

THE

ACICA REVIEW

DECEMBER 2019



ACICA

Australian Centre for
International Commercial
Arbitration

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ACICA

Australian Centre for
International Commercial
Arbitration

Leader in International Dispute Resolution

THE

**ACICA
REVIEW**

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Contents

President's Welcome	2
Secretary-General's Report	3
Report of the AMTAC Chair	10
International Arbitration and the Preservation of Assets in China	12
Australian Joint Standing Committee on Treaties approves new investment treaties between Australia, Hong Kong and Indonesia	16
Privileged and Confidential – Do These “Magic Words” Provide Sufficient Protection?	19
Case Note: Sanum Investments Limited v ST Group Co Ltd	25
Arbitration in Australia - Rising to the Challenge	28
Surveying Australian Arbitration	37
A change in Investment Treaty Climate	39
Arbitration, Africa and Asia: The Emerging Ascent	44
Application of Arbitration Agreements to Non-Signatories: The ‘Through or Under’ Route	47
Peering Over the Pond: Encouraging the Resolution of Internal Trust Disputes by Arbitration in Western Australia	51
Confidentiality versus Transparency in International Commercial and Investment Treaty Arbitration in Australia, Japan and Beyond	54
Book Review: Global Construction Success– Charles O'Neill	57
News in brief	61

THE ACICA REVIEW

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President's Welcome



Brenda Horrigan
ACICA President

Welcome to the December edition of the ACICA Review, and to our new members since the last edition. It has been a busy time since our last edition, published in June 2019.

Australian Arbitration Week

Australian Arbitration Week was held in Brisbane this year, with proceedings commencing on November 18 with the *Building Bridges: Resolving Disputes Through International Arbitration* conference jointly organised by ACICA and CI Arb Australia. That event attracted more than 150 participants (full capacity), coming from 5 continents and 15 jurisdictions. It was followed by 19 additional official ancillary events stretching from Tuesday to Thursday, all with strong attendance, including an ACICA45/Young ICCA joint event that attracted approximately 50 attendees. The feedback that we have received has been quite positive, with a number of the international participants indicating that they have been impressed by the growing attention being given to arbitration among Australian practitioners.

Nationwide Arbitration Survey

ACICA, with the support of the Australian Bar Association, the Western Australia Initiative, Francis Burt Chambers and FTI Consulting rolled out Australia's first nationwide arbitration survey on Monday, 3 November 2019. Survey champions were identified in each state and tasked with holding individual conversations with identified potential respondents to encourage participation. The survey period closed on Friday, 13 December 2019, and data analysis will be conducted early in the New Year and a report published thereafter.

Additional Initiatives

There are a number of additional initiatives planned for the coming months, including sessions aimed at young transactional lawyers, a series of arbitrator roundtables (following on an initial successful roundtable in Brisbane), and others. ACICA will also be in attendance at the upcoming ICCA Congress to be held in Edinburgh, Scotland in May 2020.

Secretary-General's Report



Deborah Tomkinson

Secretary General

Australian Arbitration Week 2019 – Record Numbers!

The 7th annual Arbitration Week held in Australia proved to be a record year with 20 events held over 4 days. The ACICA/CI Arb Australia International Arbitration Conference, the flagship event of the Week, was fully subscribed with speakers and participants attending from jurisdictions around the world, including Singapore, Hong Kong, People's Republic of China, UK, UAE, Qatar, Canada, France, Germany, USA and Brunei.

Opening Australian Arbitration Week, the International Arbitration conference focused on the theme of *Building*

Bridges – Resolving Disputes Through International Arbitration, with a broad programme covering topical subjects for the dispute resolution community such as Resources and Energy, China's One Belt, One Road, Intellectual Property, M&A and Construction & Infrastructure. The Hon. Chief Justice Catherine Holmes, Supreme Court of Queensland welcomed delegates and opened the conference, followed by a keynote from the



ACICA President, Brenda Horrigan & CI Arb Australia President, Caroline Kenny QC



Hon. Justice Patrick Keane AC of the High Court of Australia. Delegates were also treated to an up-close-and-personal conversation with Paula Hodges QC, moderated by CIArb Australia President Caroline Kenny QC, and an Around the Globe in 60 minutes session exploring hot topics in diverse jurisdictions including the UAE and around Asia. A detailed summary of the conference may be found on the CIArb website [here](#).

On Tuesday, the **ArbitralWomen** breakfast put the *Spotlight on Arbitration in Queensland* with Erika Williams (McCullough Robertson), Jennifer Barrett (Corrs Chambers Westgarth), Dr Anne Matthew (School of Law, QUT) and Elise Higgs (Herbert Smith Freehills) discussing a variety of practical issues that have recently arisen in their arbitration practices. This was followed by a **Corrs Chambers Westgarth/Level Twenty-Seven Chambers** panel discussion, moderated by Joshua Paffey (Partner, Corrs Chambers Westgarth) and featuring Professor Richard Garnett (Corrs Chambers Westgarth, University of Melbourne) and Stewart Webster, Bianca Kabel and Jason Mitchenson (Level Twenty-Seven Chambers), with commentary from the Hon. Justice Greenwood (Federal Court of Australia) on **Best Practice International Arbitration in Australia: an Australian view on current issues affecting the arbitral mandate**. **DLA Piper and CIArb Australia** hosted a seminar showcasing CIArb's new Guidelines for Witness Conferencing in International Arbitration through a mock witness hot tub involving Professor Doug Jones AO as arbitrator, Brenda Horrigan (ACICA President) and Mark Johnston (Maxwell 42 Chambers) as Counsel and Liam Prescott (DLA Piper) and Darren Hopkins (McGrathNicol) as expert witnesses. This interactive session, *From Hot Seat to Hot Tub*, was moderated by Gitanjali Bajaj (DLA Piper).

AMTAC in conjunction with **Ashurst** hosted a seminar examining *Flexibility and a Fair Go – the rules of evidence in arbitration and the role of litigation funding in offshore EPC contracting disputes*. Chaired by Gregory Nell SC, guest speakers Adrian Duffy QC (Jeddart Chambers) and Jeremy Chenoweth (Ashurst) spoke on the two topic areas, with commentary from Michelle Taylor (Colin, Biggers and Paisley) and Tom McDonald (Vannin Capital). The **CIArb Australia Young Members Group** held a stimulating debate moderated by Kristian Maley (CIArb



Paula Hodges QC and Caroline Kenny QC

Young Member Group Chair) and judged by the Hon Justice Martin Daubney (Supreme Court of Queensland). Panellists Ben Holloway (Jones Day), Marina Kofman, Jay Tseng (King & Wood Mallesons) and Erika Williams (McCullough Robertson) deftly addressed the question of whether Investor-State Arbitration is a Force for Good? The afternoon held a session by the **ICC** providing *Insights into ICC Australia* chaired by Russell Thirgood (McCullough Robertson) with perspectives provided by Tim Robbins (ICC Nominations Committee Australia), Jo Delaney (Australia Alternate Member ICC Court), Hazel Tang (Counsel, Secretariat of the International Court of Arbitration, Singapore) and Lucy Martinez (Independent Arbitrator). To round off the day, a brilliant and enjoyable **CIArb Australia Annual Lecture** was given by Paula Hodges QC (President of LCIA and Head of Global Arbitration, Herbert Smith Freehills) on the topic of *The Continuing Evolution of International Commercial Arbitration – Is It Still Fit for Purpose?*

Not to be outdone, Wednesday held a just as packed schedule. Kicking off with a **Resolution Institute** breakfast exploring new features of the RI Rules and innovations in practice. **ACICA45** was pleased to co-host an oversubscribed workshop with **Young ICCA** on *Building your Case in International Arbitration: Lay and Expert Witness Evidence*. Faculty at the workshop included Lucy Martinez (Independent counsel and arbitrator), Lee Carroll (Corrs Chambers Westgarth), Erika Williams (McCullough Robertson), Grant Axman-Friend (Core Project Advisory), Guillermo Garcia-Perrote (Herbert Smith Freehills), Lucinda McPhee (Clayton Utz) and

Caroline Swartz-Zern (Allens). **ACICA** and **CIArb Australia** ran the first in a series of Arbitrator Roundtables aimed at enhancing the attractiveness of arbitration through procedural efficiencies and innovation, an initiative that will be rolled out across Australia in 2020. I was delighted to sit on the panel at the **AFIA Symposium** in the afternoon following keynote speaker Professor Doug Jones AO. My fellow panellists included Erika Williams (McCullough Robertson), Michael Stewart QC (Gerrard Brennan Chambers) and David van Homrigh (KordaMentha). Facilitated by Ashley Hill (GRT Lawyers) we explored the various challenges presented under the topic *Busting the Club: Creating a new face for Australian arbitration*. Broadcasting live to cities around Australia and four locations in India, the **Australian Disputes Centre** hosted an expert panel discussion entitled *Beyond Googlies and Cricket, India and Australia Trade, Investment and Successful Dispute Resolution*. Chaired by Matthew Hickey (Level Twenty-Seven Chambers), panellists Gitanjali Bajaj (DLA Piper), Jo Delaney (Partner, Baker McKenzie), Bronwyn Lincoln (Corrs Chambers Westgarth) and Natasha Bopaiah (Australia India Business Council) discussed some of the opportunities and challenges arising from the Australia-India trade relationship. The **Lighthouse Club** presented its popular event *Tracing a Construction Case* from commencement through to judgement via mediation and arbitration in the evening. The **Clayton Utz/University of Sydney** International Arbitration Lecture was given this year by Professor Doug Jones AO who spoke to the topic of *Arbitration In Australia Rising to the Challenge*. The lecture explored the developments that have allowed Australian arbitration to flourish, identified the challenges which remain and made some suggestions as to how Australians can ensure that Australia's domestic and international arbitration regimes not only retain, but enhance, its competitiveness in the future. An extract from the Lecture is contained later in this edition of the Review.

The momentum continued through Thursday, with **Burford Capital** hosting an event looking at how legal finance can be used as a tool to promote diversity in arbitration. **Corrs Chambers Westgarth** and **Debevoise & Plimpton** considered the vexed question of if and

when arbitration should be a party's dispute resolution mechanism of choice. Moderated by Jennifer Barrett (Corrs Chambers Westgarth), the panel consisted of Neville Henwood (Rio Tinto), Tony Dymond (Debevoise & Plimpton) and Joshua Paffey (Corrs Chambers Westgarth).

ACICA and **Ashurst** were pleased to host a lunchtime event at which moderator Erika Williams (McCullough Robertson) and panel members Michelle Tilley (Rio Tinto), William Haseler (Waratah Coal), Alex McVay (IMF Bentham), The Hon. Richard Chesterman AO RFD QC (31 West Chambers), Jeremy Chenoweth (Ashurst) and Russell Thirgood (McCullough Robertson) discussed *What Parties Want in Arbitration* and whether they can and do actually get it.

In an afternoon aimed at emerging practitioners, **ICC YAF** hosted an event reflecting on arbitration in practice and considering the way forward: *The way of the future - Arbitration or other options?* Speakers included Lucy Martinez (Independent arbitrator), Alexandra McVay (IMF Bentham, Brisbane), Jason Mitchenson (Level Twenty Seven Chambers), Carmel Proudfoot (Norton Rose Fulbright), Hazel Tang (ICC Counsel), Jay Tseng (King & Wood Mallesons), Erika Williams (McCullough Robertson). Young ITA presented an evening of discussion and debate looking at *Emergency and Interim Measures in Commercial and Investor-State Arbitration* with Cameron Sim (Young ITA Asia Chair; Debevoise & Plimpton, Hong Kong), Brenda Horrigan (Herbert Smith Freehills, ACICA President), Angus O'Brien (Level Twenty Seven Chambers), Andrew Di Pasquale (List G Barristers), Juliana Jorissen (King & Wood Mallesons) and Ryan Shlah (Corrs Chambers Westgarth).

ACICA is very grateful to all host organisations, sponsors, speakers and delegates of Australia Arbitration Week and look forward to AAW 2020!

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



Georgia Quick (left) speaking at the Belt & Road Arbitration Institutions Roundtable Forum

ACICA45

On 12 September 2019 ACICA45 held a session, hosted by Herbert Smith Freehills, addressing when to use arbitration clauses and how to draft them effectively, followed by short networking drinks in Melbourne. Moderator Chad Catterwell (Executive Counsel, Herbert Smith Freehills & ACICA45 Steering Committee Member) was joined by Joe Barbaro, a Partner in the front-end construction and infrastructure practice at Corrs Chambers Westgath, Neil McCann, a Senior Lawyer from the M+A legal team at ANZ, offering a front-end and client perspective, and Caroline Swart-Zern (Senior Associate, Allens & ACICA45 Steering Committee Member) to explore this important topic.

The next ACICA45 event was held in Adelaide on 8 November 2019. In the session moderated by Sylvia Tee (Lipman Karas & ACICA45 Steering Committee Member), panellists Robert Williams (Hanson Chambers) and Nick Gallus (Lipman Karas) shared their experiences acting in the negotiation of investment treaties and the arbitration of investment treaty claims, over a light lunch.

ACICA45 extends its thanks to Herbert Smith Freehills and Lipman Karas for their support of these events. We look forward to a full schedule of ACICA45 events again in 2020.

AMTAC Annual Address

The 2019 AMTAC Annual Address was held on 26 September 2019. The Address was given by Ms Amy Guihot, Assistant Secretary, Agriculture and Food Trade, Office of Trade Negotiations, Department of Foreign Affairs and Trade at the Federal Court of Australia in Sydney and videocast to four other locations around Australia (Melbourne, Adelaide, Perth and Brisbane).

Ten per cent of the world's sea trade passes through Australian ports and over 95% of Australian exports are transported by sea. Maritime transportation is the means by which Australia and Australian traders (especially exporters) participate in the global trading environment. Ms Guihot's Address outlined what the Australian Government is doing to try and bring stability and certainty to exporters/shippers given the current global trading environment. Her Address will shortly be available on the [AMTAC website](#).

Belt & Road Arbitration Institutions Roundtable Forum

Georgia Quick (ACICA Vice President) attended a Belt & Road Round Table Forum hosted by CIETAC in Beijing on 6 and 7 November 2019. The forum followed the China Arbitration Summit which was held from 5-6 November 2019. The Forum commenced with an invitation-only



James Morrison (left) speaking at the Bali Arbitration Summit

closed door session on the evening of 6th with representatives of over 40 institutions (including ACICA, CIETAC, ICC, HKIAC, SIAC, KCARB, VIAC, SCC, AAA, CDER & UNCITRAL) meeting to discuss areas of potential co-operation.

The following day representatives of a number of the institutions were invited to speak at an open conference. Georgia spoke to the suitability of Australia as a neutral seat for international arbitrations relating to the Belt & Road initiative that could be administered by ACICA. She included reference to the well-developed energy & resources boom in Australia and the current significant investment in infrastructure which mean that ACICA is experienced in administering, and Australian lawyers in assisting with and advising on, disputes of the type that the Belt & Road initiative will see. Georgia referred to other advantages that Australia provides: political stability, good legislative infrastructure, quality facilities, a sophisticated and supportive judiciary, as well as the relatively low cost of arbitrating in Australia. Georgia also spoke to the significant mediation expertise that exists in Australia, with the combination of mediation conducted at some stage prior to arbitration being common particularly in infrastructure and E&R disputes.

Bali Arbitration Summit 2019

Held as a part of the first Bali Arbitration Week, the Bali Arbitration Summit 2019 on 18 November 2019 brought together voices from around the world to focus on the progression of technology in alternative dispute resolution. ACICA Counsel, James Morrison, spoke at the Summit with other international practitioners in a session themed *From Justice by Ordeal to A.I. Judges? The Future of Dispute Resolution*.

Fordham 14th Annual Conference on International Arbitration and Mediation

ACICA was pleased to again support Fordham Law School's International Arbitration and Mediation Conference held on 22 November 2019. The conference was held this year as a part of the first New York International Arbitration Week, and featured speakers such as Julian Lew, Queen Mary University and Meg Kinnear, Secretary-General of ICSID.

Plan Ahead – APRAG Conference 2020 and ICCA 2020

As we near the end of the year, members are encouraged to look ahead to 2020 and make their plans for important events that are being held early in the new year.

The APRAG Conference 2020 will be held in Bangkok, Thailand from 15-17 January 2020 with a focus on the growing importance of international arbitration in Asia and Australia, significant developments Alternative Dispute Resolution and future trends in this domain. For further information and to register for the conference please see the [Conference Flyer](#) or the [Thailand Arbitration Center website](#).

We continue to look forward to the upcoming International Council for Commercial Arbitration (ICCA) Congress, being held in Edinburgh in May 2020 and encourage members to attend what is certain to be a fascinating and stimulating arbitration event. ACICA will be exhibiting at ICCA2020 and invite all to come and visit us in the exhibition hall!

ACICA Australian Arbitration Survey

ACICA, with the support of the WA Arbitration Initiative, Francis Burt Chambers, FTI Consulting and the Australian Bar Association, launched the Australian Arbitration Survey in November 2019, with the questionnaire open for responses until 13 December 2019. Through the survey, ACICA has sought to obtain insights from practitioners, in-house counsel and experts who have experience with commercial arbitration involving Australian parties, Australian seats and Australian-based practitioners (from a transactional and disputes perspective) over the last three years (2016-2019).

It is clear, not least from the WA Arbitration Report released in 2019, that there is significant arbitration work being undertaken in Australia but that more can be done to enhance the attractiveness of Australia as a dispute resolution hub and raise the profile of Australian practitioners internationally. It is expected that the outcome of the survey will contribute to our collective efforts to promote international commercial arbitration in Australia and Australian cities as arbitral venues, enhance the practice of arbitration in Australia and drive further investment in this area. ACICA is grateful to all who gave their time to answer the survey questionnaire. The data will be analysed and a report prepared for release in 2020 so watch this space! Further information about the

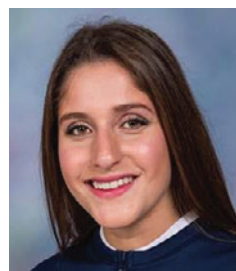
background to the survey launch and the WA Arbitration Report may be found in the article *Surveying Australian Arbitration* later in this edition.

Welcome to the new AMTAC Executive Team!

Following the AMTAC General Meeting held on 5 November 2019, we warmly welcome new Executive members Gemma Stabler (Fortesque Metals Group, Perth) and Michelle Taylor (Collin, Biggers & Paisley, Brisbane) to the AMTAC Executive, and congratulate them on their appointment. We thank continuing Chair, Gregory Nell SC (New Chambers, Sydney) and Vice-Chairs Tony Pegum (Mitsui OSK Lines, Perth), Hazel Brasington (Ashurst, Melbourne) and Anne Sheehan (Attorney General's Department, Canberra) for their ongoing service and commitment to AMTAC.

Welcome to our new Associate

ACICA welcomes a new Associate, Julie Litver, to the team. Julie is currently studying a Juris Doctor at the University of Sydney and will be assisting the ACICA Secretariat with case management and the promotion of arbitration in Australia through ACICA's events.



Julie Litver

ACICA and ADC Volunteer Intern Program

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



Ashley Catterall
Kings College, London



Cyrus Bailey
Macquarie University



Ha My Linh
Diplomatic Academy of
Vietnam



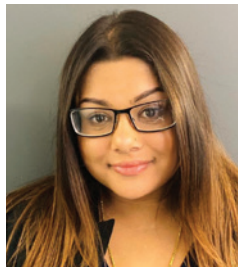
Isabelle Monier-Gorton
Macquarie University



Nina Stammach
Macquarie University



Olivia Hobill Cole
Macquarie University



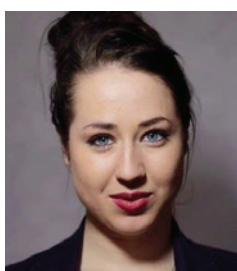
Shweta Dey
Macquarie University



Tabitha Abraham
Staffordshire University at
APIIT, Sri Lanka



Ya Feng Low
University of New South
Wales



**Zuzanna Ewa
Cieplińska**
Hague University,
The Hague

Report of the AMTAC Chair



Gregory Nell SC
AMTAC Chair

AMTAC Annual Address

The AMTAC Annual Address is AMTAC's signature event each year and an important way in which AMTAC seeks to achieve two of its stated objectives, namely promoting maritime arbitration in Australia and promoting Australia as a recognised leader in maritime and transport scholarship.

This year, the 13th AMTAC Annual Address was delivered on 26 September 2019 by Ms Amy Guihot, Assistant Secretary, Agricultural and Food Trade, Office of Trade Negotiations, Dept of Foreign Affairs and Trade. Ms. Guihot's Address was entitled *"Supporting Australian exporters/shippers in the current global trading environment"* and provided a both engaging and interesting survey of Australian trade policy and the steps that the Australian Government is currently taking to bring stability and certainty to Australian exporters/shippers, given the current global trading environment.

With approximately 10% of the world's sea trade passing through Australian ports and over 95% of Australian exports being transported by sea, maritime transportation is the means by which Australia and Australian traders (especially exporters) participate in the global trading environment. Amongst AMTAC's objectives is the facilitation of international and domestic arbitration and mediation of maritime and transport disputes. In this way, AMTAC aims to support not only the participants of the maritime transportation industry itself, but also the importers, exporters and traders who rely upon that industry. In those circumstances, it was timely to consider what is being done (especially by Government) to assist

these users of maritime transportation services, especially in connection with Australian export industries.

A copy of Ms Guihot's Address will be available on the AMTAC website shortly, as are each of the Addresses given over the last 12 years, as well as other papers presented at AMTAC sponsored seminars and events. Together, these provide a rich and readily available resource for those wishing to research into or just learn more about arbitration in the maritime law sphere.

Australian Arbitration Week Seminar

Each year, as part of what has become known as Australian Arbitration Week, AMTAC has presented a seminar focusing on maritime law and arbitration in the maritime context. This year is no different. On 19 November 2019, AMTAC conducted a seminar, in conjunction with Ashurst solicitors, as part of Australian Arbitration Week in Brisbane. This event was entitled *"Flexibility and a Fair Go"* and featured presentations by Adrian Duffy QC (Jeddard Chambers, Brisbane) on "Evidence in Arbitration" and Jeremy Chenoweth (Ashurst) on *"The role of litigation funding in marine and offshore EPC contracting disputes"*, as well as expert commentary from Michelle Taylor (Colin Biggers & Paisley and member of the AMTAC Executive). It is expected that these presentations will also be available in due course on the AMTAC website, for those who missed the opportunity to attend this event.

Other seminars and events

In my report last June, I foreshadowed that AMTAC would be conducting a Mock Arbitration Seminar in Sydney in the second half of the year. This was along the lines of seminars that AMTAC has previously conducted in Perth and Melbourne in 2017 and 2018 and at which attendees are able to observe maritime arbitration proceedings in action. Unfortunately, AMTAC was unable to offer this seminar as originally planned. However, it is expected that we will do so in the first half of 2020. Further details will be circulated and posted on the AMTAC website in due course, so watch this space.

In the meantime, the next biennial conference of the International Congress of Maritime Arbitrators (ICMA) will be held in Rio de Janeiro from 8 to 13 March 2020 (ICMA

XX1). A number of Australians, including those associated with AMTAC, have been invited to present papers at this Conference. Registration is now open and further information about this Conference, including how to register, can be found on the AMTAC website. I would encourage all those engaged or interested in arbitration in the maritime sphere to attend this Conference and take up the opportunity that 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 amongst those international practitioners. Australia and Australian arbitration practitioners have a lot to offer and conferences such as this provide an opportunity for Australian practitioners to show others in this field what we can offer and the benefits that they and their clients may thereby achieve.

IMLAM

As I had also foreshadowed in my report last June, the 20th International Maritime Law Arbitration Moot (IMLAM) was held at the School of Law, Erasmus University, Rotterdam from 30 June to 5 July 2019. This was IMLAM's first time on continental Europe. A record 31 teams (140 plus students) from Europe, Asia, the Middle East, Australia and the Americas participated in this year's

competition. University of Queensland defeated University of Sydney in the grand final before a panel comprising Hon. Justice Elizabeth Heneghan (Federal Court of Canada), Hon. Justice Pauline Hofmeijer-Rutten (Rotterdam District Court/Amsterdam Court of Appeal) and Mr Mark Hamsher (Maritime Arbitrator, England). As in previous years, AMTAC sponsored the *Spirit of the Moot* prize, which this year was awarded to Educational Institution of ITCA, Iran.

AMTAC continues to be a proud sponsor and supporter of the IMLAM Competition, which next year will be held at the School of Law, Singapore Management University, Singapore from 3 to 8 July 2020. I would encourage any arbitrators or arbitration practitioners who may be in Singapore at that time or who may be willing and able to be in Singapore then to attend and thereby support this worthy competition.

Finally, I would also take this opportunity to wish the members of AMTAC and ACICA my best wishes for the coming festive season, a relaxing time for those fortunate to be on holiday or have a break over this period and a successful and prosperous new year.

International Arbitration and the Preservation of Assets in China



Daisy Mallet

Partner, King & Wood Mallesons; ACICA Board Member & Fellow



Lucy Forbes

King & Wood Mallesons



Xuanshi Liu

King & Wood Mallesons

1 Introduction

In this article, we discuss the approach of Chinese courts to asset preservation orders in the context of international arbitrations seated outside of mainland China. In doing so, we compare the approach of PRC courts with their Australian counterparts and discuss the significance of the new mutual assistance arrangement between the mainland and Hong Kong.

2 Chinese courts typically take a more lenient approach to granting asset preservation orders than common law courts

2.1 Chinese courts adopt a broad approach to granting property preservation orders

The PRC Civil Procedure Law provides for property preservation orders to be granted during litigation proceedings if the following conditions are fulfilled:¹

- (a) That the judgment may become impossible or difficult to enforce because of the conduct of the other party in the proceedings or for any other reason;
- (b) That the property subject to the application is owned by the respondents or is property the entitlement to which is disputed between the parties to the litigation; and
- (c) That security is provided by the applicants.

Despite the requirement that an applicant show that it will be difficult to enforce a judgment, as a matter of practice Chinese courts do not require parties to prove a high threshold of difficulty in order for an asset preservation order to be granted. Usually it is enough that the parties are in a dispute, the property is owned by the Respondent and the Applicant is willing and able to provide security.

The Chinese approach to security, however, is stricter. The courts have discretion with respect to the amount and type of the security to be provided by the Applicant to compensate the Respondent or a third party for any loss and damage that might be incurred if it is found that the application is made maliciously and/or negligently, or if the Applicant's primary proceedings were unmeritorious. If the application is made before the primary proceedings are filed, the courts will usually require a security guarantee for the full value of the assets sought to be preserved. If it is filed during the proceedings, however, the security required will be not more than 30% of the value of the property sought to be preserved.² Also, the security must be reliable enough: the courts generally only accept security in the form of a cash deposit or letter of guarantee issued by a bank or reputable insurance company.

2.2 Comparing the Australian approach to property preservation orders

Australian courts may order the detention and preservation of property or funds that are the subject of

¹ Article 100 of PRC Civil Procedure Law

² See Article 5 of the *Provisions of the Supreme People's Court on Several Issues concerning the Handling of Property Preservation Cases by the People's Courts*.

proceedings.³ Where assets sought to be preserved are not the subject of the dispute, the courts have both inherent and statutory jurisdiction to grant freezing orders to prevent respondents disposing of assets with the intention of frustrating a judgment.⁴

The test applied in Australia differs slightly from the conditions for obtaining a property preservation order under PRC law. For the courts to grant a freezing order, an applicant must show that:

- (a) They have a “good arguable case” on an accrued or prospective cause of action. This threshold is flexible, and the circumstances of the case will determine how high it is.⁵
- (b) If the order is not made, there is a danger that the respondent’s assets will be disposed of or dissipated so as to render a judgment ineffective; and
- (c) The interests of justice require the making of the order.

The real contrast with the approach in China lies in the practice of how Australian courts interpret these rules. Australian courts take a far more restrictive approach to granting freezing orders than their Chinese counterparts: the High Court of Australia has recommended that courts exercise “a high degree of caution” in granting freezing orders.⁶ Applicants in Australian courts are expected to submit positive evidence – more than mere assertions⁷ – that the respondent will act to frustrate a prospective judgment. This is a substantial burden on an applicant who may need to engage in extensive research, asset tracing and financial investigation to substantiate a claim that the respondent will dissipate its assets.

In contrast, the requirement for security is less strict in Australian courts. Applicants are generally required only

to provide an undertaking for damages, although the courts may order an applicant to provide security if it is demonstrated that it has or may have insufficient assets within the jurisdiction of the Court to provide substance for the undertaking.⁸

3 Property preservation in an ongoing arbitration

3.1 The approach of Chinese courts

For arbitration administered by an arbitral institution established in China (domestic arbitration), asset preservation orders are permitted prior to an award being rendered. The application for asset preservation must be filed to the arbitral institution and the arbitral institution must in turn file the application to a competent court for decision. The test for property preservation orders in domestic arbitration is the same as for civil litigation (i.e. the test described above).

For international arbitrations which are administered by foreign arbitral institutions, preservation orders will not be granted if the application is made before an arbitral award has been handed down by the Tribunal and recognised by a PRC court. The exception is maritime matters, where property preservation orders may be granted before an award is made.

3.2 The approach of Australian courts

In contrast, Australian courts have granted freezing orders in the context of ongoing foreign arbitrations since the 1980s.⁹ Their power to grant these orders derives from two sources: firstly, the application of Article 17J of the UNCITRAL Model Law (as incorporated into Australian law by section 16 of the *International Arbitration Act*); and secondly, their inherent jurisdiction to prevent the

3 *Halsbury's Laws of Australia*, [5.6.400]; S Jacobs, M McCarthy and D Neggo, *Injunctions: Law and Practice* (online), [4.100.2].

4 *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319, Gleeson CJ at 321-322; *Frigo v Culhaci* [1998] NSWCA 17 at .

5 S Jacobs, M McCarthy and D Neggo, *Injunctions: Law and Practice* (online), [4.210].

6 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 403.

7 *Electric Mobility Co Pty Ltd v Whiz Enterprises Pty Ltd* [2006] NSWSC 580 at [6], *Bayley and Assoc Pty Ltd v DBR Australia Pty Ltd* [2012] FCA 746 at [34].

8 See, e.g., Practice Note SC Gen 14 (NSW at [17].

9 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 29-30 [81]; *Construction Engineering (Aust) Pty Ltd v Tambel (A/asia) Pty Ltd* [1984] 1 NSWLR 274.

frustration of court process in relation to potential future proceedings to enforce the award.¹⁰

Australian courts may be more willing than Chinese courts to protect assets in the context of foreign arbitrations. However, they will do so only if an applicant can meet the stringent test discussed above by demonstrating a good arguable case and providing positive evidence showing a danger that assets will be dissipated. This is illustrated by the decision of the Western Australian Court of Appeal in *Duro Felgura Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)*. The applicant adduced a substantial body of evidence concerning Duro's financial position, Australian assets, intercompany loans, potential breaches of ASIC legislation and the residence of Duro's directors to demonstrate a danger that Duro would transfer funds overseas to its parent company and thereby frustrate a prospective enforcement in Australia of an arbitration award. The Court of Appeal granted a freezing order, but only after it had carefully examined this evidence and concluded that there was a "real and not remote risk" that Duro's assets would be insufficient to satisfy a judgment absent a freezing order.¹¹

In *ENRC Marketing AG v OJSC "Magnitogorsk Metallurgical Kombinat"*, the Federal Court found that the test for a freezing order was satisfied where the respondent, while defendant in an ICC arbitration, had made public

announcements that it would imminently transfer its interests in significant assets.¹² Noting that the applicant for the freezing order had no assets or presence in the jurisdiction, however, and that the application had been made *ex parte*, the court required the applicant to provide substantial security to support its undertaking as to damages.¹³

4 The Hong Kong Arrangement: is China's attitude to property preservation in foreign arbitrations shifting?

The contrast between the readiness of Chinese courts to make asset preservation orders in domestic litigation and arbitration and the more restrictive Australian approach illustrates the way in which the two systems allocate risk differently between the applicant and respondent. While the Chinese model is weighted towards the protection of the applicant's interest in a prospective judgment being enforceable and satisfied in full, the Australian model prefers the respondent's interest in commercial freedom and places the onus on the applicant to demonstrate a positive reason why the respondent's assets should be frozen.

Conversely, while asset preservation orders in civil litigation and domestic arbitration are commonly granted in the PRC, Chinese courts have so far been more conservative than their Australian counterparts in

¹⁰ *Duro Felgura Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)* [2018] WASCA 174 at [14]-[23].

¹¹ [2018] WASCA 174 at [127].

¹² [2011] FCA 1371 at [7].

¹³ [2011] FCA 1371 at [8]-[9].



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granting these orders in the context of international arbitration. However, the recent passage of the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* ("**HK Arrangement**"), which took effect on 1 October 2019, marks a significant change for certain Hong Kong seated international arbitrations.

Under the HK Arrangement, a party to an arbitration administered by certain specified Hong Kong institutions

can apply to a Mainland court for interim measures – including property preservation – during an arbitration. The HK Arrangement therefore provides a unique ability for parties to an international arbitration seated in Hong Kong to preserve assets in China during their arbitration. We expect this will see a marked increase in the appetite of foreign parties in contracts with Chinese parties to seat their arbitrations in Hong Kong, as it will provide a unique ability to prevent asset dissipation during an arbitration.

Australian Joint Standing Committee on Treaties approves new investment treaties between Australia, Hong Kong and Indonesia



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The Joint Standing Committee on Treaties (“JSCOT”) of the Australian Parliament has just released Report No. 186. The JSCOT’s role is to carry out a review of treaties to determine whether they are in Australia’s national interest. Report No. 186 examines three treaties: *the Free Trade Agreement between Australia and Hong Kong, China (“HK-FTA”)*, *the Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China (“HK-Investment Agreement”)* and *the Comprehensive Economic Partnership Agreement between the Government of Australia and the Government of Indonesia (“IA-CEPA”)*. They have all been signed. The JSCOT has concluded that each of these treaties are in Australia’s national interest and has recommended that “binding treaty action be taken as soon as possible.” The treaties will now go before parliament for ratification.

Investment treaties have been under scrutiny. Civil society groups and trade unions, for example, have argued against the inclusion of investor-state dispute settlement (“ISDS”) provisions in treaties. Concerns have also been expressed regarding transparency, cost and consistency of outcomes in ISDS proceedings. Others see

investment-treaties risking states’ ability to regulate in relation to public policy objectives, such as health and protection of the environment. Despite these criticisms the IA-CEPA and the HK-Investment Agreement include ISDS provisions and the JSCOT was still satisfied that they were in Australia’s ‘national interest’.

1 JSCOT’s review process

This is a comprehensive process. The JSCOT considers the Australian Government’s own assessment of each treaty’s merit (this is called the Australian Government’s “National Interest Analysis”). The National Interest Analysis concluded that “*the IA-CEPA will bring both commercial and strategic benefits.*”¹ As for the HK-FTA and the HK-Investment Agreement, the National Interest Analysis found that they will “*strengthen [the] economic relationship [between Australia and Hong Kong].*”² The JSCOT also takes into account submissions which concern all aspects of the treaties. Five in person hearings were held in Melbourne, Sydney, Perth and Canberra.³ Throughout this process the JSCOT has heard from industry groups, academics, unions and other members of the public.

2 The ISDS ‘risk’?

There has been public concern in Australia (as elsewhere) about treaty mechanisms which enable arbitration proceedings to be commenced by investors against states. Some critics have commented that the ISDS system exposes the Australian government to the risk of costly and time-consuming arbitration proceedings being commenced against Australia by investors.

The JSCOT heard evidence for and against ISDS but was ultimately satisfied that the ISDS mechanisms in both the IA-CEPA and HK-Investment Agreement were not against the national interest. The JSCOT observed that “*it was*

¹ Para 2.3.

² Para 5.11.

³ Para 1.10.

*repeatedly pointed out to the Committee that Australia has been a party to ISDS provisions for a considerable time and has not been subject to successful litigation.*⁴⁴ As one submission identified *“neither of the claims against Australia was successful. Philip Morris lost their case and costs were awarded against the company.”*⁴⁵ The JSCOT also took account of the fact that some, such as Professor Luke Nottage of the University of Sydney, noted that *“empirical evidence suggested that ISDS provisions increased bilateral investment flow.”*⁴⁶

The short point is that the JSCOT appears to conclude that the risk of Australia being involved in and suffering loss as a result of meritless or frivolous claims by foreign investors is overstated.

3 Carefully crafted carve-outs

Both treaties contain a number of noteworthy carve-outs. It was acknowledged in the National Interest Analysis (and referred to by the JSCOT) that the introduction of these carve outs has led to *“a better balance between the protection of investors and maintaining the government’s right to regulate in the public interest.”*⁴⁷ These carve-outs limit the scope of claims that can be brought by investors against the states in respect of certain legislative or regulatory measures. They should therefore address concerns held by some about ISDS.

The IA-CEPA contains a carve-out which restricts investors from pursuing a claim relating to measures that are *“designed and implemented to protect or promote public health.”* A general exceptions clause further provides that claims cannot be made with respect to measures taken by the state parties to protect the public interest in sensitive sectors, such as education, indigenous rights, the promotion of essential security and certain taxation measures, provided that such measures are not arbitrary, discriminatory or a disguised restriction on investment.

The HK-Investment Agreement contains similar general carve-out provisions, but goes further by exempting specific measures including tobacco control measures and, in Australia’s case, measures relating to the Medicare Benefits Scheme, Pharmaceutical Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator. For ISDS cases the risk that they may impact prudential regulation and financial sector stability must be assessed before the ISDS process can proceed. DFAT has said that this measure will ensure that the Australian Government can legislate with respect to prudential and banking matters *“including, for example to implement the Banking Royal Commission recommendations.”*⁴⁸

The impetus for the ‘tobacco carve-out’ in the IA-CEPA was Australia’s involvement as the Respondent state in an investment arbitration brought by Philip Morris in 2011 under the Australia-Hong Kong BIT, which challenged Australia’s introduction of plain packaging legislation.

It is interesting that the specific ‘tobacco carve-out’ has been included in the HK-FTA but not in IA-CEPA. Having considered expert evidence, the JSCOT concluded that it does not matter that the IA-CEPA has no tobacco carve-out on the basis that tobacco control measures would be covered under the general exceptions provision.⁹ Deference was given by JSCOT to the DFAT’s submission in which it said: *“With Indonesia, we had discussions, both internally and we had and we consulted closely with the Attorney-General’s Department Office of International Law, on which approach to take. It was felt that the broader carve out for public health protected us not only in the case, of say, the tobacco situation but also more broadly for public health.”*¹⁰ This suggests that both options – the tobacco specific and the more general carve-out – were on the negotiation table. We had previously speculated that the tobacco specific carve-out would have simply been a non-starter given the fact that

4 Para 4.47.

5 Para 4.48.

6 Para 4.51.

7 Para 2.23.

8 Para 5.53.

9 Paras 4.55-4.56.

10 Para 4.56.

Indonesia had previously raised a complaint against Australia's tobacco plain packaging legislation at the World Trade Organisation.

4 Overlap with existing bilateral investment treaties

There are existing bilateral investment treaties between Australia and Hong Kong (the **"Aus-HK BIT"**) and between Australia and Indonesia (the **"Aus-Indo BIT"**). It is important to consider how the new treaties will interact with the pre-existing Aus-HK BIT and Aus-Indo BIT. This was a key issue identified by the JSCOT. The JSCOT noted: *"the [Aus-HK BIT] will terminate with the introduction of the new investment treaty, while there is no proposal to terminate the [Aus-Indo BIT]. This has raised concerns over the overlap between the existing [Aus-Indo BIT] and the ISDS provisions in the [IA-CEPA]."*

It seems clear that the JSCOT was of the view that having two overlapping investment treaties in force was undesirable and this ought to be resolved through further negotiation between Australia and Indonesia.

The JSCOT recommends that the Aus-Indo BIT should be terminated and that the 'sunset clause' (also known as a 'survival clause') in the Aus-Indo BIT should also be terminated. The 'sunset' clause permits claims to be brought by investors for a period of 15 years following the termination of the Aus-Indo BIT. From 2014, the

Indonesian Government has terminated many of the investment treaties it has with other states. Many of those terminated investment treaties contain sunset clauses which means that Indonesia will continue to remain exposed to claims arising from investments made prior to termination of the applicable treaties for some time.

As it stands, the termination of the Aus-Indo BIT seems to have bipartisan support. The Australian Labor Party has indicated that it will push the coalition government to terminate the Aus-Indo BIT. Trade Minister Simon Birmingham has indicated that he was not opposed and that the Australian Government *"should be able to work through that issue."*

5 What next?

The next stage is for the Australian Parliament to decide whether to pass legislation implementing the treaties in domestic law. This seems likely given that both major political parties have indicated that they support the treaties.

What should you do if you are an investor with a potential claim against Indonesia, Australia or Hong Kong? The short point is that you need to carefully consider now whether that claim could be lost or affected due to the termination (and replacement) of the Aus-Indo BIT or the Aus-Hong Kong BIT.



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Privileged and Confidential – Do These “Magic Words” Provide Sufficient Protection?



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Introduction

The words “*privileged and confidential*” often denote a rule of evidence that permits the holder of the privilege to refuse to provide evidence on a certain subject or prevent such evidence being disclosed or used in judicial or similar dispute resolution proceedings.¹ This rule of evidence is often referred to under both common and civil legal systems as the principle of legal professional privilege, professional secrecy, or the right of confidentiality and non-interference (**evidentiary privilege**). However, these protections are not uniformly applied across common and civil legal systems nor will jurisdictions within common or civil legal systems necessarily apply these protections in the same manner. This has been referred to as the “*conflict of privileges*”.

To best assist international lawyers to ascertain if the magic words “*privileged and confidential*” provide sufficient protection this paper will look to the jurisprudence of international courts and arbitral tribunals to discuss and attempt to identify a principle or approach to evidentiary privilege that is international and common to all legal systems. If an international principle of evidentiary privilege is identified this greatly assists

international legal practitioners to determine if the words “*privileged and confidential*” provide sufficient protection when navigating jurisdictions different to their own.

Attempting to define and determine the scope of an international principle of evidentiary privilege under international law is fraught with danger. For example, the recognition and scope of evidentiary privilege varies significantly from jurisdiction to jurisdiction.² There are no established mechanisms for testing a claim of evidentiary privilege under public international law. The first time a State claimed evidentiary privilege before an international court was in a recent dispute between the Democratic Republic of Timor-Leste (**Timor-Leste**) and the Commonwealth of Australia (**Australia**).³ Prior to this dispute, the International Court of Justice (ICJ) had no established mechanism or procedural safeguards to assist the court in ruling on such a claim. Several international arbitral tribunals have also had to consider claims of evidentiary privilege between parties with distinct and competing interpretations of the scope of such claims.

This paper will discuss the jurisprudence from international courts and arbitral tribunals on evidentiary privilege, provide arguments in favour and against a right of evidentiary privilege under customary international law and finally discuss a useful test for the determination of international evidentiary privilege claims with specific reference to the IBA Rules on Evidence.

Adopting an international approach

At the outset, it is important to emphasise why reviewing the international jurisprudence of international courts and tribunals is a creative and authoritative approach in determining if the words “*privileged and confidential*” provide sufficient evidentiary protection.

¹ A Sheppard QC, “The Approach of Investment Treaty Tribunals to Evidentiary Privileges” (2016) *ICSID Review* 31(3), p. 670-689.

² See, D Greenwald and M Russenberger (eds), *Privilege and Confidentiality: An International Handbook* (2nd edition, International Bar Association) 2012).

³ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* International Court of Justice, Application, 17 December 2013 (**Seizure Dispute**).

International courts and arbitral tribunals have long considered rules or principles of law that are universal in nature. These universal norms, or customary principles of international law, are legally applicable to all and no State or legal system can derogate from these principles. This paper will not suggest that an international court or arbitral tribunal has gone as far as to identify a doctrine of evidentiary privilege under customary international law. However, several international courts and arbitral tribunals have considered evidentiary privilege and the applicability of the privilege on a universal or public international law plane. Whilst stopping short of identifying a binding principle of customary international law, this jurisprudence is still helpful to ascertain the international applicability of evidentiary privilege across various legal systems.

Jurisprudence from international courts & tribunals

As noted above, the recognition and scope of evidentiary privilege differs considerably from jurisdiction to jurisdiction. Comparatively, due to interrogatories, depositions, discovery and cross examination common law legal systems have (generally) developed to recognize a wide scope of evidentiary privilege. Evidentiary privilege has not developed as widely in civil law jurisdictions, principally due to the limited right to seek intrusive disclosure.⁴

International courts and arbitral tribunals have tended to follow a common law procedural model with extensive disclosure requirements in the form of document production and the cross examination of witnesses. As a result, the universal scope and application of evidentiary privilege has become a relevant consideration in the jurisprudence of many international arbitral tribunals.

International Arbitral Tribunals

In *Clayton and Bilcon v. Canada*, the UNCITRAL Tribunal found it appropriate when deciding the law applicable to evidentiary privilege claims to take into consideration any relevant rules of international law (emphasis added), as demonstrated in the decisions of international courts and tribunals.⁵ The Tribunal noted the IBA Rules on Evidence would serve as useful guidelines for the determination of applicable evidentiary privilege. The Parties agreed, in view of the unknown and changing jurisprudence regarding evidentiary privilege, that *“any refusal to produce documents based on their political sensitivity requires a balancing process, weighing on the one hand, the compelling nature of the requested party’s sensitivities and, on the other, the extent to which disclosure would advance the requesting party’s case.”*⁶

In *Gallo v. Canada*, the UNCITRAL Tribunal noted that solicitor-client privilege, such as those denoted by the words *“privileged and confidential”* are widely observed in one form or another in different States and these evidentiary privilege cannot be dispensed with in a proceeding governed by international law.⁷ The Tribunal also noted that *“where both parties have conducted themselves [...] on the expectation that privilege would attach, it would be unreasonable for an international tribunal to dispense with such a fundamental privilege.”*⁸ The Tribunal endorsed the *International Bank Settlements* decision noting that evidentiary privilege *“ha[d] been recognized in public international and international commercial arbitration rules and arbitral awards”*.⁹ Importantly, the Tribunal also defined four prerequisites for the application of evidentiary privilege concerning legal advice:

“(i) [T]he document has to be drafted by a lawyer acting in his or her capacity as a lawyer; (ii) a solicitor-client

4 A Sheppard QC, “The Approach of Investment Treaty Tribunals to Evidentiary Privileges” (2016) *ICSID Review* 31(3), p. 671.

5 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v. Government of Canada*, UNCITRAL, PCA Case No 2009-04, Procedural Order No. 13 (11 July 2012) paras. 20-23.

6 A Sheppard QC, “The Approach of Investment Treaty Tribunals to Evidentiary Privileges” (2016) *ICSID Review* 31(3), p. 678.

7 *Vito G Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Procedural Order No. 3 (8 April 2009) paras. 49-50.

8 *Vito G Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Procedural Order No. 3 (8 April 2009) para. 50.

9 *Ibid* at 49.

*relationship based on trust must exist between the lawyer (in-house or external legal advisor) and the client; (iii) the document has to be elaborated for the purpose of obtaining or giving legal advice; and (iv) the lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation*¹⁰

In *Apotex v. United States*, the ICSID Tribunal noted that in determining claims of evidentiary privilege that “as an international arbitral tribunal, the tribunal bases its decision directly upon the exercise of its discretionary powers under the IBA Rules on Evidence and ICSID Arbitration (Additional Facility) Rules, rather than national rules of law.”¹¹

Accordingly, the Tribunal was attracted to using the IBA Rules on Evidence to determine the claim of evidentiary privilege not domestic legal sources.¹²

International Courts

The seizure dispute between Australia and Timor-Leste arose as result of the Australian Security Intelligence Organisation and the Australian Federal Police executing a warrant for the search and seizure of documents, data and other property at the premises of Timor-Leste’s legal advisor.¹³ Timor-Leste claimed the seized documents were marked “*confidential and privileged*”.

Due to the seizure by Australian authorities, Timor-Leste filed an application before the ICJ claiming the seized documents were subject to inviolability and immunity as State property and that the documents and data between Timor-Leste and their legal counsel were protected by legal professional privilege as a customary

or general principle of international law. Timor-Leste also made an application for provisional measures requesting the documents be immediately returned to Timor-Leste or alternatively sent to The Hague until the resolution of the dispute.¹⁴

Timor-Leste successfully obtained some but not all the provisional measures sought from the ICJ. Importantly, Australia was ordered to ensure that the content of the seized material was not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste, kept under seal until further decision of the court and to not interfere in any way in communications between Timor-Leste and its legal advisors in connection with the Timor Sea Treaty Arbitration, any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States.¹⁵

Following negotiations between Australia and Timor-Leste, Australia returned the seized documents and data and Timor-Leste informed the ICJ of its wish to discontinue the proceedings. The case was removed from the court list and there was unfortunately no decision on the merits of Timor-Leste’s application concerning a customary or general principle of international law of evidentiary privilege.

The seizure dispute raised novel issues on the existence and scope, if any, of a right to evidentiary privilege between a State and its legal advisers under customary international law. If a right of evidentiary privilege does exist under customary international law, a necessary question arises concerning the scope and any

10 *Vito G Gallo v. Government of Canada*, UNCITRAL, PCA Case No. 55798, Procedural Order No. 3 (8 April 2009) para. 47.

11 *Apotex Holdings Inc and Apotex Inc v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on Document Production Regarding Parties’ Respective Claims to Privilege and Privilege Logs, 5 July 2013, paras. 20-21.

12 See, also, *Cambodia Power Company v. Kingdom of Cambodia*, ICSID Case No. ARB/09/18, Amended Decision on the Claimant’s Application to Exclude Mr. Lobit’s Witness Statement and Derivative Evidence, 14 February 2012, where the ICSID Tribunal found that questions of evidentiary privilege were governed by international law and that the Tribunal considered that it may be guided by the IBA Rules on Evidence to assist in the determination of such evidentiary claims.

13 This legal advisor acted for Timor-Leste in arbitration proceedings commenced under the Timor Sea Treaty against Australia before the Permanent Court of Arbitration in The Hague.

14 *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* International Court of Justice, Application, 17 December 2013.

15 *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* International Court of Justice, Provisional Measures, Order, 3 March 2014 at para. 55.

exemptions that may also apply to the privilege.

Timor-Leste described evidentiary privilege as fundamental to the international rule of law as it enables States to obtain legal advice and assistance freely, without fear of outside interference and allows a State to participate in dispute settlement processes. Evidentiary privilege upholds the integrity of international judicial proceedings and allows litigant parties to prepare without hindrance or the fear of disclosure of their internal deliberations.¹⁶

Other international courts have also considered the scope of evidentiary privilege under international law. In *AM & S Europe Limited v. Commission of the European Communities*, the European Court of Justice supported evidentiary privilege, subject to some conditions, as a general principle of law to prevent and limit the powers of the European Commission to conduct investigations involving written communications between lawyers and their clients that were subject to confidentiality.¹⁷

In several cases the European Court of Human Rights has also found the principle of evidentiary privilege to be a requirement for the proper administration of justice, maintenance of the rule of law, and an essential component of democratic society.

Importantly, evidentiary privilege has never been described or accepted by the ICJ as a general principle of customary international law. Both decisions in the *Bank for International Settlements* and *AM & S Europe* do not recognise evidentiary privilege as a general principle of customary international law and to the extent evidentiary privilege exists as a general principle of international law it is qualified and not absolute. Both decisions found evidentiary privilege would be waived if the information is voluntarily published by the party claiming the privilege, or in circumstances where the privilege is being abused and used in ways that would unfairly benefit the party claiming the privilege.

The decisions of the European Court of Human Rights are also distinguishable on the basis the decisions are all concerned with articles of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* and do not provide a right of evidentiary privilege applicable between States and their legal advisors, let alone a general principle of evidentiary privilege under customary international law.

If a general principle of evidentiary privilege is to exist under customary international law, the scope of the privilege must be qualified to ensure it cannot be abused by parties or produce distorted effects on other general rights under international law. This approach is consistent with other recognised rights under public international law. For example, the right of a foreign State to avoid having its diplomatic bag opened or detained on the territory of a host State cannot be used as a cover to facilitate a criminal offence, such as drug smuggling.

Arguments in favour and against a customary international law principle of evidentiary privilege

Unfortunately, from a customary international law perspective, the issue of evidentiary privilege raised by the Seizure Dispute was never considered by the ICJ on the merits. Timor-Leste withdrew its Application by consent, prior to the ICJ making a decision. However, the ICJ's decision on provisional measures gave a strong indication of the ICJ's thinking on the possible existence of a customary international law principle of evidentiary privilege. The ICJ indicated that it accepted, under international law, that a State has a right to a confidential relationship with its legal advisors, particularly during dispute settlement. In a separate opinion of Judge Trindade, the concept of evidentiary privilege was described as high as an international legal obligation.¹⁸

The ICJ derived this right from the principle of sovereign equality, reasoning that if a State engages in peacefully

16 S. Tully, 'Legal update: International law: Timor-Leste v. Australia, privilege, security and international law' (2014) 1(5) *Law Society of NSW Journal*, p. 85.

17 *AM & S Europe Limited v. Commission of the European Communities (Legal Privilege)*, Case 155/79, Judgement, 18 May 1982 (**AM & S Europe**).

18 See, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* International Court of Justice, Provisional Measures, Separate Opinion of Judge Cancado Trindade, 3 March 2014.

settling a dispute with another State through arbitration or negotiations it would expect to undertake these activities without interference by the other State in the preparation of its case.¹⁹

The ICJ gave no indication of the limits on the scope of such a right, presumably waiting for the opportunity to further consider and develop any universal right of evidentiary privilege under international law in a decision on the merits of Timor-Leste's application.

In any event, the implication of the provisional measures decision is considerable. A State may claim a right of evidentiary privilege, without exception, and refuse to expose the claim to the jurisdiction of the courts of the host State in which it chose to engage in the communication.

The implications of a right to evidentiary privilege under international law attaching to communications immune to any limitations is concerning. Such a right would appear contrary to State practice both in common and civil law legal systems and the jurisprudence of several international arbitral tribunals.

Determining the applicable rule – the “closest-connection” test

To address the “*conflict of privileges*” and determine if the words “*privileged and confidential*” provide sufficient protection, commentators have proposed the “*closest-connection*” test subject to an equitable adjustment by the court or tribunal.²⁰

Firstly, the legal practitioner should revert to the law applicable at the jurisdiction where the “*privileged and confidential*” document came into existence to determine if the “*magic words*” provide sufficient protection under the laws of the domicile State.

This approach may lead to the application of different rules of evidentiary privilege depending on the parties or category of documents. By way of example, parties from common law jurisdictions may claim evidentiary privilege over “*privileged and confidential*” advice received from common law in-house counsel, however civil law parties will not be able to claim the same category of evidentiary privilege from their own in-house civil law counsel. In these circumstances, commentators suggest an

19 See, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* International Court of Justice, Provisional Measures, Order, 3 March 2014.

20 See, for example, A Sheppard QC, “The Approach of Investment Treaty Tribunals to Evidentiary Privileges” (2016) *ICSID Review* 31(3); A Sheppard and F von Schlabrendorff, ‘Legal Privilege and Confidentiality in Arbitration’ in D Greenwald and M Russenberger (eds), *Privilege and Confidentiality: An International Handbook* (2nd edn, International Bar Association 2012); F von Schlabrendorff and A Sheppard, ‘Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution’ in Gerald Asken and others, *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing 2005). See also, Diana Kuitkowski, ‘The Law Applicable to Privilege Claims in International Arbitration’ (2015) 32 *J Intl Arb* 65; Michelle Grandó, ‘An International Law of Privileges’ (2014) 3 *Cambridge J Intl & Comp L* 666; Klaus Peter Berger, ‘Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion’ (2006) 22 *Arb Intl* 501.

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adjustment to the evidentiary privilege is required to “level the playing field”.²¹ An adjustment to permit one of the parties to resist disclosure on the same grounds as the other would be fair and equitable. Specifically, the adjustment by a court or tribunal is consistent with the obligation to act fairly and/or to treat the parties equally.²²

Referring to these sources will arm the legal practitioner with the tools required to determine if the magic words “privileged and confidential” provide sufficient protection in cross-border and international disputes where a “conflict of privileges” arises.

Conclusion

International courts and arbitral tribunals have determined the scope of the evidentiary privilege applicable in circumstances where parties to the dispute have varying and, at times, competing interpretations of the applicable privilege - the “conflict of privileges”. Recourse to the decisions of international courts and arbitral tribunals therefore aid and assist international practitioners to determine if the magic words “privileged and confidential” provide sufficient protection in cross-border and international disputes where the “conflict of privileges” is most likely to arise.

The jurisprudence confirms that legal practitioners considering if the words “privileged and confidential” provide sufficient protection should refer to: (i) transnational rules of evidentiary privilege, notably the IBA Rules on Evidence as a “useful harmonisation of common law and civil law approaches”²³; (ii) the general principles of international law regarding evidentiary privilege identified in the Seizure Dispute; (iii) formal and informal international agreements recognising evidentiary privilege in transnational litigation²⁴; and in the opinion of the writer (iv) the “closest connection” test.

21 A Sheppard QC, “The Approach of Investment Treaty Tribunals to Evidentiary Privileges” (2016) *ICSID Review* 31(3), p. 677.

22 See, for example, the obligation to act fairly is expressly imposed by the ICC Arbitration Rules (n 5) art 22(4) and the LCIA Arbitration Rules (n. 24) art. 14.4(i). The obligation to treat the parties equally is expressly imposed by the UNCITRAL Model Law (n .22) art. 18; the Swiss Rules (n. 22) art. 15.1 and the ICDR Rules (n. 19) art. 20.1.

23 A Sheppard QC, “The Approach of Investment Treaty Tribunals to Evidentiary Privileges” (2016) *ICSID Review* 31(3), p. 673

24 See, for example, Article 11 of the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters; and Article 18.1 of the 2004 Principles of Transnational Civil Procedure, adopted by the American Law Institute and the International Institute for the Unification of Private Law “effect should be given to privileges, immunities, and similar protection of a party or non-party concerning disclosure of evidence or other information”.

Case Note: Sanum Investments Limited v ST Group Co Ltd



Frank Bannon

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Sanum Investments Limited v ST Group Co., Ltd (No 2) [2019] FCA 1047 concerned award enforcement proceedings in which there was a dispute over the effectiveness of service of the originating application on the award debtors who were incorporated (and resided) in the State of Laos. In this decision, the Court ruled that it would be impracticable for the applicants to strictly comply with the service rules applicable in Laos, and that, in circumstances where the application had clearly been brought to the award debtors' attention, service could be "deemed" to be effective. This article discusses a few of the interesting aspects of the Court's decision.

Background

On 22 August 2016, an arbitral tribunal rendered an award under the rules of the Singapore International Arbitration Centre (**SIAC Award**) in favour of Sanum Investments Limited (Macau, SAR, China) (**Applicant**) against, severally, a natural respondent residing in Laos, and three corporate respondents all incorporated in Laos (collectively, the *Respondents*).¹

On 22 December 2016, the Applicant filed an application seeking leave to serve on each of the Respondents an originating application (with supporting affidavits) for the enforcement of the SIAC Award.²

On 8 February 2017, an application for leave to serve the

Respondents abroad was heard *ex parte* and orders for leave were granted.³ The Applicant served the originating materials on the Respondents by ordinary post and by email, which were found to have come to the attention of the Respondents by no later than 20 February 2017.⁴ The matter returned for a hearing before Justice Foster on 23 March 2017, at which the Respondents made a conditional appearance through their Australian lawyers to contest the orders for leave to serve abroad under rule 10.42 and 10.43 of the *Federal Court Rules 2011* (Cth) (**FCR**), and to resist the Applicants' request for deemed service under FCR rule 10.48.

Issues for Determination

The Court was tasked with determining the following questions:⁵

- 1 What were the requirements to effect service of a foreign originating process on a local person and/or corporation under the laws of Laos?
- 2 Had service been validly effected by the Applicants in accordance with those requirements?
- 3 If service was not effected under Laos law, should the Court make an order under FCR rule 10.48 deeming service to be effective on the ground that it would be "impracticable" to comply with the requirements identified in answer to above question (1)?
- 4 In any case, had the Applicant established a *prima facie* case for enforcement of the award so as to justify the grant of leave to serve abroad for the purpose of FCR rules 10.42 and 10.43?

Findings and Reasoning

Was service compliant with the applicable requirements? (Issues 1 and 2)

The Court found that Laos is neither a party to the Hague Service Convention nor a party to any other continuing

¹ *Sanum Investments Limited v ST Group Co., Ltd (No 2)* [2019] FCA 1047, [1]-[3].

² *Ibid*, [8].

³ *Ibid* [13]; reasons for judgment: *Sanum Investments Limited v ST Group Co., Ltd* [2017] FCA 75.

⁴ See *Ibid* [16] for the Court's summary of the issues in contention.

⁵ *Ibid*, [25].

service treaty with Australia. Therefore local Lao laws of service applied, the contents of which were established by way of expert evidence to require:⁶

- translation into the Lao language of the originating application and supporting affidavits prior to service;
- submission of those processes to the Ministry of Foreign Affairs of Laos via the Embassy or Consulate of the issuing state in Laos; and, subsequently,
- transmission to a relevant court in Laos for consideration and, if considered appropriate, for service by officers of the relevant court.

Justice Foster held that the Applicant's service by ordinary post and email did not comply with these requirements.⁷

[Should service be "deemed" to be effective \(Issue 3\)](#)

FCR rule 10.48 provides that a Court may deem service to have been effective if:

- "(a) it is not practicable to serve the document on the person in a foreign country in accordance with a convention, the Hague Convention or the law of a foreign country; and
- (b) the party provides evidence that the document has been brought to the attention of the person to be served."

There was no dispute that the application had been brought to the Respondents' attention. The question which remained was whether service in accordance with Lao law was "not practicable".

In explaining what the threshold test of impracticability under this rule required, the Court stated at [148] that (emphasis added):

"(...) although mere inconvenience may not be enough to constitute "impracticability", r 10.48 FCR is intended to ameliorate the stultification of cases

against foreign defendants caused by an unduly cumbersome and uncertain set of requirements governing service of this Court's process in a foreign country. In my judgment, once this court is satisfied that its process and other documents have come to the attention of the foreign defendants, it should not hesitate to deem service to have been effective if there is any suggestion that the law of the relevant foreign country as to service will unreasonably delay or even frustrate the progress of the proceeding." [emphasis added]

Adding to the above, Justice Foster noted that efficiency and speed were key objectives of the *International Arbitration Act 1974* (Cth) (**IAA**) and the New York Convention,⁸ and that the context of the proceedings accordingly required the Court to take a "sensible view of what is "impracticable" by not requiring too high a threshold".⁹

Justice Foster accepted on the evidence, that it would be impracticable to achieve service under Lao law. This evidence included anecdotal lay evidence of a lawyer who had represented the Applicant in the past, explaining past difficulties encountered in navigating court systems in Laos.¹⁰ Lay evidence was also led that attempts to achieve service might be disrupted by "inappropriate or corrupt influences" being exercised by the Respondents in Laos (although Justice Foster held that this evidence was ultimately of "little or no assistance").¹¹ Accordingly, orders were made deeming service to be effective.

[Should leave be granted to serve abroad \(Issue 4\)](#)

The Applicant was also required to demonstrate that the earlier orders for leave to serve abroad were justified by showing that they had a *prima facie* case for the relief they were seeking (i.e. orders for enforcement of the award), for the purposes of FCR rules 10.42 and 10.43. The Respondents argued that there was no such *prima facie*

6 Ibid, [14], [109].

7 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at the Hague on 15 November 1965 (**Hague Service Convention**).

8 *Sanum Investments Limited v ST Group Co., Ltd* (No 2) [2019] FCA 1047, [160].

9 Ibid, [161].

10 Ibid, [155].

11 Ibid, [156].

case for relief because the award was unenforceable on various grounds including that the Respondents were not bound by the agreement to arbitrate underpinning the award and that the proper seat for any proceedings was Macau, not Singapore.¹² The Respondents therefore argued that leave to serve abroad should be denied to the Applicant.

This argument was given short thrift by the Court. After outlining the principles that apply in determining whether a *prima facie* case exists,¹³ Justice Foster found that whilst the Respondents' arguments raised points to be investigated at a final hearing, the Applicants had established a *prima facie* case for the enforcement of the award.¹⁴

Implications

Arbitration is a prevalent form of dispute resolution in the mining, energy and resources and infrastructure industries around the world, including in particular in developing jurisdictions where laws of service often have yet to be streamlined and where the Hague Service Convention may not apply. Those with experience in seeking to effect service under complex and often unclear foreign rules and systems for service will appreciate the real obstacles this can pose for the timely resolution of disputes (as exemplified by this case).

The Court in this case proposed a special (less stringent) threshold, applicable in award enforcement cases, for showing that compliance with foreign service requirements would be impracticable so as to justify dispensing with those requirements. This reflects a commercially pragmatic approach by the Australian courts and a desire to give effect to the fundamental objectives contained in the IAA and in the New York Convention (to which Australia is a signatory). This development of legal principle is therefore a welcome one.

The significance of the case for Australian award enforcement must however be viewed having regard to FCR r 28.44(3), which provides that an application for enforcement of a foreign arbitral award may be made without notice to any person. Justice Foster noted that the Applicant had not sought to invoke that provision in this case, and so he proceeded to determine the matter without applying r 28.44(3).¹⁵ It is not clear why this course was adopted by the Applicant, though there are a range of reasons why a forensic decision not to do so may have been taken. In other cases, award creditors may wish to avail themselves of this provision, and might thereby avert the issues of service that arose in the circumstances of this case.

¹² Ibid, [118].

¹³ Ibid, [38]-[40].

¹⁴ Ibid, [134]-[139].

¹⁵ Ibid, [8].

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Arbitration in Australia - Rising to the Challenge⁺



Professor Doug Jones AO*

Independent Arbitrator; ACICA Board Member

1. Introduction

It is a great honour to be asked to deliver the Clayton Utz / Sydney University International Arbitration Lecture this year in Brisbane. Having been associated with the creation and development of the lecture over the past 17 years, I know the many distinguished persons who have delivered it, and I consider it a privilege to follow in their footsteps. For me it is a special pleasure to be giving this lecture in Brisbane where I commenced my legal career and practiced for 20 years before moving to Sydney.

In the last century, until the 1980s, international arbitration was confined to a select few seats in the Northern Hemisphere. The concentration of business in centres such as London, Paris, Stockholm, Switzerland and New York supported the development of successful arbitral seats.¹ However, with the rapid growth of an interconnected global economy and the rise of regionalism, international dispute resolution has developed to meet the demands of shifting trade flows, resulting in the rise in international commercial arbitration to serve Asia's booming economies. This global marketplace presents attractive opportunities for Australian practitioners for an interesting and lucrative stream of work, in addition to providing the obvious economic and political benefits for Australia.

Australia has made significant efforts to promote and enhance international arbitration and is now well-

positioned to be a leading arbitral seat. Australia has robust modern legislation, a supportive judiciary, a well-functioning arbitral institution, outstanding international arbitration legal expertise, and is a safe and accessible seat. Despite this, it is yet to meaningfully establish itself as a potential international dispute resolution hub. There are clear challenges which remain, in a competitive environment, arising from concerns of the impracticality of arbitrating and litigating in Australia. These include perceptions of Australia's geographical isolation and its fragmented legal framework across the states and territories. It is my suggestion that these barriers can be overcome by addressing these perceptions and through a concerted effort to develop the complete package of international dispute resolution services. In a world-class international arbitration landscape, comprised of an attractive Australian commercial law and a commercial court specifically catering towards international disputes, we can be liberated from the twin tyrannies of distance and division.

I propose to address the challenges ahead for the development of international arbitration in Australia in two parts. First, I will discuss the development of the law of arbitration in Australia, increasing judicial support, and the local institutions that have been driving the growth of international arbitration over recent years. With that background, I will then turn to future challenges and look ahead to what may be achieved by, and for, the next generation of international arbitration practitioners in Australia. There is further work to be done to enhance Australia's attractiveness as a dispute resolution hub. I suggest two solutions that can combat these challenges: the development of an Australian commercial law for use by international parties and an international commercial court capable of applying this law. Ultimately, only by offering a complete framework for international disputes can Australia truly compete for international dispute resolution work in the future.

⁺ This is an extract from the paper given at the 18th Annula Utz International Arbitration Lecture, Brisbane 2019. A complete copy of the paper may be downloaded from dougjones.info

^{*} International Arbitrator, CArb, International Judge, Singapore International Commercial Court (www.dougjones.info). I gratefully acknowledge the assistance provided in the preparation of this address by my legal assistant, Sara Pacey.

¹ Doug Jones, 'Overcoming the Tyranny of Distance: Australia as an Arbitral Seat' in Augusto Zimmermann (ed) *A commitment to Excellence: Essays in Honour of Emeritus Professor Gabriel A. Moens* (Connor Court Publishing, 2018).

2. The London Principles: Tracing the Development of Arbitration in Australia

To mark its centenary, the Chartered Institute of Arbitrators developed the London Principles. These are not comprehensive rules, but are a set of guiding principles or key characteristics that make a seat an appropriate and effective forum in which to conduct international arbitration.² The London Principles were intended to provide encouragement to existing, and new, seats for international arbitration by identifying the characteristics necessary for a safe and attractive arbitral seat. The characteristics identified were: the law, the judiciary, legal expertise, education, right of representation, accessibility and safety, facilities, ethics, enforceability and immunity. Of course, the choice of a seat is of critical importance as it establishes the applicable arbitration law and sets the framework in relation to the challenging and enforcement of arbitral awards.³

I will outline the Australian position in the context of a number of these principles, starting with the first and arguably one of the most critical principles: the law. By “the law”, I refer to whether there is effective international arbitration law that facilitates the fair and just resolution of disputes through arbitration, limits court intervention and strikes an appropriate balance between confidentiality and transparency.⁴

2.1 The Law

In 1985, the United Nations established the Model Law for International Commercial Arbitration (“Model Law”),⁵ which provided countries with a robust and effective framework for the regulation of international arbitration.⁶ Australia was one of the first countries to adopt the Model Law through the enactment of the *International Arbitration Amendment Act 1989*,⁷ which incorporated Model Law provisions into Schedule 2 of the *International Arbitration Act 1974* (“IAA”). When UNCITRAL revised the Model Law in 2006 and in 2010, amendments were made to the IAA which adopted nearly all of these revisions.⁸ It can thus be seen that the Commonwealth Government has made a long-standing commitment to the development of international commercial arbitration.

The enhancement of the IAA continued over the years through many amendments, of which I will refer only to some recent changes. In 2015, key amendments were introduced⁹ which confirmed that confidentiality in international arbitration applies on an opt-out basis (effectively reversing the decision of *Esso v Plowman*).¹⁰ The amendments also improved enforceability by providing for the enforcement of international awards made in jurisdictions that are not party to the New York Convention¹¹ by Australian courts.¹² Most recently, in late 2018, the Commonwealth Parliament introduced amendments that incorporated the UNCITRAL Rules on

2 The London Centenary Principle Drafting Team, ‘The Chartered Institute of Arbitrators London Centenary Conference, July 2015’ *CI Arb Journal* 81(4) 404.

3 Janet Walker, ‘The London Principles and their Impact on Law Reform’ 2018 84(2) *The International Journal of Arbitration, Mediation and Dispute Management* 174.

4 The London Centenary Principle Drafting Team (n 2) 405.

5 *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, GA Res 40/72, UN GAOR, 40th sess, 112th plen mtg, Supp No 17, UN Doc (A/40/17) (21 June 1985) (amended on 7 July 2006) (“Model Law”).

6 Doug Jones, ‘International and Domestic Arbitration Regimes – Should They be Combined or Separated?’ (Paper presented at the CCA Taipei Conference on Arbitration and Mediation, Taipei, 27 August 2018), 3.

7 *International Arbitration Amendment Act 1989* (Cth).

8 Albert Monichino and Luke Nottage, ‘Country update: Australia’ in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review*, (Hong Kong International Arbitration Centre (HKIAC); Hong Kong International Arbitration Centre (HKIAC) 2018, Volume 20 Issue 3) 131, 132.

9 *Civil Law and Justice (Omnibus Amendments) Act 2015* (Cth).

10 (1995) 183 CLR 10.

11 New York Convention, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

12 *International Arbitration Act 1974* (Cth) s 7.

Transparency into the IAA, clarified requirements for enforcing foreign awards and gave arbitrators more flexibility in awarding costs.¹³ These amendments strike a balance between preserving confidentiality in commercial arbitration while increasing the legitimacy of Investor-State Dispute Settlement (ISDS) arbitration. They have maintained the consistency of Australian law with international best practice.

In order to understand the law governing arbitration in Australia, it is important to recognise that as Australia is a constitutional federation, the Commonwealth Parliament has power to legislate for international arbitration and the

states for domestic arbitration. Despite this separation, Australia has done well to ensure uniformity, to a large degree, between its domestic and international regimes. Previously, the States were reluctant to reform the existing uniform law of domestic arbitration.¹⁴ However, in 2009, in a bold move, the Standing Committee of Attorneys-General agreed to adopt a series of *Uniform Commercial Arbitration Acts* based on the Model Law for the domestic arbitration regimes.¹⁵ These acts were enacted in all states and territories, starting with NSW in 2010 and finishing with the ACT in 2017.¹⁶ Thus, despite the separation of powers for legislation in relation to

¹³ *Civil Law and Justice Legislation Amendment Bill 2017* (Cth) sch 7.

¹⁴ *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA).

¹⁵ Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2nd ed, 2013) 16, 18.

¹⁶ *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2017* (ACT).

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arbitration, Australia is in the special position among federal states of having the same legislative regime for both domestic and international arbitration based on the UNCITRAL Model Law.

It is interesting to note the different approaches taken by major economies between the development and growth of domestic arbitration on the one hand and international arbitration on the other. Take for example, the system in the United States, in which the *Federal Arbitration Act*¹⁷ (which is not based on the Model Law) governs (some) domestic and international arbitration proceedings, and all fifty states have adopted their own arbitration statutes for domestic arbitration,¹⁸ with only some of these states having adopted the Model Law. Similarly, in Canada, all provinces and territories, aside from Quebec, have enacted separate statutes for domestic and international arbitrations, with only the international regime incorporating the Model Law. In contrast to the Australian system, the Canadian domestic arbitration regime varies significantly according to the particular province.¹⁹ Thus, Australia is unique insofar as it has legislation common to both domestic and international arbitration based on the UNCITRAL Model Law.

Notwithstanding the international focus of this lecture, Australia's domestic regime is relevant because the practice of domestic arbitration inevitably influences the way in which practitioners and arbitrators approach international arbitration. Training and experience in domestic arbitration is useful preparation for international arbitration, particularly where both regimes have adopted the Model Law.²⁰ It is therefore important for domestic arbitration in jurisdictions that seek to promote themselves as centres for international arbitration, to be as international as possible. And the capacity for Australia to do so has been significantly enhanced by the

amendments to the domestic legislation which uniformly adopt the Model Law.

Thus the legislative framework within which both domestic and international arbitration occurs in Australia is as good if not better than that available in any other jurisdiction in the world, serving to enhance Australia's attractiveness as a seat for arbitration.

2.2 The Judiciary

Legislation alone is insufficient to develop international arbitration in a particular jurisdiction. As practitioners, we recognise that judicial support for the arbitral process is critical to the success of arbitration. I will therefore now consider another London Principle that is of vital importance – the judiciary.

An effective arbitral seat has two qualities when it comes to its courts:

- (1) an experienced judiciary capable of dealing with matters relating to international arbitration; and
- (2) courts that respect the parties' choice to refer their disputes to arbitration by adopting a non-interventionist approach to enforcing awards.

This principle is succinctly encapsulated in Art 5 of the Model Law, which provides that:²¹

In matters governed by this Law, no court shall intervene except where so provided in this Law.

While this is an issue with which some jurisdictions still grapple, Australian courts are at the leading edge when it comes to judicial support for arbitration.

Specialist Judges

First, in most jurisdictions, specialist judges deal with matters relating to international arbitration. A particular example of this can be seen in the Federal Court of Australia. Similarly, the Supreme Court of New South

¹⁷ *Federal Arbitration Act* 9 USC Sections 1-16, 201-208 and 301-307

¹⁸ Mark W. Friedman and Floriane Lavaud, 'Arbitration Guide: United States' *International Bar Association*, January 2018. <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides.aspx>.

¹⁹ Pierre Bienvenu and Martin Valasek, 'Arbitration Guide: Canada' *International Bar Association*, February 2018 <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides.aspx>.

²⁰ Roger Gyles AO QC, *Report on Enhancing International Arbitration Opportunities* (Inquiry, Australian Bar Association, 9 July 2019) ("Gyles Report") [58].

²¹ Model Law art 5.

Wales, which championed reform to the Uniform Commercial Arbitration Acts, has jurisdiction to deal with all arbitration matters, international and domestic, offering parties a specialist Commercial Arbitration List in its Equity Division. Earlier this year, here in Queensland, the *Uniform Civil Procedure (Commercial Arbitration) Amendment Rule* amended the Uniform Civil Procedure Rules to incorporate harmonised rules for international and domestic commercial arbitration.²² The creation of specialist lists and harmonised practices for arbitration assures parties that their commercial arbitration matters will be dealt with efficiently and fairly by arbitration-experienced Judges. It also affords parties greater certainty and predictability. As the Hon Justice Clyde Croft stated:²³

One of the benefits of the Arbitration List is that a consistent body of arbitration related decisions will be developed by a single judge or a group of judges. This should provide parties with greater certainty when judicial intervention or support is required.

The Australian judiciary's support of arbitration is also obvious outside the courtroom, with the Federal Court of Australia hosting this lecture for many years, and an International Arbitration Lecture series alongside the CI Arb. Indeed, the Chief Justice of the Federal Court, the Hon James Allsop AO, is a staunch supporter of international arbitration and an intellectual leader in this area (and many others) within Australian judiciary. He is also the chair of ACICA's Judicial Liaison Committee.²⁴

Judicial Support and Decisions

This brings me to the second quality, judicial support for arbitration as demonstrated by Australian jurisprudence.

Australian judges have commented on the shift of Australian courts towards "a significantly more positive, pro-arbitration, position."²⁵ The courts' former apprehensions concerning arbitration,²⁶ stemming from historical tensions between judges and arbitrators, are a thing of the past.²⁷

In 1995, a controversial Australian decision on confidentiality became internationally notorious. In *Esso v Plowman*,²⁸ the Australian High Court expressed views about confidentiality which were the subject of vigorous, and often negative debate in the international arbitral community. However, as time has passed and as issues of transparency have become far more important in international commercial dispute resolution, many have realised that the Australian High Court decision had considerable merit. This is not the place to debate the merits of confidentiality and transparency, but merely to note that the recent amendments to the IAA mentioned above have made the debate in Australia moot, as confidentiality now applies on an opt-out basis to commercial arbitration.

Australian courts have, through numerous decisions, created an environment that strongly supports the process of international and domestic arbitration. The non-interventionist attitude of Australian courts is evident in the decision of *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*, in which the High Court upheld the constitutionality of the IAA and confirmed the court's inability to refuse enforcement of an arbitral award for an error of law.²⁹ There are numerous Australian decisions that confirm the high threshold for setting aside or denying enforcement of

22 *Uniform Civil Procedure (Commercial Arbitration) Amendment Rule 2019* — Explanatory Note.

23 Justice Clyde Croft, 'Arbitration Reform in Australia and the Arbitration List (List G) in the Commercial Court - Supreme Court of Victoria' (Speech delivered at the Seminar of the Commercial Bar Association of the Victorian Bar, Victoria, 24 May 2010), 5.

24 *Gyles Report* [65].

25 Chief Justice Allsop and the Justice Clyde Croft, 'Judicial Support of arbitration' (Paper presented at the APRAG Tenth Anniversary Conference, Melbourne, 28 March 2014).

26 Patrick A Keane, *The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House, Our Rules* (2013) 79(2) Arb 195.

27 James Spigelman AC, 'Foreword' in L Nottage and R Garnett (ed), *International Arbitration in Australia* (The Federation Press, 2010) viii.

28 *Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals)* (1995) 183 CLR 10.

29 *TCL Air Conditioner (Zhongshan) v Judges of the Federal Court of Australia* (2013) 251 CLR 533.

arbitral awards.³⁰ There is also no general discretion to refuse enforcement in Australia, and the public policy ground for refusing enforcement under the *IAA* is to be interpreted narrowly and without residual discretion.³¹

Similar approaches exist with respect to the interpretation of arbitration agreements. Australian courts have held that arbitration clauses are to be construed flexibly and liberally, confirmed by the Federal Court's decision in *Comandate Marine Corp v Pan Australia Shipping*.³² The courts' pro-arbitration approach can be seen in the recent decision in *Rinehart v Hancock Prospecting Pty Ltd*,³³ in which the High Court construed the arbitration clause having regard to its language and context, to capture disputes relating to the validity of the arbitration clause.³⁴ Admittedly, while the issue of the conflicting approaches to interpretation under the *Rinehart v Welker* and *Fiona Trusts* cases was not finally decided, the decision confirms that Australian courts will construe arbitration clauses broadly.

Finally, in the Federal Court case of *Uganda Telecom v Hi-Tech Telecom*,³⁵ Foster J identified the enforcement of arbitral awards as the key rationale of Australian public policy. Courts have recognised that discrete parts of awards infected by a breach of natural justice may be severed from the balance of the award.³⁶ The courts can then enforce part of an award, preventing it from being declared void in its entirety if the void portion is separate and divisible,³⁷ as confirmed by the NSW Court of Appeal in *Aircraft Support Industries Pty Ltd v William Hare*.³⁸ It is evident, therefore, that the enforceability of awards (another London Principle) is clearly adhered to in

Australia. It is safe to assume that what Foster J described as a "pro-enforcement bias"³⁹ toward the recognition and enforcement of arbitral awards will continue. The Australian judiciary has demonstrated its clear support for the practice and procedure of international and domestic arbitration in a manner wholly consistent with the London Principles.

2.3 Facilities

In addition to its legislative framework and judiciary, Australia has the necessary facilities and infrastructure in place to support arbitration, driven largely by practitioners themselves. When discussing "facilities", I am referring firstly to access to leading arbitral institutions with modern rules, and second, world class facilities that ensure the smooth conduct of proceedings and the administration of international arbitrations. It is safe to say that these are features possessed by the Australian Centre for International Commercial Arbitration (ACICA).

To provide some history, in 2001, the IBA held its annual arbitration day in Sydney. This event provided a catalyst for reviving ACICA. A coalition of senior practitioners from a number of the national firms joined with the then president of a largely moribund ACICA to revitalize the institution and transform it into a truly effective international arbitration institution. These practitioners included the late Keith Steel, of Freehill Hollingdale & Page (now Herbert Smith Freehills), David Fairlie of Mallesons Stephen Jaques (now King & Wood Mallesons), Tim L'Estrange, then of Allens Arthur Robinson (now after a period as a banker, a partner in Melbourne of Jones Day) and me, of Clayton Utz.

30 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (No 2) [2012] FCA 1214; *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* (No 2) (2012) 201 FCR 535; *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287.

31 *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361.

32 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [164].

33 [2019] HCA 13.

34 *Ibid* [43].

35 *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 [126].

36 *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403, affirmed on appeal in [2015] NSWCA 229.

37 *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229 [57] [60] (Bathurst CJ) (Special Leave to appeal to the High Court refused).

38 *Ibid*.

39 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* (No 2) [2012] FCA 276 [90] (Foster J).

ACICA introduced arbitration rules in 2005 which were revised in 2011 and 2016. These revisions included provisions for emergency arbitrators and expedited arbitrations.⁴⁰ ACICA's commitment to ongoing reform ensures arbitration in Australia remains consistent with international best practice.⁴¹

Australia also offers excellent infrastructure to support international arbitration through its world class facilities. After ACICA's creation, with the support of the then Attorneys General the Hon John Hatzistergos in New South Wales and the Hon Robert McClelland of the Commonwealth, the Australian Disputes Centre ("ADC") was established in Sydney. The ADC works closely with ACICA to provide a venue with all the features of the best dispute resolution centres that can be customised to the needs of the arbitration to maximise cost effectiveness for the parties.⁴²

In recent years with the flourishing of international dispute resolution associated with the resources industry, the Perth Centre for Energy & Resources Arbitration (PCERA) has been established to promote Australia as a place for the resolution of resources disputes. It is gratifying and encouraging to see PCERA now working under the ACICA umbrella to promote international arbitration as a national endeavour, rather than merely as a regional activity. Meeting the challenge faced by federations such as Australia with far-flung places and regional interests is one that calls for a national vision and persistent effort in order to succeed.

Also associated with ACICA is a specialist commission, the Australian Maritime and Transport Arbitration Commission (AMTAC), establishing ACICA as an umbrella organisation for the development of international commercial arbitration in the areas of general commercial arbitration, maritime arbitration, and resources arbitration. The shared objective of these

organisations, that being to further arbitration within Australia, has resulted in high-quality service and facilities for use by commercial parties.⁴³

Thus so far as facilities and institutions are concerned, Australia certainly satisfies the London Principles.

2.4 Legal Expertise

Successful seats are home to skilled and experienced legal practitioners who are able to administer, and provide support for, international arbitration.⁴⁴ The high quality of Australian lawyers is amply demonstrated by their success and prominence as practitioners by all the major common law jurisdictions of the world and many civil law jurisdictions as well. Recent times have seen the establishment of international arbitration practices within international and domestic law firms in Australia. Examples include firms such as Corrs Chambers Westgarth, King & Wood Mallesons, Herbert Smith Freehills, Clayton Utz, Allens, Ashurst, Baker McKenzie, DLA Piper, Clifford Chance, Allen & Overy, HFW, Norton Rose Fulbright, Clyde & Co, White & Case and Jones Day.

For there to be such an interest by these firms in the practice of international arbitration in Australia is a testament to the number of positive characteristics that Australia possesses. First, the practice of law in Australia is much more open to international practitioners than in some other jurisdictions. Law firms practising international commercial dispute resolution have the capacity to operate both in the domestic courts here and in international arbitration. This cannot be said of a number of other prominent jurisdictions in the region. Secondly, the cost to legal practitioners and firms of operating in Australia is lower than in a number of other leading centres in the region. Australia provides a very economically sustainable base from which international arbitration practices can develop. As these firms continue to practice and grow in Australia, the financial interest

40 ACICA Rules 2011 (2011) <<https://acica.org.au/acica-rules-2011/>>; ACICA Arbitration Rules Incorporating the Emergency Arbitrator Provisions 2016 (As at 1 January 2016); ACICA Rules 2016 (As at 1 January 2016); ACICA Expedited Arbitration Rules (As at 1 January 2016) <<https://acica.org.au/wp-content/uploads/Rules/2016/ACICA-Expedited-Arbitration-Rules-2016.pdf>>.

41 Jones (n 1), 276.

42 Doug Jones and Bjorn Gehle, 'Australian Centre for International Commercial Arbitration (ACICA) (2010) *World Arbitration Reporter*.

43 Jones (n 1), 277.

44 Lord Peter Goldsmith, 'The London Principles 2015' (2015) 81(4) *The International Journal of Arbitration, Mediation and Dispute Management* 407.

that they have in seating arbitrations in Australia is obvious.

The State Bars have had a continuing interest in the growth of international arbitration as attested to by the corporate membership of the New South Wales and of the Victorian Bars in ACICA. There has been a recent revival of interest by the ABA in the development of the practice of international commercial arbitration, no doubt encouraged by the number of international arbitral disputes which have been spawned by oil and gas and mining disputes arising in recent times due to changing economic conditions in those industries.

At the recent ABA conference in Singapore, a debate took place on increasing opportunities for Australian barristers to practice international disputes, which had been the subject of a report by the Hon Roger Gyles AO QC. This discussion was significant in furthering the interests of the Australian Bar in developing a competitive practice in Australia and more importantly in the Asia Pacific region. The skills of Australian dispute resolution practitioners interested in international arbitration, including those from the independent Bars of the States and Territories, is equal to that of the London Bar whose capacity to win work in the region has been and continues to be demonstrated regularly. Some Australian barristers are also associated with overseas chambers, in England or Singapore. Indeed, a group of prominent barristers from Sydney and Brisbane have taken chambers in Maxwell Suites in Singapore to create “Maxwell 42”, specialising in international arbitration.⁴⁵ Thus I suggest that Australia is not only well placed to be an effective centre for international commercial arbitration, it is in many respects *uniquely* well placed.

2.5 Other Principles

It can safely be said that Australia satisfies all other criteria of the London Principles, indicating that it is a safe and attractive seat for international arbitration. It is apposite to mention of a few of them here.

Education

Closely linked with the competency of the legal profession is education, another of the London Principles. Educational institutions providing undergraduate and postgraduate study in international arbitration proliferate in Australia, with many of the leading Australian universities providing courses in international commercial arbitration (including a host of this lecture, the University of Sydney). The Resolution Institute provides arbitrator accreditation and grading in Australia, run in conjunction with the University of Adelaide Law School.⁴⁶ In terms of practical experience, ACICA offers an internship program for law students or law graduates with an interest in commercial arbitration.⁴⁷ CI Arb Australia also provides a number of training courses for accreditation and professional development as well as an Asia Pacific Diploma in International Arbitration.⁴⁸

The involvement of Australian universities in the Willem C. Vis Moot has been long and sustained and the success enjoyed by Australian teams in the Vis Moot has been consistent. In recent years, the Australian Catholic University, Monash University, the University of New South Wales, the University of Queensland and the University of Sydney all received honourable mentions, and the University of Sydney was awarded the Pieter Sanders Award for Best Claimant Memorandum in 2019.⁴⁹ In addition, a number of international arbitration moots are also available to Australian students, including the Alfred Deakin International Commercial Arbitration Moot and the CI Arb/New South Wales Young Lawyers

⁴⁵ *Gyles Report* [73].

⁴⁶ Resolution Institute, ‘Arbitrator accreditation and grading in Australia’ *Accreditations* (Web page, 2019) <<https://www.resolution.institute/accreditations/arbitration-australia>>.

⁴⁷ Resolution Institute, ‘Arbitrator accreditation and grading in Australia’ *Accreditations* (Web page, 2019) <<https://acica.org.au/internship-programme/>>.

⁴⁸ CI Arb Australia Branch, ‘2019 CI Arb Asia Pacific Diploma In International Arbitration’ *Training* (Web page, 2019) <<https://www.ciarb.net.au/training/diploma2019/>>.

⁴⁹ The Annual Willem C. Vis International Commercial Arbitration Moot, ‘26th Vis Moot Results’ *Previous Moots* (web page 2018) <<https://vismoot.pace.edu/site/previous-moots/26th-vis-moot>>.

International Arbitration Moot. It is therefore safe to say that the education of international arbitration in Australia is widespread and of a high quality.

Right of Representation

Another of the London Principles is the right of representation. The entitlement of parties to be represented by their counsel of choice in international arbitrations in Australia is enshrined in Commonwealth legislation. Section 29(2) of the *IAA* relevantly provides:

- (2) A party may appear in person before an arbitral tribunal and may be represented:
- (a) by himself or herself;
 - (b) by a duly qualified legal practitioner from any legal jurisdiction of that party's choice; or
 - (c) by any other person of that party's choice.

This legislative provision precludes any attempt by the State Bars of Australia to preserve their "patch" in this space.

Summary

It is therefore clear that Australia satisfies all of the London Principles. Collectively, the prevalence of these characteristics in Australia makes this country a safe and effective seat for disputing parties in the Asia-Pacific region.

Nevertheless, arbitration in Australia has not yet reached its full potential. One would assume that, given the prevalence of these characteristics, more international arbitrations would be seated in Australia. There are several reasons for this. These represent challenges that remain to be overcome to ensure the continued growth of international arbitration in Australia in a highly competitive international market. Further developments must be made to enhance Australia's potential as an international dispute resolution hub.



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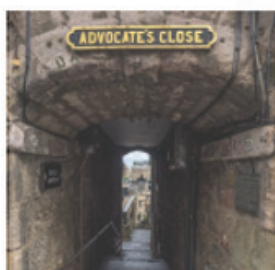
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Surveying Australian Arbitration



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With Deborah Tomkinson

ACICA Secretary General

Introduction

In 2018 the WA Arbitration Initiative, with the support of Francis Burt Chambers, FTI Consulting, ICC Australia and Law in Order, conducted a detailed survey to investigate the extent of arbitration work with a Western Australian connection that was undertaken in the 2017/2018 financial year. The WA Arbitration Report, in which the survey results were analysed, was released in early 2019 revealing significant levels of arbitration work with a Western Australian connection and a vibrant arbitration community with substantial domestic and international arbitration expertise particularly in the energy, resources and construction sectors. The WA Arbitration Report provides the first solid empirical data analysing the use of arbitration in an Australian context and is unique in Australia, with no comparable data available from other Australian jurisdictions.

In order to address this at a national level, ACICA has collaborated with the WA Arbitration Initiative and FTI Consulting, supported by Francis Burt Chambers, the Australian Bar Association and a network of state-based 'champions', to launch the Australian Arbitration Survey. This national survey was open for responses throughout November and December 2019 and work will soon be underway to analyse the responses and prepare a report. The national survey follows a similar framework to the original WA questionnaire (with contextual tweaks), and seeks to reveal the scope of arbitration work with any Australian connection that was undertaken in the time

period from 2016-2018. The national survey aims to provide practitioners involved in arbitration a chance to provide feedback about what works in arbitration and what can be improved. It is anticipated that the information obtained as a result will contribute to a more meaningful conversation with stakeholders to drive investment in arbitration, inform collective efforts to promote arbitration in Australia and Australian cities as arbitral venues, provide a baseline against which changes in usage and perceptions in this area can be assessed and generally enhance the practice of arbitration in Australia.

The results of the Australian Arbitration Survey are anticipated in early 2020 and ACICA looks forward to reporting further at that time.

This article reflects on the results of the WA Arbitration Report and what it means for the promotion of arbitration, Western Australia and Australian arbitration practitioners. The data obtained reflects positively on the current scope and future development of arbitration across Australia.

Background to the WA Arbitration Survey

The inaugural WA Arbitration Report was launched by the Attorney General, the Hon. John Quigley MLA on 1 May 2019.

The Report is the result of a survey of practitioners, conducted by the WA Arbitration Initiative, investigating the extent of arbitration work with a WA connection during the 2017/2018 financial year.

The impetus for the survey was to fill an information gap. While some arbitrations become public (eg. *Rinehart v Hancock Prospecting Pty Ltd* [2019] 366 ALR 635), most arbitrations occur behind closed doors. The result is that solid data about arbitration is not readily available and no-one really knows how much arbitration is going on. It was anticipated that the survey could address this information deficit and support the promotion of arbitration, Western Australia as a seat/place for arbitration and Australian arbitration practitioners within Australia and internationally.

The WA Arbitration Initiative was developed by WA arbitration practitioners Brian Millar and Scott Ellis. They have been joined by the former Chief Justice of Western

Australia, Wayne Martin AC QC, who now practices as an arbitrator and mediator. The purpose of the WA Arbitration Initiative is to promote arbitration, and arbitration practitioners, and is 'institution neutral'.

Survey methodology

The survey interrogated the nature and extent of arbitration activity with a WA connection during 2017/2018. It was not limited to arbitrations that were heard in WA.

The survey was directed to arbitrators, law firms, in house counsel and barristers. To preserve confidentiality of the arbitral process, the responders and their data were de-identified. It was expected that some responders might be involved in opposite sides of the same arbitrations, so questions involved unique identifiers to enable duplicate responses to be eliminated.

The Results

The responses revealed that during the period under review:

- There were 105 unique arbitration proceedings
- Of those 105 arbitrations, 53 were domestic arbitrations and 52 were international
- The amounts in issue in the arbitrations totalled more than AUD14bn in claims and an additional AUD8.5bn in counterclaims
- The larger amounts in issue were skewed towards the international arbitrations
- The disputes were predominantly in the mining, resources, energy (oil and gas) and construction/ engineering sectors
- Firms in Western Australia derived at least \$85m in fees for arbitration related services during the year surveyed
- In addition to those fees, other costs included:
 - AUD9m in Tribunal costs
 - AUD13m in witness fees (including fees to expert witnesses)
 - AUD4.5m in other costs

Implications

The survey shows that there is a significant arbitration community in WA with substantial expertise and experience in international and domestic arbitration, particularly in the resources, energy and construction sectors. That expertise has been honed by the WA arbitration communities' involvement in the numerous, significant and high value disputes, which have arisen out of the state's major mining, oil & gas and infrastructure projects.

The survey also showed that WA practitioners are using their expertise acting in arbitrations heard overseas, which do not involve Western Australia projects or Australian parties, indicating recognition of the depth of Australian legal talent and its successful export.

Feedback from participants shows that experience in arbitration and innovative approaches are important in selecting both arbitrators and legal representatives. Another recurring theme was the need to utilise the inherent flexibility of the arbitral process to reduce the overall time and costs involved and to avoid processes resembling court litigation.

The Survey results indicate that there are opportunities for WA based practitioners to increase their involvement in the international market and to increase the use of arbitration in resolving domestic disputes. The promotion and development of WA arbitration also brings economic advantages to the state, and complements the development of WA as a global energy and resources hub.

It is anticipated that the results of the 2019 Australian Arbitration survey will be as compelling, and demonstrate the potential for continued growth in the use of arbitration across Australia and by Australian practitioners domestically and internationally.

A copy of the WA Arbitration Report may be downloaded here: [CLICK TO DOWNLOAD REPORT](#)

A change in Investment Treaty Climate

Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain [2019] FCA 1220



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Introduction

1 Investor-state claims under energy charter treaties are becoming prolific against European countries. That is, there are claims being made by renewable energy corporations against nation states arising from the current changing investment climate.¹ Such claims arise when, after having been attracted to invest in foreign economies through governmental financial incentives, the incentives offered to entice foreign investors have been subsequently withdrawn. This

has resulted in adverse affects on these foreign investments.

- 2 Such rapid attention to the renewable energy sector has not come without turmoil. While nation states are seeking to become better corporate citizens, investment in the energy sector has left some nations with no choice but to rescind their position due to the financial viability in adhering to investment incentives they have offered. As a result, many investors in the renewable space are left with investments that cannot perform as anticipated, or which are potentially no longer viable. Consequently, this has opened the flood-gates to investor-state arbitrations.
- 3 Such investor-state claims have recently gained local attention in Australia when, in August this year, the Federal Court of New South Wales determined a stay application in the case of *Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain* [2019] FCA 1220 and subsequently heard the parties substantive submissions in the case.

Original award

- 4 The original award, dated 15 June 2018,² related to a dispute regarding measures taken by the Respondent, Spain, in the renewable energy sector and the alleged breaches of its obligation to provide fair and equitable treatment under both the Energy Charter Treaty (**ECT**) and international law with respect to the Infrastructure Services Luxembourg S.A.R.L and Energia Termosolar B.V.³ (**Claimants**) and their investments (**Award**).⁴
- 5 In 2011, the Claimants acquired shareholding participations in Andasol-1 Plant and Andasol-2 Plant, two operational concentrated solar power plants

1 Pun intended.

2 *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v Kingdom of Spain (Award)* (ICSID Committee, Case No. ARB/13/31, 15 June 2018) (*Infrastructure Services v. Spain (Award)*)

3 Formerly *Antin Infrastructure Services Luxembourg S.A.R.L and Antin Energia Termosolar B.V.*

4 *Infrastructure Services v. Spain (Award)* (n.2) [5].

located in Granada, Southern Spain.⁵ This investment occurred after Spain had introduced Royal Decree 661/2007 (**RD 661/007**) which⁶

'sought to grant [renewable energy] producers stability in time, allowing them to do medium and long-term planning while obtaining a sufficient and reasonable return'.

- 6 RD 661/007 introduced a feed-in-tariff (**FIT**) mechanism for renewable energy producers, amongst other incentives.⁷
- 7 In 2012, Spain made certain legislative changes which eliminated the right for the Claimants to receive a FIT.
- 8 The Claimants alleged that they invested approximately €139.5 million in the Spanish renewable energy sector⁸
'based on the expectation that their ... plants would generate regular and sustainable income that would allow the Claimants to service their debt and obtain a return on their investment'.
- 9 The Claimants contended that the Spanish legislative changes caused them to suffer substantial losses and violated Spain's obligations under the ECT to accord them fair and equitable treatment.⁹
- 10 The Tribunal found that, in the circumstances, it could not conclude that Spain had complied with its obligations under the ECT to accord investors fair and equitable treatment.¹⁰ The Tribunal awarded the Claimants €112 million in compensation plus interest

and a contribution to the Claimants' cost of the arbitration and legal fees.¹¹ On 29 January 2019, the Tribunal made a further award rectifying the amount of compensation to €101 million.¹²

Federal Court of Australia Proceedings

- 11 In April 2019, the Claimants in the arbitration who became the Applicants in Australian Federal Court proceedings, sought orders from the Federal Court of Australia for leave to have the Award enforced against Spain.¹³ The Applicants also sought payment of the Award in the amount of €101 million plus interest and costs.¹⁴
- 12 However, before any substantive steps were taken in the Federal Court proceedings, Spain filed an application with the ICSID to have the Award annulled and requested the Secretary General of ICSID to provisionally stay enforcement of the Award until the annulment application was determined.¹⁵ On 23 May 2019, the Secretary General of ICSID provisionally stayed the enforcement of the Award.¹⁶
- 13 The next step in the Federal Court proceedings was taken by Spain when, on 6 June 2019, Spain filed a conditional appearance for the purpose of asserting immunity from the jurisdiction of the court of Australia pursuant to the *Foreign States Immunities Act 1985* (Cth) (**Immunities Act**).¹⁷
- 14 In a twist, and as a result of the ICSID provisional stay, in July 2019, the Applicants filed an interlocutory

5 Ibid [70].

6 Ibid [91].

7 Ibid [93].

8 Ibid [359].

9 Ibid [360].

10 Ibid [573].

11 Ibid [748].

12 *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Enerfia Termosolar B.V. v The Kingdom of Spain (Decision on Rectification of the Award)* (ICSID Arbitral Tribunal, Case No ARB/13/31, 29 January 2019) [40].

13 *Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain* [2019] FCA 1220 [1]; (*'Infrastructure Services Luxembourg S.A.R.L'*).

14 Ibid [2].

15 Ibid [12].

16 Ibid [13].

17 Ibid [16].

application seeking orders staying their own enforcement proceeding.¹⁸ Their reason for this application was because, had they proceeded to take the prescribed steps in the Federal Court proceeding, they would be in conflict with the ICSID provisional stay.¹⁹ However, if they failed to continue with the Federal Court proceeding, they would be in breach of the Federal Court's programming orders for the service and filing of evidence.²⁰ The Applicants indicated that they would apply for the Federal Court stay to be lifted if the ICSID provisional stay was lifted.²¹

- 15 In a further twist, Spain opposed the Applicants' stay application and instead argued that the Federal Court must proceed to determine the foreign state immunity issue prior to exercising any jurisdiction against Spain, including by determining the stay application.²²

To Stay or to Proceed?

- 16 The key issue for consideration was the interaction between Articles 52(5) and 54(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (**ICSID Convention**) which, by virtue of s 32 of the *International Arbitration Act 1974* (Cth), has the force of law in Australia.
- 17 Article 52(5) of the ICSID Convention provides for the mandatory provisional stay of enforcement if requested in an annulment application. Whereas, Article 54(1) makes it mandatory for a state party to the ICSID Convention (which Australia is) to recognise and enforce an award made pursuant to the ICSID Convention.

- 18 It was Justice Stewart's view that the obligations on a state to recognise and enforce an award are subject to the provisional stay of enforcement provisions such that a provisional stay also suspends Australia's enforcement obligations.²³

- 19 Justice Stewart's position aligned with the reasoning in *Maritime International Nominees Establishment v Republic of Guinea*²⁴ where it was held that:²⁵

'although the Convention does not explicitly so provide, it seems clear that suspension of a party's obligation to abide by and comply with the award necessarily carries with it suspension of a Contracting State's obligation (and for that matter its authority) to enforce the Award even though during the pendency of the Committee's examination of the application for annulment the validity of the Award remains unaffected.'

- 20 In adopting the above reasoning, Stewart J found that the above position is the only logical way to read the articles together.

Spain's Immunity Argument

- 21 Before concluding on the Applicants' stay application, Stewart J had to address Spain's argument that the issue of state immunity must be determined prior to any stay being granted.
- 22 Justice Stewart distinguished between subject matter jurisdiction (which he found that the Federal Court clearly has as the designated court under the International Arbitration Act for the purpose of recognition and enforcement of ICSID awards) and jurisdiction over a foreign state.²⁶

18 Ibid [18]

19 Ibid [19].

20 Ibid.

21 Ibid [18].

22 Ibid [3], [19], [21].

23 Ibid [28].

24 *Maritime International Nominees Establishment v. Republic of Guinea (Interim Order 1)* (ICSID Committee Case No ARB/84/4, 12 August 1988).

25 Ibid [10].

26 *Infrastructure Services Luxembourg S.A.R.L* (n15) [39].

23 In considering whether the Federal Court had jurisdiction over Spain, Stewart J referred to the plurality in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240 (**PT Garuda**), which considered jurisdiction in the context of the Immunities Act and noted that in this context,²⁷

"jurisdiction" is used not to identify the subject matter of a proceeding, but the amenability of a defendant to the process of Australian courts.'

24 The plurality in *PT Garuda* also considered the term 'immunity' in the same context and found that foreign immunity is a foreign state's protection from being impleaded or made a party to a legal proceeding against its will.²⁸

25 Justice Stewart considered these interpretations and found that his determination of the stay application did not 'implead' Spain, nor did it make Spain a party to a legal proceeding against its will.²⁹ He was therefore not prevented from determining the stay application.

26 On this basis, on 1 August 2019, Stewart J exercised the Federal Court's powers and stayed the Federal Court enforcement proceedings.³⁰

Determination in relation to ICSID Provisional Stay

27 On 21 October 2019, an ad hoc committee comprising Mr Cavinder Bull SC, Prof. Dr. Nayla Comair-Obeid and Mr. José Antonio Moreno Rodríguez lifted the provisional stay of the award.³¹

28 In reaching their decision to lift the stay of enforcement, the ICSID ad hoc Committee (**Committee**) considered the application of Article 52(5) of the ICSID Convention which provides that the Committee may ***'if it considers that the circumstances so require, stay enforcement of the award pending its decision'*** (emphasis in decision).³²

29 It was the Committee's view that, for a stay to be required, the circumstances must, at the very least, rise above those which are common to most stay applications³³, and that the continuation of a stay cannot be presumed.³⁴

30 The Committee considered the reasoning in the 2018 decision in the case of *Valores Mundiales v Venezuela*,³⁵ where the ad hoc committee observed, amongst other things, that:³⁶

'...the practice of most committees that have decided in favour of the continuation of the stay, to which Venezuela refers, is not enough to prove the existence of such presumption...'

31 The Committee also noted that the presumption in favour of granting a stay ran counter to the principle that ICSID awards were final and binding.³⁷ Accordingly, the Committee agreed with the observations by the ad hoc committee in *SGS v Paraguay*³⁸ that:³⁹

'...the binding nature of the award is the rule, whereas the annulment is the exception...'

The inevitable consequence of the foregoing reasoning is that, despite an application for annulment, awards must be enforced and only in

27 *PT Garuda Indonesia Ltd v Australia Competition and Consumer Commission* (2012) 247 CLR 240, 247 [17].

28 *Ibid.*

29 *Infrastructure Services Luxembourg S.A.R.L.* (n15) [37].

30 *Ibid* [41].

31 *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v Kingdom of Spain (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)* (ICSID Committee, Case No. ARB/13/31, 21 October 2019). (*'Infrastructure Services v Spain (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)'*).

32 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 1 June 1991, art 52(5)).

33 *Infrastructure Services v. Spain (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)* (n15) [60]

34 *Ibid* [62].

35 *Valores Mundiales, S.L and Consorcio Andino, S.L v The Bolivarian Republic of Venezuela (Valores Mundiales v Venezuela) (Decision on the Request for a Continuation of the Provisional Stay of the Enforcement of the Award)* (ICSID Committee, Case No ARB/13/11, 6 September 2018).

36 *Infrastructure Services v. Spain (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)* (n35) [63]

37 *Ibid* [65].

38 *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay (SGS v Paraguay)* (Decision on Annulment) (ICSID Committee, Case No. ARB/07/29, 19 May 2014).

39 *Infrastructure Services v. Spain (Decision on the Continuation of the Provisional Stay of the Enforcement of the Award)* (n35) [66]

very specific cases where the circumstances so require, may enforcement be stayed by the corresponding committee.

- 32 As to whether there would be any prejudice to the respective parties if the stay was granted or not granted, the Committee made the following comments:
- (a) the burdens and risks raised by Spain are common to virtually all annulment applications, particularly in this case where Spain bears no high financial burden or risk in the connection of recovery of the award monies, nor conflict with their international obligations;⁴⁰ and
 - (b) while the Claimants submitted that the granting of a stay would move the Claimant to the *'back of a long line of award-creditors'*, the Committee formed the view that there was insufficient evidence to show that a continuation of the stay would occasion significant prejudice to the Claimants.⁴¹
- 33 Finally, the Committee did not consider that the merits of Spain's annulment application was a relevant circumstance that would demonstrate that a stay is required.⁴²
- 34 Accordingly, the Committee made a finding that the stay should not continue and reserved the issue of costs.⁴³

Federal Court of New South Wales

- 35 Meanwhile, in Australia, on 25 October 2019, following the above Decision on the Continuation of the Provisional Stay of the Enforcement of the Award, his Honour Justice Stewart made orders that the stay of the proceedings in the Federal Court of New South Wales be lifted, that the submissions filed and served by the parties in the original proceeding commenced in the Federal Court be treated as submissions in this proceeding, and that the matter be listed for hearing.⁴⁴
- 36 The one day hearing was held on 29 October 2019

during which counsel for both parties presented their oral arguments. Judgement has been reserved. We anticipate that Justice Stewart's judgment will be published in the first half of next year.

Investor-state arbitrations

- 37 Not only is this case of great interest to Spain, but its outcome will be relevant to other investors who may come to Australia to enforce their awards against foreign states.
- 38 For example, Tethyan Copper Company Pty Ltd (**Tethyan Copper**) has commenced proceedings in the same jurisdiction, being the Federal Court of Australia, to enforce an award of over USD 4 billion against the Islamic Republic of Pakistan.⁴⁵ A case management hearing for the Tethyan Copper proceedings was held before the same judge as the enforcement proceedings against Spain, Justice Stewart, on 21 November 2019. With no appearance from Pakistan, his Honour adjourned the case management to 6 February 2020. In the same move as Spain, Pakistan is reportedly seeking to annul the award at ICSID.
- 39 If the award against Spain is enforced in the Federal Court of Australia, this will be an encouraging outcome for Tethyan Copper and potentially other investors who are successful in investor-state arbitrations against foreign states.
- 40 Where the Australian pro-arbitration stance is already well known in the commercial arbitration sphere, if the court's decisions in the enforcement proceedings against Spain and Pakistan are in favour of enforcement, we could well see an influx of investor-state arbitration award enforcement proceedings in Australia.

⁴⁰ Ibid [72]-[73], [75].

⁴¹ Ibid [78].

⁴² Ibid [83].

⁴³ Ibid [85].

⁴⁴ A copy of the Orders of the Federal Court of New South Wales dated 25 October 2019 can be found here, <https://www.comcourts.gov.au/file/Federal/P/NSD602/2019/3855085/event/30069018/document/1491954>.

⁴⁵ *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan* (Federal Court of Australia NSD1749/2019, commenced 17 October 2019).

Arbitration, Africa and Asia: The Emerging Ascent



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I Abstract

This work briefly canvasses a number of arbitration trends in Africa.

II Introduction

Fuelled by Chinese investment, Sub-Saharan Africa is regarded as one of the fastest-growing regions in the world.¹ Despite political instability and rule of law issues, foreign capital is flooding the continent. International trade and investment will inevitably give rise to disputes.

International arbitration is gaining increased popularity in Asia² and is an obvious method of addressing investment disputes. This work examines a number of noteworthy developments and the trend they foreshadow.

III Developments

A Organisation for the Harmonisation of Corporate Law in Africa ('OHADA')

The OHADA treaty was executed in 1993 by 17 African member states with the objective of improving the investment climate by creating a more favourable economic climate.³ Similar to initiatives such as the European Court of Arbitration, the treaty created a Common Court of Justice and Arbitration ('CCJA') which has supra-national jurisdiction over member states.⁴ In late 2017 OHADA the body enacted reforms to the Uniform Arbitration Rules – importantly the inclusion of provisions for investment arbitration,⁵ thus establishing another arbitration forum.

The CCJA's low caseload⁶ indicates that it may not be a particularly attractive or useful to disputants. However, despite criticisms, bilateral investment treaties are increasingly stipulating that disputes be referred to the CCJA.⁷ It has been argued that the CCJA serves to provide 'healthy competition' to ICSID.⁸ If so, this is indicium of a trend towards more African seated arbitrations and greater confidence in such institutions.

B Belt and Road

Perhaps one of the most ambitious political endeavours of our era, the Belt Road will see enormous volumes of capital and investment into the continent.⁹ Given the amount of capital at stake, questions of the impingement of sovereignty in a region that has a not too distant

+ The author would like to express gratitude to the ACICA Editorial Board, close friends and family. Email: tobyfadida@gmail.com. Any errors or omissions belong to the author.

1 See, eg, Joseph Onjala 'Chinese Direct Investments in Africa: Motivations and Environmental Implications' [2016] (winter/spring) *Georgetown Journal of International Affairs* 91.

2 See, eg, Christopher K. Tahbaz and Justin R. Rassi, 'The Development of Arbitral Institutions in Africa' 13 *University of Pennsylvania Asian Law Review* 102.

3 See, eg, Michael W. Buhler, 'Out of Africa: The 2018 OHADA Arbitration and Mediation Law Reform' [2018] (October) *Journal of International Arbitration*.

4 Gaston Kenfack Douajni, 'Recent Developments in OHADA Arbitration', *Global Arbitration Review* (online, 11 April 2019) <<https://globalarbitrationreview.com/chapter/1190118/recent-developments-in-ohada-arbitration>>.

5 Ibid.

6 Buhler, above, n 4.

7 Sadaff Habib, 'Impact of Direct Foreign Investment on Arbitration in Africa', *Kluwer Arbitration Blog* (Blog Post 27 March 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/03/27/impact-foreign-direct-investment-arbitration-africa/>>.

8 Ibid.

9 See, eg, Hong Kong Trade Development Council, 'Belt and Road Basics' (Website) <<https://beltandroad.hktdc.com/en/belt-and-road-basics>>.

memory of colonisation and indebtedness makes it impossible to expect that disputes of one sort or another will not arise. Appropriate dispute resolution mechanisms will be essential for the preservation of amicable diplomatic relations and the completion of the project. Arbitration is a natural choice for investment agreements and Silk Road will undoubtedly give rise to further developments in arbitration¹⁰.

China is negotiating further free trade agreements¹¹. This would add to Belt Road and bilateral investment treaty forums. Many of the disputes that have arisen under the initiative have been brought using investor-state dispute resolution mechanisms,¹² indicating that much of the arbitral infrastructure already exists.

The International Academy of the Belt and Road in Hong Kong released the 'Blue Book Dispute Resolution Mechanism' which purports to be a unified series of rules for the initiative.¹³ Given the number of forums and bases for bringing a dispute it is doubtful that the unified set of rules will bring the desired simplicity.

The People's Supreme Court has provided opinions on offering judicial services and safeguards.¹⁴ Adding to the extensive possible forums, the Chinese government has also established the China International Commercial Law, an extension of the Supreme People's Court, is designed to be an attractive forum for international and Belt Road litigants.¹⁵

It is also expected that state-to-state disputes will be

heard in the Permanent Court of Arbitration and using World Trade Organisation forums (where a free trade agreement exists) and using ICSID where there is a dispute between a state and an investor will be resolved using ICSID.¹⁶

The nature, diversity and complexity of disputes arising under Belt Road are likely require a range of forums. However, equally this will undoubtedly give rise to conflict of laws and res judicata issues while creating opportunities for forum shopping. While Belt Road disputants will be spoiled for choice, it is expected that international commercial arbitration will be the most widely used means of dispute resolution¹⁷.

C African Continental Free Trade Agreement (AfCFTA)

Last March 55 African Union member states signed AfCFTA which is designed to increase trade liberalisation between African nations.¹⁸

The Agreement requires that 'Protocol on Rules and Procedures on the Settlement of Disputes' be used to resolve disputes.¹⁹ This framework closely resemble those of the World Trade Organization ('WTO') and it is expected that WTO jurisprudence will be applied in AfCFTA disputes.²⁰ The framework been criticized for lacking judicial remand and political oversight.²¹ This could mean that disputants file in other forums such as the Permanent Court of Arbitration or intersect with other intra-continental means for dispute resolution like OHADA.

10 See Patrick M. Norton, 'China's Belt and Road Initiative: Challenges for Arbitration in Asia' [2018] (Volume 13) *University of Pennsylvania Asian Law Review* 72.

11 An Baijie, 'Belt and Road Initiative aligns with African Nations' *The Telegraph* (online, 28 September 2018) <<https://www.telegraph.co.uk/china-watch/politics/belt-and-road-initiative-africa-strategy/>>.

12 Olga Boltenko, 'Resolving Disputes Along the Belt and Road: are the Battle Lines Drawn?' 19(4) (2017) *Asian Dispute Review* 190.

13 See, eg, Guigo Wang, 'The Belt and Blue Road Initiative in Quest For a Dispute Resolution Mechanism' (2017) (25)(1) *Asia Pacific Law Review* 1.

14 Supreme People's Court, 'Several Opinions of the Supreme People's Court on Providing Judicial Service and Guarantee for the Construction of the "Belt and Road" by the People's Court' (report, 16 March 2017) <<https://www.yidaiyilu.gov.cn/zchj/zcfg/2401.htm>>.

15 See, eg, Jingzhou Tao and Mariana Zhong, 'The China International Commercial Court (CICC): A New Chapter for Resolving International Commercial Disputes in China' (2019) 13(2) *Dispute Resolution International* 153.

16 Nina Pichler and Alice Meissner, 'Chapter I: The Arbitration Agreement and Arbitrability, The Impact of the One Belt, One Road Initiative on International Arbitration' in Klausegger et al (ed), *Austrian Yearbook on International Arbitration 2019* (February 2019) 79.

17 Ibid.

18 *Agreement Establishing the African Continental Free Trade Area* adopted 21 March 2018 (entered into force 30 May 2019).

19 AfCFTA Art 20.

20 Collins C Ajibo, 'African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects' (2019) 53(5) *Journal of World Trade* 871.

21 Ibid.

IV Challenges

A Corruption, Enforcement and Political Stability

It is an unfortunate reality that corruption in Africa and business in general is rife. For this very reason Arbitration might be seen as an attractive alternative to local litigation but arbitral awards still need to be enforced by local courts under, for instance, the New York Convention. Parties will have reasonable concerns about whether orders made under the New York Convention are made under the influence of corruption. Whether or not this will impact on the trend is likely to depend on how parties choose to proceed with their dispute. For instance, under the ICSID Convention because its awards are not subject to review by local courts²² but it is an inescapable reality that enforcing anything requires some kind of physical social structure, like the sheriff or a corporate registry similar to ASIC.

In a climate where the rule of law is weak and corruption and political stability, poverty and unemployment are rife,²³ the practical considerations of enforcing any award in Africa is likely to have a major influence on the arbitration trends in the continent. Despite these obvious risks investors continue to flood the continent with capital. It will be interesting to observe how the risk tolerance of investors impacts on the trend of arbitration in Africa, particularly when parties will often demand Chinese forums of dispute resolution.

B Oversaturation

This work has reviewed a few of the many trending forums. The amount and complexity of investment requires many forums but this comes at a cost. It is not unforeseeable that having so many forums will create complex issues of *res judicata*, conflict of laws and

procedural fairness. There are 80 arbitral institutions in Africa.²⁴

The volume of forums, agreements and treaties can make them competitive or bring into question their credibility.²⁵

V Conclusion

This work has barely scratched the surface of the trend of Arbitration in Africa. Speaking extra-judicially the former President of the UK Supreme Court Lord Neuberger opined that 'Arbitration is not simply compatible with the key features of the rule of law, but has an increasingly important role to play in upholding those key features, both nationally and internationally'²⁶.

It is to be hoped that the increased investment in Africa and the corresponding increase in arbitration brings with it an increase in GDP, reduction in poverty and unemployment, political stability the promotion of environmentally sustainable development and, of course, the rule of law. Equally, if international investment disputes cannot be resolved amicably, history has shown that world wars may follow: better a summons than a shot.

22 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (entered into force 14 October 1966) art 53 – 54; see also Michael Hwang and Kevin Lim, 'Corruption in Arbitration – Law and Reality' 8(1) (2012) *Asian International Arbitration Journal* 1, 13.

23 See, eg, Charles Manga Fombad, 'An Overview of the Crisis of the Rule of Law in Africa Focus: The Rule of Law in Sub-Saharan Africa: Reflections on Promises, Progress, Pitfalls and Prospects' [2018] (issue 1) *African Human Rights Law Journal* 213.

24 Gregory Travaini, 'Arbitration Centres in Africa: Too Many Cooks?' *Kluwer Arbitration Blog* (Blog Post 1 October 2019) <arbitrationblog.kluwerarbitration.com/2019/10/01/arbitration-centres-in-africa-too-many-cooks/>.

25 *Ibid.*

26 The Right Honourable Lord Neuberger, 'Keynote Speech: Arbitration and the Rule of Law' (Speech, Chartered Institution of Arbitrators Centenary Conference Hong Kong, 20 March 2015).

Application of Arbitration Agreements to Non-Signatories: The 'Through or Under' Route⁺



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In the previous edition of the ACICA Review, Monique Carroll and I discussed the implications of the High Court of Australia's decision in *Hancock Prospecting Pty Ltd v Rinehart* ('*Hancock*') in respect of the interpretation of arbitration agreements.¹ This article considers a second aspect of the judgment; namely, the scope and operation of the phrase 'through or under' in s 2(1) of the *Commercial Arbitration Act 2010* (NSW) ('*CAA*') and, consequently, the ability of non-signatories to an arbitration agreement to avail themselves of the agreement.

The extent to which third-parties may rely on, or be bound by, arbitration agreements remains a vexed question in arbitration.² Section 2(1) of the CAA, like section 7(4) of *International Arbitration Act 1974* (Cth) ('*IAA*'), provides that a 'party' to an arbitration agreement

includes 'any person claiming through or under a party to the arbitration agreement'.³ There is no counterpart provision in the UNCITRAL Model Law on International Commercial Arbitration ('*Model Law*'). The 'through or under' provision has the potential to avoid the privity doctrine and increase the number of parties to an arbitration. Yet, the origin, scope and operation of the 'through or under' provision has received little attention,⁴ with Australian courts giving the phrase differing interpretations with varying results.⁵

I Facts

The facts of *Hancock* are complex. They were canvassed in the earlier joint authored article.⁶ For present purposes, the relevant facts are that:

- (a) Mrs Rinehart was the trustee of the HMM Trust and HMMF Trusts of which her children (including Bianca Rinehart and John Hancock (collectively, '*Siblings*')), and other children, were the sole beneficiaries.
- (b) The principal assets of each trust were companies within the Hancock Group of companies, including HMMF, and the mining tenements owned by those companies.
- (c) In the mid-1990's, HMMF transferred three mining tenements to HPPL, a Hancock Group company in which Mrs Rinehart had a majority interest and the Siblings had no interest.

1 Albert Monichino and Monique Carroll, 'The Proper Approach to the Interpretation of Arbitration Agreements: Australian High Court Speaks Out' (2019) 7(1) *ACICA Review* 8.

2 *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, [105]–[108] (Lord Collins): 'One of the most controversial issues in international commercial arbitration is the effect of arbitration agreements on non-signatories'. The issue has frequently arisen in 'the context of groups of companies where non-signatories in the group may seek to take advantage of the arbitration agreement, or where the other party may seek to bind them to it'.

3 While section 2 appears in the definition section of the CAA, section 7 of the IAA is concerned with enforcement of foreign arbitration agreements and gives effect to Article II of the New York Convention.

4 The statutory expression 'through or under' first appeared in the arbitration context in the *Common Law Procedure Act 1854* (UK) and was incorporated into successive State and Commonwealth arbitration Acts in Australia.

5 See *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 ('*Tanning*'); *AED Oil Limited v Puffin FPSO Limited* [2009] VSC 534 (Judd J); *BHPB Freight Pty Ltd v Costco Oceania Chartering Pty Ltd* (2008) 168 FCR 169; *Nearmap Ltd v Spookfish Pty Ltd* [2014] NSWSC 1790; *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64.

6 See above n i.

- (d) These tenements were subsequently transferred to other companies in the Hancock Group: RHIO, HDIO and MDIO (collectively, **'the Third-Party Companies'**).
- (e) Mrs Rinehart was a director of each of the Hancock Group companies, including the Third-Party Companies.
- (f) In 2006, the Siblings, Mrs Rinehart and certain Hancock Group companies (including HPPL and HFMF) entered into the Hope Downs Deed (**'Deed'**), which was intended to resolve disputes between the parties in respect of the beneficial ownership of the mining tenements. The Deed included an arbitration agreement and required the Siblings to give releases of claims and undertakings not to sue the Hancock Group Companies that were party to the Deed.
- (g) The Third-Party Companies were not party to the Deed.

In 2014, the Siblings initiated litigation in the Federal Court of Australia against their mother, Mrs Rinehart, and certain companies in the Hancock Group, for breach of trust and breach of fiduciary duty. They claimed that the Third-Party Companies had received the mining tenements, by way of assignment, from HPPL with knowledge of a breach of trust. Therefore, argued the Siblings, the Third-Party Companies held the mining tenements on constructive trust for the Siblings.⁷

The Third-Party Companies, though not parties to the Deed, sought to stay the claims against them in the Federal Court, in reliance on s 8 of the CAA. The Third-Party Companies raised two contentions:

- (a) first, they were entitled to claim 'through or under' HPPL (being a party to the Deed) because an essential element of their defence was that HPPL was

beneficially entitled to the mining tenements (ie there was no breach of trust); and

- (b) further or alternatively, HPPL obtained releases under the Deed (and therefore was absolved of responsibility for any breach of trust). The Third-Party Companies contended that they were entitled to the benefit of such releases as assignees of the tenements: [58], [73].

II Earlier Proceedings

At first instance before the Federal Court of Australia, Gleeson J rejected the contention that the Third-Party Companies could claim 'through or under' parties to the arbitration agreement (namely, HPPL and HRL). Her Honour appeared to accept that a non-party could claim 'through or under' a party to an arbitration agreement only where:

- (a) a benefit was conferred on the non-party by an instrument like the Deed;⁸ or
- (b) the non-party stood in the position of the party to the arbitration agreement and exercised the same rights.⁹

In Gleeson J's view, none of the Third-Party Companies met these criteria. According to her Honour, even if it was accepted that the Third-Party Companies had received a beneficial interest in the tenements from HPPL and HRL, and this beneficial interest was protected by the releases and undertakings not to sue contained in the Deed,¹⁰ the Third-Party Companies were not exercising the same rights, and did not stand in the same position, as HPPL/HRL.¹¹

On appeal, the Full Court of the Federal Court of Australia (**'Full Court'**) agreed with the trial judge's approach to the statutory expression 'through or under' in s 2 of the CAA. Like the trial judge, the Full Court construed the

⁷ The Full Court noted that Mrs Rinehart was a director and the controlling mind of the Third-Party Companies and, therefore, her knowledge was to be imputed to the Third-Party Companies. See *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, [291], [293] (*'Hancock Prospecting'*).

⁸ *Rinehart v Rinehart* (No 3) (2016) 257 FCR 310, [533] (Gleeson J) (*'Rinehart v Rinehart'*).

⁹ *Ibid* [539], [541] (Gleeson J).

¹⁰ Notably, the judgments do not discuss in detail how the releases and undertakings were transferred to the Third-Party Companies, whether by way of a separate document or traveling from HPPL/HRL to the Third-Party Companies alongside the beneficial interest in the tenements.

¹¹ *Rinehart v Rinehart* (n viii) [541] (Gleeson J).

expression narrowly. In sum, the Full Court considered that, properly understood, 'through or under' required the Third-Party Companies to invoke a 'derivative defence'. In applying Brennan and Dawson JJ's judgment in *Tanning Research Laboratories Inc v O'Brien* (**Tanning**),¹² the Full Court considered that the covenants in the Deed were not a derivative defence because:

- (a) knowing recipients of trust assets do not have a derivative liability; and
- (b) the relationship between the Third-Party Companies and the parties to the Deed was 'purely factual' and not a legal relationship.

Nor were the releases an essential element of the Third-Party Companies' defence as they were not bound to raise the releases as a defence.¹³

III High Court of Australia

The High Court plurality (Kiefel CJ, Gageler, Nettle and Gordon JJ) adopted an expansive view of the scope of 'through or under', overturning the narrow approach applied by the Full Court below. In dissent, Edelman J endorsed a narrower interpretation of the phrase, agreeing with the Full Court.

Notably, both the plurality and Edelman J were expressed to rely on the joint judgment of Brennan and Dawson JJ in the seminal case of *Tanning*,¹⁴ albeit differently.

The plurality held that, properly understood, the Brennan and Dawson JJ 'derivative test' required asking '*whether an essential element of the defence [of the Third-Party Companies] was, or is, vested in or exercisable by the party to the arbitration agreement [namely, HPPL]*': [66]. Applying a relatively broad conception of this test,¹⁵ the plurality held that an '*alleged knowing recipient of trust property who invoke[d] as an essential element of its defence*' the allegation that the trustee was beneficially entitled to the

subject property, was claiming 'through or under' the trustee, for the purposes of the arbitration legislation: [66].

The plurality emphasised the subject-matter in controversy. Their Honours were highly influenced by the fact that the Third-Party Companies' defences were closely related to the defences of HPPL and that if HPPL were found to be 'blameless', the Third-Party Companies 'would be equally blameless': [76].¹⁶

In contrast, Edelman J considered that an expansive approach to 'through or under' would undermine fundamental notions of privity of contract and party autonomy upon which arbitration is based: [94]. Thus, to claim through or under, the third-party must be agitating a right of the party to the arbitration agreement itself, and not its own right: [85], [88]. Therefore, 'through or under' should be given a limited discriminatory operation consistent with the doctrine of privity, such as in the case of agency, assignment, novation or succession by operation of law: [96].

His Honour proceeded to apply the approach of Brennan and Dawson JJ more strictly than the plurality: [90], [92]-[93]. According to Edelman J, to claim 'through or under', the non-party to the arbitration agreement must stand in the same position as the party to the arbitration agreement and claim a defence or cause of action available to the party to the arbitration agreement: [92]-[93].

His Honour characterised the claims against the Third-Party Companies as '**assertions of** direct liability': [98] (emphasis added). Here, Edelman J focussed on the legal nature of the claim against the alleged knowing recipients as being a claim that was independent of the claim brought by the beneficiary against the trustee: [98].

Ultimately, then, on the view of Edelman J, the Third-Party

¹² (1990) 160 CLR 332.

¹³ *Hancock Prospecting* (n vii) [317].

¹⁴ *Tanning* (n v).

¹⁵ See *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64, [65] (Nettle JA).

¹⁶ Referring to *Roussel-Uclaf v G D Searle & Co Ltd* [1978] 1 Lloyd's Rep 225.

Companies were neither in the same position as, nor asserted any contractual right available to, HPPL: [102]. Instead, they were defending an independent claim from those advanced against HPPL, *'relying upon their own rights'*: [102].

IV Comment

Given the majority's decision, an expansive approach to the concept of 'through or under' now prevails in Australia. Under this approach, 'through or under' is treated as a statutory exception to the privity doctrine. Thus, third-parties to an arbitration agreement may claim 'through or under' the arbitration agreement, even though not privy to the agreement to arbitrate.

The effect of the majority's decision in *Hancock* is to raise uncertainty as to which third-parties may exercise rights under an arbitration agreement.

With respect, the approach of Edelman J is to be preferred. This approach respects the fundamental notion of privity of contract and promotes party autonomy by enabling parties to determine who they arbitrate with and about what.

It is noted that a similar procedural result could have been achieved by simply staying the proceeding against the Third-Party Companies pursuant to the Court's inherent jurisdiction upon those parties agreeing to be bound by the result in the arbitration.¹⁷ Such an approach *'avoids any artificial construction as to the identity of the parties to the arbitration, whilst preserving an orderly resolution of the issues in one forum'*.¹⁸

For contractual drafting purposes, it may be prudent for transaction lawyers to insert a clause into the underlying contract to the effect that no third-party may rely on, or is bound by, the rights and obligations contained in the contract unless the named parties to the contract consent in writing. Of course, such a clause is unlikely to preclude non-parties to the arbitration agreement

claiming 'through or under' by operation of law (for example, liquidators or trustees in bankruptcy). However, it may well temper a court's enthusiasm for finding that a non-party to the arbitration agreement may claim 'through or under' in broader circumstances.

¹⁷ As did the Full Court, albeit not upon any condition requiring the Third-Party Companies to agree to be bound by the result in the arbitration: *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, [114].

¹⁸ David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Thompson Reuters, 3rd ed 2015), [7.50].

Peering Over the Pond: Encouraging the Resolution of Internal Trust Disputes by Arbitration in Western Australia



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I Arbitrating Internal Trust Disputes

There are principles essential to the law of trusts that can be facilitated by arbitral proceedings, principles such as privacy and confidentiality are key examples. A further consideration worth noting is the retention of trust property for beneficiaries. If a trust dispute can be resolved efficiently and, in a cost-effective manner, it is in the interests of the beneficiaries to do so. Thus arbitration would appear to be a suitable alternative to court litigation when trust disputes arise.

Trust disputes have commonly been referred to arbitration when involving a trustee and a third party, however, in the context of 'internal' trust disputes (being a dispute between a settlor, trustee and/or beneficiary), the ability to arbitrate such disputes faces significant barriers, notably:

- (a) whether or not an arbitration clause in a trust deed constitutes a valid arbitration agreement; and

- (b) how beneficiaries who lack capacity, or unascertained beneficiaries, are to be represented.

Although the barriers to arbitrating internal trust disputes are significant, a simple way to address such barriers is through legislative reform, establishing clear law on those points.

II Legislative Reform

Legislative reform to facilitate the resolution of internal trust disputes through alternative dispute resolution,¹ has occurred in a number of jurisdictions including Guernsey² and the Bahamas.³ As the global trend of legislative reform gains momentum, the latest jurisdiction to have made legislative amendments to allow the arbitration of internal trust disputes is Australia's close neighbour, New Zealand.

Following discussions regarding the resolution of internal trust disputes through arbitral procedures in recent reform of New Zealand's Arbitration legislation,⁴ New Zealand's legal committee determined that such provisions are better suited to be included in its new trust legislation ('NZ Trusts Act').⁵ Ss 142 through 148 of the NZ Trusts Act relate to ADR processes, with ss 144 and 145 specifically addressing 'internal matters':⁶

144 ADR process for internal matter if trust has beneficiaries who are unascertained or lack capacity

- (1) If a trust has any beneficiaries who are unascertained or lack capacity, then, for a matter relating to that trust that is subject to an ADR process,—

+ Any view(s) expressed in this article are solely the author's and do not necessarily reflect the views of Clyde & Co.

1 Specifically arbitration for the purposes of this article.

2 Trusts (Guernsey) Law 2007, s 63.

3 Trustee Amendment Act 2011 (Bahamas), s 18.

4 Arbitration Amendment Act 2019 (New Zealand).

5 Trusts Act 2019 (New Zealand), which was passed into law on 30 July 2019 but will not come into force until 30 January 2021.

6 Ibid, s 142: defining internal matters as 'a matter to which the parties are a trustee and 1 or more beneficiaries, or a trustee and 1 or more other trustees, of the trust'.

- (a) the court must appoint representatives for those beneficiaries; and
 - (b) those representatives may agree to an ADR settlement, or agree to be bound by an arbitration agreement and any arbitral award under that agreement, on behalf of the beneficiaries who are unascertained or lack capacity; and
 - (c) any ADR settlement must be approved by the court.
- (2) If representatives have been appointed under subsection (1) for beneficiaries who are unascertained or lack capacity,—
- (a) the representatives must act in the best interests of the beneficiaries on whose behalf they have been appointed; and
 - (b) the court may order that a representative's costs be paid out of the trust property; and
 - (c) the court may make any order that it thinks fit regarding the terms of a representative's appointment.
- (3) This section applies only to internal matters.

145 Power of court to order ADR process for internal matter

- (1) The court may, at the request of a trustee or a beneficiary or on its own motion,—
- (a) enforce any provision in the terms of a trust that requires a matter to be subject to an ADR process; or
 - (b) otherwise submit any matter to an ADR process (except if the terms of the trust indicate a contrary intention).
- (2) In exercising the power, the court may make any of the following orders:
- (a) an order requiring each party to the matter, or specified parties, to participate in the ADR

- process in person or by a representative:
 - (b) an order that the costs of the ADR process, or a specified portion of those costs, be paid out of the trust property;
 - (c) an order appointing a particular person to act as a mediator, an arbitrator, or any other facilitator of the ADR process.
- (3) This section applies in relation to internal matters only.

While a step in the right direction, respectfully the NZ Trusts Act falls short. Firstly, there is no clear expression that an arbitration clause in a trust deed is a valid arbitration agreement (this could have simply been included as a defined term under s 142). Although this could be said to be implicit in reading section 145(1)(a), it has not been made abundantly clear that an arbitral proceeding may be commenced without the leave of the court. Secondly, s 144 provides a clear procedure for appointing representation for beneficiaries who lack capacity and unascertained beneficiaries, but this procedure has been confined to the High Court and does not extend to the arbitrator/tribunal.

The supervisory role in implementing an arbitral process in internal trust disputes (thus mirroring the High Court's inherent jurisdiction to do so) is not detrimental to arbitrating internal trust disputes, however, it does risk having an efficient arbitral proceeding when judicial oversight and involvement is regularly required.

Accordingly, the NZ Trusts Act has made clear that internal trust disputes will be able to be resolved through arbitration, but it has not taken full advantage of the opportunity to adequately address the key issues pertaining to arbitrating internal trust disputes.

III Western Australian Position

In Western Australia, the Trustees Act ('WA Act') as it currently stands, provides trustees the power to submit 'whatever [thing] relating to the trust or to the trust property' to arbitration.⁷ While a broad power, it is

⁷ Trustees Act 1962 (WA), s 42(f). Similar provisions are also found in the relevant trust legislation of other Australian states.

contingent on the trustee initiating the procedure and issues regarding internal matters still remain unaddressed.

The Supreme Court of Western Australia has similarly indicated a broad use of arbitration in trust disputes generally. In considering whether or not trust disputes can be arbitrated, the Supreme Court's judgment in *Fitzpatrick v Emerald Grain Pty Ltd* expressed a broad and liberal approach to applying arbitration agreements.⁸ The circumstances of *Fitzpatrick* concerned an allegation of a breach of trust between commercial parties regarding a number of contracts for growing grain which contained arbitration clauses. The Supreme Court held that the characterisation of equitable rights did not mean the dispute was not arbitrable as the key question to ask is 'whether the issue is a matter which is the subject of the arbitration agreement'.⁹ In interpreting the broadly drafted arbitration clauses, Martin CJ held that "it is only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will be held to be non-arbitrable".¹⁰

Accordingly, *Fitzpatrick* has displayed a pro-arbitration approach to the resolution of trust disputes generally where parties have agreed to an arbitral process. Based on this position, the resolution of internal trust disputes by arbitration where an arbitration clause has been included in a trust deed would be welcomed by the courts if the barriers to such disputes are addressed simply in an amendment to the WA Act. Thus Western Australia appears ripe for legislative reform to clarify its position to allow the resolution of internal trust disputes by arbitration.

IV Concluding Remarks

As more jurisdictions show an interest in reforming their own legislation to allow the resolution of internal trust disputes through ADR procedures, Western Australia (and arguably all Australian states) should give serious consideration to amending trust legislation in a similar way to the NZ Trusts Act, with additional/alternate provisions to address the apparent shortfalls of the New Zealand legislation as identified above. In doing so, Western Australia will continue to make itself stand out as an arbitration friendly jurisdiction and encourage parties to choose it as the seat of arbitration to their dispute.

⁸ *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206 at [45]-[46].

⁹ *Ibid* at [59]-[60]; in considering s 8 of the Commercial Arbitration Act 2012 (WA).

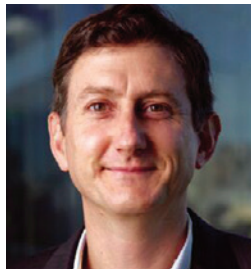
¹⁰ *Ibid* at [167].

Confidentiality versus Transparency in International Commercial and Investment Treaty Arbitration in Australia, Japan and Beyond



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A new movie, "The Farewell"¹ tells the story of a Chinese American woman whose grandmother back in mainland China has a terminal illness. The woman is going back to China but her family do not want to tell the grandmother that she is going to die. This is depicted as a common tradition still in China, based on the idea that telling such bad news to a loved one would make them feel worse. But the granddaughter, reflecting her upbringing in the USA, starts with the idea that important matters should be disclosed. So the movie poignantly explores cross-cultural tensions about when and how we should keep things quiet, or instead bring them into the open.

In a quite different comparative context, international arbitration, the confidentiality of arbitral proceedings has traditionally been considered one of the fundamental advantages over litigation but continues to undergo a major rethink. A recent seminar held in Rome considered

the topic, focusing on Australia and Japan in the wider Asia-Pacific and also global arbitration context. The seminar brought together about 50 arbitration specialists under the auspices of Arblt² and AIA,³ comparing tensions and expectations in "Confidentiality versus Transparency in International Arbitration". The keynote speaker was Prof Luke Nottage from Sydney Law School (ACICA Special Associate), with organisation and comments provided by Andrew Paton (an ACICA Fellow originally admitted in Sydney and with over 30 years' experience as an Italian qualified Rome-based lawyer). Comments on the global context were provided by three Italian arbitration experts:

- Andrea Carlevaris,⁴ focusing on the practices of the ICC Court of Arbitration;
- Maria Beatrice Deli,⁵ focusing on the position in Italy; and
- Carlo Santoro,⁶ focusing on the position of the US courts and the AAA.

Nottage's presentation⁷ began by highlighting how confidentiality is still widely seen as significant advantage of international commercial arbitration (ICA) over cross-border litigation, especially perhaps in Asia. This can be seen not only in empirical studies (as in the latest QMUL survey, with White & Case),⁸ but also in rules of most arbitral institutions. Automatic (opt-out) confidentiality is also now found in many national laws, including statutory add-ons to the UNCITRAL Model Law

1 <https://www.imdb.com/title/tt8637428/>

2 <http://www.forumarbit.it/>

3 <http://arbitratoaia.com/>

4 <https://www.belex.com/en/professional/andrea-carlevaris/>

5 <http://drlaw.it/mariabeatricedeli/>

6 <https://www.clearygottlieb.com/professionals/carlo-santoro>

7 Nottage, Luke R., Confidentiality versus Transparency in International Arbitration: Asia-Pacific Tensions and Expectations (August 29, 2019). Sydney Law School Research Paper No. #19/52, August 2019. Available at SSRN: <https://ssrn.com/abstract=3444692>

8 <http://www.arbitration.qmul.ac.uk/research/2018/>

and/or through case law for example in New Zealand, then Hong Kong, Singapore, Malaysia, and eventually Australia.

Yet there remain variations in the timing of these developments as well as the scope and procedures associated with exceptions to confidentiality. There is also no confidentiality provided in Japan's later adoption of the Model Law, although parties mostly choose the JCAA so opt-in to its Rules, which have somewhat expanded confidentiality obligations since 2014.

Another recent complication is growing public concern over arbitration procedures through (especially treaty-based) investor-state dispute settlement (ISDS), especially in Australia since an ultimately unsuccessful treaty claim by Philip Morris over tobacco plain packaging legislation (2011-15). Statutory amendments in 2018 reverse automatic confidentiality for Australia-seated ISDS arbitrations where the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are applicable.⁹ Concerns over ISDS may impede Australia enacting provisions for confidentiality of arbitration-related court proceedings, which could not be revised recently in New Zealand¹⁰ against the backdrop of its new government's anti-ISDS stance.¹¹

Growing transparency around ISDS arbitration¹² was presented as welcome given greater public interests involved in such cases. But transparency arguably should not be simply transposed into commercial dispute resolution through ICA as the fields are overlapping but distinct.¹³ Confidentiality in ICA has the disadvantage of

exacerbating information asymmetry, making it harder for clients and advisors to assess whether particular arbitrators and lawyers provide value for money. But confidentiality allows arbitrators in particular to be more robust in proceedings and drafting rulings, thus countering the rise in ICA delays and especially costs.¹⁴ More transparency around ISDS, as well as initiatives like "Arbitrator Intelligence" and experiments in reforming Arbitration Rules (eg recently by the ICC), can arguably help reduce information asymmetry for users anyway, while retaining various advantages of confidentiality particularly in ICA.

The keynote address elaborated these tensions between confidentiality and transparency in ICA and ISDS, focusing on Australia and Japan in regional context. Both countries still get few ICA cases but are trying to attract more. They take somewhat different approaches to confidentiality in that field, while negotiating investment treaties that increasingly provide transparency around ISDS arbitration.¹⁵

Carlevaris distinguished the transparency of the arbitral process from transparency (or lack of confidentiality) of the substantive issues in the arbitration. Building on his experience as former ICC Secretary-General, he highlighted the persistent efforts made by the ICC to make the former (particularly, appointment procedures, arbitrator conflict disclosures and award review processes) ever more transparent. The ICC Arbitration Rules do not contain any obligation on the parties to keep the merits of the arbitration proceedings

9 These situations will grow if and when Australia, and its counterparties in pre-2014, ratifies the Mauritius Convention: see Submissions to JSCOT by Nottage and a few others via https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ISDSUNConvention

10 Jack Wass (21 May 2019) <http://arbitrationblog.kluwerarbitration.com/2019/05/21/arbitration-law-reform-in-new-zealand-a-lesson-in-competing-values/>

11 Kawharu, Amokura and Nottage, Luke R., Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu (February 1, 2018). Sydney Law School Research Paper No. 18/03. Available at SSRN: <https://ssrn.com/abstract=3116526>

12 Nottage, Luke R. and Ubilava, Ana, Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry (August 6, 2018). International Arbitration Law Review, Vol. 21, Issue 4, 2018; Sydney Law School Research Paper No. 18/46. Available at SSRN: <https://ssrn.com/abstract=3227401>

13 Chief Justice James Allsop (ICCA Congress keynote address, 16 April 2018) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20180416>.

14 Nottage, Luke R., In/Formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia (2014). Formalisation and Flexibilisation in Dispute Resolution, J. Zekoll, M. Baelz, I. Amelung, eds, Brill, The Netherlands, 2014; Sydney Law School Research Paper No. 17/47. Available at SSRN: <https://ssrn.com/abstract=2987674>

15 See JSCOT inquiries into Australia ratifying new ISDS-backed treaties with Indonesia and Hong Kong, via <https://japaneselaw.sydney.edu.au/2019/10/new-frontiers-in-international-arbitration-for-the-asia-pacific-region-8-confidentiality-vs-transparency-in-icarb-and-isds/>

confidential (although the hearings may be held in private), as opposed to the LCIA Rules, the Swiss Rules, the SIAC Rules and many others.

The ICC receives over 800 new arbitration proceedings per year, of which only 120 of the cases (in 2016) had confidentiality obligations added by agreement, 197 in 2017 and 199 in 2018. The number is increasing, which may indicate that there is some growing awareness among parties that the proceedings are not intrinsically or impliedly confidential, but that confidentiality is quite important. The law of the seat may further provide confidentiality anyway, with considerable ICC arbitrations seated in England, Hong Kong and Singapore, but many more in states where the confidentiality is not automatically applied to international arbitrations.

Deli commented that there is no provision in the Italian arbitration law requiring the parties to keep the proceedings confidential, although it is customary to do so. Santoro advised that, in the US, there was no implied obligation of confidentiality recognised by most of the courts there; they have refused to find a duty of confidentiality there in the absence of an express contractual provision or in the adopted arbitration rules. A party needs to satisfy the “good cause” requirements of rule 26(c) of the Federal Rules of Civil Procedure.

In conclusion, the fundamental difference between treaty-based and contract-based commercial arbitration must always be kept at the forefront of any discussion of confidentiality in arbitration. Confidentiality must be balanced with the public interest and will also normally be subject to a party’s rights to pursue a legal right, to enforce or challenge an award or to comply with a legal duty. In ICA, it is advisable for parties who wish to keep the substantive issues in dispute as confidential as possible, to expressly agree so.

Book Review: Global Construction Success – Charles O'Neill

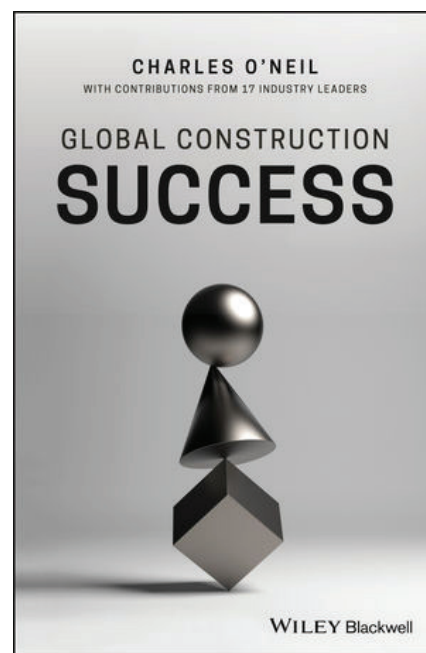


Dr Donald Charrett

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This is a unique book that addresses a challenge that is important worldwide: what are the ingredients for a successful construction project. Notwithstanding the importance of construction projects being delivered on time, within the budget and to the appropriate quality, many projects around the world fail to achieve one or more of these goals, resulting in wasted resources and disputes.

This book, written by Charles O'Neill with the assistance of 17 other experienced construction professionals, comprehensively addresses the many factors that influence the success or failure of a construction project. It is a very practical book – the authors all have many years of experience on major projects in the construction industry working for government, employer organisations, contractors, engineers, consultants, universities, financiers and lawyers. They not only collectively cover the wide range of disciplines essential to the delivery of construction projects, they have experience of project delivery in many countries around the world, both successful and unsuccessful. These experiences are articulated in the book in highlighting behaviour that contributes to unsuccessful projects, but perhaps more importantly, in identifying the behaviours and processes that result in successful projects. This is one of the book's great strengths – considered views from a variety of construction practitioners with different perspectives.



The aims of the book can best be summed up by the following quote from the Introduction: "This book seeks to identify and understand the key structural 'why' questions related to the construction industry at this time, and then to make constructive arguments as to 'how' we can improve in the future, with emphasis on 'what' specific actions and focus could produce a long-term improvement in the industry's general health." In this reviewer's opinion, the book not only ticks all these boxes, but does so with a clear understanding of the many real-world challenges that often inhibit project success and offers practical suggestions to overcome them.

Following an introduction, the book looks at the state of the industry in Chapters 2 to 6. The book then contains a number of chapters under each of the following headings:

- People and teamwork (Chapters 7 - 11)
- The right framework – forms of contract, business models and Public Private Partnerships (Chapters 12 - 15)
- Management of risk (Chapters 16 - 23)
- Robust processes – corporate and project management (Chapters 24 - 27)

Every reader of this book will have their own views of the most important and significant insights. For this reviewer, the following are some of the gems:

- The primary focus of the book is on the qualifications, performance and accountability of CEOs, directors and senior managers in both the public and private sectors, both client and contractor organisations.
- “The safest way in a new region, as with any contract is to spend the necessary extra time on detailed planning, precise specifications and on ensuring that the terms of the contract and the payment procedures in particular are clear and unambiguous, fair and reasonable, and clearly understood by both parties when the contract is signed.”
- “If foreign clients will not agree to fair and reasonable contract terms and payment conditions, then you are better off without the business.”
- “Contractors are not banks and they should be entitled to negotiate payment terms and guarantees that protect their financial position provided they perform the contract efficiently.”
- “Clients, including government authorities have an equal responsibility to be competent and professional ...”
- “Risk management in the construction industry is the difference between success and failure; between profit and loss; between life and death.”

Chapter 3 on construction consultants in the global market place highlights important risks that need to be managed. These include the increasing trends of more onerous contractual conditions, including unlimited liability, the number of indemnities and liabilities which have longer term liabilities attached, the application of liquidated and ascertained damages and litigation from third parties relying on the consultant’s information.

Chapter 4 addresses the common causes of project failure, defined as one of the objectives of any party involved in a project not being met. Case studies for a number of recent high-profile project failures are given – in Germany, USA, Australia, Scotland and England, and from 1973 to 2017, emphasising that the issues are international and not new. Thirty-five common causes of project failure are identified in which invariably the fault lies with senior management. The chapter concludes with lessons to be learned from grossly incompetent site management, illustrated by a salutary case study.

The use and abuse of construction supply chains in the UK are discussed in Chapter 5. The chapter identifies that the problems in the UK supply chain arise from its fragmented nature, inefficiencies in risk management and insurance, a high level of disputes and inequitable payment provisions in which subcontractors effectively fund the cash flow of tier one contractors.

The authors of Chapter 6 discuss the UK construction crisis in the expectation that there are lessons for the global construction industry. The roles of corporate risk manager and investment banker are highlighted in lifting the general level of corporate management and improvement of risk management. Some suggestions are made of appropriate tools to use: programme and project risk registers, gateway reviews and early warning systems.

The section on people and teamwork commences with Chapter 7 on obstacles to senior management and board success, the outcome of the author’s discussions with personnel within the industry and psychologists specialising in “team dynamics” and behavioural observation. The summary contains a useful checklist of the core key attributes required for the effective control and management of an organisation at senior level.

Chapter 8 reviews the requirements for structuring successful projects. The key factors that create success are identified – all of which have a strong human element. The different activities and responsibilities from concept to completion of construction are discussed under a number of headings. Contractors will take particular note of the author’s eleven suggestions on contract terms appropriate in a situation where the employer’s ability or willingness to pay may be in doubt. The chapter concludes with a detailed checklist for structuring successful projects.

Understanding and managing difficult client/contractor relationships are discussed in Chapter 9, in the context of wealthy residential clients. This chapter contains a number of practical suggestions on how to manage difficult clients. The problems posed by difficult contractors are also addressed, and suggestions made to manage them. This chapter makes important points that both employer/client and contractor should heed.

Social intelligence as the critical ingredient to project success is considered in Chapter 10. The chapter discusses what is involved in social intelligence, and the practical aspects of applying it in a project – learning and development, building cohesive teams, introducing a specialist in social intelligence into the team, coaching the team and managing behavioural risk.

The section on people and teamwork concludes with Chapter 11 on practical human resources considerations. This chapter is squarely aimed at senior management and includes many pertinent observations on structuring a team with appropriate personnel. The section on leadership considerations looks at: real team leaders versus egos, arrogance and poor basic management skills; cronyism; bosses with poor people skills who avoid staff management problems, illustrated with a salutary case study. The author recognises the inherent risks of decision making for survival and the human fallout from a failed project.

The section on the right contractual framework commences with Chapter 12 on the contract as the primary risk management tool. This chapter contains a number of examples that illustrate the importance of clear and unambiguous drafting in defining the parties' rights and obligations so that each party understands which risks it is responsible for. The five steps or opportunities in which to create a risk management tool in the form of contract are described in non-legal terms.

Chapter 13 is a short chapter that discusses the two themes that are inextricably linked to the New Engineering Contract – early warning systems and collaboration. The importance of these requirements are illustrated by reference to a successful UK project for construction of a manufacturing facility, contrasted with the substantial time and cost overruns on the Scottish Parliament House.

Development contracting is discussed as an efficient way to implement major projects in Chapter 14. The tools include identifying all the stakeholders that may play a role in the development cycle, and the planning and process requirements to deliver on time and on budget. The chapter contains a useful matrix of stakeholder strategy, responsibility and deliverables, and a schedule

of typical standard reports.

Chapter 15 contains an insightful critical review of Public Private Partnerships (PPPs). Based on the author's extensive experience in this field, as well as his informal survey of experienced PPP practitioners in a number of countries, the chapter reviews the pros and cons of PPPs. Clear proposals are made for efficient structuring and managing of PPPs, managing claims and disputes and a summary of the key factors for success and minimising risk.

The section on risk management commences with a discussion of the human factors in Chapter 16. These are contextualised in a discussion of the Challenger space shuttle disaster. Dispute Boards are described and discussed as an appropriate human factor to minimise disputes on site. This chapter will appeal to engineers for its technical discussion of the Challenger disaster, and the current construction of the ITER project in France.

Chapter 17 is a valuable discussion of effective risk management processes. It connects two of the most important themes of the book: the effects of human behaviour and risk management. Typical project risks are identified for client, contractor and other stakeholders, the project bidding phase and the subsequent award of the contract, design and construction. The chapter has many practical suggestions, such as keeping risk management simple and procedures to eliminate, mitigate and control risks.

Risk management and its relation to success in the North American context is discussed in Chapter 18, based on the author's experience in engineering firms and construction companies involved in PPPs. The author notes that success derives from well planned and executed risk management. The chapter contains practical suggestions for planning for success and managing risks. Brief details are provided of recent projects: a success and a failure.

Chapter 19 provides an overview of early warning systems. The discussion covers a number of issues that are typically outside the realm of mainstream risk management: looking outside of the "technical bubble", cultural barriers, and learning to value "gut feel". The value of early warning systems is illustrated by the case study of a successful cutting-edge project which highlighted the

added value provided by the non-traditional communications.

Technology to manage risk (ConTech) is discussed in Chapter 20. This provides an overview of what ConTech currently comprises, and the challenges inherent in its more widespread adoption. Potential commercial management applications are explained in the context of smart city principles. The section on dehumanising risk management considers commercial uses of ConTech through data generation and capture, data analysis and presentation, process automation and option generation and implementation. The use of blockchain technology is postulated to provide substantial improvements in the construction industry.

A specific application of ConTech is outlined in Chapter 21: intelligent document processes (IDP) to capture data and manage risk and compliance. IDP is a 21st-century computer application for textual documents such as complex contracts, which enables the ever increasingly complex suite of project documents to be readily understood and used by project participants. The author describes its benefits for any high value documents, and specifically in the context of Collaborative Business Relationships to ISO 44001.

Chapter 22 discusses the importance of aligning an organisation's strategic business plan with its information requirements to achieve its business goals and objectives for successful BIM implementation. It provides a step-by-step guide on how to create formation criteria and sub criteria recommended to populate an organisational information requirements (OIR) chart. This can inform the creation of asset and employer information requirements documentation for individual projects, and influence design, construction and operations decisions.

Three case studies of successful projects are outlined in Chapter 23 – London 2012 Olympic and Paralympic Games, tunnels for Heathrow's Terminal 5 and the Alder Hey Institute in the Park, UK that involved cyber design development. These projects illustrate many of the book's themes including people, effective risk management, appropriate management of the supply chain and clients that understand ownership of risks and the importance of appropriate and timely payment.

The penultimate section of the book is on robust processes for corporate and project management. This commences with a chapter on planning and programming major projects that describes three commonly used planning and programming formats: bar charts, S-curves and time location diagrams. Useful guidance is given on monitoring "progress versus program" and "cost-to-complete versus budget". Guiding principles are given for delay, EOTs and cost reimbursement. The important topic of ownership of float is clearly explained with the aid of simple diagrams.

Chapter 25 is on managing and resolving conflict. It contains useful commentary on the drivers of behaviour in negotiation and conflict situations and suggestions on improving relationships and collaborative working. The section on mediation is followed by a chapter on dispute resolution – the benefits and risks of alternative methods from the perspective of an experienced negotiator. It contains valuable advice for commercial clients on how to deal with their lawyers, and techniques for negotiating settlements.

Peer reviews and independent auditing of construction projects are discussed briefly in Chapter 27. The benefits for various stakeholders are outlined whilst recognising the "people" roadblocks to their use.

The final section and chapter summarises the conclusions arising from the book's contents. It contains an assessment of where the global construction industry is headed and provides a number of key observations and recommended actions for legislative change as well as for improving client contractor relationships.

This book has something of importance for all the stakeholders involved in the delivery of a construction project. They must cooperate to achieve a successful outcome, and along the journey they must manage a variety of risks, which requires robust processes for corporate and project management. A successful project is not achieved in the absence of teamwork and communication – two of the fundamental 'people' themes in this excellent book. It will undoubtedly make a significant contribution to more successful construction projects in the future - an important achievement for a better world.

News in brief

Professor Doug Jones AO appointed an International Judge of the Singapore International Commercial Court

ACICA warmly congratulates Board Member and past President Professor Doug Jones AO on his recent appointment as an International Judge of the Singapore International Commercial Court (SICC). Professor Jones has been appointed to sit in the SICC for the period from 1 November 2019 to 4 January 2021. A copy of the announcement may be viewed [here](#).

Australian Centre for International Commercial Arbitration

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

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