

THE

# ACICA REVIEW

JUNE 2019



**ACICA**

Australian Centre for  
International Commercial  
Arbitration

**GLOBAL  
LEADERSHIP  
REGIONAL  
EXCELLENCE**



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Australian Centre for  
International Commercial  
Arbitration

# Leader in International Dispute Resolution

THE

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REVIEW**

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## THE ACICA REVIEW

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# President's Welcome



Welcome to the June edition of the ACICA Review, and to our new members since the last edition. It has been a busy time since our last edition, published in December 2018.

## Changes in the Executive

First and foremost, I would like to take this opportunity, as the new incoming ACICA President, to extend a very warm thanks to our outgoing President, Alex Baykitch AM, for his outstanding contributions to ACICA during his five year term at the helm. I would also like to thank other retiring members of the executive, Khory McCormick and Tony Samuel, as well as retiring board member David Fairlie, for their exemplary service to the organisation. We welcome Jonathan Redwood as a new Vice President, to serve in that role alongside co-Vice Presidents Andrea Martignoni and Georgia Quick, and also welcome Judith Levine as a new executive member and Martin Cairns as the new treasurer. The executive is rounded out by Ian Govey and Jonathon De Boos, who are continuing in their prior roles.

## Australian Arbitration Week

The 7th Annual International Arbitration Conference, co-hosted by ACICA and the Chartered Institute of Arbitrators, Australia, will be held in Brisbane on 18 November 2019, and will be accompanied by a number of additional events rounding out the week. We have a great line-up of events and I hope to see you there

**Brenda Horrigan**  
**President**

# Secretary-General's Report



**Deborah Tomkinson**

Secretary General

## Welcome to the new ACICA Executive Team!

Following the ACICA AGM held on 15 April 2019, we warmly welcome new office bearers to the ACICA Executive, including ACICA's first female President, Brenda Horrigan (Partner, Herbert Smith Freehills) and congratulate them on their appointment (see [Media Release](#)). Our other new members are Vice President, Jonathan Redwood (Barrister, Banco Chambers), Treasurer, Martin Cairns (Director, Sapere Forensic) and Executive Director, Judith Levine (Senior Legal Counsel, Permanent Court of Arbitration). We thank continuing Vice Presidents, Georgia Quick (Partner, Ashurst) and Andrea Martignoni (Partner, Allens) and Executive Director, Ian Govey AM for their ongoing service and commitment to ACICA.

We extend our sincere gratitude to Alex Baykitch AM (past President), Khory McCormick (past Vice President) and Tony Samuel (past Treasurer), who stepped down this year from the ACICA Executive, following many years of dedicated service. David Fairlie, a prior member of the Executive for many years also retired from the Board at the AGM.

## Events

On 21 March 2019, ACICA supported a panel seminar hosted by the Australian Dispute Centre (ADC) on the topic of International Commercial Arbitration in Practice. To a packed room and via simulcast in locations across Australia, speakers Peter McQueen (Independent Arbitrator, ACICA Fellow), Jo Delaney (Partner, Baker McKenzie, ACICA Fellow), Daisy Mallet (Partner, King & Wood Mallesons, ACICA Fellow), and Greg Laughton SC (Barrister, 13 Wentworth Selborne, ACICA Fellow) discussed various topics from the client and arbitrator's

perspectives, including the benefit of international arbitration, the appointment process, prospects of settlement, appointment challenges and the enforcement of awards. The panel discussion was moderated by ACICA Counsel, James Morrison.

ACICA is proud to be a sponsor for the upcoming [Australian Bar Association Convergence Conference in Singapore from 11-12 July 2019](#) and a co-sponsor for [Fordham Law School's International Arbitration and Mediation Conference on 22 November 2019](#). Program and registration information for these exciting events may be found by clicking on the relevant link above.

ACICA is also pleased to have supported and be supporting the following conferences and events:

- Indonesian Academy of Independent Arbitrators and Mediators' 4th Annual Symposium For Arbitrators and Mediators (ASAM), 28 February 2019;
- 2nd South Pacific Arbitration Conference in Papua New Guinea, 25-26 March 2019;
- CIArb Asia-Pacific Diploma in International Commercial Arbitration, 25 May -2 June 2019
- Mauritius Arbitration Week, 10-14 June 2019;
- International Maritime Law Arbitration Moot, 30 June – 5 July 2019;
- Arbitrators' and Mediators' Institute of New Zealand 2019 Conference, 1-3 August 2019;
- 7th FDI Moot Asia-Pacific Regional Rounds, 20-23 August 2019.

We continue to look forward to the upcoming International Council for Commercial Arbitration (ICCA) Congress, being held in Edinburgh in May 2020.

You can stay up to date with ACICA and ACICA-supported events throughout the year by keeping an eye on the [Events Section of the website](#).

## Australian Arbitration Week 2019

Australian Arbitration Week 2019 will be held for the first time in Brisbane in the week of 18 November 2019. A full calendar of events will be made available closer to the time however preliminary information is available on the



Left to Right: Peter McQueen, Daisy Mallett, Greg Laughton SC, Jo Delaney, and James Morrison.

ACICA website, which will be kept updated as events are confirmed to us. The lead event for the Week, the 7th International Arbitration Conference, co-presented by ACICA and CI Arb Australia, will be held on Monday 18 November 2019. Please Save the Date in your diaries! More event details are available [here](#).

### High Court decision in *Rinehart v Hancock Prospecting Pty Ltd & Ors*

On 8 May, the High Court handed down its judgment in the *Rinehart v Hancock* matter, upholding the decision of the Full Court of the Federal Court of Australia which confirmed that the proceedings commenced against Hancock Prospecting Pty Ltd & Ors are to be resolved confidentially by arbitration.

With financial support from Vannin Capital, ACICA sought, and was granted, leave to file written submissions as *amicus curiae*. ACICA was represented by Ashurst (Georgia Quick, Partner and Luke Carbon, Senior Associate) and counsel, Justin Gleeson SC (Banco Chambers), Jonathon Redwood (Banco Chambers) and Danielle Forrester (Sixth Floor Chambers). ACICA extends its gratitude to Vannin, Ashurst and Counsel for their generous assistance in this matter. Of the High Court decision, Tom MacDonald of Vannin Capital noted:

“Vannin Capital was proud to provide financial support to ACICA to allow it to intervene in the proceeding and make its submissions. The decision further establishes

Australia as a pro-arbitration jurisdiction and Vannin looks forward to continuing to support the growth of Australia as a desirable venue for international commercial arbitration.”

### Associates

ACICA welcomes two new Associates, Christian Santos and Lucy Nason (pictured below).



Christian is in the second year of his PhD at the University of Notre Dame, Sydney and is a former intern at ACICA. He previously studied Private International Law under Professor Gabriel Moens.



Lucy is in the penultimate year of her Juris Doctor at the University of Sydney, and became interested in international commercial arbitration through her participation in the 2019 Vis Moot.

Christian and Lucy will be assisting the ACICA Secretariat with case management and the promotion of arbitration in Australia through ACICA's events.

### ACICA and ADC Volunteer Intern Program

ACICA and the ADC were fortunate to be joined by another brilliant group of hard-working interns in the first half of 2019.



**Yan Wang**  
Washington University



**Monica Dalton**  
Australian National University



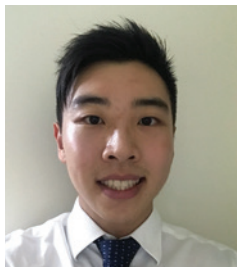
**Rachnita Sok**  
University of Melbourne



**James Occleshaw**  
University of Melbourne



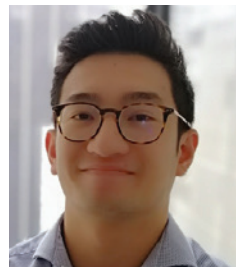
**Vishal Adhikary**  
University of Technology Sydney



**Anthony Song**  
University of New South Wales



**Ying Xia**  
Australian National University



**Nam Nguyen**  
University of Sydney



**Christian Santos**  
University of Notre Dame Australia



**Andrea Soriano**  
University of Sydney



**Christelle Santos**  
University of Notre Dame Australia

**Pavithra Ganesaratnam**  
University of Technology, Sydney

**Lena Lindinger**  
Johannes Kepler University, Austria

**Rouein Momen**  
University of New South Wales



# Report of the AMTAC Chair



## IMLAM

The 20th International Maritime Law Arbitration Moot (IMLAM) will be held this year at the School of Law, Erasmus University, Rotterdam from 30 June to 5 July 2019. The IMLAM Moot provides an opportunity for law students (both undergraduate and postgraduate) from around the world to research and argue a maritime law problem. As many law schools do not offer maritime law as a formal unit, the Moot is a way of exposing law students to this area of law in the realistic environment of an arbitration. Over 34 teams have registered for this year's competition.

As with previous years, AMTAC is a sponsor of the IMLAM competition, sponsoring the Spirit of the Moot prize, which is awarded at the end of the competition. AMTAC is also a proud supporter of IMLAM's promotion of international arbitration in a maritime context amongst budding arbitration practitioners of the future. We wish all those Australian teams who will be travelling to Rotterdam to participate in the Moot the best of luck in the competition and trust that they will have an enjoyable time, not just whilst participating in the Moot but also in meeting and interacting with other students who share a common interest in not just maritime law, but maritime arbitration.

## AMTAC events this year

AMTAC currently has a number of events planned for the second half of 2019.

On 21 August 2019, AMTAC will be conducting a Mock Arbitration Seminar in Sydney at which attendees will observe maritime arbitration proceedings in action. This Seminar, which will be along the lines of seminars AMTAC has previously conducted in Perth and Melbourne in

2017 and 2018, is directed principally at participants in the maritime and international trade industry. This is especially for those who may not have experienced or be familiar with arbitration processes and is aimed at heightening the awareness of those participants as to how a maritime arbitration is conducted, especially under the AMTAC Rules, and the benefits and advantages that the arbitration of commercial disputes in the maritime sphere offers. The more familiar industry participants are with both maritime arbitration generally and the AMTAC Rules in particular, and the benefits of both, the more likely those participants and industries will be to agreeing to resolve their disputes by arbitration, especially under the AMTAC Rules.

This year, Australian Arbitration Week will be held in Brisbane commencing Monday 18 November 2019. As in past years, AMTAC will be conducting a seminar as part of Arbitration Week. This will be from 12:30 pm to 2:00 pm on Tuesday 19 November 2019. It will involve an address, panel discussion and then opportunity for discussion generally amongst those attending about current issues concerning international arbitration, especially of maritime disputes, over lunch. Further details of this seminar will be circulated closer to the event. They are also available on the Australian Arbitration Week calendar on the ACICA website. If you are in planning to attend Arbitration Week or otherwise in Brisbane during that week, I hope to see you at this seminar.

Arrangements are also currently in hand for this year's Annual AMTAC Address, which will take place in the second half of this year. This will be our 13th Annual Address and will focus on areas associated with maritime transportation which can benefit from the use of arbitration as a dispute resolution method. Further details of this Address will be circulated shortly, and also available on the AMTAC website. In the meantime, I would also remind readers that previous Annual Addresses are available on the AMTAC website on the Resources page. This includes all the Addresses from 2007 to 2016 in a single downloadable volume, as well as the 2017 and 2018 Addresses and other papers delivered at AMTAC events. This collection of material provides a useful resource for those researching into recent issues concerning arbitration in the maritime sphere.



Discussions are also underway with Shipping Australia to hold a joint seminar on issues concerning the shipping industry in Sydney later this year, similar to the event held in June 2017 (the papers from which are also available to be downloaded from the AMTAC website).

It is through this programme of seminars that AMTAC seeks to achieve one of the principal objectives behind its foundation, namely the promotion of Australia and the Asia Pacific region as a recognised leader in maritime and transport scholarship, maritime affairs and commercial maritime dispute resolution. These events also provide a convenient opportunity for those working in the maritime and transportation industry, as well as trade and the other industries that they serve, to come together and share their recent experiences and thoughts not only about these industries but also the role that arbitration can play in resolving their disputes, as well as be brought up to date with recent developments. All members of ACICA and AMTAC as well as those who may just be interested in maritime arbitration are welcome and encouraged to attend these events.

### Overseas conferences

Finally, members are reminded that the International Congress of Maritime Arbitrators (ICMA) will be holding its next Conference (ICMA XXI) in Rio de Janeiro from 8 to 13 March 2020. There will be a call for papers from those Australian practitioners interested in presenting at this Congress shortly. Details of that call will also be posted on the AMTAC website at that time. I hope many of you will respond and take up that invitation. But even if you are not interested in presenting, I would nevertheless encourage Australian arbitration practitioners and those interested in arbitration in the maritime sphere to attend this Congress and take up the opportunity it presents to speak with and learn from other maritime arbitration practitioners from around the world, as well as to promote arbitration in Australia as a means of resolving international disputes. Australia and Australian arbitration practitioners have a lot to offer in this regard. Conferences such as the ICMA Congress provide an opportunity for Australian practitioners to show others in this field from around the world what we can offer and the benefits that they and their clients may thereby achieve.

### Gregory Nell SC

AMTAC Chair  
7 June 2019

# The Proper Approach To The Interpretation Of Arbitration Agreements: Australian High Court Speaks Out



**Albert Monichino QC**

Barrister, Chartered Arbitrator and Mediator; List A Barristers, Melbourne, ACICA Fellow.



**Monique Carroll**

Special Counsel at King & Wood Mallesons FCI Arb, ACICA Fellow.

## Introduction

On 8 May 2019, the High Court of Australia handed down its eagerly anticipated decision in *Rinehart v Hancock Prospecting Pty Ltd*.<sup>1</sup> It was hoped that the High Court would clarify the Australian approach to the interpretation of arbitration clauses, including whether the 'presumptive liberal approach' to construction endorsed by the House of Lords in *Fiona Trust & Holding Corporation v Privalov* ('*Fiona Trust*')<sup>2</sup> was good law in Australia. The main arbitration clause at issue, clause 20 of the Hope Downs Deed ('HD Deed'), has spawned litigation in Federal and State courts in Australia, with the Full Court of the Federal Court of Australia ('FCAFC') and New South Wales Court of Appeal ('NSWCA') construing the same clause in contrary ways, and adopting contrary positions as to whether *Fiona Trust* is good law in Australia. Ultimately (and somewhat disappointingly), the High Court decided that general principles of contract interpretation applied to give the arbitration agreement a broad scope and that therefore it need not determine

whether the 'presumptive liberal approach' applied in Australia.

## I Background

Globally, commercial arbitration is primarily given effect to by enforcement of contractual agreements between parties to submit their disputes for determination by arbitration. The arbitral tribunal thus obtains the primacy of its powers and jurisdiction from the agreement to arbitrate. In turn, disputes have arisen over how arbitration agreements should be interpreted.

In recent years, a 'presumptive liberal approach' to the interpretation of arbitration agreements has resulted in diminished emphasis on whether the arbitration agreement refers to disputes 'arising under' or 'arising in connection with' the agreement, for example, and a greater emphasis on the presumed intention of the parties to have intended to avoid complicated, costly bifurcation of their commercial disputes between arbitration and national courts.

In *Fiona Trust*, the House of Lords famously declared that the time had come to make a 'fresh start' for cases arising in the international commercial arbitration context.<sup>3</sup> In this regard, the English Court of Appeal had remarked below that 'ordinary businessmen would be surprised at the nice distinctions drawn in their cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words'.<sup>4</sup> Lord Hoffman (with whom the other members of the House of Lords<sup>5</sup> agreed) observed that the fine semantic distinctions drawn in the old cases between relational phrases like 'under', 'in connection

1 [2019] HCA 13.

2 *Fiona Trust & Holding Corporation v Privalov* [2007] 1 All ER (Comm) 891; [2007] EWCA Civ 20; affirmed in *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] 4 All ER 951; [2007] UKHL 40.

3 *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] 4 All ER 951; [2007] UKHL 40, [12] (Lord Hoffman).

4 *Fiona Trust & Holding Corporation v Privalov* [2007] 1 All ER (Comm) 891; [2007] EWCA Civ 20, [17] (Tuckey, Arden and Longmore LJ).

5 Namely, Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood.

with, 'in relation to', 'arising out of' and the like 'reflect[ed] no credit upon English commercial law'.<sup>6</sup> Instead, his Lordship advocated for a liberal presumptive approach to the interpretation of arbitration agreements:

In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.<sup>7</sup>

The *Hancock* saga squarely raises the question of whether — and, if so, to what extent — Australian contract interpretation principles accommodate the liberal presumptive approach to arbitration agreements. Whilst the case concerned the *Commercial Arbitration Act 2010* (NSW), this Act mirrors Australia's *International Arbitration Act 1974* (Cth), the *UNCITRAL Model Law on International Commercial Arbitration* ('the Model Law') and the Commercial Arbitration Acts in the other States and Territories.<sup>8</sup> Therefore, the High Court's decision in *Hancock* provides a road map for the future approach by Australian Courts to the interpretation of arbitration agreements (both domestic and international).

## II Facts

The labyrinthine proceedings emerged out of a long-running, bitter family dispute between, on one side, siblings Bianca Rinehart ('Bianca') and John Hancock ('Mr

Hancock')<sup>9</sup>, and, on the other, their mother, Gina Rinehart ('Mrs Rinehart') and a number of companies controlled by her (collectively, 'Hancock Group').

In 2006, the parties entered into the HD Deed, the purpose of which was 'to quell ongoing disputes as to title concerning mining tenements' that the Hancock Group had interests in.<sup>10</sup> In return for acknowledgment of title, releases of claims and undertakings not to sue, HPPL (a member of the Hancock Group) agreed to pay quarterly dividends to the Hancock Trust, which were then to be paid to the beneficiaries (including the siblings).<sup>11</sup> Clause 20 of the HD Deed provided for alternative dispute resolution, including arbitration, '[i]n the event that there is any dispute under this deed'.<sup>12</sup> Relevantly, the arbitration clause was drafted in relatively narrow terms. In particular, clause 20 read:

In the event that there is any dispute *under this deed* then any party to his [sic] deed who has a dispute with any other party to this deed shall forthwith notify the other party or parties with whom there is a dispute and all other parties to this deed ('Notification') and the parties to this deed shall attempt to resolve such difference in the following manner ...

20.1 Confidential Mediation ...

20.2 Confidential Arbitration ...<sup>13</sup>

## II *Rinehart v Welker*<sup>14</sup>

### A First Instance before the New South Wales Supreme Court

In 2011, the siblings brought proceedings against Mrs

6 *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] 4 All ER 951; [2007] UKHL 40, [12] (Lord Hoffman).

7 *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] 4 All ER 951; [2007] UKHL 40, [13] (Lord Hoffman).

8 Regulating domestic arbitration in Australia.

9 Mr Hancock changed his name by deed poll.

10 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [76].

11 *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174; [2016] FCA 539, [77].

12 In the Federal Court proceedings, several other deeds with arbitration agreements were also the subject of dispute. The Court treated those deeds as subordinate to the HD Deed and considered that 'the outcome of those claims [regarding the other deeds] was governed or controlled by the [HD] Deed': *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174; [2016] FCA 539, [21] (Gleeson J); *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [78] (Allsop CJ, Besanko and O'Callaghan JJ). On the other hand, the NSWCA was only concerned with the HD Deed: *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95, [8].

13 (emphasis added).

14 (2012) 95 NSWLR 221; [2012] NSWCA 95.



Rinehart in the New South Wales Supreme Court ('NSWSC') seeking information about the trusts of which the siblings were beneficiaries and orders under the *Trustees Act* 1962 (WA), including the removal of Mrs Rinehart as trustee. Mrs Rinehart sought to stay the proceedings, arguing that the arbitration clause in the HD Deed should be given effect since the matters before the Court fell within the scope of the arbitration agreement or, in the alternative, the releases and bars to action contained in the HD Deed provided a complete defence to the claims brought by the siblings.

In response, the siblings alleged that the HD Deed was void because it was procured through wrongful conduct by Mrs Rinehart and certain companies within the Hancock Group. Thus, the question for the Court was whether a dispute as to the validity of the HD Deed was a dispute 'under this deed' for the purposes of clause 20 of the HD Deed.

At first instance, Brereton J held that the clause was to be construed narrowly given its precise terms and, thus, the dispute between the parties was not properly characterised as a 'dispute under this deed'.<sup>15</sup> Therefore, a stay of the court proceedings in favour of arbitration was refused.

### B New South Wales Court of Appeal Decision

This narrow approach was unsuccessfully challenged on appeal.<sup>16</sup> The NSWCA interpreted the same words restrictively, with the effect that a dispute about the validity of the HD Deed was not a dispute 'under this deed'. Significantly, it held that the phrase 'under this deed' limited arbitral disputes to disputes the outcome of which was 'governed or controlled' by the deed. This assumed the HD Deed's validity.<sup>17</sup>

In reaching this conclusion, the NSWCA rejected the

liberal presumptive approach to interpreting arbitration agreements laid down by the House of Lords in *Fiona Trust*.<sup>18</sup> The majority (Bathurst CJ, Young JA agreeing) appeared to be alarmed by this approach, taking it to endorse 'constru[ing] arbitration clauses irrespective of the language'.<sup>19</sup> They held that the approach adopted in *Fiona Trust* was contrary to the approach taken to the interpretation of commercial contracts in Australia.<sup>20</sup>

Instead, the NSWCA held that arbitration clauses should be interpreted by the same rules of construction that apply to other contractual clauses.<sup>21</sup> Adopting the usual approach to construction of contracts, the Court held that a dispute as to the validity of the deed was not a dispute 'under this deed' and therefore was not a dispute that the parties had agreed to refer to arbitration.

### III *Hancock Prospecting v Rinehart*

In 2014, the siblings commenced separate litigation before the Federal Court ('FCA') against Mrs Rinehart and certain companies in the Hancock Group. Their allegations (which were distinct from the allegations made in the New South Wales proceedings) were that Mrs Rinehart breached her fiduciary duties as director of the companies in the Hancock Group and her duties as a trustee of the Hancock Trust by (a) transferring all the valuable mining assets from HFME, a Hancock Group company in which she held no shares, to a company in which she held shares; and (b) improperly increasing her shares in a particular company held by the Hancock Trust.<sup>22</sup> The siblings applied to remove Mrs Rinehart as trustee of the Hancock Trust and officer of the Hancock Group ('the Substantive Claims')

The Hancock Group applied under s 8(1) of the *Commercial Arbitration Act 2010* (NSW) ('CAA')<sup>23</sup> for an order to stay the court proceedings and refer the parties

15 *Welker v Rinehart* (No 2) [2011] NSWSC 1238, [49].

16 *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95, [44].

17 *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95, [44].

18 *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95, [121] – [125].

19 *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95, [121].

20 *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95, [121].

21 *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95, [121].

22 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [2].

23 Equivalent to Article 8 of the UNCITRAL Model Law on International Commercial Arbitration.

to arbitration, pursuant to cl 20 of the HD Deed and other related deeds (collectively, 'the Deeds'). They argued that the matters before the Court fell within the scope of the several arbitration agreements and that the releases and bars to future action contained in the HD Deed provided a complete defence to the Substantive Claims.

### A First Instance before the Federal Court of Australia

As in the New South Wales litigation, the siblings resisted the stay application on the grounds that the Deeds, containing the arbitration agreements, (a) were void (and therefore incapable of referring the parties to arbitration pursuant to s 8(1) of the CAA) because they had been procured through wrongful conduct by Mrs Rinehart and certain companies within the Hancock Group ('the Validity Claims'), or (b) that s 8 of the CAA did not apply because the dispute did not emanate from a 'commercial' relationship as required by the Act.<sup>24</sup>

The central question in the Federal Court was again whether a dispute as to the validity of the Deeds was a dispute 'under this deed'.

At first instance, Gleeson J applied the approach advocated by Bathurst CJ in the NSWCA.<sup>25</sup> In her Honour's view, 'there is no legal presumption in favour of arbitration' under Australian law.<sup>26</sup> Despite noting that 'some courts have taken a "liberal approach" to the construction of arbitration clauses, whereby "words capable of broad and flexible meaning will be given [a] liberal construction"',<sup>27</sup> the proper approach is for courts 'not [to] presume that a dispute falls within the scope of an arbitration clause unless the court can be persuaded

otherwise'.<sup>28</sup> According to her Honour, the question of the validity of the Deeds did not fall within the proper construction of the narrow expression 'under this deed'. Accordingly, she concluded that none of the Validity Disputes were 'matters' that fell within the reference to arbitration. According to her Honour, the Validity Disputes should first be determined by the Court and thus, the stay application under s 8(1) of the CAA was rejected.

### B Full Court of the Federal Court of Australia Decision

On appeal, the FCAFC (Allsop CJ, Besanko and O'Callaghan JJ) expressly disagreed with the NSWCA majority's characterisation of Lord Hoffman's comments.<sup>29</sup> According to the FCAFC, properly understood, Lord Hoffman had advocated for a liberal interpretation of arbitration clauses, **where the words allowed**, so as to give effect to the underlying presumption that parties to an arbitration agreement intend to avoid bifurcation of their disputes. It considered that this approach was consistent with earlier Australian decisions<sup>30</sup> as well as established common law principles of contractual interpretation requiring 'an examination of the text of the document in the context of the surrounding circumstances known to the parties, including the purpose and object of the transaction or the subject matter of the agreement, and by assessing how a reasonable person would have understood the language in that context'.<sup>31</sup> In the context of arbitration agreements entered into for commercial purposes, the FCAFC considered that it is presumed that parties ordinarily intend all aspects of the defined relationship in respect of which they have agreed to submit disputes to

24 *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174; [2016] FCA 539, [14] – [18]. Apropos (a), the siblings argued that before issuing a stay, the Court should determine whether the arbitration agreement was procured by improper conduct (ie determine whether the arbitration agreement is 'null and void, inoperative or incapable of being performed' for the purposes of s 8).

25 *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174; [2016] FCA 539, [99] – [102].

26 *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174; [2016] FCA 539, [102].

27 *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174; [2016] FCA 539, [103].

28 *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174; [2016] FCA 539, [102].

29 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [193].

30 In particular, its earlier decision in *Comandante Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2006] FCAFC 192 ('Comandante') and the decision of the NSWCA (Gleeson CJ, Meagher JA and Sheller JA) in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways* (1996) 39 NSWLR 160. The FCFA agreed with Martin CJ of the Supreme Court of Western Australia in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2016) 298 ALR 666; [2016] WASCA 66 that Fiona Trust did not say anything different in substance to *Comandante*.

31 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [163] – [164].

arbitration to be determined by the same tribunal.<sup>32</sup>

The FCAFC also considered that the relevant expression at issue was the composite phrase ‘any dispute under this deed’ rather than simply the expression ‘under this deed’.<sup>33</sup> ‘Any dispute’ captures any disagreement or controversy in its entirety. As such, it was improper to adopt narrow interpretations of the expression ‘under this deed’, resulting in the splitting of issues between court (on the one hand) and arbitration (on the other hand).<sup>34</sup>

Whilst conceding that their views differed from those of the NSWCA, the FCAFC was ‘persuaded to the necessary point of clarity that [the NSWCA] construction [was] not correct’.<sup>35</sup> Australian courts are required to follow earlier decisions of intermediate appellate courts, unless the earlier decision is considered to be ‘plainly wrong’.<sup>36</sup> Accordingly, it was a very serious matter for the FCAFC to depart from the earlier decision of the NSWCA, particularly as both cases concerned the interpretation of the very same arbitration clause.

#### IV High Court Decision

The siblings appealed the FCAFC decision to the High Court. Several of the Hancock Group company respondents in the proceeding, who were not parties to the deeds in question, cross-appealed. They had applied for a stay of the court proceedings brought against them on the grounds that they were relevantly a ‘party’ to the arbitration agreements (for the purposes of s 2(1) of the CAA) because they were claiming ‘through or under’ named parties to the arbitration agreements. Their stay

application was refused (at first instance and on appeal).

There were thus two main issues before the High Court:

- (a) first, whether the ‘Validity Claims’ fell within the scope of the arbitration agreements; and
- (b) secondly, the extended meaning of ‘party’ in s 2(1) of the CAA.<sup>37</sup>

ACICA was granted leave to file written submissions as *amicus curiae*.<sup>38</sup>

The High Court decision comprises two judgments. First, the plurality judgment of Kiefel CJ, Gageler, Nettle and Gordon JJ. Secondly, the judgment of Edelman J. All of the High Court justices were of the view that the ‘Validity Claims’ fell within the scope of the arbitration agreements.<sup>39</sup> There was a divergence of opinion, however on the second issue. The plurality allowed the cross-appeal.<sup>40</sup> On the other hand, in Edelman J’s view, the cross-appeal should be dismissed.<sup>41</sup>

This article is not concerned with the second issue or the cross-appeal.

According to the plurality, the appeals could be resolved by application of orthodox principles of contract interpretation, without reference to *Fiona Trust*.<sup>42</sup> In turn, this required consideration of the context and purpose of the Deeds.<sup>43</sup> The plurality embraced the FCAFC observation that ‘[c]ontext will almost always tell one more about the objectively intended reach of [prepositional] phrases than textual comparison of words of a general relational character’.<sup>44</sup>

32 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [182] and [186].

33 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [201].

34 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [161] and [201].

35 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [205].

36 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22, [135].

37 Which is similarly defined in s 7(4) of the International Arbitration Act 1974 (Cth) for the purposes of enforcement of foreign arbitration agreements.

38 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [51] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

39 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [17] (Kiefel CJ, Gageler, Nettle and Gordon JJ); [83] (Edelman J).

40 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [81] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

41 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [104] (Edelman J).

42 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [18] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

43 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [18] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

44 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [26] (Kiefel CJ, Gageler, Nettle and Gordon JJ) citing *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, 496[193].



The plurality traced the history of the three Deeds in question.

The first deed, the Deed of Obligation and Release was entered into in 2003. Mr Hancock and his sisters (on the one hand) and Mrs Rinehart, HPPL and other Hancock Group companies (on the other hand) signed the deed.<sup>45</sup> At the time the Hancock Group was negotiating a joint venture with Rio Tinto.<sup>46</sup> Mr Hancock was using sensationalist media to pursue his claims, threatening litigation against his mother, Mrs Rinehart.<sup>47</sup> This had the capacity to negatively impact on the joint venture negotiations.<sup>48</sup> Viewed in proper context, the Deed of Obligation and Release was intended to address the risk of commercial damage to the Hancock Group by public statements made by Mr Hancock.<sup>49</sup>

The second deed, the HD Deed, was entered into in about August 2006, shortly after the Hancock Group had entered into a joint venture agreement with Rio Tinto.<sup>50</sup> The HD Deed was signed by Bianca, her two sisters, Mrs Rinehart, HPPL and other parties, but not by Mr Hancock.<sup>51</sup> As previously stated, a purpose of the HD Deed was 'to quell disputes as to title concerning the mining tenements, especially the Hope Downs Tenement'.<sup>52</sup> At the time, Mr Hancock sought to ignore the earlier Deed of Obligation, contending that it had been procured by undue influence.<sup>53</sup> He filed an affidavit in proceedings brought by his mother alleging that she had committed 'grave breaches of trust'.<sup>54</sup>

By the HD Deed, the parties undertook not to do

anything which would have an adverse impact on the joint venture, and not to prosecute any claim the subject of a release under the HD Deed.<sup>55</sup> Moreover, by clause 12 of the HD Deed, each party acknowledged that the deed was entered into freely without duress or undue influence. In addition, the deed required each of the children, upon execution of the deed, to provide a letter from a lawyer to the effect that they had advised the lawyer that they had read the deed and were executing it without duress or undue influence.<sup>56</sup>

By the third deed, the April 2017 Deed, Mr Hancock adopted the HD Deed.<sup>57</sup>

Clause 14 of the Deed of Obligation and clause 9 of the April 2007 Deed were in relevantly similar terms to clause 20 of the HD Deed.<sup>58</sup>

The plurality succinctly stated the proper approach to contractual interpretation:

It is well established that a commercial contract should be construed by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract.<sup>59</sup>

Having postulated the relevant test, the plurality readily answered the dispositive question as to whether the Validity Claims fell within the scope of the arbitration agreements contained in the various deeds:

It could not have been understood by the parties to these Deeds that any challenge to the efficacy of the

45 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [30] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

46 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [28] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

47 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [28] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

48 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [32] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

49 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [32] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

50 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [35] – [36] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

51 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [36] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

52 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [36] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

53 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [34] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

54 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [34] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

55 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [38] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

56 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [40] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

57 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [36] and [42] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

58 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [10] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

59 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [44] (Kiefel CJ, Gageler, Nettle and Gordon JJ) citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7, [35] (French CJ, Hayne, Crennan and Kiefel JJ).

Deeds was to be determined in the public spotlight. Especially is this so with respect to the Hope Downs Deed.<sup>60</sup>

In arriving at this conclusion, the plurality emphasised the following aspects of the surrounding circumstances, and purposes and objects of the various deeds:

- (a) one of the fundamental purposes of the Deeds was to quell disputes about title to important mining tenements;<sup>61</sup>
- (b) it was necessary to stabilise terms of ownership of tenements to provide a safe foundation for a long-term commercial venture (with Rio Tinto);<sup>62</sup>
- (c) maintaining confidentiality about the affairs of the Hancock Group, the trusts and intra-family disputes, including of any dispute resolution, was plainly a serious concern;<sup>63</sup>
- (d) the Deeds were entered into between family members, further underpinning the need for confidentiality of any dispute resolution;<sup>64</sup>
- (e) the evident object of the Deeds was to ensure that there was no further public airing of the claims made by Mr Hancock;<sup>65</sup>
- (f) the Substantive Claims<sup>66</sup> and the Validity Claims were intertwined.<sup>67</sup> In those circumstances it would make little sense if the Substantive Claims were to be resolved by private arbitration but the Validity Claims were not;
- (g) a reasonable person in the position of the parties to the HD Deed would have appreciated that disputes

might once again arise, including concerning the validity of the Deed;<sup>68</sup> and

- (h) the parties had taken steps in the HD Deeds to stem future claims about the validity of the deed, including whether it had been procured by duress or undue influence.<sup>69</sup>

Like the plurality, Edelman J considered that the fundamental purpose of the Deeds was to quell disputes between the parties (including disputes about their validity) by confidential dispute resolution. Accordingly, the context<sup>70</sup> required the words 'disputes under this deed' to be construed broadly to encompass the Validity Claims.<sup>71</sup> His Honour went on to observe:

For that reason, it is unnecessary in this case to consider the amount of additional weight that should be placed upon the usual consideration of context that reasonable persons in the position of the parties would wish to minimise the fragmentation across different tribunals of their future disputes by establishing "one-stop adjudication" as far as possible.<sup>72</sup>

In this way, Edelman J, appears to have recognised that the considerations in *Fiona Trust* were valid considerations.

## V Comments

The High Court decision is welcome in taking a commercial approach to the interpretation of the arbitration agreements in question. However, it is disappointing that the judgment does not tackle the

60 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [44] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

61 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [27] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

62 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [31] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

63 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [32], [46] and [49] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

64 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [33] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

65 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [49] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

66 Which unquestionability fell within the scope of the several arbitration agreements.

67 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [12] and [43] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

68 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [48] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

69 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [9], [33], [40] and [43] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

70 Which Edelman J considered to be critical: '[e]very clause in a contract, no less arbitration clauses, must be construed in context. No meaningful words whether in a contract, a statute, a will, a trust, or a conversation, are ever acontextual': [83].

71 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [83] (Edelman J).

72 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [83] (Edelman J).

important policy question of whether *Fiona Trust*, and the presumptive liberal approach to the interpretation of arbitration agreements, is good law in Australia.

*Fiona Trust* has been followed in both Singapore<sup>73</sup> and in Hong Kong.<sup>74</sup> In Singapore, VK Rajah JA (delivering the grounds of decision of the Singapore Court of Appeal<sup>75</sup>) stated:

There are, all in all, strong reasons for supporting a generous approach towards the construction of the scope of arbitration clauses, given that such an approach has received widespread acceptance among the leading commercial jurisdictions, and is strongly supported by the academic community. Such an approach is also consistent with this court's philosophy of facilitating arbitration ... Accordingly, we agree that the preponderance of authority favours the view that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there is good reason to conclude otherwise.<sup>76</sup>

The High Court missed the opportunity to bring the law in Australia in line with that of its neighbours in the Asia Pacific and thereby to promote regional convergence.

Whilst there may have been no difference in outcome in this case, the failure to clarify the position leaves uncertainty in Australia's approach to interpretation of commercial arbitration agreements.

The High Court decision also leaves an unresolved controversy between intermediate appellate courts about the status of *Fiona Trust* in Australia, with the Federal Court embracing *Fiona Trust* and the New South Wales Supreme Court rejecting it. This is unfortunate as the majority of arbitration-related cases in Australia are heard in these courts.

The plurality suggested that the approach in *Fiona Trust* may not assume much importance for courts in the future given the likelihood that arbitral clauses such as the model UNCITRAL arbitration clause<sup>77</sup> (expressed in wide terms) are now recommended for use by commercial parties.<sup>78</sup> To the contrary, experience tells us that arbitration clauses are typically addressed towards the end of contractual negotiations and scant attention is devoted to them. Semantic debates about the proper interpretation of arbitration agreements are therefore likely to continue in Australia, albeit informed by the context and purpose of the relevant contract.

73 *Z v A* [2015] HKCFI 228, [38] – [41]; [2015] 2 HKC 272; *L v M* [2016] HKCFI 1368, [52] – [53].

74 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (Singapore)* [2011] 3 SLR 414, [12] – [19].

75 The Singapore Court of Appeal is the apex court in Singapore.

76 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (Singapore)* [2011] 3 SLR 414, [19] (Chan Sek Keong CJ, Andrew Phong Boon Leong JA, VK Rajah JA).

77 The model UNCITRAL arbitration clause provides: 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules' available at <<https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>>

78 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [21] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

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# Sydney Law School's Participation in the Willem C Vis International Commercial Arbitration Moot 2019



**Professor Chester Brown**

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In April 2019, a team from Sydney Law School once again travelled to Europe to compete in the Willem C Vis International Commercial Arbitration Moot. This year's team consisted of Kilian Elkinson, Nina Mao, Lucy Nason, and Beata Szabo, and they were coached by Andrew Bell (of Crown Solicitor's Office, New South Wales) and Brendan Hord (of Herbert Smith Freehills), both of whom

had been members of Sydney Law School's Vis Moot team in 2016. This year's Vis Moot competition was the largest ever, with 372 teams registered from 87 different countries, and 2,264 registered student participants.

Sydney Law School's team was very successful this year, reaching the quarter-finals of the Vis Moot Competition (thus being one of the top eight teams out of 372), and the team's Claimant Memorandum was awarded the "Pieter Sanders Award for the Best Memorandum for Claimant". In addition, two of the Sydney team members (Beata Szabo and Lucy Nason) were awarded "Honourable Mentions" in the Best Oralist competition, thus placing them in the top 50 or so of the more than 2,200 oralists at the Vis Moot.

Prior to their departure for Europe, the Sydney Vis Moot team underwent around six months of preparation in Sydney. This included a great deal of research on the UN Convention on Contracts for the International Sale of



Goods, and the practice and procedure of international commercial arbitration (including in particular the Hong Kong International Arbitration Centre Rules of Arbitration). The team also had to draft and submit a Claimant Memorandum and Respondent Memorandum on the hypothetical Vis Moot problem, and they also had countless practice moots, at which they were assisted by members of the Sydney legal profession who generously gave their time to give the team advocacy tips; this culminated in a final "Demonstration Moot" over which Justice Bell, the President of the NSW Court of Appeal, presided, with James Morrison (ACICA) and Brenda Horrigan (Herbert Smith Freehills) as the co-arbitrators.

With all that preparation behind them, the Sydney team's first port of call on their European adventure was Stockholm, where they competed in a Pre-Moot Competition which was co-organised by the University of

Stockholm, the Stockholm Chamber of Commerce, and the law firm Mannheimer Swartling. The team enjoyed three days in this beautiful Northern European city; the chilly weather was matched by the warmth of the welcome and hospitality which was displayed by the lawyers at Mannheimer Swartling, which hosted the Pre-Moot in their offices. The Sydney team won each of their moots in Stockholm and finished in 5<sup>th</sup> place. The team then travelled from Stockholm to The Hague where they competed in the Permanent Court of Arbitration Pre-Moot. This was also very well organised by the excellent team at the PCA, and the opportunity to moot in the ornate hearing rooms at the Peace Palace (which of course also houses the International Court of Justice) was a real highlight. The Sydney mooters again put in a very strong performance, winning all of their moots, and finishing in 2<sup>nd</sup> place overall. In addition, Beata Szabo was awarded the prize as the best oralist at the PCA Pre-Moot,





and Nina Mao was awarded third prize, which was very pleasing.


The Sydney team then travelled to Vienna, where they had a final “mini” Pre-Moot at the offices of law firm Vavrovsky Heine Marth, where they competed against two German teams. The team had had excellent preparation over the past week and a half, and were full of confidence heading into the Vis Moot Competition.

That excellent preparation was on display, as the team comfortably won each of their four moots in the general rounds against teams from Sofia University (Bulgaria), Masaryk University (Czech Republic), Centro Universitario de Ensino Superior do Amazonas (Brazil) and the University of Tirana (Albania). After the general rounds, the Sydney team progressed as one of only 64 teams to the knock-out rounds.

In the Round of 64, Sydney came up against the Federal University of Rio Grande do Sul (Brazil), and the Sydney team prevailed. Next was the Round of 32, where the Sydney team met Brooklyn Law School (United States). Again, Sydney was the winner. Then came the Round of 16, where Sydney mooted against the University of Mannheim (Germany). Again Sydney won and went through to the quarter-finals, where the next opponent was Pennsylvania State University. Unfortunately, the Sydney team’s run ended at the quarter-finals – and in fact Pennsylvania State University ultimately went on to win the Vis Moot Competition, beating the University of Ottawa in the final.

This was a tremendous performance from this year’s Vis Moot team, and it equalled the furthest we have progressed in the Oral Rounds of the Vis Moot, with the Sydney teams in 2011, 2014, and 2016 also making it to the quarter-finals. It was also the equal best performance by an Australian team in 2019. In addition, as already noted above, more was to come: at the final awards banquet, the Sydney team was awarded the “Pieter Sanders Award for the Best Memorandum for Claimant”, and two of the Sydney team members (Beata Szabo and Lucy Nason) were awarded “Honourable Mentions” in the Best Oralist competition.

Congratulations to all of the four team members for their efforts and on an excellent all-round team performance, and sincere thanks are due to the team’s co-coaches (Andrew Bell and Brendan Hord) for their dedicated guidance of the team. Sydney Law School is also very grateful to the Chartered Institute of Arbitrators, the NSW Bar Association, and the Law Society of NSW.



“**MAKING A DIFFERENCE  
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# Can Finality Be Achieved In International Arbitration Awards?



By JAYEMS DHINGRA<sup>1</sup>

## Abstract

International commercial arbitration is touted worldwide as the one stop forum for resolution of all disputes and issues in relation to or under a contract. The Model Arbitration Law (“**ML**”) and arbitration laws of the states, favoring free trade and open economies, generally adopt the policies of non-interference by courts, retaining only supervisory powers. The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (“**NYC**”), further limits the grounds for setting aside an arbitral award, permitting exceptions within a narrow band. The spirit of the international conventions and the laws to promote trade, and bring finality, in dispute resolution, within one forum, is beyond doubt. However the reality check could reveal that derivatives of the limited grounds in NYC from diversity of jurisdictions, may lead to a minefield of innovative grounds, for setting aside an arbitral award.

This Article provides the findings from a critical review conducted on the arbitration related appeal cases in recent years from some major jurisdictions,<sup>2</sup> to assess whether the future of arbitration is converging with court style litigation. The objective of the Paper is to postulate about the role of a tribunal, in curtailing the journey of arbitral awards traversing through, courts of first instance for enforcement, courts of appeal or Supreme Court and court of final appeal. The finality and or justice whether in

arbitration or court system, if it rests only in the court of final appeal and not arbitration, then contracting parties ought to be well informed, and exercise diligence in drafting a dispute resolution clause.

## I. Introduction

Finality if desired, can it be expected in ADR Forums or Courts?

Finality in dispute resolution forums, whether desirable or feasible, depends largely upon the parties and their appointed tribunal. This axiom is best illustrated in the words of his Excellency Sundaresh Menon CJ in an appeal case *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2017] SGCA 21 at [2],<sup>3</sup> as follows:

Settlement and litigation involve different risk paradigms. Litigation brings with it risks and uncertainty but accompanying that might be the prospect of a more complete vindication; settlement on the other hand is expected to deliver certainty though this often comes with compromise. Yet, certainty is not guaranteed. Whether a settlement does in the end deliver certainty will depend, among other things, on *whether the parties are sincerely committed to it and whether their agreement satisfactorily addresses the essential variables. If there is no such commitment or if the agreement between the parties is poorly drafted, settlements may even spawn further litigation.*

[Emphasis added]

There can be at least three key aspects worth consideration by the parties seeking finality. The first is drafting of the applicable law and dispute resolution clause (“**LDRC**”) in a contract, with strategic planning. Secondly choosing the appropriate dispute resolution forums, in context of the nature of a contract, and thirdly managing the dispute resolution process from an ethical business perspective and not vindictively.

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<sup>2</sup> The study is of selected cases from Australia, England, Hong Kong, Malaysia and Singapore.

<sup>3</sup> The case of *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* though relates to litigation in courts and not arbitration, nevertheless can be a good reference for parties when drafting dispute resolution clauses.

## Structuring a Dispute Resolution Clause

Taking the first aspect of LDRC, the parties are at liberty to choose whether to submit all issues in dispute, under or in connection with a contract, at the end of a contract, in a single forum, or as and when a dispute arises, irrespective of the stage of a contract. Therefore the finality for the resolution of all disputes, related to a contract, will largely be contingent on the provisions in the LDRC. The printed clauses in standard form contracts, or Charterparty forms, normally do not delve into timings for submission of disputes, to a legal forum for resolution.

However in Public Works Department (“**PWD**”) or infrastructure construction related projects and government contracts, a multi-tiered process is often adopted for resolution of disputes, as and when they arise; thus leaving the final resolution of all unresolved disputes to a legal forum of choice. For example in construction industry specific contracts, in countries like Australia, England, New Zealand, Malaysia, Singapore where a statutory adjudication process is available, the payment disputes during the course of a project can be referred to an adjudication, for interim or a temporary decision, leaving the final resolution through arbitration or courts at the end of a project.<sup>4</sup>

For example the provisions for such adjudication processes are also included in the Standard Form of Building Contracts (“**SFC**”) developed by Asian International Arbitration Centre, Malaysia (“**AIAC**”). The payment disputes can be referred to adjudication, and final determination can be through arbitration at the end of a project. The option to use mediation is also available at any time. Therefore the responsibility of attaining a final and enforceable resolution of disputes, if any, is up to the parties. Samples of articles related to dispute resolution in the AIAC SFC are:<sup>5</sup>

*Article 30.12* Any dispute on or in relation to Liquidated Damages, set-off, deductions and/or claims which the Employer makes or claims to be

entitled to make under the Contract shall be referred to arbitration under Clause 34.0

*Article 34.1(a)* Any dispute controversy or claim arising out of or relating to this Contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Arbitration Rules.

*Article 34.1(b)* The seat of arbitration shall be Malaysia.

*Article 35.3* Reference of Disputes to Mediation at Any Time

The Party may refer any dispute for mediation pursuant to Clause 35.1 at any time, whether before or during any arbitration proceeding under Clause 34.0, or any litigation or other proceeding in relation to any dispute between the Parties arising from and/or in connection with the Works and/or the Contract.

The construction laws within the jurisdictions of Malaysia, Singapore, Australia and England provide several options to the contracting parties, from mediation, to adjudication to arbitration. Ideally there should be fewer cases going past the ADR forums to arbitration or courts for litigation. Ironically with more options at the disposal of the parties, the varieties of issues and numbers of cases being referred to courts is also widening.

In jurisdictions where statutory adjudication is not available or in World Bank funded projects, the parties have a choice to adopt commonly used SFC's from organizations like *Federation Internationale Des Ingenieurs-Conseils* (“**FIDIC**”). The FIDIC SFC for an EPC project provides a comprehensive set of articles and procedure, for resolving not only payment claims, but also contractual issues for temporary resolution, by referring disputes to a Dispute Adjudication Board (“**DAB**”). The objective is to ensure that the project is not delayed due to a dispute. The disputed issues, including interim resolutions if not acceptable to a party, can finally be referred to either a Dispute Resolution Board (“**DRB**”)<sup>6</sup> or

4 See UK's *Housing Grants, Construction and Regeneration Act 1996*; *Construction Industry Payment And Adjudication Act 2012*, (CIPAA) Malaysia; *Security of Payment Act 2004*, (SOPA) Singapore; *New South Wales Building and Construction Industry Security of Payment Act 1999* ('NSW SOPA').

5 See The Standard Form Building Contract [Without Quantities], AIAC: Kuala Lumpur, 2017 Edition.

6 DAB and DRB are appointed by the parties at the project commencement stage and are available on need basis for administering and

external arbitration forum. Similar arrangements are feasible in oil & gas industry related, Complex Multiple Geographically Dispersed (“**CMGD**”) projects, by adopting LDRC or Model Contracts (“**MC**”) published by the Association of International Petroleum Negotiators, USA (“**AIPN**”). The AIPN MCs are often used for a diverse range of activities in offshore and onshore oil & gas exploitation related projects. These forms use a multi-tiered LDRC; therefore only unresolved issues will be referred to the forum of choice, for final resolution. Thus by the choice of a SFC, MC and LDRC, the parties can opt for a dispute resolution forum for full and final decision on all issues and claims in dispute.

### Choice of Forums for Disputes Resolution

In contrast to an option to submit all disputes to one forum at the end of a contract, some parties exercising party autonomy prefer otherwise. A classic example of party autonomy in drafting a LDRC and intended objective of achieving finality in resolution of all disputes, can be seen from the case of *Guangzhou Dockyards Co. Ltd v E.N.E. AEGIALI I* [2010] EWHC 2826 (Comm), related to a ship conversion contract, from a Very Large Crude Carrier (“**VLCC**”) to Very Large Ore Carrier (“**VLOC**”). The LDRC in Article 22 of the contract dated 7 November 2007 provided as follows:<sup>7</sup>

#### ARTICLE 22 - APPLICABLE LAW AND ARBITRATION

22.1 The Contract shall be governed by and construed in accordance with English law;

22.2 Any dispute concerning the Vessel's compliance or non-compliance with the rules, regulations and requirements of Class shall be referred to the head office of Class, the decision of which shall be final and binding upon the Parties hereto.

22.3 All other disputes or differences arising out of or in connection with this Contract or otherwise shall be referred to arbitration in London, England before a tribunal of three (3) arbitrators. ...

The Parties agree that either Party may appeal to the English High Court on any issue arising out of any award. The Parties agree that any final unappealable (sic) judgment of the English High Court (or higher court on appeal therefrom) shall be referred back to the *arbitrators and the arbitrators shall issue a final unappealable award in the form of the said judgment.*

[Emphasis added]

The simple reading of the Article 22 will show that from the start the parties intended that the disputes if any on technical matters would be referred to Class (the term normally used in maritime industry for referring to Classification Societies), and the decision will be binding on the parties. However for all other non-Class related disputes, the parties will first refer it to arbitration and then, if not happy with any issue in an award, the parties could appeal to English courts. That was not enough for a finality objective. The last sentence of the LDRC provided that “*judgment of the English High Court (or higher court on appeal therefrom) shall be referred back to the arbitrators and the arbitrators shall issue a final unappealable award in the form of the said judgment.*” This means that even after the appeal to the higher court of appeal, the parties would still have another go at arbitration, before achieving finality, in the form of a non-appealable award. This novel clause between *Guangzhou Dockyards* (a Chinese Shipyard) and *E.N.E. AEGIALI I* (a Greek Ship Owner) is undoubtedly a recipe for perpetual continuity of a dispute certainly for much longer period than the contract duration, which was as per the facts of the case was terminated from day one.

In order to understand the logic behind the above innovative LDRC, in view of anticipated curiosity of readers, it is considered best to reproduce the following paragraph from the judgment report at paragraph [5], as submitted by the counsel for the *Guangzhou Dockyards*:

The Dockyard's arguments are set out in interesting and wide ranging submissions. It accepts that the factual element of its appeal is not a conventional

resolving disputes during the project execution stage. For further details refer to the latest edition of “General Conditions of Dispute Adjudication Agreement”, which is appended to the General Conditions of the “Conditions of Contract for EPC/Turnkey Projects.”

<sup>7</sup> See *Guangzhou Dockyards Co. Ltd v E.N.E. AEGIALI I* [2010] EWHC 2826 (Comm) at [4].

arbitration appeal. It is not an appeal on questions of law under s69, nor is it a procedural challenge under s68. *It is a novel appeal*, not least, it says, because *it arises under a novel arbitration clause which has not been considered previously by any English Court*. In seeking to maintain it, it puts its case on the basis of party autonomy, a principle enshrined in s.1 (b) *Arbitration Act 1996*. It argues that the single most important feature of arbitration is that it gives the parties the opportunity to choose the particular manner in which their disputes are to be resolved. Accordingly they are able to determine for themselves which potential attributes of the arbitral process are important to them, and how to maximise the aspects that they perceive as advantageous, while minimising the perceived disadvantages. *Parties who choose to arbitrate can, it is said, dine à la carte. If they do not like any of the characteristics conventionally*

*associated with arbitration, such as finality, they can agree to opt out, by using a suitably worded arbitration clause*. In this respect, the Act reflects the familiar precepts of English law in relation to freedom of contract. *Everything is permitted*, the Dockyard submits, unless it has been prohibited by statute.

[Emphasis added]

No doubt the finality was desired by the Parties in *Guangzhou Dockyards v E.N.E.* but it was planned through a series of twists and turns. The commendable point to be noted is that the parties did specifically state in the LDRC that, *“any final unappealable (sic) judgment of the English High Court (or higher court on appeal therefrom) shall be referred back to the arbitrators and the arbitrators shall issue a final unappealable award in the form of the said judgment.”* In this exceptional case, the finality was entrusted to the arbitration tribunal.

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## Managing Dispute Resolution Process and Forums

Ironically for sake of finality, litigation begins in earnest only after the otherwise final and binding arbitral award is published by the tribunal. Though this goes contrary to the objectives of arbitration as a one stop centre for binding and final resolution of all disputes, but a reality check will reveal otherwise. Once an arbitral award is published, the winning party will seek enforcement from the court at the seat of arbitration or in foreign jurisdictions where the assets of the losing party may be available. In an Energy Charter Treaty (“ECT”) case of *Anatolie Stati, Gabriel Stati, ASCOM Group S.A. Terra RAF Trans Trading Ltd v The Republic of Kazakhstan* [2017] EWHC 1348 (Comm), challenge of award of USD500 million issued by the arbitral tribunal seated at Sweden, was initiated by the Respondent at the seat of arbitration, in the Court of Appeal of Sweden. The Claimant commenced enforcement proceedings in the District Court of Columbia, US and English courts in UK, thus post-award proceedings in three jurisdictions Sweden, US and UK simultaneously. This case demonstrates that the choice of arbitration forum with an intention to achieve finality of resolution for the issues in dispute was not to commence litigation in multiple courts as soon as the arbitral award is published, but for real resolution of disputes if any. Ironically the reality turned out to be otherwise. The successful claimant sought court assistance for enforcement of award, while unsuccessful respondent appealed in Sweden for setting aside the award on grounds of public policy and fraud. During this period the claimant had already obtained ex-parte enforcement orders from English courts. So the respondent had to in addition lodge an application to English High Court for setting aside the permission granted to enforce the award in UK.

The application for setting aside the enforcement order of the English Court was on three grounds: 1) No valid arbitration agreement; 2) invalidity in constitution of the tribunal; and 3) procedural errors, which had the effect of preventing the respondent (State) from presenting its case to the tribunal. The respondent State also made one application in US Courts, in which it was successful, thereby compelling a third party for production of

documents. Thereafter the said documents were used as evidence to prove the allegation of fraud on part of the claimant during the arbitration proceedings in Sweden.

The background information of the case was that, the claimant invested some USD245m in the development and construction of a Liquefied Petroleum Gas Plant (“LPG”) in Kazakhstan (“**the State**”) under Energy Charter Treaty (“ECT”). The LPG plant was not completed. The State took control and declared the project as failed project due to delays and discontinuance of the works by the claimants. The claimants claimed for the damages but the State considered the plant of negative value, in its unfinished stage. However based on the facts and evidence presented before the arbitral tribunal, it was held that the project was not a failed project, and there were number of bidders willing to take over the plant which had also submitted commercial bids. The arbitral award was given in favour of the claimants. The question of fraud related to inflated costs projected by the claimant, and alleged siphoning of funds through a third party, was not known at the time of arbitration but was discovered later after the award was published.

The claimant had failed to disclose the documents relating to the third party involvement, despite directions from the tribunal. The State challenged the award on the grounds that, in absence of documentary evidence of actual costs incurred and due to fraudulent misrepresentation of the costs, the bidders had submitted higher bids, which were considered by the tribunal in reaching a decision on the quantum awarded. The bidder KMG a subsidiary of the State relied on the information available which was reflected in the indicative offer as, “US\$754 million on a debt free and cash free basis (the “**Enterprise Value**”), for expected completion of the Proposed Transaction in January 2009.” The State contended that this value was based on fraudulent evidence and taken into consideration by the tribunal therefore the award was also based on fraudulent evidence.

In this case, if there had been no discovery of fraudulent misrepresentation, the finality of the award would have been a forgone conclusion. By the time the State challenged the award, the claimant had already obtained enforcement orders in UK by application to the English Courts. This case in context of the complexities

surrounding the subject matter, the LPG Plant, the investor and the State, elaborates the lacuna in the arbitration forum, which prevented the finality, and evidently not the improper intention of the State in challenging the arbitral award. The significant observations are:

- (a) The claimants did not produce the documents requested by the respondent, despite the tribunal's Directions;
- (b) The tribunal apparently did not consider this non-compliance by the claimants to its directions seriously, when drafting the final award, which led to procedural errors as one of the grounds for the State to challenge the award;
- (c) The respondent State did not take further steps until after the award was published to compel the claimant to disclose the documents evidencing the source and costs of the alleged investments. The English High Court made a finding that given the complexity of transactions surrounding the LPG project, it was not possible for the State to have produced the evidence of alleged fraud despite its exercising due diligence;
- (d) The documentary evidence was finally produced by the claimants after the State with the assistance of US Courts, successfully subpoenaed a third party, allegedly involved in the fraudulent transactions;
- (e) The Court of Appeal of Sweden after considering the application of the State including newly obtained evidence of fraud dismissed the application to set aside the award. The reasons given for dismissing the application were:<sup>8</sup>
  - *Finally, with respect to [the State's] allegation that, in the arbitration proceedings, [the Claimants] withheld from [the Tribunal] and [the State] certain information which might have influenced the outcome in the case, the Court of Appeal notes that, in a procedure amenable to out-of-court settlement such as arbitration, it cannot be demanded that a party provide the opposing party with information*

*which speaks against the party's own case. There is no room to regard [the Award] as invalid on this ground, particularly not in light of the very narrow scope of application of the public policy rule.*

- *To summarise, the Court of Appeal finds that none of the circumstances argued by [the State] in this respect - neither separately nor together - are such that [the Award], or the manner in which it arose are manifestly incompatible with fundamental principles of Swedish law."*
- (f) The English High Court took a different view of the public policy, as compared to the Court of Appeal of Sweden and allowed the application of the State for full trial on the issue of fraud. In conclusion Justice Mr. Knowles CBE, held as follows:
 

*It will do nothing for the integrity of arbitration as a process or its supervision by the Courts, or the New York Convention, or for the enforcement of arbitration awards in various countries, if the fraud allegations in the present case are not examined at a trial and decided on their merits, including the question of the effect of the fraud where found. The interests of justice require that examination.*
- (g) The claimants while preparing for the trial in the English Courts on the issue of fraud, applied to discontinue the proceedings in England and gave an undertaking not to seek enforcement in future;
- (h) The respondent State objected to the discontinuance and applied to set aside the claimant's application for discontinuance so that the finality on the issue of fraud can be determined in the English Courts;
- (i) The judge allowed the application of the State and application for discontinuance was set aside;<sup>9</sup>
- (j) The claimants appealed to the English Court of Appeal against the decision of the judge to set aside the discontinuance; and
- (k) Interestingly enough the Court of Appeal, allowed the appeal to discontinue the trial of fraud in Courts of

<sup>8</sup> See *Anatolie Stati, Gabriel Stati, ASCOM Group S.A. Terra RAF Trans Trading Ltd v The Republic of Kazakhstan* [2017] EWHC 1348 (Comm), at [59] G.

<sup>9</sup> *Anatolie Stati, Gabriel Stati, ASCOM Group S.A. Terra RAF Trans Trading Ltd v The Republic of Kazakhstan* [2018] EWHC 1130 (Comm), dated 11 May 2018.

England. The reason being that the role of the English court was limited to the issue of enforcement only, under NYC and not to determine the validity of an award, which is the role of the supervisory court at the seat of the arbitration.<sup>10</sup>

This is a typical case which exposes the lacunas in the form of diversity in public policy and treatment of procedural errors for evidence production, in an international arbitration process, and consequences for the parties. On one hand, even though the tribunal's directions were not complied with, the tribunal chose to continue with the proceedings and published its award. On the other hand during the post-award stage, the issue of fraud and its impact on the arbitral award if any is dealt with differently under public policies of different jurisdictions. Article V(2)(b) of the New York Convention 1958 ("**NYC**"), leaves such diversities in the public policies of countries, to the respective jurisdictions called upon to decide the enforceability of an international award.

NYC Art V. (2)

Recognition and enforcement of an arbitral award may also be refused if the competent authority in *the country where recognition and enforcement is sought* finds that:

...

(b) The recognition or enforcement of the award would be contrary to the *public policy of that country*."

[Emphasis added]

Therefore finality of an arbitral award is subject to passing the test of public policy of that country where the enforcement of an award is sought. In the words of his Lordship David Richards LJ, "*Public policy is a matter for the courts of each country to decide for their own jurisdiction*." Art V of NYC is limited to only enforcement of an award and not to test the validity of an award whether procured fraudulently or was based on any non-disclosure of fraudulent evidence. It is not perceivable to assess how

many jurisdictions out of almost 160 Convention States, would subscribe to this narrow view of the Article V of NYC.

## II. Can there be Finality after Public Policy Test?

The answer to this question also is not the same across all Convention States. Coincidentally in the case of *Xstrata Coal v Dalmia Bharat Cement*,<sup>11</sup> the High Court of Delhi, India dismissed the application to set aside an award from an arbitration held in London under LCIA rules. The dispute related to the sale and purchase of coal shipments. Due to force majeure conditions, the respondent sought delayed delivery of a second shipment. The dispute arose due to price fluctuations and disagreement over the Lay-time period. The respondent appealed on the grounds that the award was not based on the material evidence but the tribunal decided on a completely new basis, which was not pleaded by either party, further the award was in excess of the claim submitted by Xstrata. Therefore the award should be set aside under s48(2)(b) of the *Indian Arbitration and Conciliation Act 1996*, as being against the public policy.

The honorable Justice Vibhu Bakhru explained in detail the meaning of public policy under Indian Law by elaborating that, "the expression 'fundamental Policy of Indian law' does not mean the provisions of Indian Statutes. The key words are Fundamental Policy; they connote the substratal principles on which Indian law is founded."<sup>12</sup> He added that, "Article V (2)(b) of the New York Convention of 1958 is similarly worded as section 48(2)(b) of the Act." The refusal of enforcement cannot be on the issues of finding of facts or exercising the jurisdiction of the tribunal under the laws of the seat and applicable law of the contract, even if these laws were different from the laws of India.

This case demonstrates that the finality of an arbitral award though delayed due to additional hurdles, could only be achieved by intervention of courts.

<sup>10</sup> See *Anatolie Stati, Gabriel Stati, ASCOM Group S.A. Terra RAF Trans Trading Ltd v The Republic of Kazakhstan* [2018] EWCA EWCA Civ 1896, dated 10 August 2018.

<sup>11</sup> See *Xstrata Coal Marketing AG v Dalmia Bharat (Cement) Ltd.*, EX.P. 334/2014 [2016] dated 7 Nov 2016.

<sup>12</sup> Ibid Note 11 at [46] to [47].

## A Case in Point for Choice of Arbitrator and Forum

One Full Circle of London Arbitration - HK Courts – English Courts - Arbitration – English Courts, to seek Finality for a Contract failed to Commence

In the case of *Dana Shipping v Sino Channel*, an arbitral award dated 3 February 2015 in a London arbitration, in which the respondent *Sino*, as the Charterer, did not participate; *Dana* as the Owner, successfully obtained enforcement orders on 16 November 2015 from the Hong Kong Courts, by an *ex parte* application. The respondent *Sino* commenced its defence process, after receiving the service of Enforcement Order (“EO”) of Hong Kong Courts. *Sino* made its first application on 26 November 2015 to set aside the EO to Hong Kong High Court, followed by application in January 2016 to the supervisory court of arbitration proceedings, the English Courts, for setting aside the award.<sup>13</sup>

The grounds for the applications to set aside EO at Hong Kong Courts and award at English Courts, was that the notice of arbitration and appointment of arbitrator, was not served on *Sino*, so *Sino* could not participate in the arbitration to present its case. The matter relates to a dispute under a Contract of Afreightments (“COA”), for the carriage of about 275,000 MT of iron ore from Venezuela to China, to be carried in five shipments from June to October 2013, but no shipments were made. The COA was to be managed by a third party *Beijing XCty Trading* (“BXC”) a company incorporated in Beijing, China. *Sino* was also not itself involved in the negotiation of the COA. The COA was negotiated through the respective brokers for *Dana* and *Sino*. The agreement between *Sino* and BXC was on a back-to-back basis in which *Sino* would get USD1/- per metric ton and BXC will retain the difference between buying and selling price of the Iron ore. BXC was managing all operations related to the COA. *Sino* did not deny that it became bound by the COA as the result of signing it.

Thereafter *Sino* was not involved in the material

communications between *Dana* and BXC. The dispute arose as no shipments were made due to some political instability in Venezuela and no payments were received by *Dana*, which resulted in the commencement of arbitration. *Dana* served notice of arbitration through brokers of BXC to an employee of BXC. The said employee of BXC was the sole point of contact for *Dana* during the negotiation and for a brief duration post-fixture. *Dana* did not serve any notice of arbitration before or during the arbitral proceedings directly to *Sino* at its registered office address in Hong Kong. There is also no evidence if the arbitrator sent any notices to *Sino*.

The sequence of applications to the Hong Kong High Court and outcomes as per the following, reflects the amount of time and expense which the parties would have incurred post arbitration:<sup>14</sup>

- (i) 16 November 2015: *Dana* applied to Hong Kong Courts ex-parte and successfully obtained EO for enforcement of an arbitral award dated 3 Feb 2015;
- (ii) 26 November 2015: *Sino* applied to Hong Kong High Court to set aside the EO;
- (iii) 8 January 2016: *Dana* applied to Hong Kong High Court for security as a condition for *Sino* to pursue its application to set aside;
- (iv) 14 March 2016: Hong Kong High Court allowed an adjournment of *Sino*’s application to set aside the EO on a condition to deposit 60% of the award amount as a security with the Hong Kong Court, as applied for by *Dana*;
- (v) 1 April 2016: *Sino* applied for extension of 21 days for payment under the Security Order (“SO”);
- (vi) 4 April 2016: *Sino* failed to make the security payment within the time limit of 21 days granted by the Hong Kong Court;
- (vii) 8 April 2016: *Dana* obtained Mareva Injunction against *Sino*;
- (viii) 28 April 2016: Hong Kong High Court granted a Stay

<sup>13</sup> See *Dana Shipping And Trading SA v Sino Channel Asia Ltd*, HCCT 47/2015.

<sup>14</sup> See various applications of the parties to Hong Kong Courts on the dates indicated and Civil Appeal No. 177 of 2016, On Appeal from HCCT No. 47 of 2015.



Order for the EO till 26 May 2016 and Sino to provide security as per SO;

- (ix) 24 May 2016: Sino based on its successful application to set aside the award in English Courts, applied to Hong Kong High Courts to set aside the EO, Mareva Injunction, SO, and withdrawal of proceedings by Dana including garnishee order and statutory demand;
- (x) 28 July 2016: The Hong Kong High Court granted all the applications of Sino and the award enforcement order as well as proceedings for related actions were set aside;
- (xi) 28 July 2016: Dana successfully secured from the Hong Kong High Court a second Mareva Injunction to support a fresh arbitration to be commenced;
- (xii) 27 August 2016: Dana appealed to the Hong Kong Court of Appeal against the judgment dated 28 July 2016 of the Hong Kong High Court;
- (xiii) 26 October 2016: Sino applied unsuccessfully for security for costs to the Hong Kong Court of Appeal for costs towards the appeal of Dana against the judgment of the Hong Kong High Court.

Now turning to the set of applications by the parties to the English Courts, the supervisory court for the initial arbitration proceedings, the following set of applications were made:<sup>15</sup>

- (i) 28 January 2016: Sino applied to English Courts for setting aside the award under s72(1)(b) or (c) of the 1996 *English Arbitration Act*;
- (ii) 20 May 2016: the English Court granted the application of Sino and the award was set aside on the grounds: "that the arbitral tribunal was not properly constituted, and that the Award was made without jurisdiction;"
- (iii) June 2016: Dana appealed to the English Court of Appeal against the judgment dated 20 May 2016 of the English High Court;

- (iv) 2 November 2017: English Court of Appeal allowed the appeal of Dana and set aside the earlier judgment of the High Court, thus restoring the arbitral award to be enforceable.

This case of *Dana Shipping v Sino Trading* raises an intriguing question. What happens next after about a dozen applications to the courts of Hong Kong and two applications in courts of England: Will the arbitral award be enforceable? Though the Court of Appeal of England & Wales, has reversed the decision of setting aside and allowed the award, its enforcement after being set aside in courts of Hong Kong will be a mere procedural matter or a moot. There is one serious and fundamentally obvious observation from this case. That is, if the arbitrator or the claimant had exercised due diligence at the time of commencement of the arbitration and served the notice at the proper and registered address of the respondent, perhaps the trail of events would not have been so complex. The second observation is that the parties have incurred more than four years of time spent in litigation and arbitration, incurred management costs and legal expenses, for a COA which was never commenced, yet uncertainty looms in the air for the finality of an arbitral award.

### Seeking Temporal Finality in Infrastructure Construction Contracts Related Disputes

Infrastructure construction projects are generally of longer durations ranging from 1 to 5 years or even much longer for development of townships, airports and highways. It is not uncommon to find that such projects are often plagued with delays and cost overruns, which leads to conflicts and disputes. The contracts and chain of subcontracts add flavors to the expertise of contracts managers. From tendering process to final completion of a contract, there could be a series of addendums, additional contracts, and expansion of scope or early terminations. In view of the exceptionally large number of insolvencies in the construction industry segments during the Asian Financial Crisis of 1997, a number of

<sup>15</sup> See *Sino Channel Asia Ltd v Dana Shipping And Trading Pte Ltd Singapore and Dana Shipping and Trading SA*, [2016] EWHC 1118 (Comm); *Sino Channel Asia Ltd v Dana Shipping & Trading PTE Singapore & Another*, [2017] EWCA Civ 1703.

countries enacted laws to protect progress payments of the contractors and members of the supply chain, so as to avoid delays in infrastructure projects, and inconveniences to the public at large, besides the derailment of economic growth. These laws were enacted as Protection of Payment Acts in countries like UK, Australia, New Zealand and Singapore and with more comprehensive definition of construction contracts in the *Statutory Adjudication Act* of Malaysia

The intended objectives were well thought of, to keep the cash-flow moving, which is the bloodline of the contracting industry, and disputes if any to be resolved finally at the end of a project. Thus if all goes well then there will be a finality of a project and resolution of all disputes under one forum. This ideal may still be a vision of emerging economies and could well be achievable in the not too distant future. However the prevailing

plethora of disputes in the construction industry segments is spreading at an alarming rate. Timely intervention by courts, with swift decisions and judgments to support the vision of the legislature, can steer the economies of these nations to stay on track. The jurisprudence from the construction case law will not only be beneficial, but also sets the guideline for the emerging economies, to harmonize their legislation, from the lessons learned in these countries, where adjudication and payment protection acts have been implemented.

The chronic disposition towards litigation can cause derailment of the benefits of adjudication to the industry. When an unpaid party commences adjudication, invariably the order of the adjudicator will be for the non-paying party to make payment, the quantum of which is determined by the adjudicator. The unsuccessful or non-paying party is then aggrieved by the fast and

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prompt payment orders of the adjudication. The next step generally leads to challenging the adjudicator's decision and apply to the courts, or in some cases administrative tribunal, to set aside adjudicator's decisions, or stay of enforcement orders. Once the matter is referred to a court, then it takes on its own life-cycle of appeal and counter appeals. The well-intended fast-track process for resolving payment disputes by invoking statutory provisions, adds a new minefield, ahead of the final dispute resolution process, either through arbitration or courts as per the dispute resolution clause in a contract. Adjudication is provisional in nature, but final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined. The desire of achieving finality is overpowered by the diversity of legal channels or procedural options open for a party.

In the case of *Grouteam Pte Ltd v UES Holdings Pte Ltd*, the challenge to the adjudicator's decision, was based on the simple question where the timeline for submission of the payment claims by the claimant, allegedly was not complied with so it should be set aside.<sup>16</sup> *Grouteam* was a Subcontractor of *UES* as the Main Contractor for carrying out pump house & substation relocation related works at Singapore Changi Airport under a Subcontract dated 30 August 2013. In April 2015 *Grouteam* invoked the statutory adjudication process by first submitting its payment claim followed by the notice of adjudication. The Adjudicator's Decision ("AD") was received the on 19 June 2015 in its favour. The process was swift and well within the objectives of the statutory provisions under Security of Payment Act, 2005 ("SOPA") of Singapore. However the respondent main-contractor successfully applied to the High Court and the AD was set aside around July 2016, on the grounds that the payment claim and notice of adjudication were served out of time and not in accordance with the subcontract and provisions of the SOPA. Thus a payment claim of April 2015 remained unpaid in accordance with the AD and by that time the events at the project site had moved on. *Grouteam* appealed against the judgment to the Court of Appeal. In October 2016 the Singapore Court of Appeal allowed the

appeal and the judgment of the High Court was set aside. The court process across two courts evidently was swift and efficient, but it gives no consolation to the unpaid party, after having gone through multiple stages of dispute resolution, for resolving a dispute of one progress payment claim. Even if the decision of the adjudicator is of temporary finality, the legal channels open to the parties can lead them astray from fast track dispute resolution forums, created by the well-intended legislature. The Court of Appeal in its concluding observations for enhancement of the Act, based on the *Grouteam v UES* case, among other observations, also noted at [70]:

Legislators may also consider introducing, as part of the measures to facilitate the speedy resolution of disputes under the Act and to reduce the costs associated with the system, a fast-track process where challenges to an adjudication determination, which only has temporary finality (see s 21 of the Act), may be speedily brought to court, and where *the decision of the judge is non-appealable* except with leave from either the High Court or the Court of Appeal.

[Emphasis added]

The temporary finality may well be a step in the direction of avoidance of future disputes, by restoring the confidence and trust between the parties, to continue performing their obligations under a contract. The parties may still have a forum for full and final resolution of all disputes at the end of a project, either through arbitration or courts. The parties still remain in control of their choices when exploiting the options under the laws. However adjudication being a temporal determination need not be the forum for unnecessary expenditure of time and costs on challenges to adjudication decisions in courts. To achieve this objective, adjudicators also have a statutory duty and obligation to the parties for rendering a correct decision within the boundaries of the payment claim and the law, thus leaving no grounds for a procedural challenge.

In another landmark case in Malaysia, the issue before the Court of Appeal was, whether the final claim under a

16 See *Grouteam Pte Ltd v UES Holdings Pte Ltd*, [2016] SGCA 59.



construction contract can be considered as a progress claim, and submitted to an adjudication forum under the *Construction Industry Payment And Adjudication Act 2012* of Malaysia ("**CIPAA**"), even if an adjudicator's decision is of temporal finality, instead of initiating the dispute resolution clause under the contract. In the case of *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* the Court of Appeal considered various case law authorities from Australia to Singapore and Malaysia in dismissing the appeal and affirmed by a conclusive judgment as follows:<sup>17</sup>

Finally, we also take judicial notice that final claim payments had been lodged by an unpaid party and not objected to by a non-paying party and adjudicated by adjudicators without any fanfare since the advent of CIPAA 2012. *The Court and legal practitioners must be careful in creating an issue when it is settled among the construction industry players that there is in fact no issue* as to whether CIPAA 2012 applies to final payment claims.

[Emphasis added]

The parties incur considerable time and resources in the execution of mega projects and design of complex structures. The resolution of issues and disputes cannot be as complex as executing construction contracts and fulfilling their obligations under infrastructure construction contracts. With careful planning and apt contract administration, dispute resolution process as can be planned with a clearly defined final outcome whether palatable or not, but it is good to be at a budgeted cost and time.

## Conclusion

In the context of the sample of cases briefly discussed in this article, it will be an inaccurate and incomplete exhortation if one promotes arbitration as a forum for speedy resolution, low cost, party autonomy, flexibility and finality to the satisfaction of the parties. In contrast all these benefits can be achieved only if disputing parties desire it to be so, and exercise party autonomy towards attaining these goals. Finality is in the hands of the sincere parties desiring final resolution.

The law, the courts and diversity of ADR forums from adjudication, mediation to arbitration are at the disposal of the business community, to support international trade and growth. The parties are at liberty to take advantage of such avenues diligently, to support their economic activities, and not exploit the law to test the depths and breadths of the law, and get drowned in the quagmire of the very law which was first enacted to keep them afloat. To conclude, the first starting point one can adopt is to draft the law and dispute resolution clause, with strategic business objectives and in context of the contract, rather than relying or keeping antique default clauses of printed forms. Furthermore while drafting a law and dispute resolution clause of a contract, beware of the risks of being carried away, just like in the referred case of *Guangzhou Dockyards Co, Ltd v E.N.E.* Secondly when appointing an arbitrator, adjudicator or a mediator, exercise due diligence in making an informed choice so as to procure an enforceable outcome, with finality of resolution of all disputes.

<sup>17</sup> See *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* In the Court of Appeal of Malaysia (Appellate Jurisdiction) Civil Appeal No. W-02(C) (A)-1496-08/2016, at [54].



# Updates on the Changing State of the Climate and International Arbitration



**Judith Levine and Camilla Pondel<sup>1</sup>**

Climate change-related disputes continue to heat up around the legal world. In Australia, reverberations were felt widely when the NSW Land and Environment Court blocked development of an open-cut coal mine in the Gloucester valley, partly on climate change grounds, dismissing the appeal of a developer against the Planning and Assessment Commission's refusal to grant consent for the development.<sup>2</sup> In a world first, a group of Torres Strait Islanders are bringing a complaint against the Australian government to the Human Rights Committee of the United Nations, alleging that consequences of the government's climate inaction are a violation of human rights.<sup>3</sup> Elsewhere, the progression of climate change-related litigation and arbitration demonstrates the breadth of legal issues and solutions surrounding efforts – or lack thereof – to curb environmental damage.

This article builds on a June 2016 ACICA Review [article](#) on the Paris Agreement and environmental disputes at the

Permanent Court Arbitration ("PCA"),<sup>4</sup> by highlighting developments since then in (1) climate science, (2) multilateral efforts by States, (3) climate litigation in national courts, and (4) arbitration cases and initiatives related to climate change.

## 1. Update on the State of the Climate

Scientific evidence has continued to reinforce the severity of climate change and the urgency of action. For example:

- In October 2018, the Intergovernmental Panel on Climate Change released its Special Report on Global Warming, reporting that global warming of 1.5°C or higher from pre-industrial levels will have severe negative impacts on the global environment – temperature extremes, disruption in precipitation cycles, ecosystem degradation, food and water insecurity – and by extension on human health, habitat and security.<sup>5</sup>
- In 2018 Australia recorded a national mean temperature 1.14°C above average, with increased frequency and intensity of heat events, fire weather and drought. Ocean temperatures around Australia are increasing and oceans are acidifying. Projections indicate that temperatures will further increase, as will heat and fire events; marine heat waves are expected to intensify, causing more severe bleaching of the Great Barrier Reef; extreme precipitation and storm

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<sup>2</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7. See also Peter Briggs and Tom Dougherty, "Climate Change Impacts Used To Reject New NSW Coal Mine" (15 February 2019) Herbert Smith Freehills <[www.herbertsmithfreehills.com/latest-thinking/climate-change-impacts-used-to-reject-new-nsw-coal-mine](http://www.herbertsmithfreehills.com/latest-thinking/climate-change-impacts-used-to-reject-new-nsw-coal-mine)>.

<sup>3</sup> Client Earth, *Climate Threatened Torres Strait Islanders Bring Human Rights Claim Against Australia* (12 May 2019) <<https://www.clientearth.org/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/>>; GBK, *Our Islands, Our Home, Torres Strait Climate Justice Case* <<http://ourislandsourhome.com.au/#about>>; Katherine Murphy, *Torres Strait Islanders Take Climate Change Complaint to the United Nations* (13 May 2019) The Guardian <<https://www.theguardian.com/australia-news/2019/may/13/torres-strait-islanders-take-climate-change-complaint-to-the-united-nations>>.

<sup>4</sup> Judith Levine, 'Climate Change Disputes: The PCA, the Paris Agreement and Prospects for Future Arbitrations' (2016) 4(1) *ACICA Review* 35.

<sup>5</sup> Intergovernmental Panel on Climate Change, *Global Warming Of 1.5°C, An IPCC Special Report On The Impacts Of Global Warming Of 1.5°C Above Pre-Industrial Levels And Related Global Greenhouse Gas Emission Pathways, In The Context Of Strengthening The Global Response To The Threat Of Climate Change, Sustainable Development, And Efforts To Eradicate Poverty* (2018) <[www.ipcc.ch/sr15/](http://www.ipcc.ch/sr15/)>.

events are expected to occur more frequently.<sup>6</sup>

- The World Meteorological Organization released its State of the Global Climate Report in March 2019, which found that 2015-2018 were the warmest four years on record. The Report notes record highs in sea levels and greenhouse gas concentrations, reporting that climate change is making extreme weather events more frequent and severe.<sup>7</sup> The UN Secretary-General described this as “yet another wake-up call for ambitious and urgent climate action.”<sup>8</sup>

## 2. Update on the UNFCCC and the “Paris Rulebook”

The 24th Conference of the Parties to the United Nations Framework Convention on Climate Change (“**UNFCCC**”) (“**COP24**”) was held in Katowice, Poland, from 2 to 15 December 2018. State leaders and representatives partaking in official negotiations were amongst approximately 30,000 delegates in attendance. The key feature of COP24 was the negotiation of the Paris Agreement Work Programme, informally known as the “**Paris Rulebook**”, which sets the rules for implementation of the principles agreed to in the Paris Agreement at COP21 in 2015.

The themes of transparency and appropriate differentiation between standards for developed and developing countries were evident in the Rulebook’s negotiations and outcomes. Areas on which rules were agreed include nationally determined contributions, adaptation, climate finance, technology transfer, climate education and public awareness, transparency frameworks and disclosure, and the global stocktake process.<sup>9</sup>

Article 15 of the Paris Agreement establishes a committee to facilitate implementation and compliance, “that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive”. The Paris Rulebook now outlines the “modalities and procedures” of this committee, which will consist of 12 elected members “with recognized competence in relevant scientific, technical, socioeconomic or legal fields”. The committee is empowered to request written submissions on compliance from States, take steps to verify the content of those submissions and engage in consultations. The committee will identify “appropriate measures, findings or recommendations” to remedy non-compliance, which may include: engaging in dialogue; assisting a party engage with finance, technology or capacity-building bodies; making recommendations about challenges and solutions to compliance; recommending and assisting with the development of an action plan; and issuing findings of fact. The committee will develop its own rules of procedure, which will be recommended for consideration and adoption at COP25 in 2020.<sup>10</sup>

Several matters were earmarked for further discussion at COP25 in Santiago later this year, including article 6 regarding States’ voluntary cooperation in mitigation and adaptation. Importantly, article 6 gives rise to carbon market mechanisms, as to which related projects have been the subject of contract-based cross border disputes.<sup>11</sup>

No rules were made on article 24 of the Paris Agreement, which is the provision for resolution of disputes concerning interpretation and application of the treaty, including conciliation and an opt-in recourse to arbitration. Article 24 of the Paris Agreement incorporates

6 See generally CSIRO and Bureau of Meteorology, *State of the Climate 2018* (Australian Government, 2019); Bureau of Meteorology, *Annual Climate Statement 2018* (10 January 2019) <<http://www.bom.gov.au/climate/current/annual/aus/>>.

7 World Meteorological Organisation, *WMO Statement on the State of the Global Climate in 2018* (WMO-No. 1233, 2019) <[https://library.wmo.int/doc\\_num.php?explnum\\_id=5789](https://library.wmo.int/doc_num.php?explnum_id=5789)>.

8 World Meteorological Organisation, “WMO State of Climate Report is “Yet Another Strong Wake-Up Call” (29 March 2019).

9 For a full list of Paris Rulebook rules adopted, see *Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018*, UN Doc FCCC/PA/CMA/2018/3/Add.2, (19 March 2019).

10 Ibid 59-64.

11 See J. Levine and N. Peart, “Procedural Issues and innovations in environment-related investor-state disputes”, Ch. 9 in K. Miles (ed). *Research Handbook on Environment and Investment Law* (2019).

provisions of the UNFCCC that envisage an arbitration annex, which has not yet been drafted but is eagerly anticipated by some arbitration practitioners and public international lawyers.<sup>12</sup> Among the official side-events at COP24, there was a panel at the Business and Industry Day co-hosted by the International Chamber of Commerce (“ICC”), PCA, International Bar Association and Stockholm Chamber of Commerce on use of international arbitration for promoting and protecting investments under the Paris Agreement,<sup>13</sup> and several sessions on developments in climate litigation.

### 3. Update on Climate Litigation

In multiple jurisdictions around the world, legal actions have been commenced in domestic courts against States for their alleged failure to protect the environment, including:

- The *Urgenda* case, in which 886 Dutch citizens have been successful (at first instance and on appeal) in obtaining orders that the Dutch government must lower its greenhouse gas emissions.<sup>14</sup>
- The *People’s Climate Case* before the European Court of Justice, where a group of families is seeking annulment of EU greenhouse gas emission legislation on the grounds that it fails to adequately prevent climate change and falls short of its Paris Agreement obligations.<sup>15</sup>
- The “Swiss Grannies Case” (*Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council*),

in which a group of Swiss women over 75 years argued that the government’s climate change targets were inadequate and in breach of the Swiss Constitution and European Convention on Human Rights. The case was dismissed on the grounds that women over 75 years were not affected by climate measures differently to the general public, a decision which is being appealed.<sup>16</sup>

- *Juliana v. United States of America*, in which a group of American youths claim that the government’s failure to act to prevent climate change violates the U.S. Constitution and that they are a vulnerable group more susceptible to the effects of climate change. The group asks the court to prevent the State from causing further violations and order it to take positive action against climate change.<sup>17</sup> This is one of over a thousand climate change-related court cases in the U.S.A., which are being tracked by a project of the Sabin Center at Columbia University.<sup>18</sup>

While the above cases focus on actions by States, other test cases have been taken against companies:

- *Lliuya v RWE*, a case heard in Germany, where a Peruvian farmer is seeking damages against a German electricity provider for its contribution to climate change and the resultant melting of a Peruvian glacier.<sup>19</sup>
- The *National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People and the Responsibility Therefor, if any, of the “Carbon Majors”*,

12 For a detailed discussion of the Paris Agreement’s dispute resolution clause, see Levine, above n 3, 37-8; Ristead de Paor, ‘Climate Change and Arbitration: Annex Time Before There Won’t be a Next Time’ (2017) 8(1) *Journal of International Dispute Settlement* 179.

13 PCA, ‘PCA Participation in UN Climate Change Conference COP 24 and Side Event on Promoting and Protecting Climate Change Investment’ (Press Release, 10 December 2018).

14 *The State Of The Netherlands v Urgenda Foundation*, The Hague Court of Appeal, Case No. 200.178.245 / 01; Urgenda, *Latest Developments The Urgenda Climate Case Against The Dutch Government* <<https://www.urgenda.nl/en/themas/climate-case/>>. The case is subject to one more stage of appeal, however, the Dutch government has committed to implement the ruling notwithstanding the outcome of appeals: Government of the Netherlands, ‘Cabinet Begins Implementation of Urgenda Ruling But Will File Appeal’ (News Item, 1 September 2015); Government of the Netherlands, ‘State to Bring Cassation Proceedings in Urgenda Case’ (News Item, 16 November 2018).

15 *Information and Notices*, [2018] OJ C 61/E 34; *Carvalho and Others v Parliament and Council*, (T-330/18) [2018].

16 Bundesverwaltungsgericht, ‘Climate Seniors Association Defeated in Court’ (Press Release, 7 December 2018).

17 Juliana et al, ‘Complaint For Declaratory And Injunctive Relief’, submission in *Juliana et al. v United States of America*, 6:15-cv-1517, 8 December 2015. See also Silke Goldberg and Ben Rubinstein, *Juliana V. United States*, No. 6:15-Cv-01517-Aa (D. Or.) (18 October 2018) Herbert Smith Freehills <[www.herbertsmithfreehills.com/latest-thinking/juliana-v-united-states-no-615-cv-01517-aa-d-or](http://www.herbertsmithfreehills.com/latest-thinking/juliana-v-united-states-no-615-cv-01517-aa-d-or)>.

18 Sabin Center for Climate Change Law, *Climate Change Litigation Databases* <<http://climatecasechart.com/>>.

19 Grantham Research Institute on Climate Change and the Environment, *Lliuya v RWE Germany* <<http://www.lse.ac.uk/GranthamInstitute/litigation/liuya-v-rwe/>>.

which examines the causal link between the activities of 47 major oil companies and climate change following a petition submitted by Greenpeace to the Philippines Commission on Human Rights in 2015. The Inquiry has held six rounds of public hearings to date.<sup>20</sup>

- Three recent U.S. cases where judges have ordered the halt of oil drilling: the first found that leases granted over land in Wyoming, Utah and Colorado did not adequately consider reasonably foreseeable downstream greenhouse gas emissions;<sup>21</sup> the second found that an order revoking a ban on offshore oil and gas drilling in the Arctic and Atlantic was illegal;<sup>22</sup> and the third found that the approval of two drilling plans in Colorado did not adequately consider the plans' impact on wildlife and climate.<sup>23</sup>
- *New York v Exxon Mobil Corporation*, in which the State of New York has alleged that Exxon deceived investors about its "management of the risks posed to its business by climate change" and "create[d] the illusion that it had fully considered the risks of future climate change regulation and had factored those risks into its business operations".<sup>24</sup>

The extent to which courts from across the world in the above-listed actions tend to cite each other is notable –

several of the above were cited by Justice Preston in the *Gloucester* case. Significantly these courts have consistently engaged with and accepted the science behind climate change.<sup>25</sup>

#### 4. Update on Climate Change and Arbitration

Environmental cases continue to constitute a significant percentage of the PCA's caseload, which comprises inter-State, investor-State and contractual arbitrations.<sup>26</sup> Of the 166 disputes pending as of May 2019, over 40 relate to energy generally, and around 20 have issues of environmental impact or specifically relate to climate change related projects. Renewable energy investments in wind and solar have given rise to a number of investor claims against States, under bilateral and multilateral investment agreements, especially where there have been changes to the regulatory framework and incentive schemes in those industries.<sup>27</sup> Outside the PCA, there have also been examples of investors in fossil fuel-based projects taking actions against governments that have taken measures to reduce reliance on carbon-heavy investments.<sup>28</sup>

Inter-State disputes under the United Nations Convention on the Law of the Sea ("**UNCLOS**") frequently raise issues of sustainable development.<sup>29</sup> In the PCA-administered

20 Greenpeace Philippines, *The Climate Change and Human Rights Petition* (28 July 2016) Greenpeace <<http://www.greenpeace.org/seasia/ph/press/releases/Worlds-largest-carbon-producers-ordered-to-respond-to-allegations-of-human-rights-abuses-from-climate-change/The-Climate-Change-and-Human-Rights-Petition/>>.

21 *WildEarth Guardians et al v Zinke et al*, 2019 WL 127318 F Supp d.

22 *League of Conservation Voters et al v Donald J Trump et al*, 363 F Supp 3d 1013 (D Alaska, 2019).

23 *Citizens for a Healthy Community et al v United States Bureau of Land Management et al*, 2019 WL 1382785 F Supp 3d.

24 People of the State of New York, 'Complaint' in *People of the State of New York v Exxon Mobil Corporation*, index no. 452044/2018, 1, 6.

25 Michael B. Gerrard, 'Scale and Focus of Climate Litigation Outside of United States' 253(47) *New York Law Journal*

26 Permanent Court of Arbitration, *Environmental Dispute Resolution* <<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/>>.

27 See, eg, *Natland Investment Group NV et al v Czech Republic*, PCA Case No. 2013-35; *Antaris Solar GmbH (Germany) and Dr. Michael Göde (Germany) v The Czech Republic*, PCA Case No. 2014-01. At the time of writing, ICSID has 42 pending cases on the subject of 'renewable energy generation enterprise': ICSID, *Advanced Search* <<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>>. The future of some of these arbitrations, involving both a European investor and European Respondent state, has become somewhat muddled as a result of the ruling in the *Achmea* case. For reports of recent awards against Spain, see Tom Jones, "Spain faces more payouts over solar reforms" (GAR, 3 June 2019).

28 See *TransCanada Corporation and TransCanada Pipeline Limited v United States of America*, ICSID Case No. ARB/16/21; Ethan Lou, *TransCanada's \$15 billion U.S. Keystone XL NAFTA suit suspended* (1 March 2017) <[www.reuters.com/article/us-canada-pipeline-lawsuit/transcanadas-15-billion-u-s-keystone-xl-nafta-suit-suspended-idUSKBN1671W1](http://www.reuters.com/article/us-canada-pipeline-lawsuit/transcanadas-15-billion-u-s-keystone-xl-nafta-suit-suspended-idUSKBN1671W1)>; Prairie Mining Limited, *Statement Regarding Dispute with the Polish Government* (13 February 2019) <[www.pdz.com.au/asx-announcements/statement-regarding-dispute-with-the-polish-government](http://www.pdz.com.au/asx-announcements/statement-regarding-dispute-with-the-polish-government)>; *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21; Freshfields Bruckhaus Deringer, 'International Arbitration: Looking Ahead to the Top Trends of 2019' 17.

29 Levine, above n 3, 37.





J. Levine (PCA), I. Millar (Baker McKenzie), W. Miles (Debevoise Plimpton), N. Peart, L. Sanchez & A. Keane (Stockholm Treaty Prize winners) speaking on international arbitration and climate change investment at the COP24 Business and Industry Day organized by the IBA/ICC/PCA/SCC

*South China Sea* arbitration, the tribunal undertook a detailed analysis of the obligation to protect and preserve the marine environment under Part XII of UNCLOS.<sup>30</sup> Some NGOs and commentators have observed that the Tribunal's analysis of the environmental obligations under UNCLOS could pave the way for a State drastically affected by climate change to bring an action against polluting States.<sup>31</sup> The pending *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* also raises issues of marine conservation, with Ukraine alleging that the Russian Federation has violated "its duty to cooperate with Ukraine to address pollution at sea".<sup>32</sup>

The transition to a green economy, and the trillions of dollars of investment that must flow from commitments under the Paris Agreement,<sup>33</sup> will lead to a plethora of cross-border commercial relationships. For disputes that will inevitably arise out of those relationships, international arbitration is important in offering a robust, neutral and flexible mechanism.<sup>34</sup> Nine cases at the PCA have been contract-based disputes relating to Clean Development Mechanism projects under the UNFCCC and the Kyoto Protocol, including six under the PCA's optional environmental rules.<sup>35</sup>

Reflecting the increasing prevalence of climate change-

30 *South China Sea Arbitration (Philippines v. China)* (Award, PCA Case No. 2013-19, 12 July 2016) 319-97.

31 Alan Boyle, 'Litigating Climate Change Under Part XII of UNCLOS' (forthcoming in *International Journal of Marine and Coastal Law*); Freedom-Kai Phillips & Silvia Maciunas, 'How a Fight Over South China Islands Led to Climate Win' (12 July 2017), <<https://www.cigionline.org/articles/how-fight-over-south-china-islands-led-climate-win>>.

32 PCA, 'Tribunal to Hear Preliminary Objections Raised by Russian Federation in Preliminary Phase' (Press Release, 31 August 2018) 1.

33 See OECD's estimates at <<http://www.oecd.org/environment/cc/climate-futures/policy-highlights-financing-climate-futures.pdf>>.

34 For examples of use of arbitration in instruments relating to climate finance, see J. Levine, ADB/UNCITRAL Conference on Dawn of International Arbitration in the South Pacific, February 2018, <<https://k-learn.adb.org/system/files/materials/2018/02/201802-climate-change-rising-sea-disputes.pdf>>.

35 *PCA Optional Rules For Arbitration of Disputes Relating to Natural Resources and / or the Environment* <[https://pca-cpa.org/wp-content/uploads/sites/6/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and\\_or-Natural-Resources.pdf](https://pca-cpa.org/wp-content/uploads/sites/6/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf)>.

related disputes, and calls from the international legal profession for arbitral institutions to consider specialised rules like those adopted by the PCA,<sup>36</sup> the ICC has established a Task Force on Arbitration of Climate Change Related Disputes. The Task Force's purpose is first to assess the current use of arbitration and other dispute resolution of climate change, energy and environmental disputes, and second to identify any specific features required for the resolution of such disputes. The ICC Commission formally approved the mandate of the Task Force at its session in Paris in April 2019.<sup>37</sup>

## Conclusion

The focus on climate change has continued to intensify globally. It has led to worldwide activism among school children<sup>38</sup> and has been identified by Australian CEOs as "the biggest issue they want the Federal Government to tackle over the long term".<sup>39</sup> And as seen above, it has become a burgeoning area of legal practice.

This is complex legal landscape where lawyers have shown creativity and innovation in adapting a wide

variety of causes of action nationally, regionally and internationally. Whilst the dispute resolution architecture continues to evolve, it is clear that international arbitration holds a firm place in the mix of avenues available to the aggrieved, strengthened in recent years by practitioner and institutional upskilling and experience in this formerly niche area.<sup>40</sup>

36 See, eg, IBA, *Achieving Justice and Human Rights in an Era of Climate Disruption* (July 2014) 13.

37 Other institutions, have also taken initiatives with respect to climate change, see, e.g.: <<http://stockholmtreatylab.org/>>.

38 Jessica Glenza et al, *Climate Strikes Held Around The World – As It Happened* (21 March 2019) The Guardian <[www.theguardian.com/environment/live/2019/mar/15/climate-strikes-2019-live-latest-climate-change-global-warming](http://www.theguardian.com/environment/live/2019/mar/15/climate-strikes-2019-live-latest-climate-change-global-warming)>.

39 Chris Pash, *Climate change has Australia's company directors worried* (25 October 2018) Business Insider <[www.businessinsider.com.au/company-directors-climate-change-australia-2018-10](http://www.businessinsider.com.au/company-directors-climate-change-australia-2018-10)>.

40 See, e.g., Mark Clarke et al, 'Climate Change Litigation: A New Class of Action' (Insight, White & Case, 13 November 2018); Mark Baker et al, 'Acclimatising to Climate Change' (GAR, 19 November 2018); Freshfields Bruckhaus Deringer, 'International Arbitration: Looking Ahead to the Top Trends of 2019' 17; Herbert Smith Freehills, *Climate Change: The Transition to a Lower Carbon Future* <<https://www.herbertsmithfreehills.com/our-expertise/services/climate-change>>.



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# The 'Bones' arbitration: An American cautionary-tale for Australian practitioners



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Not all that glitters is gold in Hollywood, particularly when the arbitrators get involved.

This time last year, we explored how and why proceedings brought by the producer and director of *Mad Max: Fury Road* against Warner Bros Feature Productions Pty Ltd were stayed by the New South Wales Court of Appeal and referred to arbitration in Los Angeles.

This year, we look at why Fox found itself the subject of inflamed criticism from a JAMS Arbitrator (the Hon. Peter D Lichtman), who ruled that Fox must pay \$178.7 million to former producers and stars of the popular crime television series 'Bones'. The Arbitrator's ruling became public after the award creditors filed a petition to confirm the award in the Superior Court of California of the County of Los Angeles (**LA Superior Court**). The skeletons in Fox's closet were thus thrust into the spotlight, taking arbitration fans behind-the-scenes into the world of arbitration in the entertainment industry.

## Fox's grave mistakes

Screening from 2005 – 2017, 'Bones' was based on a series of best-selling fiction novels by Kathleen Reichs. The show was directed and produced by Barry Josephson, starring Emily Deschanel and David Boreanaz in the lead roles.

Ms Reichs, Mr Josephson, Ms Deschanel and Mr Boreanaz (together, **the Respondents**) had individual agreements with a Fox subsidiary, Twentieth Century Fox Film Corporation (**Studio**). Each agreement contained a term guaranteeing that:

'Fox's transactions with Affiliated Companies will be on monetary terms comparable to the terms of which the Affiliated Company enters into similar transactions with unrelated third-party distributors for comparable programs.'<sup>1</sup>

<sup>1</sup> Amended Final Award, JAMS Arbitration Case Reference No. 1220052735, 4 February 2019 (**Award**).

As contemplated by the clause, the Studio licensed seasons 5 and 6 of *Bones* to its affiliate broadcasting company, Fox Broadcasting Company (**Network**), for \$2 million per episode. This licence fee was far less than might be expected for a show of *Bones*' popularity, because the Network refused to pay its subsidiary a full cost-of-production licence fee. In the Arbitrator's view, due to commands from upper management, the Studio willingly accepted the lesser licence fee from the Network, to the detriment of the show's talent (being, the Respondents).

Eventually, the aggrieved talent caught wind of the suspicious dealings behind *Bones*' licencing arrangements. They initiated court proceedings claiming that the Studio not only breached the affiliate transaction protection clause, but never attempted to comply with it at all. They further alleged that this dealing, compounded by many additional instances of misconduct by the Network, gave rise to claims against the Network for breach of contract, fraud, tort (including intentional interference with contract, self-dealing and inducement of breach of contract).

Seeking dispute resolution in respect of these claims in arbitration rather than litigation, the Network filed a Demand for Arbitration with the JAMS arbitration body in Los Angeles (which is how the Network and others became the Claimants in the arbitration and the aggrieved talent became the Respondents). The proceedings occurred over two and a half years culminating in a 66-page ruling awarding the Respondents almost US \$179 million in damages (being approximately \$33 million in contractual damages and \$129 million in punitive damages, \$10 million in interest and \$7 million in legal fees). Although the Arbitrator's ruling sets out each claim in detail, this article will focus primarily on the Arbitrator's consideration of the issues of arbitrability and assessment of damages.

### Arbitrability found to be a dead-end argument

The Arbitrator did little to conceal his dismay at the Network's contention that '*certain critical issues presented and argued by the Respondents were not arbitrable and as such, outside the purview and authority of the arbitrator and the matters before him*'. The Arbitrator's frustration stemmed from the fact that the Network put forward its arbitrability arguments for the first time in the 'final hour of closing arguments', after more than four weeks of hearings.<sup>2</sup>

In any case, the Arbitrator considered the Network's submissions, contending that the following two claims raised by the Respondents were not arbitrable:

- (a) the 'Hulu ownership claim', which was part of the Respondents' claim that the Network licenced in-season streaming rights for *Bones* to its affiliate Hulu on artificial monetary terms in violation of self-dealing provisions contained in the Respondents' agreements; and
- (b) the 'reasonable and non-discriminatory claim', which concerned whether the Studio breached its obligation to distribute *Bones* 'on a reasonable and non-discriminatory basis'.

Both claims were characterised as 'Self-Dealing Claims', being 'claims related to the allegations that the Studio entered into transactions with affiliates on terms that were not comparable to the terms on which the affiliated entity entered into similar transactions with unrelated third parties'.<sup>3</sup>

The Arbitrator required the Network's jurisdictional arguments to overcome three barriers, being judicial estoppel, acceptance and waiver. As to the first barrier of judicial estoppel, his Honour noted that under California law, 'parties may expressly agree to arbitrate: (1) in a contract signed before a dispute arises...; or (2) in a binding stipulation to arbitrate entered into after a dispute has arisen'.<sup>4</sup> The present case was not contentious in this respect, as the parties had signed both a contract and a binding stipulation expressly agreeing to arbitrate.

<sup>2</sup> Ibid at 3.

<sup>3</sup> Ibid at 6.

<sup>4</sup> *Douglass v Serenivision, Inc.*, 20 Cal. App. 5th 376, 378 (2018).



In further confirmation of these two arbitration agreements, the Network submitted a Statement of Claim to JAMS, stating:

'All of the claims raised in [the Respondents] Complaints, however, are subject to the parties' agreements to arbitrate. Indeed, binding and applicable arbitration provisions are found in the very Agreements that the Respondents claim they want enforced'.<sup>5</sup>

The Network then moved to compel arbitration of the Respondents' claims in the LA Superior Court and in April 2016, Judge Rico issued an Order granting the Network's motion to compel and staying the non-arbitrable claims. His Honour also held that the Self-Dealing Claims were subject to arbitration. Given that the Network had obtained the relief it sought in the LA Superior Court, the Arbitrator determined that the doctrine of judicial estoppel prevented the Network from back flipping and asserting an inconsistent position in the present arbitral proceedings.<sup>6</sup>

As to the second issue, the Arbitrator conducted an 'Arbitrator Management Conference' 18 days after Judge Rico issued the Order, during which the Arbitrator ordered the parties to reach a formal stipulation as to each claim that would be subject to arbitration.<sup>7</sup> Accordingly, the parties agreed on a 'Stipulation Regarding Claims in Arbitration',<sup>8</sup> stating that: 'The Self-Dealing and 2009 Release Claims are arbitrable; the Contingent Compensation and Failure to Permit Audit Claims are not'.<sup>9</sup>

Pointing out that Judge Rico's Order set the scope of the arbitration and could not be challenged, the Network argued that the Order circumscribed the arbitral proceedings and nullified the Stipulation agreed to by the parties subsequent to the Order. However, the Arbitrator disagreed, confirming that the Stipulation was not voided by virtue of the Order, rather it served to

confirm the parties' understanding of the Order's terms. He went on to say that the two claims were clearly within the scope of the arbitration, as they related to the Self-Dealing Claims which the parties explicitly agreed to arbitrate, in both a signed agreement before a dispute arose and in a binding stipulation to arbitrate entered into after the dispute arose.<sup>10</sup>

As to the third barrier, JAMS Rule 11 provides that 'jurisdictional and arbitrability disputes... shall be submitted to and ruled on by the Arbitrator'. Further, JAMS Rule 9(f) stipulates that:

'[j]urisdictional challenges under Rule 11 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability.'

As a comparison, this rule serves a similar purpose to Rule 28.3 of the ACICA Rules, providing that:

'A plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Statement of Defence referred to in Article 26, or, with respect to a counterclaim, in the reply to the counterclaim.'

The words '*or promptly thereafter*' of JAMS Rule 11 provides arbitrators with more discretion than ACICA arbitrators to receive jurisdictional challenges after the defence or reply to counterclaim is submitted. Considering this difference, it is interesting to note that the Arbitrator still took a strict approach and rejected the Network's claim definitively on the basis that it was well outside the time frame within with a jurisdictional challenge could be brought under the JAMS Rules. To this end, his Honour pointed out that the Network willingly participated in the arbitration over the past two and a half years without challenging the arbitrator's jurisdiction. The Network initiated the arbitration in the first place, in

5 Award at 5.

6 Ibid at 5.

7 Ibid at 6.

8 Ibid at 6.

9 Ibid 6.

10 Ibid at 7.

addition to participating in discovery and engaging in a month-long arbitration hearing. The Network was therefore deemed to have waived its right to challenge the Arbitrator's jurisdiction.<sup>11</sup>

Thwarted but not discouraged, the Network then sought to rely on a principle raised in the case of *Ficek v S. Pac. Co.*<sup>12</sup> (**Ficek**), submitting that waiver can only apply if a party waits until *after the arbitrator's decision* to raise an objection. Unsurprisingly, the arbitrator rejected this 'last-minute' argument on the basis that the United States Court of Appeals for the Ninth Circuit had actually interpreted the principles in *Ficek* to be equally applicable to objections raised before the arbitrator's decision, reasoning that 'it would be unreasonable and unjust to allow [the defendant] to challenge the legitimacy of the arbitration process, in which he had voluntarily participated over a period of several months.'<sup>13</sup>

Ultimately, the arbitrator rejected all of the Network's submissions challenging the arbitrator's jurisdiction, bluntly describing them as 'frivolous' and 'a transparent attempt to derail this Arbitration before the final award is issued.'<sup>14</sup>

### Punitive damages - the Respondents' weapon of choice

Ultimately, the Arbitrator found that the Network did indeed breach its various agreements with the Respondents, as well as fraud and tortious interference with contract.

An interesting issue to which the Arbitrator gave lengthy consideration was whether, and to what extent, punitive damages should be awarded. As a preliminary point, the Arbitrator confirmed the general jurisdiction of arbitrators

to award punitive damages.<sup>15</sup> This reflects the position in Australia that punitive damages (often called exemplary damages) are available to arbitrators in exceptional circumstances where they feel that such damages are necessary to punish and deter the defendant, above and beyond merely compensating the aggrieved party.<sup>16</sup>

His Honour also confirmed the causes of action to which punitive damages attached, explaining that punitive damages are available for tortious interference with contract and inducement of breach of contract.<sup>17</sup> In this respect, the Arbitrator was satisfied that the same evidence establishing the Network's tortious interference with, and inducement of breach of, the Respondents' agreements with the Studio also supported an award of punitive damages.<sup>18</sup>

In addition, the Arbitrator agreed with the Respondents that punitive damages ought to be awarded against the Network for other tortious conduct committed in the context of the Bones licensing agreements, including the Studio's and the Network's 'fraudulent, oppressive and malicious acts' in inducing Josephson's and Reich's signatures on a release purporting to extinguish their rights to challenge the licence fees.<sup>19</sup>

Having made these preliminary points, the Arbitrator outlined three criteria for an award of punitive damages:

- (a) the reprehensibility of the defendant's conduct;
- (b) the reasonableness of the relationship between the award and the plaintiff's harms; and
- (c) in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct.<sup>20</sup>

The Arbitrator also emphasised that there is 'no legally

<sup>11</sup> Ibid at 8 and 9.

<sup>12</sup> 338 F.2d 665, 657 (9th Cir. 1964).

<sup>13</sup> *Fortune, Alsweet & Eldridge, Inc. v Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983).

<sup>14</sup> Award at 9.

<sup>15</sup> Ibid at 53; *Mastrobuono v Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995).

<sup>16</sup> See for example, discussion in Duncan Miller, 'Public Policy in International Commercial Arbitrations in Australia' (1993) 28 *Australian Construction Law Newsletter* 5.

<sup>17</sup> *Duff v Engelberg*, 237 Cal. App. 2d 505, 508 (1965).

<sup>18</sup> Award at 54; *Webber v Inland Empire Invs.*, 74 Cal. App. 4th 884, 911-12 (1999).

<sup>19</sup> Ibid at 54.

<sup>20</sup> *Kelly v Haag*, 145 Cal. App. 4th 910, 914 (2006).

prescribed formula;<sup>21</sup> but instead a 'wide range of reasonableness for punitive damages reflective of the fact finder's human response to the evidence presented.'<sup>22</sup>

In accordance with the principles set out above, the Arbitrator considered a number of factors in determining the reprehensibility of the Network's conduct.<sup>23</sup> At first glance, the Arbitrator's views in relation to the reprehensibility of the Network's conduct were obvious, due to the remarkably emphatic language used in the award, for example: 'the Arbitrator finds Fox's position... to be patently absurd' and 'merely describing the testimony as false is far too generous. The Arbitrator is convinced that perjury was committed by the Network witnesses. Accordingly, if perjury is not reprehensible then reprehensibility has taken on a new meaning.'<sup>24</sup>

Beyond this colourful language, the Arbitrator considered the facts in more detail, finding first that the Respondents were financially vulnerable in the sense that they depended upon the Network and Studio for their careers and livelihoods. This vulnerability was said to be exploited by the Network in its position of relative financial power.<sup>25</sup> Second, the Network repeated its tortious conduct from 2005 to approximately 2009, which involved the disingenuous motive of maximising profits and minimizing participant leakage. Given the gravity and repetitiveness of these torts, the Arbitrator was dismayed by the 'cavalier attitude' of the Network and its witnesses, who took no responsibility or expressed any remorse.<sup>26</sup> Third, the Arbitrator took into account that the Respondents' harm was the result of the Network's intentional acts of fraud and malice in connection with its fraudulent inducement of the release and tortious interference with contract. By these three factors, the Network had clearly engaged in reprehensible conduct

deserving of a punitive damages award at the 'higher end of the scale.'<sup>27</sup>

In relation to the second criterion, the Network asserted that according to judicial principles, where compensatory damages are substantial, punitive damages should be lower than the compensatory damages award. To that allegation, the Arbitrator pointed out that a contractual arbitration is:

'a private proceeding, arranged by contract, without legal compulsion... Consequently, the arbitration and award themselves [are] not governed or constrained by due process, including its elements applicable to judicial proceedings to impose punitive damages.'<sup>28</sup>

As such, the Arbitrator determined that judicial principles did not limit the tribunal's discretion to decide the amount of punitive damages in arbitration.<sup>29</sup> Along the same lines, judicial authorities did not dictate the amount of damages awarded by the Arbitrator, although he chose to be guided by them.

The Arbitrator analogised the decision of *Bardis v Oates*,<sup>30</sup> in which punitive damages of nine-times the compensatory damages was awarded due to the defendants' repeated and intentional self-dealing constituting 'egregious misconduct.'<sup>31</sup> The Arbitrator likened the case to the Network's behaviour, reinforcing that the Network engaged in a company-wide pattern and practice of fraudulent self-dealing by which it enriched itself in violation of the Studio's agreements with the Respondents.

Ultimately, the Arbitrator awarded punitive damages five times the amount of Respondents' actual damages, resulting in a total of almost \$129 million. The Arbitrator

21 *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 424-25 (2003).

22 *McGee v Tucoemas Fed. Credit Union*, 153 Cal. App. 4th 1351, 1362 (2007).

23 Award at 56-62.

24 Award at 57.

25 Award at 56.

26 Award at 57.

27 Award at 58.

28 *Rifkind & Sterling, Inc. v Rifkind*, 28 Cal. App. 4th 1282, 1291 (1994).

29 Award at 59.

30 119 Cal. App. 4th 1 (2004).

31 *Ibid* at 22-23; Award at 60.

considered that this 5:1 ratio represented only 0.6% of 21<sup>st</sup> Century Fox's (a Network subsidiary that would likely pay the award) stipulated net wealth. This was well below the 10% cap recognised under California law,<sup>32</sup> but reasonable and necessary to punish the Network for its reprehensible conduct and deter it from future wrongful conduct.<sup>33</sup>

The Respondents were also awarded the costs of the arbitration.

### Final thoughts

Although the arbitration took place in Los Angeles and applied the JAMS Rules, we can draw several useful observations relevant to Australian practitioners.

Parties who wish to challenge an arbitrator's jurisdiction should do so as soon as possible in pleadings and the hearing. As demonstrated in the *Bones* arbitration, arbitrators may not take kindly to parties who contend the tribunal's jurisdiction at the last minute and appear to be merely trying to subvert the award. In any case, parties must take heed of timelines stipulated in the relevant arbitration rules, such as Rule 28.3 of the ACICA Rules.

This award endorses the availability of punitive damages in arbitration, although in Australia as in the US, arbitrators will consider a number of different factors and limitations to determine whether, and to what extent, punitive damages are appropriate.

Although arbitration is typically conducted in a private forum, arbitral awards do not always remain private. Arbitrators should keep this in mind when drafting and considering the tone of their award; likewise, parties should conduct themselves carefully during and after the arbitration, as the skeletons could very well be dug up for scrutiny by the general public.

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32 See e.g. *Sierra Club Found. v Graham*, 72 Cal. App. 4th 1135, 1163 (1999).

33 Award at 62.



# 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](#).

## Professor Gabriël Moens awarded an AM in the 2019 Queen's Birthday Honours

Professor Gabriël Moens has been awarded an AM in the 2019 Queen's Birthday Honours List 'For significant service to the law, and to higher education'.

# 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](http://www.disputescentre.com.au)) ACICA also has registries in Melbourne and Perth.

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