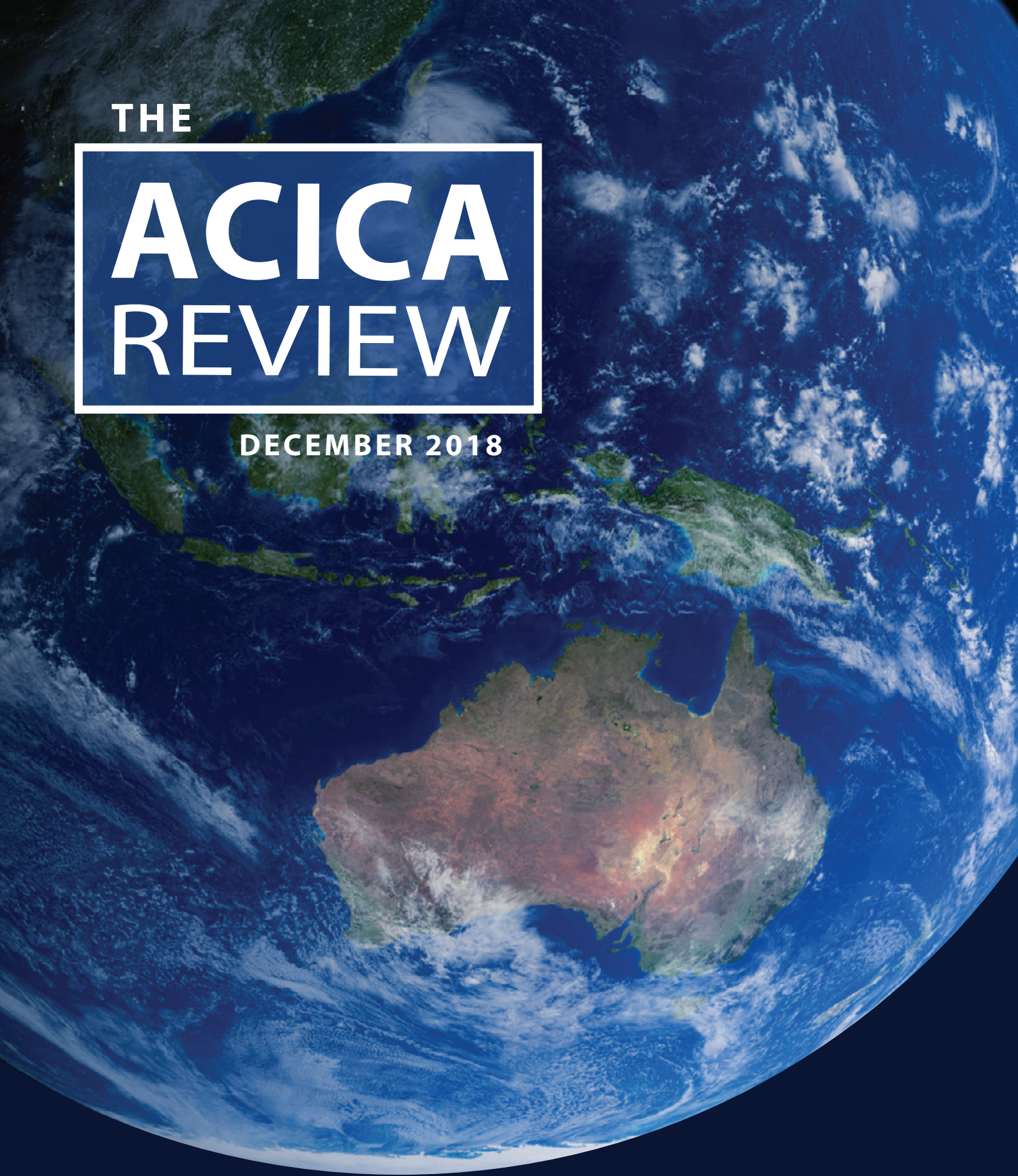

THE ACICA REVIEW

DECEMBER 2018

ACICA
Australian Centre for International Commercial Arbitration

GLOBAL LEADERSHIP
REGIONAL EXCELLENCE

ACICA
Australian Centre for International Commercial Arbitration

Leader in International Dispute Resolution

THE
ACICA REVIEW

Dec. 2018 | Vol 6 | No 2

ISSN 1837 8994

Contents

THE ACICA REVIEW

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President's Welcome

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

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

Australian Arbitration Week

Australian Arbitration Week held from 15 to 18 October 2018, was a very busy but exciting week and I hope that everyone who attended the sessions enjoyed them. The highlight was the *6th International Arbitration Conference: The Business of International Commercial Arbitration* – a joint presentation between ACICA, CIArb Australia and the Business Law Section of the Law Council of Australia, followed by the CIArb Australia dinner. The event featured notable guest speakers including, the Honourable Susan Crennan AC QC, the Honourable Justice Middleton and the Honourable Justice Clyde Croft.

Australian Arbitration Week could not have been such a success without the support of the organisations, including our Corporate Members, which collaborated with ACICA in holding many of the events.

ACICA Symposium – Perth

On 23 October 2018, ACICA held the *'Underwriting Cross Border Contracts – the significance of the New York Convention 60 years on'* symposium in Perth. The symposium explored the key role that the Convention has played in the growth of international trade over the course of the last 60 years. There were notable guest speakers, including the Honorable Justice Wayne Martin AC, Simon David, Elizabeth Macknay and Dr Sam Luttrell. Thank you to Herbert Smith Freehills for sponsoring the event.

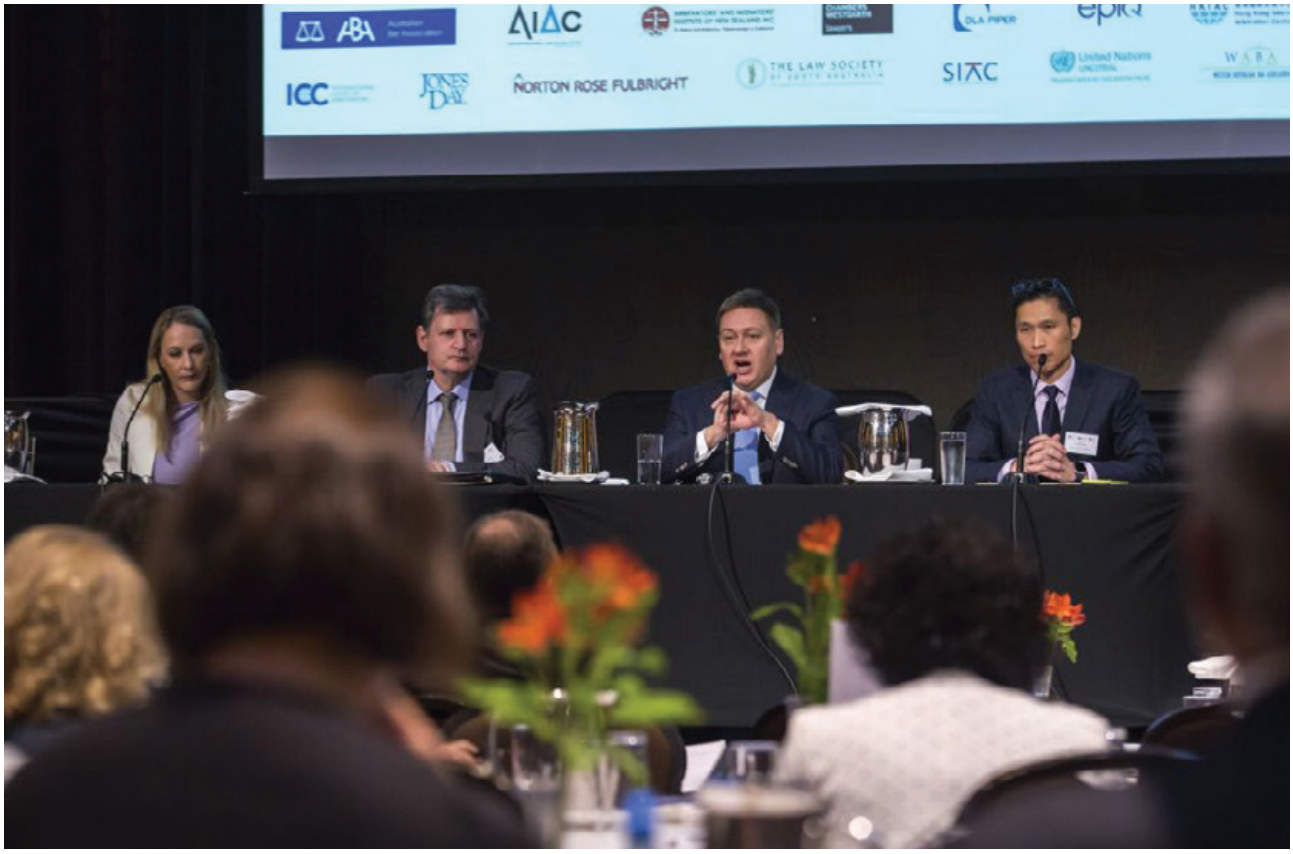
ACICA 45

ACICA 45, a new group for young and emerging practitioners in Australia, was successfully launched during Arbitration Week. This new group organises activities and events around Australia to encourage participation in arbitration and provide educational opportunities for emerging practitioners interested in arbitration. They held a networking drinks event to gather subscriptions to the ACICA 45 mailing list and to celebrate their launch. We look forward to their growth over the next year.

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

Alex Baykitch AM
President

6th International Arbitration Conference – Key Note Address by Dr Michael Pryles[1]



6th International Arbitration Conference – China's Belt & Road: what it means for the Asia Pacific Region Chair and Panellists

1 Reprinted with the kind permission of CIArb Australia www.ciarb.net.au

Deputy Secretary-General's Report

Jonathon De Boos
ACICA Deputy Secretary General

Australian Arbitration Week

This year marked the sixth instalment of Australian Arbitration Week, calling Melbourne home for the first time in its relatively short history.

Festivities kicked off on 15 October 2018, with a new addition to the week's events – the inaugural CIArb Australia Lecture, which was proudly sponsored by Allens. The lecture was given by the Honorable Chief Justice James Allsop AO, Federal Court of Australia, who provided his insights on The Role of Law in International Arbitration.

That evening also featured the AMTAC Seminar, which was kindly hosted by AMTAC and HFW Australia. The seminar was moderated by Gregory Nell SC, AMTAC Chair, and included discussions by Gavin Vallely and Chris Lockwood (Partners, HFW Australia) on the implications of Brexit on international maritime arbitration; Matthew Harvey (Commercial Barrister, Victorian Bar) on recent case law regarding anti-arbitration injunctions; and James a'Beckett (Managing Director, Braemar ACM) who concluded the event in the real-life practicalities of shipping with his talk on the sharp increase in bunker fuel contamination that has occurred recently and the potential for a wave of multi-party disputes to arise as a result.

The following day, the Resolution Institute with generous sponsorship from HFW Australia hosted a lunchtime event titled "Offshore energy arbitration: lessons learnt", with Nicholas Pane QC (Commercial Barrister, Victorian Bar), Bronwyn Lincoln (Partner, Corrs Chambers Westgarth) and Matthew Blycha (Partner, HFW) making up the experienced panel of presenters.

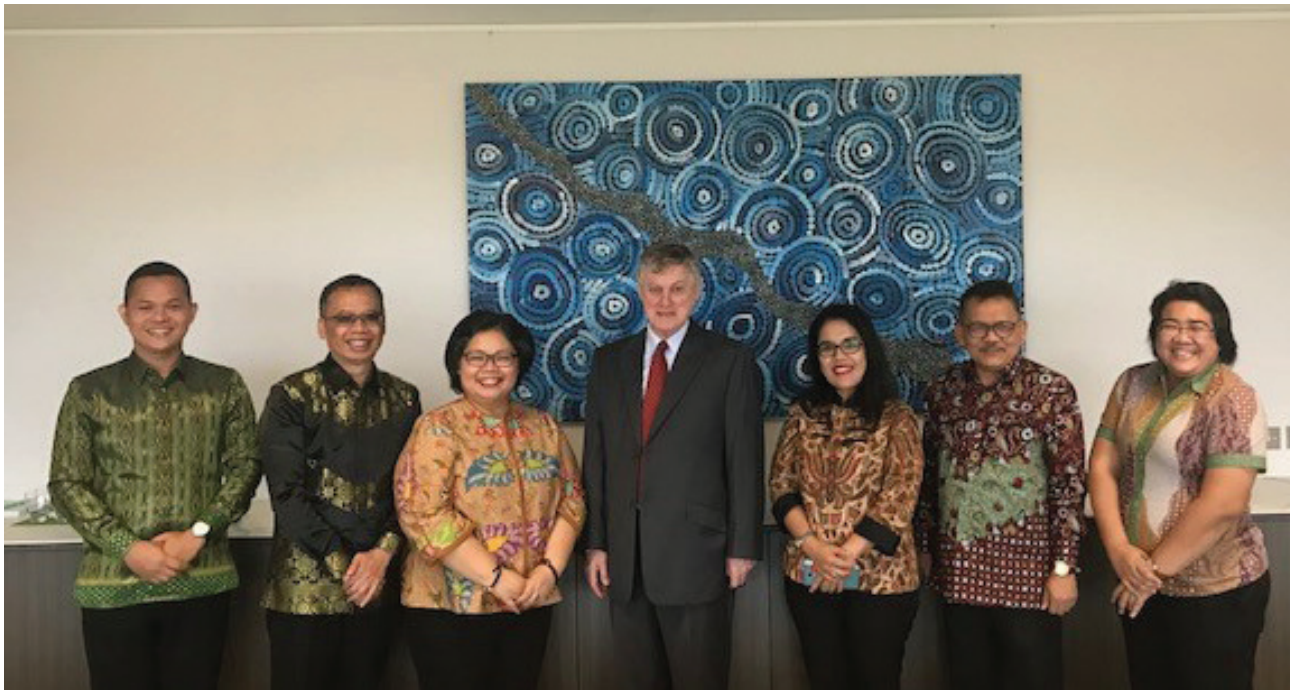
Later that Tuesday, Clayton Utz and University of Sydney marked the 17th anniversary of their International Arbitration Lecture series, with Robin Oldenstam (Partner, Mannheimer Swartling and Member, ICC International Court of Arbitration) delivering an engaging speech on "The Need for Speed – Is International Arbitration Becoming Overly Fixated with Efficiency?". The speech considered the current drive for efficiency and the need to balance that imperative against basic procedural principles such as party autonomy, due process and general considerations of fairness.

As outlined in the President's report, the lead event for the week was the 6th Annual International Arbitration Conference held on Wednesday 17 October 2018. The conference included a keynote speech from Dr Michael Pryles AO PBM on Australia's place in international arbitration as well as fascinating presentations on Challenges to Jurisdiction; China's Belt & Road Initiative and the implications for the region; Streamlining Evidence and Procedure in International Arbitration; and Enforcement of Awards. The conference was followed by CIArb Australia's Annual Dinner, featuring special guest speaker Allan Myers AC QC (Chancellor of the University of Melbourne, leading international arbitrator and prominent businessman).

Thursday saw the week turned over to the young(er) brigade, with the Young ICCA International Arbitration Skills Workshop on "tactics and strategies in International Arbitration: tips to survive procedural guerrilla warfare"; the AFIA Symposium on "Current Issues in International Arbitration: Third party funding, expedited proceedings and investor-state dispute resolution reform"; and the CIArb Young Members Group discussion on "Launching a career in international arbitration".

The day also featured an ArbitralWomen breakfast sponsored by Corrs Chambers Westgarth on "Commerciality in International Arbitration" and a charity event, hosted by the Lighthouse Club, in which a line-up of speakers from Australia and abroad traced a construction claim from its creation by the claims manager, through all legal processes including adjudication, mediation, arbitration and final court judgment. All proceeds of the event supported the Lighthouse Club, a construction industry charity that assists the workforce and their families in times of hardship and stress.

The evening concluded with the launch of ACICA 45, a new group for young and emerging practitioners. ACICA 45 organises activities and events around Australia to encourage participation in arbitration and provide



Professor Khory McCormick (Vice President, ACICA) with delegates from the Indonesian Attorney General's Department.

educational opportunities for emerging practitioners interested in arbitration. ACICA 45 welcomes open participation and invites those interested in arbitration to register (registration is free) and get involved by joining the mailing list on our website here: acica.org.au/acica-45

Australian Arbitration Week's first visit to Melbourne proved to be a huge success, with a packed line up of events showcasing the quality and breadth of expertise in Australia and the Asia-Pacific region. We look forward to you joining us next year when the event heads to Brisbane for the first time.

Visiting delegation from Indonesian Attorney General's Department

On 16 November 2018, a group of twelve State Attorneys of the Attorney Generals Department of the Republic of Indonesia visited Sydney to participate in a one day presentation on the role of ACICA and International Commercial Arbitration in Australia.

Topics aimed to provide insight to arbitration practices in Australia, and included Australia's legal framework and relevant institutions, ACICA's services and ACICA's global reach across the Asia-Pacific region. The day was capped with an official welcome and presentation on behalf of ACICA by Professor Khory McCormick (Consultant, Bartley Cohen Litigation Lawyers, ACICA Vice-President).

ACICA thanks James Morrison and Professor Khory McCormick for organizing a successful event and making our guests feel welcome.

ACICA and ADC Volunteer Intern Program

ACICA and the Australian Disputes Centre were fortunate to be joined by another brilliant group of hard-working interns in the second half of 2018.

Aidan O'Callaghan
Macquarie University

Jacqueline Starr
Western Sydney University

Michael Moryosef
University of New South Wales

Rebecca Cooper
Macquarie University

Alisha Sharma
Panjab University Chandigarh

Elisabeth Everson
University of Geneva/ University of Sydney

Justin Long
Washington University School of Law: St. Louis, Missouri

Rose Lyu
Washington University School of Law: St. Louis, Missouri

Report of the AMTAC Chair

AMTAC Executive

In July this year, John Reid resigned from the AMTAC Executive, following his departure from the Attorney-General's Department to take up a senior executive role in Parliament. I would like to thank John, both personally and on behalf of the other members of the AMTAC Executive, for his enthusiastic service to AMTAC and its promotion and development, over the many years he served on the Executive. We wish John every success in his new role and on behalf of all of the members of AMTAC I would once again thank John for his contribution in the past.

I would also like to welcome Anne Sheehan as a new Vice Chair of AMTAC and John's replacement. Anne is the first female Assistant Secretary of the International Division of the Attorney-General's Department, having worked in the Department since 2005, including in the area of the law of the sea. Anne also completed a Masters of Law at the University of Queensland in 2005 with a maritime law specialisation. I am confident that Anne will be able to put her previous experience to very good use as a member of the AMTAC Executive and in relation to its future work and deliberations and I look forward to working with her to that end.

AMTAC 12th Annual Address

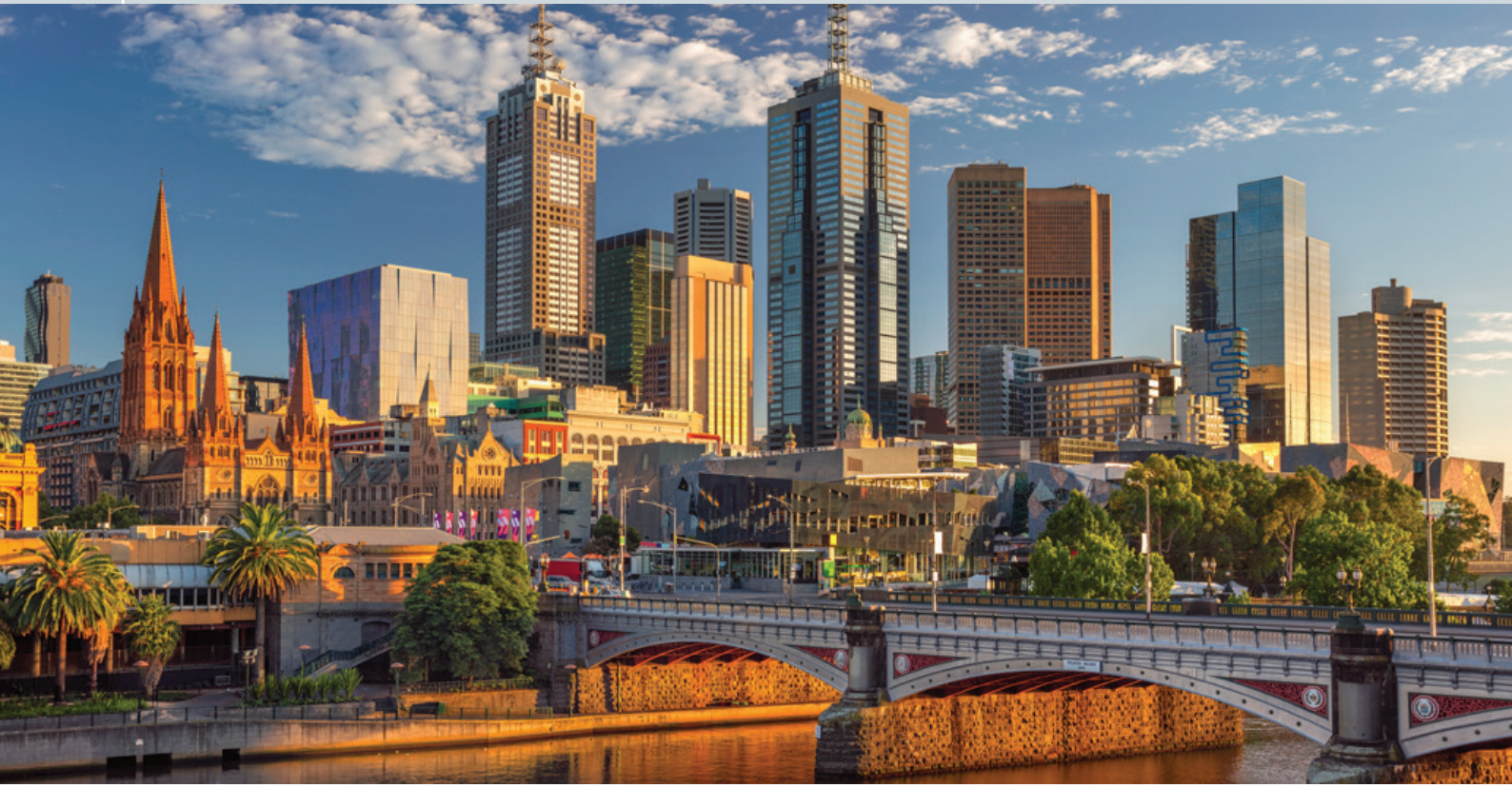
On 29 August 2018, the Honorable Justice Steven Rares of the Federal Court of Australia presented this year's AMTAC Annual Address. As I indicated in my report earlier this year, Justice Rares is especially well placed to speak on arbitration, in particular in the maritime context, being both the National Convening Judge and NSW Registry Convening Judge for the Federal Court's Admiralty and Maritime National Practice Area, as well as a member of 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' address was entitled "The Rule of Law and International Trade" and was video-cast from the Federal Court of Australia in Sydney around Australia. In his address, Justice Rares discussed the role of the possibly counterintuitive concept of the rule of law in international trade, especially in the context of disputes where no one national system of law operates to define and enforce the rights of the parties to the dispute and where there is no overarching societal institution (like the rule of law) to regulate the parties' relationship. Importantly, his Honour pointed to international arbitration being an integral contributor to the rule of law in international trade. This is especially in the modern environment where there is much less judicial supervision of and hostility to arbitration agreements and arbitral awards, a policy that is also reflected both legislatively in Australia in the *International Arbitration Act 1974* (Cth) and internationally in the New York Convention and UNCITRAL Model Law (and the widespread adoption of both, including in Australia). His Honour's interesting and informative address is available on the AMTAC website, https://amtac.org.au.

Other AMTAC events

On 19 June 2018, AMTAC conducted a Mock Arbitration Seminar at the Melbourne offices of Norton Rose, solicitors. The seminar, which was presented by Peter McQueen, Tony Pegum, Hazel Brasington and Deborah Tomkinson, was principally directed at heightening the awareness of maritime and international trading industry participants as to how a maritime arbitration is conducted, especially under the AMTAC Rules. As I have previously suggested, the more familiar industry participants are with maritime arbitration generally and the AMTAC Rules in particular, as well as the benefits that they both offer to industry, the more likely those industries and industry participants will be to agree to arbitration (including under the AMTAC Rules) as a means of resolving their disputes. By all accounts, the seminar was a success and plans are underway to reprise it, possibly in Sydney, next year.

On 15 October 2018 and in conjunction with HFW Australia, AMTAC conducted a seminar as part of Arbitration Week in Melbourne. Presentations were given by Chris Lockwood (Consultant at HFW Australia) on



"Brexit – who rules the Waves ?" (a consideration of the possible implications of Brexit on the role of London as an arbitration centre and the potential opportunities this may present for other venues, including Australia); Matthew Harvey (Barrister) on "Anti-arbitration Injunctions: Thinking the Unthinkable" (an analysis of the recent judgment of the Federal Court of Australia in *Kraft v Bega* [2018] FCA 549); and James a'Beckett (Managing Director of Braemar ACM) on "Bunker Fuel Contamination – implications for shipowners and trade". On behalf of AMTAC, I would like to thank Chris, Matthew and James for their presentations, as a result of which this seminar proved to be a fitting entreé for the remainder of the events that followed, as part of Arbitration Week.

IMLAM

The 19th International Maritime Law Arbitration Moot (IMLAM) was held in Brisbane from 29 June to 3 July 2018. In all, 28 teams from 13 countries, participated, including teams from Australia, Asia Pacific, Europe and America. In what was described as "a first class grand final", the University of Queensland defeated the University of Hong Kong. AMTAC was represented by our immediate past Chair, Peter McQueen, who was a member of the tribunal for the grand final. AMTAC is also very proud to have once again sponsored the "Spirit of the Moot" prize, which was won this year by the University of Miami. AMTAC looks forward to continuing its support of the IMLAM competition, which will be held at the Erasmus University in Rotterdam next year, and in that way the promotion of international arbitration in a maritime context amongst budding arbitration practitioners of the future.

Future conferences and events

The International Congress of Maritime Arbitrators (ICMA) will be holding its next biennial conference (ICMA XXI) in Rio de Janeiro from 5 to 13 March 2020. This conference will provide members with an opportunity to meet, hear from and speak with maritime arbitration lawyers from around the world. Further details will be provided on the AMTAC website as they come to hand.

Plans are also underway for AMTAC's own programme of events next year and further details of these will be provided (including on the AMTAC website) in due course. It is through these events that AMTAC seeks to achieve its objective of promoting 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 as well as those interested in maritime arbitration generally, are welcome and encouraged to attend these events.

Gregory Nell SC
12 November 2018

Amendments to the *International Arbitration Act 1974* (Cth)

James Morrison
ACICA Counsel

Clémence Bernard
ACICA Associate

On 26 October 2018, the *Civil Law and Justice Legislation Amendment Act 2018* (Cth)[1] ('the Amendment Act') came into effect, making a number of important changes to the *International Arbitration Act* 1974 (Cth) ('the IAA'). The key reforms are summarised below.

1. Procedural requirements for enforcing foreign awards

The Amendment Act clarifies that, under ss 8(1) and 8(5)(f) of the IAA, foreign awards are binding between parties 'to the *award*' rather than between parties 'to the arbitration *agreement*' pursuant to which the foreign award was made.[2]

This change, which applies retrospectively to arbitral proceedings commenced before the Amendment Act,[3] settles uncertainty in the case law concerning the procedural requirements under s 9(1) of the IAA for enforcing a foreign award in Australia.

There was authority based on the pre-amendment language in s 8(1) of the IAA (ie, foreign awards are binding on the parties 'to the arbitration agreement') that the award creditor was required to prove in foreign award enforcement proceedings that the award debtor was a party to the arbitration agreement.[4] Subsequent authority held that, under s 9(1) of the IAA, the award creditor need only produce to the court the foreign award and the arbitration agreement purportedly binding the award debtor under which the foreign award was made, with the onus then shifting to the award debtor to prove that it was not bound by the arbitration agreement.[5]

The effect of the Amendment Act is to clarify that the latter approach is to be followed in Australia, in line with Singapore, Hong Kong and the United Kingdom.

2. 'competent court'

The Amendment Act clarifies that the Federal Court of Australia as well as the Supreme Court of each of the States and the Territories is a 'competent court' for the purposes of recognising and enforcing interim measures and awards, as well as court assistance in taking evidence pursuant to the IAA.[6]

This change, which applies only to arbitral proceedings commenced after 26 October 2018,[7] removes the question which arose in *Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209 as to whether the Federal Court is a competent court under the IAA for the purposes of enforcing a non-foreign award arising out of an international commercial arbitration governed by the *UNCITRAL Model Law on International Commercial Arbitration* ('the Model Law').

In that case, the award debtor argued (among other things) that, while ss 8(2) and (3) of the IAA specifically vested jurisdiction in the Federal Court and the State and Territory courts to enforce foreign awards, no provision of the IAA specifically vested jurisdiction in any court to enforce Model Law awards rendered in Australia.[8] On that basis, the award debtor argued that the Federal Court did not have jurisdiction to enforce the award. Murphy J

1 *Civil Law and Justice Legislation Amendment Act 2018* (Cth).
2 Schedule 7, ss 2 and 4 of the *Civil Law and Justice Legislation Amendment Act 2018* (Cth).
3 Schedule 7, s 5 of the *Civil Law and Justice Legislation Amendment Act 2018* (Cth).
4 See *Altain Khuder LLC v IMC Mining Inc & Anor* [2011] VSC 1.
5 See *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161.
6 Schedule 7, ss 6 and 7 of the *Civil Law and Justice Legislation Amendment Act 2018* (Cth).
7 Schedule 7, s 8 of the *Civil Law and Justice Legislation Amendment Act 2018* (Cth).
8 See *Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209, [34].

rejected that argument, deciding that the non-foreign Model Law award was enforceable by the Federal Court pursuant to its original jurisdiction under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) in respect of "*any matter arising under laws made by the Parliament*" (ie, the IAA).[9]

Following the Amendment Act, the Federal Court is clearly empowered as a competent court for the purposes of enforcing foreign awards, Model Law awards rendered in Australia and interim measures, as well as providing evidentiary assistance.

3. Exceptions to confidentiality in certain investor-state arbitrations

The confidentiality provisions of the IAA have been updated to reflect Australia's signing of the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* ('the Convention on Transparency'), which, if ratified, would give effect to the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* ('the Transparency Rules') in certain investor-state arbitrations involving Australian investors and Australia as a host-state.

In particular, in an investor-state arbitration pursuant to an investment treaty where the Transparency Rules apply, including because both the host-state and the state of the investor are parties to the Convention on Transparency, certain information in the arbitration may, subject to exceptions, be published or made publicly available irrespective of the applicable arbitration rules, including any confidentiality provisions. Furthermore, the hearings shall be public unless exceptions apply.[10]

Under the Amendment Act, the confidentiality provisions in ss 23C to 23G of the IAA are excluded and do not apply to investor-state arbitrations commenced after 26 October 2018 which are seated in Australia and in which the Transparency Rules are applicable pursuant to the Convention on Transparency or otherwise.[11] The confidentiality regime in the IAA remains applicable to all other investor-state arbitrations and international commercial arbitrations seated in Australia, unless there is a written agreement between the parties that it will not apply.

According to the Explanatory Memorandum that accompanied the draft of the Amendment Act, increased transparency under the Amendment Act will promote consistency in arbitral practice and contribute to the right of individual investors to a fair and public hearing.[12]

4. Powers to award costs

Under the Amendment Act, the powers of arbitral tribunals to award costs under the IAA have been modernised and streamlined. Prior to the changes, in awarding costs, an arbitral tribunal could 'tax' them, including on the basis of scales or other rules used by courts when making costs orders. That power has now been omitted. In arbitral proceedings seated in Australia commenced after 26 October 2018, arbitrators will simply have broad discretionary powers to award costs without reference to taxation.[13]

Conclusion

Overall, commentators argue these amendments bring Australia in line with international best practice and continue to enhance Australia's attractiveness as a seat for arbitration.[14]

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9 See *Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209, [57].

10 Article 6 of the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.*

11 Schedule 7, ss 11 and 12 of the *Civil Law and Justice Legislation Amendment Act 2018* (Cth).

12 Explanatory Memorandum, Civil Law and Justice Legislation Amendment Bill 2017 (Cth), 9.

13 Schedule 7, ss 13 to 17 of the *Civil Law and Justice Legislation Amendment Act 2018* (Cth).

14 Russell Thirgood and Erika Williams, *Now in Force: Internationalising the International Arbitration Act* (31 October 2018) McCullough Robertson Lawyers The Bench Press Blog <http://www.mccullough.com.au/2018/10/31/now-in-force-internationalising-the-international-arbitration-act/>; Adam Firth, Luke Carbon and Prajesh Shrestha, *Recent Amendments to the International Arbitration Act 1974 (Cth)* (8 November 2018) Ashurst News and Insights < https://www.ashurst.com/en/news-and-insights/legal-updates/recent-amendments-to-the-international-arbitration-act/>; Ben Luscombe, Sam Luttrell and Peter Harris, *2.2 Changes to National Law* (August 23 2018) Chambers & Partners Law and Practice <https://practiceguides.chambers.com/practice-guides/international-arbitration-2019/australia/22-changes-to-national-law>.

Case Note: Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liquidation)

Leon Chung
Partner,
Herbert Smith Freehills
(ACICA Corporate Member)

Mitchell Dearness
Solicitor,
Herbert Smith Freehills

Summary

In the last edition of the *ACICA Review*[1] we wrote about the Supreme Court of Western Australia's decision in *Trans Global Project Ltd (in liq) v Duro Felguera Australia Pty Ltd.*[2] The decision has since been upheld on appeal.[3] The Western Australia Court of Appeal's judgment confirms that interim measures can effectively be sought from Australian courts prior to the commencement of international arbitration proceedings and that those measures can remain in place until such a time as the tribunal issues a final award (unless the orders giving effect to the interim measures are formulated to expire at a point in time beforehand). In this article we consider the appeal court's judgment.

Background

Trans Global Projects Pty Ltd (in liquidation) (**Trans Global**) and Duro Felguera Australia Pty Ltd (**Duro Felguera**) are parties to a contract. Duro Felguera is a subsidiary of Duro Felguera SA (**Duro SA**).

Trans Global commenced arbitration proceedings against Duro Felguera, thereafter Trans Global was placed into voluntary administration and then into liquidation. Trans Global requested an undertaking of Duro Felguera's finances and an assurance that Duro Felguera would maintain sufficient funds to satisfy any future award. Duro Felguera rejected Trans Global's requests and so Trans Global commenced court proceedings seeking a freezing order and an ancillary order requiring Duro Felguera to disclose information about its financial position.

First Instance Decision

The Supreme Court of Western Australia's jurisdiction to order interim measures in aid of international arbitration is discussed in this case note. Article 17J of the *UNCITRAL Model Law on International Commercial Arbitration* (**Model Law**), which is given force of law by s 16 of the *International Arbitration Act 1974* (Cth) (**IA Act**), requires the Court to exercise its power to award interim measures 'in accordance with its own procedures.' Accordingly the Court applied Order 52A of the ***Rules of Supreme Court 1971*** (WA) (**Order 52A**) as it would in the context of ordinary domestic litigation. The Court found that the Order 52A requirements were satisfied and:

- made the freezing order against Duro Felguera;
- ordered that Duro Felguera disclose information about its financial position; and
- ordered that the liquidators of Trans Global undertake to commence the arbitration proceedings with expedition.

Appeal Decision

Duro Felguera sought to appeal the Supreme Court of Western Australia's judgment on two grounds:

a. that the primary judge erred in fact and law in being satisfied of the jurisdictional requirement in Order 52A r 5(4); namely that there was a danger that a prospective judgment would be unsatisfied because

1 See pages 12 – 14, *ACICA Review* (June 2018).
2 [2018] WASC 136
3 *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liquidation)* [2018] WASCA 174.

assets might be removed from Australia, or disposed of, or dealt with, or diminished in value (**Ground 1**); and

b. that the primary judge erred in formulating the freezing order so that it would operate 'until further order' (**Ground 2**).

Ground 1

This ground of appeal was dismissed. Considering the financial position of Duro SA there was a real risk that any surplus funds belonging to Duro Felguera or which could become available to Duro Felguera in the future would be provided to Duro SA which was in a precarious financial position. The Court of Appeal determined that it was open to the Supreme Court to conclude, as it did, that there was a danger that if a future award was made against Duro Felguera it would not be satisfied.

Ground 2

Duro Felguera contended that the freezing order could only operate until the arbitral tribunal had been constituted and had a reasonable opportunity to consider for itself whether to grant the equivalent relief.

The Court of Appeal noted that the power to make a freezing order in this context arises from two concurrent sources. The first is the Court's power which arises under Art 17J of the Model Law which is given force of law by s 16 of IA Act. Art 17J of the Model Law provides:

> *A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.*

The second source of power is an inherent or implied power to make a freezing order to prevent the abuse or frustration of the Court's process in relation to matters coming within its jurisdiction. This power extends to situations in which a court is requested to make a freezing order in relation to an anticipated arbitral award of which there was sufficient prospect that the Court would be asked to enforce that award according to Art 35 of the Model Law.

Duro Felguera argued that when exercising the power to order interim measures it is necessary for the Court to pay due regard to the *"subject matter, scope and purpose of the [IA Act]"* and the objects of the IA Act. Further, Duro Felguera relied upon the requirement in Art 17J that when the power is exercised the Court should "consider the specific features of international arbitration." In light of these requirements Duro Felguera argued that the freezing order should only operate until such a time as the tribunal was constituted and had a reasonable opportunity to consider for itself whether that relief should have been granted.

The Court of Appeal held that it is necessary to consider the objects and purpose of the IA Act when ordering interim measures and orders should not be made which are inconsistent with an arbitration agreement or which usurp the role of the arbitral tribunal. Despite this being so, the Court of Appeal found that there was no inconsistency with the primary judge's decision. To support this conclusion the Court of Appeal referred to:

- the stipulation in Art 9 of the Model Law that it is not incompatible with an arbitration agreement for a court to grant interim measures during arbitration proceedings;
- the drafting history of the Model Law and an Explanatory Note by the UNCITRAL secretariat which described that the purpose of Art 17J was to *"put beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures"*;
- the fact that proposals to limit the scope of Art 17J of the Model Law, consistent with the position adopted by Duro Felguera, were considered but abandoned in the drafting stage; and
- case law in British Columbia which supported Trans Global's position.

Implications

Interim measures are often required to preserve the integrity and utility of the arbitration process. Parties requiring those measures often have to make a choice as to the forum in which those measures are to be sought. If the arbitration is an institutional arbitration and the rules of the particular institution contain an emergency arbitrator regime then the measures could be sought from an emergency arbitrator. Alternatively, the interim measures could be sought directly from the tribunal once it has been constituted. Finally, as this litigation confirms, parties can seek interim measures from courts.

The Court of Appeal's decision confirms that interim measures ordered by courts will be treated as binding (unless they are formulated in such a way as to expire) until the tribunal has determined the final merits of the dispute and issued a final award. It is not necessary that the tribunal once constituted has the opportunity to re-consider and second guess a court's decision to order interim measures. It is conceivable that a tribunal may seek to alter interim relief ordered by a court. The decision does not clarify how such a situation should be dealt with by a court asked to enforce the tribunal's order.

60 Years of the New York Convention – The Role of the Courts

Wayne Martin[1]

Introduction

In 2015, much was said of the 800th Anniversary of Magna Carta. Over those many centuries there has been much hyperbole and exaggeration directed to the impact of that treaty – apparently encouraged by Lord Coke's overstatement of its effects in order to pray it in aid in support of his campaign against the power of the Crown. Public perception of that document and its legal consequences rather exaggerates its actual legal and historical significance.

By contrast, public perception of the New York Convention rather understates its significance, not only in legal terms, but also in terms of its effect upon world development through its enhancement of global trade and commerce. 159 State parties have now adopted the convention, out of 195 member countries of the United Nations - an adoption rate of around 80%. On the occasion of the 40th Anniversary of the Convention, then Secretary General of the United Nations, Kofi Annan observed "The Convention is one of the most successful treaties in the area of commercial law"[2]. Earlier, Lord Mustill wrote that the Convention could "lay claim to be the most effective instance of universal legislation in the entire history of commercial law"[3].

In the absence of a system of international civil courts, the development and promotion of international trade requires mechanisms for the resolution of disputes between traders from different legal regimes and for the effective enforcement of the outcome of those mechanisms in the jurisdictions in which either the trader found to be liable or its assets can be located.

The key elements of the Convention

At the risk of oversimplification, the key elements of the Convention may be described as follows:-

1. Domestic courts are required to enforce arbitration agreements by staying proceedings brought inconsistently with an international arbitration agreement at the request of a party to that agreement.
2. Court approval for enforcement is only required in the jurisdiction or jurisdictions in which the award is to be enforced.
3. Courts in the jurisdiction of the seat of the arbitration can only influence the enforcement of the award if it is annulled in that jurisdiction – and even then, Courts in jurisdictions in which enforcement is sought have a discretion to enforce the award notwithstanding annulment in the jurisdiction of the seat.
4. The Convention exhaustively specifies the grounds, and the only grounds upon which recognition or enforcement of awards can be refused.
5. The Convention places the onus of proof of a ground for resisting recognition or enforcement of an award on the party resisting recognition or enforcement.

The role of the Courts

Ratification of the Convention and implementation of its terms by domestic legislation results in the conferral of jurisdiction to enforce international arbitral awards upon

1 The Hon Wayne Martin AC QC Mediator and Arbitrator, Francis Burt Chambers, Perth – Chief Justice of Western Australia 2006 – 2018.
2 Enforcing Arbitration Awards under the New York Convention – Experience and Prospects – United Nations, New York 1999 at [2].
3 M J Mustill "Arbitration; History and Background" (1989) 6th Journal of International Arbitration [43], [49];- cited in *Dell Computer Corporation v Union des consammaterus* [2007] SCC 34 per Deschamps J., at [39].

the domestic courts of signatory jurisdictions. The prospect of effective award enforcement is of course vital to the success of the international regime for the resolution of disputes by commercial arbitration. However, such data as there is suggests that it is the availability of curial enforcement which results in compliance, and that actual resort to the courts is only necessary in a surprisingly small proportion of cases. A study conducted by Queen Mary College at the University of London in 2008 concluded that of the 5,000 international arbitration cases studied, 25% of those cases settled before an award was made, 49% of the awards made were voluntarily complied with, and only 11% of the cases went to the point of recognition and enforcement by domestic courts[4]. Nevertheless, the availability of curial enforcement through the Convention is a vital component of the system for resolution of international disputes by commercial arbitration. Without the prospect of such enforcement, the level of compliance reported in this study above would have been miniscule and the system itself would be insipid and largely futile.

The efficacy of the system for the resolution of international commercial disputes also depends heavily upon the maintenance of appropriate relationships between arbitral tribunals and domestic courts. In particular, it is vital that domestic courts use their powers with respect to the stay of legal proceedings brought contrary to an arbitration agreement, the supervision of arbitral proceedings within their jurisdiction (through powers relating to the composition of the tribunal, the production of evidence etc) and in relation to the enforcement of awards in a manner which supports and promotes arbitral resolution of disputes, rather than undermining or diminishing arbitration. Happily, after some initial uncertainty and ambivalence, the courts in the vast majority of States which are signatories to the Convention have adopted policies and principles which support arbitration, rather than hinder it. The balance of this paper will be directed at making that point good, through a consideration of some of the issues arising under the Convention which have been addressed by Courts in Australia and elsewhere when a stay is sought of legal proceedings said to have been brought in contravention of an arbitration agreement.

The policy of curial non-interference

The initial uncertainty and ambivalence to which I have referred perhaps reflects the longstanding distrust of arbitration by English common law courts and the inheritors of common law traditions[5]. Despite those traditions, a policy of curial support for the arbitral process and the recognition and enforcement of awards is now firmly established amongst the domestic courts of comparable countries engaged in significant international commercial trade, including countries in North America, Europe, Asia and Australasia.

Clear and unequivocal support for a policy of non-interference was enunciated by the Full Court of the Federal Court in *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*[6], together with an exhortation to refer to and rely upon the decisions of domestic courts in comparable jurisdictions[7].

This approach has been emphatically endorsed by a number of decisions of State courts[8].

Stay applications

Article II of the Convention requires the Courts of contracting States, when seized of actions in "a matter" to

4 Study cited by Dr Jorg Webber in "Inside Arbitration" – Herbert Smith Freehills 2018 at p. 5.

5 The Hon T F Bathurst, ACICA New York Convention Symposium "The Role of the Courts", 4 July 2018 at [2] – [3].

6 [2014] FCAFC 83.

7 at [76] et seq.

8 In New South Wales see *Aircraft Support Industries v William Hare UAE* [2015] NSWCA 229; in Victoria see *Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37; *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163 at [37]; *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326; *Indian Farmers Fertiliser Co-operative Limited & Anor v Gutnick & Anor* [2015] VSC 724; and in Western Australia, *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66.

which an arbitration agreement applies, to refer the parties to arbitration if one of the parties so requests, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

In Australia effect is given to that provision of the Convention by section 7 of the *International Arbitration Act* (1974) (Cth) (IAA). The principles governing the practical application of that section were recently considered by the Full Court of the Federal Court in *Hancock Prospecting Pty Ltd v Rinehart*[9].

The court drew attention to the divergence in the approach taken in the Courts of different countries in relation to the burden and standard of proof with respect to applications for a stay. As the Court noted, the weight of more recent international authority favours an approach consistent with the *Kompetenz-Kompetenz* principle, to the effect that the jurisdiction of arbitrators includes the jurisdiction to determine the extent of their own jurisdiction, with the result that arbitrators should be left to exercise that jurisdiction if there appeared to be a valid arbitration agreement which, on its face, covered the matter in dispute[10].

The other approach - taken by the English courts and most evident in the decision in *Joint Stock Company (Aeroflot Russian Airlines) v Berezovsky*[11], requires the court to determine, on the balance of probabilities, the scope of the arbitration agreement and whether facts have occurred which brings the dispute the subject of the curial proceedings within the scope of that agreement.

In *Hancock*, the Full Court disparaged any rigid categorisation of the approach properly taken but nevertheless generally favoured the "*prima facie*

9 [2017] FCAFC 170.

10 See in Singapore, *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 (per Menon CJ); in Hong Kong see *Star (Universal) Co Ltd v Private Company "Triple V" Inc* [1995] 2 HKLR 62 at [65] and *PCCW Global Ltd v Interactive Communication Service Ltd* [2006] HKCA 434; [2007] 1 HKLRD 309, 320-321; in Canada *Dell Computer Corp v Union des consommateurs* [2007] SCC 34; 2 SCR 801; in New Zealand see *Ursem v Chung* [2014] NZHC 436.

11 [2013] EWCA CIV 784; [2013] 2 Lloyds Rep 242, 258 at [72] – [74].

approach" as compared to the approach in *Berezovsky*. The Court also made the point that the choice between the courses to be adopted may well be influenced by the extent to which determination of the scope of the arbitration agreement would involve findings of fact which would impact upon the substantive rights and obligations of the parties and which are therefore within the primary province of the arbitral tribunal rather than the court[12]. However, it should be noted that the decision in *Hancock* has been the subject of a grant of special leave to appeal to the High Court, and that appeal has not yet been heard.

I considered these issues in *Fitzpatrick v Emerald Grain Pty Ltd*[13]. Happily, for the reasons which I endeavoured to explain, in the circumstances of that case, it was not necessary to come to a concluded view as to which of the two approaches was to be preferred, although rather like the Full Court of the Federal Court, I was inclined to favour a more flexible approach which did not require the adoption of a pre-determined procedure but which rather turned upon the nature of the issues which had to be determined in order to resolve the application for a stay, and in particular, whether curial determination of those issues would, in effect, usurp the jurisdiction of the arbitral panel to determine matters going to its jurisdiction.

Curial recognition of the importance of an arbitral tribunal deciding upon the ambit of its own jurisdiction is entirely consistent with, and evidence of the policy of judicial non-interference.

An option to arbitrate?

In *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*[14], it was held that an agreement which provided that the parties "may" arbitrate their dispute was an arbitration agreement for the purposes of section 7 of the IAA, consistently with the reasoning of the High Court in *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service*[15], and contrary to the reasoning of Menhennitt J. in *Hammond v Wolt*[16] to the effect that such a clause simply provided an option to arbitrate. Of course, in a sense, all arbitration agreements are optional, in that if neither party invokes the agreement or seeks a stay from the court, the jurisdiction of the court is not displaced.

The construction and interpretation of arbitration agreements

The proper approach to the construction and interpretation of arbitration agreements was also addressed by the Full Court of the Federal Court in the recent decision in *Hancock*[17]. Their Honours addressed the distinction which Bathurst CJ had drawn between the approach taken by Lords Hoffman and Hope in *Fiona Trust & Holding Corporation v Privalov*[18], and what has been characterised as the "liberal and flexible" approach to the construction of such agreements advanced by Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[19]. The Full Court agreed with the view I had earlier expressed[20] to the effect that there was in fact no divergence in approach because the adoption of the "liberal and flexible" approach was not a departure from the meaning of the words chosen by the parties but did nothing more than give effect to a coherent business purpose which a commercial court would ordinarily attribute to the parties to an arbitration agreement. This preponderance of support for a liberal and flexible approach to the construction of arbitration agreements is further evidence of curial support for arbitration and the philosophy of the Convention. However, given that

12 Relying upon observations made by Colman J in *AVB* [2006] EHWC [2006] (Comm); [2007] 1 Lloyds Rep 237 at 261 (137).
13 [2017] WASC 206.
14 [2012] WASC 228.
15 (1995) 184 CLR 301.
16 [1975] VR 108.
17 See *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170.
18 [2007] UKHL 40; [2008] 1 Lloyds Rep 254.
19 [2006] FCAFC 192; [2006] 157 FCR 45.
20 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66 at [61].

special leave to appeal has been granted, the precise approach to construction to be taken in Australia should be regarded as something of an open question.

Arbitrability

Occasionally a party to litigation will resist an application for a stay on the ground that the "matter" the subject of the proceedings is not "capable of settlement by arbitration"[21]. That proposition was advanced in *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* in opposition to an application for a stay of proceedings seeking declarations to the effect that the affairs of a company had been conducted oppressively and, in consequence, an order that the company be wound up. It was common ground that all the disputes giving rise to the allegation of oppression were within the scope of the arbitration agreement[22]. However, the claimant in the curial proceedings asserted that, because the arbitral tribunal could not grant all of the relief sought from the court and in particular could not make a winding up order, the curial proceedings should not be stayed pursuant to section 7 of the IAA.

In rejecting that contention, Foster J referred to the "policy of minimal curial intervention"[23] and the need to have special regard to international case law when construing and applying the IAA and the New York Convention and the Model Law. He relied upon observations made in *Tanning Research Laboratories Inc v O'Brien*[24] to the effect that even where curial proceedings encompassed issues additional to those constituting "a matter capable of settlement by arbitration" a stay could nevertheless be granted. Foster J concluded that because the making of a winding up order depended upon the resolution of disputes, all of which were arbitrable, there should be a stay of the entire proceedings pending the outcome of the arbitration which he ordered. Again, this decision is entirely consistent with a policy of curial support for arbitration.

"Null and void" and parties to the arbitration agreement – whose law?

Parties to litigation may also resist an application for a stay on the ground recognised by Article II of the New York Convention and section 7 of the IAA, to the effect that the arbitration agreement is "null and void". However, neither Article II of the Convention nor section 7 of the IAA specify what law is to be applied to determine whether an arbitration agreement is "null and void". It can be generally accepted that the Article refers to the arbitration agreement, which is generally considered to be severable from the substantive commercial agreement of which it forms a part. So, even if the substantive commercial agreement contains a choice of law clause, it is at least arguable that the choice of law should not axiomatically and inevitably be applied to the arbitration agreement, given its severability.

In the United States courts have tended to apply the law of the forum in order to determine whether the arbitration agreement is null and void[25]. However, in other countries courts have looked to the law of the place of arbitration in order to determine whether the arbitration agreement is null and void, which has the advantage of coincidence with the approach taken in Article V(1)(a) of the New York Convention, which specifically applies the law of the country where the award was made to the validity of the award in the absence of an express indication to the contrary.

However, it has been determined in Australia (by majority) that the question of whether a party to litigation resisting a stay is a party bound by the arbitration agreement is to be determined by the application of the choice of law rules of the forum (which in Australia, results in the application of the law of the

21 Section 7 of the IAA.
22 [2016] FCA 1164 at [24].
23 at [101].
24 (1991) 69 CLR 332 at [351].
25 See Silberman – *The New York Convention After 50 Years – Some Reflections on the Role of National Law*, 38th Georgia Journal of International and Comparative Law (2009) at [42].

forum), rather than the law of the putative arbitration agreement[26]. However, with respect, I share the view of Albert Monichino QC[27] to the effect that the dissenting view of Greenwood J on this point is to be preferred, in order to avoid the anomalous consequence that a stay could be refused on the basis that a party to litigation was not a party to the arbitration agreement, according to the law of the forum, but then, after an award had been made, its enforceability determined by reference to the law of the place of the arbitration, as required by Article V of the Convention and section 8(5)(b) of the IAA. The contrary view, which attracted majority support, was that it was anomalous for a party to be bound by the law of an agreement to which it asserted it was not a party, for the purposes of determining that issue.

For an example of a case in which the law of seat (France) was applied to determine whether an entity was a true party to an arbitration agreement for the purposes of enforcing an award elsewhere (England) see *Dallah Real Estate v The Ministry of Religious Affairs, Government of Pakistan*[28]. In that case the Supreme Court of England and Wales held that the *Kompetenz* principle did not mean that the ruling of an arbitral tribunal sitting in Paris to the effect that the government of Pakistan was a party to the relevant arbitration agreement bound the courts of England to a similar conclusion when enforcement was sought in that country. To the contrary, under Article V of the Convention, the English courts were obliged to apply French law to themselves determine the question.

"Inoperative" arbitration agreements

Another ground upon which a stay can be resisted by a party to court proceedings is the assertion that the relevant arbitration agreement is "inoperative"[29]. In *Siam Steel International PLC v Compass Group (Australia) Pty Ltd*[30]. It was argued that because neither party had given notice of dispute at the time the proceedings were commenced, the arbitration agreement was "inoperative". Le Miere J rejected that contention accepting that in its context "inoperative" meant, in effect, an arbitration agreement which was incapable of being performed as a mechanism for the resolution of the "matter" at any time in the future. This view of the narrow ambit of the exceptions to the mandatory grant of a stay is also consistent with the policy to which I have referred.

Conditions attached to the grant of a stay

The policy of curial non-intervention is also evident in the way in which the courts have approached the exercise of the power to grant a stay of legal proceedings and refer parties to arbitration subject to conditions imposed by the court. That power does not emanate from an express provision of the Convention but in Australia is to be found in section 7 of the IAA. Sub-section (2) of that section provides that a court may stay proceedings before it upon such conditions, if any, as it thinks fit, and sub-section (3) provides that where a court makes an order under sub-section (2) "it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the ... order relates".

In *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*[31] the Judge at first instance stayed the proceedings before the court on condition that the amount in dispute ($80 million) be paid into escrow by the applicant for the stay pending the outcome of the arbitral proceedings. The Court of Appeal was unanimously of the view that such an order exceeded the powers conferred upon the court by section 7 of the IAA[32].

In my reasons for arriving at that conclusion I observed

26 *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2015] FCA 1453; affirmed in *Trina Solar (US) v Jasmin Solar Pty Ltd* [2017] FCAFC 6.

27 A Monichino *"Enforcement of Arbitration Agreements against Non-Signatories: Which Law (the Chicken and the Egg)?"* ACICA Review, December 2017 at 43.

28 [2010] UKSC 46.

29 Article II of the Convention; section 7 of the IAA.

30 [2014] WASC 415.

31 [2012] WASC 228.

32 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66.

that because the powers conferred by subsection (3) were conditioned upon the making of an order under sub-section (2), it was reasonable to infer that the legislature intended the power to be used for the purpose of promoting and enforcing the parties' agreement to resolve their disputes by arbitration. I also observed that the powers conferred by this section could only be exercised "for the purpose of preserving the rights of the parties" whereas the order made by the Judge at first instance altered those rights, by, in effect, directing the performance of a significant obligation by one party prior to any arbitral award. That view was reinforced by the description of the orders authorised by section 7(3) as "interim or supplementary orders"[33]. I relied upon a number of previous decisions in Australia and other comparable jurisdictions for these conclusions[34].

McLure P relied upon various provisions in the Model Law to arrive at the conclusion that the powers conferred upon the court by section 7 were intended to be utilised for the interim preservation of property or rights pending the determination of those rights by arbitration rather than for the purpose of enforcing disputed rights on an interim basis[35].

Conclusion

This paper commenced with an observation with respect to the vital importance of the 60 years of operation of the New York Convention in relation to the development of global trade and commerce. Non-exhaustive analysis of the ways in which courts in Australia and other comparable jurisdictions have responded to issues arising in stay applications brought under the Convention and the legislation giving it effect in those jurisdictions shows that a firm policy of curial nonintervention with respect to international arbitration is well established and recognised by courts in those jurisdictions. It is a policy which has served well to facilitate the Convention achieving its fundamental objective – that is, of providing a relatively reliable means by which disputes arising from international commerce may be resolved and the rights and obligations of international traders enforced.

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33 [2013] WASCA 66 at [84] – [87].

34 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 at [245]; *O'Brien v Tanning Research Laboratories Inc* (1988) 14 NSWLR 601; *WesTrac Pty Ltd v East Coast Otr Tyres Pty Ltd* [2008] NSWSCA 894; in England and Wales see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334; *Cetelem SA v Roust Holdings* [2005] EWCA CIV 618; in Hong Kong see *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347; *Owners of the Ship "The Lady Muriel" v Transorient Shipping* [1995] 2 HKC 320; in New Zealand see *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608, 625 [74]; *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 at [40]; in Singapore see *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565, 582.

35 At [127] – [129].

Australia's Framework for International Commercial Arbitration

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This paper is based on a talk given in Canberra on 24 October 2018 at an event held by the UNCITRAL National Coordination Committee for Australia (UNCCA) to mark the 60th anniversary of the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

At various times over the years I worked in the Attorney-General's Department, I was responsible for UNCITRAL and its work, and for advising on federal arbitration law. (I attended several UNCITRAL meetings including one that worked on the UNCITRAL Conciliation Rules.) I was also involved in promoting the use of Australian arbitrators and Australia as a venue for international arbitrations through the Department, and also as an executive director of the Australian Centre for International Commercial Arbitration (ACICA) and a member of the International Legal Services Advisory Council (ILSAC). My role with ACICA has continued after leaving the Attorney-General's Department.

This paper draws on my experience working on Australia's framework for international commercial arbitration, that is the laws which apply and the institutions (the Courts and arbitral bodies) which play a role.

The huge amount of world trade and its expansion over the decades means that traders need an effective means of resolving the inevitable disputes that arise. Australia's trade has increased similarly, especially with Asian countries, which have very different legal systems and a different approach to settling disputes.

It seems to me that three key principles govern the process of resolving international trade disputes once friendly discussion and conciliation are no longer options:

- First, each party wants to avoid litigating in the courts of a foreign country. There are several reasons for this, including the desire to avoid resort to a system that is unknown, that is likely to be expensive especially because it is in another country and that may be less favourable to foreign parties.
- Secondly, the parties want maximum autonomy so that they can decide who will resolve their dispute, where that will occur and how it will occur. By 'how' I mean under what rules and with minimal court involvement or supervision.
- Thirdly, they want the final outcome to be just that i.e. 'final' and they want it to be enforceable wherever the other party has assets.

I may not be entirely objective given my personal involvement over many years, but in my view successive Australian Attorneys-General (and most of their State and Territory counterparts) have placed a high priority on putting in place an effective and uniform framework for the conduct of arbitration in Australia.

New York Convention

The Commonwealth's enactment of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth) implemented the New York Convention. Australia's accession to the Convention became effective on 26 March 1975 and, in accordance with the Convention, the Act's substantive operation commenced on 24 June 1975.

While I won't go into detail about the Convention, it is worth emphasising how significant it is in providing the bedrock for international arbitration, both because of the limited grounds it allows for challenging arbitral awards, and the ease of enforcing awards. Without it, more resort would probably be had to courts. However, there is no equivalent convention for enforcing court judgments, and the means of enforcing judgments through bilateral arrangements are limited and, where they are not in place, the common law remedies are more difficult to navigate.

The success of the New York Convention is reflected in the number of parties - now 159 - which is truly impressive considering the United Nations has a total of 193 member states and a good number of these do not have developed legal frameworks or are not significant international traders. (The 159 parties include three that are not members of the UN.)

The number of parties to the New York Convention has continued to grow with 15 countries joining since 2010. When Australia became a party some significant Asian countries were not members, including China, Malaysia, Singapore, Vietnam and Myanmar. All these countries are now members. (China in 1987, Malaysia in 1985, Singapore in 1986, Vietnam in 1995, and Myanmar in 2013.) Japan, South Korea, Cambodia and Thailand were members before Australia so the coverage in Asia is fairly comprehensive. Interestingly, New Zealand did not become a party until 1983 and Canada until 1985.

Gaps remain in the coverage of the Convention, most notably in the Pacific where around 14 countries are not members, including Papua New Guinea, Tonga, Timor-Leste, Vanuatu and the Solomon Islands. However, on a world scale the Convention has a remarkable coverage and probably more parties than any other private law convention.

Model Law and ICSID Convention

The Arbitration (Foreign Awards and Agreements) Act was renamed the *International Arbitration Act 1974* in 1989 when the 1985 UNCITRAL Model Law on Commercial Arbitration was incorporated in a schedule to the Act to provide rules for the conduct of international arbitrations. The Model Law was updated by UNCITRAL in 2006 and these amendments were largely picked up and incorporated in the Act in 2010, along with other changes to improve the Act.

Consistent with the principle of party autonomy, the Act enables parties to agree that certain Model Law provisions will not apply to their arbitration, while others apply only if they are adopted by the parties. The Act also provides that a party can be represented by a qualified legal practitioner from any jurisdiction.

It is worth noting that the State, ACT and Northern Territory legislation which governs domestic arbitration largely replicates the Model Law. This uniformity brings with it the advantage of increased familiarity with the Model Law by both practitioners and judges.

In 1990 Australia's accession to the *Convention on the Settlement of Investment Disputes States and Nationals of Other State*s (ICSID Convention) was finally implemented by way of an amendment to the International Commercial Arbitration Act (*ICSID Implementation Act 1990*). I say 'finally' with some feeling because I worked on its implementation for several years in the Attorney-General's Department, but the Treasury had a different view and blocked its adoption.

Australia had been a relatively early signatory to the Convention in 1975, in fact, in the same month as we became a party to the New York Convention. However, it took another 16 years to ratify the ICSID Convention. It came into force for Australia on 1 June 1991 with the Convention implemented through a schedule in the International Arbitration Act. ICSID has almost as many parties as the New York Convention with 154 countries having adopted it as a mechanism for resolving disputes between member states and investors from other member states.

Institutional support

The role played by the Australian courts and by arbitration bodies, primarily ACICA, is a major reason why Australia has such a supportive framework for international (and indeed domestic) arbitration.

Courts

In the early years it would be fair to say two significant problems were encountered with judicial supervision of arbitration. First, some judges were suspicious if not hostile about the use of arbitration and considered that the rule of law required either court adjudication of these disputes or at least close judicial supervision of arbitrators or the process they used. The second problem was that, with our federal system of courts, inconsistent views were sometimes taken on the same or similar provisions or legal principles.

When the federal Government was implementing the updated Model Law, serious consideration was given to granting the Federal Court exclusive jurisdiction over matters arising under the Act. However, while this view did not ultimately prevail, the earlier concerns about the role of the State and Territory judiciary no longer seem to apply.

Australian Parliaments have encouraged a positive and uniform approach by the courts, including by enacting provisions encouraging 'words and expressions' in the Model Law to be given the same meaning as in the federal Act. For example, section 2A of the ACT *Commercial Arbitration Act 2017* requires that in interpreting the Act 'regard is to be had to the need to promote, so far as practicable, uniformity between the application of this Act' to domestic commercial arbitrations and the Model Law - subject only to the Act's paramount object in section 1C ('to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense').

Perhaps more significantly, section 39 of the federal Act requires, in essence, a court handling an international arbitration matter to have regard to the fact that 'arbitration is an efficient, impartial enforceable and timely method by which to resolve commercial disputes' and that 'awards are intended to provide certainty and finality'.

Recent years have seen a very positive approach by virtually every Court in relation to international arbitration. This has been assisted in some jurisdictions, including the Federal Court and the Supreme Courts of NSW and Victoria, which in practice handle most arbitral matters, by having one or a small number of judges nominated to hear these matters.

The High Court has adopted a similarly positive approach, including in its 2013 decision in *TCL Airconditioner (Zhongshan) Co Ltd v The Judges of the Federal Court* (2013) 251 CLR 533. In rejecting a challenge to the constitutional validity of the International Arbitration Act, the Court's position was consistent with the objective of minimal judicial involvement.

The approach of Australian courts was summed up by Justice Middleton of the Federal Court who said in a speech in 2016 at a Chartered Institute of Arbitrators (Australia) event:

'It is now accepted that it is crucial for courts to be supportive of the legislative framework governing arbitration, to understand the global context in which international commercial arbitration operates and to be willing to preserve the integrity of the arbitral process.'

ACICA

ACICA, Australia's peak arbitral body, was established in 1985. However, its early efforts to promote international arbitration were hampered by another aspect of our federal system – rivalry between Melbourne and Sydney. At a Colloquium on Dispute Resolution hosted by the Attorney-General's Department in 1986, the Chairman (then Secretary, Pat Brazil AO) noted that 'for Australia to succeed as a place for international arbitration, there needs to be coordination in the promotion of the idea – rather than rivalry, and possibly confusion between two, or possibly even more than two, independent bodies'. He based these comments on discussions the Department was having at the time with the rival groups.

The Department's efforts to address this issue were not successful at the time. However, the rejuvenation of ACICA and the establishment of a new centre in Sydney in 2010 have seen a co-ordinated approach that is serving Australia well.

The Attorneys-General of the Commonwealth and NSW found a way to contribute much needed funding to support the Centre for the first few years after 2010 and it has since gone from strength to strength. As well as promoting the use of Australian arbitrators, ACICA promotes Australia as a venue for arbitration both in Sydney and elsewhere

The Centre has been selected as the venue for an increasing number of arbitrations which enables the ACICA to be financially viable without government funding. This year ACICA is administering in the order of 20 arbitrations, mediations and requests to act as an appointing authority under the International Arbitration Act.

Future developments

At its meeting in June this year UNCITRAL adopted the *Convention on Enforcement of Conciliated Settlement Agreements* (Singapore Convention on Mediation). This Convention is designed to enable mediated agreements to be enforced in other countries in much the same way as arbitration decisions are under the New York Convention. The Convention is due to be signed in Singapore next year and it will then be a matter for each country to decide whether to adopt it as part of their national law - inevitably a long and often painful process.

Work is also underway to implement the UNCITRAL *Convention on Transparency in Treaty-based Investor State Arbitration* (the Mauritius Convention), which Australia signed in July 2017. Its essential aim is to promote greater transparency in the conduct of Investor-State arbitrations, in particular, by providing rules on publication of documents, open hearings and the opportunity for interested third parties to play a role. The Convention entered into force in October last year, but at this stage has only limited operation.

Other work is taking place in UNCITRAL to consider further reform of the international regime dealing with Investor State investment disputes.

It is generally agreed that the absence of an international regime for enforcing court judgments is a significant reason why international arbitration is preferred over litigation. After many years work by The Hague Conference on Private International Law on enforcement of court judgments in other counties, there is now a viable, albeit limited, international instrument Australia could implement. The Convention on Choice of Court Agreements was adopted in 2005 and entered into force in 2015. Under the Convention a contracting State is required to enforce a foreign judgment given by a court that has been agreed for this purpose by the commercial parties. (The choice of court agreed by the parties is also required to be recognised.) Australia has been taking steps toward implementing the Convention, with the Parliamentary Joint Standing Committee on Treaties endorsing this action in a report in November 2016.

It remains to be seen whether this Convention, or any further one that might be adopted by the Hague Conference, will have an impact on the extent to which arbitration is favoured by international traders. It might lead to more use of courts, especially International Courts like the Court in Singapore. However, resort to litigation for this reason seems likely to be more than compensated for by an increase in international disputes proceeding to arbitration.

UNCCA and UNCITRAL

UNCCA deserves congratulations both for promoting the 60th anniversary of the New York Convention and even more significantly for its work in promoting UNCITRAL and the adoption of its instruments as part of Australian law.

'Commercial Arbitration' was identified as a key topic for future work in a paper presented to the very first meeting of UNCITRAL in New York in 1968. Over the following years, its work led to the adoption of the UNCITRAL arbitration model law, its arbitration rules and its conciliation rules. Its work in this field continues today.

Conclusion

Australia's law and institutional framework for international arbitration is, I think, in good shape, but it is a dynamic field and one that requires input from participants if it is to continue to support Australia's trade. ACICA and UNCCA are well placed to contribute to the ongoing work that will be needed.

A race to set aside or enforce the award:

Hyundai Engineering & Steel Industries Co Ltd v Alfasi Steel Constructions (NSW) Pty Ltd

Jo Delaney
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(ACICA Fellow)

The legal framework designed to support and enforce the arbitration process has been tested in a recent case before the Federal Court of Australia, *Hyundai Engineering & Steel Industries Co Ltd v Alfasi Steel Constructions (NSW) Pty Ltd* [2018] FCA 1054. Both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) and the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) provide that proceedings to enforce an award may be stayed or adjourned whilst an application for annulment of the award is heard by the courts of the seat of the arbitration. However, as confirmed by the Federal Court of Australia, the court has a discretion whether or not to grant such an adjournment with or without security. Whether or not to exercise that discretion depends on the individual circumstances of each case.

The Arbitration

Hyundai Engineering & Steel Industries Co Ltd (**Hyundai**) and Alfasi Steel Constructions (NSW) Pty Ltd (**Alfasi**) entered into a "Sub-Subcontract" in December 2013 (**Contract**). Hyundai agreed to fabricate and deliver steel for use by Alfasi in the construction of the Sydney International Convention Exhibition and Entertainment Precinct in Darling Harbour (**Project**). The Contract contained an arbitration clause referring disputes to arbitration under the arbitration rules of the Singapore International Arbitration Centre (**SIAC**).

Following various claims by the Parties and delays to the Project, Alfasi commenced arbitration. The key question was who was responsible for the delays in the execution of the steel manufacturing works: was Hyundai responsible for the delays to its work or was Alfasi responsible because it failed to provide adequate drawings in a timely manner.

On 9 March 2018, the sole arbitrator issued a final award in which he found that the main reason for the delays was Alfasi's failure to provide adequate drawings in a timely manner and that Hyundai was entitled to an extension of time. The sole arbitrator awarded Hyundai more than $5.5 million in net payment of Alfasi's claims and Hyundai's counterclaims plus interest and costs.

The Parties' subsequent steps following the award

On 6 June 2018, Hyundai applied to the Federal Court for enforcement of the award.

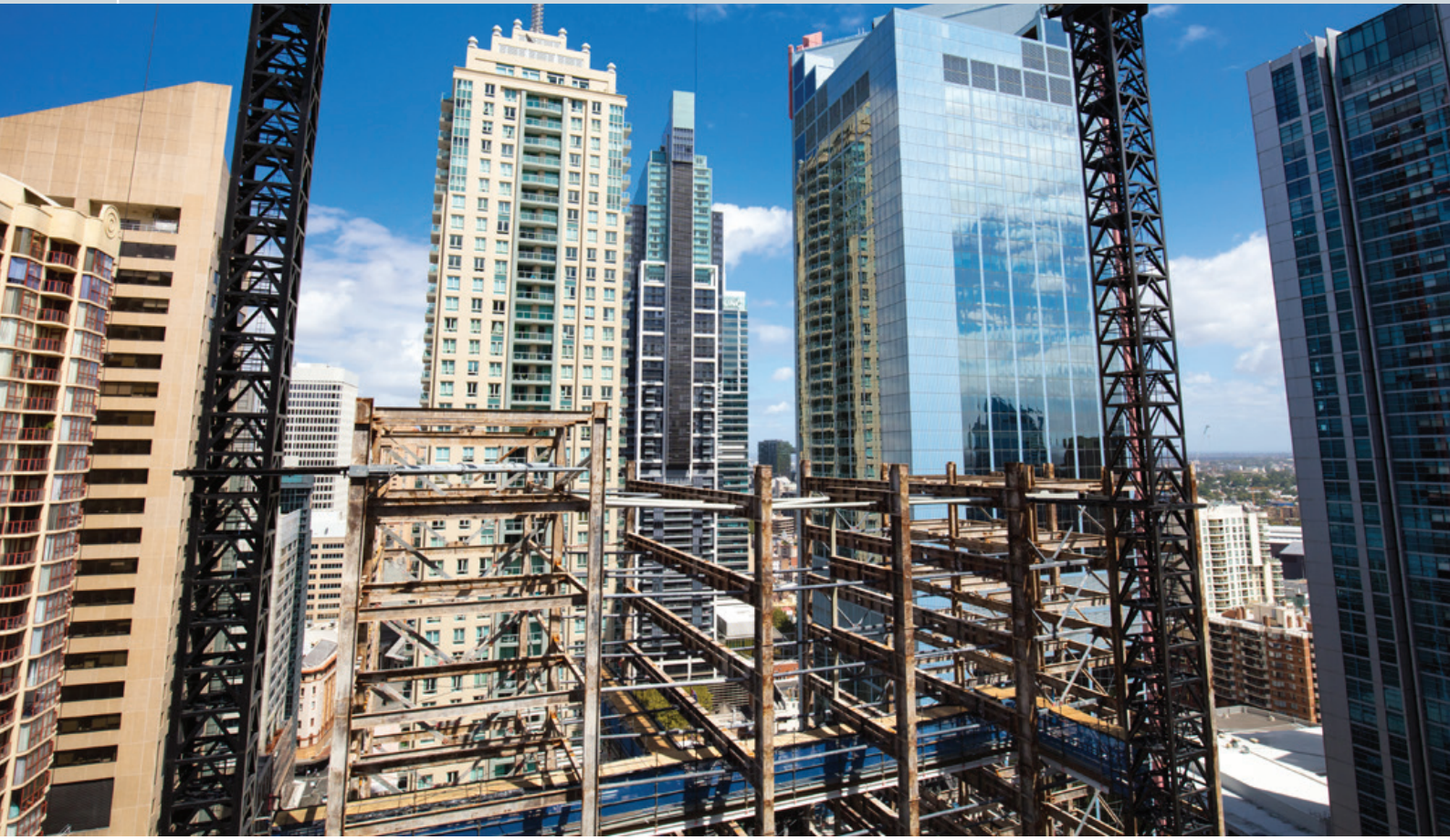
On 8 June 2018, Alfasi applied to the Singapore High Court for annulment of the award.

On 22 June 2018, Alfasi applied for an adjournment of the enforcement proceedings under section 8(8) of the *International Arbitration Act 1974* (Cth) (**IAA**) or the Court's general power to control its own process, pending the outcome of the application in the Singapore proceedings.

On 25 June 2018, Hyundai requested an order for security in the event that the enforcement proceedings were adjourned.

Annulment vs enforcement: the discretion of the court

Section 8(8) of the IAA provides that the court may adjourn enforcement proceedings in the event that a party has applied for the annulment of the award in the seat of the arbitration. However, this is not mandatory; the court has a discretion as to whether or not to adjourn



the enforcement proceedings and whether or not to grant security if an adjournment is granted.

This is consistent with the approach under the New York Convention. Article VI provides that the court has a discretion to adjourn proceedings "if it considers it proper" and may also order, on the application of the party seeking enforcement, "suitable security" of the other party.

The Federal Court (Justice O'Callaghan) considered the principles that guide the exercise of this discretion, as set out by Foster J in *Esco Corporation v Bradken Resources Pty Ltd* (2011) 282 ALR 282; [2011] FCA 905 (***Esco* case**). In considering what is "suitable security" Justice Foster took into account:

- the quantum of the security;
- the type of security; and
- the terms and conditions upon which the security is to be provided, including the circumstances in which it may be called upon by the enforcing party.

Justice Foster stated that:[1]

> *"Factors to be considered by the court when ordering security would include the subject matter of the award; the history of the parties' dealings (especially with each other) since the making of the award; the enforcing party's prospects of enforcing the award; and the potential for the party against whom enforcement is sought to resist enforcement by, for example, applying to suspend or set aside the award in the jurisdiction where it was made."*

Justice Foster emphasised that the discretion "must be exercised by having regard to the objects of the IAA and the rationale underlying the [New York Convention]".[2]

When it came to considering whether or not to grant an adjournment, Justice Foster adopted an approach that was consistent with the approach of the English courts, as discussed below.

Federal Court endorses approach of the English courts

In the *Esco* case, Justice Foster referred to two relevant decisions of the England courts: *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 (***Soleh Boneh***) and *IPCO (Nigeria) Limited v*

1 [2018[FCA 1054 at [35].
2 Ibid.

Nigerian National Petroleum Corporation [2005] EWHC 726 (***IPCO v NNPC***).

The approach taken in the *Soleh Boneh* case was that the enforcing court was to consider two factors in determining whether or not to adjourn the enforcement proceedings if there were parallel annulment proceedings: first, the strength of the annulment arguments on a sliding scale and second, the ease or difficulty of enforcement of the award.

Regarding the first factor, a sliding scale is to be considered: if those arguments to annul the award were strong then an adjournment should be grant, probably with out security; if those arguments were weak, an adjournment may be refused or only granted with security. This analysis is to be carried out on a brief consideration of the arguments only as it would not be "sensible or appropriate for the enforcing court to second guess the judgment of the foreign court or authority called upon to rule on the application to set aside or suspend the award nor would it be sensible or appropriate for the enforcing court to usurp the role of that foreign court or authority".[3]

Regarding the second factor, the court is to consider whether an adjournment would render it more difficult to enforce the award because, for example, assets have been moved. If there are concerns about the availability of assets against which the award may be enforced, then the granting of security is more likely.

In *IPCO v NNPC*, the English High Court endorsed the sliding scale approach whilst also emphasising that each case will depend on its own individual circumstances. The Court indicated that:[4]

> *"Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice."*

Justice O'Callaghan agreed with Justice Foster that these English cases provide useful guidance as to how the court's discretion should be exercised.

Adjournment only with security

Adopting this approach, Justice O'Callaghan accepted the arguments made by Hyundai's counsel, Justin Hogan-Doran, that the adjournment should only be granted if Alfasi provides security. Justice O'Callaghan noted that it was not possible to "form a meaningful and considered view about the merits of the matter, even if it were otherwise appropriate to do so". He noted that whilst Hyundai had argued that Alfasi's case will fail, Hyundai had acknowledged that for the purpose of the adjournment application, it was at least arguable.

However, as Alfasi's counsel (Dr Anton Trichardt) accepted, even if the annulment was successful, it would only reduce the award to an amount of more than $3 million to be paid to Hyundai. Adopting the sliding scale approach, and assuming that the annulment was no more than arguable, Justice O'Callaghan found that there should be security and that "suitable security" was the full amount of the award plus interest. He also found Alfasi's arguments that the fact that no security had been sought during the arbitration proceedings and that security may not be awarded in the Singapore proceedings irrelevant.

On this basis, Justice O'Callaghan ordered that an adjournment only be granted if security was provided by Alfasi. If there was no security, then there would be no adjournment.

Conclusion

In this case, the Federal Court has endorsed the arbitration friendly approach adopted in recent years. Adopting an approach similar to the English courts, the Federal Court has continued to support the arbitration process and the outcome of that process in circumstances where there are parallel proceedings relating to an arbitration award: i.e. enforcement proceedings in the Australia courts; and annulment proceedings in the courts of the seat of the arbitration.

3 [2018] FCA 1054 at [36].
4 [2018] FCA 1054 at [36].

ICSID's New Mediation Rules: A Small but Positive Step Forward

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In August this year the International Centre for the Settlement of Investment Disputes (ICSID) announced its fourth and most extensive changes to dispute resolution rules, to date.[1] The proposed amendments only apply to the rules and not the Convention itself. ICSID Additional Facility (AF) rules will now be applicable to cases where neither respondent nor claimant is the ICSID Contracting State or national of a Contracting State, whereas previously at least one side had to be a (national of a) Contracting State. Thus, these dispute settlement facilities will be more widely available world-wide.

These proposals are important not only due to their scale, but also some unique aspects. ICSID is proposing a new dispute settlement mechanism, the Mediation Rules, deemed to be part of the ICSID AF Rules. These will be the first set of institutional rules for investor-state mediation (ISM) released by the world's main arbitral institution for investment disputes. The International Bar Association published ISM Rules in 2012[2] but so far these seem to have had little impact in practice.[3] The new ICSID Rules are likely to have more impact, but States like Australia should do more than just agree to AF Rules in its investment treaties or contracts.

Voluntary Mediation Option

ICSID AF Mediation Rules provide a procedure for voluntary ISM. The proposal covers two grounds for initiating mediation. The first ground is an existing agreement to mediate provided in the treaty that carries the consent to ISDS (Rule 3). Yet only a very small number of international investment agreements (IIAs) specifically mention mediation by including advance consent to mediate in their ISDS provisions. Indeed, according to the introductory text of the proposal, there is only one IIA that has a mandatory mediation clause incorporated in its ISDS provision as a pre-condition to arbitration – the Investment Agreement for the COMESA Common Investment Area (not yet in force).[4] However, art 26 of COMESA arguably does not provide for mandatory mediation as a pre-condition to arbitration. A mandatory pre-condition would arise if mediation were to be the only required step before arbitration, but that is not the narrative of art 26. According to art 26, parties shall seek the assistance of a mediator 'where no alternative means of dispute settlement are agreed upon…'[5]

The second ground for initiating mediation according to the ICSID Mediation Rules is where there is no prior agreement to mediate (Rule 4). In this case, a party interested in mediation can still invoke the process and seek the consent of the other party through the assistance of ICSID's Secretary-General. This provision should be welcomed in the present reality where most

1 ICSID Website <https://icsid.worldbank.org/en/amendments>.

2 Micah Burch, Luke R Nottage and Brett G Williams, 'Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century' (2012) 35(3) ***University of New South Wales Law Journal***, SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065636>.

3 For a rare reported instance of the IBA being used, in a dispute with the Philippines, see Luke R Nottage, and Sakda Thanitcul, 'International Investment Arbitration in Southeast Asia: Guest Editorial' (Research Paper No. 16/95, Sydney Law School, November 1, 2016) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862272>.

4 ***Proposals for Amendment of the ICSID Rules — Consolidated Draft Rules*** (2018) 3 Annex E, ICSID Additional Facility Mediation Rules 748 <https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf>.

5 ***Investment Agreement for the COMESA Common Investment Area*** opened for signature 23 May 2007 (not yet in force) art 26 (3)(4) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092>.

IIAs have no mention of agreements to mediate. It makes these Mediation Rules accessible to everyone who may be interested.

Rule 13 of the ICSID AF Mediation Rules covers the process of the First Session. What could require further attention is the Rule 13(4) (a), stating '[a]t the first session or within any other period as the mediator may determine, each party shall: identify a representative who is authorized to settle the dispute on its behalf…'. If and when Australia agrees on these Mediation Rules, it may be beneficial for the State to identify beforehand the person(s) having authority to mediate.

Unlike the 2012 IBA Mediation Rules, the ICSID AF Mediation Rules allow the mediator to engage in caucusing i.e. conduct meetings and communications with the parties separately. This is something opponents of ISM might protest due to the sensitivity of caucusing, but it should not be problematic because the mediator is not envisaged to be the same person as the arbitrator(s) appointed if the dispute proceeds to arbitration.

Rule 14(4) of the ICSID AF Mediation Rules preclude mediator recommendations for settlement terms, absent party agreement, thus favouring a more facilitative style mediation even for investor-state disputes. This contrasts with the more formalised ICSID Additional Facility Conciliation Rules (draft Annex C),[6] including proposed Rule 30(2)-(3) allowing settlement recommendations by the conciliators, which is similar to Rule 30(3) of the current 2006 Conciliation Rules[7] Where the parties choose Conciliation Rules instead under the ICSID Convention, applicable where a claimant investor is from a home state as well as the respondent host state are member states of this multilateral treaty, Convention Article 34(1) also allows conciliators to make settlement recommendations.

Transparency

Rule 16 provides the parties with the opportunity to keep their mediation process and settlement agreement as confidential as the parties choose it to be, with two exceptions: (a) when the disclosure is required by law or for the purposes of the enforcement of such agreement and (b) in compliance with the proposed amendments to the AF Rules, Rule 4, according to which only the benchmark information is published by ICSID: the fact of mediation, parties to the mediation and the identity of the appointed mediators. Another major setback commonly identified by opponents of ISM is the secrecy or (less pejoratively) the lack of transparency of this dispute settlement mechanism. Due to this characteristic it has commonly been believed that mediation was not suitable for ISDS because public awareness and transparency constitute a crucial component of a dispute settlement regime where one of the parties is a State. Stakeholders in ISDS have expressed growing concerns that mediation will be used to bypass transparency[8] and also have access to universal enforceability through the 2018 UN Convention on International Settlement Agreements.[9] A major argument against settlement in ISDS is that it will be used to keep cases confidential and remove them from public scrutiny. This leaves the impression that settlements are only used to keep cases confidential and that every other arbitration outcome other than amicable settlement ensures transparency.

In fact, Ana Ubilava conducted an empirical study of all known and concluded treaty-based investor-state claims, over 1990-2017, to determine the confidentiality levels of (ICSID and other) arbitration cases that had been settled during the arbitral process but before the final arbitral award had been rendered.[10] In 43% of cases the fact of the settlement, identity of the parties, and the settlement amounts that had been amicably agreed by the parties

6 ***Proposals for Amendment of the ICSID Rules — Consolidated Draft Rules*** (2018) 2 Annex E, ICSID Additional Facility Mediation Rules <https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf>.

7 ICSID Conciliation Rules (2006) <https://icsid.worldbank.org/en/Documents/icsiddocs/AFR_English-final.pdf>.

8 Emilie Marie Hafner-Burton, Sergio Puig and David G Victor, 'Against Secrecy: The Social Cost of International Dispute Settlement' (2017) 45 ***Yale Journal of International Law*** (Forthcoming) SSRN <**https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2720706**>.

9 Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (August 27, 2018, SSRN) <**https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239527**>.

10 Luke R Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' (2018) 21(4) ***International Arbitration Law Review***

was found to be publicly available. This figure is nonetheless significantly lower in comparison to investor-won cases where awarded amounts are known in 98% of cases. Based on these results, we can assume that settled cases are indeed more susceptible to confidentiality than any other ISA outcome.

It is possible that the settlement amounts of such cases are known because the dispute had originally been registered for arbitration and once the claimed amounts were publicly known, it was in the interests of the State to then publicize the settlement amounts in order to show to their public that they did not strike a bad deal. The picture could therefore be very different if the mediation is initiated before the arbitration is registered. Under the proposed new ICSID Rules, the benchmark information does not include the dispute amount. So, there may be a greater chance for such mediation settlement agreements and their settlement amounts to stay confidential. If this is of concern for States like Australia, however, they can add in their individual treaties a provision requiring fuller transparency.

Meanwhile, having general procedural rules ready and available through ICSID is better than having none. This is because there may well already be numerous cases of investors and States engaging in conflict resolution procedures with third-party neutrals behind closed doors. There is no database where any such conflict resolution process is or could be registered. Nobody knows what is said or agreed upon during such communications, which means total secrecy. Through the mediation settlement procedure offered by ICSID, the international community will, at the very least, have information on the existence of such a dispute that is being attempted to be settled amicably during a particular mediation process, even if the terms of the final mediation settlement agreement do not automatically become public.

Enforceability of Settlement Agreements

In addition, while the ICSID AF Mediation Rules provide the procedural rules for the initiation and the conduct of ISM procedure, they do not provide for the enforcement mechanism for the settlements that result from successful mediations. The ICSID commentary on its proposed Rules refers in this respect to the 2018 Singapore Mediation Convention. That assumes first that the Convention, which provides for enforceability of "commercial" settlement agreements subject to exclusions similar to (but more extensive than) those listed in the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. This is plausible, in light of this and other UN instruments or commentaries referring to "commercial" agreements, as discussed by Em Prof Catharine Kessedjian at the International Law Association conference in Sydney recently.

In addition, if the enforceability of mediation settlement agreements is believed to be essential, the efficiency of these Mediation Rules depends on the Singapore Convention on Mediation. That begins on the premise that amicable settlements take the form of a contract, a new agreement between the parties, and often parties are unable or unwilling to comply with its terms. Some ISDS stakeholders fear that the non-binding nature of amicable settlements could cause similar non-compliance issues and hence prolong the already complex investor-state dispute settlement process. In fact, it is perceived to be the main reason why amicable settlements in any form or shape, be it mediation or conciliation, are believed to be unsuitable for investor-state disputes, which also explains the limited use of ICSID Conciliation Rules. This was the reason why in 2014 UNCITRAL began working on the convention responsible for uniform enforceability of such mediation settlement agreements both in purely commercial and investment dispute settlement platforms. Now, ICSID is offering procedural rules for ISM while UNCITRAL is offering a convention for enforcement of settlements reached during such mediations.

Interestingly, however, Ubilava's empirical study of 541 concluded, investor-state treaty-based arbitration cases tells a different story. Once the arbitration process is initiated, parties to investor-state arbitration are not prohibited from attempting amicable settlement of their

SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3227401>.

dispute. When such settlements are successful parties usually have two options: to terminate the arbitration process based on party consent or to embody their settlement agreements in an arbitral award. By embodying their settlements into the arbitral awards, parties attribute the simple settlement contract with the enforceability powers granted by the ICSID or the New York Conventions. The empirical analysis found that approximately one-third of the total number of studied cases were amicably settled by the parties before the final award was reached. If the non-enforceable nature of amicable settlement agreements (including mediation) is a critical concern, then most of such settlement agreements would be expected to have been embodied into arbitral awards. This has not been the case, however. The study showed that 60% of all known amicably settled ISA cases were in fact not embodied. These findings challenge but do not undermine, the importance of the Singapore Convention. Even if the numbers show that non-enforceability does not seem to be an issue to many parties who settle, the existence of such a convention and its enforcement mechanism should only encourage the non-believers to engage more in amicable settlement negotiations with stronger feeling of security. Australia should therefore consider adopting the Singapore Convention, as part of its response to the new ICSID Rules.

Conclusion

The ICSID proposal for ISDS is therefore a useful step towards improving the ISDS system but should be accompanied by other initiatives and may not have a large impact in practice. Providing mandatory mediation as pre-condition to arbitration would be much more far-reaching, but it is questionable whether ICSID could or should do this through Rule rather than Convention revisions. This may be so even for AF Arbitration Rules, but all the more so for investor-state dispute settlement under the ICSID Convention (where the claimant is from a member state and the respondent is one too). For such a mandatory pre-step to be possible, allowing cost and time savings as well as more creative dispute settlement options, Australia should meanwhile consider consenting to multi-tier ISDS clauses in its IIAs. This could be achieved when replacing all Australia's existing BITs and FTAs, especially when superseded by broader regional FTAs, as well as by starting to implement such multi-tier dispute settlement clauses in future IIAs.

Some (Very) Random Thoughts on Decreasing Costs and Increasing Efficiency in International Arbitration[1]†

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Respondents to the 2018 International Arbitration Survey from Queen Mary University of London overwhelmingly confirmed that the worst characteristic of international arbitration was its cost. Thirty-four percent of respondents listed lack of speed as its worst feature.[2] The 2018 survey confirmed concerns regarding the speed and costs associated with international arbitration that have existed for some years.[3]

The cost and speed of international arbitration are inter-related issues. Give counsel additional time, and they will surely fill it with billable hours – ***i.e.***, increased costs. Arbitral institutions are beginning to recognize that they must do more to ensure that international arbitrations are conducted in an efficient and effective manner, without unreasonable delays. The International Chamber of Commerce (ICC), for example, now requires potential arbitrators to provide some assurance of their ability to conduct an arbitration in a timely manner.[4] Many arbitral institutions now provide optional 'expedited' procedural rules for arbitrations.[5]

There is a clear need to reduce costs and to increase efficiency in international arbitration. While there are certainly multiple ways in which these goals may be achieved, here are four somewhat random thoughts to consider and keep in mind to promote decreased costs and increased efficiency in international arbitration.

Joint and Several Liability

Multiple parties may be jointly and severally liable for a single breach of contract or wrong. When parties have joint and several liability, each party is separately liable for the entire obligation until it is performed or remedied in full by one or more of the parties.

This basic legal principle must be remembered and should guide efforts to develop a less costly and more efficient international arbitration process. There are at least four inter-related stakeholders in the international arbitration process: (1) the parties; (2) their counsel; (3) the arbitrators; and (4) the arbitral institutions. Each stakeholder bears responsibility not only for the high costs associated with international arbitration but also the perceived lack of speed in the process. At the same time, costs cannot be effectively reduced and efficiency and speed increased without the cooperation and

1 † This article is adapted from a presentation and comments by the author during a panel discussion entitled 'Evidence and Procedure in International Arbitration: Streamlining for Efficiency and Cost Effectiveness' at the 6th International Arbitration Conference, held in Melbourne on 17 October 2018.

2 Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018) 7-8 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF>.

3 See, e.g., Queen Mary University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) 6-7 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf>.

4 International Chamber of Commerce, ICC Rules of Arbitration, 'Arbitrator's Statement of Acceptance, Availability, Impartiality and Independence' (2012) <http://library.iccwbo.org/content/dr/PRACTICE_NOTES/SNFC_0001.htm?l1=Practice+Notes>.

5 See, e.g., ICC Rules of Arbitration, Article 30 & Appendix VI (1 March 2017) <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_30new>; ACICA Expedited Arbitration Rules (1 Jan. 2016) <https://acica.org.au/wp-content/uploads/Rules/2016/ACICA-Expedited-Arbitration-Rules-2016.pdf>.

participation of all stakeholders. Each stakeholder is, in effect, jointly and severally liable for the present high costs and lack of speed in international arbitration. Each stakeholder also is jointly and severally responsible for remedying the present problems. As Benjamin Franklin allegedly said nearly 250 years ago, 'We must, indeed, all hang together, or assuredly we shall all hang separately.'[6]

'I feel the need … the need for speed.'

In the 1986 film ***Top Gun***, Maverick (played by Tom Cruise) and his radar intercept officer Goose (played by Anthony Edwards) announce together, 'I feel the need … the need for speed.' This need surely exists in international arbitration. As mentioned above, it is a need that has been felt for a number of years and remains a critical concern of users of international arbitration. In response, many arbitral institutions now provide expedited procedures that may apply to disputes depending on their size or the agreement of the parties.[7]

Pressure to utilize expedited arbitration rules and to increase the speed of international arbitration will only continue to increase. The United Nations Commission on International Trade Law (UNCITRAL) recently received proposals from the United States, Switzerland, Italy, Norway and Spain that one of its Working Groups take up consideration of rules for expedited arbitration, which neither the UNCITRAL Model Law nor the UNCITRAL Model Arbitration Rules presently contain.[8] One of the key complaints raised by delegations at UNCITRAL's Working Group III, which is considering reforms to the Investor-State Dispute Settlement (ISDS) process, is the length of time the process takes and associated high costs.[9]

Thus, each stakeholder in the international arbitration process must be prepared for the 'need for speed' to play an increasingly important role in international arbitration. All stakeholders should be ready to conduct all stages of arbitral proceedings with greater dispatch in shorter time periods than now is typically the case.

'Round up the usual suspects.'

Near the end of the classic 1942 film, ***Casablanca***, French police Captain Renault tells his men, 'Major Strassor has been shot. Round up the usual suspects.' This instruction is followed by Rik Blaine (played by Humphry Bogart) saying to Renault, 'Louis, I think this is the beginning of a beautiful friendship.'

For far too long, parties, their counsel, and arbitral institutions have 'round[ed] up the usual suspects' in international arbitration. This means that parties have consistently selected the same (usually large) law firms as counsel. These counsels, in consultation with their clients, have selected the same (usually white male European or North American) arbitrators. Arbitral institutions similarly have too often appointed the 'usual suspects' as arbitrators or panel chairs.

However, selecting the same counsel and the same arbitrators often results in higher costs and lengthier proceedings as counsel juggle multiple matters and arbitrators accept appointments that they in fact (despite affirmations to the contrary) do not have adequate time to undertake. Most egregiously, these long-standing 'beautiful friendships' have effectively excluded otherwise qualified counsel and prevented the appointment of otherwise qualified arbitrators. For arbitrators in particular, the pool has been unfairly limited. Indeed, UNCITRAL's Working Group III has identified as areas of concern in ISDS 'the lack of diversity in the appointment of arbitrators involved in ISDS cases and … that some of the arbitrators were repeatedly appointed.'[10]

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6 Attributed to Benjamin Franklin in Jared Sparks (ed), *The Works of Benjamin Franklin* (Hilliard Grey, 1840) vol I, 408.

7 For an overview and comparison of expedited arbitration rules amongst Asia-Pacific arbitral institutions, see Ben Davidson and Jonathan Mackojc, 'Expedited Arbitration: Asia-Pacific Institutional Rules – Overview and Comparative Table Guide' (12 Sept. 2018) <https://www.corrs.com.au/thinking/insights/expedited-arbitration-asia-pacific-institutional-rules-overview-and-comparative-table-guide/>.

8 Proposal by the Governments of Italy, Norway and Spain: future work for Working Group II, A/CN.9/959 (30 Apr. 2018) 2 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/028/10/PDF/V1802810.pdf?OpenElement>.

9 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017) (Part I)', A/CN.9/930/Rev. 1 (19 Dec. 2017) 7-9 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/83/PDF/V1802983.pdf?OpenElement>.

10 'Report of Working Group III (Investor-State Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018)', A/

By breaking down the typical 'beautiful friendship' that exists, and refusing to 'round up the usual suspects', stakeholders can increase gender, ethnic, cultural, and geographic diversity in international arbitration – a need that remains critical. There is no requirement for the same counsel to be retained, particularly in light of the advancements in technology. These advances allow highly qualified, but often ignored, smaller firms to effectively, efficiently, and usually at lower costs, handle the largest and most complex of international arbitrations. Similarly, many well-qualified, frequently younger, arbitrators are available today who are from diverse, non-traditional backgrounds and who will bring fresh eyes and new views to international arbitration. Stakeholders in the international arbitration process must encourage the appointment and use of diverse counsel and arbitrators to better reflect reality in international arbitration.

The Pareto Principle

In all but the simplest and most-straightforward of international arbitrations, analysing and assessing liability and damages is expensive and time-consuming. The costs associated with international arbitration often increases almost exponentially the more complex the matter or the higher the amount of damages in issue.[11] The ICC has suggested that the starting assumption in commercial arbitrations should be that no expert witnesses will be required in order to control costs.[12] However, such a presumption is rarely, if ever, practical in all but the most simplistic of matters. Regardless, the costs associated with damages issues and damages experts alone often are viewed as a barrier to early analysis of this critical aspect of any dispute, and their in-depth analysis and evaluation can significantly increase costs.

Fortunately, in 1896 Italian political economist Vilfredo Pareto posited what now is known as the Pareto Principle, also referred to as the 80/20 Principle or 80/20 Rule.[13] 'The 80/20 Principle asserts that a minority of causes, inputs, or effort usually lead to a majority of the results, outputs, or rewards.'[14] The Pareto Principle equally applies to the evaluation and analysis of liability and damages issues in international arbitration. Typically, 80% of the benefit from the analysis of liability and damages issues can be obtained for 20% of the costs. Indeed, the International Institute for Conflict Prevention & Resolution has stated that early identification of damages issues is '[o]ne of the most important and cost-effective steps arbitrators can take'.[15]

International arbitration stakeholders must keep in mind the Pareto Principle throughout the arbitration process. Initial assessment of liability and damages, sometimes through the employment of early neutral evaluation processes, should result in more informed decisions by parties and their counsel regarding the merits of their case without the expenditure of significant sums. These early assessments may lead to faster resolution or identify specific areas for focus. Further, the 80/20 Rule means that parties and their counsel do not need to turn over every stone, request and examine every document, or make every possible argument in an arbitral proceeding. The costs associated with the last twenty percent of such efforts usually will greatly exceed the benefits gained. Arbitrators similarly should encourage parties and their counsel to focus their efforts more astutely and carefully. Proper determination of a dispute will rarely, if ever, require the submission of hundreds of exhibits and associated testimony. Multiple witnesses testifying on the same issue or issues usually do not establish any fact more firmly than a single good witness.

CN.9/935 (14 May 2018) 11 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/59/PDF/V1802959.pdf?OpenElement>.

11 For a study establishing this fact in ICSID cases, see Tim Hart, 'Study of Damages in International Center for the Settlement of Investment Disputes Cases', Credibility Consulting (2014) 14-15 <www.credibilityconsulting.com/ICSID_Damages_Study.pdf>.

12 International Chamber of Commerce, ICC Commission Report, 'Controlling Time and Costs in Arbitration' (2012) 13, ¶62 <www.iccwbo.org>.

13 *See generally* Vilfredo Pareto, *Manual of Political Economy: A Critical and Variorum Edition*, Aldo Montesano, Alberto Zanni, Luigino Bruni, John S. Chipman, and Michael McLure (eds) (Oxford University Press, 2014).

14 Richard Koch, *The 80/20 Principle: The Secret to Achieving More with Less* (Doubleday, 2nd ed 2008) 4.

15 CPR International Committee on Arbitration, 'CPR Protocol on Determination of Damages in Arbitration', International Institute for Conflict Prevention & Resolution (2010) 3 <www.cpradr.org>.

Applying the 80/20 Rule is undoubtedly difficult, especially for counsel who frequently believe they must present every exhibit and make every argument, no matter how marginally relevant or likely of success. Parties and their counsel in international arbitration should not shy away from analysing and assessing liability and damages issues with less than all of the documents or facts known. If it is followed, the Pareto Principle ensures that significant, and usually cost-saving benefits, can be obtained in international arbitration.

Conclusion

Users of the international arbitration process have long recognised that costs must be decreased and efficiency increased. All stakeholders in the process must recognize that they are jointly and severally responsible for the present deficiencies and the need to correct them. International arbitration must be conducted with greater speed and efficiency. To achieve this goal, the same counsel and arbitrators should not be consistently retained and appointed. Doing this will also have the benefit of increasing gender, ethnic, cultural, and geographic diversity in international arbitration. Finally, stakeholders must recognize that the Pareto Principle means that every document, argument and issue does not need to be reviewed or presented. Nearly all useful information and analysis can be obtained for 80% of the typical effort, thereby further reducing costs and increasing efficiency in international arbitration.

The Singapore Convention 2018: The Enforcement of Mediated Settlements: An Oxymoron?

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On 10 June 1958 the rather innocuous entitled document "E/CONF.26/8" was adopted by the United Nations General Assembly in New York. Sixty years on, the New York Convention as it is better known, arguably enjoys the greatest impact of any one single instrument adopted by the General Assembly. Currently, 153 of the 193 United Nations member States are signatories. Much of the cross border trade and commerce seen throughout today's world relies upon it for dispute resolution and enforcement processes.

Now a new document, "A/CN.9/942" will be before the General Assembly during its 73rd session commencing on 18 September 2018. Like the *New York Convention* before it, this document also has the potential to reshape alternate dispute resolution and enforcement throughout the world.

The text of this document, assuming it will be adopted, will become known as the "*Singapore Convention 2018*"[1] and will provide enforcement rights to settlement agreements reached during mediation. The proposed title derives its name from the nationality of the Working Group's Chairperson, Ms Natalie Yu Lin Morris Sharma of Singapore. The Working Group's Rapporteur of this final and critical session was Mr Khory McCormick of Australia.

As the Queen Mary University of London 2018 Survey results attest[2], enforceability of Awards is by far the most important and defining factor in participants to engage in binding arbitration agreements. *Mediation-arbitration* (med-arb) dispute resolution clauses are also becoming more common. If the matter does not resolve at mediation, such clauses require the parties to then arbitrate. If the matter does in fact settle at mediation (prior to the arbitration process commencing), there is currently no regime (absent the proposed *Singapore Convention*), to enforce those settlements. Accordingly, enforceability of mediated agreements appears to be the next logical step.

Since September 2015, UNCITRAL's Working Group II has been developing the wording of the Singapore Convention to allow for the enforcement of settlements arising under mediation or conciliation agreements. The Working Group's Sixty-eighth Session held in New York on 5-9 February 2018, finalised the draft convention wording to be referred to the General Assembly. The Working Group's final session was attended by 42 UNCITRAL State member representatives3 suggesting wide support, or at least wide interest in, the operation of the proposed Convention. The Working Group's Report noted that wide consultation between it and the participants took place.

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1 The text of the draft convention is entitled *United Nations Convention on International Settlement Agreements resulting from Mediation* see Note by the UNCITRAL Secretariat document A/CN.9/WG.II/WP.205/Add.1. The title of draft amended Model Law is "*UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (Amending the UNCITRAL Model Law on International Commercial Conciliation 2002*"

2 Detailed consideration of which was undertaken at the ICCA 2018 Sydney Conference on 17 April 2018.

3 Minutes of the UNCITRAL Fifty First Session for 23 June to 13 July 2018 with Working Group document A/CN.9/943 distributed 19 February 2018.

What will it Cover?

The *Singapore Convention* will cover international commercial agreements and "settlement agreements"[4] reached between parties to those agreements. To attract enforceability, the generic *settlement agreement* (which must be in writing) will require one of the following characteristics at the time of being concluded in writing between the respective parties:

1 at least two of the parties have their places of business in different States; or

2 the States in which the parties to the settlement agreement have their places of business, must be different from either:

(a) the State in which a substantial part of the obligation under the settlement agreement is performed; or

(b) the State with which the subject matter of the settlement agreement is most closely connected.

The UNCITRAL Working Group recommended (and noted in its report) that "*commercial agreements*" under the draft *Singapore Convention* are to cover a "*wide field*". Specifically the Working Group noted that they would include (but not be limited to) the following types of agreements: transactions for the supply of goods and services, distribution agreements, commercial representations or agency, factoring, leasing, construction of works, consulting, engineering, licensing, financing, banking, insurance, exploration agreements or licences, joint ventures or other forms of business cooperation and carriage of goods or persons by sea, rail, air or road.

It should be noted that an "opt in and opt out" provision (Article 8(1)(b)) has been inserted into the draft convention to enable parties to mediation agreements to have the ability to exclude its operation.

Settlement agreements that have been recorded and are enforceable as part of arbitral proceedings, will not be covered by the draft *Singapore Convention*[5].

4 Article 1(1) of the draft issued 2 March 2018
5 Article 16(3).

Like the *New York Convention*, Article 5 of the draft *Singapore Convention* (and article 18 of the draft amended Model Law) sets out those grounds for an executing Court[6] to refuse the granting of relief (ie enforcement). Those grounds are grouped into two subparagraphs, Articles 5(1) and 5(2).

Article 5(1): Incapacity and Lack of Fairness

Article 5(1) is specific to the mediation process itself and allows a challenge to the enforcement of the settlement agreement in the following circumstances:

(a) where a party to the settlement agreement was under an incapacity at the time of executing the settlement agreement;

(b) the settlement agreement is incapable of being performed under the law that the parties have agreed it to be subject;

(c) the obligations of the settlement agreement (i) have been performed; or (ii) are not clear or are incomprehensible;

(d) the granting of relief would be contrary to the terms of the settlement agreement;

(e) there was serious breach of the mediation standards applicable to the mediation itself by the mediator; or

(f) there was a failure by the mediator to disclose to the parties, circumstances that would impact on the mediator's impartiality in the mediation process and that failure had a material impact or undue influence on one of the parties to the agreement, such that they would not have entered into the settlement agreement.

What may constitute an "incapacity" by one party, a "serious breach" of the mediation standards by the mediator, or "undue influence" resulting in one party executing the agreement, will be fertile ground for argument at enforcement stage as those terms are not defined in the draft convention. Critically, all that a Court or other competent authority will have before it at the enforcement stage will be the signed document of the parties and some evidence that mediation had taken place.

Unlike enforcement based upon an arbitral award, there will be none of the reasoning that is attached. It is to be wondered how a Court will be able to make a determination when the calling evidence from one or both sides as well as possibly the mediator, effectively defeats the confidential nature of the mediation itself.

Article 5(2); The Public Policy Exceptions

Article 5(2) of the draft Singapore Convention includes a "public policy" exception reflective of the *New York Convention*. It was specifically noted in the Report of the Working Group[7] that through the operation of Article 5(2)(a) the public policy exception *could* include in certain cases (1) *national security* or (2) *national interest* and that it would be up to each Contracting State to determine this issue.

What may be deemed of "*national interest*" is certainly capable of having different meanings to different States. Certainly the global geopolitical landscape in 2015, when the UNCITRAL Working Group first undertook working on the framework that has lead to the *Singapore Convention*, was very different to that which exists at present.

We now live in an age of open trade wars and the United Kingdom preparing for its exit from the European Union. One can imagine that *national interest* could be widely interpreted at the enforcement stage to avoid (domestically) politically sensitive enforcement proceedings.

6 Referred to as a "competent authority"
7 Section 4 at Paragraph 67

At any point in time the international geopolitical landscape may change and this will introduce potentially, an interesting note of self interest that will add to the risk of enforcement of mediated settlement agreements in a way not otherwise featured by the enforcement of arbitral awards.

What does the Future Hold?

While nothing can be certain, it is likely that the General Assembly will ratify the *Singapore Convention* at the upcoming 73rd Session in September 2018. Hopefully it will attract a wide number of Member State signatories at a faster rate than did the *New York Convention*. It should be remembered that by 1970 when the *New York Convention* was coming into its "teenage years" it had only been ratified by 33 Member States. By the time it reached was 21 years old in 1979, the *New York Convention* had still only attracted 49 Member States.

It was only during the *New York Convention's* "middle age" in the 1980's and 1990's that it gained significant numbers of signatories and ratification, growing to the 159 Member States who had adopted it by its 60th birthday.

Once a Member State becomes a signatory, there must be of course appropriate domestic laws to give effect to its provision. In Australia, the question may then be raised as to whether we wish to give it effect through "bolt on" amendments to the current domestic legislation giving effect to the *New York Convention* and *Model Law*[8], or alternatively through a separate domestic legislative framework.

While the *Singapore Convention* may enjoy significant support from the 159 Member States to the *New York Convention* such that it attracts a large numbers of Member State signatories, the speed at which domestic legislation is implemented may be slow.

It might well be that rather than give effect to the *Singapore Convention* immediately, it may be prudent to adopt a wait and see approach. This is particularly so when the settlement agreement relied upon will be devoid of the comfort of reasoning by an accepted and recognised qualified arbitrator as one would find with an award. Further, as the mediation process itself normally suggests compromise and agreement between the parties to reach a solution, one party's decision to not to be bound to that agreement, such that enforcement proceedings are then necessary, could suggest that the resolution between the parties was devoid of good faith at the time at which it was entered into.

A mediated settlement by its very nature is the embodiment of a mutually acceptable agreement. If enforcement is required of a mediated agreement then the inevitable conclusion is that mediated settlement was not mutual. With that in mind, would not every enforcement action potentially fall within one of the exception contained in Article 5(1)?

8 The *International Arbitration Act* (1974) Cth

Replacing Investor-State Dispute Settlement with Protections for Foreign Investors in Individually Negotiated Investment Contracts?[1]

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Introduction

Treaty-based investor-State dispute settlement (*'ISDS'*) has become a common feature in bilateral investment treaties (*'BITs'*) and in bi- or multilateral free trade agreements (*'FTAs'*). However, ISDS as a dispute resolution process is not undisputed. Australia's former Gillard Government, a Labor Party-led government that lost its power in 2013, explicitly eschewed ISDS for future treaties (like the Regional Comprehensive Economic Partnership, RCEP). It appears that Australia's now oppositional Labor Party and the Greens continue to maintain that position. Yet, the Joint Standing Committee on Treaties of the Parliament of Australia has recently expressed its support for the ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TTP 11).[2] By contrast, the new Labor-led coalition government of New Zealand announced in October 2017 that it would exclude ISDS provisions from future BITs and FTAs.[3] From an investor's perspective, such a policy may imply that protection must be sought in individually negotiated contracts containing arbitration clauses (as generally put forward, for instance, by Prof Muthurcumaraswamy Sornarajah). This brief contribution therefore first points out some key differences between ISDS and international commercial arbitration (*'ICA'*). In a second step, it discusses possible implications resulting from eschewing and replacing ISDS with protections for foreign investors through investment contracts with arbitration clauses negotiated individually with host state entities.

Similarities and Key Differences between ISDS and ICA

ISDS and ICA may share some common features. However, a closer look reveals that they are conceptually profoundly different. Indeed, as Chief Justice James Allsop pointed out right at the beginning of his opening keynote address at the 2018 ICCA Congress in Sydney, 'many of the concerns in relation to international commercial arbitration are expressed in language similar to concerns about ISDS arbitration, but that superficial similarity should not be allowed to disguise the important differences between the two types of dispute resolution, and the quite different issues involved.'[4]

The main similarity between ISDS and ICA appears to be the fact that they both use arbitration as a means of dispute resolution and channel legal disputes away from

1 This contribution is based on a research essay submitted to the University of Sydney Law School for the Master of Laws program and reflects the author's views only. The author would like to thank Prof Chester Brown, Professor of International Law and International Arbitration, University of Sydney Law School, and Prof Luke Nottage, Professor of Transnational and Comparative Business Law, University of Sydney Law School, for their valuable feedback and input.

2 See Joint Standing Committee on Treaties, Parliament of Australia, *Report 181* (August 2018) v. A separate inquiry of the Senate into TPP 11 was still pending at the time of the finalisation of this contribution.

3 See in general Amokura Kawharu and Luke Nottage, 'Renouncing Investor-State Dispute Settlement in Australia, then New Zealand: Déjà vu' [2018] *Sydney Law School Research Paper No 18/03* <https://ssrn.com/abstract=3116526>.

4 James Allsop, 'Commercial and Investor-State Arbitration: The Importance of Recognising their Differences' [2018] *Federal Judicial Scholarship* 3, [1].

domestic courts to arbitral tribunals which are called on to exclusively decide these disputes in a final, binding and widely enforceable manner.[5] In addition, both ISDS and ICA may use the same arbitration rules (such as the UNCITRAL Rules) and share the same judicial review mechanism at the seat of arbitration and enforcement regime under the *New York Convention*,[6] regardless of the fact that the respective interests involved in ISDS and ICA are quite distinct (ie, while ICA is mainly about commercial contracts with parties acting in their private capacities, ISDS may involve challenges of a host state's public policy in general).[7] However, to the extent that ISDS arbitration is conducted under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*,[8] ISDS differs from ICA, as the *ICSID Convention* provides for a self-contained mechanism for challenges of awards rendered under the *ICSID Convention*.[9] This leaves no room for domestic court intervention[10] and notably excludes the application of the *NYC*.[11] Indeed, under the system of the *ICSID Convention* a state may only resist enforcement of an award on grounds of sovereign immunity.[12] In addition, there appears to be a greater call for transparency in ISDS than in ICA. The ICSID Arbitration Rules, for instance, provide for greater transparency, as they allow arbitral awards to be made public and 'non-disputing parties' to file written submissions.[13] Further, although the UNCITRAL Rules are in principle designed to be used in 'any type of commercial dispute',[14] the United Nations Commission on International Trade Law published in 2014 the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration *('UNCITRAL Transparency Rules')*,[15] which are applicable to investment treaties concluded after 1 April 2014.[16] The UNCITRAL Transparency Rules, inter alia, provide for (i) the publication of information on the commencement of arbitral proceedings and of certain documents (Articles 2 and 3), (ii) submissions of third parties (Article 4) and (iii) public hearings (Article 6). The UNCITRAL Transparency Rules have been cast into the *United Nations Convention on Transparency in Treaty-based Investor State Arbitration,*[17] which renders the UNCITRAL Transparency Rules applicable to investment treaties concluded before 1 April 2014.[18]

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5 See Jose Daniel Amado, Jackson Shaw Kern and Martin Doe Rodriguez, *Arbitrating the Conduct of International Investors* (Cambridge University Press, 2018) 14.

6 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (*'NYC'*).

7 See further Allsop, above n 3, [21]–[22], [42].

8 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* opened for signature 14 October 1966, 575 UNTS 159 (entered into force 14 October 1966) (*'ICSID Convention'*). The *ICSID Convention* is designed to resolve legal disputes that arise directly out of an investment, see *ICSID Convention* art 25(1). Arbitration under the *ICSID Convention* is not limited to ISDS in terms of 'treaty claims' and may also be available in relation to disputes from investment contracts, provided that the jurisdictional limits of the arbitral tribunal imposed by the *ICSID Convention* are respected, see Anthony Sinclair, 'Bridging the Contract/Treaty Divide' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for 21st Century* (Oxford University Press, 2009) 92, 94–5.

9 Luke Nottage and Kate Miles, "Back to the Future" for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests' (2009) 26 *Journal of International Arbitration* 25, 40. The advantages of the *ICSID Convention* in terms of a self-contained regime for challenging arbitral awards are not available for arbitration proceedings conducted under the ICSID Additional Facility Rules (ie, for investor-State disputes that fall outside the jurisdictional scope of the *ICSID Convention*), see Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration* (Cambridge University Press, 2011) 488 [10.37].

10 See Judith Levine, 'Navigating the parallel universe of investor-State arbitrations under the UNCITRAL Rules' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 369, 401.

11 Pecuniary obligations imposed through arbitral awards rendered under the *ICSID Convention* have to be recognised and enforced like final judgments of domestic courts, see *ICSID Convention* art 54(1); further Nottage and Miles, above n 8, 40.

12 Nottage and Miles, above n 8, 39.

13 Greenberg, Kee and Weeramantry, above n 8, 489–90 [10.42].

14 Levine, above n 9, 371–2.

15 UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration* (January 2014) <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

16 See further Allsop, above n 3, [17].

17 *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration,* opened for signature 17 March 2015 (entered into force 18 October 2017) (*'Mauritius Convention'*).

18 Ibid art 1(1).

Yet, the main difference between ISDS and ICA appears to be found in the nature of the claims and the source of the arbitral tribunal's jurisdiction.

In ICA, on the one hand, the claims arise from a contract between the parties to the arbitration proceedings or are closely related to that contract.[19] In principle, such claims can be raised by all parties to a contract (ie, by the foreign investor as well as by the host state or a host state entity in case of an investment contract).[20] The arbitral tribunal derives its jurisdiction from the agreement between the parties, who are in principle entirely free to decide which claims they want to have submitted to the arbitral tribunal[21] and choose the arbitration rules under which they want to conduct the arbitration.[22] Thus, the subject matter of the arbitration is not necessarily limited to investments. In deciding the respective contractual (or related extra-contractual) claims, however, the arbitral tribunal is supposed to apply the relevant substantive law to the dispute, which is in principle contract law.[23] The claims of a foreign investor under an investment contract containing an arbitration clause or arbitration agreement are therefore 'purely' contractual,[24] and it is up to a foreign investor to prove a breach of contract (or of an obligation sufficiently related to the contract) on part of the host state or a host state entity.[25] By contrast, in ICA the arbitral tribunal usually has no mandate to decide claims arising from international public law.[26] As a consequence, foreign investors may try to reproduce and import substantive standards offered in BITs and FTAs into investment contracts (eg, by introducing so-called 'stabilisation clauses' that oblige a host state not to make certain changes to its existing legislative framework).[27] Yet, given the inherent power of states to legislate (unless confined by international law), it is questionable whether such clauses may be able to effectively bind a host state legally and to prevent it from enacting legislation that may impact on existing contractual arrangements.[28] By the same token, the efforts of foreign investors to 'de-nationalise' or 'internationalise' investment contracts and to remove them from the ambit of a host state's domestic laws (eg, by subjecting an investment contract to general principles of law)[29] may be frustrated by such domestic laws that are mandatory and deemed to be applied to investment contracts irrespective of the substantive law chosen by the parties.[30]

In the ISDS universe, on the other hand, the arbitral tribunal has to determine disputes arising from obligations owed by a host state to foreign investors under BITs or FTAs and, thus, under public international law.[31] Generally speaking, states agree in such investment treaties to guarantee within their territories certain substantive standards of protection in relation to investments of nationals of other contracting states parties.[32] These substantive standards typically include

19 See Amado, Kern and Rodriguez, above n 4, 14.
20 Ibid 13–4.
21 See Greenberg, Kee and Weeramantry, above n 8, 193 [4.162].
22 Ibid 80 [2.92], 305–6 [7.4]–[7.7].
23 See Nottage and Miles, above n 8, 28.
24 Sinclair, above n 7, 92–3.
25 Chester Brown, 'Investor-State Arbitration: Getting More Bite Out of Your BIT' [2014] *AMPLA Yearbook 2014* 204, 212.
26 Piero Bernardini, 'Investment Protection under Bilateral Investment Treaties and Investment Contracts' (2001) 2 *Journal of World Investment* 235, 246–7.
27 See André von Walter, 'Investor-State Contracts in the Context of International Investment Law' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law – A Handbook* (Nomos Verlagsgesellschaft, 2015) 80, 89 [19].
28 See Alex Mills, 'The public-private dualities of international investment law and arbitration' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 97, 105; Giuditta Cordero-Moss, 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press, 2009) 782, 784–5.
29 See Bernardini, above n 25, 236.
30 See Greenberg, Kee and Weeramantry, above n 8, 119–26 [3.97]–[3.119].
31 See ibid 478 [10.4].
32 See Brown, 'BIT', above n 24, 207.

fair and equitable treatment of, and the provision of full protection and security for, investments, protection from unlawful expropriation, national treatment of foreign investors (*'NT Clauses'*) and most favoured nation treatment for foreign investors (*'MFN Clauses'*).[33] Foreign investors are thereby provided with a uniform standard of protection at treaty level which bears certain similarities to human rights provisions in terms of freedoms from state interventions and rights to positive measures and equal treatment. Further, BITs and FTAs may also contain so-called 'umbrella clauses', which may oblige a host state to respect the obligations it owes to foreign investors under an investment contract or under its domestic laws.[34] Such umbrella clauses may 'elevate' otherwise purely contractual claims to the level of public international law.[35] As a result, a host state cannot evade its respective obligations by changing its domestic laws.[36]

If a host state violates the substantive standards it has undertaken to guarantee in a BIT or FTA, it may be liable to the other contracting state party or states parties in terms of state responsibility.[37] In practice, states often grant nationals of other contracting states parties a right to directly institute international arbitration proceedings if they (ie, the host states) did not comply with the substantive standards guaranteed in the respective BIT or FTA (or, sometimes, even with customary international law).[38] The consent of a host state to a dispute settlement clause in an investment treaty amounts to a standing offer to arbitration directed to all nationals of another contracting state party who qualify as foreign investors[39] and who are deemed to provide their consent to arbitration by initiating arbitration proceedings.[40] Thus, the arbitration agreement is not negotiated individually between a foreign investor and the host state, but a foreign investor may choose from certain options offered by the host state in the respective investment treaty.[41] Hence, the scope of arbitration is defined by the respective treaty and is often limited to 'investment disputes' and to the host state's treaty obligations and, therefore, to so-called 'treaty claims'.[42] Foreign investors may thereby enforce a host state's obligations under public international law, which was traditionally seen as a matter of diplomatic protection.[43] Hence, in ISDS the arbitral tribunal is supposed to apply public international law in the first place instead of contract law.[44] As a corollary, the arbitral tribunal does not have jurisdiction to hear a host state's potential counter claims arising from an investment contract with the foreign investor.[45] ISDS has therefore been described as a 'one-way street'.[46]

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33 See ibid 207–9.

34 See ibid 209–10.

35 See August Reinisch, 'The Scope of Investor-State Dispute Settlement in International Investment Agreements' (2013) 21 *Asia Pacific Law Review* 3, 9.

36 See Cordero-Moss, above n 27, 784.

37 See Stephan Wittich, 'State Responsibility' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law – A Handbook* (Nomos Verlagsgesellschaft, 2015) 23, 38 [31]–[32].

38 Micah Burch, Luke Nottage and Brett Williams, 'Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century' (2012) 35 *University of New South Wales Law Journal* 1013, 1021.

39 See Levine, above n 9, 372; further Bernardini, above n 25, 246

40 Greenberg, Kee and Weeramantry, above n 8, 145–6 [4.7].

41 Cf Luke Nottage and Sakda Thanitcul, 'International Investment Arbitration in Thailand: Limiting Contract-Based Claims While Maintaining Treaty-Based ISDS' (2017) 18 *Journal of World Investment & Trade* 793, 833.

42 Amado, Kern and Rodriguez, above n 4, 13–4.

43 See Chester Brown, 'The Evolution of the Regime of International Investment Agreements: History, Economics and Politics' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law – A Handbook* (Nomos Verlagsgesellschaft, 2015) 153, 160 [12]. If a host state frustrated a foreign investor's right to arbitration under a BIT or FTA (eg, by unlawfully refusing enforcement of an arbitral award within its territory), the investor might seek diplomatic protection from his or her home state as a last resort, see Bernardini, above n 25, 246. Cf also Andrew Stephenson, Lee Carroll and Jonathon Deboos, 'Interference by a local court and a failure to enforce: Actionable under a bilateral investment treaty?' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 429.

44 Nottage and Miles, above n 8, 28.

45 See Reinisch, above n 34, 9.

46 Amado, Kern and Rodriguez, above n 4, 15.

Impediments to Replacing the ISDS Universe with Investment Contracts

Against the background of the similarities and differences between ISDS and ICA discussed above, the main impediments to replacing ISDS with protections for foreign investors through investment contracts with arbitration clauses negotiated individually with host state entities appear to be the following:

First of all, foreign investments would become more vulnerable to host state interference. Without being able to directly invoke substantive standards of protection guaranteed in BITs or FTAs through ISDS, foreign investors would have to rely on the host states' domestic laws for protection in the first place. Thus, even if substantive guarantees were included in investment contracts with a host state entity, the legislator of the host state might still be able to override such contractual guarantees through adverse mandatory laws and regulations. This might even be the case if the substantive law applicable to the investment contract (ie, the *lex causae*) was not the law of the host state.[47] Indeed, an arbitral tribunal would have to take mandatory laws of the host state into account when determining the obligations under an investment contract. By contrast, the arbitral tribunal appears to be unlikely to apply any standards of protection contained in BITs or FTAs, even if the host state to which the contracting entity belongs was bound by these treaty instruments.

Secondly, it appears questionable whether substantive standards of protection guaranteed in BITs and FTAs could be meaningfully reproduced or duplicated within a contractual framework between foreign investors and

47 See Greenberg, Kee and Weeramantry, above n 8, 119 [3.97].

host state entities. For instance, MFN Clauses or NT Clauses refer to objective or uniform legal standards of protection accorded to foreign investors of other states and to a host state's own investors. Indeed, as indicated above, the guarantees provided for in BITs and FTAs share structural similarities with fundamental rights and freedoms. By contrast, substantive guarantees stipulated in individual investment contracts between foreign investors and host state entities appear to fall short of comparable uniformity. Further, to the extent that only a host state entity was party to an investment contract, it is difficult to perceive how such an entity could possibly guarantee standards such as fair and equitable treatment or full protection and security and, thus, standards related to the behaviour of the host state itself, which is usually beyond the control a host state entity.

Thirdly, the inclusion of substantive standards of protection and individually negotiated arbitration clauses in investment contracts would become a matter of bargaining power and would be likely to increase transaction costs.[48] Further, it is to be expected that only foreign investors who are in a strong position would be able to secure appropriate standards of protection and arbitration clauses. Other foreign investors might therefore come under pressure to seek alternative protection, eg through (expensive) political risk insurance.[49] The replacement of ISDS with standards of protection through investment contracts could even induce foreign investors to fall back on diplomatic protection. On the other hand, even if foreign investors were able to secure substantive guarantees through individual negotiations, different investments might end up enjoying different standards of protection. This could not only lead to unjustified discriminatory treatment of foreign investors (at least from the same home state) but would also prevent or at least hinder the creation of a coherent body of interpretation of these standards of protection by arbitral tribunals.[50]

Fourthly, a foreign investor's choice to arbitration under the *ICSID Convention* (and, hence, to the self-contained mechanism for challenges of arbitral awards) may not be available if the investment contract and the arbitration agreement are concluded with a host state entity and not with the host state itself. The avenue of the *ICSID Convention* in such cases is only available if the host state as contracting party to the *ICSID Convention* has designated the respective host state entity pursuant to Article 25(1) of the *ICSID Convention*.

Fifthly and finally, the replacement of ISDS with investment contracts between foreign investors and host state entities providing for substantive guarantees and arbitration clauses might also adversely affect a host state's own investors. Indeed, as a matter of reciprocity other states would also withdraw from the ISDS universe and thereby deprive the investors of the host state of protection for their investments abroad.[51]

As a result, from an investor's perspective there are several major impediments to replacing ISDS with protections for foreign investors through investment contracts with arbitration clauses negotiated individually with host state entities. Indeed, such a replacement would be likely to render foreign investors more vulnerable, increase investment costs and could have a disruptive effect on the overall system of foreign investment, which in turn might lead to an overall decrease in foreign investments.

Conclusion

ISDS remains a controversial topic in the Asia Pacific Region, especially in Australia and New Zealand. The question as to the adequate level of investor protection is open to debate. In any event, a comparison between ISDS and ICA indicates that eschewing ISDS for future investment treaties is likely to lower the level of investor protection.

48 See Burch, Nottage and Williams, above n 37, 1038.

49 See Bernardini, above n 25, 240.

50 Cf Leon E Trakman and Kunal Sharma, 'Jumping Back and Forth Between Domestic Courts and ISDS' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law* (Oxford University Press, 2016) 316, 332–3.

51 Ibid 326–7.

Efficiency in International Arbitration

Analysing the Results of the 2018 International Arbitration Survey[1]

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The 2018 International Arbitration Survey ('2018 Survey'),[2] entitled "The Evolution of International Arbitration", was published in May 2018 by the School of Arbitration of the Queen Mary University of London, in partnership with White & Case LLP. It followed the ICCA 2018 Conference in Sydney, Australia, which was themed similarly "Evolution and Adaptation". These two topics highlight how impossible it is to participate in international arbitration and fail to notice that the landscape is constantly changing. Furthermore, it is also clear that there are ongoing concerns about the efficiency of arbitration, in terms of time and cost. This was a major recurring theme in the 2018 Survey, and among the areas which touched on that theme, the two most prominent were the role of institutions and the use of technology in arbitration, both of which, unsurprisingly, are also integral aspects of the direction in which arbitration is evolving. This article takes a dual approach in analysing and responding to these two areas and how they have the potential to improve efficiency of and mould international arbitration in the years to come.

Arbitrators and Arbitral Institutions

Despite one highlighted response (by a full-time practicing arbitrator) calling for a return to ***ad hoc*** arbitration, a significant amount of feedback was premised in an appreciation of and reliance on the work of institutions in facilitating arbitrations, providing education and training, and maintaining a level of order and coherency internationally.[3] Institutions are well-placed to gather data, make recommendations, as well as directly train arbitrators on ways to improve their approach to arbitration procedure. In fact, a majority of respondents (80%) stated that they would like to be given the possibility to evaluate arbitrators at the conclusion of the arbitration, which, if in the form of reporting to the arbitral institution, would assist that organisation to better tailor arbitrator training and education accordingly.[4]

During the interview stage of the 2018 Survey, respondents were invited to make suggestions about improvements to efficiency, many of which were related to arbitrator conduct. These pointed to a trend of dissatisfaction with the way that arbitrators are handling arbitration procedure, and their powers during the arbitral process. The critiques included suggestions that arbitrators tend to apply a 'one size fits all approach', allow too many rounds of submissions, and are not proactive enough in using the powers and sanctions available to them under most standard arbitration rules to respond to anti-competitive tactics by parties.[5] Despite a group of counsel and arbitrator respondents defending the conservative conduct by arbitrators as conscientious efforts to ensure enforceability of awards (especially in countries without strong judicial support for arbitration),[6] these critiques and suggestions suggest that the right compromise as to case management and deterrence of dilatory tactics has not yet been reached.

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1 The author thanks CEO Gianna Totaro of CIArb Australia for her assistance with this article.

2 2018 International Arbitration Survey: The Evolution of International Arbitration' (Report, Queen Mary University of London and White & Case LLP, 2018)

3 2018 Survey, 2, 9, 18, 23, 26-27, 33-34.

4 2018 Survey, 23.

5 2018 Survey, 27.

6 2018 Survey, 27.

Technology

The second significant trend related to efficiency in the 2018 Survey was the growing ubiquity of various technological options in the stages of arbitration, which is a popular topic at present.[7] The 2018 Survey named five different technologies, namely videoconferencing, hearing-room technologies, cloud storage, artificial intelligence and virtual hearings.[8] It was not explained why these were chosen for the survey, or grouped in this way, but it is presumed that they were considered to be the most common or promising by the 2018 Survey creators. Respondents had varying levels of familiarity and experience with them, but overall had experienced considerably more exposure to the first three and strongly supported their continued use. By contrast, out of the respondent group, 53% stated that they have never used artificial intelligence aids during the arbitration process, and 64% stated they have never used virtual hearing rooms.

This demonstrates a split which also appears to be reflected in the wider commentary. For example, the 2017 ICC Report on ***Information Technology in International Arbitration*** reports widely on technology that fits under the first three categories, but does not touch on the use of artificial intelligence or 'virtual hearings'.[9] Nevertheless, it is clear that some in the community are aware of the utility of artificial intelligence aids, especially in the organisation of large volumes of

7 In addition to being featured at ICCA 2018, technology is also highlighted in Jonathan Mackojc, '10 Hot Topics for International Arbitration in 2018' Kluwer Arbitration Blog (Report, Young ICCA, 2018), and other current blog articles and legal commentary.

8 2018 Survey, 31.

9 'Information Technology in International Arbitration' (Report, International Chamber of Commerce Commission on Arbitration and ADR, 2017)

data, and text analysis ('text-mining').[10] 78% and 66% of respondents respectively stated that artificial intelligence and virtual hearing rooms should be used more often in arbitration, overall the 2018 Survey revealed an optimistic result about the potential for technology to improve efficiency.[11] These tools could radically change the arbitration landscape in the years to come by optimising legal work, better predict outcomes, and advise more nuanced strategies by having more synthesised information at users fingertips.[12]

However, resistance to new technologies also exists. A significant number of respondents, primarily counsel and arbitrators, expressed doubts about the effectiveness of videoconferencing for examining witnesses during hearings.[13] This was despite 89% of respondent stating that videoconferencing should be used more often, and many respondents highlighting the savings of time and money that flow from using technology.[14] The other major concerns flagged in the 2018 Survey were a lack of familiarity with artificial intelligence and virtual hearings due to the entry cost of introducing these newer technological aids. With regard to artificial intelligence, the 2018 Survey also suggested that there is a prevailing "fear of allowing technology to interfere excessively with the adjudication function", however, this view was not supported in the 2018 Survey with statistics or explanation about how such interference might occur.

Once again, arbitral institutions occupy a key role, this time in managing the transition towards increased integration of technology in arbitration. Many institutions already give guidance about using electronic documents or incorporating online dispute resolution.[15] Institutions can also liaise directly with legaltechs to ensure preservation of confidentiality,[16] and provide advice and training to arbitrators to ensure that the role of technology is not overly influential or preventing arbitrators from tailoring proceedings according to the needs of the parties. They are central for determining the future of international arbitration and should be taking the lead in testing out new technologies and training arbitrators to make the best use of powers and case management techniques. Practitioners should also be proactive in selecting institutions that demonstrate a willingness to do so, and research the quality and nuance of education programs and innovations that institutions are developing.

10 Gauthier Vennieuwenhuyse, 'Arbitration and New Technologies: Mutual Benefits' Volume 35 Journal of International Arbitration Issue 1 (2018), 119.

11 2018 Survey, 33.

12 Gauthier Vennieuwenhuyse, 'Arbitration and New Technologies: Mutual Benefits', 120.

13 2018 Survey, 32.

14 Ibid.

15 See for example, the Chartered Institute of Arbitrators, the Australian Centre for International Commercial Arbitration, the ICC, the CIETAC, and the HKIAC.

16 See for example, the legaltech Dispute Resolution Data and its case database created with the cooperation of twenty institutions, discussed in Gauthier Vennieuwenhuyse, 'Arbitration and New Technologies: Mutual Benefits' Volume 35 Journal of International Arbitration Issue 1 (2018), 120.

News in brief

International Maritime Law Arbitration Moot 2019

The prestigious International Maritime Law Arbitration Moot Competition (IMLAM) is a competition for all law students worldwide.

Professor Kate Lewins (Moot Director) extends a warm invitation to all maritime arbitrators, maritime lawyers and other maritime professionals to join us. You will help provide a 'real world' experience and valuable training to the maritime lawyers of tomorrow.

To register as a volunteer, please click here.

International Council for Commercial Arbitration (ICCA) Congress 2020 - Scotland

The Scottish Arbitration Centre will host the 25th Congress of the International Council for Commercial Arbitration in Edinburgh 10-13 May 2020.

Following the success of ICCA 2018 in Sydney, #LookToScotland and plan to join colleagues old and new in historic Edinburgh for ICCA 2020

Information about the Congress, accommodation options and the destination may be found on the ICCA 2020 Edinburgh website.

Western Australia Arbitration Initiative

Francis Burt Chambers together with ICC Australia, FTI Consulting and the ADR Centre, are seeking to promote the use of arbitration to resolve Western Australian related disputes.

They are conducting a confidential survey directed to arbitrators, lawyers and in-house counsel involved in arbitration that has a connection with Western Australia.

If you were involved in a commercial arbitration during the 2017 – 2018 financial year, as an arbitrator, a solicitor, as counsel or, as in-house counsel, we encourage you to take the opportunity to participate in the survey. Further details can be found here.

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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