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THE ACICA REVIEW

DECEMBER 2017

ACICA
Australian Centre for International Commercial Arbitration

Leader in international dispute resolution

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ACICA
Australian Centre for International Commercial Arbitration

CONTENTS

The ACICA Review December 2017

ACICA REPORTS PAGE

FEATURE ARTICLES

ARTICLES

Alex Baykitch AO ACICA President

President's Welcome

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

ICCA

It has been a busy time since our last ACICA Review. ICCA is progressing well and there has been keen interest from our international colleagues.

Deborah Tomkinson and Samantha Wakefield have been travelling promoting the ICCA Congress in London, Milan, Paris, Dubai, Houston, Atlanta, Miami, New York, San Francisco together with the IBA here in Sydney and Hong Kong Arbitration Week.

We have some exciting panels and speakers for the Congress. To register click on the link: http://www.icca2018sydney.com/registration.php

Arbitration Week

The Arbitration Week has this year been held in Perth. Please find a report on this important yearly event in the Secretary General's Report.

Alex Baykitch AO
President AM

Deborah Tomkinson
ACICA Secretary General

Secretary General's Report

Australia Arbitration Week 2017 - Perth
Held in Perth for the first time since the Week's inauguration in 2013, Arbitration Week provided a great line up of events showcasing the depth and breadth of arbitration expertise across Australia and the Asia Pacific region, with a particular focus on energy and resources disputes.

On the evening of Monday, 20 November 2017 **AMTAC** and DLA Piper hosted the **AMTAC Seminar**, chaired by Richard Edwards (Partner, DLA Piper). Experienced speakers included Simon Davis (Barrister, Francis Burt Chambers) who examined *How to deal with non-appearing parties in arbitration*, Tony Pegum (Australian representative, Mitsui OSK Lines) and Mark North (Western Australian Manager, Thurlestone Shipping) exploring *All Going Well (AGW) and Without Guarantee (WOG) – their commercial and legal implications* and Paul Hopwood (Senior Associate, Cock Macnish) considering *Sale of cargo the subject of arbitration proceedings and held on board under Owners' lien – a case study: Dainford Navigation Inc -v- PDVSA Petroleo S.A "MOSCOW STARS" [2017] EWHC 2150 (Comm)*. The event was followed by networking drinks.

The **Fifth Annual International Arbitration Conference**, co-hosted by **ACICA**, **Chartered Institute of Arbitrators Australia** and the **Business Law Section of the Law Council of Australia**, was held on Tuesday, 21 November 2017. The conference focused on the theme of *International Arbitration in a Changing Global Economy*. The programme covered a broad range of topical areas including Arbitration in the Gas, Energy, Resources and Projects Sectors, Maritime Arbitration: Recent Issues and Trends, Around the Globe in 60 minutes: Hot Topics in International Arbitration, Out of Africa: The Hot Spot in International Arbitration and Third Party Funding in Arbitrations – Australia and Beyond, with expert speakers from around Australia and the region more broadly.

AMTAC Seminar: *(L-R) Tony Pegum (Mitsui OSK Lines), Mark North (Thurlestone Shipping), Simon Davis (Francis Burt Chambers), Paul Hopwood (Cocks Macnish), Greg Nell SC (AMTAC, New Chambers) and Richard Edwards (DLA Piper)*

Fifth Annual International Arbitration Conference: *Keynote address from the Honourable Chief Justice Wayne Martin AC*

Other events held during the week included the **Resolution Institute's** *Great Debate - Arbitration has a great deal to learn from statutory adjudication* hosted at Jackson McDonald. Attendees at the **ICC** seminar *Black, Gold and Gas: An ICC perspective on energy related disputes* held at Curtin Law School, heard from The Honourable Robert French AC and an experienced panel of speakers.

ACICA was pleased to again support a **Young ICCA Workshop**, held at Jones Day, to provide young practitioners with a hands-on opportunity to develop practical skills in international arbitration. The focus of this year's workshop was *Constructing a Case: Fact Finding in International Energy & Resources Arbitration*. The **ArbitralWomen** seminar provided an *In-House perspective on arbitration* from Gemma Stabler (Senior Legal Counsel, Fortesque Metals Group). This was followed by a sundowner seminar: *WA as a place of arbitration* at the David Malcolm Justice Centre, Supreme Court of Western Australia which explored the advantages that WA offers as a seat for arbitration and offered a tour of the court's facilities.

Young ICCA workshop with faculty members: *(L-(R) Kristian Maley (Jones Day), Carolyn Wyatt (Law In Order), Ben Olbourne (39 Essex Chambers), Erika Williams (McCullough Robertson), Jan Symington (BHP), Wendy MacLaughlin (HKA) (on screen) and Abhinav Bhushan (ICC)*

The week was brought to a stimulating and enjoyable close on Thursday evening with the **Lighthouse Club** and **39 Essex Chambers** presenting *Tracing a Construction Case* from commencement through to judgement via mediation and arbitration. With a line-up of speakers from Australia and abroad, including the Chief Justice of the Supreme Court of WA, this charity event drew an enthusiastic crowd.

ACICA is grateful to all host organisations, sponsors, speakers and delegates of Australia Arbitration Week. We look forward to next year!

Lighthouse Club & 39 Essex Chambers *(L-R): Ben Olbourne "The Barrister" (39 Essex Chambers), Adrienne Parker "The Solicitor" (Pinsent Masons), The Hon. Chief Justice Wayne Martin AC "The Judge" (Chief Justice, Supreme Court of Western Australia), David Bateson "The Arbitrator" (39 Essex Chambers), Simon Bellas "The Narrator" (Jones Day), Swee Im Tan "The Mediator" (Tam Swee Im, Silva & Partners) and Lee Armstrong "The Claims Consultant" (Contract Solutions International)*

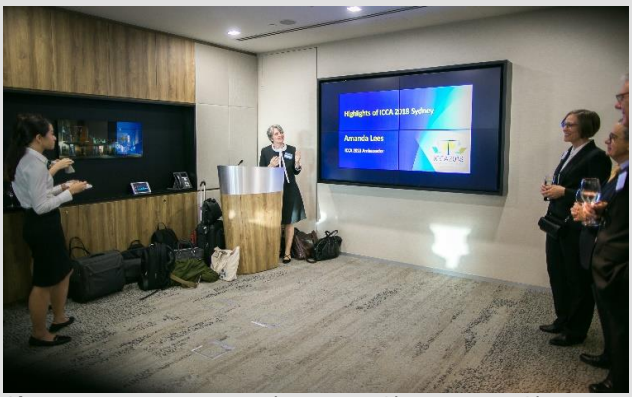
ICCA 2018 Sydney

We are pleased to confirm that all speakers and moderators for the 24th ICCA Congress, to be held in Sydney from 15-18 April 2018, have been announced! Centered around the theme "Evolution and Adaptation: The Future of International Arbitration", the programme for the Congress is packed with hot topics and current issues in international arbitration such as legitimacy challenges, cybersecurity and the role of public bodies and public interest. The full list of speakers, programme and registration information may be found on the ICCA 2018 Sydney website (www.icca2018sydney.com) along with destination tips for how to make the most of your visit to Sydney. Details about the follow-on event being held in Queenstown on 19 and 20 April 2018 may be found on the New Zealand event website (http://www.aminz-iccaqueenstown.org/).

We have been busy promoting the Congress and the New Zealand conference to follow through the second half of the year, with events run around the globe. On 28 June 2017 an event was held in Perth, hosted by **Clifford Chance** and ICCA 2018 ambassador, **Sam Luttrell** to share our plans for the Congress. This was combined with a Mock Case seminar showcasing the running of an arbitration under the ACICA Arbitration Rules 2016.

Perth event panelists: *(L-R) Duncan Watson (Quinn Emanuel), Liz MacKnay (Herbert Smith Freehills), Sam Luttrell (Clifford Chance), Deborah Tomkinson (ACICA), Scott Ellis (Francis Burt Chambers) and Greg Steinepreis (Squire Patton Boggs)*

On the same day, guests in Singapore were invited to **Simmons & Simmons** to attend an Australia wine tasting and to hear from **Doug Jones AO**, **Professor Janet Walker** and ICCA 2018 ambassador **Amanda Lees** about the Congress.



Singapore event: *Amanda Lees, Simmons & Simmons speaking*

These events were closely followed by those held in Adelaide on 6 July 2017 at the offices of **Lipman Karas**, with ICCA 2018 ambassador **Julia Dreosti** speaking about the Congress, in combination with the ACICA Mock Case seminar (with panelists **Robert Williams**, Hanson Chambers; **Tom Besanko**, Jeffcott Chambers; **Nicholas Floreani**, Jeffcott Chambers and **Sylvia Tee**, Lipman Karas) and in Melbourne on 19 July hosted by **Corrs Chambers Westgarth** and ICCA 2018 ambassadors **Catherine O'Keefe** (Corrs) and **Chad Catterwell** (Herbert Smith Freehills), with Guest Speaker **Michael Pryles AO PBM**. Cocktails and Canapes were held on 26 July in Auckland, hosted by **Lowndes Jordan** and ICCA 2018 ambassador **Tim Lindsay** (Lowndes Jordan) with **Alex Baykitch AO** and **John Walton** (AMINZ) speaking.

Adelaide event: *Julia Dreosti, Lipman Karas speaking*

Melbourne event: *(L-R) Michael Pryles AO PBM, Catherine O'Keefe (Corrs Chambers Westgarth) and Chad Catterwell (Herbert Smith Freehills)*

August saw events held in Mumbai and Brisbane. On 8 August, a seminar was hosted at the **Mumbai Centre for International Arbitration** followed by networking drinks in the offices of **Shardul Amarchand Mangaldas & Co**. Guest speakers at this event included **Mr Aspi Chinoy** (Bombay High Court), **Mr Hiroo Advani** (Advani & Co) and ICCA 2018 Sydney ambassador **Mr Promod Nair** (Arista Chambers), with **Mrs Pallavi Shroff** (Shardul Amarchand Mangaldas & Co) moderating. ACICA Fellow, **Jo Delaney** (Baker McKenzie) outlined our plans for the Congress to the crowd. On 10 August, ICCA 2018 ambassador **Erika Williams** and **McCullough Robertson** hosted Cocktail and Canapes in Brisbane, also run in conjunction with an ACICA Rules Mock Case seminar (with panelists **Richard Morgan**, Jeddart Chambers; **Ashley Hill**, GRT Lawyers; **Elise Higgs**, Herbert Smith Freehills; **Liam Prescott**, DLA Piper and **Khory McCormick**, Bartley Cohen).

In late September ACICA and its ICCA 2018 team exhibited at the 12th ICC New York Conference on International Arbitration. A USA roadshow was run around this conference, with events in:

- Houston on 21 September 2017, supported by the **Houston International Arbitration Club** at the offices of **Vinson & Elkins**. ACICA Fellow, **Tim Nelson** (Skadden) was guest speaker on the topic of *Non-Cooperative Tactics and Recalcitrance – Are We Witnessing a Resurgence?*

Houston event: Tim Nelson speaking

- Atlanta on 22 September 2017, supported by the **Atlanta International Arbitration Society** and the **Atlanta Center for International Arbitration and Mediation** at the offices of Eversheads Sutherland. I had the pleasure of speaking to guests about the Congress and the prospects for international arbitration in Australia arising from increased trade and investment in the Asia Pacific region.

Atlanta event: *(L-R) Shelby Grubbs and Magaly Cobian (ACIAM), Deborah Tomkinson (ACICA), Kirk Watkins (AtLAS) and Samantha Wakefield (ACICA)*

- Miami on 25 September 2017, supported by the Miami International Arbitration Society and JAMS Miami, with guest speakers Ignacio Torterola (GST LLP) and Daniel Gonzalez (Hogan Lovells)

Miami event: *(L-R) Ines Calderon (MIAS), Sherman Humphrey (JAMS Miami), Samantha Wakefield (ACICA), Deborah Tomkinson (ACICA) and Ignacio Torterola (GST LLP)*

- San Francisco on 28 September 2017, supported by the Northern California International Arbitration Club. I enjoyed presenting on the Congress and arbitration opportunities in the Asia Pacific region to the large and diverse group of practitioners and aspiring law graduates that attended this function.

San Francisco event

Exhibit at the 12th ICC New York Conference on International Arbitration

The **International Bar Association Annual Conference** came to Sydney in the week of 8 to 13 October 2017 and ICCA 2018 Sydney exhibited throughout the week at the conference. We also exhibited at the **2017 ADR in Asia Conference** in Hong Kong in October 2017. ACICA was also a co-organiser along with CIArb (East Asia Branch) of ICCA 2018 Sydney Diamond Sponsor, the **Beijing Arbitration Commission/Beijing International Arbitration Center's Annual Summit on Commercial Dispute Resolution in China**. The Summit, held on 14 October in Hong Kong just prior to the commencement of Hong Kong International Arbitration Week provided a unique insight into the opportunities and challenges for arbitration practitioners and users, and explored the impact of the Belt and Road Initiative on dispute resolution in years to come. On 23-24 October 2017 the **Pan American Arbitration Congress** was held in Sao Paulo by ICCA 2018 Sydney Platinum Sponsor, **CAM CCBC Center for Arbitration and Mediation**. ACICA was pleased to support the conference and have a presence at it to promote ICCA 2018.

BAC/BIAC Annual Summit, Hong Kong: *(L-R) David Fong (CIArb East Asia Branch), Khory McCormick (ACICA, Bartley Cohen), Dr Fuyong Chen (BAC/BIAC), Andrea Martignoni (ACICA, Allens), Deborah Tomkinson (ACICA)*

From 5 to 7 November 2017, we returned to Miami to exhibit at the **15th ICC Miami Conference**. Separately, in a special seminar event held on 6 November 2017, international arbitration practitioners heard from an expert panel on *The Changing Landscape of Arbitration* in New Delhi, an event sponsored by Cyril Amarchand Mangaldas, AZB & Partners, SIAC (South Asia) and MCIA. Following a welcome by **Neeti Sachdeva** (MCIA) and an opening address by **Mr Fari Nariman** (Supreme Court of India), guests heard from speakers **Indu Malhotra** (Supreme Court of India), **Promod Nair** (Arista Chambers), **Percy Billimoria** (Cyril Amarchand Mangaldas) and VP Singh (AZB & Partners). Doug Jones AO provided his personal reflections on the evolution and adaptation of international arbitration and outlined plans for ICCA 2018 Sydney. The event was brought to a conclusion by **Pranav Mago**, SIAC.

New Delhi event: *Neeti Sachdeva (MCIA) speaking*

To close out the year, we exhibited at the **AAA-ICDR/ICC/ICSID 34th Annual Joint Colloquium on International Arbitration** in New York on 1 December 2017. AAA-ICDR are the Ruby Sponsor for ICCA 2018 Sydney.

Our great thanks go to all of the sponsors, supporting organisations, ICCA 2018 ambassadors, speakers and guests who made this series of events possible and successful!

For more information about ICCA 2018 Sydney, please visit the website: www.icca2018sydney.com.

ACICA Seminars & Courses

In addition to the joint events we have held in conjunction with Australian Arbitration Week and the promotion of ICCA 2018 Sydney, and the conferences and events we supported around the globe throughout the year, ACICA has been involved with the following:

International Arbitration in the ASEAN Century: Thailand-Australia Perspectives

On 26 July 2017, ACICA joined with the **Thai Arbitration Institute** and the **International Institute of Trade and Development** to present a successful colloquium on *International Arbitration in the ASEAN Century: Thailand – Australia Perspectives*. Held at the Centra by Centara Government Complex Hotel & Convention Centre Chaeng Watthana, this full-day colloquium explored international arbitration in Thailand and Australia, current trends and developments, investor-state arbitration, future challenges and included a session about ICCA 2018 Sydney. The ACICA delegation was led by Vice President **Khory McCormick**

(Bartley Cohen) and included **David Fairlie** (Competitive Foods), **Ian Davidson SC** (NSW Bar Association) and **Russell Thirgood** (McCullough Robertson). Delegates were welcomed by the President of the Supreme Court of Thailand and heard from a number of Thai judicial officers and TAI representatives providing an in-depth Thai perspective on topical areas of law and international arbitration practice.

Managing Risk in cross-border contracts: international arbitration toolkit for transactions lawyers

ACICA supported this **AMPLA** toolkit seminar held on 29 August 2017 at the offices of Minter Ellison in Sydney. The interactive session aimed at transactional lawyers and covered the essentials of international arbitration. I joined **Tamlyn Mills** (Minter Ellison) to discuss when international arbitration is the right choice of dispute resolution mechanism, what issues you should consider when drafting an international arbitration clause, drafting tips and traps to ensure your international arbitration clause is effective and recent developments in international arbitration in the energy & resources sector.

AMTAC Address 2017

We were thrilled to have the 2017 **AMTAC Address** given by **Mr Peter McQueen**, Immediate Past Chair of AMTAC and Independent Arbitrator. Peter enthusiastically chaired AMTAC through its first ten years and has been instrumental in all of AMTAC initiatives. His Address on the topic of *Maritime Arbitration – Its Place in the Global Economy* was thought provoking and well received. The AMTAC Address was held at the Federal Court of Australia and video-cast to Federal Court locations across Australia. A copy of the Address may be found on the AMTAC website: www.amtac.org.au.

AMTAC Address: *(L-R): Greg Nell SC (AMTAC, New Chambers), Peter McQueen, Chief Justice James Allsop AO and Alex Baykitch AM (ACICA, King & Wood Mallesons)*

The Developing World of Arbitration: current patterns in arbitration law reform and practice in the Asia Pacific

On 5 October 2017 we were delighted to present an evening seminar at the **Australian Disputes Centre** with Guest Speaker **Justice Anselmo Reyes**, International Judge of the Singapore international Commercial Court and a panel consisting of **Professor Luke Nottage** (University of Sydney), **Edwina Kwan** (King & Wood Mallesons) and **Jonathon Redwood** (Banco Chambers). The seminar explored some of the ways in which arbitration laws and practices have been recently reformed in various Asia Pacific jurisdictions, provided a cross-jurisdiction comparison of the developing world of arbitration in this region, and considered future trajectories for development.

Evening Seminar at ADC: *(L-R) Edwina Kwan (King & Wood Mallesons), Jonathon Redwood (Banco Chambers) Justice Anselmo Reyes (Singapore international Commercial Court) and Professor Luke Nottage (University of Sydney)*

Training Session on the IBA Arb40's Toolkit for Award Writing

The Toolkit was created by the International Bar Association's Arb40 Subcommittee to assist young arbitration practitioners as they approach the drafting of their first arbitral awards. The training is designed for practitioners in the early stages of their career as arbitrator, or arbitrators who would like a refresher in arbitral award writing. This session was held on 13 October 2017, kindly hosted by the **NSW Bar Dispute Resolution Centre** and sponsored by **Clifford Chance**. The featured speaker was **Justin Gleeson SC** (Banco Chambers), and trainers were **Swee Yen Koh** (Wong Partnership**), Dr Rouven F. Bodenheimer** (Bodenheimer Herzberg), **Angeline Welsh** (Matrix Chambers) and **Shreyas Jayasimha** (Aarna Law).

We are looking forward to another packed seminar and events programme in 2018!

ACICA and ADC Volunteer Intern Program

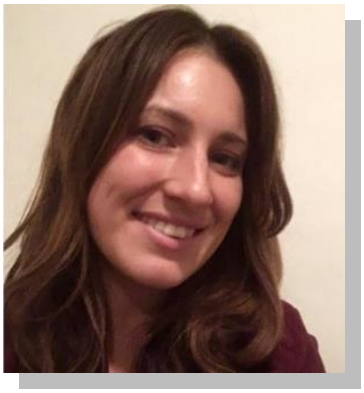
Our thanks to the great group of interns who have given their time volunteering with ACICA and the Australian Disputes Centre through the second half of 2017:

Caitlin Meade, Macquarie University

Edward Basha, Macquarie University

Elsa Chapple, Macquarie University

Ivana Stojanovic, Macquarie University



Louise Weir, University of NSW

Nina O'Keefe, University of NSW

Phillip Alphonse, Macquarie University

Susan Lee, University of NSW

Gregory Nell SC
AMTAC Chairman

AMTAC Chairman's Report

AMTAC Executive

The General Meeting of AMTAC was held on 6 September 2017 and a new Executive Committee was elected, comprising Gregory Nell SC (Chair) and Tony Pegum, John Reid and Hazel Brasington as Vice Chairs.

After 10 years at the helm, the inaugural Chair of AMTAC, Peter McQueen, did not seek re-election. On behalf of all of the members of AMTAC, I would like to thank Peter for his enthusiasm and energy in the development and promotion of AMTAC since its inception in 2007. Peter has, as Chair, been a driving force behind AMTAC and is largely responsible for its achievements during its first 10 years. Peter remains on the Executive Committee as Immediate Past Chair and I look forward to his continuing involvement both in the administration of AMTAC as well as the promotion of arbitration in the Australian maritime and transportation sector more generally.

I also welcome Hazel Brasington, a partner of Norton Rose Fulbright in Melbourne, as a newly elected Vice Chair. Hazel has considerable experience in the maritime area, which I am sure will be put to good use as a member of the AMTAC Executive.

AMTAC 11th Annual Address

Fittingly, this year's 11th Annual Address was presented by Peter McQueen on 6 September 2017. The address, which was video-cast from the Federal Court of Australia in Sydney around Australia, was entitled "*Maritime Arbitration – its place in the Global Economy*" and canvassed the present and future role of arbitration as a means of dispute resolution in the maritime sector, not only in Australia but also the Asia Pacific region. The address was accompanied by a video of circumstances in which a ship may find itself at sea and which may give rise to claims suitable for resolution by arbitration. Peter's paper (although not the video) is available on the AMTAC website, https://amtac.org.au.

This year's Address continued the tradition established by the Annual Addresses delivered over the last 10 years, the transcripts of which have now been published in an e-book which is available for free download on the AMTAC website.

Other AMTAC events

On 27 June 2017, AMTAC held a breakfast seminar on "*Safe Ports*" in Sydney, co-convened with Shipping Australia. The event attracted around 45 attendees and presentations were given on operational, insurance and legal perspectives of ships in ports by Ken Fitzpatrick (Director, Shipping Australia), Philip Holliday (Chief Operating Officer and Harbour Master, Port Authority of NSW), Marcus John (Managing Director, Thomas Miller, Sydney) and Angus Stewart SC (Barrister, New Chambers, Sydney). These presentations are also available on the AMTAC website.

On 29 June 2017, AMTAC conducted a Mock Arbitration Seminar in Perth. Approximately 30 registrants from the Western Australian maritime and international trading industries attended. This seminar was aimed at heightening the awareness of industry participants as to how maritime arbitration works. A similar seminar will be held in Melbourne in February 2018. Further details will be distributed shortly.

On 9 October 2017 AMTAC and the Federal Court of Australia held a "*Reception and tour of the Federal Court of Australia*" for members of the Maritime and Transport Committee (MTC) of the International Bar Association (IBA) during the week long IBA Conference in Sydney. The Chief Justice of the Federal Court, Chief Justice Allsop AO, addressed the approximately 40 members of the MTC who attended this event on the Court's admiralty and maritime jurisdiction.

On 20 November 2017, AMTAC will be conducting a seminar on Maritime Arbitration in Perth, as part of Australian Arbitration Week. This seminar, which is to be chaired by Richard Edwards, a partner of DLA Piper, and held in DLA Piper's Perth office, will include presentations from Simon Davis (barrister, Francis Burt Chambers, Perth), Tony Pegum (Australian representative, Mitsui OSK Lines and a Vice Chair of AMTAC), Mark North (Western Australian Manager, Thurlestone Shipping) and Paul Hopwood (Senior Associate, Cocks Macnish, Perth).

This will be followed on 21 November 2017 by the 5th International Arbitration Conference which will include amongst a session on "*Maritime Arbitration – Issues and Recent Trends*" chaired by the Justice John Gilmour of Federal Court of Australia.

The panellists for that session will include Peter Mannion (General Manager – Fleet Operations, Rio Tinto – Marine and the presenter of the 2011 AMTAC Annual Address), Peter McQueen, Dr Pat Saraceni (Clifford Chance, Australia) and Hazel Brewer (Holman Fenwick Willan, Australia).

Conferences

The International Congress of Maritime Arbitrators (ICMA) held a very successful biennial conference (ICMA XX 2017) in Copenhagen from 25 to 29 September 2017. AMTAC was represented at that conference by Peter McQueen (who chaired the Topics and Agenda Committee), Malcolm Holmes QC and Angus Stewart SC (who both presented papers), all of whom are members of the AMTAC Panel of Arbitrators. The next ICMA Conference will be ICMA XXI in Rio de Janeiro in 2019.

IMLAM

The 18th International Maritime Law Arbitration Moot (IMLAM) was held from 30 June to 5 July 2017. This competition, which attracted 30 university teams from Asia Pacific, India and Europe, is convened by Murdoch University. It was hosted this year by the National University of Singapore, who also were the eventual winners, defeating University of Queensland in the final. The AMTAC sponsored "*Spirit of the Moot*" prize was won by Koç University (from Istanbul, Turkey).

The 19th IMLAM Moot will be hosted next year by University of Queensland from 29 June to 3 July 2018.

Gregory Nell SC
9 November 2017

5 Reasons to attend ICCA 2018 Sydney

1 Build Your Professional Network

As the premier biennial global International Arbitration conference, ICCA 2018 offers an unprecedented networking opportunity, attracting up to 1,000 delegates from all around the world, including many of the field's leading arbitrators, academics, and practitioners. ICCA 2018 Sydney will also be attended by leading figures from the Australian judiciary and government. Hosted in Australia for the first time, the ICCA 2018 Congress provides a unique chance to develop your profile, build international contacts and expand your practice within the Asia-Pacific region.

2 Professional Development: Expand Your Knowledge Base

The ICCA 2018 Congress promises a stimulating series of talks, symposiums, and panel discussions, with a focus on the conference theme of 'Evolution and Adaptation: The Future of International Arbitration'. Delegates will hear from leading thinkers and discuss up to date information on the most current issues and best practice in international commercial arbitration and investment treaty arbitration. The Congress will canvass current thinking in cutting edge areas such as technology, transparency, and new frontiers in the use of arbitration for climate change, corporate social responsibility, and the protection of indigenous peoples. These topic areas and more will be discussed by the best in the business.

3 Contribute to the development of dispute resolution theory

Since the first ICCA Congress was held in 1961, these conferences have made significant contributions to the development of theory and practice in international arbitration by stimulating thought leadership and providing new insights on emerging issues and contentious topics. Be a part of this in-depth discussion at ICCA 2018 Sydney.

4 Exclusive Sydney

ICCA 2018 boasts an unrivalled social programme to complement the Congress sessions. The Opening Ceremony and Welcome Reception will be held in the magnificent Sydney Opera House, on an exclusive basis for ICCA 2018 Sydney, with a special performance from the Sydney Symphony Orchestra and an evening of Australian wine and food. The Conference Gala Dinner, themed 'Dinner under the Southern Stars', will form the social climax of the Congress, providing an evening of fine dining, Australian entertainment and warm Australian hospitality. This will be an event not to be missed and is only for ICCA 2018 Sydney delegates.

5 Space for Business

The conference will be hosted in the heart of the Sydney CBD at the newly-opened International Convention Centre, Sydney, allowing for comfortable conference facilities, purpose-built spaces, networking lounges, and the most up-to-date technology to facilitate your professional needs.

What is the International Council for Commercial Arbitration (ICCA) Congress?

The International Council for Commercial Arbitration (ICCA) is a worldwide nongovernmental organisation (NGO) devoted to promoting the use and improving the processes of arbitration, conciliation and other forms of resolving international commercial disputes. Its activities include convening international arbitration congresses, sponsoring authoritative dispute resolution publications and promoting the harmonization of arbitration and conciliation rules, laws, procedures and standards.

The ICCA Congress is a biennial event held around the world for the presentation and discussion of papers on different aspects of international dispute resolution. It is widely considered the premier International Arbitration Conference in the year which it is held, attracting high delegate numbers from across the globe and making a significant contribution to the development of dispute resolution theory and practice. The first ICCA Congress took place in Paris in 1961.

Hosting the ICCA Congress in Australia will enhance and showcase the benefits and opportunities for international arbitration in the region, the expertise of Australian practitioners and Australia as a neutral venue for international arbitration providing as it does a modern framework for the conduct of international arbitration, a supportive judiciary and premier facilities for the hearing of proceedings.

ICCA2018
Sydney Australia 15-18 April 2018

ICCA Member Registration AUD $2,610 incl GST and
ICCA Non Member Registration $2,900 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.

ACICA Australian Centre for International Commercial Arbitration

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Te Mana Kaiwhakatau, Takawaenga o Aotearoa

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sapere forensic

Wolters Kluwer

BDO

P.R.I.M.E. FINANCE

Burford

Debevoise & Plimpton

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.

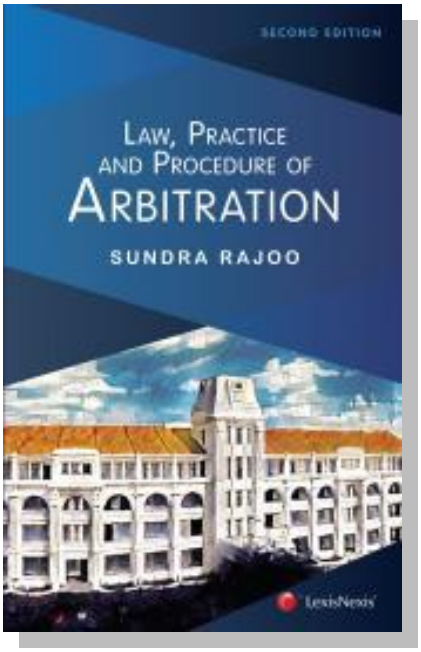
ICCA Membership Benefits

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.

For more information about the ICCA 2018 Sydney Follow-on event in Queenstown visit www.aminz-iccaqueenstown.org

NEWS IN BRIEF

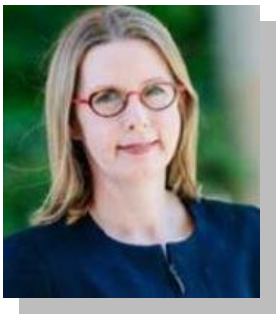
Book Review: Law, Practice and Procedure of Arbitration by Datuk Professor Sundra Rajoo, 2nd Ed., Lexis Nexis, 2017, 1290pp, hardback and online, ISBN/ISSN: 9789674006099



Law, Practice and Procedure of Arbitration offers a wide-ranging analysis and discussion of the principles, practice and procedure of arbitration with a particular emphasis on Malaysia.

Datuk Professor Sundra Rajoo is the Director of the Kuala Lumpur Regional Centre for Arbitration (KLRCA) and a Chartered Arbitrator.

The text deals in a comprehensive manner with the foundational topics in international arbitration, but with a greater emphasis on practice and the practical aspects of the arbitral process. With its easy to read style and in-depth coverage of the subject-matter, this text will appeal to practitioner and student alike. Its coverage of general law principles as they relate to the various topics covered in the book will be especially useful to non-lawyer arbitrators, for example, engineers, quantity surveyors, architects, or claims professionals. Full Book Review at page 53.



Professor Sarah Derrington has been appointed to the position of President of the Australian Law Reform Commission. Professor Derrington currently serves as the Academic Dean and Head of School of the T C Beirne School of Law, The University of Queensland. She has also been appointed a judge of the Federal Court of Australia from which she will be seconded during her tenure as President of the Commission. Professor Derrington's field of expertise is admiralty law, maritime law and insurance law.

Professor Gabriël A Moens (The University of Queensland and Curtin University), Professor Camilla Andersen (The University of Western Australia) and Tracy Albin (GTC Lawyers) co-authored a comparative law article on *Maintaining the Attractiveness of Arbitration in a Changing World: the ACICA Arbitration Rules and the SIAC Arbitration Rules*. The article has been accepted for publication in the April 2018 issue of Sharia & Law Journal, a leading journal published by the College of Law of the United Arab Emirates University.

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UNCLOS Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia - A New Model for Dispute Resolution

Over a thousand years of legal evolution has not stripped back the most prevalent of dispute resolution methods, trial before a third party adjudicator; but it is no secret that not everyone is satisfied with this adversarial system, despite its predominance. As disputes grow more complex, time more valuable, relationships more critical, and with more at stake, Governments, legal practitioners and corporations alike continue to look for more amicable, commercial and efficient means to resolve their disputes. In 2016, Timor-Leste commenced the first ever compulsory conciliation process under the United Nations Convention on the Law of the Sea (**UNCLOS**) to resolve its maritime boundary dispute with Australia. There was a great deal of uncertainty amongst the legal community as to how this non-binding process would play-out and what it could achieve. Yet the results delivered so far indicate that this conciliation method has real potential as a model of dispute resolution, with possible broader application in commercial disputes.

The Compulsory Conciliation

On 11 April 2016, pursuant to Article 298 and Annex V of UNCLOS, the Government of the Democratic Republic of Timor-Leste initiated compulsory conciliation proceedings against the Government of the Commonwealth of Australia.

The dispute between the States involves the delimitation of the maritime boundary between them in the resource rich Timor Sea; an issue that has been a source of contention between Timor-Leste and Australia since Timor-Leste's independence in 2002. With Australia having carved-out the application of binding dispute resolution mechanisms that would otherwise allow Timor-Leste to seek a determination of the maritime boundary (such as proceedings commenced with the International Court of Justice or the International Tribunal on the Law of the Sea or *ad hoc* arbitration), and a stalemate in negotiations, Timor-Leste initiated the never before used UNCLOS compulsory conciliation process.

UNCLOS compulsory conciliation is a relatively un-prescriptive, 12-month process, in which an expert Commission of 5 members hears the parties, examines their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement. At the end of the process, the Commission issues a non-binding report recording any agreement, or if there is no agreement its conclusions on the issues of fact and law in dispute, and any recommendations it deems appropriate. Given its quasi-legal, quasi-political and non-binding nature, the process understandably attracted much doubt from the legal community.

**Legal representatives for the Government of Timor-Leste in the Conciliation proceedings.*

Yet, on 1 September 2017 the Permanent Court of Arbitration (**PCA**)(acting as the Registry in the matter) announced that on 30 August 2017 an agreement had been struck between the Parties to end their long standing dispute. Then, on 15 October 2017, just over 1.5 years after the commencement of the process, the PCA announced that the two States had reached agreement on the text of a treaty to delimit their maritime boundary and complete a comprehensive package agreement dealing with the greatly contested Greater Sunrise gas field, among other things.[1]

This success is not only impressive when considered against the typical length of such a complex dispute resolution process, but also when considering that maritime boundary agreements generally take many years and, in some cases, decades to agree.

The details of the procedure remain confidential, however, via publications by the Conciliation Commission and the PCA, some information on the process is available to the public, and it is possible to identify elements that have contributed to its success.

Innovation and adaptability in process

The procedure under UNCLOS affords a large degree of control and innovation to the Conciliation Commission and the Parties. The Conciliation Commission determines its own procedure and is mandated to facilitate an amicable settlement of the dispute. In the Timor-Leste and Australia matter the Conciliation Commission is constituted of the Chair, H.E. Ambassador Peter Taksøe-Jensen (Denmark), Dr. Rosalie Balkin (Australia), Judge Abdul G. Koroma (Sierra Leone), Professor Donald McRae (Canada and New Zealand), and Judge Rüdiger Wolfrum (Germany).

These esteemed individuals contribute to the process a wealth of experience and knowledge of diplomacy, law of the sea, dispute resolution, and a diverse contextual understanding. UNCLOS affords broad autonomy to the Conciliation Commission in applying this knowledge and experience.

By way of example, UNCLOS provides that the Conciliation Commission shall determine its own procedure (unless otherwise agreed by the Parties) and may draw the attention of the Parties to any measures, whether legal or otherwise, which might facilitate an amicable settlement of the dispute. This undoubtedly allowed the Conciliation Commission to structure and guide the process in an innovative and appropriate manner, drawing from their experience and adapting to the changing nature of the dispute and Parties' positions. This is a feature unseen in most other processes, which are typically very rigid.

Comprehensive approach

The PCA publications on the matter give an insight into how the Conciliation Commission structured and adapted the process, revealing that confidence building between the Parties to the dispute was fundamental to its resolution.

In January 2017, the Parties and the Commission announced that in October 2016 the Conciliation Commission had brought the Parties to agreement on certain confidence-building measures, which "*included a series of actions by both Timor-Leste and Australia to demonstrate each Party's commitment to the conciliation process and to create the conditions conducive to the achievement of an agreement on permanent maritime boundaries*."[2] These measures were no minor hand-shaking exercise, but involved removing major and long-standing obstacles between the Parties, including existing litigation between the States and the *Treaty on Certain Maritime Arrangements in the Timor Sea* (a resource-sharing interim arrangement, which had long been a source of disagreement between the States).[3]

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[1] Permanent Court of Arbitration Press Release No. 10 in the Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia, 15 October 2017, https://pcacases.com/web/sendAttach/2240

[2] Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of UNCLOS, 24 January 2017, https://pcacases.com/web/sendAttach/2053

[3] Joint Statement by the Governments of Timor-Leste and Australia and the Conciliation Commission Constituted Pursuant to Annex V of UNCLOS, 24 January 2017, https://pcacases.com/web/sendAttach/2053

Having removed these obstacles, the Commission announced it would then hear the Parties' negotiating positions on the maritime boundary with a view to identifying possible areas of agreement for discussion in future meetings, thereby adopting an arbitration style presentation of claims.

Following this, the PCA Press Releases show that meetings took place on around a bi-monthly basis, totalling 7 meetings between October 2016 and October 2017. These meetings were an ongoing exploration of the Parties' positions, finding the areas where differences could be narrowed or extinguished. By June 2017, the Commission's Chair reported that "*the Commission has gained a deeper understanding of the Parties' interests and of the differences that separate them*" and that "[t]*he Commission continues to believe that, with the goodwill we see from both governments, a comprehensive resolution of this dispute is possible*."[4] By 1 September 2017, a deadlock had been broken, as an agreement was reached through the 'structured dialogue' facilitated by the Commission.

The approach taken by the Conciliation Commission is indicative of an advanced combination of arbitration, negotiation and mediation. Exploring every facet of the dispute through litigation styled meetings, then separately mediating the areas of difference, before finally bringing the Parties together to negotiate the agreement.

Some key differences that can be observed between this process and a usual litigation/arbitration proceeding are that the conciliation seemed to have: (i) avoided adversarial and fatalistic presentation of claims; (i) sought confidence before compromise; and (iii) adapted during its course. The Commission used this exhaustive exercise to support a 'comprehensive solution'. This dynamic approach to both method and agreement is truly unique and undoubtedly was a substantial contributor to the success of the process.

What can we learn from the process

This dispute and its resolution will undoubtedly act as a new model for resolving complex disputes between States, but does it have a role in a commercial context? The answer we would argue is that it is definitely worth trying to extrapolate this process, whether in whole or in parts, to commercial disputes. Despite the significant improvements in commercial dispute resolution in the past decades, there is no doubt that we require further innovation and ingenuity. This process was able to resolve a deeply political and complex dispute, in a short period of time, with improved relationships and an amicable solution. Critics may argue that the process is similar to med-arb and may suffer from the same prejudices, however unlike a med-arb where parties are likely to go from compromise to conflict, this process advocates confidence before compromise.

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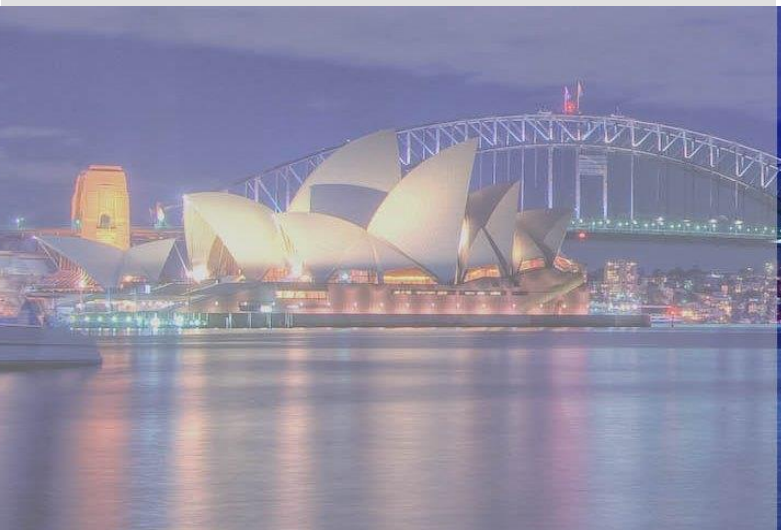
[4] Permanent Court of Arbitration Press Release No. 7 in the Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia, 12 June 2017, https://pcacases.com/web/sendAttach/2157



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Federal Court Sets Aside International Arbitration Awards and Removes an Arbitrator

Overview

Respondents in an international commercial arbitration have recently been successful in the Federal Court in Australia in setting aside parts of two partial awards and removing the sole arbitrator pursuant to Articles 12, 18 and 34 of the UNCITRAL Model Law. These articles are incorporated into domestic law by section 16 of the *International Arbitration Act 1974* (Cth).

The Court found that the arbitrator had conducted the arbitration in such a manner that the respondents could no longer have confidence in him as the arbitrator. This was mainly because the arbitrator had decided various substantive questions in a final manner, without giving the respondents an opportunity to be heard on those questions.

The Court observed that procedural difficulties were encountered due to the hiving off and determination of incomplete separate questions in circumstances where issues between the parties had not been properly crystallised.

The decisions of Justice Beach in *Hui v Esposito Holdings Pty Ltd* [2017] FCA 648 and *Hui v Esposito Holdings Pty Ltd (No 2)* [2017] FCA 728 demonstrate the circumstances in which the Court may review the actions of an arbitrator and may be prepared to terminate an arbitrator's mandate and set aside awards.

Court's comments on the procedural background

On an application by the claimant in the arbitration, the arbitrator directed that there be a preliminary hearing in relation to some of the claimant's claims. It had not been contemplated that the determination of defences to those claims (such as set off defences) were within the scope of the preliminary hearing. Despite this, in its closing address, the claimant sought to make submissions, for the first time, in relation to the set off defences. In his reasons delivered following the preliminary hearing, the arbitrator made findings concerning the availability of set off defences.

Before any awards had been made, the respondents challenged the arbitrator's reasons in the arbitration. The arbitrator invited the parties to make submissions on the basis upon which it was being put that the tribunal should have come to a different conclusion. In the Federal Court, it was contended that this invitation constituted a reasonable opportunity to address the arbitrator and that it demonstrated the arbitrator's objectivity, especially in circumstances where no awards had been made. Justice Beach rejected this submission, commenting that it was a curious invitation, as the arbitrator appeared to have already made up his mind. The Court noted that the arbitrator's prejudgment provided reason enough as to why the arbitrator should not continue.

Ultimately, the arbitrator declined to recuse himself and maintained that he did not exceed his jurisdiction in deciding the set off issues in the preliminary hearing. Two partial awards were then made. The respondents commenced proceedings in the Federal Court to set aside the partial awards and have the arbitrator removed.

Decision

Loss of a valuable opportunity

Justice Beach found that it was well understood by the parties, and accepted by the arbitrator, that the preliminary hearing would not concern the availability of set off defences or the merits of those defences. Despite this, the arbitrator entered

upon and decided issues relating to the availability of those defences, despite the respondents not being put on notice that there was any possibility of any defences being ruled in or out as a result of the preliminary hearing.

As to Article 34 of the UNCITRAL Model Law, his Honour emphasised the need for there to be significant judicial restraint in determining any Article 34 challenge. He also supported Justice Croft's view in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 that the grounds in Article 34(2)(a)(ii) ('unable to present') and Article 34(2)(b)(ii) ('public policy') overlap.

In finding that the applicants had lost a valuable opportunity to argue their defences, Justice Beach observed that:

1. in order to justify the setting aside or remittal of an award, real unfairness or real practical injustice must have resulted by the denial of the relevant opportunity to a party to present its case;
2. real unfairness or real practical injustice can be demonstrated by showing that there was a realistic, rather than fanciful, possibility that the award may not have been made or may have differed in a material respect favourable to the party said to have been denied the opportunity. Here, this required set off defences that were reasonably arguable. The judge noted that, if the applicants' arguments had been hopeless, then they would have lost nothing of value and no real injustice would have been caused to them by the lost opportunity. His Honour rejected the notion that the opportunity to put an argument itself has intrinsic value irrespective of the argument's merits; and
3. the onus rests on the party seeking to set aside an award or remit it to the arbitrator for reconsideration.

Full opportunity to present a case

Article 18 of the UNCITRAL Model Law requires that the parties are treated equally and are to be given a 'full opportunity' to present their respective cases. In general, the relevant inquiry is whether a party had an appropriate opportunity to deal with an issue, both in the affirmative and responsive sense, and in the context of the arbitration.

Justice Beach referred to Justice Fisher's suggestion in *Trustees of Rotoaira Forest Trust v Attorney General* [1999] 2 NZLR 452 that 'surprise' is a key element and that it must be demonstrated that the arbitrator travelled beyond what was reasonably foreseeable by a reasonable person in the position of the complaining party. While such concepts were said to be not determinative (cf *TCL Air Conditioners (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [140]-[141]), his Honour emphasised that a reasonable person in the positon of the applicants could not have reasonably foreseen that the arbitrator would trespass into areas well beyond the scope of the issues defined for hearing, and that the applicants were unacceptably surprised.

Real danger of bias

Justice Beach noted that Article 12 of the UNCITRAL Model Law – which permits an arbitrator to be challenged if circumstances give rise to justifiable doubts as to their impartiality or independence – is modified by section 18A(2) of the *International Arbitration Act* – which imports the 'real danger of bias' test.

Justice Beach decided that, where there is no allegation of actual bias, the correct perspective for the 'real danger of bias' test is that of a 'reasonable bystander' or a 'reasonable man', in contrast with the perspective of the Court (cf *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131, [197]-[198] per Beach J).

His Honour also supported the test in *Lovell Partnerships (Northern) Ltd v AW Construction plc* (1996) 91 BLR 83 that illustrates the connection between a breach of the no hearing rule and the basis upon which an arbitrator breaching the rule ought be removed for prejudice. In *Lovell*, Mance J (as he then was) stated that the legal test is whether a reasonable person would no longer have confidence in the arbitrator's ability to come to a fair and balanced conclusion on the issues if the case were remitted to the arbitrator.

Observations

These decisions by the Federal Court confirm that Australia is a safe seat for international arbitrations, with a judiciary that understands and safeguards the integrity of the arbitral process within the outer limits of what is prescribed in the *International Arbitration Act* and the UNCITRAL Model Law.

In practice, these decisions also demonstrate that parties should ensure that there is clarity around the scope of preliminary issues for separate determination or split hearings (bifurcation), in order to ensure that each party is given an opportunity to be heard.

** HSF acted for the applicant in the Federal Court application. An abbreviated version of this article was first published on the HSF Arbitration Notes blog.*

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Judicial Support of Foreign Awards in Australia – Should Australia Step up?

In a recent decision, the Federal Court of Australia in Western Australia dismissed a request for a subpoena of Australian evidence made in support of an international arbitration under the UNCITRAL Rules, seated in Singapore. The decision suggests a narrow approach to judicial support of foreign-seated arbitrations.

Background: the facts

On 5 September 2017, Samsung C & T Corporation filed a request for a subpoena to obtain evidence for use in an arbitration, seated in Singapore and administered by the Singapore International Arbitration Center (***SIAC***), under the UNCITRAL Rules, currently on foot between Samsung and Duro Felguera Australia Pty Ltd. Both parties have related Australian entities.

In assessing whether the Federal Court could grant Samsung's request, Justice Gilmour first considered s22A of the IAA, the Interpretations section, so as to determine whether the Federal Court of Australia was the proper jurisdiction in which to bring the request. Relevantly, 'court' is defined as:

a) in relation to arbitral proceedings that are, or are to be, conducted in a State -- the Supreme Court of that State; and
b) in relation to arbitral proceedings that are, or are to be, conducted in a Territory:
   (i) the Supreme Court of the Territory; or
   (ii) if there is no Supreme Court established in that Territory -- the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory; and
c) in any case -- the Federal Court of Australia.

Samsung argued that the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed) (the ***SIAA***) can only compel evidence in Singapore and therefore it is only through the IAA that evidence located in Australia can be compelled. Samsung further reasoned that even if there were territorial limits on the Federal Court of Australia, there was sufficient nexus between the dispute and Australia for evidence from Australia to be compelled through the courts of Australia.

Justice Gilmour also considered that the intention of the Federal Government in introducing and amending the IAA was to encourage international arbitrations seated in Australia.

Background: the decision

Federal Court's limited jurisdiction

Justice Gilmour held that he did not have jurisdiction to grant the request for a subpoena in Australia because:

- 'in any case', the third limb of the definition of 'court', should be interpreted narrowly to be consistent with the intention of the IAA and to not unnecessarily read words into the phrase. Consequentially, the Federal Court only has jurisdiction where a state/territory court would have jurisdiction.
- The IAA only applies to arbitrations commencing or taking place in Australia for the following reasons:
  - Article 1(2) of the Model Law provides that it applies only to international arbitrations seated in the state in which the Model Law has been adopted. When enacting the Model Law, a legislating state may expand on this provision;
  - Australia enacted the Model Law;
  - Part II of the IAA expressly relates to 'foreign awards', whereas Part III does not make a similar distinction to cover foreign arbitral proceedings;
  - the intention of the IAA was to help develop Australia as a regional hub for international arbitration; and
  - when the Federal Government reviewed the Federal Court's jurisdiction over international arbitration matters in 2008, the Federal Court was given concurrent jurisdiction to state and territory courts, meaning that either a state or territory are the only jurisdictions for the IAA to apply.

Justice Gilmour suggested that parties should instead avail themselves of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (the ***Hague Evidence Convention***). To do so, a party must obtain permission from the arbitral tribunal, obtain a letter executed by the judicial authority in which the arbitration is seated, and then bring that letter before the courts of Australia for recognition and execution.

Comment: an impractical interpretation of the IAA

Justice Gilmour's decision reflects the view held by other jurisdictions, particularly those that have adopted the UNCITRAL Model Law. However, when comparing s23 and the other provisions considered 'optional' in Part III of the IAA, and considering the practicalities that arise from his decision, Justice Gilmour's interpretation may be at cross purposes with the objectives of international arbitration.

An alternative interpretation of the consequences of the adoption of the Model Law for Part III of the IAA may mean that it applies equally to foreign-seated awards. As the Federal Government expressly chose not to adopt the exact language of the Model Law in Part III, it is equally acceptable that s23 should apply to foreign-seated arbitrations.

Article 27 of the Model Law, 'court assistance in taking evidence', states:

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence. [emphasis added]

Article 27 constrains a party from seeking evidence from another jurisdiction, by designating that the request be from *'a competent court of this State'*. However, the Federal Government chose to adopt more fluid language in s23 of the IAA, which contrary to article 27 of Model Law, provides that a party may seek evidence from 'a' court. The narrow interpretation of 'court' in s22A indicates that 'any' should actually mean 'either'. A broader interpretation of 'court' is consistent with s23(2), which places the primary condition precedent on the section, namely that a party may only obtain a subpoena with the express permission of the arbitral tribunal. With this mechanism in place, s23 ensures that courts act in support of the arbitral tribunal's proceedings.

By interpreting s23 (and, in turn, the purpose of the IAA) narrowly to only cover international arbitrations seated in Australia, Justice Gilmour permits a gap in the arbitral proceedings for foreign-seated arbitrations requiring evidence in another jurisdiction. For the approximately 60 jurisdictions that have adopted the Hague Evidence Convention, as Justice Gilmour suggested, a solution is available, albeit a more costly and time-consuming solution (two characteristics that international arbitration endeavours to avoid). For all other jurisdictions, a party, even one with a strong nexus to Australia, cannot obtain evidence that may be critical to the arbitral proceedings.

A broader interpretation of s23 of the IAA would be consistent with the intent of international arbitration to serve as a transnational tool, supported by domestic courts. This interpretation would follow France and a growing number of jurisdictions in the US, wherein a party may obtain evidence within the jurisdiction if the evidence itself is located within that jurisdiction.[1]

Justice Gilmour's decision does not merely affect subpoenas. There are a number of provisions relating to judicial support of international arbitrations that a party may not be able to avail itself of if it is accepted that the IAA does not apply to foreign-seated arbitrations, including:

- s23A – compelling evidence, the production of which has been refused by a person;
- s23B – compelling evidence, the production of which has been refused by a party to the arbitration;
- s23C to s23G– protections against the disclosure of confidential information and the circumstances in which it can be disclosed;
- s23H – the effects on an arbitration agreement if a party dies;
- s23J – provisions for the inspection, photography observation or conduct of experiments on evidence;

Providing discretion to Australian courts, on the basis that an arbitral tribunal has already considered the evidence to be necessary, would provide greater efficiency for users of international arbitration.

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[1] There are differences to the relevant statutory regime. In the US, 28 U.S.C. §1782 empowers the district court in which evidence resides to compel such evidence in support of foreign tribunals.

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AMTAC Address 2017: Maritime Arbitration – its place in the Global Economy

What is globalisation, what is the global economy and what are their relationships to shipping?

The IMF defines globalisation as "the process through which an increasingly free flow of ideas, people, goods, services and capital leads to the integration of economies and societies.[1]

The global economy has been defined as "the economy of the world considered as the international exchange of goods and services which is expressed in monetary units of account (money)."[2]

The International Maritime Organization (the IMO) says that "shipping in the 21st Century underpins international commerce and the world economy as the most efficient, safe and environmentally friendly method of transporting goods around the globe" and that "we live in a global society which is supported by a global economy – and that economy simply could not function if it were not for ships and the shipping industry."[3]

There are more than 45,000 merchant ships trading internationally, transporting every kind of cargo. The world fleet is registered in over 150 nations and manned by over one and a quarter million seafarers of virtually every nationality.

Without international shipping, the IMO observes that half the world would freeze and the other half would starve.[4]

Around 80 per cent of global trade by volume is carried by sea, which enables the cheap transport of raw materials and commodities, as well as the distribution of manufacturing goods all around the world. This means that shipping is one of the most important factors of globalisation and at the same time globalisation is one of the most important factors of demand in shipping. [5]

Thus there exists a symbiotic relationship between shipping and globalisation, whereby globalisation has increased the demands for shipping, while shipping, as an integrated component in a larger goods movement system, which is the intermodal transport chain, has enabled globalisation.[6]

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1 www.imf.org Glossary of financial terms, November 2006
2 American English Definition Macmillan Dictionary 2015
3 International Shipping Carrier of World Trade, World Maritime Day 2005, IMO
4 Ibid.
5 Pocuca and Zanne, "Globalization, International Trade and Maritime Transport", University of Ljubljana, Slovenia, November 2006
6 Corbett and Winebrake, "The Impacts of Globalisation on International Maritime Transport Activity", Global Forum, November 008, Guadalajara, Mexico

Shipping, as the backbone of globalisation, lies at the heart of cross-border transport networks, supporting global supply chains and enabling the flow of international trade.

In 2016, despite the lower oil and commodity price levels, weak global demand and a slowdown in China, world seaborne trade volumes in 2016 were over 10 billion tons, and shipments expanded by over 2 per cent.[7] UNCTAD forecasts that the slowdown in China will foster further growth in other areas such as the South-South trade, (that is trade within and among developing countries) through initiatives such as the Chinese "One Belt, One Road" initiative to recreate the Silk Road, the Japanese and Asian Development Bank's "Partnership for Quality Infrastructure: Investment for Asia's Future" and the expansions in both the Panama and Suez Canal. All will have the potential to affect seaborne trade, to reshape world shipping networks and to generate business opportunities. In parallel trends, such as Shipping 4.0 within the Fourth Industrial Revolution (4IR), data and electronic commerce, including Blockchain and crypto currencies, continue to unfold and to entail both challenges and opportunities for shipping.[8]

BIMCO has forecast that the shipping industry has had its work cut out this year, noting that the IMF has forecast the lowest level of global GDP growth this year since 2009.[9]

Shipping is continuing to face headwinds this year, given that the global economy is in uncertain territory with a new administration in the United States, with Europe still mired in weak growth and with economic activity in China not showing signs of picking up sharply. Further international trade faces a rise in protectionist rhetoric, with events such as Brexit shaking the foundation of free movement of goods, services and capital.

However trade growth within Asia is outpacing trade growth in other regions. The shipping industry can draw some comfort from an expected rise in international trade growth in the near term as the IMF is expecting growth in the volumes of global exports from 2016 to 2017 of 1.3 per cent, (that is, to 3.5 per cent in 2017 from 2.2 per cent in 2016).[10]

Maritime arbitration centres

Historically, London and New York have been the dominant traditional centres of maritime arbitration.

In recent years, centres in Asia Pacific have gone to significant lengths to develop competent and cost efficient arbitration and other ADR services. The economic growth in this region, and the consequent increase in trade flows to it, is being followed by a desire of the maritime and trading community operating in Asia Pacific to resolve their disputes in the region.[11]

Maritime arbitration centres were established in Japan in Japan Shipping Exchange in 1926, and in Russia in the Russian Federation Chamber of Commerce, in 1930. In China, CMAC was established within the China Council for the Promotion of international Trade in Beijing in 1959. In Europe, C.A.M.P was established in Paris in 1959. In the United Kingdom, the LMAA commenced in London in 1960 and, in the USA, the SMA commenced in New York in 1963.

In the 1980's centres were set up in Denmark, Germany, Spain, the Netherlands and in Canada. Since 2000, further centres have opened in Greece, Nigeria, United States, Australia, Hong Kong and Singapore.

In the last three years, CMAC has opened an arbitration centre in Hong Kong and, in the UAE, EMAC has opened in Dubai.

There are now over 20 maritime arbitration centres operating world-wide.

In 1972 the International Congress of Maritime Arbitrators, ICMA, was established as a forum of maritime arbitrators and practitioners. It conducts conferences every two to three years to promote maritime arbitration and its conduct. This September ICMA will hold the 20th of such conferences in Copenhagen, at which over 100 papers will be delivered on both maritime substantive law and arbitration procedural law subjects by speakers from over 30 countries.

The development of these centres, in addition to the activities of ICMA, and importantly national maritime arbitration associations, reflects the international scope of the practice of maritime arbitration and the breadth of its place in the global economy.

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7 http://unctad.org/en/PublicationsLibrary/rmt2016_en.pdf p 11.

8 Ibid.

9 Sand, "The Shipping Market in 2016 and Looking Forward", BIMCO, Copenhagen, Denmark, January 2017

10 http://dupress.deloitte.com "Global Economic Outlook Q1 2017, Shipping industry is facing a crisis"

11 Singapore International Arbitration Centre, 'SIAC Annual Report 2016' (Annual Report, 2016).

The place of maritime arbitration in the Asia Pacific region of the global economy

The Asia Pacific region is the fastest growing economic region in the world today, noting the movement of trade flows to it and of investment and commercial activity, including maritime and transport activity. Commercial parties operating in this region wish to resolve their disputes here where, in many instances, they have arisen and they wish to do so in a timely and cost effective manner.

In the context of the practice of maritime law and of the conduct of maritime arbitration, there is both a wealth of knowledge and of experience to service this wish in this region. Therefore these commercial parties should be encouraged to nominate Asia Pacific seats of arbitration and to specify the application of arbitration rules of Asia Pacific arbitration institutions in the arbitration agreements appearing in their contracts.

It remains squarely with all members of the Asia Pacific maritime arbitration community to ensure that maritime arbitration as conducted in this region meets both the needs and the expectations of those commercial parties, who are seeking reliable neutral seats of arbitration, efficient dispute centres and skilled maritime arbitration practitioners.

The challenges facing maritime arbitration and its future

An admiralty judge recently observed that maritime arbitration institutions were operating in "an increasingly crowded space".[12] With the increase in the number of maritime arbitration centres and their geographical spread as I have described, traditional maritime arbitration institutions face increasing competition.

As maritime arbitration centres continue to market themselves to their users as the "quickest, cheapest and most efficient" way of resolving maritime disputes, there may be the possibility of some commoditisation and lack of differentiation in the arbitration services being provided which would not be a positive development.

If the maritime industry continues to witness large insolvencies such as OW Bunkers[13] and Hanjin Shipping,[14] 'one-sided' arbitrations involving one or more non-responding respondents may become more of the new norm. This may pose greater challenges as the enforceability of the final award and drafters of institutional arbitration rules will need to take this into account when amending those rules.

A lean, skilled and efficient procedural model has always been a feature of maritime arbitration because of the high level of skill and specialisation required in understanding and resolving many of the maritime disputes. These standards must be maintained and deepened by the development of coherent and effective educational and intellectual resources.

This can be achieved, as to a degree it is already, by the co-operation of bodies such as ICMA, the Chartered Institute of Arbitrators, national and regional arbitration institutions and maritime centres, as well as, importantly, significant maritime courts, such as the Maritime Courts of the PRC, the Hong Kong and Singapore Courts, the London Commercial Court and the Federal Court of Australia.

This is not merely a reminder of the need to maintain standards, but it is also the key to maintaining the integrity of maritime law and maritime dispute resolution as a separate, and indeed unique, body of commercial activity.

In order for there to be a truly efficient maritime arbitration regime which will grow and prosper there must be skilled, well-educated and respected arbitrators and counsel, who come from a broad and diverse range of backgrounds, but who recognise a common heritage of law and practice.

The major challenge is the question of costs and how they are to be managed in arbitrations. This must be met with practical wisdom and a rejection of the driving features of what has been referred to as "industrialisation" of dispute resolution, particularly as evidenced in litigation.

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12 Justice Steven Chong, 'Making Waves in Arbitration – the Singapore Experience' (Speech delivered at the Singapore Chamber of Maritime Arbitration Distinguished Speaker Series, Singapore, 10 November 2014)

13 See: http://www.bbc.com/news/business-29961566

14 See: https://www.theguardian.com/business/2016/sep/02/hanjin-shipping-bankruptcy-causes-turmoil-in-global-sea-freight

Arbitrators, including maritime arbitrators, have an opportunity to maintain the good health of what is a justice system in which they participate, by seeking to conduct arbitrations in a way which facilitates this, namely by conducting a tight lean arbitration which reflects procedural efficiency and cost effectiveness.

The Honourable PA Keane, Chief Justice of the Federal Court of Australia as he then was, in presenting the AMTAC Annual Address 2012, noted that in the market-based economies of the Asia Pacific region the development of international arbitration is the preferred mechanism for the management of performance risk. He also observed that at a practical level the views of international traders, and their priorities and perspectives are crucial to the prospects of international arbitration in Australia. He concluded "one is reminded of the observation that it makes little sense for sheep to pass resolutions in favour of vegetarianism while the wolves remain of a different opinion".[15]

Arbitration must be seen as the most appropriate and the preferred process of resolving disputes by its users and the process must always be reviewed to see if it meets their interests.

The providers of the arbitrations services must listen to, and consider the views of those users and must be constantly reviewing and considering possible changes to the arbitration procedures. They must be both specialised and globally recognised and shaped to meet the needs of the particular Industry to which they apply, here shipping and international trade. Those procedures must involve specialised practitioners.

They must be, and be seen to be, expeditious, cost effective, readily available, responsive to the needs of the users, and be fair and neutral.

The Australian brand of maritime arbitration

The Honourable Robert McClelland MP and Commonwealth Attorney General, as he then was, in giving the AMTAC Annual Address 2010 made reference to an Australian brand of arbitration when explaining the 2010 amendments to the *International Arbitration Act 1974* (Cth). He said it was his hope that those amendments would spark a cultural reform in Australian arbitration and would result in an Australian brand of arbitration which would deliver swift and cost competitive outcomes. He went on to say that "in short, the Australian brand of arbitration means we would become known as the place to come to when you want your problem fixed fast and fairly" and that we need to create and promote a local maritime arbitration culture.[16]

I endorse the development of an Australian brand of all arbitration.

So that is the place of maritime arbitration in the global economy and more particularly in Asia Pacific where the Australian maritime arbitration community is well placed to play an important role in its future. [17]

However there is much work still to be done, and challenges to be met, in order to advance maritime arbitration in Australia and to promote it, and the Australian brand, in Asia Pacific.

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15 Keane, "The Prospects for International Arbitration in Australia", AMTAC Annual Addresses 2007-2016, p98

16 McClelland, "Keeping an even keel – resolving maritime and transport disputes through arbitration to maintain commercial relationships", AMTAC Annual Addresses 2007-2016, pp69-70

17 I would like to acknowledge the assistance provided to me in the preparation of this Address:
Chief Justice Allsop, Dennis Chan, Malcolm Holmes QC, Daniella Horton, Chris Howse, David Martowski, Magistrate Julie Soars, Brad Wang and Philip Yang.

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Enter Global Stage, Enter Global Issues

What prompts parties to an arbitration to seek the intervention of a court? That question was recently considered by The Hon. Justice Clyde Croft, Judge in Charge of the Arbitration List for the Commercial Court of the Supreme Court of Victoria, in a paper he delivered in Melbourne.[2] The reasons included issues concerning the arbitrability of certain types of disputes, questions as to the appropriate standard of ethical behavior and the challenging and enforcement of awards.

Until fairly recently, most Australian judges have tended to resolve questions arising from arbitration by referring reflexively to the practices of their own courts – the exact practices that the parties have sought to avoid by choosing arbitration. Some State Supreme Courts have addressed that problem by assigning cases concerning arbitration to judges with specialised knowledge of arbitration (such as Justice Croft). As Australia develops into a seat preferred by international contracting parties wishing to resolve their disputes through arbitration, it is likely that issues that commonly arise in busier arbitral jurisdictions around the globe will increasingly land on Australian shores. When they do, it is now more likely that the courts will seek guidance from experience overseas. In this article we consider some particular issues that have, in recent times, frequently arisen in international arbitrations throughout Europe and the Middle East.

Arbitrator's bias and conflicts of interest

It has become relatively common, in arbitrations governed by English law, for parties to raise questions regarding an arbitrator's independence. It is not often, however, that the courts will be called upon to intervene and remove the arbitrator (not least because most arbitrators will prefer to voluntarily step down, rather than have their reputation sullied in the courts).

There has, however, recently been one notable instance where the High Court of England and Wales removed an arbitrator on the basis of there being justifiable doubts as to the arbitrator's impartiality. In the case of Cofely Ltd v Anthony Bingham & Knowles,[3] the Commercial Court granted Cofely's application to remove Mr. Bingham as arbitrator.[4] The matters giving rise to that decision were quite damning when considered together: Knowles had deliberately manipulated the CIArb's appointment process in order to ensure that Mr. Bingham was the only candidate available to be appointed as arbitrator; Mr. Bingham failed to disclose that he had acted in 25 cases involving Knowles in the previous 3 years, finding in Knowles' favour in 18 of those cases; and, as the facts revealed, about 25% of Mr. Bingham's income was derived from those 25 cases. Mr. Bingham's aggressive conduct in response to Cofely's queries about Mr. Bingham's relationship with Knowles was another key factor in the Court finding that a case of apparent bias had been made out.

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[1] Any views expressed in this article are strictly those of the authors and should not be attributed in any way to White & Case LLP.

[2] This paper was presented at a seminar held by the Victorian Arbitration and determinative Special Interest Group on 16 October 2017.

[3] [2016] EWHC 240.

[4] Cofely's application was brought under Section 24 of the Arbitration Act 1996.

In the Middle East, the UAE takes a more extreme approach to dealing with potentially biased arbitrators. In Dubai, parties to a dispute are able to adopt a version of the LCIA Arbitration Rules that has been modified by the Dubai International Financial Centre to take into account the local and regional legal and business cultures. Yet despite having already integrated such well-established and widely used arbitral rules, in late 2016 the United Arab Emirates Penal Code introduced criminal sanctions for a person "failing to maintain the requirements of integrity and impartiality, in his capacity as an arbitrator[5]. Anecdotal evidence suggests that even the remote possibility of imprisonment in a Middle Eastern jail has been sufficient to persuade numerous potential arbitrators to turn down appointments in the UAE.

The applicable rules of privilege

There is a continuing uncertainty in international arbitration over the question of which country's laws regarding privilege should apply to the arbitration. Often, the parties' different legal backgrounds will lead to significantly different expectations as to what documents and communications will be protected by privilege.

Parties from common law backgrounds will generally expect that the protections that they enjoy in their home jurisdiction will remain in any arbitration. However, the difference between the common law approach and the laws of privilege in other jurisdictions can be stark. Chinese law, for example, does not recognise any concept of attorney-client privilege. In Russia, privilege only applies to information that an "advocate" (i.e. a lawyer who is specifically qualified to represent clients in court) considers secret. And in Sweden, whilst there are legislative rules dealing with the issue of privilege in litigation, there is no equivalent provision for privilege in arbitration proceedings. The fact that lawyers from common law countries tend to think of privilege as a substantive right, rather than a mere rule of evidence, means that this issue is often agitated strenuously.

Most of the main institutional rules, as well as the IBA Rules on the Taking of Evidence, provide the Tribunal with a very broad discretion as to which rules of privilege should apply[6]. Some Tribunals try to ascertain the law governing privilege based on the choices of the applicable law made by the parties in their contract and in their arbitration agreement. Failing that, some of the more common methods adopted by Tribunals to resolve this issue include choosing either the "least favourable" or the "most favourable" set of rules and applying those to both parties; applying the law of the professional domicile of the legal counsel; or applying the law of the place where the document is located or was created. It is difficult to know how an Australian court, if invited to intervene, would resolve this question. The right to claim privilege is deeply embedded in the Australian legal system; against that, there is a cogent argument that a party who has submitted to a trans-national system of dispute resolution, often governed by the procedural law of another country, cannot automatically expect to be treated as if it were still in an Australian court.

Calls for transparency vs. the need for confidentiality

The confidential nature of arbitration proceedings is frequently regarded by parties wanting to resolve their private disputes as being an attractive, if not essential, feature of the process. However, the lack of publicly available information regarding the conduct of arbitrations has led to a demand in recent years for some form of transparency in the process. Such concerns tend to arise in circumstances where the outcome affects more than the immediate parties to the dispute, such as in investor-state arbitrations or arbitrations involving publically listed companies.

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[5] Article 257 of the UAE Penal Code.

[6] See the IBA Rules on the Taking of Evidence in International Arbitration, Article 9(b).

In response to these growing concerns, some of the major arbitration institutions have started to publish information about the cases they handle. The LCIA, for example, publishes a comprehensive analysis of cases in order to provide users with information on the average costs and duration of arbitrations.[7] Earlier this year, the ICC began publishing on its website the names of the arbitrators appointed to ICC cases, their nationality, their role within the tribunal and whether the appointment was made by the parties or by the ICC Court, with parties being permitted to opt out from such information being published about their case.[8] The ICC is also able to publish awards in redacted form without it being necessary to first have the parties' consent or a specific rule stating so. By comparison, the SIAC Arbitration Rules state that the parties' and the Tribunal's consent is required for publication of redacted awards.[9]

Arbitration users' views

The School of International Arbitration at Queen Mary, University of London, in partnership with White & Case, has recently launched its fourth International Arbitration Survey. This survey researches the sentiment of the international arbitration community as a whole, compiling the results of thousands of respondents from across the globe in order to examine the evolution of international arbitration, explore current perceptions and provide insight into what arbitration users will want in the future.

The results from the 2015 survey confirmed that international arbitration is the overwhelmingly dominant choice for dispute resolution in international transactions. When users of international arbitration were asked what improvements should be made to it, one point that was raised repeatedly was the reluctance of tribunals to act decisively in certain situations (especially where one party seeks to create unreasonable delay), presumably for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully. Even arbitrators themselves identified this phenomenon as both problematic and commonplace. This was seen as contributing to other commonly perceived issues with international arbitration, such as the lack of insight into arbitrators' efficiency and lack of speed.

By contrast, the responses showed that stakeholders generally have a positive perception of the guidelines and soft law instruments available in international arbitration, with the IBA Rules on the Taking of Evidence and the IBA Guidelines on Conflicts of Interest being the most widely known, the most frequently used and the most highly rated. Given the number of mechanisms that are available within the various institutional rules to allow arbitrators to be firm and decisive during the arbitral process, some interviewees suggested that the issue is primarily the lack of effective use by arbitrators of the sanctions that are available.

Conclusion

In order for Australia to remain an attractive arbitral seat for international contracting parties, it will be important for parties' counsel and the potential arbitrators to be aware of the plethora of potential issues that may arise. Looking to lessons learned in foreign jurisdictions is a good way of ensuring arbitration practitioners can remain a step ahead.

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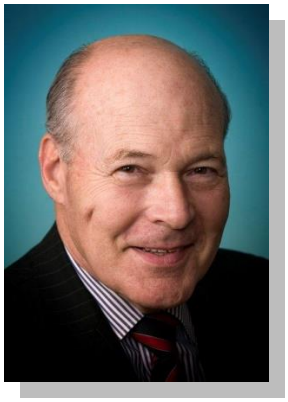
[7] LCIA, Tools to Facilitate Smart and Informed Choices, 3 November 2015.

[8] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, 1 March 2017.

[9] SIAC Investment Arbitration Rules, 30 December 2016, Section 32.12.



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Which Remedy to Choose? Are the Users Getting What They Want? Differences Between Statutory Adjudication, Expert Determination, and Arbitration in Western Australia

From the perspective of General Counsel[1], the rapidly changing business environment calls for a recognition of the interconnectivity between business and disputes, where *'the general counsel reports to the CEO, controls the selection of and the contacts with outside counsel and is an integral part of the management team of the company.*'[1]

When it comes to planning the most desirable means of dispute resolution, what does the General Counsel want in terms of outcome, and which method of dispute resolution is likely to satisfy those needs? From my own experience as in-house Counsel on Mega-projects and as General Counsel it was – certainty – an enforceable outcome, one way or the other. Certainty means a determination that is considered to be generally correct and enforceable; it does not mean 100% legal precision, if there is such a thing. This, together with speed, minimal cost, simplicity and confidentiality. But how best to achieve that outcome? Uncertainty diminishes the confidence of management in counsel, and in the law. What is clear is that there is a growing awareness that dispute management policy with an effective dispute management process has cost saving effects, and corporate counsel are striving to 'control costs better'[2].

We look at Statutory Adjudication in Western Australia, Expert Determination and Arbitration as options. Having been through the process, which will provide the most 'certainty'?

The Courts

It is important to appreciate by way of background that the courts will uphold the terms of a contract properly entered into, provided they are not contrary to public policy or statute law. This doctrine of freedom of contract has far-reaching ramifications for the resolution of disputes between contracting parties because it means that, as with all other aspects of their commercial arrangements, parties are free to provide for any method(s) of dispute resolution they may choose. It is, however, against public policy to attempt to "oust the jurisdiction of the court", and a term that has that effect will not be enforceable.[3] Irrespective of the dispute resolution mechanism in the Contract, the courts have ultimate authority in respect of interpretation and enforcement of contract terms, or deciding on the consequences of a breach of the contract.

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[1] Ugo Draett, 'The Role of In-house Counsel in International Arbitration' (2010) IBLJ 385.

[2] Queen Mary University of London and PricewaterhouseCoopers, 'Corporate Choices in International Arbitration', (PWC 2013), 4.

[3] In *Balderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1997) 14 BCL 277 the judge did not uphold a contractual clause which provided for resolution of any dispute by the "final and binding" decision of an independent third party expert. The expert was empowered to make his decision in any manner that he saw fit, subject to observing the principles of procedural fairness and natural justice. However the judge found that in the circumstances of a dispute involving matters of fact and law, the dispute resolution clause was against public policy in that it "(a) purports to oust the jurisdiction of the court and (b) prescribes a procedure which is entirely unsuited to the resolution of disputes which may arise out of the contract." However, the Court distinguished Balderstone v Kayah in *Straits Exploration v Murchison* [2005] WASCA 241 at [23].

Contractual Dispute Resolution (CDR)

CDR generally means any method of dispute resolution alternative to litigation in the courts which the parties have provided for in the contract. CDR as used here therefore includes negotiation, mediation, conciliation, *expert determination, statutory adjudication, arbitration* and dispute boards. There is a wide range of options to choose from, and experience is required to determine which permutations and combinations will be most appropriate for a given set of circumstances. Lawyers can add most value by working with management to provide solutions which are best suited to maximising the potential for settlement and minimising exposure in the event settlement cannot be reached at an early stage.

As is so often the case, *"one of the main cultural obstacles to early dispute resolution…is the unwillingness of business people to cooperate in early case evaluation, and manage the paperwork that goes with it.*[4]

Modern construction contracts typically have sophisticated multistage provisions to provide for resolution of disputes between contracting parties.

Speed is the essence of modern dispute resolution procedures. *"The longer the process takes, the greater the stress on the parties. In too many cases, that stress becomes too great to bear and a party with a good claim will abandon it, or a party with a good defence will admit liability rather than protract the agony. In those cases, there is no doubt that justice has been denied."*[5]

Each method of contractual dispute resolution discussed here (Statutory Adjudication, Expert Determination and Arbitration) has advantages and disadvantages. Statutory Adjudication will apply automatically if triggered by one of the parties and the criteria set by the *Construction Contracts Act 2004* (WA)(as amended) are satisfied, while Expert Determination and Arbitration rely on contractual provisions to compel the parties to implement the resolution of a dispute as determined by application of the process.

Statutory Adjudication – CCA

Statutory Adjudication in Western Australia is governed by the CCA. It should be noted that Statutory Adjudication is not a form of Expert Determination or Arbitration. In essence, this is a method of dispute resolution in which an independent Adjudicator resolves the dispute by providing a provisionally binding determination of the parties' contractual rights following an impartial assessment of the parties' submissions and other evidence. It should be emphasised that the process does not provide a final resolution of any dispute. But it does, or should, provide a preliminary, enforceable outcome. It should, and often does, provide a determination which satisfies the parties and brings the payment dispute to an end[6]. An Adjudicator's determination decides which party gets to "hold the money", pending final resolution of the dispute through the dispute resolution process provided for in the Contract, if either of the parties wish to pursue the matter further. Key features of Adjudication are that it is carried out within a strictly limited timeframe and should therefore be relatively inexpensive, and it does not alter or finally determine the parties' contractual rights. The speed and economy of Adjudication make it an attractive dispute resolution mechanism for principals, contractors and subcontractors, for the latter of whom cash flow is vital and the time involved in ultimate resolution of disputes potentially financially crippling or fatal.[7]

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[4] Jean-Claude Najar see above at 243.

[5] The Hon Wayne Martin AC, Chief Justice of Western Australia: Speech to the Australian Centre for Justice Innovation on 17 May 2014 titled: "Timeliness in the Justice System: Ideas and Innovations: Because Delay is a Kind of Denial".

[6] As at 30th September 2017, a total of 1760 determinations had been made in Western Australia, amounting to $2,757,856,407.52 in value. In the year 2015/2016 applications reported were slightly down on 2014/2015 but reached the highest value during the life of the Act. In all, a relatively small number of determinations were overturned by the State Administrative Tribunal and the Supreme Court.

[7] Loots and Charrett, Practical Guide to Engineering and Construction Contracts, CCH 2009, [25.8] at 307.

The aims of the CCA, to resolve payment disputes quickly, and inexpensively, were, until recently, largely achieved, although the exclusion of fabricating or assembling items of plant used for extracting oil and natural gas or any derivative of natural gas or any mineral bearing or other substance is in no way justified. It appears to be an unfortunate political concession extracted presumably for no reason other than to have the ability to continue to exploit the supply chain, because for all practical purposes the supply chain serving those sectors of the economy is no less dependent upon cash-flow.

More recently, the demand for Statutory Adjudication has plummeted, arguably due to the ease with which the enforcement of favourable determinations can be thwarted, risks of adverse publicity, delay, increased costs of appeals to the Supreme Court, and generally the increased uncertainty of outcomes. The law governing challenges against determinations based on jurisdictional grounds looks set to descend into a boundless morass of complexity, cost and uncertainty. The result is that Statutory Adjudication may no longer be as attractive as it was intended to be and once was.

Expert Determination

Expert Determination is a method of dispute resolution in which an independent impartial Expert is engaged by the disputing parties to determine those disputed questions of fact and/or law in the reference defined by the parties. The significant distinction between an arbitration and an expert determination is that an arbitration entails the mandatory requirement that the arbitrator act judicially, while an expert is neither bound to, nor precluded from, acting judicially, provided the expert is acting in accordance with the terms of the appointment[8].

A mistake in the reasons given for an expert determination does not necessarily deprive them of the character of reasons as required by the relevant contract nor deprive the determination of its binding force. A deficiency or error in the reasons given by an expert may affect the validity of the determination in two ways:[9]

a). it may disclose that the expert has not made a determination in accordance with the contract;
b). It may be such that the purported reasons are not reasons within the meaning of the contract, if the provision of reasons is a necessary condition of the binding operation of the determination.[10]

The jurisdiction of the expert is determined by the terms of the agreement between the parties in terms of which the Expert is appointed.

In *Goldspar Australia Pty Ltd v Council of the City of Sydney* [2000] NSWSC 685; (2001) 17 BCL 183, the Supreme Court of New South Wales held that the court will not set aside an expert's determination on the ground that the expert committed an error or that his determination was incorrect. In each case, the critical question must always be: was the valuation made in accordance with the terms of the contract?[11i]

Differences between Expert Determination, Adjudication and Arbitration

The differences between Adjudication, Arbitration, Expert Determination are illustrated by the differences between what is required to comply with the rules of natural justice in each case[12].

The requirements of natural justice were explained by Mr Justice Cole in *Xuereb v Violia* [1989] 18 NSWLR 453 a case which concerned a Reference under part 72 of the New South Wales Supreme Court Rules.

The key (to determining whether or not an expert is bound to act in accordance with the principles of procedural fairness) is to consider the nature of the task assigned to the expert. In *Australian Vintage Ltd v Belvino Investments (No 2) Pty Ltd* [2015] NSWCA 213, the Supreme Court of New South Wales (Court of Appeal) held that the question of whether the determination is open to review depends on whether or not the expert has carried out the task which he or she was contractually required to undertake. If the expert in fact carried out that task, the fact that he or she made errors or took the relevant matters into account would not render the determination challengeable.

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8 *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2007] QSC 206; (2008) 24 BCL 117.

9 *Legal & General Life of Australia v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 331 – 337; Holt v Cox (1997) 23 ACSR 590 at 596 – 597; *AGL Victoria Pty Ltd v SP/Networks (Gas) Pty Ltd* [2006] VSCA 173 at [51] – [54].

10 See *Dura v HBL* (2013) 41 VR 636; [2013] VSCA 179 and *WMC Resources v Leighton* (1999) 20 WAR 489.

11 See also *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* (2012) NSWSC 4; (2013) 29 BCL 266.

12 Robert Hunt, The Law relating to Expert Determination, The Institute of Arbitrators and Mediators Australia, July 2011, at 43.

IAMA has published Expert Determination Rules which can be used as appropriate Procedural Rules for the conduct of either binding or non-binding expert determination. The ICC has published two sets of Procedural Rules applicable to Expert Determination. The ICC Rules for experts are appropriate for non-binding expert determination under the supervision of the ICC.[13] The Rules for a Pre-Arbitral Referee Procedure are appropriate for binding expert determination under the supervision of the ICC, and enable contracting parties to have rapid recourse to a Referee (Expert) who is empowered to make an order designed to meet an urgent problem.[14] The Conciliation Agreement published by IAMA could, with some appropriate changes, form the basis of a Third Party Agreement for either form of expert determination.[15]

As the Expert normally acts inquisitorially and does not hear evidence, the determination may not be based on all the available evidence. Expert Determination is particularly suitable in disputes in which there are complex technical issues or matters of aesthetics, the questions of law are straightforward, and both parties share confidence in the Expert's skill and ability to determine the issues fairly and justly.

Arbitration

Arbitration is the private judgement of a dispute between parties by an independent, unbiased and impartial arbitrator who applies the principles of procedural fairness - natural justice - in a process in which all parties have the opportunity and the right to present their case and to rebut the case of their opponents. The arbitrator must consider all the evidence presented by the parties, and decide what the relevant facts are from the evidence which, when applied to the relevant principles of law, determine the rights and obligations of the parties in relation to the dispute. The arbitrator publishes his/her findings on the facts and the law and the rights and obligations of the parties applicable to the dispute in a written determination called an award which is binding on all parties to the arbitration.

The arbitration agreement needs to be in writing for the arbitration to benefit from the provisions of the relevant Australian statutes, and is the most fundamental and important document in regulating the entire arbitration process. It sets out what can be arbitrated, when the arbitration will take place, and the legal and procedural framework within which a dispute would be arbitrated.

Natural justice in the context of arbitration

The principles of natural justice in Arbitration were expressed by Mr Justice Marks in *Gas & Fuel Corporation of Victoria v Wood Hall Ltd* [1978] VR 385. as follows:

'There are two rules or principles of natural justice… The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – nemo judex in causa sua. The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim – audi alteram partem... Transcending both principles are the notion of fairness and judgement only after a full and fair hearing given to all parties.'

Legislative framework for arbitrations

There are two different sets of Australian legislation that make provision for the arbitration of commercial disputes:

(a) the *International Arbitration Act 1974 (Cth)* (IAA); and

(b) the State and Territory *Commercial Arbitration Acts* (CAA).

The parties must do all things necessary for the proper and expeditious conduct of the arbitration proceedings; comply without undue delay with any order or direction of the arbitral tribunal with respect to any procedural, evidentiary or other matter; and not wilfully do or cause to be done any act to delay or prevent an award being made. In the case of the IAA the arbitral proceedings are subject to the jurisdiction of Australian courts and relevant Australian statute law, whereas in foreign international arbitration Australian courts only have jurisdiction in respect of setting aside or enforcement of foreign awards.

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13 http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_expert_english.pdf.

14 http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_pre_arbitral_english.pdf?terms=%22%22pre-arbitral+referee%22%22+AND+english.

15 http://www.iama.org.au/pdf/ConciliationAgreement.pdf.

The IAA contains legislative provisions in respect of international commercial arbitration for:

a) enforcement of an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, i.e. an arbitral award made in an arbitration in which the seat of arbitration was not Australia [Part II - Enforcement of foreign awards gives effect to Australia's accession to the United Nations Convention on the Recognition and Enforcement of Foreign Awards (*New York Convention*)]; and
b) a default set of rules that apply to the entry into arbitration, the conduct of arbitration proceedings, making the award and termination of proceedings, and the role of courts in setting aside an award or enforcing its provisions. Part III - International Commercial Arbitration - provides that subject to the IAA, the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations (Model Law) has the force of law.

Role of the court

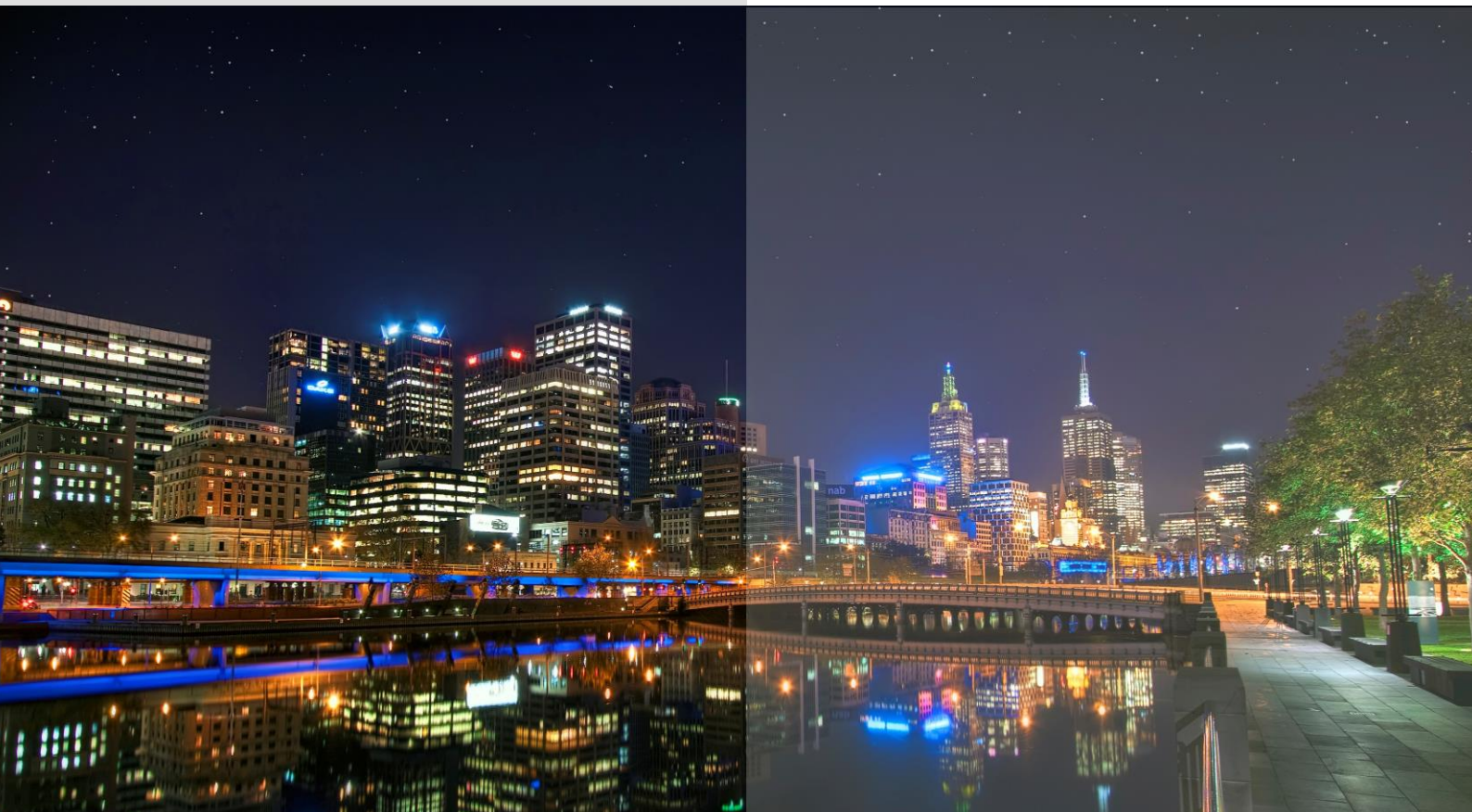
In the same way as in an international arbitration governed by the Model Law, a court may only intervene in matters governed by the CAA in specific circumstances where the CAA allows it to do so.

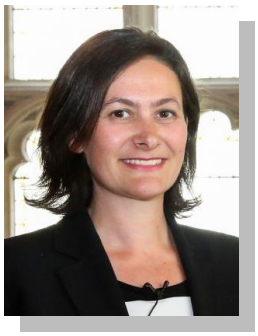
In *Hancock v Rinehart* [2017] FCAFC 539 s8 of Commercial Arbitration Act 2010 (NSW) the Federal Court dealt with circumstances in which claims against third party companies can be stayed under the Court's general power to stay proceedings.

Conclusion

With the above considerations in mind, which method of resolving construction disputes would you, as General Counsel, choose, assuming you want the certainty of an enforceable outcome, one way or the other; together with speed, minimal cost, simplicity and confidentiality?

Acknowledging Doug Jones' statement that: "The difficulty and the cost (both in time and money) of resolving construction disputes has been persistent and universal. New ideas on how to manage this have been legion", and that the 'magic bullet' has not been found , I would rather suggest that a 'magic bullet', namely, Statutory Adjudication might have been found, but may become lost in its application. Reference directly to arbitration, after all, may be the best solution.





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Business and Human Rights: A "New Frontier" for International Arbitration?

Introduction

The theme of the upcoming Sydney ICCA Congress is "Evolution and Adaption: The Future of International Arbitration" and the planned session on "New Frontiers in International Arbitration" is set to explore how arbitration in the future might become a forum for resolving disputes under emerging norms, including on human rights, labour laws, health and safety.[1] As delegates at the Congress will hear, and as we describe in this article, some of these "future" uses of arbitration in the realm of business and human rights are already a reality at the Permanent Court of Arbitration ("PCA").

Part 1 of this article offers background on business and human rights principles and the ways in which their recognition is gaining momentum amongst states and multinational enterprises ("MNEs"). Part 2 then addresses the question of remedy and explores the potential role for arbitration as a mechanism for resolving disputes over business and human rights violations. It describes two contexts in which worker safety rights have already been elevated into enforceable contractual obligations, namely the ready-made garment industry in Bangladesh, and the construction industry for major international sporting events. Part 3 concludes with some observations on what these developments may mean for international arbitration practitioners.

1. Business and Human Rights: Emerging Norms

The UN Guiding Principles on Business and Human Rights, developed by Professor John Ruggie and unanimously endorsed by the UN Human Rights Council in 2011 ("UN Guiding Principles") are considered as the authoritative global statement on state and corporate accountability for human rights.[2] The UN Guiding Principles rest on three "pillars": the duty of states to *protect* human rights; the corporate responsibility of businesses to *respect* human rights; and the access to *remedy* for those whose rights have been violated.

A number of developments at the international and national level evidence a growing commitment towards ending impunity for businesses that perpetuate human rights violations. At a multilateral level, these include:

- The UN Forum on Business and Human Rights established by the UN Human Rights Council in 2011, which meets annually in Geneva, for stocktaking and lesson-sharing on efforts to move the UN Guiding Principles "from paper to practice."[3] During the 2014 UN Forum, NGOs, indigenous peoples, international lawyers, academics, representatives of State organisations, and corporations raised concerns about the adequacy of existing dispute resolution mechanisms.

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[1] International Council of Commercial Arbitration, Congress Programme, available at https://icca2018sydney.com/programme/

[2] HRC Resolution A/HRC/RES/17/4, passed on 6 July 2011, http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement.

[3] "About the United Nations Forum on Business and Human Rights", United Nations Human Rights Office of the High Commissioner, available at: http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx, last accessed 2 November 2017.

A proposal by a group of international lawyers to use mediation and international arbitration as a means to resolve business-related human rights disputes garnered interest.[4]

- The UN Human Rights Council Resolution 26/9, adopted (narrowly) on 14 July 2014, "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" with the mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of Transnational Corporations and Other Business Enterprises."[5] Its most recent working paper, published on 29 September 2017, reiterates commitment to existing human rights norms and includes proposals for possible establishment of a specialist international court or other judicial mechanisms to pursue criminal or civil liability of transnational corporations.[6]

- The UN Guiding Principles are also reflected in the OECD's 2011 Guidelines for Multinational Enterprises,[7] and the European Commission's Communication on 25 October 2011 on a renewed European Union Strategy for Corporate Social Responsibility.[8]

States also are increasingly adopting laws to implement the UN Guiding Principles and have either launched National Action Plans (such as the United Kingdom,[9] the Netherlands,[10] the United States,[11] and Germany[12]) or are in the process of developing a National Action Plan (including Australia, Japan, Malaysia, Mexico and Thailand).[13]

In Australia, recent government initiatives include the establishment of a Multi-Stakeholder Advisory Group, which met for the first time in May 2017, comprising businesses, industry, civil society and academia, to provide expert advice and support broader consultations on the implementation of the UN Guiding Principles.[14] The Department of Foreign Affairs and Trade has also commissioned the Stocktake on Business and Human Rights in Australia to identify the existing laws, government policies and business practices relevant to the UN Guiding Principles.[15] In a move to combat modern slavery, a parliamentary joint committee was formed to inquire into the need for a Modern Slavery Act for Australia,[16] based on UK legislation, which would include measures such as annual reporting and an independent anti-slavery commissioner.[17] In addition, a new forum to combat modern slavery, the Bali Process Government and Business Forum, was jointly launched by Australian and Indonesian Foreign Ministers in August 2017.[18]

4 Claes Cronstedt and Robert Thompson, "An International Arbitration Tribunal on Business and Human Rights", 13 April 2015, available at: http://business-humanrights.org/sites/default/files/documents/Tribunal%20Version%205.pdf.

5 HRC Resolution A/HRC/RES/26/9, passed on 14 July 2014, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement.

6 Chairmanship of the Intergovernmental Working Group, "Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights", page 13, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf.

7 OECD Guidelines for Multinational Enterprises 2011 Edition, available at http://www.oecd.org/daf/inv/mne/48004323.pdf.

8 "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility", Brussels 25 October 2011, COM (2011) 681 final.

9 Government of the United Kingdom, "Good Business: Implementing the UN Guiding Principles on Business and Human Rights", updated May 2016, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf.

10 Netherlands Ministry of Foreign Affairs, "National Action Plan on Business and Human Rights", December 2013, available at https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf.

11 U.S Department of State, "U.S National Action Plan on Responsible Business Conduct", December 2016, available at https://www.state.gov/documents/organization/265918.pdf.

12 German Federal Government, "The National Action Plan on Business and Human Rights", December 2016, German version available at http://www.auswaertiges-amt.de/cae/servlet/contentblob/754690/publicationFile/222786/161221-NAP-DL.pdf.

13 List of States that are in the process of developing a national action plan or have committed to doing one published on the United Nations Human Rights Office of the High Commissioner website: http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx, last accessed on 31 October 2017.

14 Australian Department of Foreign Affairs and Trade, "Multi-Stakeholder Advisory Group on Implementation of the UN Guiding Principles on Business and Human Rights", Communiqué, 2 May 2017, available at http://dfat.gov.au/international-relations/themes/human-rights/business/Pages/multi-stakeholder-advisory-group-on-implementation-of-the-un-guiding-principles-on-business-and-human-rights.aspx.

15 Australian Department of Foreign Affairs and Trade, "Stocktake on Business and Human Rights in Australia", April 2017, available at http://dfat.gov.au/international-relations/themes/human-rights/business/Documents/stocktake-on-business-and-human-rights-in-australia.pdf.

16 For more information, see: https://www.aph.gov.au/modernslavery.

17 Australian Attorney General's Department, "Modern slavery in supply chains reporting requirement: public consultation paper and regulation impact statement", 16 August 2017, available at https://www.ag.gov.au/Consultations/Documents/modern-slavery-in-supply-chains-reporting-requirement/modern-slavery-in-supply-chains-reporting-requirement-public-consultation-paper.pdf.

18 Minister for Foreign Affairs The Hon Julie Bishop MP, "Government and business working to combat modern slavery", Media Release 25 August 2017, available at https://foreignminister.gov.au/releases/Pages/2017/jb_mr_170825.aspx.

Through this forum, Ministers and business leaders of the Bali Process can develop strategies, and share best practices, "to combat modern slavery, human trafficking and forced labour, and prevent exploitation of migrant workers and other vulnerable employees."[19]

Initiatives amongst businesses include CEO sign-up to the UN Global Compact, with commitments to human rights and labour standards, as well as anti-corruption and sustainability goals.[20] Another example is the adoption of the Equator Principles, an environmental and social risk management framework, by 91 financial institutions in 37 countries. Participating financial institutions commit to not provide Project Finance or Project-Related Corporate Loans to projects where the client does not comply with the Equator Principles, which have "increased the attention and focus on . . . robust standards for indigenous peoples, labour standards, and consultation with locally affected communities within the Project Finance market."[21] NGOs and global media outlets have also been active in reporting on businesses with respect to supply chain accountability.[22]

Although these developments have assisted in defining the roles and responsibilities of businesses and governments with respect to protection and respect for human rights, the "third pillar" of the UN Guiding Principles – access to remedy – has proven more challenging to implement.

Commentators have remarked on procedural and substantive hurdles that have undermined access to remedy. Efforts to seek redress may be thwarted by a lack of access to information, an inequality of arms, and difficulty in piercing the corporate veil, among other factors.[23] Victims may also be precluded from bringing claims in domestic courts if the alleged harm occurred extraterritorially, or by the *forum non conveniens* doctrine, which allows courts to prevent a case from moving forward in the jurisdiction in which it is filed on the basis that another jurisdiction is the more appropriate venue.[24] Claims filed before domestic courts are typically brought against multinational business enterprises in their home courts by human rights NGOs, but, it has been noted that such cases may "drag on for years and often end inconclusively."[25]

2. Arbitration as a Possible Route to Remedy for Business and Human Rights Violations

The availability of arbitration as an optional mechanism to determine business and human rights disputes has been identified as potentially beneficial to both corporations and victims, even where fair and competent courts are available, owing to arbitration's unique characteristics of neutrality, enforceability, and procedural flexibility.[26] Arbitral proceedings can occur anywhere in the world regardless of the location of the harm, and may be conducted by decision-makers neutral of the parties. International arbitral awards may be enforced in any of the 156 states that are parties to the New York Convention. Resolving disputes through arbitration gives parties greater autonomy and control over the process, with flexibility as to selection of arbitrators, applicable rules, language, venue, and appropriate provisions for confidentiality and transparency.

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19 The Bali Process is a regional process designed to boost efforts against people smuggling and trafficking. It aims for increased technical capacity and cooperation between the 45 member countries and 3 UN organisations, the UN Nations High Commissioner for Refugees, the International Organization for Migration (IOM); and the UN Office on Drugs and Crime. See: http://dfat.gov.au/international-relations/themes/people-smuggling-trafficking/pages/the-bali-process.aspx.

20 Currently, 9000 companies are participants of the UN Global Compact: https://www.unglobalcompact.org/what-is-gc/participants.

21 Equator Principles: http://www.equator-principles.com/index.php/about-ep/about-ep

22 For e.g., KnowTheChain, a partnership between the Business & Human Rights Resource Centre, Humanity United, Sustainalytics and Verité, is a resource for businesses and investors who need to understand and address forced labor abuses within companies' supply chains, and benchmarks current corporate practices, develops insights, and provides practical resources that inform investor decisions and enable companies to comply with growing legal obligations while operating more transparently and responsibly. See: https://knowthechain.org/. See also research by The Economist Intelligence Unit, "No more excuses: Responsible supply chains in a globalised world" (2017), available at http://growthcrossings.economist.com/wp-content/uploads/sites/47/2017/07/EIU-SCB-RSC-WP.pdf.

23 See, e.g., Amnesty International, "Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse", 4 September 2017; Claes Cronstedt, Jan Eijsbouts and Robert C. Thompson, "International Business and Human Rights Arbitration", Lawyers for Better Business, 13 February, 2017, available at http://www.l4bb.org/news/TribunalV6.pdf.

24 Gwynne Skinner, Robert McCorquodale, and Olivier de Schutter with case studies by Andie Lambie, "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business", December 2013, available at https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657dfa6a4963597fed598b/1483046398204/The-Third-Pillar-FINAL1.pdf.

25 Cronstedt and Thompson, n.4 above, page 2.

26 Prof Jan Eijsbouts, "Business and Human Rights Mediation and arbitration", International Law Association, Arbitration Institute Stockholm Chamber of Commerce Seminar, 23 March 2017, available at http://www.sccinstitute.com/media/185187/jan-eijsbout.pdf.

The essential gateway to arbitration, however, is consent. The relevant stakeholders must therefore be persuaded to consent to an arbitral proceeding in a binding contract. We next discuss some recent examples where stakeholders have come together, in the wake of tragedy or controversy, to agree to respect standards of protection and resort to arbitration to enforce such standards.

(a) The Bangladesh Accord on Fire and Building Safety

On 24 April 2013, a garment factory, Rana Plaza, collapsed in Bangladesh, killing more than 1,100 people and injuring more than 3,000. Reportedly, the factory, built on unstable ground, collapsed after heavy machinery was operated on the top floors which were built without permission.[27] The incident led to immediate negotiations amongst stakeholders in the garment industry to put in place a system for monitoring, reporting and remedying future safety issues. The Accord on Fire and Building Safety in Bangladesh was negotiated with the assistance of the Bangladeshi Government, the International Labour Organization, and various NGOs. It was signed in May 2013 by two global trade unions, 8 Bangladeshi trade unions (representing together some 2 million workers), and over 200 apparel brands, retailers, and importers from over 20 countries in Europe, North America, Asia and Australia.. The Accord enshrines binding commitments by apparel brands that hazards in their supplier factories are to be inspected and remediated, and that sufficient funds are available to maintain sourcing relationships.[28] The Accord also contains a complaints mechanism and a dispute resolution process referring to arbitration of disputes.[29]

As announced in October 2017, the PCA is currently administering two arbitration proceedings under the Accord which concern alleged breach of the remediation and supplier incentive provisions in respect of over 200 factories. The claimants in both cases are IndustriALL Global Union and UNI Global Union: two non-governmental labour union federations based in Switzerland. The two respondents are global fashion brands. On 4 September 2017, the tribunal found the claims to be admissible (having satisfied the pre-conditions to arbitration set out in the Accord) and issued directions on confidentiality and transparency.[30] The matters will proceed to a hearing on the merits in the first part of March 2018.

With the original Accord due to expire in May 2018, stakeholders have negotiated a new version of the Accord, which already has nearly 50 signatories as of 6 October 2017.[31] The arbitration provision in the 2018 Accord incorporates the most recent revision of the UNCITRAL Arbitration Rules, provides for The Hague as the seat of arbitration, and specifies the PCA as the administering institution. The 2018 Accord also contains a choice of law provision with the law of the Netherlands governing the Accord.[32]

While the 2018 Accord has as its goal "the safe and sustainable Bangladeshi Ready-Made Garment and other related industries," a footnote to its preamble states that upon agreement by the Accord's Steering Committee, "the work of the Accord could possibly be expanded to other related industries . . . on a voluntary basis," perhaps foreshadowing the use of the Accord as a model for future multi-stakeholder agreements in other industries.

(b) Major Sporting Events

One other area which has seen increased attention to the safety rights of workers is the construction activity deployed in the lead up to major sporting events. For example, since Qatar won its bid to host the 2022 FIFA World Cup, entailing an estimated US$100 billion spending on infrastructure such as a new airport, roads, hotels and stadiums, a spotlight has been shone by human rights organizations, unions and the media on the abuse of migrant workers' rights.[33] In May 2017, FIFA published a Human Rights Policy setting out its commitment to "all internationally recognised human rights" and promising to "strive to promote the protection of these rights."[34]

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27 See, e.g., The Guardian, "Bangladesh factory collapse blamed on swampy ground and heavy machinery", 23 May 2013, available at https://www.theguardian.com/world/2013/may/23/bangladesh-factory-collapse-rana-plaza; citing the report of an investigation committee headed by Main Uddin Khandaker of the Ministry of Home Affairs.

28 Accord on Fire and Building Safety in Bangladesh, available at: http://bangladeshaccord.org/wp-content/uploads/the_accora.pdf.

29 Article 5, Accord on Fire and Building Safety in Bangladesh.

30 For more information, see https://pca-cpa.org/en/cases/152/.

31 For list of signatories, see: http://www.industriall-union.org/signatories-to-the-2018-accord. The new Accord takes effect after expiry of the current Accord.

32 Article 24, 2018 Accord on Fire and Building Safety in Bangladesh: May 2018, available at http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf.

33 See, e.g., Amnesty International, "Five years of human rights failure shames FIFA and Qatar", 1 December 2015, available at https://www.amnesty.org/en/latest/news/2015/12/five-years-of-human-rights-failure-shames-fifa-and-qatar/

34 FIFA's Human Rights Policy, May 2017 edition, available at https://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy_neutral.pdf

It recognised the UN Guiding Principles and stated that it will "implement its commitments regarding remedy . . . in close collaboration with entities with whom it has relationships, including those established to prepare and host FIFA tournaments, and its commercial affiliates and suppliers. In meeting these commitments, FIFA also considers, as appropriate, internal and external as well as local and international mechanisms and is guided by the effectiveness criteria for non-judicial grievance mechanisms outlined in principle 31 of the UNGPs."[35]

The International Olympic Committee has also incorporated the UN Guiding Principles into its Host City Contract for the 2024 Olympic Games. Article 13.2 of this Contract commits the Host City and National Olympic Committee "in their activities related to the organisation of the Games" to "protect and respect human rights and ensure any violation of human rights is remedied in a manner consistent with international agreements, laws and regulations applicable in the Host Country and in a manner consistent with all internationally-recognised human rights standards and principles, including the United Nations Guiding Principles on Business and Human Rights, applicable in the Host Country". [36] This obligation is subject to an arbitration clause in Article 51.2 of the Host City Contract, which provides for the submission of any dispute concerning performance of the contract to arbitration, to be decided by the Court of Arbitration for Sport in Lausanne.[37]

3. What do these Developments Mean for Practitioners?

What do these developments mean for practitioners in the field of international arbitration? As a starting point, practitioners should become familiar with the UN Guiding Principles and commentary.[38] The International Bar Association published in 2016 a "Practical Guide on Business and Human Rights for Business Lawyers."[39] With enterprises identifying the importance and business advantages of compliance with human rights norms, several global law firms have established practice groups or knowledge hubs committed to business integrity and started identifying ways to work with clients in ensuring management of business and human rights issues as part of the reality of doing business in the 21st century.[40] MNEs are increasingly finding it hard to ignore "the consequences of being associated with systemic human rights abuse," leading them to incorporate terms and conditions on human rights compliance in their supply chain and other contracts.[41] According to a recent joint survey by Legal Business and Herbert Smith Freehills, of 275 general counsels (GCs) and senior counsel, "46% of businesses now have a human rights policy in place. For companies in the $10bn+ revenue bracket, that figure rises to 84%."[42] In the same survey, 46% of the participants said they had encountered specific human rights clauses in commercial contracts. As international arbitration rests on consent, practitioners may identify ways of building into such agreements references to international arbitration, amongst other non-judicial grievance mechanisms.

Assuming the relevant parties agree to arbitration, then some of the issues their advisers should consider, both at the stage of drafting the arbitration agreement, and in managing the dispute once it has arisen, are: (i) applicable law/s, (ii) place of arbitration, (iii) procedures for selection of appropriately experienced arbitrators; (iv) appropriate levels of transparency and/or confidentiality, (v) administrative support from experienced arbitral institutions; (vi) cost management issues, particularly when stakeholders of little means are involved.[43] The parties and tribunal may also need to devise procedures suitable to the handling of multiple claims.

The 2013 Bangladesh Accord, and its more recent 2018 iteration show that businesses are willing to work with national governments, IGOs, NGOs, and groups representing affected individual workers to agree on arbitration as a neutral, enforceable and flexible means to address grievances relevant to business and human rights.

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35 Article 11, FIFA's Human Rights Policy.

36 Article 51.2, International Olympic Committee Host City Contract Principles, available at http://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf

37 Article 51.2 further provides that if, for any reason, the Court of Arbitration for Sport denies its competence, the dispute shall then be determined conclusively by the state courts in Lausanne, Switzerland.

38 Julie Bédard Lea Haber Kuck Timothy G. Nelson, "Business and Human Rights Movement Spurs Development of Remedial Options", Skadden's 2017 Insights, January 30, 2017, available at https://www.skadden.com/insights/publications/2017/01/business-and-human-rights-movement-spurs-developme.

39 IBA Practical Guide on Business and Human Rights for Business Lawyers, available at: https://www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx.

40 See, e.g., Debevoise & Plimpton, "Debevoise Launches Business Integrity Group", 14 September 2016, https://www.debevoise.com/news/2016/09/debevoise-launches-business-integrity-group; Herbert Smith Freehills Business and Human Rights Hub: https://www.herbertsmithfreehills.com/latest-thinking/hubs/business-and-human-rights.

41 Cronstedt, Eijsbouts and Thompson, n.22 above, page 13.

42 James Wood, "The new risk front for GCs – nearly half of contracts have human rights clauses, LB research finds", 8 September 2016, available at https://www.legalbusiness.co.uk/blogs/the-new-risk-front-for-gcs-nearly-half-of-contracts-have-human-rights-clauses-lb-research-finds/

43 In the Bangladesh Accord arbitrations, for example, the PCA and tribunal agreed to reduced rates, and the claimants' counsel are acting pro bono. See Terms of Appointment, https://pcacases.com/web/sendAttach/2237.

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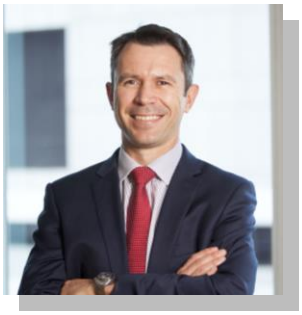

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Australia Signs the Mauritius Convention: How Investor-State Arbitration Might Look With More Transparency

The Mauritius Convention and investor-state arbitration

On 18 July 2017, Australia signed the Mauritius Convention, officially known as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (**Mauritius Convention**). The Mauritius Convention aims to increase transparency in investor-state arbitration by extending the application of the UNCITRAL Rules on Transparency (**Transparency Rules**).

Investor-state arbitration is a dispute resolution method available to foreign investors from countries (states) which are state-party to a treaty or agreement with the state in which the foreign investment is made and that treaty or agreement contains an investor-state dispute settlement (**ISDS**) regime which includes arbitration.

The treaty or agreement is typically a bilateral investment treaty (**BIT**), multilateral investment treaty (**MIT**) or free trade agreement (**FTA**), although not all FTAs contain ISDS provisions. The discussion below includes BITs, MITs and FTAs when it refers to treaties.

A BIT is a binding agreement between two states, by which each state assumes obligations in relation to investments made by parties based in the other state. MITs are similar agreements between a number of states. A state in which an investment is made may be obliged, for example, to promote favourable investment conditions, to treat investors fairly and equitably, and not to undertake expropriation or nationalisation. The certainty and security provided by BITs and MITs is intended to foster investment between the signatories to the treaty.

Australia is a party to 21 BITs with countries throughout the world. Australia also has free trade agreements (**FTAs**) with other significant trading partners, many of which include ISDS provisions, as is the case in the FTAs with China, Korea, and Singapore.

The Mauritius Convention and the Transparency Rules

While allowing for the protection of confidential information, the Transparency Rules provide for the publication of information relating to the arbitration and key documents including the statement of claim and defence, tables of evidence, written submissions, and transcripts of hearings. The Transparency Rules also mandate public hearings and allow opportunities for interested third parties to make submissions in the arbitration.

Currently, the Transparency Rules have limited application. They only apply to investor-state arbitrations initiated under the UNCITRAL Arbitration Rules where the arbitration is initiated under a treaty concluded on or after 1 April 2014 (unless the parties to the treaty or arbitration agree otherwise). The Transparency Rules can apply to arbitrations initiated under the UNCITRAL Rules and based on treaties concluded before April 2014, but only if:

(a) the parties to the *arbitration* (e.g. an investor and a state) agree to apply the Transparency Rules; or

(b) the parties to the *treaty* (e.g. two states) concluded before April 2014 agree after 1 April 2014 that the Transparency Rules apply.

The Mauritius Convention would expand the applicability of the Transparency Rules to any investor-state arbitration based on a treaty concluded before 1 April 2014 where:

(a) the state respondent is a Party to the Convention; and

(b) the investor claimant is either from a state which is Party to the Convention, or the investor claimant consents to the application of the Transparency Rules.

The Mauritius Convention also removes the limitation currently in the Transparency Rules whereby the Transparency Rules only apply to arbitrations conducted under the UNCITRAL Rules.

21 countries across Europe, North America, the Middle East and Africa have signed the Mauritius Convention, but so far it has only been ratified by Mauritius, Canada, and Switzerland. Australia is the first in the Asia-Pacific region to sign up and hopes that its move will encourage other Asian countries to do the same. Merely signing the treaty though does not make it binding in Australia. Australia is not legally bound by the Mauritius Convention's provisions until it ratifies it by depositing an instrument of ratification with the United Nations. This will not be done until the government's Joint Standing Committee on Treaties has had an opportunity to consider Australia's ratification.

Australia's move towards greater transparency in investor-state arbitration is further supported by the recent *Civil Law and Justice Legislation Amendment Bill 2017* (Cth) (**Bill**), which is currently before the Senate. The Bill aims to amend the *International Arbitration Act 1974* (Cth) (**IAA**) to suspend the operation of its confidentiality provisions in certain circumstances to better facilitate the Transparency Rules where they apply in investor-state arbitrations conducted in Australia.[1]

Once Australia ratifies the Mauritius Convention, investor-state arbitrations between Australia and consenting investors or investors from states party to the Convention will become subject to the Transparency Rules regardless of when the treaty underpinning the arbitration was concluded, or the applicable arbitration rules. Similarly, Australian investors engaging in arbitration against foreign states party to the Convention should be wary that the Transparency Rules may apply. As more countries sign up to the Mauritius Convention, transparency will automatically apply to more investor-state arbitrations.

Hypothetical impact of the Transparency Rules on the Philip Morris arbitration

The recent case of *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* [2] illustrates how important transparency could be in investor-state arbitration. In this case, the parties were asked to reach agreement on the applicable standard of confidentiality that should apply to the proceedings. No agreement was reached, with Philip Morris primarily campaigning for privacy. The tobacco giant wanted the procedure as a whole to be conducted confidentially – with hearings held in camera, documents not in the public domain to remain confidential, and awards, decisions, orders and directions of the tribunal to be redacted to protect confidential business information. After receiving submissions from both parties as to what the standard of confidentiality should be, the tribunal made Procedural Order No. 5 which provided that:

(a) awards, decisions and orders of the tribunal were to be published with appropriate redactions;

(b) hearings, meetings, conferences and transcripts were to be private and confidential; and

(c) the parties were free to publish their submissions subject to appropriate redactions.

It appears that the only additional documents to the awards and orders of the tribunal that are public are Philip Morris's notice of claim and notice of arbitration and the Commonwealth's response to the notice of arbitration. No submissions appear to have been made public by either party.

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[1] For more on the proposed amendments to the IAA, see Erika Williams, 'Internationalising the International Arbitration Act' on McCullough Robertson, *The Bench Press* (21 August 2017) <http://mcrbenchpress.blogspot.com.au/2017/08/updated-internationalising.html>.

[2] (PCA Case No. 2012-12) Award on Jurisdiction and Admissibility, 17 December 2015.

The investor-state arbitration initiated by Philip Morris involved a direct challenge to a public welfare measure initiated by the Australian government, being plain packaging legislation covering tobacco products. Had the Transparency Rules applied to that arbitration, hearings would have been public and interested third parties could have made submissions. The transcripts and submissions would also have been made public. Concerned members of the public could have intervened in respect of how any right of Philip Morris to protect its investment in Australia against such a measure should be balanced against Australia's right to regulate on public health issues.

Hypothetical impact of the Transparency Rules on APR's challenge to the effects of the PPSA

Florida-based company APR Energy has foreshadowed a challenge to the operation of the *Personal Property Securities Act 2009* (Cth) (**PPSA**) in a reported arbitration claim against the federal government. APR lost two wind turbines, which were leased to the Australian company Forge Group Power Pty Ltd (**Forge**), after the PPSA caused all interest in the wind turbines to vest in Forge upon it going into administration.

Right now, the Transparency Rules would not apply to this investor-State arbitration because the free trade agreement between Australia and the United Stated was signed almost a decade before the 1 April 2014 date in the Transparency Rules and it is unknown if the arbitration would be conducted under the UNCITRAL Arbitration Rules. However, if this investor-State arbitration went ahead at a time when the Mauritius Convention was in force, the Transparency Rules could, in certain circumstances, become applicable.

If APR's challenge does go ahead (and it faces some jurisdictional hurdles in this respect[3]) and an award in relation to the operation of the vesting provision in the PPSA, which caused APR to lose its turbines is published, the application of the Transparency Rules here would allow others concerned with the tribunal's decision full visibility. Those interested would then have an understanding of how a tribunal may determine another matter involving a foreign investment in Australia similarly affected by the vesting provision of the PPSA.

The availability of clear information about arbitral decisions is a key benefit of increased transparency in investor-state arbitration for foreign investors. Ultimately, transparency in investor-state arbitration increases certainty about the investment landscape in a particular state and can lower the investment risk. The operation of the vesting provision in the PPSA is one example of a matter which could be contested in investor-state arbitration with the decision affecting the status of countless investments. Under the Transparency Rules, most documents relating to the dispute would be published including the decision, allowing other investors to assess where they stand.

Conclusion

Transparency in investor-state arbitration would foster increased public participation in arbitral proceedings, and clearer publicly available information about these types of arbitral proceedings. This would in turn increase public awareness of state contraventions of treaties or the impact that challenges to state regulatory action may have on issues of public interest.

With increased transparency, investors too can gain confidence in the impartiality and consistency of arbitral decisions, assess the risk environment in the state in which they are considering investing, and remain informed about the extent of their investment rights under a treaty.

Australia has not yet ratified the Mauritius Convention and the proposed changes to the IAA have not yet been implemented. However, Australia becoming a signatory to the convention and tabling the Bill are strong indications that Australia is moving towards embracing transparency in investor-state arbitration.

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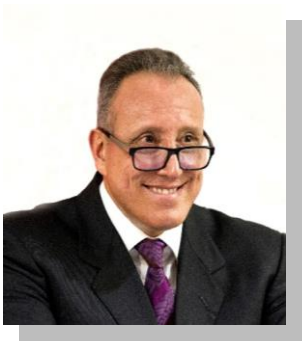
[3] See Erika Williams, 'Turbines Tussle May Test Free Trade Agreement' (2017) 37(5) The Proctor 20.



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Enforcement of Arbitration Agreements Against Non-Signatories: Which Law (the Chicken and the Egg)?

Introduction

Under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), the question of whether a non-signatory to a main contract containing an arbitration clause is bound by the arbitration agreement constituted by that arbitration clause, is a question that may be faced by a national court at different stages of the arbitral process. First, when called upon to enforce an arbitration agreement and stay its court process (under Article II).[1] Secondly, when requested to enforce an arbitral award (under Article V).[2] In both situations, the preliminary question arises: what system of law should be applied in determining whether the parties before the court are bound by the alleged arbitration agreement? While Article V contains an express choice of law (in particular, the law of the putative arbitration agreement, alternatively the law of the seat),[3] Article II is silent as to the choice of law to be applied. Should a national court entertaining an application to stay a proceeding brought against a non-signatory to an arbitration agreement apply its own conflict of law rules to determine the relevant law to be applied? Alternatively, should the court apply the choice of law rule expressed in Article V on the basis that Article II impliedly selects the same choice of law rule?

The issue has recently come before the Australian courts in **Jasmin**.[4] At first instance, Edelman J (before his elevation to the High Court of Australia) opined that on an application for a stay under s 7, if the plaintiff resisting the stay contends that it is a stranger to a contract containing an arbitration agreement, the question of whether the plaintiff is bound by the arbitration agreement (ie. the question of partyhood) is to be determined by the choice of law rules of the forum (which in Australia, at common law, results in application of the lex fori) and not the law of the putative arbitration agreement (as mandated by Article V of the New York Convention). This (obiter) view was affirmed on appeal by two judges of the Federal Court (Beach J, with whom Dowsett J generally concurred). Beach J (like Edelman J)[5] considered it counter-intuitive to suggest that the law to assess whether a contract had been formed should be the law set out in the contract that the plaintiff denied being a party to: [130].[6] On the other hand, Greenwood J dissented on this point, taking the view that

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[1] Implemented by section 7 of the *International Arbitration Act 1974* (Cth) ('IAA').

[2] Implemented by section 8 of the IAA.

[3] Articles 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law on International Commercial Arbitration are to similar effect.

[4] *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2015] FCA 1453; *Trina Solar (US), Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6.

[5] *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2015] FCA 1453, [166].

[6] A similar view was recently expressed by Hammerschlag J in *Kennedy Miller Mitchell Films Pty Limited v Warner Bros. Feature Productions Pty Limited* [2017] NSWSC 1526[63]. His Honour did not refer to Jasmin or consider any competing view based on the structured intergrated .coherence of the New York Convention and the Model Law.

"the structured integrated coherence" of the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') required the same choice of law rule mandated by s 8(5)(b) of the IAA (to the enforcement of an award) to be applied under section 7(2) (to the enforcement of an arbitration agreement), notwithstanding that section 7(2) did not expressly select a choice of law rule): [82].

The issue is reminiscent of the impenetrable brain teaser: "which came first, the chicken or the egg?".[7] With respect, Greenwood J's views are to be preferred to the views of the majority of the Full Court of the Federal Court of Australia and of the trial judge.

Facts

Trina, a US company, entered into a Supply Agreement with JRC, another US company. It provided for arbitration in New York according to New York Law. Under the Supply Agreement, Trina was to supply solar panels to Jasmin, an Australian company. To avoid GST, JRC (a related party to Jasmin) was named as the purchaser under the Supply Agreement. Instead, Jasmin was named as the guarantor. The arbitration clause in the Supply Agreement did not bind the guarantor. The solar panels were delivered late, were of the wrong model, and did not comply with Australian conditions. JRC and Jasmin refused to pay the invoices rendered by Trina. Trina commenced an arbitration against Jasmin and JRC in New York seeking recovery of unpaid invoices of about USD 1.3 million. Jasmin objected to the jurisdiction of the Arbitrator, contending that it was not a party to any arbitration agreement with Trina. In a preliminary ruling on jurisdiction, the Arbitrator found, applying New York law, that Jasmin was bound by the arbitration agreement. Jasmin took no further part in the arbitration.

Shortly afterwards, Jasmin commenced legal proceedings in Australia against Trina seeking damages, for misleading or deceptive conduct in contravention of the *Australian Consumer Law*, in the order of $A30 million. Jasmin sought leave to serve the proceedings out of the jurisdiction upon Trina in the US.

First Instance decision

Edelman J, sitting as a judge of the Federal Court, granted leave to serve the proceedings out of the jurisdiction upon Trina.[8] At the time, he was aware that there was an arbitration on foot in New York and that the Arbitrator had found that she had jurisdiction over Jasmin. Applying the lex fori (ie. Australian law) to determine the question of the existence of the putative arbitration agreement, Edelman J found that Jasmin was not a party, and accordingly it could not be confidently expected that any later stay application brought by Trina pursuant to s7 of the IAA would be successful. Accordingly, his Honour considered that there was no good reason to exercise his residual discretion not to grant leave to Jasmin to serve Trina with court proceedings out of the jurisdiction.

Trina appealed. Following Edelman J's decision, and prior to the hearing of the appeal before the Full Court of the Federal Court, the Arbitrator rendered a final award on the merits against Jasmin and JRC, and Jasmin made application before the New York courts (ie. the courts at the seat) to set aside the final award.

Appeal Decision

The Full Court of the Federal Court of Australia dismissed the appeal. All three members of the Court were of the view that the trial judge's discretion did not miscarry. However, they were divided on the question of the proper law to apply to determine whether there was an arbitration agreement in existence between Trina and Jasmin.

Greenwood J was of the view that to give effect to the "structured integrated coherence" of the international arbitration system, the question whether a party to a stay application under s. 7 of the IAA is a party to an arbitration agreement should be determined by the same choice of law rules selected in s. 8(5)(b) of the IAA (reflecting Article V(1)(a) of the New York Convention) – namely, the proper law of the putative arbitration agreement, or failing any indication thereon, the law of the seat: [82]-[83]. Notwithstanding that the trial judge applied (erroneously) the lexi fori instead of the putative proper law of the arbitration agreement, Greenwood J considered that the trial judge could not be satisfied (on a leave to serve-out application on the incomplete material before him) that a stay application would in due course be successful: [87] and [94]. Accordingly, in Greenwood J's view, the trial judge's discretion did not miscarry.

On the other hand, Beach J (with whom Dowsett J generally concurred), endorsed the view of the trial judge that a distinction applies between the law to

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[7] *Malini Ventura v. Knight Capital Pty Ltd* [2015] SGHC 225, [1]

[8] *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* [2017] FCA 1453.

be applied to determine the existence (ie. contract formation) and validity of an arbitration agreement. While validity is to be tested according to the putative proper law of the contract, Beach J considered that the choice of law rules in Australia dictated that the lex fori be applied to determine questions of contract formation (following Brennan and Gaudron JJ in *Oceanic Sun Line Special Shipping Co Inc v. Fay*).[9] I note that this is not a universal approach. Some jurisdictions (including the United Kingdom) apply the law of the putative contract to determine the question.[10]

Beach J was not persuaded that the specified choice of law rules in s 8(5)(b) [on an enforcement application] should be implied into s 7 [on a stay application]. It is widely accepted that s 8(5)(b) [and its counterparts in other jurisdictions], while speaking in terms of "validity", extends to the ground that the award debtor is not a party to the arbitration agreement: [164].[11]

Beach J observed (at [182]):

> "The fact that s 8(5)(b) provides for a choice of law different to the law of the forum in relation to whether an "arbitration agreement" exists to which a party is bound, does not entail that the same choice of law needs to be made for s 7(2)… s 7(2) contains no provision requiring the creation of a legal fiction purportedly justified by some perceived consistency with s 8(5)(b). Notably, Trina US has not cited any compelling international authority that supports its position…"

Beach J further noted (at [184]):

> "…if there are anomalies that now arise because the Final Award has been handed down, they should properly be assessed and dealt with in any stay application under s 7(2). But the idiosyncratic circumstances of the present case arising because the Final Award has now been handed down, cannot drive the proper analysis concerning s 7(2) and the choice of law question."

New York proceeding

After the hearing in the Full Court and shortly before it handed down its decision, a New York Court dismissed Jasmin's application to set aside the Arbitrator's final award.[12] The New York Court undertook a de novo review of the question of jurisdiction. Applying New York law, it found that Jasmin was bound by the arbitration agreement.

First, because JRC was acting as Jasmin's agent when it entered into the Supply Agreement. Alternatively, because an equitable estoppel (as understood in New York law) applied to preclude Jasmin from denying that it was bound by the arbitration agreement, having regard to the direct benefits that it received under the Supply Agreement and its involvement in both in its negotiation and implementation. There is no mention of the New York Court proceedings in the Full Court's decision.

Comment

Gary Born notes that there have been a wide range of divergent views expressed on this issue, and resulting uncertainty, but that in order to produce a consistent and effective legal regime for the recognition and enforcement of international arbitration agreements, and to avoid the possibility of inconsistent results, the same choice of law rules should apply under both Articles II and V at the different stages of the arbitration process. [13] The author respectfully agrees.

If, as can be expected, Trina seeks to enforce the award in Australia against Jasmin, any contention by Jasmin, in resisting enforcement, that it was not a party to the alleged arbitration agreement falls to be determined by New York law. It is highly unlikely that on an enforcement application the Federal Court would find (contrary to the finding of the New York Court) that under New York law Jasmin is not bound by the arbitration agreement contained in the Supply Agreement.[14]

This leaves open the unsavoury spectre that the Federal Court will enforce the Arbitrator's award

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9 (1988) 165 CLR 197), 133-134.

10 See *Dicey, Morris and Collins on The Conflict of Laws* (15th Edition), [32-108]: The effect of the Rome 1 Regulation on the law applicable to contractual obligations (in force in the United Kingdom) is to refer questions relating to the existence of a contract to the putative governing law.

11 Referring to *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) VR 202 [171] and *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, 77.

12 *Trina Solar US, Inc. v JRC-Services LLC and Jasmin Solar Pty Ltd* (D NY, 16-CV-2869 VEC).

13 Gary Born, *International Commercial Arbitration*, vol 1 (Kluwer Law International, 2nd ed, 2014), 493-497.

14 Thus, see *Astro Nusantra International BV v PT Ayunda Mitra* [2016] CACV 272/2015 where the Hong Kong Court of Appeal followed the Singapore Court of Appeal's view of jurisdiction *in PT First Media TBK v Astro Nusantra International BV* [2013] SACA 57, where an international arbitration award made in Singapore was sought to be enforced in Hong Kong.

and at the same time allow the Federal Court proceeding to be litigated before it. It seems incongruous that a stay application would not be granted in circumstances where the New York courts have confirmed the Arbitrator's ruling that Jasmin is bound by the arbitration agreement (unless it could be said that some of the matters alleged in the Federal Court proceeding fall outside the scope of the arbitration agreement).

The scheme of the New York Convention arguably requires courts outside the seat to respect an arbitral tribunal's assessment of its own jurisdiction, subject to review by courts of the arbitral seat.[15] Here, an Arbitral Tribunal had already found it had jurisdiction, and the supervising court at the seat had confirmed that decision. It is not known why the Full Court did not wait to see how the New York courts decided the setting aside application (if, indeed, the matter was brought to its attention at all). Neither the trial judge, nor the majority of the Full Court, placed any weight on the fact that an Arbitral Tribunal had assumed jurisdiction under the putative arbitration agreement.

Separately, it seems incongruous that on a stay application, the question of existence of an arbitration agreement should be decided according to the lex fori while the question of validity should be decided according to the putative law of the arbitration agreement, when on an enforcement application both questions fall to be determined by the putative law of the arbitration agreement. Albert Jan Van den Berg observes in his seminal text (at p. 126):[16]

> "A systematic interpretation of the Convention, in principle, permits the application by analogy of the conflict rules of Article V(1)(a) to the enforcement of the agreement. It would appear inconsistent at the time of the enforcement of the award to apply the Convention's uniform conflict rules and at the time of the enforcement of the agreement to apply possibly different conflict rules of the forum. It could lead to the undesirable situation of the same arbitration agreement being held to be governed by two different laws: one law determined according to the conflict rules of the forum at the time of the enforcement of the agreement, and the other determined according to Article V(1)(a) at the time of enforcement of the award. The silence of the Convention on this point in connection with the enforcement of the agreement is not to be interpreted *a contrario*, as it is due to the last minute insertion of the provisions relating to the arbitration agreement in the Convention, which, as previously noted, has entailed several omissions. Rather, **the Convention's provisions must be interpreted on the basis of an integral interrelation between them**… Article II can be deemed to incorporate Article V(1)(a). (emphasis added)

The main argument against applying the proper law of the putative agreement is a "boot straps" argument (i.e. that it is unfair to test the question of whether there is a binding contract by application of the proper law of the contract that one of the parties disputes). That may be so, but international commercial arbitration has similar fictions (for example, the separability doctrine which allows an arbitrator to rule that the overarching contract, in which the arbitration agreement is contained, is void). Such fictions are entrenched for pragmatic reasons.[17] Applying the law of the putative arbitration agreement on a stay application is more consistent with the doctrine of kompetenz-kompetenz which underpins the Model Law, the negative effect of which is that courts should give the arbitral tribunal the first opportunity to rule on questions of jurisdiction.[18] Conversely, adopting a forum's idiosyncratic choice of law rules on a stay application may usurp the role of the arbitral tribunal, and give rise to potentially inconsistent decisions on the existence of an arbitration agreement by the court hearing the stay application, the supervising court of the seat and the enforcement court. Indeed, Born stridently criticises this approach as "unsatisfactory and wrong".[19]

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15 Gary Born, *International Commercial Arbitration* vol 2 (Kluwer Law International, 2nd ed, 2014), 1052-3.

16 Albert Jan Van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981).

17 Hancock Prospecting Pty Ltd v Rinehart [2017] FCAFC 170 [344]: "The separability principle is a rule, reached and laid down pragmatically, rather than logically, by courts in common law and civil law jurisdictions over decades and found in arbitral rules and conventions, that the agreement to arbitrate in the arbitration clause and the substantive agreement in which one finds the clause should be viewed as separate and distinct agreements."(emphasis added)"

18 UNCITRAL, *Report of the UNCITRAL on the Work of its Eighteenth Session: Discussion on Individual Articles of the Draft Text* (UN Doc A/40/17) (3–21 June 1985) pp 31–32, at [157]–[161].

19 Born, op cit, p. 495.

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Fiji Adopts UNCITRAL Model Law on International Commercial Arbitration

On 15 September 2017, the Parliament of the Republic of Fiji passed *the International Arbitration Bill 2017*. Parliament assented to the Bill on 18 September 2017. The legislation enacts the *Model Law of the United Nations Commission on International Trade Law* ('the Model Law') and implements the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the New York Convention').

The passing of the Bill is a significant development. As it stands, Fiji and the Cook Islands are the only Pacific Island States to accede to the New York Convention and adopt the Model Law. Fiji is the 24th State in the Asia Pacific and the 76th state worldwide to adopt the Model Law.[1]

OVERVIEW OF THE MODEL LAW AND THE NEW YORK CONVENTION

The New York Convention ensures the enforceability of an arbitral award by requiring contracting states to give effect to private agreements to arbitrate and to recognise and enforce foreign arbitral awards.

The Model Law is a legislative framework intended to be used by States as a template when implementing new legislation or revising existing legislation related to international commercial arbitration. The legislation supports party autonomy and limits judicial interference in the arbitral process. It contains well-established international arbitration principles and reflects 'worldwide consensus on key aspects of international arbitration practice'.[2]

PURPOSE OF THE ENACTMENT

Investment in Fiji is 'one of the steadiest contributors to gross domestic product'.[3] Despite this stability, existing legislation inadequately dealt with international disputes and as a result, did not encourage international investment.[4] With this in mind, the new legislation aims to promote greater direct foreign investment in Fiji by improving the dispute resolution mechanism.[5]

The objectives of the legislation are to provide for the conduct of international arbitrations based on the Model Law; to promote uniformity of national laws pertaining to international arbitration proceedings; to align the administration of arbitrations in the country to the Model Law and to give effect to the New York Convention on the recognition and enforcement of foreign arbitral awards and for related matters.[6]

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1 Dominique Hogan-Doran SC, Fiji enacts UNCITRAL Model Law on International Commercial Arbitration (1 October 2017) http://dhdsc.com.au/arbitration-blog/2017/10/1/fiji-enacts-uncitral-model-law-on-international-commercial-arbitration.

2 UNCITRAL, Introduction to 1985 Model Law, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

3 Standing Committee on Justice, Law and Human Rights, Parliament of the Republic of Fiji, Report on the International Arbitration Bill 2017 4. http://www.parliament.gov.fj/wp-content/uploads/2017/02/Report-on-the-International-Arbitration-Bill-No.-37-of-2017.pdf

4 Ibid.

5 Ibid.

6 *International Arbitration Bill 2017* (Fiji), Long title.

FEATURES AND OPERATION OF THE NEW LEGISLATION

The new legislation will replace the existing *Fiji Arbitration Act 1965* only with respect to 'international' arbitrations as defined under section 4(3) of the Act.

In effect, the new legislation will apply if one of the parties is not domiciled in Fiji, if the place of arbitration is outside of Fiji, if a substantial part of the obligations of the commercial relationship are to be performed outside of Fiji, or the place with which the subject matter of the dispute is most connected is outside of Fiji.[7] The existing *Fiji Arbitration Act 1965* will continue to apply to domestic arbitration.

PERTINENT AREAS ADDRESSED BY THE NEW LEGISLATION

Notable provisions based on the Model Law are the inclusion of a detailed definition of an arbitration agreement at section 11 (based on Article 7 of the Model Law), provisions on the granting and enforcement of interim measures at sections 23 to 33 (based on Articles 17 and 17A-J of the Model Law), a requirement for Fijian courts to refer parties to arbitration if the court is seized of a matter which is the subject of the arbitration agreement, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed at section 12 (based on Article 8(1) of the Model Law), providing the arbitral tribunal with the discretion to rule on its own jurisdiction and specifying that an arbitration clause in a contract is separable from the other terms of that contract at section 22 (based on Article 16 of the Model Law).

The legislation also contains provisions adapted from legislation in leading regional and international arbitration seats of Singapore, Hong Kong and Australia. These include a definition of an 'arbitral tribunal' that now includes an 'emergency arbitrator'. This has the effect of allowing the enforcement of orders or awards by emergency arbitrators. There is also an express guarantee of confidentiality (subject to exceptions),[8] provisions dealing with the liability and immunity of arbitrators and a provision clarifying that an interim measure or award may be refused enforcement on public policy grounds.[9]

CONCLUSION

The new legislation aims to address the investment deterrents imposed by reason of a dispute resolution system that previously inadequately dealt with international commercial arbitration. The new legislation provides Fiji with 'one of the most advanced and up to date legislative regimes both regionally and internationally'. Such legislation will be sure to assist Fiji in its goal of becoming a venue of choice for international arbitration and supporting Fiji's future economic development.

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[7] Ibid s 4.
[8] Ibid s 45.
[9] Ibid s 52(2)(b)(ii).

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Book Review: Law, Practice and Procedure of Arbitration

by Datuk Professor Sundra Rajoo, 2nd Ed., Lexis Nexis, 2017, 1290pp, hardback and online,
ISBN/ISSN: 9789674006099

Law, Practice and Procedure of Arbitration offers a wide-ranging analysis and discussion of the principles, practice and procedure of arbitration with a particular emphasis on Malaysia.

Datuk Professor Sundra Rajoo is the Director of the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**) and a Chartered Arbitrator.[1]

The text deals in a comprehensive manner with the foundational topics in international arbitration[2], but with a greater emphasis on practice and the practical aspects of the arbitral process. With its easy to read style and in-depth coverage of the subject-matter, this text will appeal to practitioner and student alike. Its coverage of general law principles as they relate to the various topics covered in the book will be especially useful to non-lawyer arbitrators, for example, engineers, quantity surveyors, architects, or claims professionals.

The second edition of the text is published 14 years after the first edition appeared. The first edition dealt primarily with arbitration law, practice and procedure in Malaysia as it stood when the now repealed *Arbitration Act* 1952 was still in force. The second edition focuses on the present Malaysian Arbitration law, the *Arbitration Act* 2005, which is substantially based on the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**)[3].

Malaysia is making great strides towards becoming a leading hub for international arbitration within Asia. With the Model Law as its foundation, the Arbitration Act 2005 is generally consistent with the principles of international arbitration practice[4]. Malaysian courts are supportive of arbitration[5], adopting a largely non-interventionist approach[6]. The KLRCA with its large world class facilities[7] has been revitalised under the leadership of Professor Rajoo. Amendments to the Legal Profession Act were enacted so that non-Malaysian qualified lawyers may appear in arbitral proceedings in Malaysia either as counsel or arbitrator[8].

The KLRCA Arbitration Rules were revised in 2013 to include emergency arbitrator provisions, empowering the tribunal to award interest both

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1 See https://klrca.org/about-klrca-our-director.php; http://sundrarajoo.com/profile/

2 As does, for example, *Redfern and Hunter on International Arbitration* 6th Ed, Oxford University Press, 2015

3 Which came into operation on 15 March 2006 repealing the Arbitration Act 1952 and was subsequently amended in 2011

4 *The Asia-Pacific Arbitration Review 2016, Section 2: Country chapters Malaysia* by Jovn Choi Fuh Mann, Andre Yeap

5 Ibid, Fuh & Yeap

6 *Arbitration procedures and practice in Malaysia: overview* by Rabindra S Nathan, Shearn Delamore & Co, 1.10.16 available at https://uk.practicallaw.thomsonreuters.com/8-634-5916?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

7 at the magnificent Bangunan Sulaiman, Jalan Sultan Hishamuddin, Kuala Lumpur

8 Ibid, Fuh & Yeap

before and after the award, enhancing the confidentiality of arbitrations, with a revised schedule of fees and administrative costs to maintain KLRCA's claimed 20% cost advantage over other similar institutions.[9] The KLRCA Arbitration Rules have now been recently revised in 2017 including new provisions for joinder of parties, a new power of the Director of the KLRCA to consolidate disputes, and for the technical review of Awards.[10] The KLRCA Fast Track Rules were also revised in 2013 and the KLRCA i-Arbitration Rules 2013 (which provide for a shariah compliant arbitral process) were introduced. Recently the KLRCA, as a world first for an arbitration institution, launched its suite of Standard Form of Building Contracts[11].

In this second edition, Datuk Professor Rajoo has expanded and updated the first edition with developments brought about by the Arbitration Act 2005[12]. While the text provides a thorough detailed guide on arbitration law and practice in Malaysia, it also makes frequent reference to cases in other Model Law Asia Pacific countries, as well as extensive reference to English authorities (given their global prominence).

By far the most referenced Arbitration law is of course the Malaysian Arbitration Act 2005; but the most referenced foreign Arbitration law is the English Arbitration Act 1996. The English Arbitration Act 1996, while heavily influenced by the Model Law, remains distinct.[13] References also appear to the New Zealand Arbitration Act 1996 (from which the Malaysian Arbitration Act 2005 drew inspiration), the Singapore International Arbitration Act, and a variety of Arbitration Laws from the region and globally. There are many references to a variety of Institutional Arbitration Rules, the most prominent being the home grown KLRCA Arbitration Rules. Extensive reference is made to the ICSID Arbitration Rules, the ICC Rules of Arbitration, the LCIA Arbitration Rules, the SIAC Rules, the UNCITRAL Arbitration Rules and Model Law, the ICSID Convention, not to mention the New York Convention.

The hardcover text includes an e-book which can be downloaded upon purchase of the hard copy. The e-book includes a very helpful and functional "Search within Book" facility, and links from the table of contents to the text, providing for convenient and easy navigation.

The text follows the usual general framework of a work of this kind with a Malaysian and practical focus.

The section on *Arbitration Agreements* has a useful checklist for the contents of an arbitration agreement and deals in detail with the major topics of the separability of arbitration clauses (with reference to the seminal House of Lords' decision in the *Fiona Trust* case),[14] the jurisdiction of the Arbitral Tribunal and parties, and the scope of the arbitration agreement.

The part of the text entitled *Breach of Arbitration Agreements and Stay of Court proceedings* deals not only with stays of concurrent court proceedings (including applicable procedure and anti-suit injunctions) but conditions for obtaining a stay and the terms and effect of stays.

The section *Commencement of Arbitration & Establishment of the Arbitral Tribunal* presents a detailed discussion of the issues pertaining to the initiation of the arbitral process and appointment of the tribunal including detailed reference to the procedures under the Malaysian Arbitration Act 2005. Under the Malaysian Act the Director of the KLRCA is the default appointing authority where the parties have failed to agree on an appointment[15]. If the KLRCA Director fails to make an appointment within 30 days of being requested to do so, the parties may request the High Court to make the appointment[16]. There is an examination of the removal of an arbitrator, and the remuneration of arbitrators.

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9 Ibid, Fuh & Yeap

10 effective from 1 June 2017, see https://klrca.org/KLRCA-Revised-Arbitration-Rules-2017

11 https://klrca.org/announcements-announcements-details.php?id=161

12 http://sundrarajoo.com/portfolio-posts/law-practice-and-procedure-of-arbitration-2nd-edition/

13 Arbitration Guide, IBA Arbitration Committee, England and Wales by Andrea Dahlberg and Angeline Welsh; Sara Lembo (31 January 2010). "The 1996 UK Arbitration Act and the UNCITRAL Model Law - a contemporary analysis"; Arbitration procedures and practice in the UK (England and Wales): overview by Justin Williams, Hamish Lal and Richard Hornshaw, Akin Gump LLP (1 July, 2017)

14 *Fiona Trust and Holding Corporation v Privalov* [2007] 4 All ER 951; [2007] UKHL 40

15 S 13 Arbitration Act 2005; p. 296 of the text

16 Ibid, s. 13 Arbitration Act 2005; p. 296 of the text

The work offers many practical insights as to the *conduct of arbitrations* and the *procedure at the hearing*, *default by parties* and its consequences as well as *party representation* in arbitrations including the position of foreign lawyers who are not excluded from representing parties in international and domestic arbitrations in Malaysia[17].

The discussion on *Evidence in Arbitrations*, includes a general discussion followed by the position of the Arbitral Tribunal and the Courts in Malaysia under the Arbitration Act 2005 including the power given to Tribunals to order that any evidence be given on oath, or affirmation, the English position on evidence in arbitrations seated there and a discussion of the relevance of the IBA Guidelines on the taking of evidence in international arbitration. The text discusses general issues of evidence, including evidential weight, witnesses, receiving and excluding evidence, as well as the interesting issue of the Tribunal relying on its own knowledge and experience and the crucial issue of expert evidence.

There is a comprehensive analysis of the *Powers, duties and liability of the Arbitral tribunal* and of the support for arbitration provided by the Malaysian High Court.

As might be anticipated there is a thorough examination of the *Arbitral Award* including the requirements of an award, mistakes and omissions remedies, the effect of a valid award, interest and costs, settlement offers and the assessment of costs, with a chapter on each topic. Challenging an award, and applications to set aside awards, as well as award enforcement are also given detailed and learned consideration.

The principle enshrined under Malaysian law is the internationalist principle that "an arbitration award is final, binding and conclusive and can only be challenged in exceptional circumstances"[18]. Topics covered include correction and interpretation of an award, recourse against an award including applications to set aside an award including under s. 37 Arbitration Act 2005 which is modelled on Art 34 of the Model Law. Examples of arbitral misconduct occasioning breaches of natural justice are provided[19].

The vexed subject of conflict of laws in arbitration including the choice of law applicable to the arbitration agreement and arbitration proceedings is elucidated. As the author states, "it is common that arbitration clauses in international commercial contracts do not contain a specific provision defining the law applicable to arbitration agreements (and that) identifying (such) law, has proven to be a complex process…"[20]. This issue is also pursued in the Neil Kaplan Lecture by the Hon James Spigelman QC, "The Centrality of Contractual Interpretation – a Comparative Perspective,"[21] who suggests that "an express choice of law clause governing the arbitration agreement is advisable in a case where the governing law of the agreement and the choice of the seat diverge"[22] as "private international law rules for choice of law vary so much from one legal system to another, and the principles are so discretionary, that on many occasions different decision-makers quite reasonably, reach divergent conclusions"[23].

The text provides a valuable introduction to three significant and specialized forms of arbitration, *Investment Arbitration*, *Sports Arbitration* and *Maritime Arbitration*.

The last section is devoted to arbitration in Malaysia, which includes a detailed examination of arbitration under the KLRCA Rules, and statutory adjudication under CIPAA 2012[24].

There are also useful appendices including the Arbitration Act 2005, and the KLRCA Arbitration Rules and i–Arbitration Rules, and the CIArb International Practice Guidelines 2015-2016.

A List of Legislation and Rules provides reference with weblinks to leading Arbitration laws and soft laws, guidelines, codes and notes.

Legal and arbitration practitioners and students will be able to turn to *Law, Practice and Procedure of Arbitration* time and again for valuable statements of the law pertaining to arbitration, practice tips and summaries of procedure. *Law, Practice and Procedure of Arbitration* is a valuable and learned addition to the library of all those who practice in arbitration in Malaysia but also those in other parts of Asia and globally.

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17 Section 37A Legal Profession Act 1976

18 Page 737 referring to the chapter 14 "Challenge of Arbitral Awards" by the Hon Justice Dato' Mohamad Ariff Bin Md Yusof in *Arbitration in Malaysia: A Practical Guide*, Sweet & Maxwell Edition,2016 (Ed Rajoo and Koh)

19 Page 769

20 Page 819

21 Hong Kong, 27.11.13, see: http://neil-kaplan.com/wp-content/uploads/2013/08/KAPLAN-LECTURE-27.11.13.pdf

22 Ibid Spigelman at p. 16

23 Ibid Spigelman at p. 17

24 Construction Industry Payment and Adjudication Act 2012, see also *Judicial Review of Adjudication Under CIPAA – An Australian Perspective on The Obligation of An Adjudicator to Comply with Natural Justice* by JK Arthur http://msadj.org.my/downloads/newsletters/msa_newsletter_2014Q3Q4.pdf

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