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THE ACICA REVIEW

JUNE 2017

ACICA
Australian Centre for International Commercial Arbitration

Leader in international dispute resolution

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ACICA
Australian Centre for International Commercial Arbitration

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ARTICLES

Alex Baykitch ACICA President

President's Welcome

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

ICCA

We have had a very successful year in promoting the ICCA Congress that will be held in Sydney from 15-18 April 2018.

Earlier this year ICCA 2018 and ACICA exhibited at the IBA Arbitration Day in Milan where we had a lot of arbitration lawyers showing an interest in the ICCA Congress.

We have also held events in New York (7 February), London (27 March), Paris (28 March) and Dubai (2 April). These events were extremely successful and brought in significant registrations for the ICCA 2018 Congress. I would like to thank our Ambassadors for their support during these events, namely James Hosking, Peter Hillerstrom, Jennifer Younan and Bjorn Gehle.

This year ACICA will also be promoting at the IBA in Sydney and at Hong Kong Arbitration Week together with proposed events in Singapore, Hong Kong and Korea.

If you have not yet registered your attendance please use this link to register and take advantage of the Early Bird Registration currently available:
http://www.icca2018sydney.com/

We look forward to seeing you at the ICCA Congress in 2018.

5th Annual International Arbitration Conference

This year the 5th International Arbitration Conference co-hosted by the Business Law Section of the Law Council of Australia, ACICA and Chartered Institute of Arbitrators, Australia will be held in Perth on 21 November 2017. We have a great list of speakers for this event and I hope to see you there.

Alex Baykitch
President

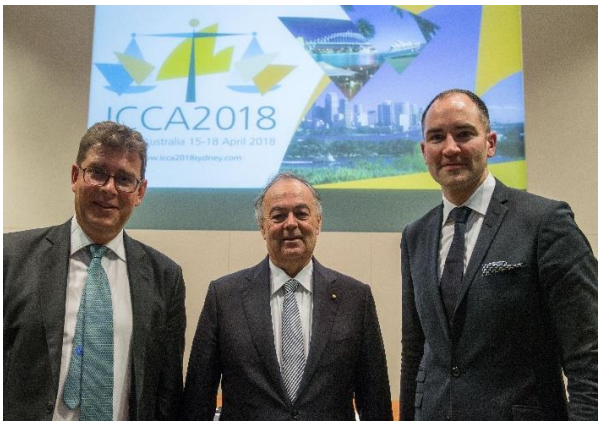
Deborah Tomkinson
ACICA Secretary General

Secretary General's Report

ICCA 2018 Sydney

A series of successful events have been held in the first half of the year to promote the upcoming ICCA 2018 Congress, being held in Sydney in April 2018, with a follow on event in Queenstown. On 7 February 2017, a cocktails event, kindly hosted by **Chaffetz Lindsey LLP** and ICCA 2018 ambassador **James Hosking**, was held to coincide with the 66th session of the UNCITRAL Working Group II in New York. On 27 March, we joined colleagues at **Linklaters LLP** in London to hear from the **Hon. James Spigelman AC QC** and ICCA 2018 ambassador **Peter Hillerstrom** about Congress plans. On 28 March we shared our plans with Paris at an event hosted by **Shearman & Sterling LLP** and ICCA 2018 ambassador **Jennifer Younan**, with guest speaker **Michael Polkinghorne**.

New York event: (L-R) Alex Baykitch AM (ACICA President), Donald Donovan (ICCA President) & James Hosking (Chaffetz Lindsey LLP)



London event: (L-R) Tom Lidstrom (Linklaters LLP), Hon. James Spigelman (Essex Court Chambers) & Peter Hillerstrom (Linklaters LLP)

Paris event: Emmanuel Gaillard (Shearman & Sterling LLP)

Jennifer Younan (Shearman & Sterling LLP)

Michael Polkinghorne (White & Case LLP)

ACICA and its ICCA 2018 team exhibited at the International Bar Association (IBA) International Arbitration Day held in Milan from 30 – 31 March 2017. Following this, an event was held in Dubai at the office of Clyde & Co on 2 April, with ICCA ambassador Bjorn Gehle introducing the Congress to attendees, joined by guest speaker Nassif Boumalhab and Susan Grace, Deputy Head of Mission, Australian Embassy. Keep an eye on the ACICA website (acica.org.au) for upcoming ICCA 2018 promotional events in Asia and around Australia!

Dubai event: Bjorn Gehle (Reed Smith LLP)

Nassif Boumalhab (Clyde & Co)

IBA Arbitration Day, Milan

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

Launch of ACICA Tribunal Secretary Panel and Guideline on the Use of Tribunal Secretaries

ACICA was pleased to launch its Tribunal Secretary Panel and Guidelines on the Use of Tribunal Secretaries in January 2017.

Tribunal Secretary Panel

Recognising the widespread use of tribunal secretaries and the useful role that tribunal secretaries can play in ensuring the efficacy of arbitral proceedings, ACICA launched its Tribunal Secretary Panel, which will be maintained as a resource for tribunals and parties undertaking arbitration in Australia and the region. Applications are now being accepted and a listing of current tribunal secretary panel members is available on the ACICA website as a resource for tribunals and parties undertaking arbitration in Australia and the region. The listing will be updated on a rolling basis as applications are received.

Guideline on the Use of Tribunal Secretaries

ACICA has produced the ACICA Guideline on the Use of Tribunal Secretaries to encourage transparency with respect to the appointment, duties and remuneration of tribunal secretaries. Further information and a copy of the Guideline may be found on the ACICA website.

Launch of the AMTAC Annual Addresses 2007-2016

Since its establishment in 2007, AMTAC has convened the AMTAC Annual Address, which have been presented by judges, academics, maritime law and arbitration practitioners and industry representatives. In celebration of its 10th Anniversary in 2016, AMTAC has compiled and published all 10 Addresses in this one volume. An e-book version can be downloaded from the AMTAC website: amtac.org.au.

Release of the ACICA Protocol for Decisions on Applications for Consolidation and Joinder and Challenges to Arbitrators Under the ACICA Rules 2016

In accordance with relevant provisions of the ACICA Arbitration Rules 2016 and ACICA Expedited Arbitration Rules 2016, ACICA may receive applications for consolidation, joinder or to challenge an arbitrator. To provide a transparent process for the consideration and determination of applications, ACICA has developed the Protocol for decisions on applications for consolidation and joinder and challenges to arbitrators under the ACICA Rules 2016. In accordance with the Protocol and the relevant provisions of the ACICA Rules, ACICA Council Members make recommendations to the ACICA Executive on applications received by ACICA. The Protocol applies to all applications for consolidation, joinder or to challenge an arbitrator, received by ACICA on and from 1 May 2017. Further information about the ACICA Council and a copy of the Protocol may be found on the ACICA website.

ACICA Seminars & Courses

ACICA Advocacy in International Arbitration Workshop Series 2017

ACICA was pleased to launch the inaugural Advocacy in International Arbitration Workshop Series this year. The series of four half-day (held in February, March and May 2017) workshops was designed by ACICA and Course Director, **Greg Laughton SC** (ACICA Fellow, Barrister, Arbitrator & Mediator) to provide an intensive introduction to the provision of effective advocacy in an international arbitration context. The course provided participants with a detailed understanding of and practical experience focused on communication skills and persuasion, case preparation and written advocacy, preparation for performance and oral advocacy. High profile guest speakers included **Justin D'Agostino** (Herbert Smith Freehills, Hong Kong), **Kim Rooney** (Gilt Chambers, Hong Kong), **Max Bonnell** (King & Wood Mallesons, Sydney) and **Sam Luttrell** (Clifford Chance, Perth). Participants also benefited from working closely with experienced tutors **Daisy Mallett** (King & Wood Mallesons, Sydney), **Nicola Nygh** (Resolve Litigation Lawyers) and **Anne Hoffmann** (Herbert Smith Freehills, Sydney) to obtain real time feedback on performance. Thank you to all who were involved in ensuring that this workshop series was such a success!

Asia Arbitration: Hot Topics & Recent Developments with Justin D'Agostino

On 27 February 2017, ACICA hosted a seminar at the Australian Disputes Centre in Sydney with a compelling and interactive presentation from **Justin D'Agostino** (Global Head of Disputes, Herbert Smith Freehills) which explored recent trends and practices in the regional arbitration landscape. Topics covered included third party funding in Asia, arbitration in mainland China and guerilla tactics in international commercial arbitration. The seminar was webcast with viewers from around Australia and parts of Asia attending.

APPEA/AMTAC Presentation – Dispute Resolution Clauses

In March 2017 AMTAC, in association with the Australian Petroleum Production & Exploration Association (APPEA), presented a seminar addressing the importance of dispute resolution clauses for the Australian oil and gas industry, hosted by **Ashurst** in Brisbane. Speakers, **Peter McQueen** (AMTAC Chair) and **Paul Roberts** (APAC regional lead of Hill International Disputes Group), provided an opportunity for industry stakeholders to ask questions and debate issues currently experienced in the sector.

AMTAC/SAL Breakfast Seminar on Safe Ports

On 27 June AMTAC, together with Shipping Australia Limited, will host a breakfast seminar in Sydney on Safe Ports, with speakers **Ken Fitzpatrick** (Shipping Australia Ltd), **Philip Holliday** (Port Authority of NSW), **Marcus John** (Thomas Miller, Sydney) and **Angus Stewart SC**, (AMTAC Panelist, ACICA Fellow and Barrister, New Chambers).

ACICA Keith Steele Memorial Prize

Sydney University held its annual Prize Giving Ceremony on 25 May 2017. ACICA congratulates Andrew Carr on winning the 2016 ACICA Keith Steele Memorial Prize for the highest mark achieved in the postgraduate unit of study in International Commercial Arbitration.

ACICA and ADC Volunteer Intern Program

Our thanks to the great group of interns who have given their time volunteering at the Centre through the first half of 2017:

Matt Coffey, University of NSW

Jennifer Kim, Macquarie University

Jason Kim, Macquarie University

Alex Ho, University of NSW

James Li, University of NSW

Horace Ng, University of NSW

Gigi Lockhart, University of NSW

Amanda Huynh, Macquarie University

Peter McQueen
AMTAC Chair

AMTAC Chair's Report

AMTAC Executive

In March, Julie Soars resigned as a Vice Chair to take up her appointment as a Magistrate of the NSW Local Court. Her position has been taken by Greg Nell SC.

AMTAC Annual Addresses 2007-2016

Following AMTAC's 10th Anniversary in 2016, the transcripts of the 10 Annual Addresses presented from 2007 to 2016 are being published in a volume which will be available in both electronic and hardcopy format. Further information relating to this publication available shortly at page 12.

IMLAM 2017 Singapore 1-5 July 2017

The International Maritime Law Arbitration Moot will be held in Singapore between 1 and 5 July 2017. The competition, which has attracted over 30 university teams this year, is convened by Murdoch University and this year will be hosted by the National University of Singapore. AMTAC will be represented and will again sponsor the "Spirit of the Moot" prize. Further details for those interested in arbitrating at the competition are at www.murdoch.edu.au/School-of-Law/International-Maritime-Law-Arbitration-Moot/ .

ICMA XX 2017 Copenhagen 25-29 September 2017

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

Further information relating to the Conference, including registrations, which are now open with early bird rates closing 31 July 2017, is at www.icma2017copenhagen.org .

Forthcoming AMTAC Events 2017

- Seminar, co-convened with Shipping Australia, on Safe Ports, Sydney, 27 June 2017
- Annual AMTAC Address, Sydney, 6 September 2017
- Maritime Law Seminar, Australian Arbitration Week, Perth, 20 November 2017

Refer to www.amtac.org for more details.

Peter McQueen
Chair AMTAC

Registration Now Open

ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

Early Bird Registration now available for ICCA 2018
ICCA Member Early Bird AUD $2,340 incl GST
Early Bird Registration AUD$2,600 incl GST
Register online at www.icca2018sydney.com

SYDNEY ICCA 2018
15-18 April 2018

Evolution and Adaptation: The Future of International Arbitration

ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ACICA
Australian Centre for International Commercial Arbitration

ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND INC
Te Mana Kaiwhakatau, Takawaenga o Aotearoa

ICCA2018
Sydney Australia 15-18 April 2018

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ICCA 2018 Sponsors
SHEARMAN & STERLING LLP
MAXWELL CHAMBERS
sapere forensic
Wolters Kluwer
BDO

ICCA 2018 Follow-on event
AMINZ – ICCA International Arbitration Day, 19-20 April 2018

www.aminz-iccaqueenstown.org

Early Bird Registration rate for the NZ follow-on event now available NZ$840.00 incl GST

ICCA 2018
Sydney 15-18 April 2018
www.icca2018sydney.com

ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

Location

ICCA 2018 will be hosted in the heart of the Sydney CBD at the newly opened International Convention Centre in Darling Harbour – the Asia Pacific's premier integrated convention, exhibition and entertainment precinct.

Conference Programme Highlights

The theme for ICCA 2018 draft program is 'Evolution and Adaptation: the Future of the International Arbitration', with key events including:

- A "TED Talk" style luncheon, where leading arbitrators will offer their personal reflections on the past, present and future of their careers and of arbitration itself. Questions and observations from the floor will be encouraged.
- A "hot topics" panel discussing the latest controversies, newest decisions, and boldest proposals of 2018. Congress delegates will be invited in advance to suggest "breaking news" topics for the panel's consideration.
- A panel discussion on the role of public bodies and public interests in arbitration processes which will consider the role of arbitration as a public inquiry that regulates broader norms of fairness.

Social Programme

ICCA 2018 promises to provide a vibrant social calendar that makes use of the many harbourside venues and restaurants that define the city of Sydney.

ICCA 2018 Opening Ceremony
Sunday 15 April 2018 1700-2000. Sydney Opera House
Sydney Harbour Symphony

The Opening Ceremony extravaganza will take place at the Sydney Opera House, followed by a Welcome Reception and will be a start to an ICCA Congress like no other. Music by the Sydney Symphony Orchestra will feature a special performance created just for ICCA.

ICCA 2018 Gala Dinner
Tuesday 17 April 2018 1800-2100
Dinner Under the Southern Stars

The ICCA 2018 Gala Dinner will encapsulate the magic of fine dining under the glorious Southern sky. As dusk turns to night, the lights will drop for a grand entrance to tables for a unique dining experience.

The menu will showcase Indigenous Australian and New Zealand flavours and will be carefully paired with premium Australasian varietals to feature the very best of wine producers.

Accommodation

The ICCA 2018 Congress Secretariat has confirmed rooms at a selection of Sydney hotels for the benefit of Congress delegates.

The hotels have been selected for their proximity to the ICC Sydney (International Convention centre) There is a broad selection and choice to suit your accommodation needs whilst in Sydney.

You are encouraged to secure your accommodation through the Congress secretariat to ensure that you receive the negotiated competitive rates.

ICCA Membership Benefits

ICCA Members receive an additional 10% discount on Congress rates. Not an ICCA member yet? Annual rates range from 175EUR – 350EUR and benefits include discounts on ICCA publications, being featured in the annual ICCA Membership directory, regular newsletters and more. Visit http://www.arbitration-icca.org/members.html for more information and to sign up.

NEWS IN BRIEF

Book launch: AMTAC Addresses 2007-2016

The Australian Maritime and Transport Arbitration Commission (AMTAC) provides dispute resolution services to the maritime and transport industry and works to promote education and scholarship relating to maritime law and to the practice of maritime arbitration in Australia and the Asia Pacific region.

Since its establishment in 2007, AMTAC has convened the AMTAC Annual Address, which have been presented by judges, academics, maritime law and arbitration practitioners and industry representatives. In celebration of its 10th Anniversary in 2016, AMTAC has compiled and published all 10 Addresses in this one volume.

AMTAC hopes that you will enjoy reading the AMTAC Addresses 2007-2016.

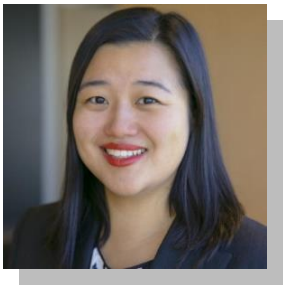
Download a PDF version of the AMTAC Annual Addresses 2007-2016

Book review: Quantification of Delay and Disruption in Construction and Engineering Projects by Robert J Gemmell

Delay and disruption often impacts entire projects and is prevalent throughout the entire construction and engineering industries - no project or construction professional is immune to the effects. This book is aimed at any construction professional anywhere in the world who is involved in preparing, assessing, managing and/or deciding issues concerning the assessment of additional time to complete the work, and also additional payment for delay and/or disruption to the progress of a construction or engineering project.

Delay and disruption is endemic in the construction industry and leads to time and cost overruns. It is therefore essential that delays and/or disruptions are identified early so that corrective action can be taken. However, when delay and/or disruption actually occurs, the issue of quantifying the period of any delay, the effects of disruption, and the quantification of the resulting loss during, and especially at the end, of a project is complicated.

Robert Gemmell's text book is as comprehensive as it is valuable, providing as it does a practical guide to the critical exercise of quantification of the loss. The subject matter is not only written for application in Australia, but also internationally. The Hon Justice Peter Vickery, a Judge of the Supreme Court of Victoria and Judge-in-charge of the Technology, Engineering and Construction List.



Ruimin Gao
King & Wood Mallesons
Corporate Member

Josephine Lao
King & Wood Mallesons
Corporate Member

Recognition and Enforcement of Chinese Judgments in Australia

The recognition and enforcement of judgments from courts of the People's Republic of China has not been the subject of any published court decisions in Australia to date. This is despite the fact that China has been Australia's largest two-way trading partner in goods and services for the past decade and is currently also Australia's largest source of imports[1].

Recent events such as the China-Australia Free Trade Agreement entering into force in late 2015 and the Bank of China (Sydney branch) being designated as Australia's official RMB clearing bank in late 2014 have helped to support trade and investment between the two countries, which is expected to continue to grow in future years.

We take a look below at the legal requirements for the recognition and enforcement of Chinese judgments in Australia and discuss some practical tips to consider for enforcement proceedings.

General Legal Framework

The *Foreign Judgments Act 1991* (Cth) ("**Act**") provides for the recognition and enforcement of judgments of certain overseas courts specified in the *Foreign Judgments Regulations 1992* (Cth) ("**Regulations**"). Although the Schedule to the Regulations lists superior courts from Hong Kong,[2] the statutory scheme does not apply to any jurisdictions in Mainland China.

However, money judgments from China can still be enforced according to the common law procedure if the person seeking to enforce the Chinese judgment (the "**judgment creditor**") commences proceedings in an appropriate Australian court. For a Chinese judgment to be recognised at common law, the onus is on the judgment creditor to satisfy four conditions:

1. that the Chinese court exercised a jurisdiction that Australian courts recognise (that is, a jurisdiction recognised under the Australian conflict of law rules) – this requirement could be satisfied if, for example, the judgment debtor was ordinarily resident (or present) in China when served with the originating process;
2. that the Chinese judgment is final and conclusive;
3. that the parties to the Chinese judgment are identical to the recognition proceedings in Australia; and
4. that the judgment is for a fixed debt or readily calculable sum.

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[1] Department of Foreign Affairs and Trade, *China country brief* (http://dfat.gov.au/geo/china/pages/china-country-brief.aspx).

[2] Specifically, the Court of Final Appeal and the High Court of Hong Kong at item no. 13 in the Schedule.

A Chinese judgment that satisfies the above requirements is *prima facie* enforceable in Australia, unless the judgment debtor can establish one or more of the recognised defences to the enforcement of a foreign judgment. The general principle is that the judgment debtor is not entitled to challenge the merits of the Chinese court decision. However, the judgment debtor may challenge the recognition application by arguing that the Chinese judgment was obtained by fraud, the judgment debtor was denied natural justice in the Chinese court proceedings, that enforcement of the Chinese judgment would be contrary to Australian public policy, or that enforcement of the Chinese judgment would amount to enforcement of China's penal or revenue laws.

Once a Chinese judgment is recognised by an Australian court, the Australian court judgment is then enforceable in Australia, the same as any other domestic judgment.

Practical Considerations

There are some unique and specific aspects to the Chinese legal system and judgments that should be considered when seeking the recognition and enforcement of Chinese judgments in Australia.

First, there is an automatic right to appeal from most first instance Chinese court decisions. This, however, does not affect the finality of the Chinese first instance judgment for the purposes of recognition and enforcement. A Chinese judgment is therefore final and conclusive even before the appeal period lapses, although an Australian court may stay recognition and enforcement proceeding if there is evidence that the judgment debtor is likely to appeal the first instance judgment.

Second, notaries in China can issue a *Certificate of Enforcement* that allows a creditor to a credit agreement to apply directly to a Chinese court for compulsory enforcement in the event of default by the debtor. This procedure applies where the debtor has agreed to be bound by compulsory enforcement in the terms of the credit document and the agreement has been notarised with a *Notarial Certificate of Credit Document of Compulsory Enforcement Effect*. In compulsory enforcement proceedings, the debtor's only remedy is to object to the enforcement itself and not the merits of the underlying credit documents. The Chinese court can issue a *Ruling of Enforcement* based on a notarised credit document and *Certificate of Enforcement*. Based on the case of *Maleski v Hampson*,[3] it is likely that Australian courts would consider a *Ruling of Enforcement* from a Chinese court, rather than the *Certificate of Enforcement*, to be the subject of recognition and enforcement proceedings.

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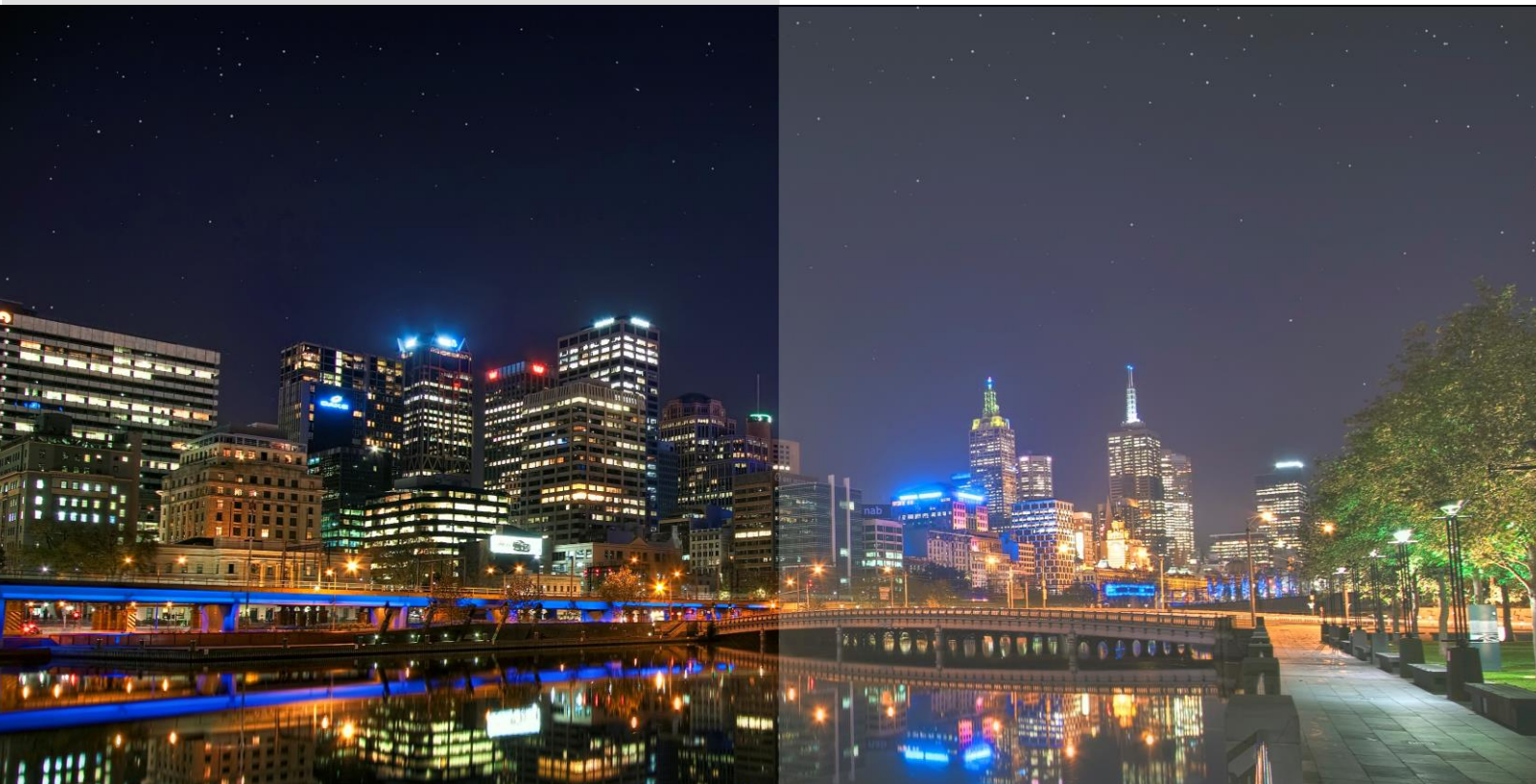
[3] *Maleski v Hampson* [2013] NSWSC 1794. The case concerned a US loan document that was signed and witnessed by a notary public of New Jersey. The NSW Supreme Court considered the decision of the Superior Court of New Jersey as the foreign judgment to be recognised and enforced, and not the notarised loan document.



Mitchell Dearness
Herbert Smith Freehills
ACICA Corporate Member

Event Wrap Up: ACICA Advocacy in International Arbitration Workshop Series

The first *ACICA Advocacy in International Arbitration Workshop Series* was held this year between February and May. The course, which was delivered in four half-day workshops, catered for a diverse range of participants including early career arbitration lawyers, experienced counsel and seasoned litigators looking to learn more about arbitration. Each workshop included a presentation from a guest speaker, a lesson on the topic of the week and a practical exercise. The following topics were addressed in the workshops:

1. Communication skills and persuasion;
2. Case preparation and written advocacy; and
3. Preparation for performance and oral advocacy

Guest Speakers

Leading international arbitration advocates were invited to speak on the main topics covered in the course:

1. Justin D'Agostino (Herbert Smith Freehills, Hong Kong), drawing from a wealth of experience, presented on arbitration in Asia and cultural considerations for advocates in international arbitration;
2. Kim Rooney (Gilt Chambers, Hong Kong) addressed the subject of written advocacy; and
3. Max Bonnell (King & Wood Mallesons, Sydney) and Sam Luttrell (Clifford Chance, Perth) presented on effective oral advocacy.

Course participants benefited greatly from each practitioner's unique insight gained through decades of experience, the preparation of hundreds of written submissions and the delivery of countless cross-examinations. Many thanks to each of the guest speakers for sharing their experiences.

Practical Exercises

The workshop provided an excellent forum for participants to test their advocacy skills. Throughout the course, participants:

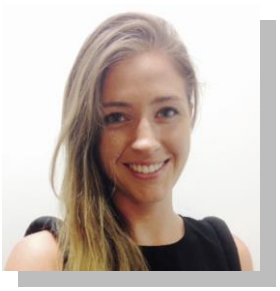
1. Drafted written submissions;
2. Prepared and delivered opening and closing addresses; and
3. Prepared and delivered examinations in chief and cross-examinations.

Participants received immediate performance feedback from experienced practitioners who kindly volunteered their Saturday morning to be instructors, tribunal members and in some cases, witnesses. Thank you to Anne Hoffmann (Herbert Smith Freehills), Daisy Mallett (King & Wood Mallesons) and Nicola Nygh (Resolve Litigation Lawyers).

The workshops were well structured so that the participants were provided with the appropriate balance of formal instruction and opportunity to develop advocacy skills through practical exercises. I would certainly encourage other practitioners to participate next year if the course is offered. Finally, thank you to Greg Laughton SC, Deborah Tomkinson and the team at ACICA for all their efforts.

Gitanjali Bajaj
DLA Piper
Corporate Member

Samuel Cho
DLA Piper
Corporate Member



Billie Stevens
DLA Piper
Corporate Member

SIAC's Early Dismissal of Claims and Defences (Rule 29); and SCC's Summary Procedure (Article 39)

Summary Procedures in International Arbitration: Treading on Thin Ice?

Two major arbitral institutions recently introduced new arbitration rules incorporating procedures for summary disposal of claims and defences. These rules are:

- the 2016 edition Arbitration Rules of the Singapore International Arbitration Centre (**SIAC Rules**), which provide for the early dismissal of claims and defences at Rule 29; and
- the 2017 edition Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (**SCC Rules**), which provide for summary procedures at Article 39.

As the two arbitral institutions take the lead in traversing grounds dreaded by many, should others follow suit?

Underlying Rationale for Summary Procedures

In litigation, summary procedures provide for early dismissal of proceedings for an unmeritorious claim or defence (see for example, Part 13 of the *Uniform Civil Procedure Rules 2005 (NSW)*). A key obvious advantage of summary procedures is the time and costs saving which would otherwise have been expended on a full hearing. Such summary procedures are rarely invoked in international arbitration due to the fear of a subsequent challenge of the arbitral award on the ground that the aggrieved party was deprived of a reasonable opportunity to present its case.

A reasonable opportunity to present one's case is a fundamental right enshrined in Article 18 of the UNCITRAL Model Law on International Arbitration (**Model Law**)[1] and in most arbitration rules.[2] As breach of this fundamental right is a commonly used ground to challenge arbitral awards, arbitral tribunals tend to err on the side of caution by showing more deference to the parties' case than that warranted in litigated cases.

It is however arguable that arbitral tribunals do have general powers for summary disposal of claims. Arbitral tribunals are conferred with general case management powers, which allow them to conduct arbitrations in such manner as they consider appropriate, subject to the requirement to avoid unnecessary delay or expense having regard to the complexity and value of the dispute.[3] Although these case management powers do not explicitly reference summary procedures, it can be argued that tribunals could use these powers to summarily dispose of proceedings. Further and in any event, in the absence of an express provision for summary procedures, parties can expressly incorporate summary procedures into their arbitration agreement. To this end, a UK case authority confirms that the adoption of summary procedures into arbitral proceedings by agreement does not necessarily amount to a denial of due process.[4]

The above said, most tribunals nonetheless prefer to take the conservative view that their powers do not extend to adopting summary procedures in the absence of an explicit basis to issue summary awards.

SIAC Rules vs SCC Rules

To this end, Rule 29 of the SIAC Rules and Article 39 of the SCC Rules are a welcome development as these expressly provide for the tribunal's powers in relation to summary procedures. Rule 29 of the SIAC Rules relevantly provides that a party may apply for the early dismissal of a claim or defence on the basis that the relevant claim or defence is "*manifestly without legal merit*" or "*manifestly outside the jurisdiction of the tribunal*".[5] Similarly, Article 39 of the SCC Rules provides that a party may request that the tribunal decide one or more issues of fact or law by way of summary procedure, without undertaking every procedural step that might otherwise be adopted for the arbitration.

While these provisions are designed to serve similar purposes, there are key differences as follows:

- Under the SCC Rules, a request for summary procedure may be made on issues of jurisdiction, admissibility or the merits. Notably, the request may also include an assertion that the relevant issue is "*for any other reason, suitable to determination by way of summary procedure*".[6] This is in contrast to the SIAC Rules, under which a request may be made on narrower grounds, limited to a claim or defence that is manifestly without legal merit or outside the jurisdiction of the tribunal.
- The SIAC Rules require the tribunal to make a summary award within 60 days of the date of filing of the application, subject to any time extension granted in exceptional circumstances. Under the SCC Rules, there is no set deadline within which the tribunal must make its summary award.
- Under the SCC Rules, the requesting party must propose the form of summary procedure to be adopted, demonstrating that such procedure is both efficient and appropriate. Under the SIAC Rules, there is no express provision allowing the parties to propose the form of summary procedure, although in practice experienced tribunals are likely to do so out of an abundance of caution.
- Under the SIAC Rules, the tribunal has discretion to allow (or refuse) an application for the early dismissal of a claim or defence to proceed. This means that any frivolous application for summary procedure may be rejected by the tribunal outright without having been heard. By contrast, the SCC Rules do not expressly provide for such discretionary power for the tribunal (thereby arguably exposing arbitration to the risk of being unnecessarily prolonged by frivolous applications for summary procedures).

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[1] Incorporated into the *International Arbitration Act 1974* (Cth).

[2] See, for example, Article 21.1 of the Rules of Arbitration of the ACICA (**ACICA Rules**); Article 22(4) of the Rules of Arbitration of the International Chamber of Commerce (**ICC**); Article 14.4(i) of the Arbitration Rules of the London Court of International Arbitration; Article 13.1 of the Administered Arbitration Rules of the Hong Kong International Arbitration Centre.

[3] See, for example, Article 19(2) of the Model Law (incorporated into the *International Arbitration Act1974* (Cth)), Article 22.2 of the ACICA Rules and Article 22.1 of the ICC Rules.

[4] *Travis Coal Restructuring Holdings LLC v Essar Global Fund Limited* [2014] EWHC 2510 (Comm).

[5] Rule 29.1 of the SIAC Rules.

[6] Article 39(2) of the SCC Rules.

Pros and Cons of Summary Procedure Rules

Although the effectiveness of the summary procedure rules remains to be seen, such procedures should serve as an effective tool to discourage parties from advancing unmeritorious claims and defences in arbitration. Properly administered, the summary procedures should also help to achieve the much needed efficiency in arbitration. While the risk of subsequent challenge on the ground of lack of procedural fairness still remains, such risk can be effectively mitigated including by having the summary award scrutinised by the relevant arbitral institution.[7]

Claimants in straightforward claims (such as banks in simple debt recovery actions) are likely to be attracted to arbitration by the summary procedure rules. For these claimants, the preferred mode of dispute resolution has conventionally been litigation given the perceived delay, complexity and high cost in arbitration.

The summary procedure rules may however lead to the front-loading of the parties' preparation work, with more details of the parties' claims and defences being provided in the early stage of the proceedings, in an attempt to guard against any subsequent application for summary disposal by the opponent. This will in turn add to the parties' costs.

Additionally, given the current paucity of case law on how these summary procedure rules should operate in practice, arbitral tribunals will likely show general reluctance and caution in invoking the rules. That said, judicial guidance in this area will inevitably develop sooner or later, as some of the summary awards become the subject of challenges in court by the aggrieved parties. The guidance should then help formulate the way in which arbitral tribunals are to implement summary procedures in practice.

Conclusion

The summary procedure rules align with the current global trend to streamline arbitral proceedings for efficiency and cost savings. There is, however, no one-size-fits-all approach to such procedures given that every arbitration is different. Whilst being named as summary procedures, what in fact transpires in practice may involve more than what is usually covered in litigation-styled summary processes. Further, the more important question is whether the relevant procedure adopted by the tribunal is within the scope of its power. This is a question of substance and not about how the procedure is to be labelled in the relevant arbitration rules. It is anticipated that lessons learnt from the SIAC Rules and SCC Rules in the coming years should help shed further light on this.

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[7] See, for example, Rule 32.3 of the SIAC Rules, which requires a compulsory secondary review and approval of any draft award by the SIAC before it is made.

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Arbitrability, Separability of Disputes and Stay of Proceedings

The Federal Court decision in ***WDR Delaware Corporation v. Hydrox Holdings Pty Ltd; In the Matter of Hydrox Holdings Pty Ltd***[1] (27 September 2016) offers valuable insight into the scope for disputes to be held to be arbitrable, and justifying a stay of proceedings, even where what is being litigated are the grounds on which a winding up order is sought, such being an order only a Court can make. The decision explores the arbitrability of disputes where they occur within the purview of a statute such as the ***Corporations Act***, the attendant considerations of public policy and the rights of third parties who may not be parties to the arbitration clause.

Foster J held that the mere fact that a winding up order was being sought and founded upon an "oppression action" did not alter the characterisation of the real controversy as being an *inter partes* dispute. Although it was for the Court and the Court alone to decide whether a corporation should be wound up, issues alleged to amount to oppression within the meaning of the ***Corporations Act*** were arbitrable. Those issues were separable from the ultimate question of whether the corporation should be wound up. In such circumstances, where court proceedings were advancing disputes within the scope of an arbitration clause, they could be stayed.

The First Plaintiff WDR Delaware Corporation (WDR) was incorporated in Delaware in the United States of America. The Second Plaintiff, Lowe's Companies, Inc (Lowe's) was incorporated in North Carolina. WDR was a wholly owned subsidiary of Lowe's. The Second Defendant, Woolworths Limited was listed on the ASX. In 2009 Lowe's and Woolworths formed a Joint Venture Agreement (JVA) to establish and operate a chain of home improvement and hardware stores known as "Masters".

The joint venture was to operate through a corporation specifically incorporated for that purpose, Hydrox Holdings Pty Ltd (Hydrox). WDR held one third of the shares in Hydrox. Woolworths held the remaining two thirds. Hydrox was the corporate vehicle for the conduct of the Masters joint venture. The Masters venture was not a success. Disputes arose between WDR and Lowe's on the one hand, and Woolworths on the other.

Lowe's and WDR approached the Court on an ex parte basis and sought the early return of an Originating Process claiming a declaration that the affairs of Hydrox had been conducted in a manner oppressive to, unfairly prejudicial to or unfairly discriminatory against WDR, and an order pursuant to s.233(1)(a) of the ***Corporations Act 2001*** or alternatively pursuant to s.461(1)(k) of the ***Corporations Act*** that Hydrox be wound up.

Foster J observed that s.233(1) empowered the Court to make one or more of ten types of orders of which a winding up order was only one.

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[1] [2016] FCA 1164.

Woolworths responded with an application seeking, inter alia, an order that the proceedings be stayed pursuant to:

(a) s.7(2) of the ***International Arbitration Act 1974*** (Cth) (the IAA);

(b) art 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, as given effect by s.16(1) of the IAA;

(c) s.23 of the ***Federal Court of Australia Act 1976*** (Cth); and/or
the implied powers of the Court.

Woolworths contended that the arbitration clause in the JVA provided that disputes of the character which comprised the subject matter of the proceedings must be determined by arbitration and that all of the disputes raised by the Plaintiffs in the proceeding were "capable of settlement by arbitration" within the meaning of that phrase in s.7(2)(b) of the IAA and also within art 8(1) of the UNCITRAL Model Law on International Commercial Arbitration.

Foster J held that s.7 of the IAA was engaged, because both WDR and Lowe's were domiciled or ordinarily resident in the USA which was, and is, a Convention country (see s.7(1)(d)). Although neither the Plaintiffs nor Woolworths submitted that an arbitrator appointed under the JVA could make an order winding up Hydrox, the Plaintiffs argued that no part of the proceeding was arbitrable. Woolworths submitted that all of the Plaintiffs' claims, i.e. the oppression allegations disputes other than the winding up order itself were arbitrable.

The Plaintiffs' case for oppression was based upon allegations that Woolworths with its domination of Hydrox failed to provide information sought before Hydrox board meetings, that Woolworths, by its domination of Hydrox purported to require the Lowe's nominee directors to vote on resolutions without sufficient information, in other instances swamped the Lowe's nominees with a large amount of information immediately before those meetings where there was insufficient time to consider the information, purported at Board meetings to exercise powers by majority vote without considering the requisite approval of at least one Lowe's nominee director, purported wrongfully and in bad faith to terminate the JVA for the improper purpose of allowing the Woolworths nominees on the Hydrox Board to pass by majority vote a resolution concerning the winding up of the Masters business, caused resolutions to be put to the meeting of the Hydrox Board against the advice of the lawyers it retained to advise Hydrox and over the objections of the Lowe's nominees, and excluded WDR, Lowe's and their nominees from management of the affairs of Hydrox.

The parties were also in dispute concerning the exercise by WDR of a put option requiring the purchase price of its shares in Hydrox by Woolworths to be determined pursuant to a methodology in the JVA and further, the circumstances surrounding the exercise by Woolworths of its call option under the JVA requiring WDR to sell its shares in Hydrox to Woolworths. The exercise by each party of its option triggered the necessity for Independent Expert Valuations.

WDR gave notice of dispute for the purpose of the arbitration clause as to whether the independent expert valuation obtained by Woolworths was valid within the meaning of the JVA. Woolworths similarly gave notice of arbitration for the same reasons. WDR commenced an arbitration (though Woolworths did not) on the put option and independent valuation dispute and Woolworths lodged a Defence and Counterclaim.

Foster J held that there was a "policy of minimal curial intervention" in matters governed by arbitration agreements (***Robotunits Pty Ltd v. Mennel***[2]). In a stay application Courts were not entitled to delve into the merits of a case any more than they were in the context of enforcement or setting aside proceedings (***Robotunits***[3]). There was a special need to have regard to international case law when construing and applying the IAA, the New York Convention and the Model Law: ***TCL Air Conditioner (Zhongshan) Co Ltd Limited v. Castel Electronics Pty Ltd***.[4] The word "matter" in s.7(2)(d) of the IAA connoted that matters to be determined in any given proceeding were distinct from the proceeding itself and multiple matters may exist within the one legal proceeding. In ***Tanning Research Laboratories Inc v. O'Brien***[5] Deane and Gaudron JJ (at 351-352) had held that, unlike Ch III of the Constitution, "matter" in s.7(2) of the IAA did not mean "the whole matter". Foster J held that the "matter" for the purposes of s.7 of the IAA may or may not comprise the whole subject matter of any given proceeding. The Court had to identify the "matter".

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[2] [2015] VSC 268.
[3] at 306 [14].
[4] [2014] 232 FCR 361.
[5] [1990] 169 CLR 322.

The Plaintiffs argued that the Court was being asked to exercise a power, namely winding up a corporation, a pre-condition to which was the formation of an opinion as to the appropriateness of the relief, which necessarily concerned evaluation of the allegations put forward in the oppression proceedings. Foster J observed that the issue of arbitrability went beyond the scope of an arbitration agreement. It involved a consideration of the inherent power of the national legal system to determine what issues are capable of being resolved through arbitration to be determined by application of the nation's domestic law alone: ***Comandate Marine Corp v. Pan Australia Shipping Pty Ltd***.[6] For a matter to be non-arbitrable there had to be a "sufficient element of legitimate public interest in the subject matter making the enforceable private resolution of disputes concerning them outside the national court's system inappropriate".

The Plaintiffs accepted that some claims for relief under the ***Corporations Act*** were arbitrable including claims for purely *inter partes* relief under s.233 (***ACD Tridon Inc v. Tridon Australia Pty Ltd***[7] per Austin J; ***Robotunits***[8]; ***Re 700 Form Holdings Pty Ltd***[9]; and ***Brazis v. Rosati***[10]). They submitted that a claim for a winding up order was not arbitrable at all.

Foster J followed the decision in ***Tanning Research Laboratories Inc v. O'Brien.***[11] It held that the question of whether the debt was due and if so, in what amount, was arbitrable notwithstanding that it was raised in a context which directly involved application of the Corporations legislation and even though the ultimate decision whether or not to reverse the liquidator's rejection of a debt could only be made by the Court.

Foster J referred with approval to ***Fulham Football Club (1987) Limited v. Richards***[12] where the Court held that although only the Court could wind up the company, the arbitration clause covered the issues in dispute which might form the grounds upon which a winding up order might later be made. In ***Fulham Football Club*** Patten LJ referred to in ***Re Pevril Gold Mines Limited***[13] where it was said that an agreement between shareholders to resolve a dispute which might later justify a winding up order on the just and equitable ground would not, if the subject of an arbitration clause, infringe the company law statute or be void on grounds of public policy.

In ***Tomolugen Holdings Limited v. Silica Investments Limited***[14] the Singapore Court of Appeal followed ***Fulham Football Club*** and ***Re Quiksilver Glorious Sun JV Limited***[15] where a distinction was made between the substantive dispute, i.e. the commercial disagreement and the order which was ultimately sought.

As to separability of disputes Foster J considered ***ACD Tridon Inc v. Tridon Australia Pty Ltd***[16] where one group of claims made in the proceeding fell within the wording of the relevant arbitral agreement but four others did not. His Honour distinguished ***A Best Floor Sanding Pty Ltd v. Skyer Australia Pty Ltd***[17] where Warren J declined an application for an order staying a winding up proceeding on the grounds that an arbitration clause purporting to give that power was null and void, because it had the effect of obviating the statutory regime for the winding up of a company. However, the public policy considerations held by Warren J to be applicable to the disputed claim to wind up a company did not prevent the parties from referring to arbitration a claim for some merely *inter partes* relief under the oppression provisions of the ***Corporations Act***.

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6 [2006] FCAFC 192; (2006) 157 FCR 45.
7 [2002] NSWSC 896 at [192].
8 at 325-320 [55]-[69].
9 [2014] VSC 385.
10 [2014] 102 ACSR 626.
11 [1990] 169 CLR 332.
12 [2012] Ch 333.
13 [1898] 1 CH 122.
14 [2015] SFGA 57.
15 [2014] HKCFI 1306; (2014) 4 HKLRV 759.
16 [2002] NSWSC 896.
17 [1999] VSC 170.

In conclusion, Foster J held that the case was a dispute solely between the shareholders of Hydrox involving the way in which those shareholders performed their contractual and other obligations *inter partes*. There was no public interest element in the determination of those disputes. No one had suggested that Hydrox was insolvent. No creditor had sought leave to participate in the proceeding. The mere fact that a winding up order had been sought did not alter the characterisation of the real controversy between the parties as being an *inter partes* dispute.

Other than the relief sought as to a winding up order, the questions of fact and law marking out the substantive controversy between the parties were all matters which were capable of resolution by arbitration. Foster J held that if, at the end of the arbitral process the award or awards did not address satisfactorily or comprehensively all of the grounds relied upon by the Plaintiffs in support of their claims for relief in the present proceedings, then they could supplement them with any available evidence in support of a winding up application. Having regard to the fact that there were two extant arbitrations already on foot between the same parties concerning central aspects of the JVA and upon an intimation by Senior Counsel for the Plaintiffs that his clients would not wish to proceed with the hearing of the winding up application until such time as the arbitrable matters had been determined by arbitration, Foster J granted a stay of the whole of the present proceedings.

WDR Delaware v Hydrox Holdings has already been referred to in ***Four Colour Graphics Australia Pty Ltd v Gravitas Communications Pty Ltd*** [18] and applied in ***In the matter of Infinite Plus Pty Ltd***[19] ("Infinite Plus"), another shareholder oppression claim.

The most noteworthy aspect of the latter is the demonstrated breadth and flexibility of the discretion to stay a part of the proceedings even if non-arbitrable. In ***WDR Delaware v Hydrox Holdings***, the application for the winding up order sought was non-arbitrable, but was stayed pending the outcome of the arbitrable disputes involving the oppression claim.

The orders by Gleeson JA in ***Infinite Plus*** included an order for the stay of the proceedings to operate against a co-plaintiff who was not a party to the shareholder agreement containing the arbitration clause. Gleeson JA referred to ***Casceli v Natuzzi S.p.A***,[20] itself quoting from Merkel J in ***Recyclers of Australia*** [21]

" the basis for the discretion is that the spectre of two separate proceedings-one curial, one arbitral, proceeding in different places with the risk of inconsistent findings on largely overlapping facts, is undesirable" .

Thus it would seem that if arbitrability of a dispute can be shown, the mandatory language in s. 7(2) of the IAA and Article 8(1) of the Model Law will lead not only to the stay of those disputes but may also lead to the exercise of a discretion , based on the court's inherent power to control its own process, involving claims beyond the strict scope of the arbitration clause.

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[18] [2017] FCA (9 March 2017).
[19] [2017] NSWSC 470 (27 April 2017).
[20] [2012] FCA 691.
[21] Recyclers of Australia Pty Ltd v Hettinga Equipment Inc [2000] FCA 547@ [65],[66].

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Recent Developments in Relation to the Use of Mediation During an Arbitration to Facilitate a Resolution of the Dispute

Introduction

Practitioners in common law jurisdictions such as England and the like minded jurisdictions of Singapore, Australia and Hong Kong have been slow to embrace the use of a fused process involving both arbitration and mediation to resolve a commercial dispute. However there are signs that this is changing and it is now possible to analyse the relatively recent developments in Australia and Singapore to see the ways in which a combined process can enhance the likelihood of an early agreed resolution of a dispute.

This paper is in four parts. First, it is sometimes overlooked that the use of a fused process of arbitration and mediation by an arbitral tribunal has ancient roots. It is useful to use an early example of an arb-med-arb process as the background when analysing modern methods of combining arbitration with mediation. Part 1 considers a little known aspect of one of the most famous arbitrations, the Alabama Claims Arbitration of 1872, where a combined arb-med-arb process was used to resolve a very significant part of the dispute. Part 2 examines the recent legislative and other attempts to introduce the use of arb-med in Australia and in particular in NSW. Part 3 considers the 2015 Arb-Med-Arb Protocol jointly introduced by the Singapore Chamber of Maritime Arbitration (SCMA) with the Singapore Mediation Centre. Finally in Part 4, the paper sets out the personal experience of the author acting as the chair of an arbitral tribunal in Italy in 2006, which involved combining mediation with arbitration to assist in ultimately resolving the parties' dispute with

PART 1: The use of Arb-Med-Arb in the Alabama Claims Arbitration

The Alabama Claims Arbitration of 1872 arose out the American Civil War between the Southern Confederate States and the Northern Union States. The background to the arbitration may be very briefly summarised. When war broke out in April 1861 Great Britain issued a proclamation of neutrality and thereby announcing that as a matter of international law as a neutral State, it could not, and would not support either side in the conflict. President Lincoln in the North declared a blockade of the Southern Confederate Ports with the aim of preventing the Confederates from exporting their crops such as cotton to the textile mills in England and Europe and the aim of stopping arms being delivered to the South. The Confederates' response was to send representatives to England to surreptitiously build and arm warships under the disguise that they were ordinary merchant ships destined for European owners. The Confederates managed to obtain 14 warships in this manner despite the North protesting and urging England to stop their construction. These warships caused an enormous amount of damage to the North's merchant fleet across the globe. When the war was over and the Union States in the North succeeded, the US demanded compensation from Great Britain.

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[1] This paper is based on a presentation given by the author on Thursday 18 May 2017 in Beijing to the Beijing Arbitration Commission.

The US said that Great Britain had breached its obligations as a neutral State by allowing the warships to be built and for assisting in the recruitment of crew for the warships. The US claimed compensation for the damage done by these Confederate warships to the US merchant fleet. The direct losses of ships and cargo amounted to some US$15 million which is an extremely large sum in today's values. The US pressure for compensation grew until it reached the point where Great Britain and the US were on the brink of war. Eventually the two States agreed to refer the their dispute to arbitration. Their arbitration agreement was contained in the Treaty of Washington which they signed in 1871. The subsequent arbitration was named the Alabama Claims Arbitration after the name of the Confederate's warship which had caused the most damage and had become the most notorious, the 'CSS Alabama'.

The arbitral tribunal held its first case management conference in Geneva in December 1871. Both parties gave a written presentation of their respective cases at this case management conference. The written case for the US included the anticipated claim for US$15m for the direct losses for the destruction of ships and cargo. The US also presented additional claims for the indirect losses suffered by the US. These were called the indirect claims and were claims for: (1) the national expenditure in pursuit of the Confederate's warships, (2) the loss caused by the transfer by some of the US merchant fleet who transferred to the British merchant fleet to avoid being attacked, (3) the higher insurance premiums paid by the US merchant fleet because of the increased risk of damage being caused by the Confederate warships, and (4) a claim the warships had caused the civil war to be prolonged by some two years and the North claimed the costs incurred by this prolongation of the civil war. Almost immediately, a public dispute arose about the scope of the arbitration agreement. Did the arbitrators have jurisdiction to rule over the indirect claims? Were the indirect claims covered by the arbitration agreement? The indirect claims would far exceed the direct claims.

In February 1872, Queen Victoria entered the fray. She said in her speech to the British Parliament that: "*The arbitrators appointed pursuant to the Treaty of Washington, for the purpose of amicably settling … the Alabama Claims, have held their first meeting at Geneva.*

Cases have been laid before the arbitrators on behalf of each party to the Treaty. In the case submitted on behalf of the United States, large claims have been included which are understood on my part not to be within the province of the arbitrators."

Next, the Secretary of the Tribunal met with the parties in April 1872 in Geneva when the parties exchanged their evidence and submissions in reply. In its case in reply, the British government expressly reserved its position on the indirect claims.

The arbitration hearing commenced in Geneva on Saturday 15 June 1872, when the United States, as Claimant, presented its written case. The British Government instead of presenting its written case, then asked for an adjournment for eight months to allow the two parties to consider and negotiate a new convention or treaty to resolve the indirect claims. The application was not successful and the hearing was stood over until the following Monday, and then again to Tuesday, to allow what has been described as intense negotiation to take place. This appears to be a very early example of a combined arbitration and mediation procedure, because these discussions involved not only the representatives of both parties and their counsel, but also the presiding arbitrator, and the two party appointed arbitrators, the US appointee, and the British appointee, in an attempt to resolve the dispute. The arbitral tribunal was made up of five members. The other two arbitrators appear not to have taken part in the discussions.

On the Tribunal resuming on the Wednesday, the presiding arbitrator, with the agreement of both sides, read a short statement referring to the application for an adjournment, and the disagreement over whether the arbitral tribunal was competent to rule on the indirect claims. The arbitral tribunal, in language and circumstances which suggested that there had been a compromise provisionally agreed in the negotiations which was subject to obtaining formal instructions, said:

"That being so, the Arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the government of the United States in respect of these claims, they have arrived … at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation

award of compensation or … damages between nations, and should … be wholly excluded from the consideration of the Tribunal in making its award, …"

The hearing was then adjourned to the following Tuesday, when the US representative informed the arbitral tribunal that, in view of arbitral tribunal's decision, he was authorised to say that, the US would not press the indirect claims any further. There was then another adjournment to the Thursday when the British representative informed the arbitral tribunal that, as a result of the tribunal's decision on the indirect claims, he had been instructed to seek leave to withdraw his application for an eight month adjournment. His request was granted by the tribunal and he then presented the case for the British government on the remaining original direct claims. The hearing finished in September and the arbitral tribunal made an award in favour of the US on the direct claims.

The parties had complete freedom to choose the manner in which they conducted their arbitration and there were no applicable rules either permitting or regulating their mediation. The procedure was a matter for the tribunal and the parties. As this was a dispute between sovereign and independent States no local laws applied to the arbitration and no institutional rules applied. The tribunal refused to delay the hearing for eight months and compelled the parties to negotiate.

There was never any suggestion that some of the arbitrators might be disqualified by taking part in the mediation and the negotiations. The party appointed arbitrators were clearly aligned with the party that had appointed them. The British appointed arbitrator was the British Lord Chief Justice appointed by Queen Victoria. The US appointee was the former US Minister to London at the time the warships were being surreptitiously built in England. He was the US representative who had protested and had urged Great Britain to stop the building of the warships but his protests had been ignored.

The keys to the success of the combined process appear to be, (1) the complete flexibility of the procedure, (2) the timing of the use of mediation in the arbitration, it occurred when all the evidence and submissions had been exchanged and it was almost the last chance to resolve this part of the dispute before continuing with the arbitration, (3) the agreement of the parties and the tribunal to the arbitrators being actively involved in the mediation, and (4) the absence of any concern that the arbitrators' participation in the mediation, would render any award unenforceable if the mediation had failed and it was necessary to resume the arbitration.

PART 2: Arb-Med-Arb in NSW

The use of a combined process has had legislative support in domestic arbitration since the enactment of s.27 of the (now repealed) *Commercial Arbitration Act, 1984* (NSW). This section provided that the parties to an arbitration agreement could authorise an arbitrator to act as a mediator between them, before or after proceeding to arbitration, and whether or not continuing with the arbitration. If the dispute was not resolved in the mediation, no objection could be taken to the subsequent conduct of the arbitration solely on the ground that the arbitrator had previously acted as a mediator in the dispute. Further, unless the parties otherwise agreed in writing, the arbitrator was bound by the rules of natural justice when seeking settlement as a mediator.

There was no or virtually no resort to the hybrid process contemplated by s.27 of the 1984 Act. This is most likely because once parties had agreed to the Arb-Med-Arb process, they would have no opportunity to opt out of having the arbitrator continue the arbitration following a failure of the mediation to resolve the dispute. The requirement to observe the rules of natural justice during the mediation phase meant that, if private sessions were held, any subsequent arbitral award could be set aside by a court as contrary to those rules since one or more of the parties would not have been given an opportunity to know and respond to the case it had to meet.

In the opinion of most mediation specialists in Sydney such as the highly regarded, Alan Limbury, these serious problems in domestic arbitration/mediation were fixed in 2010 when the 1984 legislation was repealed and the provision replaced by s.27D of the *Commercial Arbitration Act, 2010* (NSW).

His reasoning and comments[2], which I adopt and endorse, are explained as follows. Under the current procedure contemplated by s.27D:-

1. The parties must agree in writing before the arbitrator may mediate.
   Comment: this ensures the arbitrator may not attempt to mediate without the parties' written consent.

2. When acting as a mediator, an arbitrator may communicate separately with the parties and, unless otherwise agreed, must treat any information obtained in the course of such communications as confidential.
   Comment: this enables the mediator to explore creative possibilities for resolution (such as enlarging the pie) that cannot be properly addressed in the arbitration, which is confined to determination of who is right, who is wrong and what should be the consequences that flow from that determination.

3. The mediation terminates by the agreement of the parties, the withdrawal of a party or by the decision of the mediator.
   Comment: as with 'normal' mediation, the parties may withdraw at any time, whether or not there has been a resolution of their dispute, and the mediator may decide that the continuation of the process is likely to be unproductive.

4. For an arbitrator who has acted as a mediator to continue with the arbitration, the parties must give their written consent upon or after the termination of the mediation, in which case no objection may be taken to the arbitrator's subsequent conduct of the arbitration solely on the ground that the arbitrator acted previously as mediator.
   Comment: this is perhaps the most important of the improvements to the 1984 legislative regime. The parties may embark on the process with greater confidence and may speak frankly and freely in the mediation phase because they know in advance that they may opt out of any continued arbitration after the termination of the mediation phase. If anything were to happen during the mediation which makes them feel uncomfortable with the mediator resuming as an arbitrator, they may withhold their written consent to that course. The fetter on subsequent objection is confined to the mere fact that the arbitrator acted as mediator in the same dispute, so any other objections to the arbitrator's subsequent conduct may still be taken by the parties.

5. If the parties do not so consent, the mandate of the arbitrator is taken to have been terminated and a substitute arbitrator is required to be appointed.
   Comment: this means that the initial arbitrator will remain bound to keep confidential anything learned in private session during the mediation. It also suggests that the parties should agree that the mediation should take place early in the arbitration process (for example, as soon as the issues to be arbitrated have been identified) so as to avoid the possibility of wasted arbitration costs in the event that a substitute arbitrator would have to start the process all over again.

6. Before continuing with the arbitration following termination of the mediation, the arbitrator must disclose to all parties any confidential information obtained during the mediation which the arbitrator considers to be material to the arbitration.
   Comment: although this seems at first sight to be a surprising idea, in practice no sensible disputant or legal advisor to a disputant in a common law jurisdiction would be willing to agree to the arbitrator continuing with the arbitration without first ascertaining what confidential information of that party learned in the mediation the arbitrator regards as being material to the arbitration. Upon being so informed, the disputant may decide to refuse to give consent to the arbitrator continuing with the arbitration or may decide to give consent. It would make sense for the party or its advisor to ask for any such information to be provided in writing before making that decision so that, if the arbitration were to continue, each party and

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[2] '*Don't be scared, this is the future – avoiding the pitfalls of arb-med-arb'* by Alan Limbury, Strategic Resolution, 2014 Alternative Dispute Resolution Law Bulletin, Vol 1, No 4, pages 84-86

the arbitrator would be in no doubt as to precisely what confidential information imparted to the arbitrator in the mediation by that party is to be disclosed to the other parties and so that any award based on undisclosed confidential information may be set aside for lack of procedural fairness or bias. Similar provisions have been adopted in Hong Kong[3] and Singapore[4].

It is important not to assume that this form of combined process will work in any dispute. It is even more important not to assume that it will never work which seems to be the case at present, because despite the problems in domestic arbitration having been fixed by s.27D, I have not been able to find any instance where the section has been used since its enactment in 2010.

As Alan Limbury points out[5], one key factor likely to be critical to the success of this combined use of arbitration and mediation, is choosing the kind of dispute that appears to lend itself to a creative solution irrespective of who is right and who is wrong. Another factor likely to be critical to the success of this combined process is choosing a dispute in which the parties' decision-makers appear reasonable and willing to engage in assisted negotiation to find their own solution. As with most disputes, success of the process will depend on 'fitting the forum to the fuss'[6].

It is, and will also be, important to select an arbitrator with expertise as a "facilitative" mediator, as distinct from an "evaluative" one. Briefly, a facilitative mediator will not express any of his or her views on any aspect of the dispute. An evaluative mediator will consider and evaluate each party's position and may express his or her views on aspects of the dispute. By having a facilitative mediator this will avoid having the arbitrator express an opinion in the mediation phase on the merits of a party's case.

Unfortunately, in Australia arbitration and facilitative mediation are seen as different worlds, inhabited by different species[7]. This may be a consequence of the relatively recent advent of mediation in commercial disputes. I share the hope that the increasingly sophisticated requirements of corporate counsel and executives for speedy and less costly resolution and the emergence from Law Schools of graduates familiar with the full range of adjudicative and non-adjudicative ADR processes will see the emergence of arbitrators who are also skilled in facilitative mediation and facilitative mediators who are also skilled in arbitration. Then perhaps a combined process may be used to some advantage in resolving disputes.

International commercial arbitration in Australia has not expressly provided any support or encouragement for combining arbitration and mediation to achieve an early and agreed settlement of a dispute. Globally arbitrators are increasingly being recognised as dispute managers with an obligation to exercise their arbitral powers to act as a settlement facilitator.[8] Under Art 22(1) of the ICC Rules, 2012 edition, the arbitrator and the parties, are under an obligation to 'conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity of the dispute.' In order to achieve such an objective arbitrators are vested with the power under Art 22(2) to issue 'such procedural measures as [they] consider appropriate, provided that [such measures] are not contrary to any agreement of the parties.' Appendix IV to the ICC Rules then sets out a number of case management techniques which the arbitral tribunal and the parties may consider with a view to 'controlling time and cost'. The arbitrator's initiative[9] as a settlement facilitator is expressly listed in Appendix IV as one of the recognised case management techniques.

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[3] See sections 2A-2C of the *Arbitration Ordinance* (Cap 341) (Hong Kong):

[4] See section 17 of the *International Arbitration Act* (Cap134A) (Singapore):

[5] '*Don't be scared, this is the future – avoiding the pitfalls of arb-med-arb'* by Alan Limbury, Strategic Resolution, 2014 Alternative Dispute Resolution Law Bulletin, Vol 1, No 4, at page 85

[6] Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure, Frank E. A. Sander and Stephen B. Goldberg, Negotiation Journal, Volume 10, Issue 1, pages 49–68, January 1994.

[7] '*Don't be scared, this is the future – avoiding the pitfalls of arb-med-arb'* by Alan Limbury, Strategic Resolution, 2014 Alternative Dispute Resolution Law Bulletin, Vol 1, No 4, pages 86

[8] *'The Arbitrators' Initiative: When, Why and How Should It Be Used?'* ASA Special Series No 45, Eds D Baizeau and F Spoorenberg, 2016, Juris, Chapter 4

[9] *'The Arbitrators' Initiative: When, Why and How Should It Be Used?'* at page 101

Paragraph (h)(ii) of Appendix IV provides that 'where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.' These measures reflect a cultural tradition not always seen in Common Law based jurisdiction. Stronger measures are called for under the German Institution of Arbitration Rules, 1998 edition, the DIS Rules, where Section 32.1 states that '[a]t every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of the individual issues in dispute.'

The only local attempt has been a tentative and recent recognition that there are a range of ADR options open to parties that the parties should consider and the parties should not be wedded to the idea of only proceeding with an arbitration process. This attempt is seen in the Arbitration Rules of the Australian Centre for International Commercial Arbitration which require the arbitrator at the first case management conference to request that the parties consider the use of other dispute resolution processes to resolve their dispute. Article 21.3 of the ACICA Arbitration Rules provides as follows;

21.3 (at the first case management conference) … the Arbitral Tribunal … shall make a procedural timetable for the arbitration which may include provisional hearing dates. …. The Arbitral Tribunal shall raise for discussion with the parties the possibility of using other techniques to facilitate settlement of the dispute.'

PART 3: THE SCMA ARB-MED-ARB PROTOCOL (the Protocol')

This Protocol is found in SCHEDULE C to the SCMA Arbitration Rules (2015). In contrast to the above examples, the Protocol contemplates separate universes of arbitration and mediation with a specialist institution managing its own universe. The SCMA manages the arbitration universe and the Singapore International Mediation Centre (SIMC), or any other recognized mediation institution, manages the mediation universe.

Protocol relevantly applies to disputes submitted for resolution under the SCMA recommended Arb-Med-Arb Clause or other similar clause. A party must first commence arbitration under the SCMA Rules. The parties will inform the Mediation Centre that the arbitration has commenced within 4 working days from the commencement of the arbitration. The parties will send to the Mediation Centre a copy of the notice of arbitration.

The arbitral tribunal shall be constituted in accordance with the SCMA Rules and/or the parties' arbitration agreement. The Tribunal shall, after the exchange of the Notice of Arbitration and Response to the Notice of Arbitration, immediately stay the arbitration. The parties will send the Notice of Arbitration and the Response to the Mediation Centre for mediation at the Mediation Centre. Upon the Mediation Centre's receipt of the documents, the Mediation Centre will inform the parties of the commencement of mediation at the Mediation Centre pursuant to the relevant Mediation Rules applicable at the Mediation Centre.

All subsequent steps in the arbitration shall be stayed pending the outcome of mediation at the Mediation Centre. The mediation which is conducted under the auspices of the Mediation Centre must be completed within 8 weeks from the mediation commencement date, unless, the parties in consultation with the Mediation Centre extends the time. At the termination of the 8-week period (unless the deadline is extended by the parties in consultation with the Mediation Centre) or in the event the dispute cannot be settled by mediation either partially or entirely at any time prior to the expiration of the 8-week period, the Mediation Centre shall promptly inform the parties of the outcome of the mediation, if any.

In the event that the dispute has not been settled by mediation either partially or entirely, either party may inform the arbitral tribunal that the arbitration proceeding shall resume. Upon the date of such notification to the arbitral tribunal, the arbitration proceeding in respect of the dispute or remaining part of the dispute (as the case may be) shall resume in accordance with the SCMA Rules.

In the event of a settlement of the dispute by mediation between the parties, the Mediation Centre shall inform the parties that a settlement has been reached. If the parties request the arbitral tribunal to record their settlement in the form of a consent Award, the parties shall refer the settlement agreement to the Tribunal and the Tribunal may render a consent Award on the terms agreed to by the parties.

This process raises a number of concerns. First, as two institutions are involved in the dispute resolution process the parties will incur two lots of administrative fees and expenses, one for the arbitration and one for the mediation. The failure by one party to pay the additional mediation fee may also cause the other party incur a further expense. Another concern is the mandatory stop of the arbitration process at a time not of the parties' choosing and at a time when they may not be ready to embark on mediation. For example further evidence may be needed and the parties may still be committed to arbitration.

This form of a combined procedure also underlines the importance of obtaining the parties' agreement to the staying of any applicable time limit whilst the mediation takes place. Otherwise the terms of an expedited arbitration procedure under the applicable institution rules may have a road block effect preventing the parties from proceeding down the path of mediation.

PART 4: A PERSONAL EXPERIENCE OF A COMMON LAWYER WITH THE ARB-MED-ARB PROCESS

In 2006 whilst acting as chair of an arbitration panel in Italy the author experienced a combined process. The parties' arbitration agreement conferred considerable freedom in the way the process was to be conducted. The other Panel members each had a civil law backgrounds and cultures and were accustomed to using a combination of mediation and arbitration. The result was a procedure not normally seen in traditional common law jurisdictions.

Shortly before the hearing and after the tribunal members had been fully briefed with the parties' evidence and opening submissions, each of the tribunal memebers formed the view that the dispute was capable of settlement using mediation. The tribunal then met and discussed what procedure should be followed. A reading of the papers left each of tribunal member in no doubt that the matter would best be resolved by negotiation and mediation rather than arbitration. The tribunal members agreed that at an appropriate time, the tribunal should suggest to the parties that they attempt to settle their dispute by mediation before the chair acting as sole mediator and if unsuccessful, the arbitration hearing would resume.

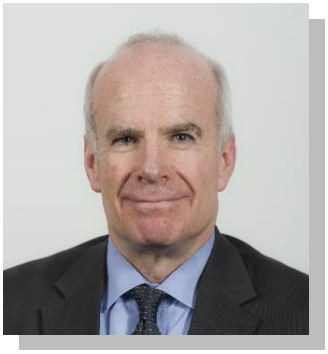
The hearing of the arbitration commenced and both parties presented their oral submissions and outlined their positions in front of the other party and the tribunal, in much the same way as a mediation sometimes commences with an 'eyeball to eyeball meeting', with each party pointing out directly to the other, the strengths of its case and the weaknesses in the other's case. After they had finished, the tribunal invited the parties to endeavour to settle their disputes amicably in a mediation to be conducted before the presiding arbitrator. They agreed and the presiding arbitrator, with the consent of the parties and the other arbitrators, embarked upon a mediation of their dispute. It soon became apparent that the resolution of the dispute turned on the attitude of a third party who was not present and so, the mediation was adjourned to allow that party to be contacted. A request was made by both parties to the third party to join in the discussions.

The third party, who was nearby, acceded to their request and became a party to the arbitration agreement. Once joined to the dispute, the presiding arbitrator was able to continue with the mediation involving the three parties. The parties ultimately reached an agreement to resolve their dispute. Upon an agreement being made, the arbitral tribunal resumed the arbitration and the arbitral tribunal issued a consent award at the request of the, now three, parties to give effect to the settlement agreement reached in the mediation.

As noted above in relation to the ICC Rules, a combined procedure usually requires that every effort be made to ensure the enforceability of any subsequent award. The presiding arbitrator was concerned to ensure that if it became necessary to continue with the arbitration hearing, that the attempt at mediation not render any subsequent award unenforceable in a common law jurisdiction. Accordingly during the mediation phase, the presiding arbitrator insisted that all parties be present during each and every discussion out of a concern that if the arbitrator/mediator caucused separately with each party, the arbitrator/mediator may be disqualified from continuing to act as arbitrator or that the award may be vulnerable to challenge. The idea that one of the parties might have had the opportunity to convey information or raise arguments in the absence of the other, even during a separate mediation process is not countenanced in common law jurisdictions. In the civil law world, it seems there is no such concern or reticence to engage in such a process. In this case, using an amalgam of the procedures, a successful outcome was achieved.

There was no cultural impediment to a combined process. The parties and the tribunal followed a completely flexible procedure which was driven by a desire by all involved to facilitate an outcome that was acceptable to all parties as expeditiously as possible.

The keys to the success of the combined process were, as in the Alabama Claims Arbitration, the complete flexibility of the procedure, the timing of the use of mediation in the arbitration, the agreement of the parties and the tribunal to the arbitrators being actively involved in the mediation, and taking steps to ensure that the arbitrators' participation in the mediation, would not render any award unenforceable if the mediation had failed and it was necessary to resume the arbitration.



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An Overview of the Rules and Procedures Relating to Experts in International Arbitration

Introduction

Experts and expert evidence are needed in international arbitration for the same reasons as in domestic litigation.

Experts may be required to report on technical matters outside the tribunal's expertise and experience[1] to "provide independent assistance to the [tribunal] by way of objective unbiased opinion in relation to matters within his expertise",[2] for example, an engineer as to the cause of a malfunction in an industrial process or machine; an expert accountant in calculating and proving the quantum of damages in a loss of profit or other case, or the value of a business or shares in a private company; a valuer to assess the value of land; and a foreign legal expert as to foreign law.[3]

As is the principle in courts, lay witnesses may only give evidence as to matters of fact and cannot give opinion evidence; and for experts to give opinion evidence, they must actually be experts and their evidence must fall within their expertise.

Experts in international arbitration

In international arbitration, there are two types of experts:

- tribunal appointed; and
- party appointed.

The former type derives from the civil law system and the latter from the common law.[4]

Criticisms may be levelled at each model. Party appointed experts are often seen as "hired guns" who are no more than paid advocates for their party's cause. While tribunal appointed experts are said to be independent, party concerns are that the tribunal lacks control over the expert's role, and that the expert's role may even usurp the arbitral tribunal's role of actually deciding the issues in dispute.[5]

Despite criticism, the flexibility of the arbitral process enables the arbitral tribunal and parties to mould or fashion the choice of experts and the procedure for adducing expert evidence to what is required to suit a particular dispute.[6]

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1 Chartered Institute of Arbitrators "Practice Guideline 10: Guidelines on the use of tribunal-appointed experts, legal advisers and assessor" (10 June 2011) www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/practice- guideline-10-june2011.pdf?sfvrsn=2.

2 National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer") [1993] 2 Lloyd's Rep 68 at 81–2 (Cresswell J).

3 As to choosing the right expert, see R D Bishop and E G Kehoe (eds) The Art of Advocacy in International Arbitration (2nd edn) JurisNet, LLC 2010 pp 263–65.

4 Above n 3, at pp 261–62.

5 G De Berti "Experts and expert witnesses in international arbitration: adviser, advocate or adjudicator?" in C Klausegger, P Klein, F Kremslehner, A Petsche and N Pitkowitz (eds) Austrian Yearbook on International Arbitration 2011 Manz'sche Verlags- und Universitätsbuchhandlung 2011 www.dejalex.com/ pdf/pubb_11_AYIA.pdf; D H Freyer "Assessing expert evidence" in L Newman and R D Hill (eds) The Leading Arbitrators' Guide to International Arbitration (2nd edn) JurisNet, LLC 2008 www.skadden.com/sites/default/files/publications/Publications1405_0.pdf; N Ponniya and D Chen, CONSTRUCTION: The Presentation of Expert Evidence in International Arbitration of Construction Disputes — Prevalent Practices in Asia, 22 June 2010, http://globalarbitrationreview.com/article/1029375/construction-the-presentation-of-expert-evidence-in-international-arbitration-of-construction-disputes-prevalent-practices-in-asia; see also E D D Tavender QC Discussion Paper on Expert Evidence Issues in Commercial Arbitrations Second Annual Energy Arbitration Conference, Western Canada Arbitrators Roundtable (May 2008).

6 D H Freyer, above n 5.

Whether the expert is tribunal or party appointed, it remains the task of the tribunal and the parties to adequately test the expert's evidence.[7]

Tribunal Appointed Expert

Under various national arbitration laws — lex arbitri — of states, the arbitral tribunal has the right to appoint experts, for example, Art 26 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law);[8] Art 25(4) of the International Chamber of Commerce (ICC) Arbitration Rules 2012 (ICC Rules); s 28 of the Malaysian Arbitration Act 2005 Art 50 of the Arbitration Law of Indonesia;[9] and Art 6 of the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration 2010 (IBA Rules).

These rules generally provide for two primary objects:

- the arbitral tribunal's power:
  - to appoint an expert or experts; and
  - to require the parties to cooperate with the expert to provide information and documents required (so that the power of appointment is efficacious); and
- the participation of the expert in the hearing so that the parties may question him or her and present their own expert evidence on the points at issue.

Art 6 of the IBA Rules deals with tribunal appointed experts in a generally similar way.

The Chartered Institute of Arbitrators (CIArb) "Practice Guideline 10: Guidelines on the use of tribunal appointed experts, legal advisers and assessors" (Practice Guideline 10) provides assistance to tribunals in the sorts of cases which are suited to tribunal appointed experts, their selection and terms of reference, material to be provided to the expert, and processes after the report and at the hearing. In accordance with the requirements of natural justice and the Model Law, parties must always be allowed sufficient opportunity to test the tribunal appointed expert's evidence.[10] If this requirement is not met, the award may be refused enforcement.[11]

Party Appointed Experts

It is at the very least implicit, if not expressly provided for in most arbitration laws, that parties may appoint their own experts as well (for example, Arts 20 and 24 of the Model Law — place of arbitration;[12] ss 22(3) and 26(5) of the Malaysian Arbitration Act; Arts 37 and 49 of the Arbitration Law of Indonesia where they expressly permitted; and Art 5(1) of the IBA Rules).

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[7] R A de By, ICDR/CIArb/LACBA Conference — International Arbitration in the Pacific Rim: The Use of Reliance Documents & Expert Witnesses — Efficiency & Fairness: A New Focus for the Expert Witness Debate in International Arbitrations, 2013, www.connonwood.com/publications/29-international-arbitration/119-expert-witness-in-international-arbitrations.

[8] UNCITRAL Model Law on International Commercial Arbitration (Model Law), Art 26 provides as follows:

Expert appointed by arbitral tribunal

1. Unless otherwise agreed by the parties, the arbitral tribunal
   a. may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
   b. may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
2. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

It should be noted that the Model Law is given force of law in Singapore, as well as in Australia and Hong Kong.

[9] Arbitration Law of Indonesia, Art 50 provides:

1. The arbitrator or arbitration tribunal may request the assistance of one or more expert witnesses to provide a written report concerning any specific matter relating to the merits of the dispute.
2. The parties shall be required to provide all details and information that may be deemed necessary by such expert witnesses.
3. The arbitrator or arbitration tribunal shall provide copies of any report provided by such expert witnesses to the parties, in order to allow the parties to respond in writing.
4. In the event that any matters opined upon by any such expert witness is insufficiently clear, upon request of either of the parties, such expert witness may be requested to give testimony in a hearing before the arbitrator(s) and the parties, or their legal representatives.

[10] See above n 8, Art 18: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[11] Paklito Investment Ltd v Klockner East Asia Ltd [1993] 2 HKLR 39 per Kaplan J, referred to by M Hwang and A Lai "Do egregious errors amount to a breach of public policy?" (2005) 71(1) Arbitration: the journal of the Institute of Arbitrators 1–24.

[12] Above n 8, Arts 20 and 24:

Article 20. Place of arbitration

1. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
2. Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless other- wise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

…

Article 24. Hearings and written proceedings

…

3. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

The CIArb "Protocol for the use of party appointed expert witnesses in international arbitration" (CIArb Protocol) (Arts 3 and 6)[13] seems to require consent to be sought from the arbitral tribunal before a party may adduce expert evidence.

Under the Model Law, the parties are free to agree on the arbitral procedures;[14] so if they have agreed either expressly, or through the particular arbitration rules adopted, that a party may appoint an expert, then that is that. It would only be if a set of arbitration rules was not chosen by the parties that the arbitral tribunal may have the power to determine this issue.[15]

If the parties to an international commercial contract have inserted an arbitration clause which incorporates a set of arbitration rules, then these rules will govern issues of procedure and evidence, subject to the particular lex arbitri having mandatory provisions which govern procedural issues and which cannot be overridden by the parties or the arbitrator.[16] Subject to this, the parties and the arbitrator will be able to adapt the chosen rules to suit the particular circumstances of a dispute.

Party's right to appoint and adduce evidence from experts is part of the fundamental right to procedural fairness

Even if tribunal permission is needed to rely on expert evidence, it is suggested it would invariably be given. Art 5(1) of the IBA Rules provides that:

A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.

What the expert report is required to contain is set out in Art 5(2) of the IBA Rules. The right of a party to appoint an expert is part of the fundamental procedural right to be heard contained in Art 18 of the Model Law; s 20 of the Malaysian Arbitration Act; and in comparison with Arts 29, 42 and 46 of the Arbitration Law of Indonesia.[17]

Provision made in arbitration rules for experts

Procedural rules of arbitration such as the UNCITRAL Arbitration Rules (as revised in 2010), Arbitration Rules of the Singapore International Arbitration Centre 2016 (SIAC Rules), 2013 Administered Arbitration Rules of the Hong Kong International Arbitration Center (HKIAC Rules), Arbitration Rules of the Kuala Lumpur Regional Center for Arbitration (KLRCA Rules), Rules of Arbitral Procedure of the Indonesia National Board of Arbitration (BANI Rules) and Arbitration Rules of the Australian Centre for International Commercial Arbitration (ACICA Rules) all provide a set of procedural rules for the conduct of arbitral proceedings between them upon which parties may agree. As noted, a set of arbitration rules is often incorporated by the arbitration clause. For example, the model SIAC arbitration clause:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.
The seat of the arbitration shall be [Singapore].*
The Tribunal shall consist of ___ ** arbitrator(s).
The language of the arbitration shall be ___.[18]

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13 Chartered Institute of Arbitrators "Protocol for the use of party appointed expert witnesses in international arbitration", Arts 3 and 6.

14 Above n 8, Art 19(1).

15 Above n 8, Art 19(2).

16 The Model Law specifies certain provisions as mandatory including: Art 18 (procedural fairness); Art 23(1) (statements of claim and defence); Art 24(2) (parties to be given sufficient advance notice of a hearing) and Art 24(3) (statements, documents and information supplied to the tribunal by one party will be communicated to the other including any expert report relied upon by the tribunal); Art 27 (court assistance in taking evidence); Art 30(2) (award upon a settlement); Art 31(1), (3) and (4) (the form of an award, including that it be in writing and signed by the tribunal, states its date and place of arbitration, and copy to be delivered to parties); Art 32 (arbitral proceedings terminated by an award); and Art 33(1), (2), (4) and (5) (correction and interpretation of award if requested within 30 days). The parties are not free to agree on rules which are in contravention of these mandatory provisions.

17 Law No 30 of 1999: Arbitration and Alternative Dispute Resolutions.

18 Parties can also agree on applicable law: see Singapore International Arbitration Centre,SIAC Model Clause, www.siac.org.sg/model-clauses/siac-model-clause.

The KLRCA model clause is:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA Arbitration Rules.[19]

The ACICA model clause is along similar lines:

Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on Article 10 of the ACICA Arbitration Rules].[20]

The ACICA Rules, in common with the SIAC Rules, deal with experts and expert evidence in a number of contexts. For example, the ACICA Rules include the following:

- If requested by a party, the arbitral tribunal will hold hearings for the presentation of evidence including from expert witnesses (and if there is no request, the tribunal decides)[21] (see Art 25(3) of ICC Rules; r 5.2(c) of the SIAC Rules; Arts 17(3) and 28(2) of the KLRCA Rules; and Art 23(4) of the BANI Rules).
- Experts appointed by the tribunal (which augments then ML article)[22] (see r 26 of the SIAC Rules and Art 29 of the KLRCA Rules).
- "Costs of arbitration" include "the costs of expert advice and of other assistance required by the Arbitral Tribunal"[23] (see r 35.2(c) of the SIAC Rules; Art 37(1) of the ICC Rules; and Art 40(2)(c) of the KLRCA Rules).

Additionally, the SIAC Rules include the following rules:

- Before any hearing, the tribunal may require the parties to give notice of the identity of witnesses, including expert witnesses, whom the parties intend to produce, the subject matter of their testimony and its relevance to the issues and may allow, refuse or limit the appearance of witnesses to give oral evidence.[24]
- Immunity from suit also covers tribunal appointed experts (in addition to arbitrators, SIAC itself, etc).[25]
- Duty of confidentiality is also imposed upon tribunal appointed experts (in addition to arbitrator)[26] (compare with r 15 of the KLRCA Rules).

The KLRCA Rules include the following additional rules:

- Witnesses, including expert witnesses, may be a party.[27]
- The arbitral tribunal may require the retirement of any witness or expert witness.[28]

Arbitration guidelines, protocols and rules

Apart from the arbitration laws of individual states, and arbitration rules which relate to experts and expert evidence, there are various guidelines, rules and resources produced to assist arbitrators, party representatives and in-house counsel, for example, the CIArb Practice Guideline 10 and the CIArb Protocol; and the IBA Rules. These "soft" laws will not be binding unless agreed to by the parties.

To assist arbitrators, party representatives and in-house counsel, in relation to procedural issues relating to experts and expert evidence in international arbitration, there are many useful resources which can provide guidance and rules which the parties can adopt. CIArb has produced many "best practice" guidelines for arbitrators, arbitration practitioners and other participants in the arbitral process.[29] These include the CIArb Practice Guideline 10 and the CIArb Protocol; the UNCITRAL Notes on Organising Arbitral Proceedings (UNCITRAL Notes); and the ICC Commission Report: Techniques for Controlling Time and Costs in Arbitration (ICC Report).

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19 Arbitration Rules of the Kuala Lumpur Regional Center for Arbitration, available at http://klrca.org/arbitration/arbitration/rules_arb_en/PDF-Flip/PDF.pdf.

20 Australian Centre for International Commercial Arbitration, ACICA Model Arbitration Clause, https://acica.org.au/acica- model-arbitration-clause/.

21 Arbitration Rules of the Australian Centre for International Commercial Arbitration, r 21.4.

22 Above n 22, r 32.

23 Above n 22, r 44(c).

24 Arbitration Rules of the Singapore International Arbitration Centre 2016, rr 25.1 and 25.2.

25 Above n 24, r 38.1.

26 Above n 24, r 39.1.

27 Arbitration Rules of the Kuala Lumpur Regional Center for Arbitration, Art 27(2).

28 Above n 27, Art 28(3).

29 Chartered Institute of Arbitrators, Practice Guidelines and Protocols, www.ciarb.org/guidelines-and-ethics/guidelines/practice-guidelines-protocols-and-rules.

The CIArb Protocol provides a complete guide and procedure for party appointed expert evidence for identifying the issues to be dealt with by way of expert evidence, the number of experts, their identity, what tests or analyses are required, the independence of the experts, the contents of the experts' opinions, privilege, meetings of experts and the manner of expert testimony.

The IBA Rules are most influential. However, without the agreement of the parties, the IBA Rules (or for that matter, the CIArb Protocol) will not be binding. The ACICA Rules provide that the arbitral tribunal shall have regard to, but is not bound by, the IBA Rules. The UNCITRAL Notes (as did the first edition in 1996) helpfully lists and briefly describes matters relevant to the organization of arbitral proceedings and which arbitrators should consider in devising with the parties the specific procedures which will apply to the arbitration in question. Expert evidence is dealt with in cll 92–107.

The ICC Reports (which are intended for use with the ICC Rules) are also relevant and are aimed at assisting tribunals and counsel by providing a range of techniques that can be used to increase the time and cost efficiency of arbitration. Many of these measures, as well as others, have been adopted in other contexts to achieve similar objectives. For example:

- a presumption that expert evidence is not required[30] and providing for meetings of experts where the opportunity is given for experts to meet to try to narrow the issues in dispute;[31]
- the appointment of a single expert appointed by the tribunal or jointly by the parties (to maximize the expert's utility to the tribunal, the parties should agree on the scope of the expert's brief and provide the expert with clear instructions);[32] and
- "witness (expert) conferencing" where two or more fact or expert witnesses presented by the parties prepare a joint report and are questioned together on particular topics by the arbitral tribunal and by counsel.[33]

Expert witness codes of conduct and declarations and the like may also be used. Reference may also be made to Case Management Techniques which is App IV to the ICC Rules (primarily relevant for those rules in Art 24 Case Management Conference and Procedural Timetable). The ICC Expert Rules contain rules for the proposal of experts and neutrals, for the appointment of experts and neutrals, and for the administration of expert proceedings. These rules may also be adopted by the parties.

Conclusion

As is the case in domestic litigation, expert evidence is often critical to the outcome in international arbitration. It is accordingly necessary for arbitrators, party representatives and experts to be familiar with the practice and procedure relating to the presentation of expert evidence in international arbitration.[34]

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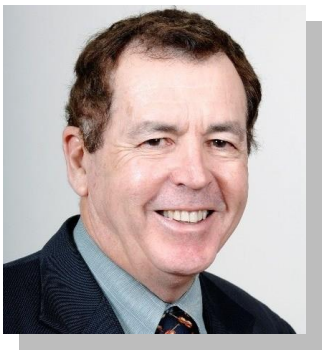
30 ICC Commission on Arbitration and ADR ICC Commission Report: Techniques for Controlling Time and Costs in Arbitra- tion (2012) cl 62.

31 Above n 30, at cl 67.

32 Above n 30, at cl 68.

33 Above n 30, at cl 79.

34 R Bamforth, N Beale and A Grantham, Expert Evidence: The Evolution of Best Practice, 1 July 2007, http://globalarbitration review.com/article/1028122/expert-evidence-the-evolution-of-best-practice.



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The Duties and Responsibilities of Expert Witnesses

Introduction

I recently attended an international arbitration conference in Europe, which included a session on expert witnesses. Comments from several participants displayed a surprising lack of understanding of the role, with several people saying that if lawyers and their clients engaged an independent expert and paid his or her fees then that expert should support their case.

I discussed the matter with colleagues who are experienced international lawyers and arbitrators and they told me that they regularly experience this type of misunderstanding and (sometimes) blatant misuse of expert witnesses.

Therefore, this article seeks to provide an overview of the role, summarise the essential principles, and produce concise guidelines that one should follow in accepting and undertaking an appointment as an expert.

My research has shown that the general principles apply pretty much the same worldwide, but that there are some small differences in the rules and protocols in different jurisdictions. I will not elaborate on these differences, but have provided links to some of them, along with case references. These primarily reflect UK protocols and law, with some from the U.S.

Expert witnesses and expert evidence defined

The Royal Institution of Chartered Surveyors (RICS) in the U.K. and the U.S. provides an apt definition for expert witnesses:
"An expert witness is a person engaged to give an opinion based on experience, knowledge and expertise. The overriding duty of an expert witness is to provide independent, impartial and unbiased evidence to the court or tribunal".
http://www.rics.org/us/knowledge/glossary/what-is-the-role-of-an-expert-witness/
The Expert Witness Institute (UK) goes further:
http://www.ewi.org.uk/membership_directory/whatisanexpertwitness
And the UK Civil Procedure Rules (CPR) Part 35 and Practice Direction (PD) 35 provide clear guidelines on the role.

Expert evidence – the following site describes the fundamental characteristics of expert evidence
http://www.businessdictionary.com/definition/expert-evidence.html

There is an important difference between opinion evidence from a layperson and that of an expert in regard to what is acceptable evidence. Lay witness evidence is normally restricted to factual matters that are within someone's personal knowledge; he or she is not permitted to express opinions.

Evidence from an expert is used when the evaluation of the issues in dispute involves technical or other subject knowledge that only real experts would have and that would likely be outside the knowledge of laypersons and those trying the case.

Primary duties and responsibilities of an expert witness

Expert witnesses have **a primary obligation to assist the court or tribunal** on matters falling within their expertise and are not bound to the party that has appointed them and is paying their fees. This is quite often misunderstood and it is not uncommon for clients and their legal advisers to 'lean' on experts to make their opinion supportive of the client's case. This compromises the independence of the expert and should be strongly resisted, to the point of turning down the appointment. The client is free to appoint an **expert adviser** for this purpose if they so desire (see below).

In *Ikarian Reefer* (UK) Mr Justice Cresswell provided a succinct summary:

'A misunderstanding on the part of some of the expert witnesses has taken place concerning their duties and responsibilities which has contributed to the length of the trial.'

He then proceeded to outline the duties and responsibilities of expert witnesses in civil cases:

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: see *Whitehouse v Jordan (1981) 1 WLR 246, 256, per Lord Wilberforce.*
- Independent assistance should be provided to the court by way of objective unbiased opinion regarding matters within the expertise of the expert witness: see *Polivitte Ltd v Commercial Union Assurance Co plc (1987) 1 Lloyd's Rep 379, 386, per Mr Justice Garland;* and *Re J (1990) FCR 193, per Mr Justice Cazalet.* An expert witness in the High Court should never assume the role of advocate.
- Facts or assumptions upon which the opinion was based should be stated together with material facts which could detract from the concluded opinion.
- An expert witness should make it clear when a question or issue fell outside his expertise.
- If the opinion was not properly researched because it was considered that insufficient data was available then that had to be stated with an indication that the opinion was provisional (see Re). If the witness could not assert that the report contained the truth, the whole truth and nothing but the truth then that qualification should be stated on the report: see *Derby & Co Ltd and Others v Weldon and Others (No 9), The Times, 9 November 1990, per Lord Justice Staughton.*
- If, after exchange of reports, an expert witness changed his mind on a material matter then the change of view should be communicated to the other side through legal representatives without delay and, when appropriate, to the court.
- Photographs, plans, survey reports and other documents referred to in the expert evidence had to be provided to the other side at the same time as the exchange of reports.

And in Kennedy v Cordia LLP Scotland 2016 there is an excellent section on *"The evidence of skilled witnesses"* in paragraphs 38–59, which includes comment on an expert witnesses' duty to the court or tribunal.
https://www.supremecourt.uk/cases/docs/uksc-2014-0247-judgment.pdf

The difference between an expert adviser and an expert witness

This difference should be clear, at least to lawyers, but this is still where misunderstanding remains.

'Independence' is the key to this difference. An expert witness has a primary obligation to provide an independent, impartial and objective assessment to the court or arbitration tribunal, which supersedes his or her duty to the instructing party.

This independent opinion may not turn out to support the case of the instructing party or counter the evidence of the other party, but a professional expert will not be swayed by who appointed them in arriving at their conclusions. If the report does not suit the appointing party then they may not be able to just bury it in the bottom drawer, because this is not allowed in some jurisdictions (see below).

In summary, opinion experts must maintain their independence and impartiality at all times.

Expert advisers have quite a different role. As well as providing their opinion and advice to clients, they can also discuss related matters and case strategies, knowing they will not have to appear as witnesses and be cross examined, or have their opinions critically reviewed by other experts. And advice provided by an expert adviser is privileged.

Pinsent Masons provide an excellent explanation of this difference on the following link, http://www.out-law.com/topics/dispute-resolution-and-litigation/court-procedure/expert-witnesses-and-expert-advisers/

Qualifying as an expert

Experts are generally approached because of their reputation in a field, but prior to appointment they will normally be asked to affirm that they have real expertise in the specific issues identified in the brief. Sometimes parties will invite someone to participate as an expert who may be well-known in the industry but not a particular expert on the specific issues in question. In this situation, the appointment should be declined. It is far wiser to decline than to expose yourself to the risk of being humiliated by real experts and opposing counsel in a hearing.

Accepting expert appointments

- Appointments may be made by the court or tribunal or by one of the parties or by their legal advisers. In complex disputes several experts may be appointed;
- The appointing party should provide a brief that stipulates what is required from the expert, with written terms of appointment;
- Experts need to confirm that they have real expertise in the required area, providing detailed information that satisfies the appointing party;
- Experts should make a declaration that they have no conflict of interest, or alternatively provide a statement advising of a relationship with one of parties but confirming that they will be able to act impartially, as well as explaining why;
- Perceived conflict of interest can be a difficult area and probably should be avoided by declining the appointment, even for those who feel they can act impartially.
- The fees for experts are normally payable by the appointing party, or become a cost of the case if appointed by the court/tribunal, and they should not be contingent on the outcome of the case.

The brief from the appointing party

The brief should clearly identify the issues to be addressed in the expert's written opinion, together with the relevant case documents. In the course of their assessment the expert should request additional information if they feel it is necessary.

During the course of the litigation or arbitration or during the actual hearings it may arise that the facts on which they have reached their opinion are actually different from what they have been told in their brief. In this situation refer to Mr Justice Cresswell's statement above.

Investigations and report writing

- The form and content of the report should follow a recognised format. These are readily available from expert witness institutions; see also UK Practice Direction (PD) 35 (Para. 3.1).
- The report should specifically address the issues identified in the brief. Do not write about other related issues that are actually irrelevant to the case.
- There are two categories of evidence that experts can cover in their report and on which they will be examined:
    - Evidence on the facts of the case they have been provided with or have personal knowledge of;
    - Opinion evidence based on their personal expertise, including facts and data from other relevant cases and recognised industry sources.
- The findings in the report must be signed off as being those of the expert only, based on the facts provided and the expert's own expertise in the field. If the report is prepared with the assistance of a team, the lead expert that signs it off must understand and agree with every detail in it, as he or she will be the only one in the witness box.
- Reports should be professionally prepared and comply with jurisdictional protocols. They will be critically examined by experts representing the other side.
- Resist any pressure to 'slant' a report towards a party's case; do not compromise your independence. The closest you can come is to provide clarification of points, but not alter your basic findings.
- It is not uncommon for an expert's opinion to be decisive enough that it leads to settlement before the hearing; an ideal result.
- The importance of thorough research and professional preparation of the report cannot be overstated, otherwise the consequences may be highly embarrassing, as in paras 77-94 of Van Oord Ltd & Anor v Allseas UK Ltd [2015] EWHC 3074 (TCC).
- Likewise, any partiality or bias towards a party's case will be detected and will be equally damaging to the expert's professional reputation.

Protocol for hearings and meetings of experts

Readers will know the court and arbitration procedures for their own jurisdictions, so we will only highlight some key points that expert witnesses need to be aware of:

- Experts' reports should be exchanged before the hearing to avoid parties being taken by surprise.
- Experts' reports are not admissible as evidence if the expert does not appear at the hearing for examination.
- Normally an expert appears to be examined on their report, but with the permission of the court or tribunal an expert may give oral evidence, which shall become evidence proper without a supporting written opinion.
- An expert should be able to convince the court or tribunal that their opinion would be the same if they had been instructed by the other party.
- An expert should not act as an advocate or argue a case.
- *'First-time'* expert witnesses should receive advice on *'witness box'* techniques, for everyone's benefit. You will most likely undergo rigorous cross-examination in the hearing.
- Meetings of experts – if there is disagreement between experts representing the opposing parties or the tribunal, which sometimes results from different briefs, then the tribunal may direct the experts to give concurrent evidence.
- Concurrent evidence or 'hot tubbing' is considered to have several advantages. The experts are sworn in together and the judge/arbitrator acts as 'chair' of the meeting, putting questions to each expert. The experts can also question and respond to each other. The process is designed to assist the court in understanding complex matters, whilst saving considerable time and cost.
- Concurrent expert evidence became part of English court procedure in April 2013. https://www.ashurst.com/publication-item.aspx?id_Content=9604
- Is there room in American courts for 'hot-tubbing'? http://www.jonesday.com/room_in_american_courts/

Disclosure of expert reports, instructions and briefing documents

It is not uncommon for parties to think they can bury an expert's report in the bottom drawer because it doesn't support their case, treating it as privileged. However this is not necessarily the situation. If the opposing party hears that an undisclosed expert report exists then they may be able to request an order that it be tabled and that the author appears as an expert witness. This will depend on the rules for the particular jurisdiction.

There is no general rule across jurisdictions in regard to privilege and disclosure of instructions, case material supplied, draft reports and undisclosed expert witness reports.

A safe way to travel is to assume that all communications between legal advisers and experts have the potential to be disclosed to the opposing party.
https://www.lawgazette.co.uk/law/disclosure-of-expert-medical-evidence/59858.article

Professional liability and immunity

Provided an expert maintains a high standard of care and professionalism in accordance with his or her jurisdictional rules, then professional negligence should not be an issue. Nevertheless prudent practitioners should carry Professional Immunity (PI) insurance, with the main reason being to cover the costs of defence in the event of a challenge on some basis, such as a technical error that influences and leads to an unjust finding against a party.

In *Jones v Kaney* [2011] UKSC 13 the UK Supreme Court decided that expert witnesses did not have immunity from claims for professional negligence. This reversed a line of authority dating back 400 years.

Summary

The key points are clear and simple:

- An expert's primary responsibility is to the tribunal/court, irrespective of who pays the fees.
- An expert witness must clearly understand the difference between their role and an expert adviser.
- Do not accept an appointment unless you are a real expert in the area stipulated in the brief. Do not risk being torn apart in cross examination or in hot tubbing by purporting to be an expert when you are not. A real expert will not be concerned about this.
- The expert must have no conflict of interest or perceived conflict and must be strictly independent.
- An expert must provide a *'black & white'* objective opinion that is based only on the facts and it must not contain subjective comment or perceived partiality towards either side.
- Strict independence and impartiality is fundamental, both actual and perceived, e.g. problems can arise if an expert has communications, meetings or site inspections with one party only.
- Experts must maintain high professional and ethical standards.

George Meng
Shandong Kangqiao Law Firm, Jinan, China
Senior Lawyer

Chinese Lawyers and International Sports Dispute Resolution: My Experience and Reflections

Background

On 9 September 2016, Chinese football super league's elite Shandong Luneng Taishan Football Club ("Club") received a notification from the Asian Football Confederation ("AFC") Disciplinary Committee that Mr. Jin Jingdao (the "Player"), one of the Club's footballers, was tested positive for a banned substance clenbuterol during the Club's recent Asian Champions League knock-out match with FC Seoul. The Chairman of the AFC Disciplinary Committee imposed a sixty-day provisional suspension on any football-related activities against the Player accordingly.

As the Club's legal counsel, I was briefed about the situation and thereafter I did my preliminary investigation with the Club and the Player himself. Based on the information collected, I formed a tentative view that the positive test result would have come from the Player's digestion of contaminated mutton in his dinner two days before the match with FC Seoul.

I therefore helped the Player get an oral hearing opportunity before the AFC Disciplinary Committee. The hearing took place in Kuala Lumpur on 3 November 2016 and I attended it on behalf of the Player. The Disciplinary Committee subsequently issued its decision sanctioning the Player for an eight-month suspension. The Player was not satisfied with that decision and therefore I helped him lodge an appeal before the AFC Appeal Committee. In the end the AFC Appeal Committee partially upheld the Player's appeal by reducing his suspension to three months. The Player eventually accepted the Appeal Committee's decision.

Reflections

(i) Language Is Not A Main Barrier Stopping Chinese Lawyers from Participating in International Sports Dispute Resolution

In the course of the above-mentioned proceedings, the official language of communication is English. Most Chinese lawyers speak Chinese only - I believe that is the main reason why only few Chinese lawyers are involved in international dispute resolution including in the sports dispute resolution field.

However, I do not think it is a big issue. Firstly, in most situations, English is one of the official languages in those cases. Most Chinese lawyers have been studying English for more than ten years and some of them even study English abroad. Rather than English language skills, I am of the view that Chinese lawyers seldom take part in advanced stages in the international sports dispute resolution process mainly due to their shortage of practice experience and opportunities. Secondly, not all of the panel members are native English speakers. For example, during my hearing in Kuala Lumpur on 3 November 2016, the panel members are from Singapore, Yemen, Vietnam and Guam. Their English accents are strong and different but it did not affect our communications. Thirdly, when I appeared and argued the Player's case in the Kuala Lumpur hearing, I found that the most important thing

was my reasoning and logic of setting up the grounds to support my opinions rather than the language itself.

(ii) Sports Sector in China Is Emerging

Although the above-mentioned case of mine is only one, it reflects that the Chinese sports sector is starting to expand into global marketplace, especially in those commercialized fields, such as football, basketball and volleyball, etc.

According to Goal statistics, a dedicated football website, in 2016 Chinese Super League market value increased by 81.33% from the last year's' figure representing the fastest growing football league in the world[1]. Many excellent foreign footballers or coaches, including those from Brazil, England, Germany or Portugal, joined or are retained by Chinese football clubs.

The information above shows that Chinese sports sector is a prospective area for lawyers to tackle. At present, however, most Chinese lawyers are still focusing on those more traditional legal practice areas while only a few of them begin to concentrate on sports law area. Part of the reason, I think, is that the Chinese sports sector is not entirely market-oriented yet.

The situation may well change over time. For example, Chinese State Council (Chinese Central Government) issued a guideline in 2014 titled "*The State Council's Several Opinions on Accelerating Development of Sports Industry and Promotion of Sports Consumption"* (《国务院关于加快发展体育产业促进体育消费的若干意见》)[2] . In this guideline, the State Council set the target to make Chinese sports sector a US$ 700 billion one in volume by 2025. It appears, however, that Chinese lawyers are not ready for it. Like early birds catching the worm, the first lawyers stepping into this area will catch this chance of a lifetime.

(iii) The Foreign Professionals' Expertise and Experience in Sports Law Areas Are In High Demand in China

As I mentioned above, many foreign athletes or coaches have come to the Chinese sports sector in recent years. It is inevitable that some disputes will arise in the years ahead. For instance, as a long-standing legal counsel for a leading Chinese football club, I deal with 4-5 matters with respect to international players or coaches every year. Another example is that the CAS set up its Court of Arbitration for Sport Shanghai Alternative Hearing Center in Shanghai in 2012. As the "supreme court of sports", CAS's set-up in Shanghai is not by coincidence.

So I believe, with more interface between Chinese and foreign parties in the sports law areas, those sports law-related disputes will increase accordingly. Those disputes may be resolved by industry regulatory bodies such as AFC, FIFA or CAS, etc. But most Chinese lawyers are short of experience to deal with those contentious matters offshore.

As we all see in the years ahead, Chinese sports sector will continue to grow. Unfortunately only few Chinese lawyers are ready to deal with China-related international sports disputes at present. When other Chinese lawyers encounter such situations, it is natural for them to seek help from foreign lawyers or experts to help them resolve the problems. Thus, Chinese lawyers and foreign lawyers may cooperate to combine their respective advantages to provide best services to the clients. Other than dispute resolution, many Chinese sports clubs may need to retain domestic and foreign legal counsels or experts to provide them with cross-border legal advisory services in the first place.

Conclusion

The development of Chinese sports sector may create numerous opportunities for Chinese lawyers. However, the reality in China now is that most Chinese lawyers lack sports law-related experience. This will afford abundant opportunities for foreign lawyers with rich sports law experience to cooperate with Chinese lawyers to share this huge cake.

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[1] https://www.ishuo.cn/show/1118911.html

[2] http://www.scio.gov.cn/xwfbh/xwbfbh/wqfbh/2015/33862/xgzc33869/Document/1458267/1458267.htm

Michelle Blore, Ryan Hunter, Maria Mellos, and Alexi Polden

The Willem C. Vis International Commercial Arbitration Moot: The University of Sydney

To argue is human, to moot divine. In April 2017, 343 universities descended on Vienna, Austria, for the Willem C. Vis International Commercial Arbitration Moot, including nine Australian teams. The Vis Moot is a unique opportunity for students to engage with the world of international commercial arbitration and to meet like-minded students from all over the world. Each year students are tasked with mooting a hypothetical contractual dispute which has been sent to international arbitration. The contract is governed by the United Nations Convention on the International Sale of Goods (CISG), and the procedural rules of the arbitration are selected from a different arbitral institution every year. This year, the competition applied the Arbitration Rules of the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), which is Brazil's leading arbitral institution.

This year, teams grappled with an aircraft engine manufacturing contract gone wrong, and a series of blunders by accountants and lawyers. The parties had entered into a contract without specifying an exchange rate, and then added an ambiguous addendum. When time for payment came, the exchange rate had collapsed, and a government levy was imposed on the payment which neither party was willing to bear. Making matters worse, when the claimant attempted to send the dispute to international arbitration, it failed to provide the correct material to initiate arbitration within the parties' contractual limitation period. The respondent then sought an interim order for security for costs after discovering that the claimant was being propped up by its parent company.

Over what otherwise would have been the summer holidays, the Sydney University team researched and drafted the Claimant's Memorandum and the Respondent's Memorandum before preparing for the oral hearings which were held in Vienna from 8 – 13 April 2017. This year Australian teams had the opportunity to compete in the inaugural Australian Pre-Moot, which was run in February by the Australian Branch of the Chartered Institute of Arbitrators. Teams competed in state rounds, after which winners travelled to Melbourne for the finals. The Grand Final Moot was judged by a tribunal consisting of the Hon Susan Crennan AC QC, Neil Kaplan CBE QC SBS, and Dr Michael Pryles AO PBM. After a closely contested final between Monash University and the University of Sydney, Sydney prevailed, with Katherine Browne from Monash University taking the top speaker award. The experience was invaluable as a chance for the Australian teams to prepare for their moots and receive feedback from leading arbitrators, as well as a chance to meet other Australian competitors before travelling to Europe. The University of Sydney team is extremely grateful to the

Chartered Institute of Arbitrators for having made this possible, as well as to the co-sponsors, Corrs Chambers Westgarth, McCullough Robertson and the Victorian Bar.

In the week before the Vis Moot in Vienna, further Pre-Moots are held across Europe. This year's team from the University of Sydney competed at the Permanent Court of Arbitration Pre-Moot in The Hague, as well as at a Pre-Moot at Norton Rose Fulbright in Paris, before travelling to Vienna. The team came second in both Pre-Moots. In Vienna, the University of Sydney was awarded an "Honourable Mention" for its Claimant Memorandum. After a week of intense mooting in Vienna, the competition was won by the University of Ottawa**.**

The team from the University of Sydney took away an invaluable experience and a wealth of knowledge from their six months preparing for and competing in the Vis Moot. The chance to have an insight into legal drafting and on developing complex legal arguments with feedback from some of Australia's most respected solicitors and barristers practicing in arbitration was one which will continue to aid the students in their studies and eventually, practice. The University of Sydney team consisted of Michelle Blore, Ryan Hunter, Maria Mellos and Alexi Polden, and was coached by Sophie Maltabarow, (Associate to the Hon Justice Leeming of the NSW Court of Appeal) and Heydon Wardell-Burrus (Allens Linklaters), both of whom are former "Vis Mooties" from the University of Sydney. The team was also assisted by Professor Chester Brown, the Faculty Coordinator at the University of Sydney. Finally, the team wishes to record its gratitude for the generous support of the University of Sydney, the Australian Branch of the Chartered Institute of Arbitrators, the New South Wales Bar Association, Allens Linklaters, and Clayton Utz.

Ana Abilava*
University of Sydney

International Investment Arbitration Across Asia: A Symposium

Recent developments in the international investment scene have also impacted the Asian region. Notably, China and Southeast Asia have emerged not just as growing foreign direct investment (FDI) recipients but also as major sources of outbound FDI. In parallel, the Asian region experienced a proliferation in international investment agreements (IIAs). Asian countries were initially hesitant toward investor-state dispute settlement (ISDS) mechanisms. Later, however, as Asian countries began encouraging inbound and then outbound FDI, they started committing to treaties with ISDS mechanisms. Unlike some countries from other regions, which changed their course of action towards ISDS provisions after their first-ever ISDS cases, most of the ASEAN member states have continued incorporating ISDS provisions even after their initial encounters with ISDS claims.

On 16 February 2017, the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS) and the Sydney Centre for International Law (SCIL) co-hosted a symposium on the theme: "International Investment Arbitration Across Asia". The symposium, sponsored also by the Sydney Southeast Asia Centre and Herbert Smith Freehills, brought together leading experts of international investment law from Southeast Asia, North Asia, India and Oceania. The symposium re-examined the historical development of international investment treaties in the Asian region, focusing on whether and how the countries may be shifting from rule takers to rule makers. A focus was on the ASEAN(+) treaties, including the (ASEAN+6) Regional Comprehensive Economic Partnership (RCEP) at an advanced stage of negotiations, and the Trans-Pacific Partnership (TPP) Agreement, which was discussed more broadly as an urgent topic in the wake of the change of direction by the US under the new administration. Participants at the symposium also elaborated on the experiences of Asian countries with ISDS mechanisms, and the attitude towards ISDS before and after first major investor-state arbitration (ISA) cases in the region. The many speakers and discussants for the event further explored possible future trajectories of international investment treaty policymaking of Asia-Pacific countries, especially China, Japan, Korea, India, Australia and New Zealand.

Dr Luke Nottage (University of Sydney) delivered an opening speech, surveying pan-Asian FDI, major treaties (including the TPP) and ISDS patterns. Dr Nottage provided an overview of the increased inbound and outbound investments in the Asian region with a special focus on Southeast Asia. He also talked about the rule of law indicators in the ASEAN member states, corruption perceptions and consistency in their investment treaty making, as well as the timing of

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* Please refer to his post as: Ana Ubilava, 'International Investment Arbitration Across Asia: A Symposium', Kluwer Arbitration Blog, March 1 2017, http://kluwerarbitrationblog.com/2017/03/01/international-investment-arbitration-across-asia-symposium/

the first ISDS claims against ASEAN member states on the signing on IIAs. Dr Nottage suggested that these ISDS cases may have had less impact on subsequent signing bilateral investment treaties (BITs) and Free Trade Agreements (FTAs) by Asian countries compared to other parts of the world.

Dr Julien Chaisse (Chinese University of Hong Kong) joined this speech to outline the current state and future development trajectories of TPP, RCEP and the G20 Guiding Principles for Global Investment Policymaking. Dr Chaisse emphasized the importance of the TPP with regard to ISDS provisions and further elaborated on current issues with respect to the US and the TPP. He contrasted the Malaysian and Vietnamese experience, stating that their participation in TPP was a result of intensive negotiations and a huge commitment. Vietnam also incorporated parts of the TPP draft into negotiations to conclude an FTA with the EU. "TPP is not dead", Dr Chaisse concluded, expressing his belief in the TPP at least as a benchmark for ongoing and future IIAs. With regard to RCEP, Dr Chaisse stressed that it remained an ASEAN (not Chinese) initiative, and emphasised the treaty's complexity and importance, the success of which greatly depends on cooperation among all ten ASEAN member states. Lastly, Dr Chaisse analyzed characteristics and future implications of the G20 Guiding Principles for Global Investment Policymaking.

Deeper factors responsible for the evolving treaty practices were scrutinized by Dr Lauge Poulsen (University College London). Including reference to the Asian region, Dr Poulsen addressed motives of the governments signing up to treaties that constrain their regulatory authority and expose them to potentially expensive arbitration claims. A commonly assumed expectation of developing countries was that BITs would attract more FDI. Dr Poulsen pointed out two new empirical aspects for this, as well as risks associated with concluding such investment agreements, and questioned whether governments considered them before being bound by such agreements. This argument further led to the conclusion that although ISDS claims did not necessarily stop the process of signing the international investment treaties, they considerably slowed down the process.

Dr Shiro Armstrong (Australian National University) presented the results of the econometric study, in collaboration with Dr Nottage, which examined the impact of investment treaties and ISDS provisions on FDI. The study found that on aggregate, while both weaker and stronger ISDS provisions have a positive impact on FDI, the effect of weaker ISDS provisions is more pronounced. Dr Nottage added that disentangling the factors at play and drafting policy implications remains a complex task, and both authors expressed concerns about the quality of the existing data on FDIs and other methodological issues. Making a virtual appearance via a Skype call from Bangkok, Dr Jason Yackee (University of Wisconsin) extended such methodological concerns, after presenting his preliminary research on the correlation of Thailand's commitments to ISDS with an increase in FDI, where results differed greatly depending on whether OECD or Thai government data was used. Dr Yackee urged participants to think outside the box to come up with new research strategies for future analysis of this controversial policy question.

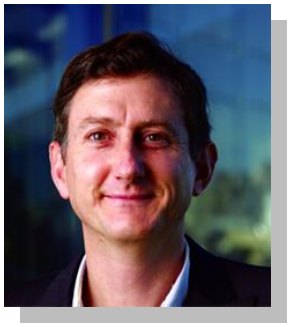
Insightful observations on the ASEAN(+) treaties, including RCEP, were added by Dr Diane Desierto (University of Hawaii, by Skype from Stanford). Dr Desierto discussed strategies, norms, institutions and politics of the regional investment treaties. Dr Desierto also discussed some common features and ISDS provisions of the ASEAN in Southeast Asia as well as the risks of parallel proceedings associated with the fragmented investment treaty instruments in the Asian region. Elaborating the topic, Jurgen Kurtz (University of Melbourne) presentation focussed on South East Asian investment treaty practice. Dr Kurtz critiqued the assumption of isomorphism underpinning that practice arguing instead that unique political economy considerations (especially drivers of internalization of costs) have shaped distinctive (and at times, innovative) treaty choices. ASEAN's bold positioning of collective investment rules however have suffered from internal contradictions, not least the puzzling practice of reverse open regionalism. Dr August Reinisch (a discussant from the University of Vienna) sketched some parallels and contrasts between ASEAN and EU investment treaty developments, particularly with regard to the approaches now to ISDS provisions agreed within EU member states as well as with the rest of the world.

A succession of experts then deliberated on the investment treaty practices of other significant Asia-Pacific countries. Dr Julien Chaisse analysed the investment policy of China, stating that "there are many rules leading to Beijing". Reflecting on the current events in relation to Prime Minister Abe's meeting with President Trump, Dr Tomoko Ishikawa (Nagoya University) reviewed Japan's current investment treaty regime. In particular, she focused on treaty practices before and after 2010, identifying novelties added by the TPP, not previously common in Japan's practice. The case of Korea was presented by Dr Joongi Kim (Yonsei Law School). Dr Kim addressed three important areas: the extensive investment treaty practice of Korea; the ISDS cases where Korea was respondent but also now the claimant investor's home country; and the trade and FDI inflows versus outflows. In addition, trends in the international investment regime globally and within Asia cannot be fully understood now without touching on India's new Model BIT. Dr Prabhash Ranjan (South Asian University) explained the highly controversial ISDS and related provisions in the December 2015 Model BIT. Dr Ranjan set out the background to India's novel approach and addressed some of the key issues of the new Indian Model BIT, recently accepted by Cambodia.

Topics presented at the symposium were not limited to "Asia" in the narrow or formalistic sense. Amokura Kawharu and Dr Luke Nottage offered a comparative study of key areas of the existing treaties for Australia and New Zealand, closely integrated economically with the Asian region and even more so bilaterally. They ended up examining the potential to facilitate more EU-style treaty innovations in the Asia-Pacific region and the influence these two countries collectively might have on such processes. The final main speaker of the symposium, Adjunct Professor Donald Robertson (Herbert Smith Freehills) addressed the relation of investment treaties with governance, focusing on principles of best-practice regulation, which sparked considerable potential for further debate.

Justin Gleeson SC, former Solicitor-General and leader of the team that successfully defended the Philip Morris claims against Australia, offered concluding remarks to sum up the symposium. He noted that despite the diversity of the objectives of the speakers, the core aim of these studies remained the same: "it is all about human wellbeing across the planet".

The symposium therefore offered an excellent platform to share new findings and discuss ideas related to challenges and opportunities related to the investment treaty regime and associated peculiarities in the wider Asia-Pacific region. This marked a thought-provoking continuation of intellectual debate from a related previous conference on "International Investment Arbitration and Dispute Resolution in Southeast Asia" hosted by Chulalongkorn University on 18 July 2016, focusing on the experience of individual ASEAN member states. The research presented at both conferences, also related to an Australian Research Council project over 2014-7 (for Trakman, Armstrong, Kurtz and Nottage), will be brought together in a book on "International Investment Treaties and Arbitration Across Asia" to be co-edited by Dr Chaisse and Dr Nottage.



Luke Nottage
Sydney Law School
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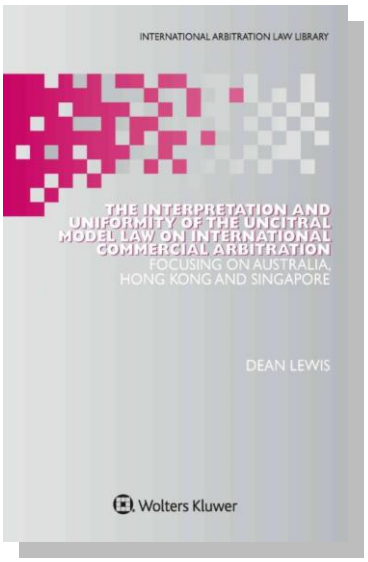

Book Review – Dean Lewis, 'The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Focusing on Australia, Hong Kong and Singapore'

This very useful and exhaustively researched book, written by an experienced practitioner based in Hong Kong and based on PhD thesis completed part-time at the University of Leicester, compares the extent to which uniformity has been achieved in the UNCITRAL Model Law on International Commercial Arbitration (UML) regimes across three Asia-Pacific jurisdictions that adopted it quite early on. Chapter 2 defines uniformity (not seen as absolute and therefore more akin to harmonisation: p20) as 'an approach which achieve[s] a degree of textual and applied uniformity with the latter divided into the adoption of an approach which ha[s] due regard to the objectives of the UML and the similarity of results' (p88).

Chapter 3 compares textual uniformity in the UML, finding the most in the legislation as adopted in Hong Kong (from 1989), considerable uniformity in Australia (also since 1989) and the least in Singapore (since 1994). Singapore has still not incorporated Article 2A, added to the UML as revised in 2006 and most relevantly providing that in interpretation 'regard is to be had to its international origin and to the need to promote uniformity in its application'. However, chapter 2 argues that is anyway a codification of principles applicable to uniform international instruments.

Chapter 2 also sets out criteria to test for applied uniformity in the sense of courts adopting an international approach, divided into:

(a) the 'UML I-Norm': whereby judgments expressly or impliedly reflect the principles of UML Article 2A (which may arguably also apply to cases applying the 1958 New York Convention or 'NYC');

(b) the 'TP I-Norm': whereby courts have regard to the UML's *travaux preparatoires*;

(c) the 'JC I-Norm': whereby courts have regard to the UML 'global jurisconsortium', meaning case law from other jurisdictions applying the UML and scholarly writings.

Chapter 4 then tests the extent to which these norms are applied, based on a qualitative analysis of the most important case law, as well as a quantitative analysis of 358 cases from the three jurisdictions applying the UML or the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (NYC). (The time span for this case law is not immediately obvious, but seems to be all judgments rendered over 1997-2015, including appeal judgments; but excluding cases that apply a UML framework to domestic arbitrations, as in Australia in almost all states and territories sequentially from 2010.) Lewis also considers whether the judgments considered any relevant textual dissimilarities, and citations to English cases, although remarking that (pp89-90, citation omitted):

'Nottage has criticised the lack of an internationalist approach (and thus reliance upon English cases) by Australian courts and that criticism may be justified to the extent that reliance primarily on English cases is unnecessary because there are relevant cases from UML jurisdictions. The analysis of cases for this book however suggests that many references to English cases relate either to enforcement decisions (where there is NYC overlap) or principles such as waiver and estoppel where UML jurisprudence is inevitably less developed. A continued reliance on English cases is not therefore determinative of a failure to adopt an internationalist approach although a finding that courts have largely stopped the practice would suggest a stronger internationalist approach'.

The result of the quantitative analysis across all cases is summarised in Table 2 (p203) and reproduced below (with permission from Lewis):

		Internationalist Approach									Textual Uniformity Test			English Cases Citation		
		UML I-Norm			TP I-Norm			JC I-Norm								
		HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS
1977-1994	Cases analysed	36	0	3	36	0	3	36	0	3	36	0	3	36	0	3
	Cases Engaging I-Norm	5	0	0	8	0	0	13(4)	0	0	0	0	0	16	0	3
1995-2003	Cases analysed	88	13	11	88	13	11	88	13	11	88	13	11	88	13	11
	Cases Engaging I-Norm	1(7)	0	0	2(8)	2(1)	0	6(24)	2	2	0	0	0	26	9	5
2004-2010	Cases analysed	35	34	12	35	34	12	35	34	12	35	34	12	35	34	12
	Cases Engaging I-Norm	(8)	0	1	2(8)	9(1)	3(1)	1(11)	14(10)	3(1)	1	2	2	17	29	11
2011-2015	Cases analysed	41	40	45	41	40	45	40	40	45	41	40	45	41	40	45
	Cases Engaging I-Norm	(14)	4(4)	18(5)	2(20)	17(10)	8(11)	4(20)	25(7)	19(8)	0	5	8	28	29	30
Total	Cases analysed	200	87	71	200	87	71	200	87	71	200	87	71	200	87	71
	Cases Engaging I-Norm	6(29)	4(4)	19(5)	14(36)	28(12)	11(12)	24(59)	42(16)	24(9)	1	7	10	87	68	49

He observes that Hong Kong judgments professed the most markedly internationalist approach over 1977-94, but this diminished over 1995-2003 (after Justice Neil Kaplan retired in 1996). Singaporean case law slowly started to emerge in this respect, but across all three jurisdictions there still 'was no uniformity to any significant degree' (p99). From 2004-2010, however, Singaporean courts began rendering much more internationalist judgments. (It could be added that this tracked the government's strong push to promote Singapore as a hub for international arbitration, evidenced by the inauguration of premises at Maxwell Chambers followed by a significant increase in SIAC case filings.) From 2011-2015, Australian case law belatedly begins to 'compete' – a 'significant development of the internationalist cause … [that] … continues the push toward making an Australia a centre for international commercial arbitration' (p126) – although it remains a far less popular seat than Singapore and Hong Kong, despite the latter's noticeably less internationalist case law. Lewis also acknowledges (p126, citations omitted) that:

'inconsistency remains depending on the judge or court in Australia exercising jurisdiction. An example … is the question of public policy given a broad interpretation in New South Wales and Queensland and a narrow International I-Norm interpretation in the Federal Court in *TCL*.'

The Full Court decision in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 is further described as 'probably the most internationalist judgment of the courts in Australia' (p115). However, it should be added that the extended delays in enforcing that rare Australia-seated international arbitration award – including the unusual but fortunately fruitless constitutional challenge to the entire UML enforcement regime – indicate the rough road still ahead in belatedly transitioning towards a more internationalist and therefore pro-arbitration mindset. A more recent sorry saga is the protracted litigation in the Federal Court, including *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2015] FCA 1028, which Lewis briefly notes as demonstrating the 'almost *de rigueur* internationalist approach of the Federal Court' (p124).

Lewis further argues that Croft J's decision enforcing an award from Mongolia in *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1 'was probably the first Australian case where great care was taken to adopt an international approach in the engagement of all the I-Norms' (p107), but goes on to acknowledge its reversal by the Victorian Court of Appeal. Lewis suggests this appeal case applying the NYC 'demonstrates both an internationalist approach (the UML and JC I-Norms engaged) but with appropriate regard for textual dissimilarities' in the Australian legislation (p108). Nonetheless, he acknowledges that some commentary and indeed subsequent case law have doubted the correctness of the appeal judgment as incorrect – and insufficiently internationalist.

Chapter 5 turns to the uniformity in application of the UML, especially judgments concerning Article 34 on setting aside of awards at the seat. The analysis also extends to the (largely) 'equivalent grounds in the NYC' (p143), namely Article V – probably included also because otherwise the sample for Australia would have been disproportionately low. The focus is predominantly

on the 'international ratio decidendi' or 'I-Ratio' influencing not only subsequent lower courts within each jurisdiction, but also potentially those in the other two jurisdictions (p144). The comparison first shows how an implicit principle in Article 34, that there should be no appeal to the courts on the merits of the award, was in tension in the *Altain Khuder* judgments but more clearly established in *TCL*. Similar pronouncements in Singapore and Hong Kong, albeit without cross-border citations, generates in a high degree of applied uniformity in this I-Ratio (pp 147-8). By contrast, there is little uniformity between those two jurisdictions regarding a possible discretion not to set aside an award even if a listed ground is established, and almost no case law discussion in Australia (p151).

The latter disappointing pattern is evident with respect to I-ratios generated by case law on the setting-aside ground of the award debtor having been *unable to present its case*, and only somewhat more uniformity in Singapore and Hong Kong regarding the ground that the award was *outside the scope of submission* to arbitration. There is even less uniformity regarding the grounds of *party incapacity* or an *invalid arbitration agreement*. The ground of *procedural excess* has instead produced multiple judgments but no I-Ratio that has crossed jurisdictions. This leaves only the *public policy* ground, which has generated the most case law (as depicted also in Table 7 on p216). He does uncover here some significant cross-border referencing, particularly of *Hebei Import and Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKCFAR 111, albeit perhaps with some divergent strands recently emerging particularly in Singapore (pp 179, 183). Although Lewis does not specifically mention this when critically examining the reasoning of Mason NPJ in *Hebei* (at p95), the popularity of its leading judgment's narrow formulation of the public policy ground may be related to it having been rendered by a former Chief Justice of Australia.

Overall, in contrast to the internationalist approach perceived through the quantitative analysis in chapter 4, Chapter 5 therefore shows that adoption of I-Ratios across borders is 'fairly limited' and usually then results in reformulations in each jurisdictions. This indicates that 'the convergence necessary for an acceptable level of uniformity for achievement of UNCITRAL's objective of uniformity is still some time away' (p190). Lewis also concedes that, to make matters worse, one jurisdiction's court may 'adopt an internationalist approach, to also adopt an I-Ratio (possibly from another jurisdiction) but then apply that I-Ratio to the facts in such a manner to be quite different to another's jurisdiction's application' (p194). This opens the **scope for 'interventionism', contrary to the UML's for** uniformity and underlying support for arbitration. However, Lewis argues that such interventionism is not readily apparent from the low success rates when award debtors resist enforcement (pp184-5), ranging from 11-21% over the three jurisdictions for 116 judgments since 1995 (and even somewhat less for the subset of 50 setting-aside judgments).

Nonetheless, these outcomes are achieved often after extensive (and no doubt expensive) appeals. Anyway, it should be remembered that such statistics are heavily influenced by the post-2010 pro-enforcement case law particularly from the Federal Court of Australia (and involving mainly enforcement of foreign awards). Lewis also acknowledges that restrictions on reporting arbitration case law in Singapore and especially Hong Kong mean that the underlying sample is not complete. Indeed, more generally, he suggests that such an extension of confidentiality may impede future principled development of arbitration law and indeed the promotion of Hong Kong as an international arbitration venue (p192).

In addition, Lewis reiterates calls for Australia to address its ongoing 'significant challenges' if 'it really wishes to join the arbitration club', by having the Federal Court assume exclusive jurisdiction. He views counter-arguments as appearing 'parochial and unconvincing at first blush' (p192), although the cited reference acknowledges that there may be constitutional objections where the relevant arbitration case deals with matters solely of private law (without any substantive law questions arising from federal legislation).

Lastly, Lewis urges other measures to promote uniformity, particularly by UNCITRAL, including a more user-friendly UML Article 2A, and either a codification of Article 34 in terms of significant I-Ratios or a modified UNCITRAL Digest of UML case law (pp192-3). In this reviewer's opinion, it would also be useful to encourage national reporters for UNCITRAL's CLOUT database, which contain summaries of judgments world-wide applying the UML and NYC, to refer to such I-Ratios. More broadly, it is quite disturbing that there is hardly any reference in the Australian case law to the current iterations of UNCITRAL resources – and therefore probably in submissions by counsel.

In sum, despite the book's somewhat pessimistic conclusions as to the degree of uniformity achieved so far across these three UML jurisdictions, it provides relatively reassuring reading for those based in Australia. It highlights some significant

improvements made particularly since the 2010 revisions to the UML. Yet it also shows how much work is still to be done by courts and legislators – well beyond the two minor amendments in 2015 (not mentioned in this book) – as Australia obviously comes from behind. Australian readers may be particularly comforted that Hong Kong case law seems to have become much less overtly internationalist since the 'Kaplan era'. However, another reading could be that Hong Kong courts have been able to continue down an internationalist line by referring instead to such earlier cases. By contrast, Australian courts have only recently begun to break the bounds of earlier precedents. Or perhaps, for Lewis based in Hong Kong and this reviewer in Australia: the grass seems greener on the other side of the jurisdictional divide.

As a footnote, there are a few quibbles about style – especially in fact the footnotes. Unusually, the footnotes are numbered consecutively, ending with footnote 1423 on p194, rather than recommencing consecutively chapter-by-chapter.

Thus, for example, when checking for the year and other citation data for the work by Bachand and others mentioned in footnote 1420 on p193, the reader needs to flick way back to the cross-referenced footnote 86 (p14). This is hardly user-friendly, especially as the book is only available in an (expensive) hard-cover version. There are also throughout some distracting problems with punctuation, including the lack of quotation marks for the final paragraph citing the Chief Justice of the Federal Court of Australia (on p194, citing to (2015) 81 Arb 169). Nonetheless, that quotation by James Allsop marks an appropriate way to finish off this review, as well as this rich and very important book:

'The development of skill and consistency in and among the major legal centres of the region is critical to the creation of a self-conscious and coherent law area and justice system, based on shared values reflected in the Model Law and upon shared experience as judges and arbitrators'.

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