity costs against an award debtor who unsuccessfully sought to resist enforcement of a foreign award, even though it was not necessary to do so. The Court of Appeal considered that a decision to award indemnity costs should be determined by the facts of the individual case, rather than because the case belonged to a particular class of cases.

The issue of indemnity costs was taken up in the case of *Ye v Zeng (No 5)* [2016] FCA 850. In that case, the Court was not required to decide the issue. However, Allsop CJ stated in obiter that there were 'powerful considerations' in favour of the Hong Kong approach. The case concerned an application to enforce a foreign arbitral award in the Federal Court of Australia under sections 8 and 9 of the *International Arbitration Act 1974* (Cth) (**the Act**). The question considered by Allsop CJ in *Ye v Zeng (No 5)* was whether the applicant should receive its costs on a full and complete indemnity basis. His Honour answered this question affirmatively, awarding indemnity costs by 'applying entirely conventional and unremarkable authority'.[7] His Honour held that there had 'never been an attempt to agitate any legitimate ground to resist enforcement.'[8] Rather, the Respondents had 'acted in their own perceived commercial interests and without merit and should pay the commercial price of doing so.'[9]

The less 'conventional' aspect of the reasoning was Allsop CJ's response to the additional question, namely the proper approach to costs in proceedings to enforce international commercial arbitral awards under the Act and whether indemnity costs should be awarded against a party who unsuccessfully seeks to set aside or resist enforcement of an arbitral award, as a matter of course.

Allsop CJ considered both the Australian and Hong Kong approaches but declined to decide whether the Hong Kong approach should be preferred and adopted in Australia as it was 'both unnecessary, and, sitting at first instance, inappropriate' to do so. His Honour warned courts to be 'astute to distinguish between conduct that reflects no more than an attempt to delay or impede payment and the reasonable invocation of the proper protections built into the [New York Convention] and the Act.'

Allsop CJ's comments were not made in isolation. Colman J in *A v B* applied a similar presumption to Reyes J in *A v R* with respect to the unsuccessful resistance to a referral of a dispute to arbitration.[10] Martin CJ in *Pipeline Services* subsequently followed *A v B*, describing this approach as 'impeccable'.[11] However, Colman J's statement of principle has also been subsequently doubted or not followed.[12]

Most recently in *Sino Dragon Trading v Noble Resources International (No 2)* [2016] FCA 1169, Beach J rejected any rule requiring that costs be awarded on a *prima facie* basis against a party that fails to successfully set aside an award. His Honour did however note that an award of indemnity costs would be justified where a party fails to set aside an award and where its claim had 'no reasonable prospects of success', although the burden of proving this should remain on the successful party in the arbitration. On the facts of the case, Beach J ordered two-thirds of the costs of the successful party be paid on an indemnity basis because he found that 2 of the 3 grounds of challenge by Sino Dragon had no reasonable grounds for success.

Looking ahead

The limitations of the Australian approach appears to be the premise on which it is founded. A decision to award indemnity costs against an unsuccessful party is dependent upon there being 'circumstances of the case…such as to warrant the Court…departing from the usual course' of awarding costs on a party and party basis.[13] Such a departure is only warranted in the presence of special circumstances. However, an unsuccessful application to resist enforcement of a foreign arbitral award is not considered to be an established category of special circumstances in Australia.

As seen in *A v R*, the Hong Kong approach starts from the opposite premise. That is, indemnity costs will be granted in the absence of special circumstances. If a losing party only pays costs on a conventional party and party basis, it will never bear the full consequences of its 'abortive application', even though a party seeking to enforce an award should not have had to contend with such type of challenge in the first place. This would encourage the bringing of unmeritorious challenges to an award. It may therefore turn applications to set aside an award, which should be 'exceptional events', into something which is potentially 'worth a go'.[14]

It is worth monitoring any further developments in relation to indemnity costs and the enforcement of arbitral awards in the context of Australia's push to establish itself as a 'pro-arbitration' jurisdiction. It may be that as Courts become more alive to unmeritorious challenges, as a practical matter, indemnity costs will be awarded more often, even if no general rule is adopted.

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[7] *Ye v Zeng (No 5)* [2016] FCA 850 at [1].
[8] Ibid at [18].
[9] Ibid at [19].
[10] *A v B* [2007] EWHC 54 (Comm); [2007] 1 Lloyd's Rep 358 (Colman J).
[11] *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10(S) at [18] (Martin CJ).
[12] *Ansett Australia Ltd v Malaysian Airline System Berhad (No 2)* [2008] VSC 156 at [22]; *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 829 at [6].
[13] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 at [55].
[14] *A v R* [2009] 3 HKLRD 389 at [71].

Stephen Thompson
Holman Fenwick Willan

Federal Court of Australia imposes substantial costs order as a deterrent to those requesting that it set aside or intervene in Australian International Arbitral Award

On 13 September of this year, in the matter of *Sino Dragon Trading Ltd* v *Noble Resources International Pte Ltd* [2016] FCA 1311, the Federal Court was asked to rule on the right to appeal an international arbitral award based on (1) whether the dispute fell within the terms of the arbitration clause; (2) whether a party was able to present their case; (3) whether the arbitrators were appointed in accordance with the arbitration clause; and (4) justifiable doubts as to impartiality or independence of the arbitrators.

The Facts

On 9 January 2014, Sino Dragon Trading Ltd ("**Sino Dragon**") contracted to purchase 170,000 m/t of iron ore from Noble Resources International Pte Ltd ("**Noble**"). The contract required Sino Dragon to open a letter of credit by 17 January 2014.

Sino Dragon failed to open the letter of credit and Noble treated that failure as a repudiation of the contract, terminated the contract and commenced arbitration in Australia to recover its losses.

The Arbitration was held under the UNCITRAL Arbitration Rules, which required a panel of three arbitrators, who delivered their final award in favour of Noble on 12 May 2016 (**"Award"**).

Sino Dragon applied to the Federal Court of Australia, seeking amongst other things, to have the Award set aside on the following grounds:

- the Tribunal proceeded outside the arbitration clause in dealing with the dispute, as it found an email written in Chinese amounted to an act of repudiation, when the contract provided for all communications to be in English;

- Sino Dragon's witnesses were unable to properly present evidence due to technical difficulties with a video-link facility, which gave rise to a lack of procedural fairness and a lack of equality of treatment; and

- there was a reasonable apprehension of bias on the part of the arbitrators.

Federal Court Decision

The Honourable Justice Beach of the Federal Court of Australia rejected all of the grounds raised by Sino Dragon, finding that:

- non-English communications could constitute conduct amounting to repudiation. Beach J confirmed that when dealing with an arbitration clause, principles for the interpretation of commercial contracts support an expansive or liberal approach consistent with the objectively ascertained commercial purpose, so long as such an interpretation is not inconsistent with the plain text construed in context[1].

- the mode of evidence by telephone or video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce *"real unfairness"* or *"practical injustice"*. Beach J observed[2] that Sino Dragon had:

  i. chosen the mode used for its witnesses and took responsibility for arranging the video-link facilities;

  ii. failed to seek an adjournment, when the original video-link did not work, to deal with the evidence of its witnesses in a different way; and

  i. raised these issues for the first time in the Federal Court application and well after the Award had been delivered against them.

On consideration as to whether the Applicant had demonstrated *"real unfairness"* or *"real practical injustice"*, Beach J confirmed that the provisions of the UNCITRAL Model Law were not, and could not be, intended to apply to unfairness caused by a party's own conduct, including forensic or strategic decisions.

- no fair-minded lay observer would perceive any possibility of bias on the part of the arbitrators, particularly in circumstances where Sino Dragon had failed to produce any probative evidence to question the arbitrators' independence. The relevant test was confirmed to be that in *Ebner v Official Trustee in Bankruptcy*[3] as to whether a fair-minded lay observer might reasonably apprehend that the arbitrator might not bring an impartial mind to the relevant adjudication and determination. The question, it was said, is *"one of possibility (real and not remote), not probability"*.[4]

HFW Perspective

In a pro-arbitration forum such as Australia, Courts are exceedingly reluctant to invalidate an award other than in severe circumstances where it can be demonstrated that there has been a patent error of law or a decision directly contrary to public policy. The Federal Court maintained that stance by imposing a substantial costs order against Sino Dragon, which should act as a warning to any party seeking to have an arbitral award set aside.

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[1] [2016] FCA 1311 at [114].
[2] [2016] FCA 1311 at [160] – [171].
[3] [2000] 205 CLR 337 at [6] – [8].
[4] [2016] FCA 1311 at [198].

Jeremy Quan-Sing
Allens Linklaters

Lily Hands
Allens Linklaters

Samsung C&T Corporation v Duro Felbuera Australia Pty Ltd [2016] WASC 193

The principle of *competence-competence* – a narrow approach in Australia?

In *Samsung C&T Corporation v Duro Felbuera Australia Pty Ltd* [2016] WASC 193, the Supreme Court of Western Australia had to carefully consider the role that Australian courts play when there is a dispute over the existence and scope of an arbitration agreement. The decision of Justice Le Miere is of significance to the principle of *competence-competence* in Australia and marks a divergence from the approach that Courts take in other regional arbitration centres, such as Hong Kong and Singapore.

Background - the relevant agreements

Samsung is the EPC contractor on the Roy Hill iron ore project in Western Australia. It subcontracted various works to an unincorporated joint venture consisting of Duro Felguera and Forge Group Construction Pty Ltd (the ***Subcontract***). However, in February 2014, Samsung terminated the Subcontract on the basis that an administrator had been appointed to Forge.

Samsung and Duro entered into a new agreement by way of a term sheet (the ***Interim Subcontract***). The Interim Subcontract essentially provided for Duro to perform the works that Forge and Duro had agreed would be performed by Duro under the original Subcontract. The term sheet was binding, but provided that the parties would negotiate in good faith to agree a more detailed substitute contract in due course. The parties' rights and obligations remained governed by the Interim Subcontract because no substitute subcontract was ever entered into.

The original Subcontract contained an arbitration agreement that provided for disputes between the parties arising from or in connection with the subject matter of the Subcontract to be resolved by arbitration administered by the Singapore International Arbitration Centre under the UNCITRAL Rules. The governing law of the contract was Western Australian law.

The dispute

In March 2016, Samsung initiated an arbitration against Duro under the Subcontract. Duro responded by making counterclaims in the arbitration, some of which arose under the Interim Subcontract. Samsung applied to the Supreme Court for a declaration that the proper forum for Duro's claims was the Supreme Court of Western Australia. It argued that the existence of the Jurisdiction Clause meant that the arbitration agreement in the Subcontract was not part of the Interim Subcontract.

Duro sought to stay the Supreme Court proceeding under section 7(2) of the *International Arbitration Act 1974* (Cth) on the basis that there was an arbitration agreement between the parties which applied to its claims under the Interim Subcontract.

Did the Interim Subcontract contain an arbitration agreement on the same terms as the Subcontract?

The central issue in the proceeding was whether the Interim Subcontract contained an arbitration agreement in the same terms as the arbitration agreement in the Subcontract. This was a question of the proper construction of the relevant agreements. The Interim Subcontract was stated to be on the same terms as the Subcontract (which contained an arbitration agreement), as modified by the terms of the Interim Subcontract. Did the Jurisdiction Clause mean that the arbitration agreement in the Subcontract was not adopted in the Interim Subcontract?

Justice Le Miere reviewed the relevant authorities and found that they contained the following relevant principles:

(a) There is a presumption that rational business people who are parties to contracts dealing with the same or a related subject matter intend all questions arising out of their legal relationship to be determined in the same forum.

(b) Notwithstanding the above presumption, clear agreements must be given effect, even if this may result in a degree of 'fragmentation' in the resolution of disputes between the parties. (His Honour noted that such fragmentation produces increased expense and delay and gives rise to a risk of inconsistent findings between a court and an arbitral tribunal, which rational business people are likely to have intended to avoid).

(c) Whether a jurisdiction clause in a subsequent agreement is inconsistent with and supersedes an arbitration agreement in an earlier agreement is a question of construction. The words of the subsequent agreement are to be given effect so far as it is commercially rational to do so.

Applying these principles, his Honour held that, when considering the text, context and purpose of the term sheet, it was possible to construe the Jurisdiction Clause and the clause in the Subcontract which created the arbitration agreement in a manner which was consistent. To do this, his Honour adopted a narrow construction of the word 'proceedings' in the Jurisdiction Clause, such that it meant only those 'proceedings' which a party could institute in the courts of Western Australia under the terms of the Subcontract and the arbitration agreement contained within it. (For example, the Subcontract expressly provided that a party could commence 'proceedings' in a court to enforce payment due under the Subcontract or to seek injunctive or declaratory relief).

Justice Le Miere found that 'considerations of commercial convenience', namely that it would be inconvenient to have separate forums for dispute resolution for each of the Interim Subcontract and the Subcontract, favoured such a construction. As a result, his Honour determined that the Subcontract's arbitration agreement was a term of the Interim Subcontract and that the proceeding should be stayed and referred to arbitration.

What standard of review should the court apply to the question of the existence and scope of a binding arbitration agreement?

As part of his decision, Justice Le Miere considered what standard of review a court must apply when asked to determine whether a binding arbitration agreement existed and, if so, its scope. This question often arises when one party seeks to commence proceedings in a court and the other party seeks a stay of the proceeding so the dispute can be referred to arbitration.

His Honour noted that there were two competing views on the authorities. The first view is that to grant a stay of proceedings and defer the matter to arbitration a court need only satisfy itself on a prima facie basis that the matter falls within the scope of a valid arbitration agreement between the parties (the '*prima facie approach*'). The second view is that a court should determine the question on the balance of probabilities (the '*full merits approach*').

The adoption of one approach over the other has important implications for the principle that an arbitral tribunal should have the power to determine its own jurisdiction. This principle is sometimes described in English as '*competence-competence*', and is enshrined in Article 16(1) of the Model Law.

The arguments for each of the prima facie and full merits approach can be summarised as follows:[1]

a) The *prima facie approach* preserves the principle of to the greater extent and is consistent with the requirements of section 7(2) of the *International Arbitration Act* which requires that where the proceedings before the court involve the determination of a matter that, in pursuance of an arbitration agreement, is capable of settlement by arbitration, the court shall stay the relevant part of the proceedings and refer the parties to arbitration in respect of that matter. Unless a dispute is clearly not subject to a valid arbitration agreement the court will refer the matter to arbitration and let the arbitral tribunal make a decision. The prima facie approach is one adopted in Hong Kong and Singapore[2] - regional jurisdictions commonly considered 'arbitration friendly'.

b) The *full merits approach* is justified on the basis that, under the Model Law, one of the few ways to challenge an arbitration award is via a jurisdictional challenge by a party who asserts that no binding arbitration agreement applies to the dispute in question. If a court will have a final say on jurisdiction upon any challenge to an award, it is arguably more efficient to have a court conclusively determine the existence of an applicable arbitration agreement at the outset. However, a full merits decision by a court on the existence of a binding arbitration agreement intrudes into an arbitral tribunal's ability to determine the same question, thereby restricting the operation of *competence-competence*.[3]

Justice Le Miere reviewed some of the relevant authorities. While his honour noted that in *Tomolugen Holdings Ltd v Silica Investors Ltd*[4] the Singaporean Court of Appeal had adopted the prima facie approach, his Honour was ultimately persuaded to apply the full merits approach by reason of its general adoption by the English courts[5] and by Gleeson J in *Rinehart v Rinehart (No 3)*[6] (albeit in the context of section 8 of the *Commercial Arbitration Act 2010* (NSW)).

His Honour also considered the court's ability to grant declaratory relief in relation to the existence of an arbitration agreement. His Honour concluded that the court did have the discretion to grant declaratory relief in relation to the existence and scope of an arbitration agreement and that nothing in the *International Arbitration Act* removed that discretion.

In summary, his Honour held that the Court has the power to grant declarations as to the existence of an arbitration agreement and that the Court should apply the full merits approach when determining the existence of an arbitration agreement. This is a decision of some significance, signalling a narrow approach to the principle of *competence-competence* in Australia. Regionally, it makes the position in Australia different to the position in Hong Kong and Singapore, and might be construed by some as making Australia less arbitration-friendly than those jurisdictions.

Did it matter that the arbitral tribunal had already ruled on its jurisdiction to hear the dispute?

The arbitral tribunal had separately been asked to consider its jurisdiction to hear Duro's counterclaims. Its decision on jurisdiction was handed down after the hearing before Justice Le Miere, but before his Honour delivered judgment. Duro sought to have the application reopened so that the arbitral tribunal's decision could be adduced as evidence before the Supreme Court.

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[1] See the useful discussion in Michelle Lee, 'Existence of Arbitration Agreements – The Tension between Arbitral and Curial Review' (2014) 10(2) *Asian International Arbitration Journal* 67.

[2] See *Private Company 'Triple V' Inc v Star (Universal) Co Ltd* [1995] 3 HKC 129; *Pacific Crown Engineering Ltd v Hyundai Engineering and Construction Co Ltd* [2003] 3 HKC 659; *PCCW Global Limited v Interactive Communications Service Limited* [2007] HKCA 40; *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57.

[3] As noted by the Court of Appeal in *Tomolugen Holdings*, '[t]he full merits approach has the potential to reduce an arbitral tribunal's *kompetenz-kompetenz* to a contingency dependent on the strategic choices of the claimant in a putative arbitration'.

[4] [2015] SGCA 57 [63].

[5] At [39]; see *Joint Stock Co 'Aeroflot Russian Airlines' v Berezovsky* [2013] EWCA Civ 784 [73] - [74].

[6] [2016] FCA 539 [86] - [115].

Justice Le Miere declined to consider the arbitral tribunal's decision, essentially finding that the tribunal's decision was not material to the application before him. A central issue in relation to the question of materiality was whether, if Justice Le Miere did not consider the arbitral tribunal's decision, there was the risk of his decision being inconsistent with the arbitral tribunal's award. His Honour held that there was no risk of inconsistency as the Supreme Court was not being asked to determine the scope of the arbitral tribunal's jurisdiction but was considering the question of whether a separate arbitration agreement existed under the Interim Subcontract.

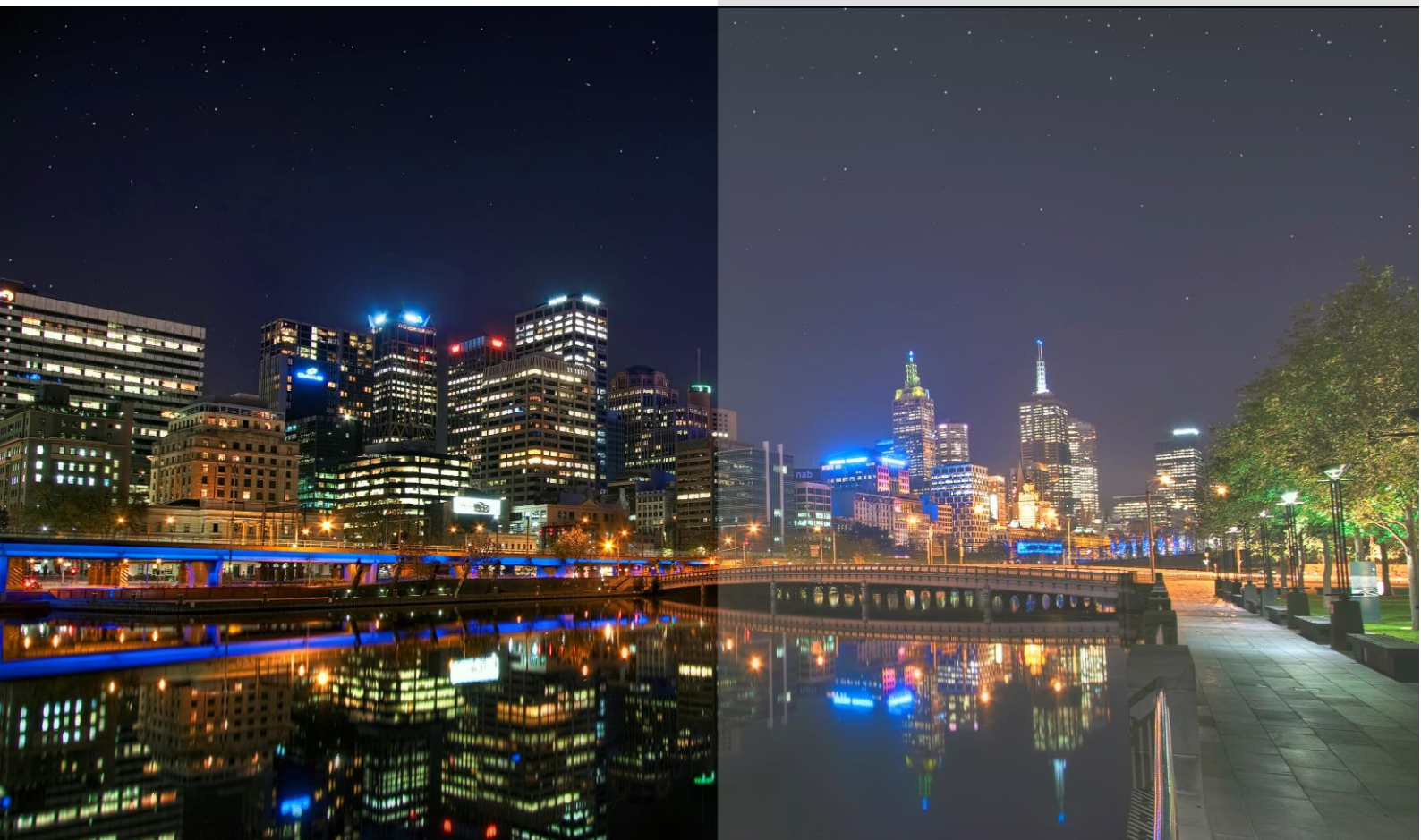
As the court's ultimate decision was to stay the proceeding and refer the dispute to arbitration, this aspect of the decision had little impact on the practical outcome for the parties. However, Justice Le Miere's decision indicates that the Western Australian Supreme Court will take a narrow approach when considering whether a judgment of the court might be inconsistent with a decision of an arbitral tribunal.

Conclusion

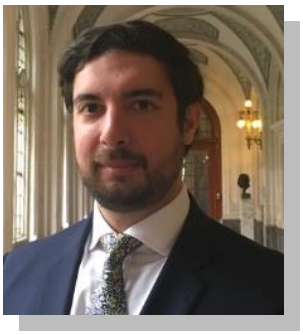
Justice Le Miere adopted a broad construction of the relevant agreements to find that an agreement to arbitrate existed. In this sense it was an arbitration-friendly decision, indicating that, where possible, courts will construe commercial agreements and arbitration agreements consistent with a presumption that parties intend all disputes arising from the same subject matter or legal relationship to be resolved in the same forum.

However, his Honour's adoption of the 'full merits' approach to determining the existence of an arbitration agreement necessarily intrudes on the principle of *competence-competence* and gives rise to the risk of court decisions being inconsistent with the decisions of arbitral tribunals on jurisdiction. In this regard the decision differs from the case law in other 'arbitration friendly' jurisdictions in the region – Hong Kong and Singapore – which have adopted the 'prima facie' approach.

It remains to be seen how the Australian authorities on this point will evolve. However, for the time being, it seems that door remains open for parties to substantively challenge the existence of an arbitration agreement, and therefore the jurisdiction of an arbitral tribunal, in the WA Supreme Court prior to any arbitral award being made.



Judith Levine
Senior Legal Counsel, Permanent Court of Arbitration
ACICA Board Member and Fellow, CAS Arbitrator



Domenico Cucinotta
Assistant Legal Counsel, Permanent Court of Arbitration
PCA-King's College London Fellow 2016-17

Faster, Stronger, Fairer: CAS Arbitration and the Rio 2016 Olympic Games

Introduction

At first glance, the worlds of elite sport and international arbitration appear to have little in common. In many sports, speed is the determinative factor. Similarly, sports-related disputes often relate to time-critical issues requiring swift resolution. For over 30 years, such swift resolution has been achieved by arbitration under the rules of the Court of Arbitration for Sport ("**CAS**") – the so-called "supreme court of world sport"[1] The continued success of the CAS – which currently handles over 500 cases per year -- is largely attributable to the speed and flexibility of tribunals operating under its auspices. These features are most prominently on display in the special *ad hoc* procedure established by the CAS for the resolution of disputes at the Olympic Games (the "**Olympics Procedure**").[2] The Olympics Procedure, like other arbitrations administered by the CAS – or, for that matter, any expedited procedure – requires a delicate balance to be achieved between efficiency and respect for due process. The Olympic Procedure at the Rio 2016 Olympic Games ("**Rio 2016**") was the busiest in history and provides an interesting case study to see how the goals of efficiency and due process can be accommodated within a high stakes, high pressure environment. Part I of this article briefly explains the history and jurisdiction of the CAS. Part II examines the Olympics Procedure and how it was used in Rio 2016. Part III deals with Australia's involvement at the CAS in the context of Rio 2016.

I An Introduction to CAS

Upon his election as IOC President in 1981, Juan Antonio Samaranch foresaw the need for a sports-specific dispute resolution body. To that end, Judge Keba Mbaye, a judge of the International Court of Justice and a member of the International Olympic Committee ("**IOC**"), chaired a working group which produced the statutes of the CAS. The statutes were ratified by the IOC in 1983 and entered into force on 30 June 1984.

Initially, there were strong links between the IOC and the CAS. In particular, the CAS was largely funded by the IOC, the IOC had the power to amend the CAS statutes, the IOC President was empowered to appoint individuals to the list of arbitrators, and the CAS is seated, like the IOC, in Lausanne, Switzerland. The propriety of these links was soon challenged in the Swiss Federal Tribunal (**"SFT**") by equestrian Elmar Gundel who had been disqualified, fined and suspended by the International Equestrian Federation ("**FEI**") for a horse doping violation. Mr Gundel argued that the CAS was not a proper court of arbitration because these links affected its

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[1] Philippe Cavalieros and Janet (Hyun Jeong) Kim, "Can the Arbitral Community Learn from Sports Arbitration?" (2015) 32(2) *Journal of International Arbitration* 237 citing Keba Mbaye, "Foreword" in Matthieu Reeb (ed), *Digest of CAS Awards II 1998-2000* (Kluwer Law International 2004) at xii, quoting Juan Antonio Samaranch.

[2] Court of Arbitration for Sport, "Arbitration Rules for the Olympic Games", available at http://www.tas-cas.org/fileadmin/user_upload/CAS_Arbitration_Rules_Olympic_Games__EN_.pdf.

independence and impartiality. The SFT noted that had the IOC been a party to the proceedings, the links mentioned above might have been sufficient to affect the CAS' independence. However, the court found the CAS was entirely independent and impartial with respect to the FEI and so the award was upheld.[3]

The IOC did not ignore the *dictum* of the SFT in the *Gundel* case and sought to reform the CAS. Critically, this led to the creation of the International Council of Arbitration for Sport ("**ICAS**") which took on the responsibility of running and financing the CAS and the creation of two divisions within CAS, the Ordinary Arbitration Division and the Appeals Division. This reformed version of the CAS survived a similar challenge by two Russian athletes in 2003 with the SFT noting: "[h]aving gradually built up the trust of the sporting world, [the CAS] is now widely recognised and… remains one of the principal mainstays of organised sport."[4]

The jurisdiction of the CAS is, like any other arbitral tribunal, based on party consent. However, the CAS limits itself *ratione materiae* to "sports-related dispute[s]".[5] The CAS also holds a unique place in world sport by virtue of its Appeals Division. The Appeals Division is permitted to review decisions of sports federations, associations or sports-related bodies if the statutes or regulations of the relevant body permit.[6] The jurisdiction of the CAS Appeals Division has attracted attention recently in the case of German speed-skater Claudia Pechstein. In 2009 the International Skating Union ("**ISU**") suspended Ms Pechstein for two years for a doping violation on the basis of "irregular blood parameters". Ms Pechstein appealed the finding to the CAS which upheld the suspension. Appeals to the SFT were similarly unsuccessful. The case was investigated again in 2014 by the German Olympic Sport Association which found that the blood-doping provisions had not, in fact, been breached. Ms Pechstein then sued the ISU and the German Ice-skating Union in the German courts for damages for lost earnings arising due to her suspension. In those proceedings, Ms Pechstein challenged the validity of the arbitration agreement between her and the ISU on the basis that the reference to CAS arbitration in the ISU statutes was non-negotiable if she wished to compete and thus violated her rights under German competition law and the European Convention on Human Rights. Ms Pechstein's challenge was upheld, albeit for different reasons, in the court of first instance and on appeal but was overturned on further appeal to the German Federal Tribunal (*Bundesgerichtshof*) ("**BGH**").[7]

The BGH did not agree that the reference to CAS arbitration constituted a structural imbalance between the ISU and the athlete given: the independence of the CAS; its provision of a mechanism which delivers consistent and prompt decisions; the fact that the athlete's rights are protected in the CAS procedural rules; and the ability of the athlete to choose an arbitrator from the list of over 200 CAS arbitrators. Ms Pechstein has expressed an intention to appeal the BGH decision to the German Constitutional Court.[8]

The Pechstein case illustrates the dilemma with which CAS is faced. Its demonstrated advantages of expertise, consistency and efficiency have ensured that many federations, associations and sports-bodies include CAS arbitration in their statutes.[9] However, these instruments are rarely negotiated between the athlete and the federation, leading some athletes to challenge the validity of the reference to CAS in the first place. These challenges have, to date, been ultimately unsuccessful because of the independence and impartiality of the CAS and the fact that the CAS procedure ensures that athletes are afforded due process at all stages.[10] Both the Swiss and German courts have determined that any shortcomings in the process alleged by the complainant athletes are tolerable given the exigencies of international sporting competition.

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[3] *G v Fédération Equestre Internationale et Tribunal Arbitral du Sport (TAS)*, Tribunal federal, 1re Cour civile, 15 March 1993 in Matthieu Reeb (ed), *Digest of CAS Awards I 1986-1998* (Kluwer 1998) 545; see also Louise Reilly, "An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes" (2012) *Journal of Dispute Resolution* 63.

[4] Court of Arbitration for Sport, History of the CAS <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>; see also *Larissa Lazutina & Olga Danilova v CIO, FIS & CAS* (27 May 2003) reported in Albert Jan van den Berg (ed) *Yearbook of Commercial Arbitration XXIX* (Kluwer 2004) 206

[5] CAS, Code of Sports-related Arbitration (In force as from 1 January 2016) ("**CAS Code**") R27.

[6] CAS Code R47.

[7] *Bundesgerichtshof*, 7 June 2016, KZR 6/15 <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=a671788bc1e302d1931d2cb0f24b2b39&nr=75021&pos=1&anz=2&Blank=1.pdf>; see also Despina Mavromati, "The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law: The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016", *CAS Bulletin 2016/1* <http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2016_1.pdf>.

[8] "Eisschnellläuferin Pechstein scheitert mit Klage", 7 June 2016, *Die Zeit* (online) <http://www.zeit.de/sport/2016-06/eisschnelllaeuferin-pechstein-scheitert-vor-dem-bundesgerichtshof>; "Speed skater's doping challenge to CAS hit by German legal ruling", 7 June 2016, *Financial Times* (online) <https://www.ft.com/content/dc893f5a-2c87-11e6-bf8d-26294ad519fc>.

[9] Note that CAS is not the only body capable of resolving sports-related disputes, see Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd ed, Kluwer 2016) 492-3.

[10] See generally, Reilly (n 2); Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (Kluwer 2015)

The CAS appears to take any criticism of its procedures seriously. Its willingness to adapt is evident from its public response to the BGH decision, in which the CAS explained:

> Although the [BGH] decision represents a ratification of the current CAS system, the CAS will continue to listen and analyze the requests and suggestions of its users, as well as of judges and legal experts in order to continue its development, to improve and evolve with changes in international sport and best practices in international arbitration law with appropriate reforms [citing as recent examples the introduction of legal aid for athletes and the diversification of the composition of ICAS].
>
> At a time when international sport is facing serious challenges, the [BGH] ruling sets a very significant precedent and emphasises more than ever the need to have the Court of Arbitration for Sport as the world's highest sports tribunal; able to guarantee an efficient procedure and a fair trial to all CAS users, and to provide binding decisions in accordance with the applicable law and regulations.[11]

II The Olympics Procedure

The Olympics Procedure entails an extreme balancing act between due process rights and the need for swift resolution of disputes arising during an event that only lasts 16 days. Introduced for the Atlanta 1996 Olympic Games,[12] the Olympics Procedure in its current form establishes two *ad hoc* divisions of the CAS to resolve disputes on site. The CAS sends two special panels of arbitrators (one for legal disputes and one for doping cases)[13] and staff of the Secretariat to facilitate the Olympics Procedure. In Rio, "pro bono lawyers based in Rio were available to assist Games participants before the CAS Divisions."[14] Rio 2016 marked the first time that the CAS acted as first-instance authority in doping-related matters at an Olympic Games.[15]

The urgency of proceedings at an Olympic Games is recognised and given effect in the special set of rules followed by the CAS *ad hoc* division which mandates that the panel must "give a decision within 24 hours of the lodging of the application" unless extended by the President of the *ad hoc* division.[16] The shortest case determined by the Rio 2016 *ad hoc* division lasted only three hours and twenty minutes[17] while the longest took 150 hours.[18]

The *ad hoc* division for the Rio 2016 Olympic Games had the heaviest workload of any *ad hoc* division to date with 28 cases registered. Among the 28 cases, 23 related to the athlete's eligibility to compete, there were two appeals in relation to anti-doping violations,[19] two were so-called "field of play" cases where the athlete challenged in the CAS the decisions made by officials during competition[20] and one related to the blanket ban from competition of the Russian Weightlifting Federation.

The strict application of deadlines proved to be the downfall of a number of athletes bringing eligibility challenges prior to Rio 2016. One such case involved Jamaican discus thrower Jason Morgan.[21] Mr Morgan did not qualify for automatic selection because he finished outside the top three at the Jamaican national championships despite achieving the qualifying distance in an earlier

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[11] Court of Arbitration for Sport, "Statement of the Court of Arbitration for Sport (CAS) on the Decision made by the German Federal Tribunal (Bundesgerichtshof) in the case between Claudia Pechstein and the International Skating Union (ISU)", 7 June 2016 <http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_07.06.16_English_.pdf>.

[12] The Olympics Procedure has been used at every Summer and Winter Olympic Games since 1996 and similar *ad hoc* procedures have been used at the Commonwealth Games, FIFA World Cup and UEFA European Championships.

[13] Note that arbitrators sitting in the general division during an Olympic Games cannot sit in the anti-doping division and vice-versa: Art 3, Arbitration Rules for the Olympic Games; and Art 3, Arbitration Rules Applicable to the CAS Anti-doping Division.

[14] Activities of the CAS Divisions at the Olympic Games Rio 2016, p 1.

[15] A proposal was made by the IOC at the 5th Olympic Summit on 8 October 2016 (ie, post- Rio 2016) that the CAS be used more generally as a first-instance tribunal in doping-related disputes: see, International Olympic Committee, *Declaration of 5th Olympic Summit* (8 October 2016) <http://iocnewsroom.com/wp-content/uploads/2016/10/SCRIPT_VNR_Declaration_5th_OlympicSummit.pdf>.

[16] Arbitration Rules for the Olympic Games <http://www.tas-cas.org/fileadmin/user_upload/CAS_Arbitration_Rules_Olympic_Games__EN_.pdf>.

[17] CAS OG/16/20 *Vanuatu Association of Sports and National Olympic Committee & Vanuatu Beach Volleyball Association v Fédération Internationale de Volleyball & Rio 2016 Organising Committee*.

[18] CAS OG/16/06 *Viktor Lebedev v Russian Olympic Committee, International Olympic Committee & United World Wrestling.*

[19] Separately, eight cases were registered in the new first instance anti-doping division.

[20] Note that both of these "field of play" cases were dismissed on the basis that the CAS does not overturn decisions made by officials on the field of play unless there is evidence that the rules were applied arbitrarily or in bad faith; see CAS OG/16/27 *Fédération Française de Natation, Aurélie Muller & Comité National Olympique et Sportif Français v FINA*; CAS OG 16/28 *Behdad Salimi & National Olympic Committee of the Islamic Republic of Iran v IWF*.

[21] CAS OG/16/08 *Jason Morgan v Jamaican Athletics Association*.

competition.[22] Mr Morgan was not selected despite the fact that two of the three athletes who finished ahead of him at the national championships had not achieved the qualifying distance.[23] Mr Morgan's lawyer was notified of the fact that he would not be selected on 21 July 2016, 15 days before the Opening Ceremony for Rio 2016.[24] However, Article 1 of the CAS *ad hoc* Rules only grants jurisdiction to tribunals operating in the *ad hoc* division for disputes that "arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games," and his case was ruled inadmissible.

Unsurprisingly, the majority of cases related to the eligibility of Russian athletes following the decision of the IOC Executive Board on 24 July 2016 (the "**IOC Decision**"). The IOC Decision was made after the publication of a report by Professor Richard McLaren appointed as Independent Person by the World Anti-Doping Agency (or "**WADA**") which concluded that, *inter alia*, the Russian "Ministry of Sport directed, controlled and oversaw the manipulation of athlete's analytical results or sample swapping" in relation to the Sochi 2014 Winter Olympic Games and at other times.[25] Despite calls for the IOC to impose a blanket ban on all Russian athletes, the IOC Executive Board determined that "according to the rules of natural justice, individual justice, to which every human being is entitled, has to be applied."[26] Accordingly, each Russian athlete was "given the opportunity to rebut the applicability of collective responsibility"[27] and the IOC Decision specified that the IOC would only accept Russian athletes if certain conditions were met. One condition imposed by the IOC Decision was that the Russian Olympic Committee could not "enter any athlete… who has ever been sanctioned for doping, even if he or she has served the sanction."[28] A number of Russian athletes challenged the validity and enforceability of this condition, arguing that it amounted to a denial of natural justice and double jeopardy for those athletes who had already served sanctions for doping violations. Russian swimmer Yulia Efimova was one such athlete.

Ms Efimova had served a 16 month ban for an anti-doping violation between 2013 and 2014 and was therefore unable to satisfy all conditions of the IOC Decision.[29] The Russian Olympic Committee removed Ms Efimova from its entry list on 25 July 2016.[30] The Tribunal upheld Ms Efimova's challenge in part, determining that the condition was unenforceable as it "denies the athlete natural justice, being the very right emphasised in the IOC Executive Board's decision itself."[31]

The Tribunal rejected the IOC's argument that it had a right to autonomy under Rule 44 of the Olympic Charter which states: "Any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds. Nobody is entitled as of right to participate in the Olympic Games." This argument failed for two reasons. First, the athlete was not challenging a decision by the IOC to refuse entry, but rather challenged the direction of the IOC to the national Olympic committee not to nominate athletes who had previously been subject to doping sanctions.[32] Second, the IOC's reference to the rules of natural justice in the IOC Decision effectively limited its own discretion under Rule 44 of the Olympic Charter. Therefore, the impugned condition was contrary to the remainder of the IOC Decision which had intended to accord natural justice to athletes and was, therefore, unenforceable.[33] Ultimately, Ms Efimova was permitted to compete at Rio 2016 and won two silver medals.

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[22] CAS OG/16/08 *Jason Morgan v Jamaican Athletics Association*, paras 1.4-1.5.
[23] CAS OG/16/08 *Jason Morgan v Jamaican Athletics Association*, para 1.7.
[24] CAS OG/16/08 *Jason Morgan v Jamaican Athletics Association*, para 1.6.
[25] Richard McLaren, *The Independent Person Report* (18 July 2016) para 3 <https://wada-main-prod.s3.amazonaws.com/resources/files/20160718_ip_report_newfinal.pdf>.
[26] International Olympic Committee, *Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016* (24 July 2016) <https://www.olympic.org/news/decision-of-the-ioc-executive-board-concerning-the-participation-of-russian-athletes-in-the-olympic-games-rio-2016> ("**IOC Decision**").
[27] IOC Decision (n 25).
[28] IOC Decision (n 25).
[29] CAS OG 16/04 *Yulia Efimova v ROC, IOC & FINA*, paras 2.3-2.6.
[30] CAS OG 16/04 *Yulia Efimova v ROC, IOC & FINA*, paras 2.7-2.9.
[31] CAS OG 16/04 *Yulia Efimova v ROC, IOC & FINA*, para 7.18; see also CAS OG/16/13 *Anastasia Karabelshikova & Ivan Podshivalov v FISA & IOC.*
[32] CAS OG 16/04 *Yulia Efimova v ROC, IOC & FINA*, para 7.21.
[33] CAS OG 16/04 *Yulia Efimova v ROC, IOC & FINA*, para 7.24.

III Australia and The CAS at RIO 2016

Australia's general enthusiasm for sport is reflected in its representation at the CAS. The current CAS President is Mr John Coates, President of the Australian Olympic Committee, Sydney hosts a registry of the CAS and there are 23 Australians on the CAS list of arbitrators.[34] While no Australian athlete had to make use of the *ad hoc* division or anti-doping division at Rio 2016, two Australian arbitrators from the CAS list – the Hon Dr Annabelle Bennett AO SC and the Hon Dr Tricia Kavanagh – were selected to sit as arbitrators during Rio 2016. Australians may also be familiar with the work of the CAS since it was a CAS tribunal that upheld WADA's appeal and imposed a two year suspension on 34 players from the Essendon Football Club following the Australian Sports Anti-Doping Authority's investigation into Essendon's supplements program.[35]

One Australian athlete, 17 year old Mitchell Iles, brought an appeal to the CAS prior to the commencement of Rio 2016 challenging the selection of Australia's male representatives for the trap shooting event. Mr Iles was initially selected as a reserve and challenged that selection on the basis that Shooting Australia did not take into account the "Development/2020 Factor" – that is to say, whether "selection will enhance [the athlete's] long-term development towards the success of the 2020 Olympic Games" – when making their selection for Rio 2016. The Sole Arbitrator determined that even though the selection process empowered Shooting Australia with discretion, that discretion was not unfettered but "governed by principles [of] good faith and reasonableness both as to process and result"[36] and Shooting Australia should have considered the "Development/2020 Factor" as a criterion for selection.[37] Accordingly, Mr Iles' nomination was referred back to the selection committee for determination in accordance with the relevant criteria, this time including the Development/2020 Factor. Mr Iles was selected for the Rio 2016 team, making him "Australia's third youngest ever shooting athlete to compete at an Olympic Games."[38]

Conclusion

The CAS has not only managed to survive numerous challenges to its status, impartiality and independence but has invoked those features of its structure and process to cement its position as the world's foremost institution for the resolution of sports-related disputes. By necessity, CAS proceedings are resolved swiftly. This is especially apparent in the CAS *ad hoc* division at an Olympic Games. As the decisions discussed in this article demonstrate, an increase in speed does not necessarily diminish the level of due process afforded to the parties involved. Both the Efimova and Iles decisions are examples of how CAS tribunals have protected an athlete's right to natural justice and ensured that those athletes did not unfairly miss an opportunity to represent their country at an Olympic Games. CAS arbitration certainly gives credence to the notion that arbitration can be a just, quick and cheap process for resolving disputes. There is no reason in principle why ordinary commercial arbitration cannot similarly deliver an efficient process while maintaining due process.

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[34] CAS List of Arbitrators <http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html?GenSlct=2&nmIpt=&nltSlc%5B%5D=165>.

[35] See CAS 2015/A/4059 *World Anti-Doping Agency v Thomas Bellchambers et al, Australian Football League, Australian Sports Anti-Doping Authority.*

[36] CAS A1/2016 *Mitchell Iles v Shooting Australia*, para 57.

[37] CAS A1/2016 *Mitchell Iles v Shooting Australia*, para 59.

[38] Australian Olympic Committee, Mitchell Iles Athlete Biography <http://rio2016.olympics.com.au/athlete/mitchell-iles>.

Russell Thirgood
McCullough Robertson Lawyers
ACICA Board Member

Erika Williams
McCullough Robertson Lawyers

Australian courts' approach to multi-party and multi-contract arbitration

Australia's domestic commercial arbitration landscape has recently undergone comprehensive reform, with the adoption of the UNCITRAL Model Law (**Model Law**) in all jurisdictions except the Australian Capital Territory. The uniform Commercial Arbitration Acts (**Acts**), introduced between 2010 and 2013, have simplified Australia's dualist arbitration regime but have simultaneously added complication to multi-party proceedings. The present article will examine the courts' application of the new legislation with special attention to their newfound obligation to uphold arbitration agreements.

A poorly drafted arbitration clause may result in only part of a dispute between parties being referable to arbitration. Alternatively, the dispute may involve parties who were not subject to the arbitration agreement. In these cases, enforcement of the arbitration clause could result in a bifurcation of proceedings, whereby part of the dispute is heard by an arbitral tribunal and the residue is put before the court. This scenario presents a risk of contradictory findings, and adds cost and complexity to the dispute resolution process. Until the introduction of the new Acts, where a dispute is only partly arbitrable, courts had traditionally exercised their discretion to refuse to enforce the arbitration clause, such that the entire dispute is heard by the court.

Following the adoption of the Model Law, however, the courts no longer have this discretion. Section 8 of the Acts provides that, where a valid and operative arbitration clause exists, the court 'must… refer the parties to arbitration'. The principal question in applying section 8, then, is whether the dispute falls within the scope of a valid and operable arbitration agreement. In addressing this question, the courts have had reference to Australian decisions construing the Model Law in the context of the *International Arbitration Act 1974* (Cth), as well as overseas decisions that consider the Model Law. These decisions have informed the standard of proof required to satisfy section 8.

In Singapore, for example, the courts consider themselves bound to refer a dispute to arbitration where, on a prima facie review, there is a valid agreement that encompasses the dispute[1]. The prima facie approach is also favoured in Canada and Hong Kong.[2] In contrast, the English courts adopt a full merits approach, including a trial where necessary, to decide on the balance of probabilities whether an arbitration agreement exists and encompasses the dispute.[3]

The Australian position most closely resembles the English test. In *Rinehart v Rinehart (No 3)*[4] Gleeson J held that a party seeking referral to arbitration 'must prove, on the balance of probabilities, the existence of an apparently valid arbitration agreement'. The party must also demonstrate 'on the balance of probabilities whether, on the proper interpretation of the relevant arbitration agreement, a matter arising in the proceeding falls within the scope of the agreement'.[5]

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[1] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57.
[2] *Rinehart v Rinehart (No 3)* [2016] FCA 539 [111].
[3] *Joint Stock Co Aeroflot Russian Airlines v Berezovsky* [2013] EWCA CIV 784 [73].
[4] [2016] FCA 539 [103].
[5] *Rinehart v Rinehart (No 3)* [2016] FCA 539 [115].

Multi-party disputes

An example of the application of this approach can be found in *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd*,[6] a case of a multi-party dispute. There, John Holland had entered into separate contracts with Kellogg Brown & Root (**KBR**), and Atlantis Corporation (**Atlantis**), each of which contained an arbitration agreement. John Holland commenced proceedings in the Supreme Court of New South Wales against KBR and Atlantis seeking damages for breach of contract and negligence, amongst other claims. Both KBR and Atlantis applied to the court for a stay of the court proceedings and referral to arbitration under section 8 of the *Commercial Arbitration Act 2010* (NSW), relying on the arbitration agreements contained in their respective contracts. The Court found that the arbitration agreement in the KBR contract was valid and did encompass the dispute, and referred that dispute to arbitration. However, the arbitration agreement between John Holland and Atlantis was held to be inoperative because the parties had not yet undergone negotiation and expert determination, which were contractual preconditions to arbitration. The Court stayed John Holland's action against Atlantis pending fulfilment of the obligations of negotiation and expert determination. This resulted in John Holland being able to pursue its claim against KBR through arbitration, while being unable to bring arbitration proceedings against Atlantis at the time.

Multi-contract disputes

A multiplicity of proceedings can also arise where there exist multiple contracts between the same parties, as in *Elders International Pty Ltd v Beijing Be Green Import & Export Co Ltd*.[7] In that case, relevantly, Beijing Be entered into three contracts with Elders for the purchase of cattle, namely contracts C90, C93, and C96. Beijing Be made claims against Elders for commission payments under C93 and C96. In the meantime, Elders alleged that Beijing Be had breached its obligations under C90, thereby entitling Elders to unliquidated damages to be set off against its obligation to pay commission under C93 and C96. Elders failed to pay the commission Beijing Be asserted it was owed. Consequently, Beijing Be referred the claims under C93 and C96 to arbitration before CIETAC.[8] With the consent of each party, those claims were consolidated. Elders submitted a counterclaim in that proceeding for unliquidated damages for breach of C90 to be set off against any commission Elders was found to owe Beijing Be. The arbitral tribunal held that the dispute under C90 was unrelated to the commission payments proceeding, and that the tribunal did not have jurisdiction, without consent of Beijing Be, to determine the unliquidated damages claim under C90 within the commission payment arbitration. Beijing Be sought, and the Federal Court granted, enforcement of the tribunal's judgment.[9] Elders had sought a stay of enforcement on the basis that it had good prospects of success in the claim under C90 that it was pursuing in separate arbitration proceedings and it would be entitled to set off that award against the judgment in C93 and C96. However, the Court refused the stay, observing:

> '*When appropriate weight is given to the circumstance that the Award was the result of an arbitral process into which the parties had freely and voluntarily entered through their commercial agreements, the refusal of the stay became inevitable*.'[10]

On appeal, the decision to enforce the judgment was upheld. Chief Justice Allsop observed that there was no connection between the three contracts, and 'no overarching contract linking' them. This was despite the individual contracts, and the arbitration clauses within them, being in substantially identical terms. There was no 'capacity to bring about a relationship between disputes under separate contracts.'

The decision in *Elders* demonstrates the risk of a multiplicity of proceedings where multiple contracts exist between the same parties, even when those contracts deal with the same subject matter and provide for arbitration by the same method.

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[6] [2015] NSWSC 451.
[7] [2014] FCAFC 185.
[8] China International Economic and Trade Arbitration Commission.
[9] *Beijing Be Green Import & Export Co Ltd v Elders International Australia Pty Ltd* [2014] FCA 1375.
[10] *Beijing Be Green Import & Export Co Ltd v Elders International Australia Pty Ltd* [2014] FCA 1375 [82].

Simplifying multifaceted disputes

As Allsop CJ suggested in *Elders*, parties who become involved in multi-contract disputes can execute an 'overarching contract' or umbrella agreement requiring the parties to resolve each dispute in a single arbitral proceeding. Such an agreement can be executed even after the formation of the substantive contracts. Where, at the time of contracting, the parties foresee the existence of multiple contracts, the arbitration clause in each contract should provide for consolidation of all disputes between the parties. It is also advisable to agree that any future arbitration be conducted pursuant to institutional rules that facilitate joinder or consolidation. However, joinder or consolidation generally requires the consent of the parties, which may not be forthcoming once a dispute has arisen. The rules of all key international arbitral institutions provide for consolidation and joinder and some, including ACICA[11] and HKIAC,[12] allow a third party to apply to intervene in proceedings.

Conclusion

It is clear that even where there exists a commercial closeness between contracts or parties, and despite the efficiency benefits of determining all disputes before a single forum, the courts will fulfil their statutory obligation to enforce an arbitration agreement. In seeking to protect against a multiplicity of proceedings, contracting parties should draft arbitration clauses in wide terms and ensure all potential disputants are subject to the agreement to arbitrate. By these measures, parties can strive to have their disputes resolved quickly and at minimal expense, while enjoying the benefits of privacy and flexibility afforded by commercial arbitration.

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[11] Australian Centre for International Commercial Arbitration.
[12] Hong Kong International Arbitration Center.

Andrej Dalinger
Student and Intern at ACICA & ADC

Sports Arbitration in Germany

Introduction

To guarantee a fair competition all athletes have to play their sport by the same rules. If it comes to a sport-related dispute regarding the infringement of rules by an athlete, one has to make sure that there is an independent judicial body deciding this dispute. To prevent legal uncertainties and a national affected interpretation of the sport regulations the Court of Arbitration for Sport (CAS), seated in Lausanne, Switzerland, provides services to resolve sport-related disputes through arbitration. Consequently every Olympic athlete has to sign an arbitration clause if he or she wants to be a part of the Olympic Games. In addition, most of the international sport associations acknowledge the CAS as the second instance to their own court of first instance. Therefore, the CAS is often referred to as the "Supreme Court of Sports".

While the Swiss Federal Court ("Bundesgericht") clearly stated that the CAS has to be seen as an arbitral court in accordance with the New York Convention[1] there was not such a clear statement of the German Federal Court ("Bundesgerichtshof"). This changed with its much anticipated decision dated 7 June 2016[2] in the case of Ms. Claudia Pechstein, a German speed skater and winner of several Olympic medals. This article briefly outlines the legal situation of domestic and international sport arbitration in Germany and analyses the consequences of the said decision.

Arbitration in Germany

Germany is party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards since 1961.[3] The regulations regarding arbitration are primarily stated in the 10th book of the code of civil procedure procedure (Zivilprozessordnung; ZPO). According to § 1030 para. 1 ZPO, any proprietary claim is arbitral. An exception from that rule can be found in § 102 para.2 of the labour court act (Arbeitsgerichtsgesetz; AGG) saying that there should be no arbitral procedure between an employee and his employer. The German Institution of Arbitration (DIS), seated in Berlin, promotes arbitration and offers central support of arbitration tasks in Germany.

Domestic Sport Arbitration

The national anti-doping agency and its fight against doping outlines the most important field of domestic sport arbitration in Germany. Therefore, every German athlete who has to comply with the NADA anti-doping regulations has to sign an arbitration clause. This clause states that every dispute between an athlete and the anti-doping agency has to be resolved by the German Sports Arbitration Court, an independent court run by the DIS.[4] The German Sports Arbitration Court is not only limited to disputes in relation to doping regulations but also offers its dispute resolution services to various national sport associations.

According to European and national employment law team athletes like soccer players are employees of the club they play for.[5] Since disputes between employees and employers are not arbitral in Germany, arbitration cannot be held between clubs and their players. As a consequence clubs and players have to find a mutual agreement (most regular occurrence) or run public legal proceedings.

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[1] BG, BGE 129 III 445.
[2] BGH, 7.6.2016 – KZR 6/15.
[3] http://www.newyorkconvention.org/list+of+contracting+states.
[4] http://www.dis-sportschiedsgericht.de/de/.
[5] ECJ, 15.12.1995 – C-415/93; BAG, 08.12.1998 – 9 AZR 623/97.

International arbitration

In international sports competition there are many different kinds of disputes that can arise. The most common case is banning an athlete from competing due to doping.[6] Therefore, in case a dispute arises, an athlete, club, association or organizer(s) of sporting events can submit their dispute to the CAS. All the associations, member to the International Olympic Committee exercise this option and oblige their athletes to accept the arbitration agreement stated in the regulation or sign a specific arbitration agreement.

The CAS was originally founded and financed by the International Olympic Committee but now claims to be an institution independent of any sports organisation.[7] The CAS publishes two lists of arbitrators, a general and a soccer related list, from which the parties can choose their arbitrators from. As a result the parties are not entirely free to choose the arbitrators but are limited to the two lists of 352[8] (general related disputes) and 93[9] (soccer related disputes) names. Although the CAS tries to involve the athletes making the list of arbitrators, most of the names were chosen by the associations.

The Pechstein Case

The importance of the CAS to German athletes and the scope of international sport arbitration in Germany is well characterised by the Pechstein-Case and the recent decision of the German Federal Court.

The CAS confirmed a two year doping ban imposed on Pechstein by the International Skating Union (ISU).[10] The athlete's appeal to the Swiss Federal Court was dismissed as well as other judicial remedies the athlete raised in courts in Switzerland. The athlete did not give up after exhausting the available legal remedies against the CAS award in Switzerland but decided to file a legal action against the ISU before the District Court in Munich, claiming the payment of the loss of profit of EUR 3.5 Million. Before deciding on the merits the court had to decide about the validity of the arbitration clause.

The court questioned the impartiality of the CAS and therefore the validity of the arbitration agreement between the athlete and the association. At the end it affirmed the validity of the arbitration agreement and dismissed the legal action. However, it only did so because Pechstein failed to challenge the tribunal's impartiality during the proceedings and therefore waived her right to object the validity of the arbitration agreement.[11]

Pechstein filed an appeal to the Higher Regional Court Munich that overturned the first instance decision. The Higher Regional Court decided that by not guaranteeing equal treatment to both parties, the arbitration agreement between Pechstein and ISU infringed anti-trust laws. Since anti-trust law is part of the German public policy, the court concluded that the arbitration clause was void. Due to this interim judgement certain professional media have spoken of the end of sports arbitration in Germany[12] or at least of a revolution of sports law[13]. The court's decision was criticised by prestigious arbitrators and sport lawyers.[14] However, a collapse of the sport related dispute resolution system seemed no longer excluded.[15] Before the Higher Regional Court decided on the merits it granted leave to appeal.

Therefore, the German Federal Court had to decide about the validity of the arbitration agreement.[16] It reversed the judgement of the Higher Regional Court and ruled that the arbitration agreement between Pechstein and the ISU was valid and as a consequence Pechstein's legal action inadmissible. It decided that looking at the overall picture, the CAS is independent and neutral and therefore a true arbitral tribunal in accordance with the New York Convention.

Conclusion

The sport arbitration in Germany got staggered by the decision of the Higher Regional Court but the Federal Court prevented the sport arbitration system from collapsing. The Federal Court's decision confirmed the outstanding importance of the CAS in international sports arbitration and removed the legal uncertainty caused by the interim judgement of the Higher Regional Court. An award rendered by the CAS can still be enforced in Germany and if there is an arbitral agreement the parties cannot call a national court.

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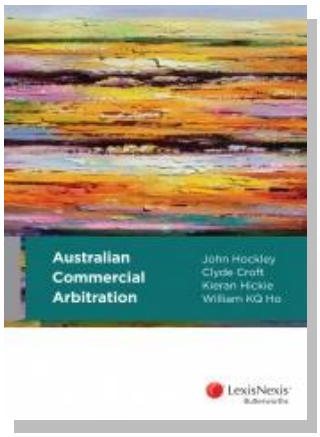
[6] http://www.bbc.com/sport/olympics/36881326.
[7] http://www.tas-cas.org/en/general-information/history-of-the-cas.html.
[8] http://www.tas-cas.org/en/arbitration/list-of-arbitrators-general-list.html; containing 23 Arbitrators from Australia.
[9] http://www.tas-cas.org/en/arbitration/list-of-arbitrators-football-list.html; containing 4 Arbitrators from Australia.
[10] CAS 2009/A/1912-1913.
[11] LG Munich, 26.02.2014 – 37 O 28331/12.
[12] http://www.lexology.com/library/detail.aspx?g=b403ea1a-eefc-4251-9a37-b1679175ec8c.
[13] http://www.disputeresolutiongermany.com/2016/06/sports-arbitration-federal-supreme-court-finds-against-pechstein-upholds-cas-arbitration-agreement/#more-5275.
[14] Duve/Roesch, SchiedsVZ 2014, 216; Schlosser, SchiedsVZ 2015, 257.
[15] Rombach, SchiedsVZ 2015, 105.
[16] BGH, 7.6.2016 – KZR 6/15.

John Arthur
Barrister
ACICA Fellow

Book review: AUSTRALIAN COMMERCIAL ARBITRATION, by John J. Hockley, Hon Clyde Croft, Wiliam KQ Ho, Kieran R Hickie, Lexis Nexis, 2015, 498pp, paperback and online, ISBN: 97804093434031



Each of the States and Territories of Australia (apart from the ACT) have now adopted a uniform national commercial arbitration regime to govern domestic arbitration, by way of the *Commercial Arbitration Acts*.

Australian Commercial Arbitration provides detailed and expert commentary and annotations to the uniform Acts.

As noted by Chief Justice Robert French AC, whose illuminating *Foreword* graces *Australian Commercial Arbitration*:

"(i)n Australia, the Commercial Arbitration Acts of the States and the International Arbitration Act 1974 (Cth) now provide for the application of the United Nations International Trade Law Model Law to arbitrations conducted in this country whether they relate to domestic or international disputes".

The Chief Justice highlights the consensual basis of arbitration, in its international form, where "(p)arties from different legal systems can agree to resolve an international commercial dispute by arbitration and choose both the law (or laws) to be applied and the processes to be followed" (as articulated by the plurality in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; (2013) 295 ALR 596; (2013) 87 ALJR 410; [2013] HCA 5 at [45]). In the Chief Justice's view, whether parties and their advisors are prepared to choose domestic arbitration comes down to considerations of cost, efficiency and confidentiality.

The Act seeks to meet these demands by the imposition of a "paramount object" in s. 1AC which gives effect to the overriding principles and aims of the Act, the inclusion of which the authors describe as "significant". The authors note that its expression is in similar terms to the Victorian *Civil Procedure Act* 2010 (s. 10); s. 56 *Civil Procedure Act* 1996 (NSW), s. 1.2 English *Civil Procedure Rules* 1998 and the IAMA, ACICA, ICC, SIAC and HKIAC arbitration rules (with the notable exception that the express considerations of proportionality in the arbitration rules are not expressed in the Act). To this list may be added s. 37M *Federal Court of Australia Act* 1976 (Cth), and r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld). It is elsewhere suggested that the rationale for the statutory imposition of an overarching purpose or paramount object is so that a workable criteria is available for decision-making in matters of process: *Court adjudication of Civil Disputes: A public service that needs to be delivered with proportionate resources within a reasonable time and at reasonable cost*, p 8, Adrian Zuckerman, Professor of Civil Procedure, University College, Oxford. (Paper presented at the 24th Australian Institute of Judicial Administration Annual Conference, Adelaide, 15–17 September 2006); cited by the Victorian Law Reform Commission, Civil Justice Review, Report 14 (2008), 90 available at http://www.aija.org.au/ac06/Zuckerman.pdf (see *Civil Procedure Victoria*, Lexis Nexis, D. Bailey and J. Arthur at [C1.01.10].

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[1] This original version of this book review appeared in the *Australian Alternative Dispute Resolution Bulletin*, Lexis Nexis, October 2016, 2016 Vol 3, No 5; pp 15-18

The authors however note that the Act seeks to achieve the *paramount object* only by comparison to the formality, speed and cost of court proceedings and does not expressly bind the parties to arbitral proceedings to the paramount object in the way they are bound under the English rules (r. 1.3) (or that for example, participants in litigation in the ordinary courts in Victoria are bound under the *Civil Procedure Act* 2010), the Act only expressing a general duty on the parties to do all things necessary for the proper and expeditious conduct of the arbitral proceedings (s. 24B)). Nevertheless the authors opine that the expression of a "paramount object" in the legislation makes it a significant tool for the efficient conduct of domestic arbitration (p. 28). Unlike other forms of 'Alternative Dispute Resolution' in Australia (as well as many other areas of the law in this country given its federal legal structure), arbitration, both international and domestic, is blessed with a uniform Australia-wide national system. The Commonwealth Act and almost universal acceptance by the States and Territories of the uniform domestic Australian arbitration regime allows for the cohesive and dynamic development of an Australia wide jurisprudence.

Australian Commercial Arbitration gives considerable assistance to this process by providing readers with an erudite summary and analysis of the provisions of the Act, with a detailed discussion of the more important provisions. There are far-ranging and comprehensive references to excerpts and discussion of leading cases both in Australia, and overseas, and to relevant academic discourse and useful material and resources.

The authors include the Hon Justice Clyde Croft of the Supreme Court of Victoria, one of Australia's leading arbitration judges and judge in charge of the Supreme Court's Arbitration List, as well as several practitioners, a solicitor and two barristers. The text is published as an online subscription, as a useful paperback book, and as an e-book. The authors have chosen the Victorian Act, the *Commercial Arbitration Act* 2011 (Vic), as the template. In the other Australian commentary to the uniform Acts, (*Commercial Arbitration in Australia,* by Doug Jones, 2nd Ed., Lawbook Co., 2013) the author has chosen the NSW Act.

The text has extensive discussion of the pivotal provisions of the Act, sections:

- s.1AC: paramount object of the Act
- s.1: scope of application
- s.2: definition section
- s.7: definition and form of arbitration agreement
- s.8: arbitration agreement and substantive claim before the Court
- s.17: power of arbitral tribunal to order interim measures
- s.17J: court ordered interim measures
- s.25: default of a party
- s.27A: party may obtain subpoenas (from the Court)
- s.27I: Court may allow disclosure of confidential information in certain circumstances
- s.28: rules of law applicable to the substance of a dispute
- s.31: form and contents of award
- s.33B: costs
- s.34: application for setting aside as exclusive recourse against an arbitral award
- s.34A: appeals against awards
- s.35: recognition and enforcement
- s.36: grounds for refusing recognition or enforcement –

with special emphasis on ss. 1, 2, 7, 8, 28, 34, 34A, 36.

Australian Commercial Arbitration provides an in-depth analysis of important Australian and overseas cases (termed "Case Study" where the analysis is extensive) including the sometimes contentious High Court decision of *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; 128 ALR 391 (implied right of confidentiality), the leading decision of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; (2006) 238 ALR 457; [2006] FCAFC 192 (variously referred to in its many aspects) (per Allsop CJ); *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398; 279 ALR 759; [2011] NSWSC 195 (Ball J) (the relationship between arbitration and the NSW Security of Payment legislation – [s. 8.20]); *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772; [2011] NSWSC 268 (Hammerschlag J) (order sought under s. 16(9) of the Act that the arbitrator did not have any jurisdiction over any of the claims and issues in relation to patent and patent applications; arbitrability - [s. 16.25]); *Altain Khuder LLC v IMC Mining Inc* (2011) 276 ALR 733; [2011] VSC 1 (the issue of competence–competence - [s 16.5]) (Croft J)[2];

[2] Brief reference is made to *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303; 282 ALR 717; [2011] VSCA 248 where the Court of Appeal allowed an appeal from Croft J's decision setting aside all the orders made in so far as they related to IMCS as the evidence did not support a conclusion that it was a party to the relevant arbitration agreement

Rinehart v Welker [2012] NSWCA 95 (where Bathurst CJ (McColl JA and Young JA agreeing) declined to follow Lord Hoffman's speech in *Fiona Trust & Holding Corp v Privalov* [2007] All ER (D) 233 (Oct); [2007] UKHL 40; [2007] 4 All ER 951; [2007] 2 All ER (Comm) 1053; [2008] 1 Lloyd's Rep 254 at [13] preferring that the approach adopted when construing the meaning of any contractual terms – [s 8.5]); *Passlow v Butmac Pty Ltd* [2012] NSWSC 225 (Adamson J)([s 8.15]); *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd* [2012] HKCA 200; [2012] HKLRD1 (arbitral procedure not in accordance with the agreement of the parties – [s 34.55]); *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666; [2013] WASCA 66 (Court of Appeal) (which held that the arbitration clause there in issue was broad enough to cover the dispute and endorsing Lord Hoffman's approach of taking an expansive approach to the construction of arbitration clauses); *Ringwood Agricultural Co Pty Ltd v Grain Link* [2013] NSWSC 191 (Hammerschlag J) (application to set aside an award because the arbitral procedure was not in accordance with the arbitration agreement and the Act refused – [s 34.57]); *Trility Pty Ltd v Ancon Drilling Pty Ltd* [2013] VSC 577 (Croft J) (Court ordered interim measures – security for costs application rejected because of delay – [s 17J.10]); *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 (Martin CJ) (application for a stay of proceedings under Commercial Arbitration Act 2012 (WA) – [s 8.50]); *Re Form 700 Holdings Pty Ltd* [2014] VSC 385 (Robson J) (where some but not all parties to a court proceeding are parties to an arbitration agreement – [s 8.23]); *Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49; [2014] VSCA 142 (the Victorian Civil and Administrative Tribunal was a "court" for the purposes of an arbitration clause in a franchise agreement which referred disputes to arbitration – [s 8.15B]); *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387; [2014] FCAFC 83 (Allsop CJ, Middleton and Foster JJ) (where an award may be contrary to public policy – [s 34.63]); *Emerald Grain Australia Pty Ltd v Agrocrop International Pte Ltd* [2014] FCA 414 (Pagone J) (public policy and the "no evidence" ground – [s. 34.70]); *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80 (Croft J) (enforcement of an arbitral award granted despite invocation of the public policy ground to seek to resist – [s. 34.70])(appeal dismissed (2015) 317 ALR 786; [2015] VSCA 37); *Hebei Jikai Industrial Group Co Ltd v Martin* [2015] FCA 228 (Wigney J)(application to set aside an award on the basis that the procedure was not in accordance with the dispute resolution procedure set out in a Deed of Settlement – [s. 34.51]); *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163 (Croft J)(party seeking to set aside the award had a reasonable/full opportunity to present its case under s. 18 of the Act – [s. 34.40]).

There are small gems to be found including references to the *Protocol on Drafting National Uniform Legislation (see http://www.pcc.gov.au/uniform/Uniform-drafting-protocol-4th-edition.pdf)*, the general power of an arbitrator to award interest (ibid, *Siemens* discussed at p. 80 of the text but see s. 33E), reference to the origin of the *real danger of bias* test where an arbitrator's impartiality is challenged under s. 12 (p. 96); and an illuminating and pithy discussion of the standard of reasons required by arbitrators (pp. 164-167).

Apart from the comprehensive annotations of the Act, and wealth of case-law explored, the text provides a host of other useful information for the arbitration practitioner. The features of the text include:

(a) useful comparative tables: a provision by provision comparison between the uniform Acts and the previous legislative scheme; commencement information in relation to each of the State and Territory Acts; and a list of each of the provisions of the Acts which are not mandatory provisions but which are 'opt out' provisions;
(b) the use of sub-headings to assist understanding and comprehension;
(c) the phrase "*Case study*" to denote an extensive case analysis;
(d) useful additions including the New York Convention and links to where its text is available online, links to the ACICA and IAMA Arbitration Rules, and to various international arbitration rules, the ICC Arbitration Rules 2012, the LCIA Arbitration Rules, the HKIAC Arbitration Rules and the SIAC Rules;

(e) handy extracts from legislation and rules of court around Australia, including relevant provisions of the *Civil Procedure Act* 2010 (Vic), the Victorian Supreme Court *Arbitration Rules*, being O. 9 of Ch II of the Supreme Court Rules and a full listing of all the forms to the Arbitration Rules, as well as Practice Note No 8 of 2014 relating to Commercial Arbitration Business in the Supreme Court's Arbitration List (which provides, inter alia, a useful summary of the court's jurisdiction under both the *International Arbitration Act* 1974 (Cth.) and the *Commercial Arbitration Act* 2011, and guide to the court's procedure under the Arbitration Rules); the relevant court rules of the Tasmanian, South Australian, Western Australian, New South Wales, and Northern Territory Supreme Courts in relation to Arbitration business.

The online service is very similar to the hard copy with its added digital functionality and regular updates. The online service includes:

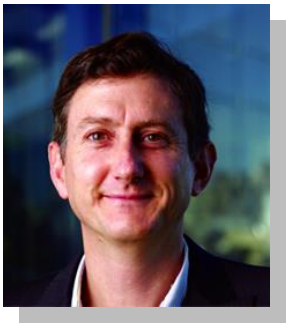
(a) a browsable pdf version (a digital age phrase) of the latest consolidated table of cases;

(b) numerous links throughout the commentary to the reports of leading cases (for subscribers);

(c) direct links to the text of the New York Convention, the ACICA Rules 2016 (and 2011); IAMA Arbitration Rules 2014 (and the 2007 Rules); as ICC Arbitration Rules 2012, LCIA Arbitration Rules (London Court International Arbitration), HKIAC Arbitration Rules (Hong Kong International Arbitration Rules), Arbitration Rules of the Singapore International Arbitration Centre and SIAC Rules (5th Edition, 1 April 2013);

(d) a "Further Reading" List which sources are referred to with text links.

The reviewer recommends *Australian Commercial Arbitration* as a valuable and learned addition to the library of all those who practice in arbitration in Australia, or any other practitioner who wishes to have a handy and comprehensive reference to consult should the need arise.



Dr Luke Nottage
University of Sydney
ACICA Special Associate

TPP and Foreign Investment: Does ISDS Promote FDI?

The Trans-Pacific Partnership free trade agreement, signed on 4 February 2016 among 12 Asia-Pacific economies, faces a rocky road to ratification. In the run-up to the US presidential election in November, both Donald Trump and (for now) Hillary Clinton say they are opposed.

Yet Australian Prime Minister Turnbull urged President Obama to put the FTA to a vote in Congress during the 'lame duck' session before inauguration of the new President, to counter the spectra of protectionism but also for broader geopolitical reasons. The Abe Government, fortified by its mid-year Upper House election victory, would surely then ensure ratification by Japan, thus bringing the TPP into force within the two-year window from its signature. (Beyond that, it can still come into force but only if all 12 countries complete ratification.)

However, back home in Australia, the Turnbull Coalition Government faces its own challenges in enacting tariff reduction legislation needed before it too can ratify. After the 7 July general election, although the Government was returned with a razor-thin majority in the lower House of Representatives, it has a reduced minority in the upper house (30 out of 76 Senators). It would therefore need votes from at least nine other Senators, yet the (nine) Greens Senators will never vote with the Government given their Party's implacable opposition to FTAs. Of the 11 other cross-bench Senators, Pauline Hanson's 'One Nation' (four) Senators are notoriously xenophobic, while the Nick Xenophon Team (three) Senators favour more support for local manufacturing.

Accordingly, the Government will more likely have to court votes from the Labor Opposition. Yet the latter has generally not been cooperative in Parliament, perhaps hoping something will happen in the lower House to trigger a new election. And in June, Labor had reiterated that if elected, it would not countenance 'new' FTAs that added the option of investor-state dispute settlement (ISDS) – in addition to inter-state arbitration provisions – to better enforce substantive commitments aimed at encouraging more foreign direct investment (FDI). The TPP provides for ISDS, like almost all FTAs nowadays, and this continues to generate broader public debate – as does FDI more generally. My recent co-authored econometric study outlined below examines more generally the links between ISDS-backed treaty commitments and FDI, which can inform ongoing policy debates in Australia and further afield.

Like Labor did eventually for the China-Australia FTA in late 2015, it might back down from this stance to vote for TPP ratification by saying that this (already-signed FTA) is not really 'new'. Indeed, substantive provisions of the TPP were partly negotiated by the Gillard Labor Government. However, from 2011-2013 its 'Trade Policy Statement' had declared that Australia would break from past treaty practice and never agree to ISDS, even in treaties involving developing countries with domestic courts and legal systems that did

not meet international standards for protecting investors. Over those few years Australia therefore could not contribute to negotiating the TPP's ISDS provisions, although they (and indeed substantive commitments) ended up being quite similar to those found in FTAs signed by the Rudd Labor Government as well as Coalition Governments since 2004. It will be interesting to follow what Labor parliamentarians now say during inquiries underway into whether Australia should ratify the TPP, in the Joint Standing Committee on Treaties as well as recently in the Senate.

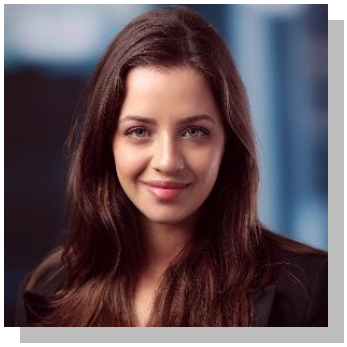
Labor's objections to ISDS since 2011 are partly driven by political expedience. (The Gillard Government was initially in coalition with the more leftist and protectionist Greens.) But the stance has also drawn on arguments from economists. They instead *favour* more free trade and foreign investment, albeit through unilateral or perhaps multilateral initiatives rather than bilateral or even regional FTAs.

Developing the latter perspective, a majority report of the Productivity Commission in 2010 into Australia's FTAs had argued against the common world-wide practice of offering foreign investors extra procedural rights (such as international arbitration through ISDS provisions) and possibly even substantive rights (such as treaty-based protections against expropriation broader than those available to all investors under domestic law). The Commission did acknowledge that such extra rights might be justified, for example if they led to greater cross-border FDI flows (which policy-makers in Australia generally have welcomed as enhancing productivity, cross-border trade and economic growth). Yet the Commission pointed to a few studies suggesting that, on an aggregate (world-wide) basis, ISDS-backed treaty provisions had not significantly increased flows.

A recent econometric study doubts that observation, as part of an Australia-based academic research project since 2014 into investment dispute management. Under a model effectively addressing the problem of endogeneity in variables, there were positive and significant impacts from ISDS provisions on FDI outflows from OECD countries over 1985-2014. This was found from ISDS provisions on their own (especially in treaties signed or promptly ratified with non-OECD or less developed countries), and when combined with the Most-Favoured-Nation provision (a key and indicative substantive treaty commitment to foreign investors).

Counter-intuitively, however, the FDI flow impact was even larger for weaker-form provisions – suggesting perhaps that investors have historically been impressed by a broader 'signaling' effect from states concluding investment treaties. The impact from ISDS provisions also seems to be diminishing since 2001. This could be related to more efforts from host states to unilaterally liberalise and encourage FDI, but also less pro-investor provisions contained in investment treaties (influenced by more recent US practice, partly in response to ISDS claims).

Further variables impacting on FDI (such as double-tax treaties) can be investigated, as can regional differences. Data limitations also remain. There is now considerable FDI outflow from non-OECD countries, and a lack of sector-level data – important to analyse FDI quality. Nonetheless, on the one hand, this baseline study suggests that it has been and still may be risky to eschew ISDS provisions altogether. In particular, results indicate a strong positive effect on FDI flows from ratified investment treaties overall even from 2001. So states will miss out on that if they insist on omitting ISDS, and this becomes a deal-breaker for counterparty states (for whatever reasons). On the other hand, the study suggests that dialed-back ISDS provisions and even substantive commitments (perhaps following recent EU preferences) may be an acceptable way forward eg for the RCEP (ASEAN+6) FTA still being negotiated. It also indicates the importance of promptly ratifying treaties after signature, including the TPP.



Marina Kofman
ACICA Dispute Resolution Case Manager

UNCITRAL's Progress on an International Mediation Instrument

Introduction

In 2015 UNCITRAL gave its Working Group II (working group) a mandate to commence work on the topic of the enforcement of international commercial settlement agreements resulting from conciliation. The work began at its sixty-third session and is continuing. Significant progress was made at its two-week long sixty-fifth session in Vienna, from 12-23 September 2016. The author attended the session from 19-23 September and offers some insights about the progress of negotiations.

While Article 14 of the Model Law on International Commercial Conciliation 2002 provides that a settlement agreement is binding and enforceable, it does not provide any further detail, but leaves the method of enforcement up to the enacting state. It is unsurprising therefore that parties prefer to arbitrate, given the certainty and reach of the enforcement regime in the *New York Convention* and UNCITRAL Model Law on International Commercial arbitration. It is hoped that an instrument on the enforceability of settlement agreements will help with the growth of international conciliation as a reliable international dispute resolution method. Below is an outline of some of the issues discussed at the session.

Requirements as to form

The working group generally agreed that the settlement agreement should be in writing and signed by the parties. A key point of difference among the members of the working group was the suggestion of a requirement for a settlement to be encompassed in either a 'single document' or a 'complete set' of documents. There was a split on this issue between members of the working group, some of which preferred the certainty and expedition of a single document and others who strongly opposed prescriptive requirements as to form, preferring to leave it to enforcing courts to decide. The United States delegation cautioned against rigidity as to form, recalling the historical experience of the writing requirement in the 1985 UNCITRAL Model Law on International Commercial Arbitration, which had the unintended effect of preventing enforcement due to non-conformity with form requirements. The observer delegations from the mediation community were strongly opposed to the one document requirement, on the ground that it does not reflect the reality of how settlement agreements are concluded in practice. After further discussion, it was generally felt that no additional form requirement would need to be included, besides an agreement in writing that was signed by the parties.

A discussion about how to distinguish a mere settlement agreement from a settlement agreement resulting from a conciliation process followed. In balancing the need for certainty with the need for flexibility, the working group agreed this could be achieved by a) indicating in the agreement itself that the settlement resulted from conciliation and either b) the agreement itself to be signed by the conciliator or c) a separate declaration to be signed by the conciliator.

Interaction with New York Convention, Hague Convention on Choice of Court Agreements and Preliminary Draft Convention on Recognition and Enforcement of Foreign Judgments

There was discussion about the status under the new instrument of settlement agreements concluded in the course of judicial or arbitral proceedings. In this regard, the possibility of overlap of instruments arises in circumstances were a settlement is reached in judicial or arbitral proceedings and it is recorded either as a court judgment or an arbitral award. Here, the issue of overlap of instruments must be balanced against the risk of gaps in the new instrument's scope of application. This interaction of instruments needs to be carefully considered as it could lead to a lack of clarity about which enforcement regime ought to apply.

Following the discussions, the preferred approach was for the instrument not to apply to settlement agreements concluded in the course of judicial or arbitral proceedings, where these are enforceable as court judgments or arbitral awards. The justification, among other reasons, is that the grounds for refusing enforcement in the instrument are not appropriate for application to court judgments or arbitral awards. Careful drafting will be required to balance the objectives of the instrument with the concerns raised in the discussions.

Recognition and enforcement

The word 'recognition' and its appropriateness for use in the instrument was a key discussion point. It was said that settlement agreements did not have res judicata effect and if recognition were to be provided for in the instrument, it might, in certain jurisdictions, confer such res judicata or preclusive effect. The words 'binding and enforceable' were considered, recalling the discussion of the Commission at its thirty-fifth session, though were not ultimately preferred. As well as enforcement, the use of settlement agreements in defence of claims was discussed, and how such a provision might be drafted, given divergent national procedures. The importance of direct enforcement under the instrument without further recourse to the State where the settlement agreement originated was emphasised. Further, a provision that explicitly allows parties to have recourse for enforcement purposes to the other laws or treaties of the State of enforcement was considered.

Defences to recognition and enforcement

The relatively uncontroversial grounds for refusing enforcement were (1)(a) incapacity, (b) that the settlement agreement is not binding on the parties; is not a final resolution of the dispute or relevant part thereof; has been subsequently modified or reciprocal or conditional obligations have not been complied with; (c) the enforcement of the settlement agreement would be contrary to its terms and conditions; the obligations in the settlement agreement have been performed; or the party applying for enforcement is in breach of its obligations under the settlement agreement; (d) the settlement agreement is null and void, inoperative or incapable of being enforced under the law to which the parties have subjected it or failing any indication thereon, under the law deemed applicable by the competent authority of the enforcing State and; paragraph (2) where the subject matter is not capable of settlement by conciliation under the law of the State and where enforcement would be contrary to the public policy of the State.

The ground in sub-paragraph (1)(e) gave rise to considerably greater debate and divergence of views. That ground provides 'the conciliator failed to maintain fair treatment of the parties, or did not disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence.' Some States expressed that the propriety of the conciliation process was of utmost importance. However, several objections were raised against the inclusion of this ground.

These were: that it could be covered by other defences, for example sub-paragraph (d); that unlike arbitration, conciliation is a voluntary and non-adjudicative process that parties can withdraw from at any time, so conciliator misconduct should not have an impact at the enforcement stage; that it would be difficult to assess if parties were treated fairly and what if any impact the alleged misconduct had on negotiations; that such a provision as a defence could restrict the flexibility of the conciliation process; that it could open the floodgates of litigation, making enforcement cumbersome; and that the court of enforcement might not be the best forum to consider issues relating to the conciliation process, which would likely have taken place in a different State.

There were several suggestions put forward about limiting this ground. One compromise solution was to limit the scope of the defence to instances where the conciliator's misconduct had a direct impact on the settlement agreement. This defence will be further considered at the next session of the working group.

As to additional defences, it was generally agreed that if a settlement agreement did not fall within the scope or did not meet the form requirements, it would not be enforceable under the regime envisaged under the instrument. It was eventually agreed that these defences would be dealt with in the scope of application provision, which will define a 'settlement agreement' as "an agreement in writing, that is concluded by parties to a commercial dispute, that results from international conciliation, and that resolves all or part of the dispute."

Comment

Overall, the author's impression is that the negotiations at the sixty-fifth session on the UNCITRAL instrument on the recognition and enforcement of international settlement agreements resulting from conciliation were rigorous, considered, conducted in a spirit of compromise and accommodated the concerns of a range of stakeholders including governments, practitioners and users of mediation. The drafting of this instrument is complex, not least because of its interactions with other instruments, including the parallel development of the Hague Conference on Private International Law's Preliminary Draft Convention on Recognition and Enforcement of Foreign Judgments. In addition, there is shared concern to promote the greatest scope of application of the instrument while avoiding a number of unintended drafting consequences. All the while the working group is mindful to retain the flexibility of the conciliation process and not to create an instrument that allows defences to enforcement to inhibit the conciliation process.

Sarah Rodrigues
King & Wood Mallesons

International Commercial Arbitration - advice for young Australian lawyers

At the first lecture of the International Negotiation and Dispute Resolution Series organised by the NSW Young Lawyers' International Law Committee, three eminent Australian jurists shared their diverse experiences of working in International Commercial Arbitration (ICA). The message from the panel to the twenty young participants interested in building a career in international disputes was clear: **be creative** and **engage with opportunities in Asia.**

ICA is a type of alternative dispute resolution that allows parties and arbitrators to weave through legal, cultural and professional differences to create a process for resolving their unique disputes. Although all now based in Australia, the three speakers at the panel event admitted that they were drawn to ICA because of the inherent "international" aspect.

While the growth of arbitration disputes in Australia remains slow in comparison to neighbouring seats in Asia[1], Australian lawyers are desirable candidates in the area of ICA. The panel of speakers explained that increased confidence in Asian arbitration centres including Singapore and Hong Kong has only been possible with the hard work of dispute resolution lawyers in the region and that well-trained Australian lawyers continue to be instrumental in this process. Growing demand for local legal expertise from Asian markets makes this an exciting time for Australian lawyers to consider a career in ICA.

ICA in Australia

Many well-known Australian jurists have advocated for Sydney, and the Australian Centre for International Commercial Arbitration (ACICA), to be a leading centre of arbitration.[2]

In reality, very few Australian law firms have practice areas devoted entirely to ICA. As a starting point, young Australian lawyers interested in ICA would benefit from gaining experience in more general commercial or construction litigation practices to enhance their adversarial and written skills. There are also numerous internships available, with entities such as the Australian Disputes Centre, which give valuable insights into the processes behind running an arbitration.

Overseas experience

For many young lawyers aspiring to work in ICA, the end goal is to work in one of the arbitration "hubs" including London, Singapore or Hong Kong. Although it is possible to build an ICA career from Australia, it was unsurprising that all three panelists spoke about their enriching professional and personal experiences overseas. One of the speakers, Daisy Mallett, a Senior Associate in International Commercial Arbitration at King & Wood Mallesons considered her overseas experience to be instrumental to her career, suggesting that "a successful arbitrator should have the ability to anticipate the legal and cultural preconceptions of both the arbitrator and the opposing side."

Other words of advice

Young Australian lawyers interested in pursuing a career in ICA should not despair, as this career path is rarely clear or linear. Take advantage of opportunities to gain litigation experience, build your networks in the ICA community and show your interest by writing academic articles. Most importantly, in a field of law that is inherently creative, be open to embracing unconventional opportunities from wherever they arise.

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[1] John Wakefield and Katrine Narkiewicz, 'Australia: The arbitration regime in Australia: Five years on' [2015](2) *Law Society Journal* 72.

[2] The Honourable Justice Clyde Croft, 'The Future of International Arbitration in Australia – a Victorian Supreme Court Perspective [2011](60) *Victorian Judicial Scholarship* 4.

Jason Corbett
Clayton Utz

International Arbitration and Independence - Off the Beaten Track

The duty of independence owed by arbitrators in international arbitration has been extensively explored over the years. It is surprising, therefore, that there has been little discussion of the existence and scope of such a duty owed by other significant participants in the arbitration process, namely counsel, experts and arbitral institutions. Elliot Geisinger, Head Arbitration Partner of leading Swiss law firm Schellenberg Wittmer Ltd, International Arbitrator, and President of the Swiss Arbitration Association (ASA), brought this question to the fore at the 15th anniversary of the Annual Clayton Utz/University of Sydney International Arbitration Lecture in 2016.

Clayton Utz / University of Sydney IA Lecture

Mr Geisinger opened with a strong personal conviction that independence is indispensable to all participants involved in an arbitration, declaring that in the context of *"unprecedented challenges"* to arbitration, independence *"is one of the most potent tools that we have to overcome those challenges".* Central to his thesis, the distinguished speaker explored the similarities between concepts of independence among jurisdictions, although precise expressions of the concepts varied.

Mr Geisinger then turned to consider the duty of independence from several perspectives.

Beginning with counsel, Mr Geisinger assessed that counsel's duties of independence in domestic settings are generally classified in two categories - independence vis-à-vis the client, and independence vis-à-vis the courts and authorities. The question of whether these duties carried over to international arbitration, however, is met with an absence of explicit confirmation in international and statutory rules. Mr Geisinger contended that the question to ask should not be limited to the legal positivist approach of *"what is the legal basis of these duties of independence in international arbitration?".* Rather, the question should be whether *"there is any reason why the rules that apply nationally should not apply also in international arbitration?"*, to which he answered emphatically in the negative.

According to Mr Geisinger, a functional approach should apply; *"if international arbitration is to remain a preferred method of international dispute resolution, then it must also be a way of upholding the rule of law"*. The duties of independence are, in his view, indispensable to achieve that goal, and any departure from these principles on the part of counsel would present a convenient argument to critics who already accuse international arbitration as being *"the justice of kangaroo courts"*.

Thus, when breaches of independence occur, sanctions should apply, but who should impose them?

The arbitral tribunal may be seen as the obvious disciplinary forum. Mr Geisinger, however, argued the contrary: Judges have statutory authority to assess misconduct, whereas the arbitrator's authority stems only from the parties' contractual agreement and the *lex arbitri* (with notable exceptions where parties agree to institutional rules which give arbitrators disciplinary powers).

Furthermore, arbitrators are tasked with resolving the dispute between the parties, and the decision of whether parties have misconducted themselves does not naturally fit within this role.

Mr Geisinger also identified a supranational body as the Global Arbitration Ethics Council proposed by the Swiss Arbitration Association in 2014 as another possible forum for discipline. However, the working group that examined this project recently decided that it is an idea whose time has not yet come.

Thus, with no clear sanctioning authority, Mr Geisinger admitted that his conclusion of this section of his lecture was *"somewhat anti-climactic"*. He reiterated, however, his position that the rules which govern a lawyers' duties of independence in their home jurisdiction should extend to apply in international arbitration. In his view, those national bodies who were already tasked with enforcing those rules domestically would also be the most appropriate disciplinary forum for sanctioning breaches of independence in international arbitration.

On experts, Mr Geisinger noted some differences arising out of civil law and common law jurisdictions. In civil law litigation, the court typically appoints an expert who carries out the role as *"a direct auxiliary of the court*" and thereby has "*the same duties of independence and impartiality as any other member of the court*". Parties remain free to appoint their own experts, though the weight of their evidence will be treated the same as any ordinary submission of the party. The same applies in international arbitration, being authorised under multiple institutional rules.

However, even in civil law countries, the usual arbitration practice is to employ party-appointed experts - a somewhat ironic reality given that the civil law does not recognise the concept of expert witnesses in law and thus does not properly regulate their behaviour. By contrast, there is a myriad of rules, procedures, and professional codes under the common law which suggest that expert witnesses have a *"fundamental and overriding duty of independence from instructing counsel and the client, and owe an overarching duty of independence, and… assistance to the court"*. In the international arbitration context, however, there is again a concerning lack of statutory, treaty and institutional rules on the matter, with few exceptions.

Mr Geisinger, however, submitted that "*The grounds are the same as for the duties of independence that are incumbent upon counsel: we cannot afford to have a system of dispute resolution in which there is not – at the very least – a minimum duty of independence, and thereby of objectivity, for party-retained expert witnesses"*. Thus a number of sanctions are argued to be applicable, for example, the removal of weight given to the evidence by the Tribunal, costs sanctions against the party who retained the expert, the disqualification of the expert, reporting the expert to their professional trade board for professional misconduct, and of course, professional reputational harm for the expert.

In considering the independence of arbitral institutions, Mr Geisinger illustrated institutions' duties of neutrality and impartiality towards parties with a hypothetical scenario of a would-be claimant contacting the arbitral institution to ask for advice on whether their claim may be time-barred. With the likely response from the institution in the hypothetical being obvious, the speaker posited that this clearly implied a duty of independence for arbitral institutions similar to the duty of independence of arbitral tribunals. Unsurprisingly, however, there is again an absence of explicit duties of independence for institutions set out in rules, statutes, and treaties.

Mr Geisinger then followed with the point that any consequences flowing from a breach of independence by an institution are remote but possible. Case law from French and Swiss courts suggest that although the independence of arbitral institutions is rarely a standalone, it may have the capacity to compromise the integrity of an arbitral award. Similarly, several authors write that a lack of independence on the part of an institution would *"suffice to vitiate the entire arbitral process and thus render moot an examination of the independence and impartiality of the tribunal"*. Such a theory finds support in obiter dicta in the decisions of the Swiss Supreme Court and Supreme Commercial Court of Russia. Mr Geisinger also shares this view, citing the increasing powers of tribunals to shape proceedings and increasing emphasis on transparency and accountability of tribunals as indicative of the duty of independence held by institutions.

Sanctions against arbitral institutions, as one might expect, are a challenge in themselves and most commonly examined in proceedings relating to a final award rendered in one case by an allegedly partial tribunal. Mr Geisinger explained that the reason for this is relatively simple: *"there is generally no way to challenge directly the decisions of arbitral institutions in the courts"*. One very *"unfortunate"* method of sanctioning institutions may be in an action against the institution for damages, however, whether one is able to overcome the hurdles of statutory immunities and liability exclusion clauses in institutional rules is another story.

As a final and practical takeaway from his lecture, Mr Geisinger implored the audience to introspectively consider *"independence from one's self"* throughout proceedings. Two questions need to be asked, no matter who the participant: *"why am I doing, or not doing, this?"* and *"should I be doing this differently?"*. At the crux of these questions is a keen self-awareness engaged with the purpose of assessing the motivation behind each action taken - "does the situation necessitate my actions, or does this only benefit myself?"

To conclude, Mr Geisinger engaged in a light-hearted exercise of *"critical self-honesty"* as he professed his guilt of slight self-promotion and vainglory in presenting. *"Is there anything fundamentally wrong with that?"* he asked to an amused audience. He answered that it would depend on whether he had succeeded in piquing our interest and in presenting provocative ideas worthy of ongoing debate. Naturally, Mr Geisinger disqualified himself from that judgment, leaving us with the spirit of his lecture in a most useful metaphor: *"These duties [of independence] are indispensable for the wheels of arbitral justice, which would no longer turn – or more likely would continue to turn, but would squeak very loudly – without them."*

Albert Monichino QC[1]
President of CIArb Australia
ACICA Fellow

Privilege disputes in international arbitration[2]

Privilege disputes may arise in international commercial arbitration in the context of either document production or the admissibility of oral evidence.

One learned commentator has noted:

> '*it has been said about the determination of privileges in international commercial arbitration that the only thing that is clear is that nothing is clear in this area.*' [3]

This article seeks to provide a basic introduction to this complex topic.

What is privilege?

Privilege may be defined as:

> *'…a legally recognised right to withhold certain documentary or oral evidence from a legal proceeding, including the right to prevent another from disclosing that information*.' [4]

Maintaining privilege involves a policy choice of elevating confidentiality above probative value, in aid of some systemic objective. [5]

Commonly recognised privileges include:

(a) Legal advice privilege;
(b) Litigation privilege;
(c) Without prejudice (or settlement) privilege; and
(d) Commercial confidence.

Privilege must be considered in context. In some countries – for example, China – there is no such thing as discovery (or document disclosure). It is therefore not surprising that the law of privilege in those countries is not well developed. As noted by one commentator:

> *'…The scope of document production and privileges are like Siamese twins: if one is growing, the other one must necessarily grow too.'* [6]

This article will focus on legal privilege. Most countries recognise the concept of legal privilege, although the precise rules vary across jurisdictions (including, for example, whether the privilege extends to in-house counsel).[7]

Whose privilege?

In common law jurisdictions, legal privilege is the client's privilege. In contrast, in civil law countries legal privilege (or its equivalent) is the lawyer's privilege. In civil law countries, the focus of the privilege is not on protecting the client but rather on maintaining the integrity of the legal profession. Indeed, a lawyer who discloses attorney-client communications may face disciplinary sanctions, or even criminal penalties for violating his or her professional duty of confidentiality. [8]

The question 'whose privilege' is important, as it determines who can waive the privilege.

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1 Albert Monichino QC, President of CIArb Australia.
2 This article is an adoption of a paper presented at the 4th International Arbitration Conference in Sydney on 22 November 2016.
3 Klaus Berger, 'Evidentiary Privileges: Best Practice Standard versus/and Arbitral Discretion' (2006) 22(4) *Arbitration International* 501 at p.501.
4 Richard Mosk and Tom Ginsburg, 'Evidentiary Privileges in International Arbitration' (2001) 50(2) *ICLQ* 345 at p. 346.
5 Jeffrey Waincymer, 'Procedure and Evidence in International Arbitration' (Kluwer Law International, 2012) at [10.17.2].
6 Reto Marghitola, 'Document Production in International Arbitration' (Kluwer Law International, 2015) 70-89 at p.88.
7 Berger, above Note iii, at p. 504; Mosk & Ginsburg, above Note iv, at p. 351.
8 Berger, above Note iii, at p. 504; Waincymer, above Note v, at [10.17.10].

Is privilege a question of procedural or substantive law, and does it matter?

There is a lack of consensus as to whether privilege is procedural or substantive in nature. In common law countries privilege tends to be treated as substantive in nature. In contrast, in civilian jurisdictions it tends to be treated as procedural in nature[9].

If procedural, the *lex arbitri* will typically provide that absent party agreement, it is for the Arbitral Tribunal to determine the procedural and evidentiary matters at its discretion - for example, under Article 19 of the UNCITRAL Model Law on International Commercial Arbitration ('Model Law').[10]

In contrast, if privilege is substantive in nature, conceptually the Arbitral Tribunal should apply conflict of law rules at the seat of arbitration. The Arbitral Tribunal then determines the applicable rules of law to be applied in resolving the privilege dispute. Notably, there is no dedicated conflict of law rule to determine the applicable law relating to the determination of privilege disputes.[11]

According to which rules of law are privilege disputes to be determined?

Very little guidance is offered by national arbitral laws or rules of arbitral institutions in identifying the relevant rules of law to be applied in the determination of privilege disputes. For example, the UNCITRAL Model law and Arbitration Rules are silent on the question of privilege.[12]

One exception is the International Dispute Centre for Dispute Resolution ('ICDR') Rules of the American Arbitration Association ('AAA'). These Rules advocate for the application of the most favoured nation approach (discussed below) in resolving privilege disputes.

In terms of potential laws to apply, there are several contenders:

(a) *The law of the seat.*
However, one may doubt that the parties objectively intended that the privilege laws of the seat should apply. The seat is usually chosen as a neutral venue, and not as a source of privilege rules.[13]

(b) *Governing law of the contract*
Again, parties rarely select the governing law of the contract intending that it should apply to the resolution of privilege disputes.[14]

(c) *Privilege rules applying in the domicile of each party (or their lawyers).*
This perhaps best reflects the legitimate expectations of the parties – that is, by selecting arbitration, parties usually should not be taken to have waived the privilege protections offered to them in their local jurisdiction (or the jurisdiction of their lawyers).

(d) *Privilege laws apply in the jurisdiction where the document was created or the communication was made.*

This is self-explanatory.

None of the above options find any substantial favour amongst commentators.

Importance of affording equal treatment

Most arbitral laws (like Article 18 of the Model Law) provide that the Arbitral Tribunal must afford equal treatment to the parties. Berger refers to equal treatment as the "Magna Carta of arbitral procedure."[15]

If the selection of applicable privilege rules does not satisfy the equality of treatment test, the resulting award may be liable to be challenged.

Most commentators agree that equal treatment requires the Arbitral Tribunal to apply identical rules of privilege to both parties.[16] Thus, the application of the privilege rules applying in the respective domiciles of the competing parties is unlikely to satisfy the requirement of equal treatment.

Where the application of various available approaches (discussed below) produce different privilege rules, the Arbitral Tribunal would be well advised to modify the result to ensure fairness and equality. Usually, this will result in the application of the most favoured nations approach (discussed below).

Common approaches adopted in practice

There is a growing consensus in the international arbitration community as to the key approaches to be applied in determining the applicable law to govern the existence and scope of privilege.

One must always first ask whether the parties have (directly or indirectly) agreed the rules or approach in determining privilege disputes. In that regard, one must look at the arbitration agreement, procedural rules and *lex arbitri* selected by the parties. If they have, that is the end of the enquiry.

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[9] Waincymer, above Note v, at [10.17.3].
[10] Mosk & Ginsburg, above Note iv, at pp. 376-377.
[11] Berger, above Note iii, at pp. 507-508.
[12] Berger, above Note iii, at p. 506; Gary Born, Chapter 9 'Disclosure and Evidence-Taking in International Arbitration' in *International Arbitration: Law and Practice* (Wolters Kluwer, 2nd ed, 2015) p. 386.
[13] Berger, above Note iii, at p. 506.
[14] Mosk & Ginsburg, above Note iv, at p. 377.
[15] Berger, above Note iii, at p. 516.
[16] Mosk & Ginsburg, above Note iv, at p. 384 contrast Waincymer, above v at [10.17.7].

Absent such agreement, there are three major approaches that are most commonly used:

(1) *Closest connection test*

This approach involves identifying the law with the closest connection with the documents or communications in question. In many cases this will be different from the governing law of the contract or the law of the seat.[17] The test involves a multi-factorial approach.[18] That is, one must look at a series of factors, including –

- where the document was created or communication took place;
- where the document was kept;
- where the parties or lawyers resided;
- the place where the attorney-client relationship has its predominant effect;
- the place where the underlying cause of action arose;
- the governing law of the contract; and
- the *lex arbitri.*

This approach is to be applied to each and every disputed document/communication. It is difficult to apply where there are many documents or communications in issue.[19]
It is likely to lead to the application of different laws of privilege to the respective parties – thereby requiring some modification in approach in the interests of ensuring equality of treatment.[20]

The approach is not conducive to certainty (given the multitude of laws to navigate), and indeed may produce arbitrary results.

(2) *Most favoured nations ('MFN') approach*

According to this approach, the Arbitral Tribunal chooses the law that provides the greatest level of protection (although in some cases it may be difficult to determine which privilege rules are most favourable)[21].
This is the approach expressly advocated by the ICDR Rules 2014. Thus, Article 22 states:

> 'When the parties, their counsel, or their documents would be subject under applicable law to different rules, **the tribunal should**, to the extent possible, **apply the same rule to all parties, giving preference to the rule that provides the highest level of protection"** (emphasis added)

The MFN approach has the obvious advantage of treating the parties equally.
Moreover:

> "*Such an approach will do justice to the reliance interests of the parties because they could be confident that they would never be required to produce information that is considered privileged under their own laws*."[22]

(3) *Least favoured nations ('LFN') approach*

This approach involves the Arbitral Tribunal choosing the law that provides the lowest common denominator in terms of protection against disclosure of privileged material.[23]
Like the previous approach, the LFN approach has the advantage of treating the parties equally.
However, one party will be denied the protection that it could legitimately expect under its local laws. Forced disclosure by that party may set up a future challenge to the award. It also may cause difficulties for lawyers for that client, if they are civilian lawyers.
Whilst this approach may not satisfy the legitimate expectations of **both** parties, it constitutes the least interference with the available evidence, and hence, the search for truth.

IBA Rules on the taking of evidence

The IBA rules on the taking of evidence in international commercial arbitration ('IBA Rules') are a soft law which help to bridge the gap between common law and civil law approaches to evidence, including document production.[24] They represent a delocalised set of standards uniquely appropriate for arbitral practice, decoupling international arbitration from the strictures of domestic processes and rules.[25]

The IBA Rules provide some guidance in the resolution of privilege disputes. Article 9(1) deals with the admissibility of evidence. It provides that the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence. Article 9(2) then sets out a number of exceptions to Article 9(1).

Article 9(2)(b) is particularly relevant for present purposes. It provides that the Arbitral Tribunal may exclude from evidence or production any document, statement or oral evidence for the following reason: '*legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable*.'

The 2010 revision of the IBA Rules provided further guidance by the inclusion of a revised Article 9(3), which provides: '

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[17] Berger, above Note iii, at p. 511.
[18] Waincymer, above Note v, at [10.17.9]; Nathan O'Malley, 'The Procedural Rules Governing the Production of Documentary Evidence in international Arbitration – As Applied in Practice' (2009) 8(1) *The Law and Practice of International Courts and Tribunals* 27 at p. 55.
[19] O'Malley, above Note xvii, at p. 57.
[20] O'Malley, above Note xvii, at p. 57.
[21] Waincymer, above Note v, at [10.17.6].
[22] Berger, above Note iii, at p. 519.
[23] Waincymer, above Note v, at [10.17.5].
[24] Tevendale and Cartwight-Finch, 'Privilege in International Arbitration: Is it Time to Recognise the Conesus?' (2009) 26 *Journal of International Arbitration* 823 at p. 826
[25] O'Malley, above Note xix, at p.28.

(3) In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:

(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;

(b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;

*(c) **the expectations of the Parties and their advisors** at the time the legal impediment or privilege is said to have arisen;*

(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and

*(e) the need to maintain **fairness and equality** as between the Parties, particularly if they are **subject to different legal or ethical rules*** (emphasis added)

While the IBA Rules do not advocate for any particular approach (unlike the ICDR Rules), Article 9(3) sets out a list of factors which may assist the Tribunal, but leaving it with considerable discretion.[26]

Article 9(3)(c) emphasises the expectations of the parties and their advisers, perhaps pointing towards the selection of the laws of the domicile of those persons.[27]

Critically, Article 9(3)(e) emphasises fairness and equality. As a result, use of the IBA Rules is unlikely to lead to the application of different privilege rules to each party. One commentator argues that Article 9(3)(e) favours the MFN approach.[28]

Finally, mention should be made of Article 9(g). It is a separate exception to Article 9(2)(b). It provides that the Arbitral Tribunal shall exclude evidence or the production of any document based on considerations of "fairness or equality of the parties that it determines to be compelling." It makes clear that diverging privilege rules must be reconciled if their rigorous application leads to an imbalance between the parties which contravenes basic notions of procedural fairness and equality.[29]

Should the Arbitral Tribunal itself determine questions of privilege?

Having determined the applicable law(s) of privilege to apply, should the Arbitral Tribunal itself examine the documents in dispute and determine the questions of privilege? If it does so, and upholds the privilege claim, it may be difficult for it to put the damaging material out of its mind. After all, arbitrators are human.

Is there a better way which insulates the Arbitral Tribunal from this potential damaging material, and a possible challenge to the award?

One possibility is the reference of the privilege question to a neutral expert.[30] Indeed, Article 3(8) of the IBA Rules contemplates that if an objection to production of documents cannot be determined without reviewing the relevant documents, the Arbitral Tribunal may: "*after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection… the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed*."

But can the reference of the question to an expert be effectively done without the consent of the parties? If there is no consent, the Arbitral Tribunal, having referred the issue to an expert, must engage in the detail in the expert's report. It cannot abrogate its responsibility to the expert by simply adopting the expert's conclusion.

In a complex arbitration that the author was involved in, the arbitral panel cajoled the parties to agree on the appointment of a fourth arbitrator to determine the extensive privilege disputes between the parties. The arbitral panel thereby insulated itself from exposure to potentially damaging, but inadmissible, documents.

It remains, however, that if the parties do not consent to the appointment of an expert or separate arbitrator to determine the privilege dispute, the Arbitral Tribunal may have little option but to review the allegedly privileged documents (or at least some of them). If the documents are ruled to be privileged, the Arbitral Tribunal then must put them out of its mind.

Conclusion

Determining privilege disputes in international arbitration poses real difficulties. There is no "one-size-fits all" solution.[31] The resolution of such disputes may have serious implications as it may lead to the admission or exclusion of valuable evidence. Most arbitral laws and rules provide little guidance. On the other hand, the new IBA Rules of Evidence 2010 provide helpful assistance. The prudent Arbitral Tribunal will seek to attain the consent of the parties to allow it to have regard to the IBA rules, thereby providing a framework for the resolution of privilege disputes, including consideration of the expectations of the parties and the need to maintain fairness and equality as between the parties.

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[26] Waincymer, above Note v, at [10.17.9].
[27] Marghitola, above Note vi, at pp. 74-75.
[28] Ibid.
[29] Berger, above Note iii, at p. 517.
[30] Tevendale and Cartwright-Finch, above Note xxiv, at 829.
[31] Ibid.

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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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