

THE

ACICA REVIEW

JUNE 2018



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THE

**ACICA
REVIEW**

June 2018 | Vol 6 | No 1

ISSN 1837 8994

Contents

President's Welcome	2
Secretary General's Report	3
Report by the AMTAC Chair	6
ICCA Congress 2018	8
Case Note: Trans Global Projects v Duro Felguera Australia	11
Ethics in arbitration – individual obligations – global consequences	14
Director's fury over road block to litigation	24
Third Party Funding Regulation; Red Tape or Green Lights?	28
2018 International Arbitration Survey: The Evolution of International Arbitration	32
Real life examples of using Arbitration to solve commercial problems	34
Australian Perspectives on International Commercial Dispute Resolution for the 21st Century: A Symposium	36
Is Party Autonomy for Fair Resolution or Extension of Disputes?	39
Report on the University of Sydney Law School's Participation in the Willem C Vis International Commercial Arbitration Moot Competition	44
News in brief	46

THE ACICA REVIEW

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President's Welcome

Welcome to the latest edition of the ACICA Review.



As the ICCA Congress sails into the sunset as a distant memory it is worth reflecting on what ACICA and our colleagues at AMINZ achieved. Australia's global appeal and our capacity to host major international events were key factors that saw over 900 arbitration lawyers from over

60 countries travel to Sydney for the 24th ICCA Congress. The Congress can only be described as a triumph!

The ICCA Congress theme of evolution and adaptation – the future of arbitration focused on sharing knowledge and setting the agenda for improving the processes of arbitration, conciliation and other forms of resolving international commercial disputes.

The attractiveness of Sydney combined with the progressive Congress program and Australia's geographic proximity to its many Asia Pacific neighbours, all contributed to the higher than expected delegate numbers.

The Congress has widely been declared as the best ever. This was the first time the Congress has been hosted in Australia and the Oceanic region since the first Congress in Paris in 1961. Hosting an ICCA Congress is like hosting an Olympics for the Arbitration community and thanks to the leadership of Congress chair Doug Jones AO, with assistance from our professional conference organiser, ICMS Australasia, and Tony Samuels, Jim Spigelman AC, Deborah Tomkinson, Samantha Wakefield, Andrea Martignioni, Julie Soars, and the members of the marketing and social committees, we did so very successfully.

I have no doubt that the ICCA Congress will further 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 with a supportive judiciary

and premier facilities for the hearing of proceedings. Our sponsors, which include all of our corporate members made it possible for us to give delegates to the Congress a uniquely Australian experience.

My colleagues and I on the Host Organising Committee did not want to create a standard format Congress. Instead we wanted delegates to experience iconic Sydney, engage new contacts, form alliances, and build a strategy for what we would do when the Congress ended. It was an incredible experience working on such a high-profile event that I know will leave enduring legacies in the years ahead for the broader arbitration community in Australia.

The Queenstown event immediately following the Congress was equally a great success, with an excellent program covering emerging topics in the arbitration world such as climate change disputes, which is an issue particularly relevant to our region.

I am already in discussions with colleagues in Chile to organise a one day satellite event during the APEC meeting next year in Santiago around Australia as the preferred venue for resolving disputes between Chinese and South American parties arising out of Chinese investments in South America. In addition, we are also developing a conference program around dispute resolution of climate change related disputes. While the Congress may seem a distant memory the next focus must be on leveraging the goodwill the ICCA Congress has generated towards Australia and events such as the APEC satellite event in Santiago next year and developing a program regarding the resolution of climate change disputes are steps in the right direction.

We now set our immediate sights to Australian Arbitration Week which will be taking place in Melbourne in the week of 15 October. I hope to see you at this event.

Alex Baykitch AM
President



ICCA 2018 Opening Ceremony,
Sydney Opera House

Secretary General's Report



International Council for Commercial Arbitration (ICCA) Congress 2018 Sydney

ACICA has enjoyed a busy start to 2018, with our focus from the outset being to ensure the success of the ICCA 2018

Congress in Sydney. As outlined

in the President's welcome, this was achieved not least due to the efforts of those who gave so much of their time to be involved in its organisation. ACICA is very grateful to all who were involved with the various committees!

From the captivating Opening Ceremony in the iconic Sydney Opera House, the live Australian animal display, and to the star-studded Congress Dinner featuring

indigenous entertainment and Australian and New Zealand flavours, we planned to take all delegates on a journey across Australia to experience in a short space of time, much of what this unique country has to offer.

Our two Keynote Speakers, The Honourable Chief Justice James Allsop AO and the Honourable Chief Justice Tom Bathurst AC, delivered exceptional addresses, setting the scene and the tone for the Congress. The immense programme developed by the ICCA Programme Committee canvassed an extraordinary range of topics, with arbitration specialists from all corners of the globe debating where the future lies for international commercial and investment treaty arbitration. A more detailed outline of the Congress sessions may be found later in this Review. ACICA was also pleased to support the Young ICCA Soap Box Debate, held on 18 April at the conclusion of the Congress which featured three stimulating mini debates.



ICCA 2018 Gala Dinner Performance



Professor Doug Jones AO, Congress Chair and Professor Janet Walker at the ACICA Exhibition



ACICA takes this opportunity to thank all our generous sponsors, in particular the Beijing Arbitration Commission (BAC) (Diamond Sponsor), Câmara de Comércio Brasil-Canadá Centro de Arbitragem e Mediação (CAM/CCBC) (Platinum Sponsor) and American Arbitration Association (AAA) (Ruby Sponsor) and Foundation Sponsors, Allens Linklaters, Corrs Chambers Westgarth, Herbert Smith Freehills and King & Wood Mallesons for their dedication to, and support of, ICCA 2018 Sydney.

AMINZ-ICCA International Arbitration Day

The follow on conference, hosted by the Arbitrators' and Mediators' Institute of New Zealand, was a fantastic event and a wonderful compliment to the Sydney Congress. Held in picturesque Queenstown, delegates were treated to two special social events at boutique wineries in the Otago Valley and a thought-provoking programme in which delegates were challenged to consider what international arbitration's response should be in order to address current issues such as climate change and gender equity. Our thanks to AMINZ and the members of the conference working group, in particular to John Walton and Deb Hart, who worked alongside the ICCA 2018 team and who brought together this exceptional ad-on conference event.

Welcome to New ACICA Executive Members!

Following the ACICA AGM held at the end of April 2018, we welcome to the ACICA Executive two new members – Brenda Horrigan, Partner, Herbert Smith Freehills and Jonathon Redwood, Barrister, Banco Chambers. We also extend our deep gratitude to Doug Jones AO and David Fairlie, who have stepped down from the ACICA Executive, for their many years of dedicated service on the Executive and we look forward to continuing to work with them as a part of the ACICA Board.



Visiting delegation from Sri Lankan Attorney General's Department

In collaboration with the University of New South Wales and Australia Awards, a group of ten senior lawyers of the Sri Lankan Attorney General's Department (pictured above) recently visited Sydney to participate in a one week intensive course on International Commercial Arbitration, held 30 April to 4 May 2018.

Course convenor, Damian Sturzaker (Partner, Marque Lawyers and Visiting Professorial Fellow at UNSW) was joined by a host of guest speakers including the Honourable James Allsop AO (Chief Justice of the Federal Court of Australia), Malcolm Holmes QC (Eleven Wentworth), Bridie McAsey (Treasury Department), Jo Delaney (Partner, Baker McKenzie), Daniel Meltz (Twelve Wentworth Selborne), Dr Wolfgang Babek (Partner, Buse Heberer Fromm), Dr Chris Ward SC (Six St James Hall), Richard Braddock (Partner, Lexbridge Lawyers), Mary Walker (Nine Wentworth), Lucy Martinez (Independent Consultant, Counsel and Arbitrator) and myself.

Topics over the week included the law, rules and institutions relevant to the Asia Pacific region, the issues relating to commencing arbitral proceedings and conducting the hearing before concluding with investor state disputes and treaty negotiations (of which Sri Lanka has experience, having participated as the state in one of the earliest ICSID cases).

In addition to lectures and workshops hosted by the Law Society, UNSW and Baker McKenzie in the week, ACICA was delighted to host the second day of the course which in addition to lectures from Mr Sturzaker, Mr Holmes QC and myself, saw participants put through their paces via moots on arbitral jurisdiction and challenges to arbitrators. The day was capped with light food and drinks and an official welcome on behalf of ACICA by Brenda Horrigan

(Partner, Herbert Smith Freehills, ACICA Board Member). The course was a giant success on all accounts and we hear that the participants are keen to ensure that their fellow colleagues back in Sri Lanka are given similar opportunities to visit Sydney to participate in the not too distant future. Should there be a repeat ACICA will be honoured to host again! ACICA's thanks to Damian Sturzaker and John Oddy of Marque Lawyers whose efforts ensured the day ran smoothly, to Ruimin Gao from King & Wood Mallesons who kindly provided her time to assist with the afternoon workshops and to Brenda Horrigan for making our guests feel welcome.

Australian Arbitration Week 2018

Australian Arbitration Week 2018 will be held for the first time in Melbourne in the week of 15 October 2018. A Calendar of Events will be made available closer to the time. The lead event for the Week, the 6th International Arbitration Conference, co-presented by ACICA, CI Arb Australia and the Business Law Section of the Law Council of Australia, will be held on Wednesday, 17 October 2018. Please Save the Date in your diaries!

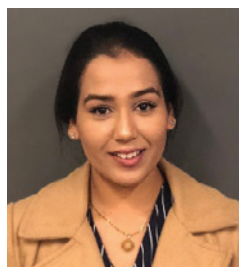
You can keep up to date with ACICA events throughout the year by keeping an eye on the Events Section of the website.

ACICA and ADC Volunteer Intern Program

We have been fortunate to be joined by another fantastic group of hard-working interns who have volunteered with ACICA and the Australian Dispute Centre in the first half of 2018



Kieren Maschio
University of
New South Wales



Jaspreet Kaur
Macquarie University



Jasper Highwood Anisi
University of
New South Wales



Abigail Jacks
University of
New South Wales



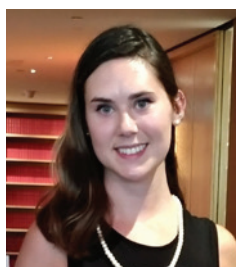
Alexandra Einfield
University of Melbourne



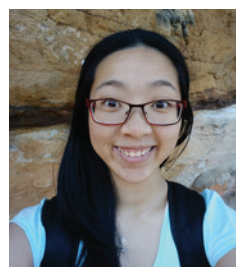
Clemence Bernard
University of Sydney



Clarence Ma
University of
New South Wales



Nicole Gougeon
Washington University
School of Law: St. Louis,
Missouri



Meihua Gong
University of
New South Wales

Report by the AMTAC Chair



ICCA Congress 2018

Last April, the International Council for Commercial Arbitration (ICCA) held a very successful Congress in Sydney. This drew together arbitrators and practitioners alike from all around the world and covered all spheres in which commercial

arbitration is used as a dispute resolution mechanism, including maritime law. The Congress provided informative papers from and stimulating discussions led by an array of internationally recognised arbitrators and practitioners, as well as an active social programme. It also provided the opportunity for new contacts to be made and old contacts to be renewed, including within the maritime arbitration community. To this end, the AMTAC banner was proudly displayed at the ACICA booth, reminding those attending the Congress of AMTAC's role in promoting arbitration in Australia in the resolution of maritime and transportation disputes. ACICA and the members of the ICCA Organizing Committee are to be congratulated on their contribution to the great success of the Congress, which proudly showcased what Australia and Australian arbitration practitioners can offer the international arbitration community, including in the area of maritime law.

The next ICCA Congress will be held in Edinburgh in May 2020. But before then, the International Congress of Maritime Arbitrators (ICMA) will be holding their next Conference (ICMA XXI) in Rio de Janeiro in March 2020. Australian arbitration practitioners, including those in the maritime sphere, are encouraged to attend these events.

AMTAC 12th Annual Address

This year's 12th Annual AMTAC Address will be presented by Justice Steven Rares of the Federal Court of Australia on 29 August 2018. Justice Rares will be well known to the maritime law community in Australia. He is currently both the National Convening Judge and NSW Registry Convening Judge for the Court's Admiralty and Maritime National Practice Area. His Honour is also on the NSW panel for the International Commercial Arbitration sub-area of the Court's Commercial and Corporations

National Practice Area (in particular as the Admiralty and Maritime representative). Justice Rares has also previously spoken and written on international arbitration, especially in the admiralty and maritime context. The Address will be held in Sydney and video-linked live by the Federal Court to the other States and territories. Further information will be circulated closer to the event. But in the meantime, members of ACICA and AMTAC should save the date.

IMLAM

As foreshadowed in my report in the December 2017 ACICA Review, the 19th International Maritime Law Arbitration Moot (IMLAM) will be held this year in Brisbane from 29 June to 3 July 2018. AMTAC is a proud supporter and sponsor of the IMLAM competition, including as the sponsor of the Spirit of the Moot prize that is awarded at the end of the competition. AMTAC also proudly supports IMLAM's promotion of international arbitration in a maritime context amongst budding arbitration practitioners of the future. Any one who will or can be in Brisbane during this period is encouraged to attend the competition and if possible to assist but if not then by supporting the students participating as audience members. Further details of this competition can be found on the Events Calendar on the AMTAC website.

Other AMTAC events this year

AMTAC also has currently planned a number of other events for 2018.

On 19 June 2018, AMTAC will be conducting a Mock Arbitration Seminar in Melbourne, along the lines of the seminar that was successfully held in Perth last year. This Seminar will be directed principally at maritime and international trading industry participants and is aimed at heightening their awareness as to how a maritime arbitration is conducted, especially under the AMTAC Rules. The more familiar those participants are with both maritime arbitration generally and the AMTAC Rules in particular, and the potential benefits that they both offer to industry, the more likely those participants and industries will be to agree to arbitration (including under the AMTAC Rules) as a means of resolving their disputes.



This year, Australian Arbitration Week will be held in Melbourne in the week commencing 15 October. As in the past, AMTAC will be conducting an evening seminar on the Monday of that week, at which there will be presentations and an opportunity for discussion about current issues concerning international arbitration, including of maritime disputes.

Following the success of the breakfast seminar that AMTAC co-convened with Shipping Australia in Sydney last year, arrangements are in hand for a similar seminar to be held again later this year.

Finally, AMTAC is also currently discussing with the Singapore Chamber of Maritime Arbitration (SCMA) the possibility of holding later this year joint presentations addressing the structure of and current issues associated with international arbitration in Australia and Singapore, including under the AMTAC and SCMA Rules.

Further details of each of these events will be circulated in due course. It is through events such as these that AMTAC seeks to achieve one of the principal objectives behind its establishment in 2007, namely the promotion of Australia and the Asia Pacific region as a recognised leader in maritime and transport scholarship, maritime affairs and commercial maritime dispute resolution. All members of ACICA and AMTAC and those generally interested in maritime arbitration are both welcome and encouraged to attend these events.

Gregory Nell SC

15 June 2018

ICCA Congress 2018

‘Evolution and Adaptation: The Future of International Arbitration’



Geneva Sekula

Allens
(ACICA Corporate Member)

This year's ICCA Congress took place at the International Convention Centre in Sydney's own Darling Harbour. Delegates from all around the world came together to examine, question, discuss and imagine the future of international arbitration. Indeed, some of the presentations went beyond what most of us could imagine, as the arbitration community moves forward into a new technological age.

Along the way, delegates were also treated to entertaining encounters with some of Australia's native wildlife including a koala, a snake, a blue tongue lizard and a wallaby (each creature had varying levels of popularity with delegates!). Even for home-grown Sydneysiders it was exciting to see what Australia had to offer our international guests. This article does not propose to provide a detailed explanation of every session that took place, but to provide a snapshot of the Congress and highlight the key themes woven throughout.

Day One

The plenary session of the Congress was opened by the Honorable Chief Justice of the Federal Court of Australia, James Allsop AO who drew attention to some of the challenges and negative perceptions faced by the international arbitral community. His Honour drew specific attention to the criticism attracted by investor-state dispute settlement (**ISDS**) provisions in international investment treaties, highlighting divisive

commentary in *The Economist* which described ISDS as 'a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes law...'

Justice Allsop turned to focus on four broad challenges facing international arbitration: the ways in which legitimacy is undermined by confidentiality; the assertion that arbitration hinders the development of the common law through a lack of precedent; concern over the characteristics and practice of arbitrators; and finally arbitration's perceived unacceptable cost and delay.

These broad themes were picked up by the sessions that made up the Congress. For instance, Stephan Schill of the University of Amsterdam moderated a fascinating discussion with a panel made up of Sundaresh Menon (Singapore Supreme Court), Alexis Mourre (ICC International Court of Arbitration), Lucy Reed (National University of Singapore) and Thomas Schultz (King's College London) in a panel titled 'Law-Making in International Arbitration - What Legitimacy Challenges Lie Ahead?'

The panel considered legitimacy in the international arbitration context examining the role of the arbitrator; the role played by arbitral bodies and institutions in rule-making; and the role played by other public actors in creating law. Though each panellist had a different view, it is clear that these issues have the potential to undermine the legitimacy of international arbitration in the eyes of the broader international legal community, and it is essential for the future of international arbitration to keep this in mind as new rules, procedures and processes develop.

Another panel titled 'Arbitration Challenged I: Reforming Commercial Arbitration in Response to Legitimacy Concerns' considered, as the title suggests, the ways in which arbitration can be reformed in response to these legitimacy concerns. Moderated by Dietmar W. Prager (Debevoise & Plimpton LLP), the panel consisted of Laura C. Abrahamson (AECOM), Andrés Jana (Bofill Mir & Alvarez Jana), Yoshimi Ohara (Nagashima

Ohno & Tsunematsu) and Noradèle Radjai (LALIVE). In particular, Ms Noradèle Radjai considered the specific tension between public and private interests, through her examination of one of Justice Allsop's identified key challenges - that arbitration can be seen to hinder the development of the common law.

Ms Radjai highlighted that any solution in this arena must be careful not to override the autonomy of the parties in their deliberate choice to select arbitration to resolve their dispute. She suggested that one potential way to mitigate this particular criticism is to consider implementing a more systematic publication of arbitral decisions. This would have the advantage of facilitating more materials for parties to consider in their own arbitral proceedings, together with allowing courts to also have regard to arbitral decisions. These decisions could be given the same weight as other non-precedential material such as academic material, and could be redacted in such a way that preserved the parties' identities.

This panel highlighted that though there are a range of challenges faced by the arbitration community, through considering new and innovative approaches, the community can take steps to increase its perceived legitimacy and to militate against its harshest critics.

And this was only the first day of the Congress!

Day Two

The second day moved into panels which took a deeper dive into the future of arbitration. In a two part series, Mark Kantor (Independent Arbitrator), Joongi Kim (Yonsei Law School), Judith Levine (Permanent Court of Arbitration), and Natalie L Reid (Debevoise & Plimpton LLP) looked at hot topics in international arbitration, including: illegally obtained evidence; the One Belt, One Road initiative; parallel proceedings and harassment and sexual misconduct.

These topics further highlighted legitimacy concerns. Take for instance harassment proceedings. Arbitration centred about consumer and employment law lead to an increasing demand for transparency and public accountability, in circumstances where it seems

inappropriate to maintain strict notions of privacy and confidentiality, particularly for an aggrieved victim. Should the public demand more when an arbitral provision in an employment contract is used to hide a sexual harassment claim? The legal world will be watching as the arbitration community looks for a meaningful path forward to resolve these tensions.

In a two part session that captured the concept of the Congress' theme, evolution and adaption, various panel members considered 'The Moving Face of Technology' as it applies to arbitration. These panels provided fascinating insight into technologies, which sounded like they were lifted from a science fiction novel. Part 1 of the panel, consisting of Paul Cohen (4-5 Gray's Inn Square Chambers), Gabrielle Nater-Bass (Homburger), Hugh Carlson (Three Crowns LLP) and Rashda Rana (6 St James' Hall), led delegates through the possibilities of using augmented reality (**AR**), instant translation and real time analytics for arbitral proceedings.

The potential for AR was particularly engaging, as the panel demonstrated to delegates how it can be used to visually take a Tribunal through the subject matter of proceedings. In the example used in the session, delegates were led through a graphic of the Death Star as Darth Vader attempted to provide a witness statement, reflecting that its negligent design was what led to its ultimate destruction. Through the use of AR, opposing counsel visually took the room through the design to demonstrate why this was not the case. Darth Vader ultimately withdrew his claim.

The implications of this for the future of arbitration are enormous. One can imagine a construction dispute, in which AR is used to show the Tribunal various aspects of the construction in issue, rather than undertaking costly site visits or submitting extensive photographic evidence. However, in keeping with the focus on legitimacy, Ms Nater-Bass cautioned that while AR may seem very appealing, parties must exercise caution to ensure that its use will not jeopardise due process, or the rights of parties to present their case and have it heard, and in particular that both parties are treated equally.

At the conclusion of Day Two, delegates had the

opportunity to put on their finest outfits and attend the Gala Dinner, in the ICC Sydney Grand Ballroom. Attendees had a lovely night of delicious food, engaging conversation, and rumour has it, the festivities stretched well into the morning.

Day Three

The final day of the 2018 Congress centred around the two-part morning plenary session which considered 'New Frontiers in International Arbitration'. These sessions again took a forward looking view, as speakers considered why international arbitration needs to evolve, and what we can do to ensure this occurs. For instance, in the second part of the plenary session titled 'Potential of Arbitration Involving New Stakeholders', Ndanga Kamau (Independent Practitioner), Makane Moïse Mbengue (University of Geneva and Sciences Po Paris School of Law), Campbell McLachlan (Victoria University of Wellington), Dan Sarooshi (Essex Court Chambers and University of Oxford) and Silvia Marchili (King & Spalding LLP) considered how to bring new stakeholders into arbitration.

Dr Campbell McLachlan took the delegates through various themes, including the importance of engaging the international community. In particular, it was noted that to be successful as a global system, arbitration requires not only party autonomy, but active support from the wider arbitration community. This session raised many issues that the arbitration community can consider moving forward, including how best to engage new stakeholders, so that arbitration can continue to grow as a legitimate dispute resolution mechanism.

The Congress was closed by The Honourable T F Bathurst, the current Chief Justice of the Supreme Court of New South Wales, who commended the Congress' speakers on their thoughtful and engaging presentations. Delegates were also treated to a little taste of what is to come in the next Congress in Edinburgh, with a showcase of bagpipes and kilts.

The 2018 Congress provided delegates with a range of issues to consider as they move forward in their varied careers. It will be exciting to see what new issues and conversations are raised in Edinburgh 2020, as a result of the thought-provoking sessions experienced in Sydney this year.

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Case Note:

Trans Global Projects v Duro Felguera Australia



Leon Chung

Herbert Smith Freehills
(ACICA Corporate Member)



Mitchell Dearness



Phoebe Winch

Summary

On 4 May 2018, Tottle J of the Supreme Court of Western Australia (**the Court**) granted a freezing order against Duro Felguera Australia Pty Ltd (**Duro Felguera**), a subsidiary of Duro Felguera SA (**Duro SA**), in the amount of AU\$20 million to ensure that it would be able to satisfy a potential award in international arbitration proceedings relating to an iron ore project in Western Australia (**the Project**).¹ The Court also ordered that Duro Felguera disclose details related to its assets and liabilities and that the liquidators of Trans Global Projects Pty Ltd (**In Liquidation**) (**Trans Global**), the plaintiff, provide an undertaking that they would commence arbitration proceedings with expedition.

Background

Trans Global and Duro Felguera are parties to a contract made in May 2014 (**the Subcontract**), pursuant to which Trans Global agreed to transport processing facility components for the Project.

By May 2015, Trans Global and Duro Felguera had substantial claims against each other. Trans Global claimed it was owed around \$30 million,² whilst Duro Felguera had cross-claims in excess of \$26 million (mostly

stemming from alleged delays in the delivery of components) that it claimed to be entitled to set off.

In June 2015, Trans Global commenced arbitration proceedings, following which it was placed in voluntary administration and then liquidation.

The creditors of Trans Global approved funding for the arbitral proceedings in December 2017. In April 2018, Trans Global's liquidators informed Duro Felguera of their intention to pursue the claims and requested an undertaking of Duro Felguera's finances and an assurance that it would keep up to AU\$30 million in cash and equivalents. Duro Felguera refused this request and so, on 19 April 2018, Trans Global applied for a freezing order and an ancillary order against Duro Felguera requiring it to disclose details of its assets and liabilities.

The Court has inherent jurisdiction to make a freezing order and, in this case, is conferred jurisdiction by Article 17J of the UNCITRAL Model Law on Commercial Arbitration, which is given force of law by s 16 of the *International Arbitration Act 1974* (Cth). The Court's jurisdiction is regulated by Order 52A of the *Rules of the Supreme Court 1971* (WA). Rule 5(4) of Order 52A provides that the Court may make a freezing order or an ancillary

¹ *Trans Global Projects Pty Ltd (in liq) v Duro Felguera Australia Pty Ltd* [2018] WASC 136.

² Trans Global categorised its claims as follows: approved invoices claim, POD (proof of delivery) claim, PTC (pass through claims) claim, disputed invoices claim and performance bond claim.

order or both against a judgment debtor or prospective judgment debtor if the court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because, relevantly, the assets of the prospective judgment debtor are removed from Australia or from a place inside or outside Australia, or disposed of, dealt with or diminished in value. This rule applies to circumstances in which an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in the Court.³

Supreme Court's decision

The Court identified three primary questions to be addressed:

- (a) Had Trans Global shown it had a good arguable case on an accrued or prospective cause of action?
- (b) On the evidence before the Court, was there a danger that a prospective arbitral award and any judgment in respect of it will be unsatisfied because assets are removed from Australia, or disposed of, or dealt with, or diminished in value?
- (c) In all the circumstances, is this a case in which it is in the interests of justice to grant a freezing order?

The Court found that it was in the interests of justice to grant a freezing order (question (c)).⁴ This conclusion flowed primarily from the conclusions reached that Trans Global had good arguable claims (question (a)) and that there was a danger that a judgment would not be satisfied (question (b)).

Good arguable case

The Court applied the applicable legal test for a 'good arguable case' as set out in *Ninemias Maritime Corp v Trave Schiffahrtsgesellschaft GmbH & Co KG* [1984] 1 All ER 398 (at 404) and *BCBC Singapore Pte Ltd v PT Bayan Resources TBK (No 3)* [2013] WASC 239. That is, a good arguable case is one that is a 'reasonably arguable case on legal as well as

factual matters', and 'which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success'.⁵

The Court found that Trans Global had shown a good arguable case in respect of its claims against Duro Felguera, with the reservation that its disputed invoices claim had a limited evidentiary basis.

It also found that Duro Felguera had cross-claims that it claimed to be entitled to set off. The Court was not, however, persuaded that the existence of the set-off claim meant it should conclude that the quantum of Trans Global's claims should be limited to the amount by which its claims exceeded those of Duro Felguera, that is, that it should assume in its favour that it would be wholly successful on its claims.

In considering how the interests of justice were to be reflected in the relief to be granted, the Court took into account the limited evidentiary basis for Trans Global's disputed invoices claims and the cross-claims raised by Duro Felguera. The effect of these considerations was to reduce the amount to be set aside by Duro Felguera from the full amount claimed by Trans Global (AU\$30 million) to AU\$20 million.⁶

Danger that a judgment will not be satisfied

The Court found that there was a danger that a prospective arbitral award and any judgment in respect of it would be unsatisfied because assets were removed from Australia, or disposed of, or dealt with, or diminished in value.⁷

The Court considered these proceedings in the context of the numerous disputes stemming from the Project, many of which involved claims between Duro Felguera and the head contractor of the Project. The Court acknowledged that, if Duro Felguera has any significant success on its claims against the head contractor, it would end up with more money than required to fulfil its

³ See Order 52A, r 5(1)(b)(i).

⁴ At [70].

⁵ At [23] – [27].

⁶ At [48], [72].

⁷ At [49].

operational requirements. The fact that an arbitral award was not expected until late this year or early next year did not preclude the possibility that Duro Felguera would receive funds in the interim as a consequence of a settlement.⁸ The Court considered the commercial reality that, in these circumstances, it would be likely that Duro Felguera would pass the money onto its parent company, Duro SA, which was facing financial difficulties and exploring refinancing.

Accordingly, without the freezing order, it would be likely that Duro Felguera's assets would potentially end up leaving the country. The Court made the freezing order, as well as the ancillary order requiring Duro Felguera to disclose its assets and liabilities.⁹ The Court also ordered

that Trans Global's liquidators should provide an undertaking that they will commence and pursue arbitral proceedings with expedition.¹⁰

Observations

The decision confirms Australian courts will intervene to protect the integrity of international arbitration proceedings. After making a thorough assessment of the contentious facts and applying the appropriate legal tests, the Court drew a fair conclusion, considering the commercial reality of the case. The opposite conclusion would have exposed one party to the real risk that any future potential award in the arbitration proceedings would not be satisfied, undermining the utility of the proceedings altogether.

8 At [66].

9 At [70], [75].

10 At [73].



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Ethics in arbitration – individual obligations – global consequences



Bronwyn Lincoln

Corrs Chambers Westgarth
(ACICA Corporate Member)

This paper was presented at the Federal Court of Australia, Melbourne, on 7 March 2018 as part of the National Commercial Law Seminar Series organised by the Federal Court of Australia, the Commercial Bar and Monash Law School.

Introduction

In the past decade there has been increasing interest in the subject of ethics in arbitration, particularly in international commercial arbitration. There are often no clear answers to ethical dilemmas and in many instances ethical obligations of lawyers in one jurisdiction conflict with equally appropriate and value-based ethical obligations of lawyers subject to different professional conduct regulations in another jurisdiction. It is therefore not surprising that there is in fact no international standard of ethics applicable to all persons engaging in international commercial arbitration (including both arbitrators and counsel). The task of reconciling professional conduct rules from around the world into one precise and commercial set of standards which acknowledges and respects cultural differences is a daunting task.

Chief Justice Sundaresh Menon expressed a different view, when his Honour stated in his opening of the ICCA Congress in Singapore in 2012:¹

As we contemplate these problems of moral hazard, ethics, inadequate supply and conflicts of interests associated with international arbitrators, it seems

surprising that there are no controls or regulations to maintain the quality, standards and legitimacy of the industry. This has much to do with how modern arbitration developed from an initially small and closely-knit group of honourable practitioners who saw arbitration as the discharge of a duty to help resolve the disputes of people of commerce in a fair, even-handed and commercially-sensible manner rather than as a business proposition. We look back at this in-built informal mechanism of peer group controls with nostalgia: but this “age of innocence” as it has been famously described has very much come to an end. Is it time then for us to give up our cherished notions of autonomy and subscribe to an international regulatory regime?

Paula Hodges QC, in a paper published in Kluwer Law International in 2017, referenced Chief Justice Menon's speech, Paula observed that:

... the significant increase over the past decade in the number of international arbitrations taking place and the expansion of practitioners participating in the process necessarily renders the question of ethics an important, but increasingly difficult, one to address.

However, when you contemplate the very factors which make international arbitration attractive to business, such as flexibility, confidentiality and award enforcement (under the New York Convention), it is easier to understand why it is that in spite of all the discussions and the attempts of institutions and associations around the world to impose ethical obligations on those involved in international arbitration, the task is in fact riddled with challenges.

To explain this further –

(a) Flexibility

When parties agree that their disputes will be resolved by arbitration, they can choose ad hoc or institutional arbitration, they can choose the seat or place of arbitration (which will dictate the procedural law applicable to the proceedings), they can agree

¹ http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf

that hearings will be held somewhere other than the seat, they can decide that the arbitration agreement will be governed by a particular law (not always the same law as the container agreement).

Again, when a dispute arises, they can choose an arbitrator from a particular jurisdiction, of a particular profession and having membership of a particular association.

These choices are one of the reasons that arbitration is seen as flexible – but the choices made mean that in any one arbitration proceeding, ethics might apply through the seat, the home jurisdiction of any lawyers involved (including the arbitrators), under the arbitral rules or through the professional membership of the arbitrators. And whilst we all have in our own mind a definition of what ethical conduct involves, cultural differences and jurisdictional differences mean that expectations are not always consistent.

(b) Confidentiality

Arbitration proceedings are almost always confidential. This means that only the parties and the tribunal know how a proceeding is conducted. This also means that policing a global ethics standard might be difficult – on the other hand, the fact that arbitration is confidential suggests that the development of a global code of ethics would further encourage confidence in the arbitration process.

(c) Enforcement of arbitral awards

In convention countries, where enforcement proceeds under the New York Convention, enforcement does not involve an analysis of the merits of the arbitration and the principal documents provided to the court are the arbitration agreement and the award itself.

Supporting affidavits might provide the court with additional information where there is a defence of lack of procedural fairness, however this information will be limited to evidence which supports one of the

exceptions to enforcement as set out in the *International Arbitration Act 1974* (Cth) (Act). The evidence will not provide details to the court of the specific conduct of an arbitrator or counsel who is alleged to have breached ethical standards.

This paper considers ethical standards applicable to both arbitrators and to counsel practising in international commercial arbitration. It includes a review of the sources of ethical standards and identifies questions in relation to their application and operation, particularly in an international market.

What are ethics?

Ethics are usually described as moral principles that govern a person's behaviour or the conduct of an activity. In the legal sense, we understand ethical obligations as professional conduct rules. In a sense, they are rules of conduct which are derived from and reflective of standards and values.

The discussion on ethics in international arbitration, however, often blurs the line between true ethics as moral principles and rules of conduct. There is a tension for example in the commentary which includes an obligation of disclosure (for the purpose of avoiding bias or conflicts) as an ethical obligation – the obligation to disclose a conflict or matters which might suggest a conflict might be described more accurately as a rule of conduct. One must accept, however, that the moral principles applied by the potential arbitrator in deciding whether to disclose something which is not black and white does raise a question of ethics.

Ethical obligations are often associated with professions.

Professions Australia (an Australian organisation representing 20 professional associations), defines a profession as:²

... a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of

2 <http://www.professions.com.au/about-us/what-is-a-professional>

learning derived from research, education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others. It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community.

With one exception the full extent of this quote could quite easily describe those who practice in arbitration, including arbitrators and counsel (disciplined group of individuals – adhere to ethical standards – possessing special knowledge and skill – apply this knowledge and skill in interests of others). The missing link is the absence of an agreed code of ethics. This absence has led to vigorous debate in recent years and the creation of an increasing number of published rules and guidelines seeking to fill what might be described as a ‘void’, but all having limited rather than universal application.

There is a question (and a divergence of views), however, as to whether a global code of ethics would change the way international arbitration is conducted or is necessary to ensure the integrity of the arbitration process. The obvious challenge (if consensus can be reached to introduce a code of ethics) is that the arbitration involves individuals engaging in a common activity, but where that engagement traverses multiple geographical locations and legal jurisdictions. The identification of the ‘moral principles’ which should apply to arbitrators and arbitration practitioners in such a disparate group is difficult, even where many individual members are subject to specific professional ethical obligations through regulation in their home jurisdiction. Another difficulty (as mentioned above) is distinguishing clearly between what truly is a question of ethics and what is more accurately described as a rule of conduct.

Whilst there is much written about ethical standards, the term ethics seems to be referred to in the context of arbitration with what might be described as a ‘stretch definition’ – it extends to conduct and not just to values with which we associate ethics.

That said, it is clear amongst the commentators that certain ethical standards are part of the playing field in arbitration – these include the standards and expectations around disclosure and conflicts of interest, equal treatment of parties, a fair hearing and evidence. Initiatives such as that of the Swiss Arbitration Association (ASA) in 2014 when it called for the creation of a Global Arbitration Ethics Council demonstrate the extent to which this topic occupies the minds of international arbitration practitioners. The Swiss proposal involved an international council formed with representatives of all arbitration associations and arbitral institutions around the world who chose to be involved in the project.

The proposal itself had challenges – issues requiring resolution included whether the pool of representatives would indeed be representative of the individuals who might come before it, what the procedures would be for the hearing and determination and the question of the substantive rules which would be applied by the council.

Interestingly the findings released by the ASA at the time of the proposal noted that its working group on counsel ethics in arbitration found that *there were extremely few complaints lodged with national bar councils or supervisory bodies in relation to international arbitration*³.

It is entirely appropriate to ask in the context of this research, whether further work is required in relation to an international ethics code or whether the existing regime, as imperfect as it is, is the best we can get.

Sources of ethics in international arbitration

Professional conduct rules

The primary source of ethical standards applicable to lawyers who act as arbitrators and legal counsel appearing in arbitration proceedings will be those which

3 <http://www.arbitration-ch.org/en/asa/asa-news/details/993.asa-working-group-on-counsel-ethics-releases-latest-findings.html>

apply by virtue of the individual counsel's admission to practice. Certain commentators have posed the question as to whether those standards, which are usually recorded in rules of professional conduct, continue to apply to counsel when they engage in arbitration outside of their home jurisdiction. The author's view is that it would be contrary to the whole purpose of ethical standards to say that they only apply to a lawyer within certain geographical boundaries.

Gary Born would agree⁴:

The professional conduct rules of many national bars either expressly or impliedly regulate the actions of lawyers admitted to practice before that bar during their representation of parties to an international arbitration. There is no 'arbitration exception' or 'international arbitration exception' from most national rules of professional conduct; a lawyer is subject to the same ethical regulations in arbitration as in his or her other professional activities.

Indeed, it is difficult conceptually to argue that an arbitrator or counsel working in a jurisdiction other than their home jurisdiction is not required to apply the same ethical and professional standards to which they are amenable in their home jurisdiction. There is a further very practical reason why this should be the case – many hearings and case management conferences do not take place face to face – the lawyers representing the parties in these conferences can be anywhere in the world, including in their own office. It makes no sense for legal counsel to be subject to one set of ethical or professional conduct rules when they participate in a hearing by phone or video and to lose the obligation to comply with those rules when he or she leaves the country.

This being the case, the potential for conflicting standards for party representatives acting within the same arbitration proceeding is immediately apparent. One such conflict which is often cited by commentators is the interaction and briefing by counsel of fact witnesses and expert witnesses in international arbitration proceedings. There are distinct differences across jurisdictions as to the extent

to which communications can take place, the extent to which a witness can be 'briefed' before giving evidence and the aptness or otherwise of contacting a witness for another party.

International guidelines

The International Bar Association (IBA) has been active in this area and produces a series of guidelines which help regulate the conduct of arbitrators and counsel in international arbitration.

These include the:

- IBA Guidelines on the Taking of Evidence in International Arbitration
- IBA Guidelines on Conflicts of Interest in International Arbitration
- IBA Guidelines on Party Representation in International Arbitration

These guidelines can be used in both institutional and ad hoc arbitration, but will only apply with the parties' agreement or pursuant to the tribunal's order.

Sometimes the arbitration agreement itself will refer to the guidelines – sometimes the guidelines will be referenced in 'procedural order no 1'. A reference alone does not make adherence to the guidelines mandatory – it is very common to refer to the guidelines as 'a guide' and subject to other orders made in the arbitration proceeding.

The Chartered Institute of Arbitrators (CIArb) also publishes Guidelines and Protocols on a range of topics. It separately contracts with all its members that they will comply with the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009) (**the Code**). The purpose of the Code (as explained in its preamble) is:

so that members may be reminded of the professional and moral principles which should at all times govern their conduct.

The Code has two parts – the second is relevant to arbitrators – it contains a code relating to the conduct of

4 Gary B. Born *International Commercial Arbitration*, Wolters Kluwer 2nd ed, p 2852.

members when acting or seeking to act as a neutral. The Code, insofar as it relates to neutrals, provides that it *forms part of the rules of any dispute resolution process* and sets out standards in relation to behaviour, integrity and fairness, conflicts of interest, competence, information, communication, conduct of the proceedings, trust and confidence and fees.

The Code is not often expressly raised in arbitration proceedings, however it has wide application; the Chartered Institute of Arbitrators has over 15,000 members in over 133 countries around the world⁵. It is highly likely that at least one member of any tribunal and one or more counsel appearing before that tribunal is a member of the CI Arb and bound by the Code.

Turning now, albeit briefly, to the IBA Guidelines on Party Representation in International Arbitration.

The discussion in the guidelines explaining their genesis and the work of the task force which was responsible for them contains some interesting and salient observations about the challenges in ethical standards in international arbitration. The diversity of rules and regulations which might apply to counsel in any international arbitration was one such issue, where the authors note:

The range of rules and norms applicable to the representation of parties in international arbitration may include those of the party representative's home jurisdiction, the arbitral seat, and the place where hearings physically take place. [...] The potential for confusion may be aggravated when individual counsel working collectively, either within a firm or through a co-counsel relationship are themselves admitted to practise in multiple jurisdictions that have conflicting rules and norms.

As an aside, a review of the guidelines discloses rather curiously that a statement in the guidelines itself highlighted the very 'confusion' to which the authors referred.

The following statement is in the preamble to the articles in the guidelines:

A Party Representative, acting within the authority

granted to it, acts on behalf of the Party whom he or she represents. It follows therefore that an obligation or duty bearing on a party representative is an obligation or duty of the represented party, who may ultimately bear the consequences of the misconduct of its representative.

It is true that where counsel engages in misconduct (which might also equate to a breach of ethical obligations), there may be consequences for a party who is represented by that counsel, but the ethical obligations of professionals are obligations of each individual, certainly in Australia under the Legal Profession Uniform Law⁶. So you see that even here (where, to be fair the guidelines make it clear that they do not seek to override or supplant local professional codes of conduct), there are ambiguities as to whether obligations belong to the counsel or the party on whose behalf the counsel acts.

In addition to providing clear guidelines in relation to a number of steps in the arbitral process (including detailed guidelines in relation to disclosure of documents), each of the guidelines is accompanied by explanatory notes. These notes are useful as a reference to identify where there may be differing standards of conduct amongst arbitration practitioners and what approach might be adopted to 'level the playing field'.

The application of the guidelines was the subject of observations of the English Commercial Court in *W Limited v M SDN BHD* [2016] EWHC 422. This involved a challenge to an award on the ground of serious irregularity affecting the tribunal; it was based on perceived (rather than actual) bias. The court observed that the guidelines did not bind the Court, but that they were valuable and it was appropriate to examine them at least as a check.

However, having noted that they made a distinguished contribution in the field of international arbitration, the Court found that there are weaknesses in the 2014 guidelines in two aspects relevant to the challenge.

First, in treating compendiously (a) the arbitrator and his or her firm, and (b) a party and any affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived. Second, in

⁵ <http://www.ciarb.org/about>

⁶ *Legal Profession Uniform Law Application Act 2014* (Vic) and identical legislation in other States of Australia

this treatment occurring without reference to the question whether the particular facts could realistically have any effect on impartiality or independence (including where the facts were not known to the arbitrator).

The reference to this case is not to criticise the IBA guidelines, but to demonstrate that they are but guidelines which will not always provide the answers, particularly in circumstances where actual or perceived bias is a question of substantive law.

Institutional rules

Guidance as to ethical standards are included in the arbitration rules of many of the world's leading institutions. Their application is of course limited to arbitration proceedings which are conducted under the rules of the institution. The standards which consistently appear in arbitrations rules cover impartiality and independence of arbitrators, conduct of the proceedings, qualifications of arbitrators, communication with parties and confidentiality. Some of the arbitral institutions also set out what might be described as 'general obligations'.

For example, the International Chamber of Commerce (ICC) Note to Parties and Arbitral Tribunals published on 30 October 2017⁷ states that:

Arbitral tribunals are expected to abide by the highest standards of integrity and honesty, to conduct themselves with honour, courtesy and professionalism, and to encourage all other participants in the arbitral proceedings to do the same.

A number of the arbitral institutions also impose obligations on arbitrators to promote efficiency.

For example, the Hong Kong International Arbitration Centre Rules (Art 13.5) require that⁸:

The arbitral Tribunal shall do everything necessary to ensure the fair and efficient conduct of the arbitration.

Similarly, the London Court of International Arbitration (LCIA) Rules 2014 (Article 14.4) provide that:

Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall

include: ... (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.

Many of the rules also regulate specifically the conduct of counsel appearing in the arbitration proceedings (often by reference to other rules or guidelines).

For example:

The ACICA Rules provide (Art 8.2) that:

Each party shall use its best endeavours to ensure that its legal representatives comply with the International Bar Association Guidelines on Party Representation in International Arbitration in the version current at the commencement of the arbitration.

The ICC Rules (para 33) provide that:

Parties are encouraged to draw inspiration from and, where appropriate, to adopt the IBA Guidelines on Party Representation in International Arbitration.

The LCIA Rules go one step further. Article 18.5 of the Rules provides that:

18.5 Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.

The Annex is short and sweet; it comprises 7 paragraphs. Paragraph 1 sets out the purpose of the guidelines which is to *promote the good and equal conduct of the parties' legal representatives appearing by name within the arbitration.*

Note as an aside, that here you have an obligation on the parties to ensure their representatives behave in a particular way, and yet the focus in paragraph 1 is on the individual named (which it might be said reinforces the fact that individuals remain accountable for their own

⁷ <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>

⁸ http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf

ethical conduct).

The Annex specifically states that its guidelines are not intended to *derogate from any mandatory laws, rules of law, professional rules or codes of conduct if and to the extent that any are shown to apply to a legal representative appearing in the arbitration.*

Again here, there is the acknowledgement that the guidelines do not cover the field – that they operate in conjunction with any other applicable ethical standards or codes.

The type of conduct prohibited by the Annex includes:

- Engaging in activities intended to unfairly obstruct the arbitration or jeopardise the finality of the award
- Making false statements
- Relying on false evidence
- Concealing documents

The Annex provides the arbitral tribunal with authority to decide when a breach has occurred and whether a sanction is necessary.

Finally, the Singapore International Arbitration Centre (SIAC) published a Code of Ethics for Arbitrators in 2015. The SIAC Code includes requirements regarding disclosure (as one would expect), but also obliges the prospective arbitrator to accept an appointment only where, amongst other things, the prospective arbitrator *is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.* Specifically, the SIAC Code states that it *is not intended to provide grounds for the setting aside of any award.*

The arbitration agreement itself

As is well known, it is the arbitration agreement which establishes the scope of the arbitration and records the parties' agreement as to how the arbitration will be conducted. The incorporation of institutional rules into the arbitration agreement may well bring with it standards of conduct adopted by the relevant institution.

The arbitration agreement might also introduce an ethical code for arbitrators appointed by the parties if, for example, the parties agree that arbitrators can only be

appointed if they are members of the Chartered Institute of Arbitrators. Similarly an agreement that the arbitration will be conducted by reference to the IBA Guidelines on Party Representation will incorporate the standards set out in those guidelines.

Party autonomy provides parties with an opportunity to go one step further – the author has long advocated that sophisticated arbitration users should consider setting out in the arbitration clause the expectations of the conduct of counsel in the arbitration proceeding. For example, the parties might specifically impose on the parties themselves and the arbitral tribunal, obligations similar to the overarching obligations which apply to litigants and counsel (and others) involved in civil litigation in Victoria (in accordance with the *Civil Procedure Act 2010* (Vic)). The incorporation of these obligations (appropriately adapted) would serve the following purposes:

- Provide the arbitrator or tribunal with support for any robust case management orders which might be required to ensure equality of the parties or to sanction a party or representative who is not acting in accordance with the obligations
- Make it clear from the outset the expectations of the parties about the way in which the arbitration will be conducted
- Rather unusually in relation to ethical standards (which are not usually actionable in civil proceedings), provide a party who suffers prejudice as a result of unethical behaviour to add a cause of action for breach of contract against the party engaging in that behaviour

In some respects this suggestion is an extension of the good faith obligation which in some jurisdictions is implied into commercial contracts and in other jurisdictions is reflected in an express term of a contract.

For completeness, it is noted that there may also be reference to guidelines or standards in any agreement executed by the parties with the tribunal members.

Ethical standards at the seat

The final source of ethical standards covered in this paper is standards which might apply by virtue of the seat of the arbitration or the *lex arbitri*.

Again, we turn to Gary Born, who considered this question and has expressed the following views:⁹

- It is difficult to conceive that all the professional conduct rules at the seat would apply to foreign counsel in a locally seated arbitration – one reason is that they tend to be designed with local circumstances in mind
- Further, rules of professional conduct tend not to address situations where there is a conflict between the rules of a lawyer's home jurisdiction and those of the foreign jurisdiction where the arbitration is taking place

He also reported on a survey taken by the IBA Task Force which showed that 63% of lawyers appearing in arbitration believed they were subject to their home jurisdiction's professional conduct rules but only 36% believed that the professional conduct rules of the seat would apply to them as well.

His conclusion is that the professional conduct rules of the seat *should rarely be applicable to counsel in a locally seated international arbitration*, but he acknowledges that where ethical considerations arise both in relation to the integrity of a professional and the conduct of

proceedings (for example, in relation to conflicts of interest), there is scope for what he describes as *overlapping or concurrent regulation*.

The role of ethical standards in international arbitration – is there a need for further regulation

In the context of the discussion earlier in this paper, it is appropriate to raise briefly the question of the role of ethical standards in ensuring what has been described as 'an uneven playing field' in international arbitration. This is a common theme in the commentaries discussing international ethical standards. The paper also offers some very brief comments on the question of whether the arbitral tribunal itself should have the role of deciding (and even sanctioning) a breach of ethics by counsel appearing before them.

Consider for a moment arbitration proceedings where the ethical obligations imposed on one counsel in his or her home jurisdiction preclude that counsel from taking certain steps in the arbitration, steps which were available to the opposing counsel. And what if the Tribunal, familiar with both jurisdictions was aware of the restrictions which applied only to one party even though the parties themselves seemed unaware of the inequality.

This scenario shows how ethical obligations imposed on counsel can raise ethical issues for the Tribunal. Should the Tribunal take into account the restrictions on the first counsel when making procedural orders? Are the

⁹ Gary B. Born *International Commercial Arbitration*, Wolters Kluwer 2nd ed, p 2874

“**MAKING A DIFFERENCE
TO THE WAY YOU SOLVE
INTERNATIONAL DISPUTES.**”

individual counsel's ethical obligations (irrespective of their source), a matter for the counsel alone. And should the counsel, recognising that his or her opponent has an advantage not being bound by the same ethical rules, disclose the potential inequity to his or her client?

Christopher Lau, international arbitrator based in Singapore and London, considered the question of whether rules and guidelines level the playing field and do they properly regulate conduct?¹⁰

One of the conclusions Mr Lau reached in a recent publication was that the answer to this question *may be more a matter of perception* and that it might be that the various rules, guidelines or codes available through the institutions and associations are all merely tools which contribute to a more even playing field.

Professor Catherine Rogers, who has written widely on the topic of ethics in international arbitration, advocates that the absence of international ethical standards and therefore the absence of any real sanctions for this type of conduct encourages misconduct by *facilitating unbounded creativity in pursuing client interests and, when called out, allows plausible deniability that particular conduct was unethical*.¹¹

The contrary view propounded by Felix Dasser of Homburger in Switzerland, is that *equality of arms and fairness do not require global standards*.

As to who decides what constitutes a breach ...

Elliott Geisinger of Schellenberg, Wittmer expresses the clear view that the arbitration hearing is not the place for determining whether a party representative has acted in breach of ethical standards – what is important in that forum is the determination of the merits of the dispute falling under the arbitration clause. Mr Geisinger says further that allowing one party representative to make a

complaint about another during the evidentiary hearing brings *boundless potential for disruption of arbitral proceedings because by placing the issue in the hands of the arbitral Tribunal, one actually increases the danger of the very misconduct one is seeking to avoid. Unscrupulous lawyers are handed a potent weapon first to attack opposing counsel and thereby to create sideshows and delay the proceedings, and then to turn on the arbitral Tribunal if its ruling does not satisfy them*.¹²

Conclusion

Jeff Waincymer identifies¹³ in one single paragraph, the competing views as to the need for defined ethical standards for arbitrators, observing that:

There is a reasonably vigorous debate as to whether there ought to be ethical rules imposed on arbitrators and if so what they should contain. Some academic commentators will typically call for such standards. Some institutions will attempt drafts, or at least establish working parties aiming to do so. Conversely, some leading practitioners will question the need, arguing that the system ultimately depends on the personal integrity of leading individuals.

The true position seems to be that the jury is still out as to whether an international code of ethics would change the nature of international arbitration. Whilst at some time in the future we may see an international code, in the interim, the integrity of the arbitral process (which is what we are protecting through the application of ethics) is significantly enhanced by:

- The many resources available to parties at the time they enter into their arbitration agreement to ensure that their arbitration proceedings are conducted according to settled standards – if they turn their mind to it.

10 Christopher Lau 'Do rules and guidelines level the playing field and properly regulate conduct? – an arbitrator's perspective' in Andrea Menaker (ed.) *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series No. 19 559, 2017

11 Catherine Rogers 'Guerrilla tactics and ethical regulation' in Stephan Wilske and Guther J. Horvath (eds) *Guerrilla Tactics in International Arbitration*, Kluwer Law International, 2013, p 314

12 Elliott Geisinger 'Soft Law' and hard questions: ASA's initiative in the debate on counsel ethics in international arbitration' in Daniele Favalli (ed) *The Sense and Non-Sense of Guidelines, Rules and other Para-regulatory Texts in International Arbitration*, ASA Special Series No. 37, 2015, p 24

13 Jeffrey Waincymer *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, p 110.

- The significance of the personal reputation of arbitrators and party representatives which relies on those persons adhering to the highest ethical standards (whether mandatory or guiding)
- The need within the arbitration community to do everything possible to reinforce integrity in the arbitration process if arbitration is to maintain its position as the preferred means of dispute resolution for cross border disputes.

And finally, a reference to the consultation draft prepared earlier this year of SIAC's proposed guidelines for party representative ethics. The proposed guidelines are described as reflecting *the minimum standard for ethical conduct as recognised between all or the majority of the different jurisdictions under study and as providing only guidance as to ethical conduct ... rather than a proscriptive set of mandatory rules.*, and the authors observe:

International arbitration is to a certain extent an amalgam of civil and common law legal traditions, and both these traditions share core values with regard to professionalism and integrity. But the way these values are interpreted and put into practice across jurisdictions varies enormously, making it difficult to identify consensus on many specific ethical issues. International arbitration is also, equally, an institution with its own character and values. Domestic standards for ethical conduct cannot be imported wholesale, as that risks overlooking international arbitration's unique qualities.

It is with tremendous pleasure that we invite you to attend the
**XXVth Congress of the International Council
 for Commercial Arbitration (ICCA)**
 which will be held in Edinburgh from 10th to 13th May 2020



Following the success of ICCA 2018 in Sydney,
 #LookToScotland and join us in historic Edinburgh for
 ICCA 2020 - early registration discounts now available!

icca2020.scot

Director's fury over road block to litigation

Mad Max arbitration to be heard in Hollywood



Russell Thirgood

McCullough Robertson
(ACICA Board Member)



Erika Williams

McCullough Robertson



Hannah Fas

McCullough Robertson

Australia continues to prove itself as a robustly pro-arbitration jurisdiction. A more glamorous recent example is *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd*,¹ in which the New South Wales Court of Appeal allowed an appeal by Hollywood studio Warner Bros, staying proceedings brought by director George Miller for a payment dispute in relation to *Mad Max: Fury Road*.

Starring Tom Hardy and Charlize Theron, the film was released to widespread acclaim. In 2015, it earned \$US378 million (\$AU500 million) at the box office.

The star-studded decision confirms the \$US7 million (\$AU9.3 million) dispute should be arbitrated in California and cements Australia's position as a safe seat for arbitration. The case also warns both Hollywood stars and mere mortals: always check the terms and conditions of your agreement (whether they are given to you or not).

The road to arbitration is long and winding

Almost a decade ago, Warner Bros Feature Productions Pty Ltd (**WB Productions**) engaged producer Doug Mitchell and director George Miller on *Mad Max* through their production companies, Kennedy Miller Mitchell Films Pty Ltd and Kennedy Miller Mitchell Services Pty Ltd (together, **Kennedy Miller Mitchell**). The agreement provided that Kennedy Miller Mitchell was entitled to a \$US7 million bonus payment if the 'net cost' of the film

came in below the budgeted \$US157 million (**Letter Agreement**).

Best Picture ≠ Best Paid

A dispute arose as to the calculation of the net cost. The initial production cost \$US154.6 million, however, Kennedy Mitchell Miller claimed that WB Productions made a series of decisions which caused substantial changes and delays, leading to additional costs and expenses which should be excluded from the net cost. Kennedy Mitchell Miller relied on clause 4(b)(ii) of the Letter Agreement, which stated:

'(b) The following (the 'Excluded Costs') shall be excluded from the overbudget calculation.

...

(ii) Costs incurred or delays caused as a result of new or changed scenes added, or changes in the approved schedule made, at the written request of an officer of WB having the rank of Vice-President or higher, and costs designated in writing as approved overages by an officer of WB having the rank of Vice-President or higher.'

WB Productions maintained that the total cost blew out to \$US185.1 million, and therefore the producer and director were not entitled to bonuses.

A further dispute concerned WB Productions entering into a co-financing agreement with RatPac Entertainment,

¹ [2018] NSWCA 81.



allegedly breaching the agreement to first offer Mr Miller and Mr Mitchell the chance to provide finance.

Kennedy Miller Mitchell brought proceedings against WB Productions and WB Entertainment (together, **Warner Bros**) in the Supreme Court of New South Wales. Warner Bros sought a stay of litigation and referral to arbitration on the ground that the Letter Agreement included a term requiring the dispute to be submitted to arbitration in California. The term was allegedly incorporated into the agreement by clause 21, which provided:

'BALANCE OF TERMS:

The balance of terms will be WB and WB standard for "A" list directors and producers, subject to good faith negotiations within WB's and WB's customary parameters.'

The parties proceeded on the basis that the repetition of 'WB' and 'WB's' in this clause was inadvertent, and that the relevant parts of the clause should be read as simply referring to 'WB standard' rather than 'WB and WB standard', and 'WB's customary parameters' rather than

'WB's and WB's customary parameters'.

However, there was a dispute as to whether Warner Bros had provided a set of contractual terms fitting the description WB standard terms for "A" list directors and producers, which include an arbitration clause in its standard terms. Warner Bros provided evidence that while most agreements with talent end up in a 'long form' format, some, like the Letter Agreement, do not, and may be documented in a shorter deal letter. Further, deals which are not "papered" in the long form format will often incorporate WB Pictures' standard terms used in the long form agreements by reference to those standard terms.

Warner Bros argued that clause 21 therefore incorporated an arbitration clause which made New South Wales a 'clearly inappropriate forum' for arbitration. The relevant clause, contained in 'form agreements' regularly used for "A" list directors and producers (emphasis added) directed:²

'Any and all controversies, claims or disputes arising out of or related to this Agreement or the interpretation,

² Ibid at [28].

performance or breach thereof, including, but not limited to, alleged violations of state or federal statutory or common law rights or duties, and the determination of the scope or applicability of this agreement to arbitrate ('Dispute'), except as otherwise set forth below, [REDACTED], shall be resolved according to the following procedures which shall constitute the sole dispute resolution mechanism hereunder. In the event that the parties are unable to resolve any Dispute informally, then such Dispute shall be submitted to final and binding arbitration. The arbitration shall be initiated and conducted according to either the JAMS Streamlined (for claims under \$250,000) or the JAMS Comprehensive (for claims over \$250,000) Arbitration Rules and Procedures, except as modified herein, including the Optional Appeal Procedure, at the Los Angeles office of JAMS, or its successor ('JAMS') in effect at the time the request for arbitration is made (the 'Arbitration Rules'). [REDACTED]. The arbitration shall be conducted in Los Angeles County before a single neutral arbitrator appointed in accordance with the Arbitration Rules. The arbitrator shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute. The parties waive the right to seek punitive damages and the arbitrator shall have no authority to award such damages.

The arbitrator will provide a detailed written statement of decision, which will be part of the arbitration award and admissible in any judicial proceeding to confirm, correct or vacate the award. Unless the parties agree otherwise, the neutral arbitrator and the members of any appeal panel shall be former or retired judges or justices of any California state or federal court with experience in matters involving the entertainment industry. If either party refuses to perform any or all of its obligations under the final arbitration award (following appeal, if applicable) within thirty (30) days of such award being rendered, then the other party may enforce the final award in any court of competent jurisdiction in Los Angeles County. The party seeking enforcement of any arbitration award shall be entitled to an award of all costs, fees and expenses, including [REDACTED] attorneys' fees, incurred in enforcing the award, to be paid by the party against whom enforcement is ordered.'

Warner Bros evidence was that the clause had been used in WB Pictures "A" List producer and director form agreements since the early 2000s. Fifty-six agreements dated between 2005 to 2009, which contained arbitration clauses based on, and in most cases identical to the above were presented as evidence.

Justice Hammerschlag dismissed the application for stay, finding that clause 21 operated to incorporate terms into the Letter Agreement, however, the contracting Warner Bros entity did not have any terms which were 'standard' which could be incorporated (as opposed to other Warner Bros entities). Further, His Honour found that, even if it was relevant that other Warner Bros group members had form agreements which required disputes to be arbitrated in California, the studio had not proved these terms were 'standard'.

Warner Bros' fury over decision

Warner Bros appealed Hammerschlag J's decision to the New South Wales Court of Appeal. The main issues on appeal were:

- 1 whether the Letter Agreement incorporated terms which were 'WB standard for "A" list directors and producers' prior to good faith negotiations occurring; and
- 2 whether the arbitration clause was incorporated into the Letter Agreement because it was a term which was 'WB standard for "A" list directors and producers'.

Court of Appeal takes the high road

The Court of Appeal (Bathurst CJ, Beazley P and Emmett AJA) unanimously allowed the appeal and set aside the orders made by the primary judge. Chief Justice Bathurst summarised his position in direct terms:³

'It was not seriously in contest that leave should be granted. The appeal is undoubtedly arguable and, if the applicants' contentions are correct, WB Productions should not be required to litigate in a forum other than the one chosen by the parties through the Letter Agreement. In these circumstances, it is appropriate to grant leave.'

3 Ibid at [44].

On the first ground, the Court of Appeal found that the Letter Agreement did incorporate terms which were 'WB standard for "A" list directors and producers' prior to good faith negotiations occurring. This was the interpretation suggested by the text of clause 21, and supported by the fact that other terms were not capable of operating unless these terms were immediately incorporated into the agreement. The Court of Appeal noted that it was irrelevant that the standard terms were not supplied to Kennedy Miller Mitchell:⁴

'As was pointed out in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52 at [47], legal instruments are "often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature". Further, there is no reason to assume that those advising [Kennedy Miller Mitchell], who were experienced in the film industry, did not appreciate the meaning of terms which were "WB standard for 'A' list directors and producers."

On the second contention, it was held that the Letter Agreement incorporated the arbitration clause which was contained in form agreements held by a division of a subsidiary of WB Entertainment. Clause 21 incorporated terms which were 'habitually proffered' by members of the Warner Bros group for agreements with "A" list directors and producers. The evidence showed that an arbitration clause had been used by Warner Bros group members for almost two decades and was included in the form agreements which were current at the time the agreement was made. Clause 21 therefore operated to incorporate the arbitration clause into the Letter Agreement.

Accordingly, the Court of Appeal granted the application for a stay of proceedings and referred the dispute to the JAMS arbitration body in Los Angeles. Chief Justice Bathurst concluded:⁵

'...[the arbitration clause] requires that an arbitrator "shall follow California law and the Federal Rules of Evidence in adjudicating the Dispute". Therefore, the "procedure in relation to arbitration" in the Letter Agreement is "governed by the law of a Convention country" for the purpose of s 7(1)(a) of the International Arbitration Act 1974 (Cth), namely, Californian law as the law of the United States. The present dispute involves a matter that "is capable of settlement by arbitration" under the arbitration clause incorporated into the Letter Agreement. It follows that the proceedings... must be stayed under s 7(2) of the International Arbitration Act 1974 (Cth).'

The Court of Appeal also ruled that Kennedy Miller Mitchell should pay Warner Bros' costs; not only for the appeal, but also for the original motion for stay.

The award for enforcing arbitration agreements goes to...

Australia! This decision supports a long line of cases which evidence the pro-arbitration stance of Australian courts and reinforce Australia's reputation as a safe seat for arbitration. Parties who contract into an arbitration agreement can rest assured that their preference for arbitration will be respected and enforced by Australian courts.

It also highlights that arbitration clauses can be incorporated by reference in short form contracts – even if a party is not provided the longer terms and conditions of the agreement. If you are signing a short form contract that, by reference, imports more substantial terms and conditions, be sure to read them. Otherwise, you could end up in the same position as George Miller and Doug Mitchell. Even those of us who are ordinary humans, not Hollywood stars, enter into contracts on a regular basis.

⁴ Ibid at [59].

⁵ Ibid at [88].

Third Party Funding Regulation; Red Tape or Green Lights?



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Introduction

As its popularity grows, third party funding raises ethical and logistical questions. This paper focuses on the logistical questions of national and institutional regulation. Specifically, this article will address the current international levels of adoption of third party funding regulation, and how arbitral institutions have adopted or ignored it in turn. Currently, there is no international agreement on third party funding in arbitration, no consensus on the adoption at a state level, and subsequently no promulgated regulation for institutions. Several states have legislation specific to third party funding in litigation, but lack any specific arbitration rules, or institutional adaption. Further, a select few states have legislation which while addressing litigation funding clarifies that it does not specifically prohibit third party funding in arbitration. Lastly, there are two States, Singapore and Hong Kong which have third party funding Legislation specific to Dispute Resolution or Arbitration.

State Adoption of Third Party Funding Regulation

Third party funding is the act of a third party, or person not associated with the dispute, financing, or providing funds to a party to the arbitration in exchange for a portion of the award.¹ This financing can include legal representation, transport, venue hire, and any other costs associated with an arbitration. The level of coverage depends on the contract between party and funder, and may even include funding the award or the opponent's costs if they prevail.²

"Unlike third party funding in ordinary litigation, third party funding in international arbitration is still not regulated. Even where a regulation of third party funding in domestic litigation does exist, these rules cannot always be automatically applied in arbitration."³ This observance does not bode well for those hoping to rely on a stable and transferable system throughout States.

Australia has long viewed third party funding in a favorable light, with Australia leading the way in third party funding regimes. Australia has the largest third party funding industry in the world, followed by the US, UK, and Germany.⁴ "There is no legislation or regulation in Australia that limits the fees funders can charge."⁵ Further, Australia currently has no regulation for capital adequacy (the requirement to be able to produce funds at any time), nor any other regulation, save for the requirement that funders have methods to identify and protect against conflicts of interest.^{6,7} While these may seem like striking issues, one must remember that parties to a commercial arbitration are sophisticated, and are able to negotiate deals at arms-length.

- 1 Quickguides, *Third party funding in international arbitration*, Ashurt (Jan. 13, 2016), <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>.
- 2 *Id.* Ashurt.
- 3 Valentina Frignati, *Ethical implications of third-party funding in international arbitration*, *Arbitration International*, Volume 32, Issue 3, 1 September 2016, Pages 505–522, <https://doi.org/10.1093/arbint/aiw011>, <https://academic.oup.com/arbitration/article/32/3/505/1741422>.
- 4 *Id.* (referencing Australia as the largest TPF industry, followed by US, UK, and Germany).
- 5 Steven Friel and Jonathan Barnes, *Litigation Funding 2017*, Piper Alderman, https://www.piperalderman.com.au/_files/d/28349/GTDT%20Litigation%20Funding%202017%20Book.pdf.
- 6 Quickguides, *Third party funding in international arbitration*, Ashurt (Jan. 13, 2016).
- 7 Caroline Kenny QC, *Third party funding of international arbitrations*, *CI Arb* (Nov. 1, 2017), <http://www.ciarb.org/news/ciarb-news/news-detail/features/2017/11/01/third-party-funding-of-international-arbitrations>.

America has robust arbitration legislation under its Federal Arbitration Act.⁸ However, America does not yet have a cohesive body of laws regulating third party funding in commercial arbitration. As it stands, the law varies from state to state. This also means that while some states have abolished maintenance and champerty laws altogether, others with these laws still on the books are dismissing them as irrelevant in third party funding arrangements, and the rest are relying exclusively on them to create “regulation (as opposed to prohibition)” on third party funders.⁹

Newly announced guidance from the Paris Bar Council in France accentuates the growing acceptance of third party funding in the international community. A resolution, passed on 21 February 2017, recognizes that third party funding is not expressly prohibited under French law, and therefore requires guidance for counsel.¹⁰ Dutch law, like French law, does not explicitly prohibit third party funding: “although the Dutch Ministry of Justice has considered certain legal issues arising from third party funding, it has not proposed any specific legislation in this regard.”¹¹ There have been no issues in Dutch law or arbitrations attributed to the lack of third party funding regulation: “in the very few published cases in which third party (litigation) funding has been considered, the Dutch courts have dealt rather liberally with the issue, applying general legal principles.”¹² Just as has been the case with France, there appears to be no

need for specific third party funding regulation at the national level in the Netherlands – maybe just some guidance by the courts.

The United Kingdom is an important nation to review because of its maintenance and champerty laws which form the basis of contention against third party funding. “Maintenance refers to an unconnected third-party assisting to maintain litigation by providing, for example, financial assistance. Champerty is a form of maintenance where a third party pays some or all of the litigation costs in return for a share of the proceeds.”¹³ Prohibitions on these laws still remain in many common law jurisdictions, though the courts in the UK have relaxed these prohibitions. Many courts will ignore maintenance and champerty laws except in circumstances of grave misconduct.¹⁴

In some countries, such as Ireland, maintenance and champerty remain criminal offenses. In April 2016, the Irish courts blocked a third party funder from funding a major case against the Irish state on grounds of champerty and then again in 2017. The case in 2017 came with a note from the court that “[c]hamperty remains the law in the State”, and that modernising Irish law on champerty and third party funding was not for the courts but was instead better suited for a “full legislative analysis.”¹⁵ This makes Ireland one of the few countries calling for a national (as opposed to an

8 9 U.S.C. 1, <https://www.law.cornell.edu/uscode/text/9>.

9 *Emerging approaches to the regulation of third-party funding*, Norton Rose Fulbright (Oct. 2017).

10 *Id.* “The resolution confirms that there is nothing in French law precluding parties from using the services of third party funders to finance international arbitration. The resolution goes further to endorse the practice of third-party funding as being in the interests of both parties and counsel, particularly in the context of international arbitration. However, it reiterates that counsel must abide by their professional and ethical obligations and further mandates that: (i) counsel should not provide legal advice to third-party funders; (ii) counsel should only take instructions from their clients; and (iii) counsel should only meet with third-party funders in the presence of their clients. The resolution also recommends that counsel encourage their clients to disclose third party funding arrangements to arbitral tribunals in order to avoid potential issues with enforcing arbitral awards.”

11 Marc Krestin and Rebecca Mulder, *Third-Party Funding In International Arbitration: To Regulate Or Not To Regulate?*, Kluwer Arbitration Blog (Dec. 12, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate/>.

12 *Id.*

13 *Emerging approaches to the regulation of third-party funding*, Norton Rose Fulbright (Oct. 2017), <http://www.nortonrosefulbright.com/knowledge/publications/157164/emerging-approaches-to-the-regulation-of-third-party-funding>.

14 *Id.*

15 *Emerging approaches to the regulation of third-party funding*, Norton Rose Fulbright (Oct. 2017).

institutional) level review of third party funding laws.

However, this does not mean that attitudes in Asian countries influenced by British law are not changing towards third party funding. Both Hong Kong and Singapore have introduced and enacted legislation to permit and regulate third party funding use in international arbitration.¹⁶ The new laws in Singapore and Hong Kong distinguish third party funding as exempt from their (still existing) champerty and maintenance laws. The argument for the new legislation was that it would allow parties to now use SIAC and HKIAC when using third party funding.¹⁷

So, what does the Hong Kong and Singapore legislation have that makes them stand apart? The new Singaporean law specifically dictates that third party funding arrangements are not contradictory to maintenance and champerty laws when used during a “dispute resolution proceeding”.¹⁸ Hong Kong, on the other hand, “provide[s] for measures and safeguards in relation to third party funding of arbitration”, making the new law much more specific than Singapore’s.¹⁹ It is imperative to note that these legislative schemes are more akin to roadblocks being removed than regulations being set. The argument can be made that these two countries are better situated to regulate third party funding at the national level because of the government’s close ties and involvement with arbitral institutions.

“In the remaining jurisdictions—including most of Europe, Asia, the Middle East, and Africa—regulation of the phenomenon of third party funding is totally absent, both in court litigation and in arbitration.”²⁰ As we can see, there is great diversity on the international stage when it comes to third party funding regulation.

Institutional Adoption of Third Party Funding Regulation

As per the discussion above, we know that most nations prominent on the international arbitration scene do not have laws prohibiting third party funding regulation, and further, many do not have any laws regulating it. Can the same be said for the arbitral institutions of those countries? And if they are regulating, why? If there is one without the other, how much regulation is really necessary to maintain a third party funding scheme in a country?

This paper does not purport to answer the above question, as I do not believe that there is an answer right now. Authors Mr Krestin and Ms Mulder from Linklaters agree, stating that, “[t]his question cannot be answered at current... countries who allow third party funding have different frameworks/levels of regulation, and the optimal level cannot be discerned until we have seen a failure in the system leading to amendments.”²¹

Unfortunately, a failure in the system means that at least one future party will surely suffer unnecessarily. The probable issues Krestin and Mulder identified with national regulation included an increase in forum shopping “and/or huge inconsistencies” between the regulations of the various implementing countries.²² They finish their analysis with the sentiment that, “until the effects are known, it may be best for institutions to create their own rules”, instead of allowing nations to blindly legislate and regulate without a better understanding of the effects.²³

Regarding the prominent institutions who would be considered thought leaders and the “early adopters” of

16 Quickguides, *Third party funding in international arbitration*, Ashurt (Jan. 13, 2016).

17 SIAC (Singapore International Arbitration Centre), HKIAC (Hong Kong International Arbitration Centre). Neither are allowed to host arbitrations which may include elements illegal in their country.

18 Caroline Kenny QC, *Third party funding of international arbitrations*, CI Arb (Nov. 1, 2017).

19 Id.

20 Valentina Frignati, *Ethical implications of third-party funding in international arbitration*, Arbitration International (Sept. 1, 2016), <https://academic.oup.com/arbitration/article/32/3/505/1741422>.

21 Marc Krestin and Rebecca Mulder, *Third-Party Funding In International Arbitration: To Regulate Or Not To Regulate?*, Kluwer Arbitration Blog (Dec. 12, 2017),

22 Id.

23 Id.

the international arbitration world, none have rules which even contemplate third party funding.²⁴ The International Centre for Dispute Resolution, the Singapore International Arbitration Centre, the London International Arbitration Centre, the International Chamber of Commerce Court of Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce, and the Hong Kong International Arbitration Centre all currently lack any institutional rules pertaining to third party funding.

Regulation Through Professional Codes

Maybe the answer to the question, “[i]s regulation the answer?” lies in professional codes of conduct, like the American Bar Association, the International Bar Association, the Code of Conduct for Litigation funders in England, or others.²⁵ As we have seen, there are few countries with national legislative or regulatory schemes, and no arbitral institutions with rules pertaining to third party funding. Therefore, it would be prudent to review these codes to see what is being done outside of those two bodies.

As mentioned, English financing companies have formed a Code of Conduct for Litigation Funders. The Code includes rules for capital adequacy requirements for funders as well as rights to terminate or control proceedings.²⁶ While this Code has been around since 2011, it is voluntary, and has only attracted 7 members.²⁷ This leaves a large body of financing companies (both English and other) unregulated, and seems to leave the viability of self-regulation in doubt.²⁸ No other independent organizations have created rules concerning the regulation of third party funding.

So why then, is the global trend at odds with public opinion and desires? The Queen Mary University of

London 2015 International Arbitration Survey announced that the majority of respondents (71%) thought that third party funding required regulation.²⁹ Some practitioners believe that the desire for greater regulation may stem from the growing liability parties carry into a third party funding scenario. For example, “[a] party seeking funding must undertake due diligence on its funder (for example, to ensure that it has adequate available capital to meet the cases in its portfolio) and carefully negotiate the funding agreement.”³⁰ The up-coming 2018 Queen Mary’s survey reportedly includes many more questions pertaining to third party funding, and will address the nuances parties and practitioners are requesting guidance for.³¹

Conclusion

As far as anyone has reported, the third party funding market in arbitration works well enough without regulation. However, practitioners and parties all seem to agree that regulation (if any) should occur at an institutional, not national level. England is testing the waters of industry self-regulation with their Code of Conduct for Litigation Funders, but this lacks traction elsewhere. Even Singapore and Hong Kong have only eliminated road blocks to third party funding, instead of truly regulating it. Allowing sovereign states whose legislative authors realistically don’t understand arbitration (exempting Singapore, and Hong Kong) to impose regulation which may be contradictory to the current trends in arbitration would not benefit anyone. This mentality is very clearly being adopted by nations around the world who have either abstained from implementing regulation, or have otherwise implicitly declared it the role of their arbitral institutions to either adopt or ignore regulation for third party funding.

24 Definition of ‘Early Adopter’, Investopedia, <https://www.investopedia.com/terms/e/early-adopter.asp>.

25 International Arbitration Report, Norton Rose Fulbright, Issue 7 (Sept. 2016), <http://www.nortonrosefulbright.com/files/international-arbitration-report-issue-7-142408.pdf>.

26 Id.

27 Association of Litigation Funders, <http://associationoflitigationfunders.com/code-of-conduct/>.

28 International Arbitration Report, Norton Rose Fulbright, Issue 7 (Sept. 2016).

29 The Queen Mary University of London 2015 International Arbitration Survey.

30 International Arbitration Report, Norton Rose Fulbright, Issue 7 (Sept. 2016). This article further discussed that, “given the increase in cases that are funded, the number of new funders entering the market and the globalisation of the industry (many funders operate across multiple jurisdictions), there may be grounds for the introduction of external regulation. A number of jurisdictions and arbitration institutions are considering just this issue. The concern, however, is that different standards could be set in different jurisdictions and under different arbitral rules. It would be far preferable – for parties and the funding industry – to have minimum common standards. The question is what that would look like and how that could be achieved.”

31 The survey had not been released at the time of writing.

2018 International Arbitration Survey: The Evolution of International Arbitration



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The results of the 2018 International Arbitration Survey are now available. This year's survey saw record participation from stakeholders around the globe, providing the most comprehensive guidance yet as to what users want and expect, and the factors that may motivate change and drive forward the evolution of international arbitration.

In our last article,² we mentioned the launch of the 2018 International Arbitration Survey, conducted by the School of International Arbitration at Queen Mary, University of London, in partnership with White & Case. The results are now available. In this article, we provide a brief summary of some of the survey's key findings and suggest how those findings could guide the development and promotion of arbitration in Australia.

The 2018 survey explored how international arbitration has evolved over recent years, the key areas for development in the future and who and what will shape the future evolution of the field. Over 900 private practitioners, in-house counsel, arbitrators and counsel participated in the survey. The respondents comprised a geographically diverse pool, having their principle practice or operations in Europe (35% of respondents), the Asia-Pacific (25%), Latin America (14%), Africa (10%), the Middle East (9%) and North America (8%). With such

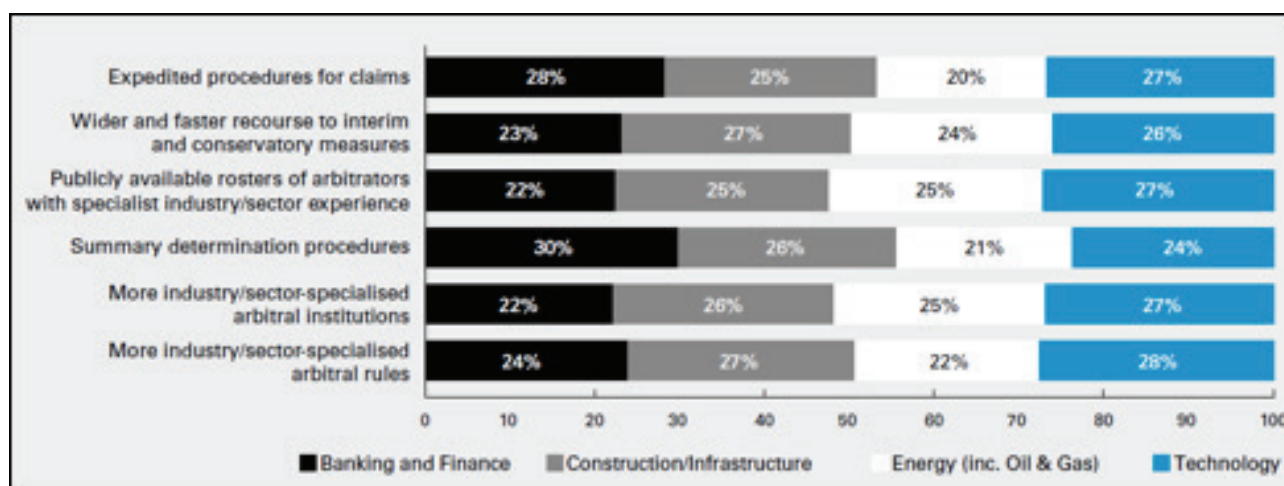
a significant proportion of Asian and Australasian responses, the 2018 survey provides helpful information about these regions.

The present

- In total, an overwhelming 99% of respondents would recommend international arbitration to resolve cross-border disputes in the future. Both in 2015 and this year, only 4% of respondents expressed that they would rather opt for commercial litigation to resolve a cross-border dispute.
- Compared to the 2015 survey's findings, there has been a significant increase in the overall popularity of arbitration combined with ADR around the globe. 97% of respondents indicated that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%). This was an increase on the 2015 survey, which found that an aggregate of 90% of respondents preferred international arbitration, either as a stand-alone mechanism (56%) or together with ADR (34%).
- "Enforceability of awards" continues to be perceived as arbitration's most valuable characteristic, followed by "avoiding specific legal systems/national courts", "flexibility" and "ability of parties to select arbitrators".

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 See the December 2017 edition of the ACICA Review, pages 27 to 29.



Meanwhile, “cost” continues to be seen as arbitration’s worst feature, followed by “lack of effective sanctions during the arbitral process”, “lack of power in relation to third parties” and “lack of speed”.

- The three most important reasons for respondents’ preference for certain arbitral institutions show that, when it comes to preferring one institution over another, arbitration users tend to look at them from a macro perspective, rather than measuring specific aspects of their administration of cases. Those reasons are: (1) general reputation and recognition of the institution; (2) high level of administration, including efficiency, pro-activeness, facilities, quality of staff; and (3) previous experience of the institution.
- The five most preferred arbitral institutions are (in order) the (1) ICC; (2) LCIA; (3) SIAC; (4) HKIAC; and (5) SCC, while the five most preferred seats of arbitration are (1) London; (2) Paris; (3) Singapore; (4) Hong Kong and (5) Geneva. Notably, Singapore has now passed Hong Kong as a preferred seat, with SIAC surpassing HKIAC as a preferred institution.
- When asked to indicate the procedural regimes respondents have used for ad hoc arbitration, the single most outstanding result was the UNCITRAL Arbitration Rules (84%). Those were followed by “national arbitration laws” (33%) and “bespoke regimes agreed by the parties” (15%).
- Respondents believe that the use of international arbitration is likely to increase in the Energy, Construction/Infrastructure, Technology and (albeit to a lesser extent) the Banking and Finance sectors.
- The survey provided a list of potential improvements and innovations to discover which ones respondents thought, if implemented, would make arbitration a better fit for each of those four industries. Respondents tended to show a similar degree of appreciation for all of the suggested measures across all four sectors. The results broken down are shown in the graph above.
- Recent arbitral practice has highlighted a number of recurrent issues that some users feel should be subject to a more focused regulation through arbitral rules. In particular:
 - the wide range of grounds on which counsel base their arbitrator challenges suggest a requirement for clear standards of arbitrator independence and impartiality (a topic we touched upon in our last article);
 - the increased use of tribunal secretaries has prompted the need to better define their duties and the limits thereof; and
 - the increasing role of expert witnesses in arbitral proceedings has led to users pondering whether experts should be held against the same or similar standards of independence and impartiality as arbitrators.

The future

- A significant majority of respondents (80%) consider that arbitral institutions are best placed to influence the future evolution of international arbitration.

Conclusion

The views provided by the respondents to the 2018 survey show that, whilst international arbitration is a clear preferred forum for resolving cross-border disputes, there remain numerous opportunities for arbitral institutions to address respondents' perceived drawbacks in opting for international arbitration over litigation.

In particular, the results of the survey show that the desirability of resolving disputes by arbitration could be increased by greater accessibility of expedited procedures (including summary determination); greater availability of effective interim measures; greater visibility of arbitrators with specialist industry and/or sector experience; and increasing efficiency and reducing cost through the use of technology throughout the lifecycle of arbitral proceedings. Interestingly, many of those processes are already well catered for in Australia and under the ACICA Rules.

Singapore and SIAC overtaking Hong Kong and HKIAC likely reflects the concerted and highly successful campaign by Singapore to promote itself as a hub for disputes, something which has been embraced wholeheartedly by Australian companies. Given the global nature of the 2018 survey, it is unsurprising that more remote seats (such as Australia) and smaller institutions (such as ACICA) do not yet feature prominently. However, the 2018 survey has shown a rise in popularity of Brazil as a seat, which may reflect an increasing willingness of parties to move away from the more traditional seats and institutions.

This suggests that greater promotion of the advantages provided by selecting the ACICA Rules, with Australia as a seat, could see more parties opting to resolve their cross-border disputes by arbitration in Australia, rather than in the national courts or by arbitration seated elsewhere.

Real life examples of using Arbitration to solve commercial problems



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In late November I was approached by a party who had executed a sale for their business some months prior and was having problems in finalising the adjustments. That party informed me that the counterparty was also interested in resolving the problem quickly and efficiently. The challenge for me was to present a solution that could resolve all matters in dispute before Christmas.

The agreement did not provide for arbitration so it was important that I satisfied the requirements of the Act to obtain agreement in writing to arbitration including the place. The place is not to be confused with venue. The place determines the procedural law which is to apply to the dispute. The venue is where the actual hearing, if any, is heard.

After the first call with the party that approached me, I asked them to email me (cc the counterparty) with the enquiry. They did so and asked for an indication of cost.

I asked by reply email for the parties to provide a summary of the dispute (not to exceed 1 page) and details of how each party said I should determine the dispute. I said further that, subject to receipt of the same, I would advise a cost or call a telephone conference to determine the cost. The originating party provided a summary and the other party did not.

I called a telephone conference to agree to my appointment and to determine a timetable. Before the conference the counterparty confirmed that the summary of the dispute provided to date was accurate.

At the conference the parties agreed to exchange evidence, submissions and evidence and submissions in reply by various dates and for me to determine the matters on the papers. The parties did not agree to a third round of submissions despite my suggestion that it would be useful. In short, the timetable did not permit the same.

I made it clear to the parties that in order to meet the timeframes I would be working on the determination as soon as each set of evidence or submissions was received. I also advised the parties to only contact me by email. I agreed to provide a non-binding estimate of my fees after receipt of the material in reply and that I would work towards a decision being made before Christmas.

Shortly before the first date for exchanging evidence and submissions, the counterparty emailed and asked for an extension of time. I replied by email and granted all parties a one day extension of time. The party not seeking an extension of time called to ask whether or not to submit its submissions as proposed by the earlier timetable. I advised that party not to call me. I emailed the parties and advised them to comply with my revised timetable and not to contact me by phone.

Once the first round of papers were received it became apparent that the parties were seeking to expand the scope of the dispute beyond the original summary. I emailed the parties and asked them to confirm that I had jurisdiction to determine all the matters as submitted in their submissions. They did so the following day. I also issued invoices for work done to date and they were promptly paid.

Before the next exchange date for submissions and evidence, the party who did not seek the first extension of time emailed and gave a brief explanation of why they needed a 24 hour extension of time. I emailed the parties adjusting the orders to suit, including pushing back the date for the determination by one day myself.

One party emailed (cc all) and asked what recourse they may have if inaccurate information was provided. I emailed in reply that each party should seek their own legal advice.

The parties filed their evidence and submissions in reply, at which stage credibility evidence was sought to be relied upon and jurisdiction was challenged in relation to one of the matters upon which I had already sought confirmation of jurisdiction.

I indicated a non-binding estimate of costs and confirmed that a decision would be made as proposed. I also asked that various documents referred to in the submissions be provided in addition to copies of each authority and standard upon which the parties sought to rely. Those documents were promptly supplied.

The party against whom credibility evidence was sought to be led emailed me (cc all) and asked to know whether or not the rules of evidence were to apply to the arbitration or not. I issued procedural orders requiring further submissions in reply the following day including any submissions they proposed to put in relation to evidence and any submissions they proposed to put in relation to whether or not the wording used in the schedules was relevant or not. I also referred the parties to s19, Commercial Arbitration Act, so they could seek legal advice in relation to same.

Further submissions were so received. I advised the parties that my original estimate was correct and required payment into my trust account of same. Those moneys were paid.

Five days later I issued my decision as promised.

It was interesting to note that much of the evidence sought to be relied upon by the parties was not relevant. This is not unusual for a contractual interpretation dispute.

What was important was that the method chosen by the parties, determination on the papers, enabled the parties to move forward and make such adjustments as were necessary to resolve the dispute.

It is difficult to see a Court based solution achieving this objective. Nor indeed would a mediation necessarily have resolved the dispute, which the parties had already tried to resolve and failed to do, in the time frame available.

Australian Perspectives on International Commercial Dispute Resolution for the 21st Century: A Symposium



Nobumichi Teramura

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Introduction

Ongoing dramatic geopolitical transitions in the world have inevitably impacted on the international business environment of the Asia-Pacific region. This requires Australia and other countries in the region to re-examine their legal infrastructure for transnational business disputes.¹ Convergence and divergence of legal systems of competing and sometimes cooperating states in the Asia-Pacific require the Australian government and other stakeholders to address unprecedented legal complexities in private to private, private to public, and public to public commercial dispute resolution.

On 19 April 2018, the Sydney Centre for International Law (**SCIL**)² at the University of Sydney Law School organised a post-ICCA³ symposium: "International Commercial Dispute Resolution for the 21st Century: Australian Perspectives".⁴ The symposium, the second recently with the University of Western Australia (**UWA**) Law School and also supported by Transnational Dispute Management (**TDM**), brought together leading experts in international arbitration, investment law and international business law from all over the world. They examined broad and perhaps increasingly overlapping fields such as investor-state dispute settlement (**ISDS**) in a changing legal and political environment, cross-border litigation in the Asian region, other international commercial dispute resolution mechanisms (arbitration and mediation), and ISDS.

The Future of Investor-State Arbitration

The first session was chaired by the Hon Wayne Martin AC (Chief Justice of the Supreme Court of Western Australia), who had directed final discussions at the first joint symposium held at UWA in February. It was dedicated to exploring the future of investor-state arbitration amidst new developments in dispute resolution for international business. The panel discussants first considered: "Whether there is a potential for Australia to develop international commercial courts for dealing with international litigation like the newly established international commercial courts in Singapore, Dubai or even Kazakhstan?". A/Prof Amokura Kawharu (University of Auckland) emphasized the success and advantages of international commercial arbitration and pointed out difficulties in creating a new international commercial court in New Zealand, where courts have few judges and therefore "lists". Dr Rajesh Sharma (RMIT University) commented that an Australian international commercial court could bring economic and financial benefits to the Australian legal sector by enabling lawyers to service in particular the Indian market, but practical issues such as visas would need to be addressed.

The second panel topic was: "Challenges and opportunities in making Australia an attractive seat for arbitrating international business disputes." Associate Professor Kawharu suggested that the Comprehensive and Progressive Partnership for Trans-Pacific Partnership (**TPP-11**) might further activate the arbitration market in Asia-Pacific region. Dr Sharma emphasised the need for more active marketing by Australian practitioners, mentioning that the apparently disproportionately high rate of Australian practitioners in international commercial cases seemed to have been brought about by repeat appointments. Professor Catherine Rogers (PennState Law and QMUL) commented that the geographical location of Australia could be a disadvantage so that creating online dispute resolution platforms may be a viable solution. Professor Luke

1 <http://booksandjournals.brillonline.com/content/books/9789004360105>

2 <https://sydney.edu.au/law/our-research/research-centres-and-institutes/sydney-centre-for-international-law.html>

3 http://www.arbitration-icca.org/conferences-and-congresses/ICCA_2018_Congress_Sydney.html

4 <http://sydney.edu.au/news/law/457.html?eventcategoryid=39&eventid=11759>

Nottage (University of Sydney) added that Australia's location could even become an advantage if targeting dispute resolution between South America and (South) Asia or "One Belt, One Road" countries or Africa.

The third topic was: "Should Australia, like the US under Trump Administration now skeptical of ISDS, reform existing provisions"? Jessica Casben Fell (Office of International Law in the Commonwealth Attorney-General's Department of Australia) pointed out the diverse nature of ISDS provisions in various free trade agreements and suggested that Australia needed to work for multiple reform options at the same time to protect the national interest. Associate Professor Kawharu regretted that the inadequate improvements contained in the TPP-11 would probably not reverse the negative public perceptions that have emerged in New Zealand recently, resulting in the new Coalition government renouncing ISDS for future treaties.⁵ Dr Sharma enumerated some recent dispute resolution initiatives in Asia that could be used for investment disputes (such as Belt and Road, ASEAN, Japan, and the Indian Ocean Rim association), pointing out that they have all included the option of mediation.

Cross-Border Litigation

In the second symposium session, Professor Vivienne Bath (University of Sydney) provided her insights on developments on cross-border litigation in Asia. Overlapping jurisdictions brought about by long-arm jurisdictions of common law countries (such as Australia) but China also posed fascinating legal challenges to the region. Explaining various possible solutions to the issue (especially arbitration, exclusive jurisdiction clauses, and international commercial courts) and their limitations, she concluded that Australia and Asia could not ignore the legal development of China in doing international business. Adjunct Professor Donald Robertson (Herbert Smith Freehills and University of Sydney) then commented about the rise of the movements for establishing international commercial courts on a global scale and added that the abundance of such movements

outside of traditional international commercial dispute resolution venues reflected current real-politik. As an example, he introduced a case in which a Russian company decided to resort to the Singapore International Commercial Court (**SICC**), which, in his view, came from the company's distrust of London's Commercial Court.

International Commercial Arbitration and Mediation

The third session was dedicated to international commercial arbitration and mediation in general. Professor Rogers introduced her project "Arbitrator Intelligence (AI)" which aims to promote transparency, accountability, and diversity in the arbitrator selection process by supplying more information about arbitrators and more opportunities for arbitration users to provide feedback about arbitrators.⁶ Dr Dominic Dagbania (UWA) positively evaluated the project since increasing transparency of the arbitrator appointment process would lead to greater efficiency of international arbitration. Second, Professor Nottage presented highlights from his recent Journal of International Arbitration article co-authored with James Morrison (sole practitioner, associated also with Allens) that critically assessed the Australian International Arbitration Act (drawing on a more comprehensive paper).⁷ He emphasised the significance of regular reforms of the Arbitration Act, including issues not clearly regulated in Model Law itself (such as indemnity costs after unsuccessful challenges) in shaping a strong arbitration community in Australia and increasing its attractiveness as a seat. Jeffrey Waincymer⁸ (Adjunct Professor at the National University of Singapore) added that the validity of the arbitration agreement was one of the most fundamental elements, with tribunals and courts exercising concurrent control under the Model Law. He argued for more deference to tribunal decision-making with respect to jurisdiction, the standard of proof applied when testing the arbitration agreement, and its applicable law.

5 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116526

6 <http://arbitrationblog.kluwerarbitration.com/2018/02/27/ai-3/>

7 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514124

8 <http://arbitrationblog.kluwerarbitration.com/author/jeffreywaincymer/>

Investor-State Arbitration

In the fourth session, the participants of the symposium shared their diverse insights on investor-state arbitration. Prof Stephan Schill (University of Amsterdam) proposed a comparative constitutional framework analysing private-public arbitration.⁹ He introduced the idea that, as there was no centralized method to control private-public arbitration, a framework for conceptualising legitimacy of private-public arbitration could be developed through comparative law analysis of the boundaries of constitutional principles such as democracy, human rights and the rule of law. Ana Ubilava (University of Sydney), drawing on her quantitative data set developed to research investor-state mediation for her PhD thesis, cautioned that ISDS arbitration claims were being used overwhelmingly against developing countries (where national laws and courts were expected to be problematic) and that known ISDS awards or even settlements were already mostly made at least partly public.

Dr Caroline Henckels (Monash University) analysed the current status of public-private arbitration in Australia, drawing on her national report for Schill's book project.¹⁰ Australian law has not adequately kept up with the rise in government contracting so raising the public awareness of the necessity of domestic legislative reform is crucial to protect the public interest. Problems included the federal or state government's unlimited ability to enter contracts providing for arbitration, and other lack of distinction between public-private arbitrations and purely private ones. Hon Robert French AC (UWA Chancellor and former Chief Justice of the High Court of Australia) generally agreed but commented that Australian public law's quite extensive review of executive action might already provide some oversight of public-private arbitrations.

Esme Shirlow (King's College London) presented empirical research for her PhD thesis on how international adjudicators attribute weight or relevance to domestic decisions in the practice of international investment treaty arbitration. Analysing 1492 publicly available 'private property' decisions of the Permanent Court of International Justice, International Court of Justice, European Court of Human Rights and Investor

State Dispute Settlement tribunals, she presented a taxonomy tracking the different approaches used by these international courts and tribunals to recognise domestic authority. She further demonstrated that ISDS tribunals have exhibited respect for domestic authority over the last 10-15 years using a mixture of techniques, including good faith, procedural, and substantive review. She compared this to the approach of the ECtHR, which has increasingly adopted procedural approaches to review, deferring to domestic decision-makers if they have adopted a measure (such as expropriation) after going through a proper procedure.

Inter-State Dispute Settlement

The fifth session addressed inter-state dispute settlement, especially under the World Trade Organisation regime. Dr Brett Williams (Williams Trade Law) suggested a further reason behind the US threatening to close down WTO dispute settlement by blocking appointments to the Appellate Body. He argued that US steel and aluminium manufacturers had been worrying about the potential for the WTO to rule against the US's continuous use of methods for inflating dumping margins and therefore duties on imports especially from as its status change from 2016 to a market-based economy, 15 years after the conclusion of China's WTO accession agreement. Richard Braddock (Lexbridge Lawyers) added that it was impossible to eliminate political influence from the WTO system although it was supposed to provide a politically neutral platform for inter-state dispute settlement.

Conclusion

Professor Nottage rounded up the final general discussion by highlighting the overlaps identified among the various types of cross-border dispute resolution directly or indirectly involving commercial interests. He called for innovative approaches from the government in Australia, and neighbouring countries such as New Zealand, to counteract the "Back to the Future" bilateralism recently revived by the US, and other challenges to globalisation particularly in the Asia-Pacific region.

⁹ <https://academic.oup.com/jiel/article/20/3/649/3933549>

¹⁰ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013518

Is Party Autonomy for Fair Resolution or Extension of Disputes?



Jayems Dhingra¹
(ACICA Fellow)

There is increasing attention being drawn on the legacy of the concept of party autonomy in international commercial arbitration proceedings. This is caused partly by the recent landmark case of dismissal of the application² in August 2017, by Shanghai First Intermediate Court, with an apparent approval from Supreme People's Court of China, for enforcement of an award under SIAC Expedited Procedure³, with Singapore as the seat of arbitration. In the earlier contrasting judgment in 2015, the Singapore High Court upheld the enforcement of an award made under the same expedited procedure of SIAC Rules, in *AQZ v ARA*, [2015] SGHC 49. The cases of challenges based on the issue of violation of party autonomy under Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention 1958** or **NYC**) are far too many over the last two decades. This should raise a concern for judiciaries and arbitral institutions, as to whether there is a flaw in the doctrine of "party autonomy" or the parties are flouting "party autonomy," for strategic gains and diverting the attention away from the real commercial and or contractual issues in dispute.

On one side of the continuum, the international Arbitral Institutions (**AIs**) are working hard to develop innovative procedures to minimize cost and restore confidence in the

efficiency and sanctity of AIs, as ideal dispute resolution forums, for enhancement of international trade. On the other hand, in tandem with the development of innovatively sophisticated rules of the AIs, the equally innovative challenges are being launched under the pretext of party autonomy, ignoring the legacy objectives. This article explores the need for imposing limits on the spectrum of the party autonomy, so as to forestall the rising mistrust of internationally trading entities, in choosing arbitration as the dispute resolution forum.

Origin of Party Autonomy in International Arbitration

The origin of party autonomy can be found in the freedom accorded to the parties under the contract laws of a state. The parties are at liberty to enter into contracts, without intervention of courts or state authorities, as far as it is not in conflict or violation of the laws of the state and are not for an illegal purpose. For instance s10(1) of the *Malaysian Contracts Act 1950*, provides, "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void⁴." The parties are free to negotiate and agree on all the terms of a contract including the choice of applicable law of the contract (the substantive law) and forum for dispute resolution. If the parties decide to provide an arbitration clause to settle their dispute arising out of or in connection with the contract, then party autonomy is further expanded by making choices of language, constitution of the tribunal, procedural rules and the seat of arbitration. Once the contract is signed with all clauses drafted and options defined, then the contract is binding between the parties to the contract. Thereafter, the question of party autonomy refers to what the parties jointly consent, agree and or sign the relevant instrument, which means not the unilateral choice of either one of the parties.

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2 *Noble Resources International Pte. Ltd. v. Shanghai Good Credit International Trade Co. Ltd.* (2016) Hu 01 Xie Wai Ren No. 1, the Shanghai No. 1 Intermediate People's Court judgment dated 11 August 2017.

3 Tribunal of Sole Arbitrator instead of three arbitrators as per the arbitration clause of the contract was appointed in accordance with Article 5.1 of the Singapore International Arbitration Centre ("SIAC") Arbitration Rules 2013, providing for expedited procedure.

4 Section 10(1), *Malaysian Contracts Act 1950* (Act 136).

In Chapter V of the Model Law⁵ from Article 18 to Article 27, the party autonomy is further expanded to govern the procedure for conducting arbitral proceedings, which tribunal can decide only when not agreed by the parties. Unlike litigation in courts where parties do not have control over the Rules of Court or CPRs, in arbitration the parties can have flexibility of choice of procedural rules. Once the choices are made, thereafter the parties ought to focus on the issues in dispute, and follow the stipulated procedure, unless violated by the tribunal or when pursuant to Article 18 of Model Law (or similar provisions in the *lex fori*) a party is not given an opportunity to present its case, and provided a real and serious prejudice is caused.

Objectives of Party Autonomy in International Arbitrations

The NYC was drafted after the end of World War II, to encourage trade and commerce for prosperity and peace across the globe. The principal aim of the NYC was to ensure that foreign awards will not be discriminated against in the jurisdictions where enforcement is sought. Further the courts of the Convention States will give due recognition to the parties agreement to settle their disputes through arbitration, and Courts of the State will not allow the matter to be accepted by the courts, where an agreement to arbitrate is evidenced.

The underlying objective of the NYC was apparently, to allow the parties to trade freely without fear of prejudices of national courts of their trading partners, when disputes were to arise. Secondly, in the years leading from 7 June 1959 (the date of entry into force of NYC), the efficiency and competency of courts in several countries to settle commercial disputes dealing with complexities of subject matters was in doubt. The parties were given freedom to select professionals from their respective industries, to act as arbiter and give decisions based on their domain

knowledge and competency in the field, in context of the contractual agreements. Certainly it would be contrary to the objectives of NYC, if the party autonomy was to be construed as flexibility of adding new issues, thus extending the range of the contractual disputes between the parties.

Developments in Party Autonomy

With increasing numbers of AIs across the world and innovative procedural rules of AIs to outshine their peers, the challenges against enforcement are suddenly on the rise. With limited number of provisions, in the Article V of the NYC to block an enforcement of foreign awards, and diminishing chances of success under public policy challenges, the party autonomy challenge is now being put to litmus test, in courts of several international jurisdictions.

The Article V(1)(d) addresses only two aspects of party autonomy: 1) composition of the arbitral authority, and 2) agreed choice of arbitral procedure. The third aspect addresses conflict between law of the seat and the agreement of the parties, which in practice, is prone to divergent views of the courts of international jurisdictions. The first two aspects of party autonomy are often delegated to the rules of an AI chosen by the agreement of the parties. In 2017 two debates between international arbitration experts were organized to explore the limits of party autonomy in international arbitration, addressing the above two aspects.

1. SIAC-CI Arb Debate on 8 June 2017 at Singapore⁶: "This House believes that the Practice of Party-Appointed Arbitrators is a Moral Hazard in International Arbitration and Should Be Abolished," (the "Singapore Debate").
2. Norton Rose Fulbright Arbitration Debate on 16 Oct 2017 at Hong Kong⁷: The Debate on Party Autonomy

⁵ UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

⁶ The debate featured top international arbitration experts, Emmanuel Gaillard, Judith Gill QC, Toby Landau QC and Darius Khamabata, debating the Motion and the Judges were Gary Born, President, SIAC Court of Arbitration, and Prof Lucy Reed and Ariel Ye, Members of the SIAC Court of Arbitration.

⁷ The debaters were Jern-Fei Ng, Barrister, Essex Court Chambers, London; Robert Pé, Arbitrator, Arbitration Chambers; Karen Gough, Barrister, 39 Essex Chambers, and James Rogers, Partner, Norton Rose Fulbright and the Judges were Anselmo Reyes, International Judge, Singapore International Commercial Court; Kim Rooney, Gilt Chambers, international arbitrator and barrister; and Philip Nunn, Norton Rose Fulbright, Consultant.

– “This house believes party autonomy must prevail to preserve the sanctity of international arbitration,” (the “Hong Kong Debate”).

Both the debates were well attended by a large number of legal professionals, practicing judiciary members and international arbitrators. The debates started in favour of the motion followed by against the motion, and then casting of votes by the members of the audience.

The verdict by the panel of judges in the Singapore Debate was non-conclusive. The number of votes in favour of party appointed arbitrators was though marginally higher but the panel of judges reserving their judgment, implicitly reflected in favour of institutional appointments to preserve the sanctity of arbitration.

However in the Hong Kong Debate, the verdict was evident from the debates itself. The arguments though started with opposing views and citations of supporting cases by each side, but in the end converged towards the point that, party autonomy is to be limited, and should end once the choice of applicable procedural rules is made. The panel of judges delivering an equally eloquent verdict stressed the need for curtailment of the party autonomy, beyond the fulfillment of intended objectives of party autonomy.

The objective of party autonomy for appointing its arbitrator was to ensure that a competent professional is engaged as arbiter and to act as a check on the other party appointed arbitrator being fair and just. Thus each appointed arbitrator performs the role of an arbiter as well as a supervisor of due process. However in view of the trend being observed, and some infamous cases cited during the debate, the reality is far from the intended objective. The parties’ appointed arbitrator is expected to act as an agent of the appointing party. In order to receive continuing business, party appointed arbitrators subconsciously will have to do something to

demonstrate the return of the favour and feel indebted. Such trends defame the sanctity of an independent, neutral and impartial forum. Party autonomy can be properly exercised by describing objective criteria for the selection of the tribunal and the appointment task could be delegated to an AI. This saves time and cost of the parties. The parties’ time could be well devoted to presenting the real issues in dispute.

The commentary⁸ on the NYC provides a comprehensive list of cases with challenges to party autonomy. For example, it is observed that the courts of some jurisdictions enforce the award even though the constitution of the tribunal was not strictly in accordance with the agreement of the parties⁹. On the other hand, a German court, just like the recent case of the People’s Republic of China Courts, refused recognition and enforcement where an award was rendered by two, instead of three arbitrators, as expressly required by the rules of the International Arbitration Court of the Belarusian Chamber of Commerce that the parties had agreed would govern their arbitration¹⁰.

In terms of the conflict between the procedural choice of the parties for constitution of the tribunal and overriding rules of the agreed AI, party autonomy was duly exercised. However the People’s Republic of China Courts have refused recognition and enforcement of Singapore award on the ground that the constitution of the tribunal was contrary to the agreement of the parties¹¹. This judgment has exposed a lacuna in Article 5 of the SIAC Arbitration Rules 2013, which have since been amended in 2016 (6th edition) by inclusion of Article 5.3 and 5.4, thus placing a limit on the spectrum of party autonomy. The courts of another jurisdiction might have viewed the implied agreement to the expedited procedure under the procedural rules agreed by the parties, as an agreement for constitution of the tribunal by sole arbitrator instead of three. Nevertheless, the People’s

⁸ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), page 191- 204.

⁹ The Hong Kong Supreme Court enforced an award rendered in China, even though its members were selected from a different list of arbitrators than provided in the parties’ agreement. In *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 13 July 1994, 1992 No. MP 2411.

¹⁰ *E20, Supplier (United States) v. State enterprise (Belarus)*, Bundesgerichtshof [BGH], Germany, 21 May 2007, III ZB 14/07, XXXIV Y.B. Com. Arb. 504 (2009).

¹¹ Ibid Note 2.

Republic of China Courts have rightly pointed out that the legacy of party autonomy when explicitly stated should be respected.

Similar to party autonomy in aspects of the constitution of the tribunal, the procedural rules are to be complied with unless otherwise agreed by the parties. Such provisions are clearly stated in the rules of AIs. Article V(1) (d) of the NYC can be invoked only at more fundamental deviations from the agreed procedure, which include situations in which the parties agreed to use the rules of one institution but the arbitration is conducted under the rules of another, or even where the parties have agreed that no institutional rules would apply. The responsibility then lies with the tribunal to ensure that the Terms of Reference (similar to as provided in ICC Rules) are properly drafted immediately upon commencement of arbitration. This will place a second limit on party autonomy.

Economics of Dispute Resolution and Justification for Limited Autonomy

In the General Principles Section (1)(b) of the English Arbitration Act 1996 it states that, *"the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."* This provision empowers the tribunal to curtail delays if any caused by frivolous grounds under the pretexts of party autonomy. Controlling the costs and time are one of the basic characteristics for resolution of disputes in arbitration.

Further as commented by one prominent international arbitrator that, *"After the Establishment of a Tribunal once a dispute has arisen, arbitration has been commenced and the tribunal has been established, the freedom of the parties to determine the arbitral procedure may be circumscribed"*¹². Thus the issues of party autonomy ought to be put to rest upon commencement of arbitration in accordance with the agreed procedure or the rules of an AI. The challenges after the publication of an award on grounds of breach of party autonomy are not only to be logically

sound, but are an uphill task to prove during enforcement applications. The objections or challenges if any should be raised during the commencement, or as soon as an event arises, so that the issue can be addressed at an early stage. The onus is on the tribunal to ensure that the parties are kept engaged and do not abandon the arbitration. The rules of AIs further make comprehensive provisions for addressing the situations when a party is not participating, which must be observed.

Conclusion

The parties incur substantial resources in the development of their business and commerce. The objective of commercial entities is to grow and expand in sustainable manner. The most important time to exercise party autonomy is when drafting contracts and especially dispute resolution clauses. In context of international trade and capital intensive infrastructure projects like in oil & gas exploration segments, there are comprehensive guidelines like from Association of International Petroleum Negotiations¹³, available for drafting appropriate dispute resolution clauses. The time well spent during the contract drafting helps in avoiding procedural mishaps in the event a dispute eventuates.

In order to enhance trust and confidence of the international community in the sanctity of the arbitral forums, the tribunals and the AIs have to take a proactive approach to preserve the legacy of party autonomy while balancing the efficiency and transparency of the dispute resolution process. The focus should be on the issues in dispute arising out of or in connection with the contracts between parties and not expanded by procedural or forum related matters.

Finally the decision of the supervisory courts when addressing challenges of breach of party autonomy provide much needed legitimacy to the rules of AIs as much as sets the principle for the guidance of the parties. In *AQZ v ARA* [2015] SGHC 49 Her Ladyship Justice Judith Prakash stated in the concluding statement that¹⁴:

12 Professor Dr. Michael Pyles, *"Limits to Party Autonomy in Arbitral Procedure,"* ICCA, (2008).

13 2017 Model Dispute Resolution Agreement, Association of Petroleum Negotiators.

14 In relation to application of Expedited Procedure under SIAC Rules (2013 edition) in *AQZ v ARA* [2015] SGHC 49, paragraph 136.

*Even if the Supplier is correct in its submission that the arbitration should not have been conducted before a sole arbitrator, the Supplier has not discharged its burden of explaining the **materiality or the seriousness of the breach**. Nor has it demonstrated that it **suffered any prejudice** as a result of the arbitral procedure that was adopted. [Emphasis added]*

Taking cognizance of the judgment of the Hong Kong and Singapore Courts discussed in this article, the noble concept of party autonomy is to be preserved for freedom of contract between the parties, which should not be tainted by adding it to the issues in dispute leading to the extension of disputes.

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Report on the University of Sydney Law School's Participation in the Willem C Vis International Commercial Arbitration Moot Competition



Professor Chester Brown

University of Sydney Law School,
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Chambers
(ACICA Fellow)

In March 2018, the University of Sydney Law School continued its tradition of participating in the Willem C Vis International Commercial Arbitration Moot Competition in Vienna, Austria. This year's Vis Moot Competition (which marked the 25th anniversary of the Vis Moot) was bigger than ever before, with 366 teams registered to compete in Vienna.

Before their departure for Europe, the Sydney Law School team (which consisted of Margery Ai, Tim Morgan, Rhys Carvosso, and Patrick Still) had spent five months researching the law and practice of international commercial arbitration (this year's moot problem was governed by the UNCITRAL Rules), grappling with provisions of the Convention on Contracts for the International Sale of Goods, drafting legal submissions, and engaging in intensive advocacy training in the form of regular practice moots. One of these was the team's traditional "Demonstration Moot" at Sydney Law School, at which the tribunal was composed of Judith Levine (Permanent Court of Arbitration), Adjunct Professor Max Bonnell (White & Case LLP), and Malcolm Holmes QC (Eleven Wentworth). Prior to the Vis Moot Competition in Vienna, the Sydney Law School team also participated in various Pre-Moots organized by the Chartered Institute of

Arbitrators (hosted by Corrs Chambers Westgarth in Sydney, and in which the Sydney team won the NSW Final), the International Chamber of Commerce (which was held at the International Chamber of Commerce in Paris), the law firm August Debouzy (also in Paris), and the Permanent Court of Arbitration (in The Hague).

With a good deal of advocacy practice under their belts, the Sydney team proceeded to Vienna for the traditional opening ceremony at the Wiener Konzerthaus, at which the many students and coaches present (of which there are around 2000) were formally welcomed to Vienna by the Directors of the Vis Moot (Professor Stefan Kröll, Professor Christopher Kee, and Patrizia Netal), and were treated to a light-hearted and entertaining performance of "the CISG Song" and "the Mootie Blues" by the talented Professor Harry Flechtner of the University of Pittsburgh.

It was then down to business. After excellent performances in their four moots in the "General Rounds" (against teams from France, Iran, Russia, and Germany), the Sydney team made the cut for the "Round of 64", which is the beginning of the knock-out rounds. The Sydney Law School team won their "Round of 64" moot, as well as their "Round of 32" moot. This brought them to the "Round of 16", where they bowed out of the Vis Moot competition. The oral rounds of this year's Vis Moot competition were ultimately won by the National Research University, Moscow, with the University of Cambridge coming second.

Aside from making it to the Round of 16 in the oral rounds, the Sydney Law School team had great success in the Awards Ceremony, with its Respondent Memorandum being awarded the Second Runner-up Prize, and three of the members of the team being awarded prizes for their oral advocacy: Margery Ai and Rhys Carvosso were awarded "Honourable Mentions", and Tim Morgan was awarded the "Martin Domke Award" for the Best Individual Oralist at the Vis Moot.



The Sydney Law School team's success owes much to the excellent guidance and support of the team's two coaches, Roisin McCarthy (Legal Aid) and Nick Boyce (Clayton Utz), both of whom are past members of Sydney's Vis Moot team. The team was also assisted at their Pre-Moot events in Paris by Domenico Cucinotta, another past Sydney Vis Mooter, who now works in the International Arbitration Group of White & Case LLP in Paris. Thanks are also due to many members of the Sydney legal profession and colleagues at Sydney Law School who generously assisted by sitting as arbitrators in practice moots, and to Sydney Law School, Clayton Utz, and the Chartered Institute of Arbitrators for their support.

ACICA Rules

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ACICA Rules 2016

In November 2015 ACICA released a new edition of its Arbitration Rules and Expedited Arbitration Rules. The new Rules came into effect on 1 January 2016. Copies of the new ACICA Rules Booklet can be downloaded from the website: www.acica.org.au



News in brief



Save the Date for the 6th International Arbitration Conference!

Co-presented by the Business Law Section of the Law Council of Australia, ACICA and the Chartered Institute of Arbitrators Australia, the 6th Annual International Arbitration Conference is the lead event for Australia Arbitration Week, being held this year for the first time in Melbourne.

The CI Arb Australia Annual Dinner will be held following the conference with guest speaker, Allan Myers AC QC, Chancellor of the University of Melbourne, leading international arbitrator and prominent businessman.

To register your interest, please email: Jane.Bacot-Kilpatrick@lawcouncil.asn.au.



Release of Austrade International Commercial Arbitration Capability Statement

The Australian Trade and Investment Commission (Austrade) recently released an International Commercial Arbitration Capability Report detailing the world-class international dispute resolution services and expertise offered in Australia to promote global trade, safeguard commercial relationships and manage risk in cross-border investment. Download your copy of the report from the Austrade website [here](#).



(left to right): Dr Jonathan Bonnitcha, Professor Luke Nottage, Professor Stephan Schill, Adjunct Professor Donald Robertson, Nguyen Manh Dzung, Adjunct Professor Amokura Kawharu, Honourable Robert French AC

Book Launch: Chaisse & Nottage (eds) International Investment Treaties and Arbitration Across Asia (Brill, January 2018)

The symposium held at the University of Sydney on 19 April 2018 (see article by Nobumichi Teramura) included the launch by the Honourable Robert French AC (former Chief Justice of Australia) of Chaisse & Nottage (eds) *International Investment Treaties and Arbitration Across Asia* (Brill, January 2018). Available online.

Australian Centre for International Commercial Arbitration

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

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