THE ACICA REVIEW

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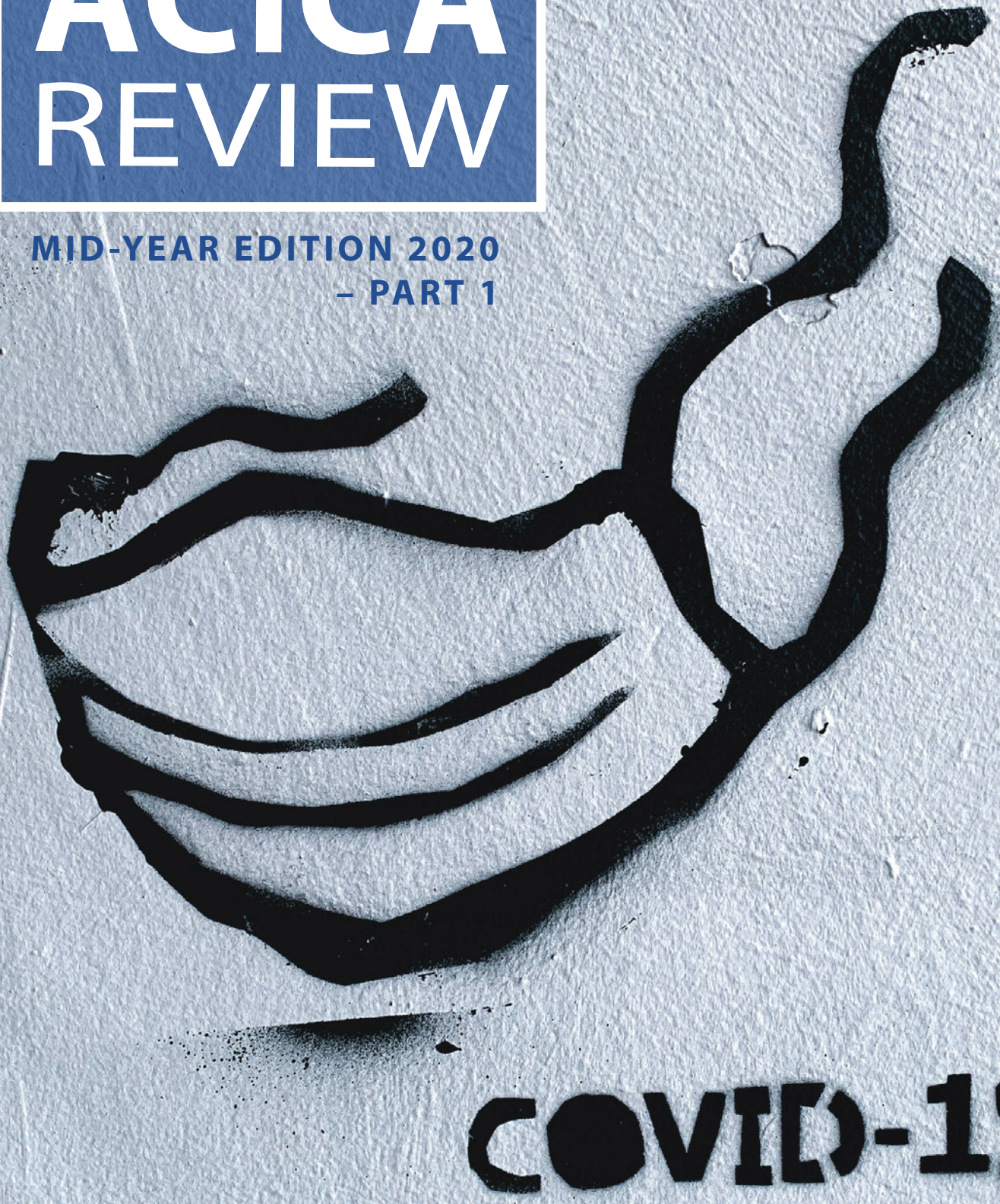
– PART 1



ACICA
Australian Centre for International Commercial Arbitration

SPECIAL EDITION

ACICA
Australian Centre for International Commercial Arbitration

Leader in International Dispute Resolution

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THE ACICA REVIEW

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President's Welcome

Brenda Horrigan
ACICA President

Welcome to a special COVID-19 edition of the ACICA Review, which will focus on some of the unique issues that have arisen in the last six months. It has been a busy (and unsettling) time since our last edition, published in December 2019. In these challenging times, ACICA has focused on providing an uninterrupted service and responding to the changing needs of the dispute resolution community to provide support through the crisis.

We thank all the authors that submitted articles for the ACICA Review. The Secretariat received the greatest number of contributions ever for any edition. As a result, for the first time, this edition of the ACICA Review has been divided into two parts. This is part one and part two will be released in July/August.

Australian Arbitration Week

In late February/early March 2020, we were busy planning for Australian Arbitration Week 2020, scheduled for October in Sydney. Those plans have slowed as COVID-19 has swept the world and restrictions have been imposed. We are watching developments closely, and will have further information on the status of the conference closer to the scheduled date.

Responding to COVID-19

ACICA, and especially the Secretariat, has been responding admirably to the challenges brought on by the virus. The team has been working remotely since 19 March 2020, and remains quite busy on case management and other matters. A new E-Filing system has been established, and we recently released a guidance note on Managing the Impact of COVID-19: Use of Arbitration to Mitigate Risk. We have also published updated model documents, including sample submission agreements, to the ACICA website, and have a number of additional initiatives in the works around giving parties tools to work with the new virtual reality.

We have unfortunately have had to postpone a number of planned in-person events, but have been rolling out a series of webinars, with the first on 13 May 2020. ACICA 45 is also converting its "Life of an Arbitration" planned series into a webinar format.

ACICA Nationwide Survey

We received a strong response to the ACICA nationwide survey conducted in November/December 2019, and are now working with FTI to analyse the data and progress a draft report.

Editorial

Deborah Tomkinson
ACICA Secretary General

MANAGING THE IMPACT OF COVID-19

2020 will not be a year soon forgotten for many reasons. The advent of COVID-19 brought with it a variety of challenges for the dispute resolution community, providing the backdrop for rapid and innovative responses. New disputes have arisen directly from the economic and social impacts of the crisis and other disputes have been delayed through the courts as an inevitable and necessary result of social distancing restrictions. There is, and will continue to be a pressing need, for parties to consider alternative means to progress the resolution of their disputes.

Arbitration is well placed to manage the impact given its inherent flexibility and the control that parties have over the process, enabling them to manage a dispute efficiently and appropriately to the circumstances of the case. To assist parties to understand the particular advantages that arbitration offers in the current environment, ACICA released an information sheet on *Managing the Impact of COVID-19: Use of Arbitration to Mitigate Risk*, a copy of which can be found in this edition of the Review. Additional ACICA resources have been developed to support disputants at this time and going forward, including the ACICA Guidance Note for Online Arbitration, and Sample Submission Agreements for parties who may wish to submit a dispute to arbitration in circumstances where they do not have an arbitration agreement in place, including disputes currently before the courts.

From mid-March, ACICA adjusted its work practices in line with health and safety requirements. The Secretariat continued to work to usual office hours but remotely, with a focus on providing an uninterrupted service to parties in dispute. An E-Filing system is available to enable parties to file cases online if they wish to do so, and ACICA has provided a 25% discount to case registration fees for the six month time period from 1 May to 31 October 2020 in recognition of the economic pressures being faced by businesses in Australia at this time.

We have also shifted our educational seminar program into webinar format with a focus on some of the key issues currently being faced in dispute resolution as a result of the pandemic. Past webinars are available to view publicly on the ACICA website.

Over this time, significant movement towards the use of online arbitration and online hearings has been seen given travel restrictions and social distancing measures in place. Steps are also being taken to use technology to improve the process for disputants. This time should be viewed as a great opportunity for the dispute resolution community to embrace new technologies and the advantages that they can provide to parties in dispute in terms of time and cost management. Making this the new normal should have a positive impact on the manner in which disputes are managed and neutralise the distance between parties, their counsel and the tribunal when engaged in international or domestic arbitration in Australia or around the world.

Australian practitioners should embrace the changes and the opportunities created

One of our recent webinars focused on best practice for online arbitration. In that webinar Justin Gleeson SC (Banco Chambers, former Solicitor General of the Commonwealth of Australia) made the point that the current situation effectively puts arbitration practitioners, wherever they are based, on a level playing field, exposing an incredible opportunity for Australia to demonstrate its capacity as an arbitral seat and for

Australian practitioners to demonstrate the significant expertise available in this country. It also gives Australia an opportunity to encourage the development of the next generation of arbitrators. As smaller or less complex disputes are potentially referred to arbitration as a result of court backlog or the need to reach a swift resolution for economic reasons, parties are encouraged to consider the wider pool of experienced arbitration practitioners that exist in Australia who are available to sit as arbitrators. ACICA does this as a part of its own practice when making appointments.

Make the change a lasting one

Crises can often bring out the best in people and through this time I have discovered that imposing distance can bring us closer together and encourage greater levels of cooperation. Our human need for contact means that we now schedule a video call or pick up the phone instead of writing an email. ACICA has been using online video conferencing for internal committee meetings with members across Australia and the region, allowing us to see our colleagues wherever they are based and build on a sense of joint purpose and cooperation. The introduction of webinars has similarly provided an opportunity for us to engage more with our membership based around Australia and overseas. Many of the initiatives and projects that ACICA has undertaken in this time have drawn heavily on the time and expertise of enthusiastic volunteers, for which we are most grateful.

While many of the positive developments made during COVID-19 were in planning stages prior to the crisis, implementation has clearly been accelerated and prioritised in order to ensure a swift response to current events. We anticipate that these developments will naturally shape future practices and projects undertaken by ACICA. Given its advantages for increased engagement, a greater use of online technology is likely to be a permanent feature of ACICA initiatives.

I encourage us all to embrace the change, take the opportunities it creates, reject the pull to 'return to normal' and remain in contact, even when we are all back in front of our screens at the office.

Report of the AMTAC Chair

Gregory Nell SC
AMTAC Chair

Unfortunately, the effect of COVID-19 and the measures implemented both in Australia and overseas to prevent its spread have adversely impacted many of the events that were scheduled for the first half of the calendar year, including in the maritime arbitration sphere.

Despite the emergence of the pandemic around that time, the biennial conference of the International Congress of Maritime Arbitrators (ICMA XXI) was held in Rio de Janeiro in early March 2020. But most if not all of the Australians who had previously indicated that they would be attending this conference did not do so. Nevertheless Justice Stewart of the Federal Court of Australia was still able to deliver by video link his address to the ICMA conference on *"The role of Courts in supporting arbitration: a review of recent developments in the Asia-Pacific region"*. In that address, his Honour concluded from his review of recent developments in arbitral law in Australia and elsewhere in the Asia-Pacific region that there was *"a continuation of the Asia-Pacific regional trend towards an internationalist and consistent development of international arbitration jurisprudence in domestic courts"* and that it *"can be expected that development in the maritime jurisdiction will follow this same trajectory in the region"*. A copy of this paper is available on the Federal Court website at https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-stewart/stewart-j-20200309.

The paper of Immediate past Chair of AMTAC, Peter McQueen, entitled *"The Essential Practice of Finding Jurisdiction"* was also delivered at the Congress in his absence by Daniella Horton, the Honorary Secretary of the London Maritime Arbitrators Association (LMAA). A copy of Peter's paper will be published in the second part of the June 2020 Review and may be found on the AMTAC website.

The impact of COVID-19 on international conferences and events such as ICMA XXI is regrettable, as these events not only assist practitioners in learning of different aspects of maritime law and maritime arbitration from other jurisdictions, but also provide an agreeable and convivial setting in which that can occur and Australian practitioners can interact with and learn from other maritime practitioners from around the world. The next biennial Congress (ICMA XXII) will be held in Dubai, United Arab Emirates in 2022/23. Hopefully by then Australian practitioners will once again be able to travel internationally and thereby attend this Congress and benefit not only in learning from the other international practitioners in attendance but also by using this event as a means of promoting commercial arbitration in Australia.

The organisers and intended participants of the 21st International Maritime Law Arbitration Moot (IMLAM) were not as lucky. This year's IMLAM moot which was to be held in Singapore in early July 2020 has been cancelled as a result of the COVID-19 crisis. Last year's competition in Rotterdam attracted a record 31 teams and over 140 participants. It was expected that those numbers would be matched if not eclipsed by this year's competition, prior to its cancellation. It is unfortunate that this year's competition has been unable to proceed and no doubt disappointing for the many would be participants. The IMLAM competition is and has for many years now been an important means of promoting both maritime law and maritime arbitration to law students, not only in Australia but Asia and other places around the world. This is with a view to encouraging the interest of those students in these areas of law as well as encouraging those students to embrace and promote the use of commercial arbitration when they enter legal practice, in particular in the maritime sphere. AMTAC is a

proud sponsor of the IMLAM competition and many of the members of AMTAC assist the competition whilst it is underway. AMTAC looks forward to continuing to support the IMLAM competition when it resumes in 2021.

The impact of COVID-19 and the measures introduced by the Commonwealth and State Governments in Australia in response have regrettably also caused AMTAC to push back the date of its Annual Address this year until later in the year. The Annual Address is AMTAC's signature event and the primary way in which AMTAC seeks to achieve its objectives of promoting maritime arbitration in Australia and promoting Australia as a recognised leader in maritime and transport scholarship. This year's Address, which will be AMTAC's 14th Annual Address, will take place once the existing social distancing and associated restrictions have been sufficiently relaxed to allow this event to proceed as normal. Further details of this event will be provided to Members and on the AMTAC website shortly.

Each year and as part of what has become known as Australian Arbitration Week, AMTAC has presented a seminar focusing on maritime law and commercial arbitration in the maritime context. This year, Australian Arbitration Week will be held in Sydney in the week commencing 12 October 2020. As part of that Week, AMTAC will be conducting a lunchtime seminar on Tuesday 13 October 2020. Further details of this seminar will be provided to members and on the AMTAC and ACICA websites closer to that date. Details of all Australian Arbitration Week events can also be found on the ACICA website at https://acica.org.au/australian-arbitration-week/. AMTAC would encourage not only its members but also those arbitration practitioners planning to attend Australian Arbitration Week who may not be familiar with arbitration in the maritime context and interested in learning more about this area of law and practice to include the AMTAC Seminar as part of its Australian Arbitration Week programme.

Finally, the COVID-19 crisis has seen the almost meteoric rise in Australia as well as elsewhere of the use of online platforms such as ZOOM and Microsoft Teams for the conduct of arbitrations and arbitral hearings, as well as hearings in court and even mediations. ACICA has also published guidelines to assist in the effective and efficient use of such platforms and technology. The use of this technology potentially offers significant advantages and cost savings to the parties to an international dispute and the resolution of their dispute by commercial arbitration. This is especially in the current context where international travel is severely restricted and unlikely to resume for some time. It will be interesting to see how much of this new technology will continue to be used once the current crisis has abated and economies return to normal. But inasmuch as the continuing use of such technologies and the acceptance of their use by disputing parties both contributes to the already existing advantages and cost effectiveness of commercial arbitration as a means of resolving international commercial disputes, and reduces the perceived tyranny of distance so far as Australia as an arbitral seat or venue is concerned (even in the Asia Pacific region) and the perceived advantages of the centrality of Hong Kong and Singapore, then these new technologies and their continued application and promotion are be encouraged.

Gregory Nell SC
AMTAC Chair

1 June 2020

Faces of ACICA: meet Daisy Mallett

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

In normal times, this interview with Daisy Mallett partner in the Disputes Team at King & Wood Mallesons in Sydney, would be face-to-face. This interview was undertaken during these abnormal COVID-19 times via phone from our self-isolating homes. I had the opportunity to have a very interesting discussion with Daisy about arbitration, ACICA and working from home life.

Daisy has adapted to running her busy home office with her three small children in tow. When asked about the pros and cons of the working from home life, it could be summed up with 'lots of family time.'

Daisy specialises in international arbitration with a focus on energy and resources and general disputes. She has been a Fellow of ACICA for 8 years and was appointed to the Board in May 2019. She chairs the ACICA NSW State Committee.

Q. What do you think are the key reasons for recommending international arbitration?

A. I see the enforceability of arbitral awards in foreign jurisdictions as the main reason for choosing arbitration. I think the process of an arbitration is a thing that is more familiar to foreign parties than being in the court system in a foreign location.

What you don't want is to have your contract with a New South Wales court clause, and find out that if something goes wrong the money you want to enforce against is outside Australia. In very many cases that will mean that your New South Wales court judgment in your favour is not worth the paper it is written on and you need to start again in a foreign court system. While there are some jurisdictions where there are reciprocal arrangements for the enforcement of court judgments, there are not many of Australia's major trading partners in Asia that have these reciprocal arrangements in place.

Q: Do you find one of the challenges of arbitration is trying to get your head around all of the differences in jurisdictions?

A. I think that is what is so interesting about international arbitration – you need to try to understand the perspective of your client, of the other party and their legal tradition if it is different to your own or that of your client and how that will impact how they conduct themselves in the arbitration and any potential settlement opportunities. Then of course you need to similarly consider the perspectives of your arbitrators and what they would expect parties to do in order to succeed in bringing a claim or defending a claim, both procedurally and substantively. You also need to consider the enforcement risks at the time you are providing your initial client advice: there is no point in advising them on an outcome if they are unable to enforce it.

Q: What do you see as the essential skill set for lawyers working in arbitration?

A. I think clients really benefit from international arbitration specialists when they are involved in an international arbitration. At King & Wood Mallesons we are increasingly working with teams across offices to build the best team for each case. Our international arbitration team has loved the opportunity to work with different partners on different cases. We had our first international off-site of the firm's global international arbitration team last year where the partners and senior associates across all the different offices – Europe, Middle East, the US, China and Australia – met up in Shenzhen for a couple of days.

Q. What is ACICA's role on the international circuit?

A. I think ACICA has done incredibly well. I think it has been a really important institution to enhance the education of Australian companies and practitioners

regarding the benefits of arbitration.

We regularly advise companies on their arbitration clauses. All things being equal, if you are an Australian party, I typically would recommend that they start with an ACICA arbitration clause in their draft contract and see whether that is something that is acceptable to the other party.

Case numbers are growing, particularly in the infrastructure space where many foreign companies are significant players in large Australian projects. It makes very good sense to opt for arbitrations administered by ACICA in such disputes because ACICA is local and has a good knowledge of the Australian arbitration market. ACICA is better able to recommend arbitrators if you are looking for Australian arbitrators than other institutions might be capable of doing.

Q. How is ACICA competing in the international market?

A. Australian lawyers have a very good international reputation. A lot of them have spent time working overseas and there is a lot of respect for the quality of lawyers that come out of Australia. I think there will always be a place for ACICA having Australian arbitrations.

One of the things that ACICA is currently working on is trying to improve education about international arbitration and ACICA within Australia across the different states. ACICA has recently established training committees in each state, which will help to develop the market.

We need to continue to consider the extent to which ACICA can attempt to obtain a market share in the non-Australian related arbitrations.

Q. What has been your experience sitting on the other side of the table as the arbitrator?

I'm in a sole arbitration being administered under the auspices of ACICA at the moment. You learn so much in doing it in understanding the issues a tribunal is concerned about. I think it's a really great opportunity for practitioners to improve the service that they can provide to their clients by having that experience of sitting on the other side of the table.

Q. International arbitration has always involved international travel. Have you had any virtual arbitrations since the lock down?

A. I've had a procedural conference but they are ordinarily held by conference call anyway. There was very little that was out of the ordinary other than the fact that I was sitting in my bedroom in a pair of jeans rather than in the office all suited up.

We have a hearing in June which is going to proceed by way of virtual hearing. We are in the thick of agreeing virtual hearing protocols and trying to arrange the logistics for the best possible process for a hearing where we have people in eight different countries. We have a Chairman in Brussels, a co-arbitrator in Singapore and another co-arbitrator in Perth and legal teams in Sydney and Singapore so we are looking at hearing days that will start for our chairman at 6 am. Unfortunately, 6 am in Brussels is the equivalent of 4 pm in Sydney, with sitting days extending to 10pm in Sydney.

Q. International arbitration has always had procedural conferences via telephone or video conference. Do you think that this makes it well placed to adapt to the lock down?

We are in the thick of all the new challenges that that will pose but it will be extraordinarily interesting to see how that goes and what the learnings out of that are.

In arbitration, I think people have had regular experience with having to cross examine witnesses via video conference. It is usually not all of them. But frequently there is a witness during the course of the hearing or a couple who, for whatever reason, are going to find it difficult to travel. A large driver for proceedings with hearings virtually is the difficulty of finding new hearing dates – this is particularly problematic where you have three busy arbitrators – pushing back a hearing could mean that the dispute is not heard for another twelve months or more Parties are trying to balance the requirement in the arbitral rules which require efficient hearings to resolve disputes and the interests of the parties in being able to resolve their disputes in a reasonable time and the concerns about due process.

There has been an expectation among these parties that an arbitration entitles a party to an in-person hearing.

Doubtless going forward there will be many more arbitration hearings that run virtually than there would have been in the absence of COVID-19.

But there is still a lot of unknowns. It will be interesting to see if unsuccessful parties attempt to challenge awards against them at the enforcement stage on the basis that they have not had an opportunity to adequately put forward their case or test the evidence of the other party where the hearing was not in person.

Q. Working from home – pros and cons

A. Lots of family time and lots of family time!

Q. What are you looking forward to when you get back into the office?

A. I am looking forward to seeing my team and being able to have all those chats that you have when you pass someone on the stairs and you bump into somebody at the coffee machine.

And how cheezels mystically appear at my side when stress levels rise above a certain temperature.

Q. What are your working from home essentials?

Getting out of the house every day and ugg boots are essential!

Interview conducted by Meghan Keary, Senior Associate, Corrs Chambers Westgarth (ACICA Editorial Board member)

Technology sector disputes: a new frontier for international arbitration

Chad Catterwell
Partner,
Herbert Smith Freehills[1]
(ACICA Associate)

The technology sector continues to grow at a rapid pace. Focussing on the Fintech industry as one example, a KPMG report quantified global investment activity involving Fintech companies during 2019 at over US $135bn.[2] Investment in the Australian Fintech industry was up 252% in 2019 (at US$1.913bn).[3] Australian Fintech companies including Judo Bank, Xinja, Afterpay, Airwallex, Prospa, MoneyMe and many more have attracted significant investment interest in recent years.

The technology sector, like international arbitration, is not limited by geographical boundaries. Disputes involving technology are 'now often high-value and international in nature and – like technology itself – they permeate all sectors.'[4] We should expect, therefore, that international arbitration will be an emerging dispute resolution mechanism of choice for the sector, given the obvious advantages in terms of cross-border enforcement under the New York Convention. Arbitration also offers increased privacy relative to court litigation and an ability to select arbitrators with the necessary technical expertise.

That said, although the technology sector is a growing area of interest for international arbitration practitioners, it is yet to be a core practice area. Gary Benton of the Silicon Valley Arbitration and Mediation Centre (established in 2015) explains:

> *Historically, technology development was largely limited to industrial centers in the US and Western Europe. Technology companies relied on local courts, which developed varying degrees of expertise in handling intellectual property and other technology-related disputes. Today, the design, development and distribution of technology is decentralised. Significant design and development work is undertaken in China, India and in many developing countries in Asia and in Eastern Europe. Advances in transportation logistics allow product to be manufactured in distant locations. Significantly, many of today's technology advances are provided online and distributed as a service. This globalisation calls for decreased dependency on local courts and more efficient, internationally focused dispute resolution mechanisms.*[5]

Consistent with this analysis, a 2016 Queen Mary survey found arbitration was the more preferred dispute resolution mechanism for TMT sector disputes, but litigation remained (for the time being) the most used.[6]

This article surveys the types of disputes that are emerging which would be candidates for resolution by arbitration and discusses the skills that we would need to develop in the arbitration community to best harness this opportunity.

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1 Chad Catterwell is a Partner at Herbert Smith Freehills, specialising in cross-border disputes and international arbitration across the Asia-Pacific region. The author gratefully acknowledges the assistance of David J Ryan, Senior Associate and Nicholas Brewer and Rachel Alter, Solicitors, Herbert Smith Freehills in preparing this article.

2 KPMG, *The pulse of Fintech H2 2019*, (February 2020) available online: https://home.kpmg/xx/en/home/campaigns/2020/02/pulse-of-fintech-h2-19-global-trends.html

3 KPMG, *Australian Fintech Highlights for H2'19* available online: https://home.kpmg/au/en/home/insights/2020/02/pulse-of-fintech-h2-2019.html

4 Claire Morel de Westgaver, Why technology-related disputes are increasingly resolved by arbitration, *IT Pro Portal* (November 2017)

5 Gary L Benton "The Silicon Valley Arbitration & Mediation Center" *Global Arbitration Review* (30 August 2017)

6 Queen Mary University of London, School of International Arbitration, *Pre-empting and Resolving Technology, Media and Telecoms Disputes: international dispute resolution survey* (November 2016)

Digitisation and automation

In recent years, digital transformation projects have become prominent across a wide range of sectors (banking, mining, logistics and many others), as businesses rapidly position themselves to harness the opportunities associated with the internet of things, blockchain and big data. These projects are notable because they are high value and commonly considered business critical. Automation projects at BHP, for example, have delivered 25% productivity gains and 40% maintenance costs savings in some drill and blast activity.[7] It is becoming increasingly clear that companies further along the digital automation pathway have been better able to manage the current COVID-19 crisis and we can expect, therefore, that digitisation and automation will accelerate in the COVID-19 and post-COVID-19 environment.

Major technology projects may involve developing an entirely new, fit-for-purpose software solution. Even where that is not the case, there will almost invariably be a complex array of configuration and customisation required to adapt the provider's core product to (a) interface with the end user's data inputs and (b) provide the specific functionality required. Delivering such a project commonly requires substantial project teams, with deliverables on both sides.

Disputes emerge where there are cost overruns, delays, scope changes and outcomes that fall short of expectations. That will sound very familiar to arbitration practitioners who practice in the construction sector. Often, as in construction disputes, it is not one issue that leads to a total relationship breakdown or project failure, but rather a "death by a thousand cuts" which build over time. Unpicking the complex web of allegations to attribute 'blame' and, more pertinently, contractual responsibility becomes a detailed forensic exercise.

Lawyers managing these disputes will need to understand both the business functions that the software was intending to address and the software development issues that have created challenges.

Business as usual IT outsourcing

It has been commonplace for many years for companies to outsource IT functions including certain IT related business and finance functions. India and China are considered leading countries for IT outsourcing.[8] The Philippines, Malaysia, Indonesia and Vietnam also rank highly. Industry analysts anticipate countries in Central and Eastern Europe will emerge as material competitors in this space.[9]

IT outsourcing arrangements are typically structured around medium term contracts, which come up for renewal periodically. A combination of the COVID-19 crisis and the broader push towards digitisation and automation has strained many outsourcing arrangements, some of which have been found to be inadequate. Some outsourcing customers are finding they need to reset their outsourcing strategy. We can expect to see a growing number of contentious exits in this area, and potentially an increase in the number of disputes regarding service level obligations.

Partnering and joint ventures

There is an increasing trend towards partnering and alliancing contracting models for both digitisation projects and business-as-usual IT outsourcing.

In 2019, Commonwealth Bank announced an investment in Swedish "buy now pay later" company Klarna and plans to distribute its capabilities in the Australian market. Commonwealth Bank invested an additional $US200 million in Klarna in January 2020. In another example involving an Australian company, in September 2018,

7 See Automation data is making work safer, smarter and faster (16 July 2019), online, available at: https://www.bhp.com/community/community-news/2019/07/automation-data-is-making-work-safer-smarter-and-faster/

8 A. T. Kearney *2019 Kearney Global Services Location Index*, online, available at: https://www.kearney.com/digital-transformation/gsli

9 Top IT Outsourcing Trends for 2019 (Vikrant Bhalodia 5 January 2019) https://www.business.com/articles/software-it-outsourcing-trends/

FBR, an ASX-listed brick-laying robotics company, announced a global partnership agreement with Wienerberger AG, the world's largest clay block manufacturer to develop customised clay block solutions and work collaboratively on business modelling, market analysis and market entry strategies.

These arrangements often involve joint venture, or quasi-joint venture, structures which seek to embed long term relationships and a pathway for assessing performance and jointly making decisions as circumstances evolve during the life of the endeavour.

These structures (and the disputes which may emerge from them) will be familiar to many international arbitration practitioners who practice in the oil and gas sector where incorporated and unincorporated joint venture based contracting models have been commonplace for many years.

In the 2016 Queen Mary survey, joint venture / partnership / collaboration disputes were reported to be the second most prominent behind disputes to protect technology related IP.

Technology sector M+A activity

Post-M+A disputes, across all sectors, are a common area of practice for international arbitration practitioners in Asia. Commonly these disputes involve circumstances where the value attributable to the target has been overstated or misunderstood during the transaction. For M+A activity involving less than a 100% acquisition, disputes relating to post-completion control and management decision-making are also common. In many cases, the entrepreneurial management style of the individuals who were critical to the success of the target pre-acquisition clash with the expectations and norms of the more established incoming investor.

We are experiencing a rapid growth in M+A, and other investment activity, in the technology sector, particularly involving tech start-ups. In a race to 'get big quick' successful start-ups can, at times, roll through a series of acquisitions before ultimately going public or being acquired by a more established player themselves. Some Australian examples illustrate the activity:

Australian cross-border payments "unicorn" Airwallex has recently closed a $US160 million ($250 million) capital raise (including investments from a number of international investors).

Australian neobank Xinja has secured a $433 million injection from World Investments, a private Dubai-based investment group.

Tencent's recent 5% acquisition of Afterpay appears designed to pave the way for Afterpay to expand in Asia, as the two companies consider integrating aspects of their payment platforms.[10] Previously, in 2018, Afterpay pursued a $110 million equity raise to buy UK payments company ClearPay and enter the UK market.

In April 2019, Australian company WiseTech Global announced that it was acquiring Xware, a leading messaging integration solutions provider in Sweden.

The valuation of a start-up is challenging to quantify with confidence. In this sector, modest sized, short-lived, business can have extreme valuations in the tens or hundreds of millions of dollars (or more). Often that valuation is heavily forward looking. Unlike more traditional M+A valuation, it may not be closely connected to historic earnings or performance. With the acquisition of any modest sized, short-lived business, there is a risk that the perceived "value" is only skin deep and that undiscovered business risks and challenges exist under the surface. Value realisation is yet another challenge. In a scenario where, for example, a bank acquires a Fintech start-up to leverage its technology, the bank will only realise the value of that acquisition once the technology is successfully integrated and its data is migrated to the new systems.

All those circumstances are apt to give rise to a raft of high-value disputes. In addition, acquisitions which involve an investment in (rather than a straight

10 As reported in the Australian Financial Review on 1 May 2020.

acquisition of) tech start-ups, may give rise to the same clash between entrepreneurial and established management styles and expectations that we see more broadly in M+A disputes in Asia.

Commercialising data

It has become increasingly clear that data has a value in its own right. Applications which efficiently harness data have even greater value. Connecting the data to the individuals with the skills to harness it often requires collaboration across companies. As noted in the 2016 Queen Mary survey, 'in the modern age of start-ups, digital disruption and ever-changing technology, for companies to stay ahead of the game (or even just to get in it) they must work with other businesses.'[11]

Even with the most careful drafting, complex questions of intellection property ownership can arise where parties collaborate to commercialise the data of one party using the software expertise of another. Similar issues can emerge where technology companies blend their respective technologies to create new solutions. Disputes with those characteristics will be familiar to those who practice in the pharmaceutical sector.

Separately, data breaches and cybersecurity risks are a cause of some types of disputes that are likely outside of the arbitration ambit (i.e. regulatory scrutiny and privacy actions by persons whose data is disclosed). However, consequential disputes regarding the contractual responsibility, or indemnification, for same may be an area where arbitration will have a role to play.

Conclusion

As outlined, many of the legal structures and issues that arise in technology sector disputes will be familiar to arbitration practitioners who specialise in other sectors (such as the construction and energy sectors). Arbitration practitioners should be well placed to adapt to this emerging sector.

However, to best seize this opportunity, the arbitration community will need to become sufficiently tech savvy to meaningfully comprehend the complex and highly technical fact circumstances that will be associated with technology sector disputes of the future. Understanding the (not inconsiderable) jargon and terminology is a necessary but not sufficient first step. Practitioners who truly excel in this space will need to understand the technology itself.

11 Queen Mary University of London, School of International Arbitration, *Pre-empting and Resolving Technology, Media and Telecoms Disputes: international dispute resolution survey* (November 2016), at p. 10

Dos and Don'ts of Virtual Hearings in International Arbitration

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Solicitor,
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The arbitration community has successfully adapted the way it operates in response to the COVID-19 pandemic, namely through the move to virtual hearings (and conferences) in-lieu of in-person attendance. Despite major disruption to international and domestic travel and stay-at-home orders, disputes are being resolved efficiently and effectively through virtual arbitration under the ACICA Rules, offering parties much needed flexibility to navigate this unparalleled global circumstance.

ACICA's Online Arbitration Guidance Note (the **Guidance Note**) sets out relevant considerations for parties to take into account in preparing for a virtual arbitration. Below, we set out a quick checklist of 'dos' for parties and tribunals to get you started.

1. Select a suitable **technology platform** (or platforms) that allows for:
    - video-conferencing with options for joint sessions, break out rooms and ability for more than one witness to testify at the same time (e.g. in a hot tub);
    - instant messaging for private communications between individual participants;
    - remote real-time transcription, preferably with hyperlinking connectivity to the electronic hearing bundle;
    - document sharing and screen sharing, including for PowerPoint Presentations; and
    - recording capability.

See the Guidance Note for more information.

2. Agree to a **procedural order** that includes, among other things:
    - the chosen technology platform and who bears the costs;
    - who will be hosting the hearing i.e. the tribunal or one of the parties;
    - whether the hearing will be recorded or in what circumstances it is agreed to record parts of the hearing;
    - timetable for the hearing, particularly where parties are based across different time zones;
    - timing for all individual participants in the virtual hearing to conduct a 'test run'; and
    - timing for parties to agree and submit the electronic hearing bundle.
3. Agree to a **hearing protocol** that addresses, at a minimum:
    - witness examination and the presentation of evidence;
    - documents and the electronic hearing bundle;
    - cyber security and confidentiality/privacy issues; and
    - contingencies and infrastructure for when things go wrong.
4. Other considerations:
    - Is a third-party virtual arbitration provider necessary or desirable?
    - Are all participants familiar with the chosen technology platform?

- What arrangements are required to be made in relation to transcription services?
- How will translation services be accommodated?

As for individual participants of virtual arbitration, below we set out some essential 'dos' and 'don'ts' to ensure you are a productive member of the hearing.

Before the virtual hearing:

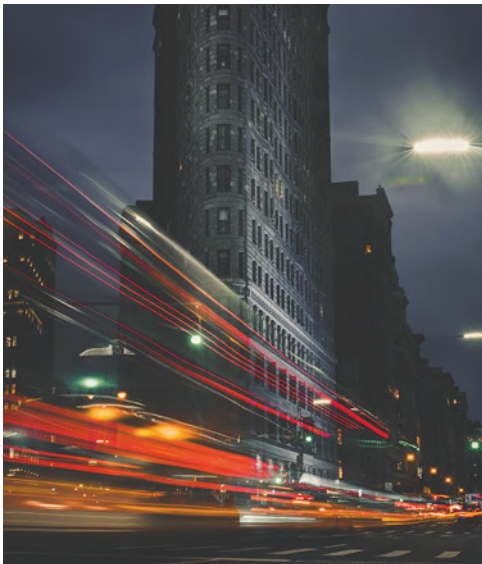
- Set-up in a private and quiet location as this will limit interference and distractions.
- Test the technology and equipment and connectivity ahead of the virtual hearing.
- Ensure that there is sufficient internet connection for your device and that it is fully charged.

During the virtual hearing:

- Mute your microphone unless addressing the tribunal or counsel.
- Identify yourself by name before commencing an address to the tribunal or counsel; this will assist with transcript preparation.
- Be mindful of your body language; nonverbal communication is even more important (and noticeable) during online meetings.
- Don't record proceedings without agreement or in contravention of the procedural order.
- Don't speak over other participants as much as possible; this will also assist with transcript preparation.

Conclusion

Ultimately, effective virtual arbitration requires diligent preparation and party cooperation. ACICA continues to support parties in resolving disputes through virtual hearings and conferences and has made available a number of resources, including ACICA's Online Arbitration Guidance Note and information sheet, which provide helpful direction to parties and counsel in the time of COVID-19 and beyond.



Bifurcation in arbitral proceedings – a strategic tool during COVID-19

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In April this year, in response to the COVID-19 pandemic (**pandemic**), we suggested that businesses involved in arbitration proceedings commenced before the pandemic reconsider whether they needed a face to face evidentiary hearing and/or cross examination of witnesses before the tribunal could render an award (International arbitration and COVID-19: reconsidering the hearing). This suggestion was made to combat delays and necessary adjournments caused by social distancing and travel restrictions. It was acknowledged that not all arbitral proceedings will be suited to a determination "on the papers", but that in some cases, where an early determination is valuable or a party has identified a risk associated with an oral hearing, the alternative might offer a sensible way to resolve the dispute while the world is in varying stages of lockdown. The article discussed how the parties' arbitration agreement, particularly for institutional arbitration, impacts on the jurisdiction of the tribunal to proceed in this way either at the instigation of one or more of the parties or at the tribunal's own volition.

Reconsideration of the need for an evidentiary hearing is, however, only one of many strategic options available during the pandemic. Another option is the question of bifurcation. This article considers the use of bifurcation within the arbitral process as a tactical measure.

Bifurcation is considered in four categories: first, in relation to jurisdictional issues; secondly, arising from summary judgment procedures; thirdly, involving a split of liability and quantum; and, fourthly, issue specific bifurcation.

Jurisdictional objections

An arbitral tribunal has the power to determine its own jurisdiction. This is known as the competence-competence principle. It is a foundation of arbitration law. As Gary Born observes in his treatise *International Commercial Arbitration Vol 1 (Walters Kluwer 2nd Ed 2014) at §7.03*:

> *As a practical matter, international arbitral tribunals routinely entertain and make decisions concerning jurisdictional issues; this includes challenges to both the existence, validity, or legality of the parties' underlying contract and to the existence, validity, legality, or scope of their arbitration agreement itself* (footnotes omitted).

The rules of many arbitral institutions confirm the competence-competence rule and also provide time limits for a party's challenge to jurisdiction or a party's objection that the tribunal is exceeding the scope of its jurisdiction. These reflect the UNCITRAL Model Law on International Commercial Arbitration 1985.

Article 20.1 of the ACICA Rules states that the *Arbitrator shall have the power to rule on objections that he or she has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.*

The ACICA Arbitration Rules require a respondent or respondent to counterclaim which challenges jurisdiction to include that challenge in its Answer to Notice of Arbitration (Article 6.1). Article 28.3 of the Rules mandates that *[a] plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Statement of Defence referred to in Article 26, or, with respect to a counterclaim, in the reply to the counterclaim.*

Under Article 20.4:

> *In general, the Arbitrator should rule on a plea concerning his or her jurisdiction as a preliminary question. However, the Arbitrator may proceed with the arbitration and rule on such a plea in his or her final award.*

The question of whether a jurisdictional challenge is heard as a preliminary issue or at the same time as the substantive dispute will depend on the attitude of the parties, the significance of the dispute (both in quantum and strategic value to the parties) and the relationship of the objection to the other issues in dispute. For example, if a party objects to jurisdiction based on a claim of invalidity of the arbitration agreement, that party might also claim that the 'container' agreement is invalid. Whilst the doctrine of separability provides that the arbitration agreement stands alone, the factual matrix supporting the party's claim might overlap for the main contract and the related arbitration agreement.

The determination of a jurisdictional challenge or objection as a preliminary or separate issue makes sense during the current pandemic. Those engaged in international arbitration are finding that video conferencing is effective for hearings, but is challenging where the hearing extends beyond a day. The challenges militate in favour of shorter hearings which will move the parties towards a resolution of the dispute or aspects of the dispute. Furthermore, a jurisdictional objection can often be effectively determined by a tribunal on the basis of written submissions.

Summary dismissal

The introduction of summary dismissal procedures in international arbitration is a relatively recent development in the institutional rules. Summary dismissal procedures are particularly useful when a claim or defence is very obviously unmeritorious or the tribunal clearly lacks the jurisdiction to proceed.

The first arbitral institution to introduce summary dismissal into its rules was the Singapore International Arbitration Centre (**SIAC**) in 2016. Under clause 29 of the SIAC Rules, a party may apply to the tribunal for the early dismissal of a claim or defence if the *claim or defence is manifestly without legal merit, or a claim or defence is manifestly outside the jurisdiction of the Tribunal*. However, the application can only proceed with the tribunal's leave (Article 29.3). The SIAC Annual Report 2019 reports that since 2016, there have been 30 early dismissal applications made; of those, 18 were allowed by the tribunals and 9 were granted.

The Stockholm Chamber of Commerce (**SCC**) closely followed in 2017, introducing a similar procedure in Article 39 of the SCC Rules enabling parties to request a tribunal to decide one or more issues of fact or law by way of summary procedure. Amendments were also made to the HKIAC Rules in 2018 conferring on tribunals the power to *decide one or more points of law or fact by way of early determination* (Article 43).

The ICC Rules do not contain specific summary dismissal procedures, however the ICC's Practice Note to Parties and Arbitral Tribunals published in 2017 (**ICC Practice Note**) contains guidance *as to how an application for the expeditious determination of manifestly unmeritorious claims or defences may be addressed within the broad scope of Article 22 of the ICC Rules*. Article 22 of the ICC Rules provides, relevantly, that *[i]n order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties*. The Article also imposes an obligation on the arbitral tribunal and the parties to *make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute*.

Prior to the introduction of summary dismissal procedures by SIAC, applications in international commercial arbitration for a determination akin to summary dismissal were rarely countenanced. The opportunity for a summary dismissal application was not a feature of Procedural Order No 1 and tribunals were naturally cautious in determining an issue outside of the usual procedural parameters where a party may subsequently claim a breach of procedural fairness or the

determination itself might be unenforceable as a foreign arbitral award.

The statistics published by SIAC in its most recent report suggest that parties are using the procedure, albeit judiciously. There may be an increase in applications as a result of the pandemic if parties and their counsel look more closely at an earlier stage at the merits of the claims and defences. On the other hand, the challenges thrown up by the pandemic might distract parties from arbitration proceedings as they seek to refocus their commercial activities and the likely delays may be considered strategically advantageous. As a claimant in proceedings where the respondent falls into the latter category, an application for summary dismissal may be a useful tool to engage the reluctant respondent in the arbitration proceedings; in some cases this might lead to a commercial settlement.

Liability and quantum

The bifurcation of liability and quantum has fallen from favour in recent years. The primary reason for this is that the conduct of an evidentiary hearing on liability (with all of its associated interlocutory issues and multiple written submissions) followed by the second hearing for the determination of quantum resulted in delay and significant cost. As we know from the surveys conducted by the School of International Arbitration at Queen Mary University London, cost and delay are a key concern of users of international commercial arbitration. The *2018 International Arbitration Survey: The Evolution of International Arbitration* found that:

> *"Cost" continues to be seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of power in relation to third parties" and "lack of speed"*,

although *[a]n overwhelming 99% of respondents would recommend international arbitration to resolve cross-border disputes in the future*. There can be no doubt that the hearing and determination of liability issues separately to quantum issues does, in most cases, contribute to additional costs and additional time.

For the purpose of this paper, liability and quantum as separate issues is raised principally for completeness. Any suggestion that the pandemic should lead to a reconsideration of bifurcation is difficult to maintain given the strong focus on procedural efficiency and cost management. The option should remain on the table, but should only be entertained where the parties, their counsel and the tribunal can see tangible benefits in the particular case before them.

"Issue specific" bifurcation

It is this category of bifurcation which warrants particular examination during the period of social distancing and travel restrictions. It requires the parties, in consultation with their counsel, to think laterally to identify one or more issues which, if determined separately, might significantly narrow the issues in dispute, might create an

opportunity for a commercial settlement between the parties or might lead to efficiencies in the conduct of the arbitration proceedings. Questions concerning the interpretation of a clause in a contract, the existence of an obligation, the effect of an exemption clause or the order of precedence of related transaction documents (where that can be determined from the text of the agreements themselves) may be appropriate for separate or preliminary determination. This would be a particularly attractive course where the parties are content for the tribunal to make its determination based solely on written submissions.

A tribunal should not as a matter of course accept a party's proposal for determination of a specific issue; it ought independently evaluate whether the proposal is consistent with its duties and its mandate under the relevant arbitration agreement. Where the parties have chosen the ACICA Rules, for example, a tribunal must have regard to Article 3.1 which provides that:

> *[t]he overriding objective of these Rules is to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved.*

Finally, in the current unprecedented times, the hearing of evidence or submissions on a particular issue might not always be foreseeable. In an online presentation on 29 April 2020 (https://www.youtube.com/watch?v=rSlsV2YP3pk), Dr Michael Pryles suggested that where technology fails during an evidentiary hearing (for example, during the cross examination of a particular witness), it may be incumbent on the tribunal to advise the parties that either video or audio is not optimal and propose that the evidence from that witness be taken on another date. Whilst not technically 'issue specific' bifurcation, the practical effect of a circumstance such as this might result in particular issues being heard in separate hearings. It is less likely, it must be acknowledged, to lead to a separate determination.

Observations

The international business community chooses arbitration for, amongst other things, its flexibility. The worldwide pandemic provides an opportunity to demonstrate why that is the case. The responsibility for adapting arbitration procedure falls not only on the tribunal and counsel, but also on the parties. International arbitration is the parties' process; they expressly choose it by the incorporation of an arbitration clause or arbitration agreement in their contracts. As Professor Doug Jones observed during his keynote speech at the 8th Asia Pacific ADR Conference in Seoul titled *A New Path Forward: Efficiency through Transparency*, flexibility of the arbitration *provides scope for innovation, as arbitrators can create unique procedures tailored on a case-by-case basis*. The careful consideration of the availability of preliminary and separate determination of issues in dispute between parties in international commercial arbitration (beyond issues of jurisdiction) is a perfect example.

COVID-19: the potential impact of insolvency on arbitration proceedings conducted in Australia

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The effects of the COVID-19 crisis are being felt across the entire world, threatening widespread insolvency events which may adversely impact existing arbitration proceedings. Even with the fiscal stimulus and other measures taken by the Federal and State governments in Australia, corporate insolvencies are likely to increase in the coming months.

Under Australia's insolvency regimes set out in Part 5 of the *Corporations Act 2001* (Cth) (**Corporations Act**), a distressed company may be subject to voluntary administration, creditors' voluntary winding up or court appointed winding up (collectively, an **external administration**). Each of these processes raises different issues for the commencement and continuation of court and arbitration proceedings. With the onset of COVID-19 and the increased possibility of companies entering into external administration, it is important to understand these different issues.

In this article, we consider the potential impact of commencing or continuing arbitration proceedings seated in Australia against an Australia company that goes into external administration. We also consider the potential impact upon the recognition and enforcement of arbitral awards by an Australian Court against an Australian company in external administration.

There are a number of other complex issues that may arise where a party to an arbitration proceedings goes into external administration, particularly if the proceedings are an international arbitration. There may need to be consideration of the different laws that may apply to different aspects or different stages of an arbitration or there may be questions about the arbitrability of the dispute.[1] These issues are beyond the scope of this article.

Insolvent respondent - stay of proceedings

The Corporations Act provides for a stay of court proceedings if a company enters into:

- Voluntary administration
- Deed of Company Arrangement (**DOCA**)
- Creditors' voluntary winding up
- Court ordered winding up

The potential impact of each of these processes on arbitration proceedings is different, as explained below.

1 Some of these issues are considered in D. Jones, "Insolvency and Arbitration: An Arbitral Tribunal's Perspective", delivered at the INSOL Asia Pacific Rim Region Annual Conference, 13-15 March 2011.

Voluntary administration and DOCA

If a company goes into voluntary administration, section 440D of the Corporations Act introduces a moratorium on existing and future court proceedings against the company and in relation to any of its property during the administration period.

Court proceedings subject to the stay can only be commenced or continued with the written consent of the administrator or with leave of the Court. The Court will generally exercise caution before granting leave. In deciding whether to grant leave to proceed, some of the factors the Court will take into account are:

- who appointed the administrator and who was applying for leave;
- whether the claim has a solid foundation and gives rise to a serious dispute;
- whether there is a public interest;
- whether the administrator would be unreasonably distracted and incur unnecessary legal costs; and
- whether the applicant will suffer a disadvantage if leave is not granted.

Section 440D provides that the stay applies to "a proceeding in a court". Section 440D does not expressly refer to arbitration proceedings. The Courts have held that the reference to "a proceeding in a court" does not extend to arbitrations proceedings.[2] This means that a stay in respect of arbitration proceedings is not automatic and leave is not required to continue or commence arbitration proceedings.

In *Auburn Council v Austin Australia Pty Ltd*,[3] the respondent entered into voluntary administration after the commencement of arbitration proceedings. An application was made to the court for leave to continue with the arbitration on the basis that the arbitration was to be considered "a proceeding in a court" for the purpose of section 440D. Leave was not granted as it was held that the arbitral tribunal was not a "court" for the purposes of section 440D and thus, leave was not required for the proceedings to continue. The same approach was taken in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd*.[4]

However, an administrator can make an application for a stay of arbitration proceedings under section 447A of the Corporations Act. Section 447A gives the Court general powers to make orders about how the voluntary administration provisions in Part 5.3A of the Corporations Act are to operate in relation to a company. The extent of the Court's powers under section 447A were analysed by the High Court in *Australasian Memory Pty Ltd v Brian*.[5]

The Courts have used the power granted in section 447A to stay arbitration proceedings.[6] In *Re THO Services Limited*, the administrators applied for a stay under section 440D in relation to pending arbitration proceedings after the respondent had entered into voluntary administration. The Court used section 447A to order that "Part 5.3A of the Act operate in relation to THO Services Limited as if for the for the purposes of s 440D(1), a "proceeding in a court" included an arbitration proceeding.[7] If the company in administration enters into a DOCA immediately after the voluntary administration, a person bound by the DOCA (such as an unsecured creditor with a claim arising prior to the appointment date of the administrators) may not begin or proceed with a proceeding against the company or in relation to its property by operation of section 444E of the Corporations Act without leave of the Court. This stay is not limited on its face to "a proceeding in a court" and it may be that this stay (referring only to "a proceeding") extends to arbitration proceedings.

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2 *Auburn Council v Austin Australia Pty Ltd* (2004) 22 ACLC 766 at [28]; *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 285 ALR 207 at [42]; *In the matter of THO Services Limited* [2016] NSWSC 509 at [18].

3 (2004) 22 ACLC 766.

4 (2011) 285 ALR 207.

5 (2000) 200 CLR 270.

6 *Re THO Services Limited* [2016] NSWSC 509.

7 *Re THO Services Limited* [2016] NSWSC 509 at [46].

Creditors' voluntary winding up

If a company enters voluntary winding up or liquidation, such as it would if it proceeds to liquidation immediately following voluntary administration, section 500(2) provides that "no action or other civil proceeding" can be commenced or continued against the company without the leave of the Court (section 500(2)).

The Courts have held that this stay does extend to arbitration proceedings.[8] Whether or not the reference to "civil proceeding" in section 500(2) extends to arbitration was considered by the Court in *Re Vassal Pty Ltd* (***Re Vassal***).[9] In that case, the Court considered the approach taken in *Alliance Petroleum Australia (NL) & Others v Australia Gaslight Company* where it was held that arbitration falls within the reference to "civil proceedings" in the context of the *Service and Execution of Process Act 1901* (Cth).[10] King CJ recognised that:[11]

> "Arbitration is a regular procedure recognised by statute for the resolution of legal claims, differences or disputes between parties. Rules of law are prescribed by statute for the conduct of arbitrations. Statutory powers are conferred on arbitrators. The jurisdiction of the Courts is invoked in aid of the arbitration procedure… The procedure results in an award which is enforceable at law. Arbitration is clearly recognised by the statute as a method of resolving legal disputes alternative to litigation in the Courts. I think that in the ordinary use of language such a procedure would be included in the description "civil proceedings"."

In *Re Vassal*, Kelly J adopted the same approach holding that leave of the Court was required to commence arbitration proceedings. He stated that:[12]

> "The proceedings are between parties and have the characteristics to which King CJ refers. I can see no warrant for limiting the term to proceedings taking place in a Court. I am therefore not prepared to make the declarations sought and I hold that leave is required to commence the arbitration which is the subject of the originating summons."

Hence, in the context of a creditors' winding up, any civil proceedings, whether court or arbitration, cannot be commenced or cannot proceed without leave of the Court.

The Corporations Act is silent on the principles that should be applied to determine an application for leave to proceed pursuant to section 500(2). When considering such an application, the Court will have regard to the likely sources of any recoveries resulting from the action and the impact on any return to creditors. It has been

8 *Doran Constructions Pty Ltd (in liq) v Beresfield Aluminium Pty Ltd* (2002) 54 NSWLR 416 (Santow JA) at [4] – [7].
9 [1983] 2 Qd R 769.
10 (1983) 70 FLR 404.
11 (1983) 70 FLR 404 at 423.
12 [1983] 2 Qd R 769 at 772D.

held that a claimant should proceed by way of proof of debt unless he or she can demonstrate "some good reason" why a departure from that procedure is justified.[13]

In *Rushleigh Services Pty Limited v. Forge Group Limited (In Liquidation)(Receivers and Managers Appointed)* the Court found that while the question is one of judicial discretion, relevant circumstances the Court would take into consideration include:

- whether there is a serious question to be tried;
- the amount and seriousness of the claim;
- the degree of complexity of the legal and factual issues involved;
- whether the company in liquidation has insurance which will respond to the plaintiff's claim; and
- the stage to which the proceedings, if already commenced, may be progressed.[14]

If the claimant is a secured creditor, then it reserves the right to realise or otherwise enforce its security. A secured creditor can appoint a receiver or a receiver and manager to take control of and realise some or all of the secured assets (collateral), in order to repay the secured creditor's debt. This right continues after the company goes into liquidation.

An unsecured creditor's right to commence arbitration against the company for circumstances which existed prior to the appointment of the liquidator is subsequently converted into a right to lodge a formal proof of debt in the winding up of the company (to be adjudicated on by the liquidator) unless leave of the Court to commence or continue the arbitration proceeding can be obtained.

Court-ordered winding up

If a company is being wound up in insolvency or by the Court, section 471B provides that Court proceedings cannot be commenced or continued against the company or in relation to its property without the leave of the Court. The primary purpose of this provision is to prevent the company in liquidation being subjected to expensive and onerous litigation claims.

The wording used in section 471B is similar to section 440D, i.e. both provisions refer to the stay applying to "a proceeding in a court". Again, there is no express reference in section 471B to arbitration proceedings. It is expected that courts would hold that the stay does not extend to arbitration proceedings.

Whilst the application of section 471B has not been decided by the courts, the history of these provisions and their current wording was discussed by Justice Brereton in *Re THO Services Limited*.[15] Justice Brereton considered section 371(2) of the Companies Codes of 1980, which provided that "no action or other civil proceeding may be commenced or proceeded with" against a company being wound up by the Court, without leave of the Court. He also considered the decision in *Re Vassal*, where it was held that the reference to "civil proceeding" extended to arbitration proceedings.

Justice Brereton noted that the language used in section 471B in relation to a court winding up did not refer to "civil proceeding" but referred to "a proceeding in court" similar to section 440D which applies to voluntary administrations. In contrast, section 500(2) which applies to a creditors' winding up refers to "action or civil proceedings". Whilst he noted the difficulties arising from the specific language used, he inferred that this was the intention of Parliament given the previous language used in the Companies Codes and the discussions of this language in previous authorities.

Justice Brereton also noted that there did not appear to be any policy consideration driving this approach. He stated:

> "On the authorities, s500(2) (and necessarily s444E) impact on arbitrations. There is no evident reason of policy as to why a creditors' voluntary winding up should operate as a stay of an arbitration, yet a court ordered winding up should not, nor why a DOCA should but a voluntary administration should not. In

13 *Rushleigh Services Pty Limited v. Forge Group Limited (In Liquidation)(Receivers and Managers Appointed)* [2016] FCA 1471 at [68]
14 *Rushleigh Services Pty Limited v. Forge Group Limited (In Liquidation)(Receivers and Managers Appointed)* [2016] FCA 1471 at [15] -[18]
15 [2016] NSWSC 509.

> that context, to proceed on the basis that the exclusion of an arbitration from s440D reflects a sophisticated policy decision would be misconceived. While I proceed on the basis that arbitration is excluded from the prima facie effect of s440D, I am unpersuaded that this reflects a conscious policy decision that arbitration should be permitted to proceed notwithstanding an insolvency administration; s500(2) and s444E indicate otherwise."

Accordingly, for present purposes, it appears that there is an inconsistent approach where arbitration proceedings are stayed against a company in a creditors' winding up but not where the company goes into voluntary administration or a court winding up.

Nonetheless, although section 447A does not apply to a liquidation, it may be possible for a liquidator to apply under section 90-15 of the Insolvency Practice Schedule to extend the operation of the stay to arbitration proceedings. Although we are not aware of this having occurred, section 90-15 gives the Court wide powers to make such orders as it sees fit in relation to an external administration and this may extend to making orders of this kind.

Enforcement of an arbitral award

Recognition and enforcement of an arbitral award by a Court in Australia requires the commencement of proceedings in an Australian Court. Hence, if an award was made against a company in voluntary administration or liquidation, then the enforcing party must apply for leave of the Court (or alternatively obtain the written consent of the administrator in a voluntary administration) before commencing enforcement proceedings to recognise and enforce the arbitral award.

The Court has granted leave in relation to the commencement of enforcement proceedings where the respondent (i.e. the party against whom enforcement is sought) has entered into external administration. For example, in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd*,[16] application was made for leave from the Court to enforce an arbitral award under the *Commercial Arbitration Act 2010* (NSW) against the respondent who was in voluntary administration. Leave was granted.

In Hyundai Engineering & Steel Industries Co Ltd v Two Ways Constructions Pty Ltd,[17][18] the applicant sought enforcement of an award made under the SIAC Arbitration Rules against the respondent. After the commencement of enforcement proceedings, an application was then made to set aside the award in the Singapore courts. The respondent then applied under s 8(8) of the *International Arbitration Act 1974* (Cth) to adjourn the enforcement proceedings on the basis of the set aside application in the Singapore courts. The Court granted the adjournment on the condition that the respondent provide security for the award. The security was not provided. Voluntary administrators were then appointed by the directors of the respondent. Application for leave to proceed with the enforcement proceedings was granted.

In Eopply New Energy Technology Co Ltd v EP Solar Pty Ltd,[19] the Court was asked to enforce an award made in China under the CIETAC Arbitration Rules against a company in Australia. Soon after the enforcement proceedings were commenced, the company entered into liquidation under section 500(2). Leave was granted to commence Court proceedings to enforce the award. In considering whether to grant leave, the Court found that the balance of convenience was in favour of allowing the applicant to proceed, by way of action to judgment, rather than pursuing the claim by the usual submission of a proof of debt.

Upon the enforcement of the arbitral award, an Australian Court will provide judgment to facilitate the recovery of the debt. However, from a practical point of view, if the claim is unsecured and only monetary in nature, the claimant will not be able to commence or continue any

16 (2011) 285 ALR 207.
17
18 [2018] FCA 1427.
19 [2013] FCA 356 at [23(b)].

court enforcement processes seeking to enforce or recover the judgment sum without leave of the Court, and instead will be required to prove under any DOCA or in any liquidation as an unsecured creditor. There may therefore be limited utility in seeking to have the arbitral award recognised and enforced by a court.

Finally, unless a costs order was made by the arbitral tribunal prior to the appointment of the administrator or the day the winding up is deemed to have commenced, a costs order will not be admissible to proof against the company in external administration.

Conclusion

There are a number of advantages of using arbitration proceedings during this difficult time of the COVID-19 pandemic. The common use of virtual hearings is one advantage. The ability to commence or continue arbitration proceedings against an Australian company that goes into voluntary administration or a court winding up may be another advantage. Nevertheless, the commercial and practical risks of ultimately seeking recovery of any remedy granted in an arbitration need to be given serious consideration.

Your BPO Supplier is WFH: BPO Disputes in a Post-COVID-19 Era

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With the worldwide outbreak and continuous socioeconomic evolution of COVID-19, its profound impact on businesses across the globe are far-reaching. Most notably, some sectors are able to transition to a working from home ("**WFH**") model to ensure that 'business as usual' continues. However, unlike those sectors that are able to smoothly transition to a WFH business model, business process outsourcing ("**BPO**") service suppliers ("**Supplier**") face challenges, given their core business is to serve client companies ("**Client**") from a fixed and secured Delivery Centre ("**Delivery Centre**"). A Client may not be able to sleep well at night if its BPO Supplier is to switch to a WFH model given the obvious potential data/security concerns (including but not limited to *GDPR*).[2] Accordingly, this may result in disputes unique to this sector taking place. BPO contracts usually have arbitration and mediation clauses as a means of dispute resolution. This article will seek to convey certain considerations in such dispute resolution.

Two Sides of the Same Coin

Before looking into the representative issues WFH may cause, it is helpful to understand the concerns from each party's perspective.

On one side, the special business model that BPOs must adopt creates a legitimate concern for a Client in today's age of transitioning into WFH models: when a Supplier's employee is WFH rather than from a Delivery Centre, is that secure? How are the Supplier's contractual obligations and agreed best practices being upheld by the Supplier in adopting a WFH model? If something untoward transpires, should a Client be made to just accept that fact in a COVID-19 world or can a Supplier be held accountable? If an amendment is required for BPO contracts (usually with a term longer than five years), what clauses may have to be considered? These are some pertinent questions this article seeks to address.

On the other side, one must also recognise the difficulties faced by a Supplier in the new world we are faced with today. Switching the workforce servicing a Client to WFH requires significant technology upgrades or changes to an existing BPO contract. Some WFH technologies could be innovative but may not be stable enough to service a Client of a Supplier. The bottlenecks may also come from something Suppliers cannot control; one example is internet bandwidth, which has a direct relationship with a country's telecom infrastructure. While the existing BPO business continuity plans or disaster recovery plans in contracts may have considered the scenario of moving service from one Delivery Centre to another, it may not have foreseen a worldwide and long-lasting pandemic, meaning WFH may become necessary until a cure and vaccine are readily and affordably available.

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2 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC* [2016] OJ L 119/1.

Bearing the above perspectives from a Client and a Supplier in mind, we may now dive deeper into several hot issues the WFH model may trigger. Those issues may not necessarily be related to each other, but they come out of the same root cause: WFH.

Working Location

In a BPO contract, the working location clause or schedule sets forth where the BPO services are to be delivered by the Supplier to the Client. Seldom or almost never would you find such contracts having covered a situation of WFH.

Given the highly sensitive and confidential nature of certain BPO services, e.g., those for finance, credit cards, procurement, human resources, and IT technical support, a Client usually requires that BPO services can only be delivered from a specific Delivery Centre, which should meet certain physical and cyber security standards. Prior notice to and consent from a Client is required even to move delivery from one Delivery Centre to another.

However, when Delivery Centre employees have to start WFH, how should this be initiated? Without prior consent from a Client, this could be a straightforward breach of contract. To cure this breach, a non-monetary service credit, which is usually offered by a Supplier to a Client to off-set future due service fees, may not be sufficient, because service credit is usually for curable under-performance under the service level agreement ("**SLA**"). Apart from this non-monetary cure, liquidated damages or other damages for breach of contract may be available. Therefore, a BPO Supplier should not underestimate the consequences of this situation. An advance arrangement should be made by both parties prior to any sudden change to a WFH model. This arrangement could be in the form of an amendment or a change order to an existing BPO contract, with other main considerations discussed below.

Data Integrity, Privacy and Cybersecurity

The essence of insisting on a specific working location (Delivery Centre) is to provide a Client with peace of mind on three key issues: data integrity, privacy and cybersecurity. An agreed Delivery Centre meets applicable standards on data, privacy and cybersecurity set down by the laws in both a Client's home jurisdiction and that of a Supplier. Any violation may trigger significant punishment by the authorities and result in loss of reputation of both parties. Therefore, a Client has reasonable concerns regarding, and legitimate interests in, having a proper Delivery Centre.

Without proper technological adaption, WFH may compromise encryption and other secured processing. As a result, data being processed by a Supplier may become vulnerable to both internal breaches and attacks from the exterior. To cope with this, some Suppliers may offer to procure and implement extra security equipment such as VDI (Virtual Desktop Infrastructure) and a VPN (Virtual Private Network) to facilitate WFH, and examine if its employees' office computer or personal computer under a BYOD (Bring Your Own Device) model would meet security standards set forth in a BPO contract.

Despite such proactive measures, some things may remain out of the parties' control, e.g., the bandwidth at an employees' home may be variable (if the number of online users surge in a 'home network' then the internet speed may significantly slow down). In such cases, service efficiency may drop and consequently an SLA may be breached. If this breach cannot be cured within a prior agreed period, then the Client would naturally be entitled to a monetary claim.

Client's Step-in Right

If people have to live with the coronavirus for a while, then rather than passively relying on its BPO Supplier a Client may have to think about mitigating data processing risk themselves. For instance, a Client may ask, 'is it better if I send a supervisory or assistance team over or have someone else step in?'

Some BPO Suppliers oppose agreement to step-in rights, no matter whether by the Client or a third-party entity engaged by the Client. A step-in rights clause usually provides very limited rights for a Client. However, for WFH, a real hurdle is the compatibility.

BPO Suppliers have reasons to be proud of their system and their own way of doing things, which is the essence of the BPO services industry and the reason a Client

selects and trusts them in the first place. A Supplier's existing system may not be compatible with what Clients try to introduce into the system. On the other hand, a Client may be understandably concerned that WFH would negatively impact the seamlessness of business processes, reduce efficiency and compromise the Client's data and proprietary information, unlike a conventional Delivery Centre. Therefore, a Client would always be nervous about the off-track event, which would compel them to step in.

As a result, a battle on step-in rights may become inevitable. Usually such fights would only occur after repetitive SLA failure and a Supplier's inability to cure it. However, given a foreseeable longer term of the COVID-19 pandemic (which may be far more than what most realise), some Clients may choose to look into this immediately and think about 'helping out'.

Client's Technology

To facilitate WFH, some capable Clients may want to extend certain technology tools to a Supplier, under the guise of exercising a step-in right. This generous gesture may necessitate incorporation of another common clause regarding "**Client's Technology**" into existing BPO contracts.

The first thing is whether a Client has a contractual basis to introduce its technology into a Supplier's services in a "given situation". In many cases, a Supplier may have a say on the introduction of Client's Technology. The reason is simple: a Supplier is accountable for delivering results. For anything introduced into a Supplier's technology environment, they should have the final say. Unfortunately, a qualifying "given situation" may not have been given significant thought during the BPO contract negotiation and finalisation stages.

Normally, a schedule on the Client's Technology would have been heavily negotiated. The underlining theory is straightforward: a Supplier should not be held accountable nor liable if the technology introduced by a Client began to malfunction and/or losses were incurred during the utilisation of a Client's Technology. Such utilisation sometimes interfaces or interplays poorly with a Supplier's existing technology or environment, causing the root reason of a breach to become more difficult to attribute. In a WFH scenario, arguably a Client acts in good faith by offering another layer of comfort, and helps a Supplier avoid breach. If using the Client's Technology means the Supplier would be exempted from its accountability in relation to that particular Client's Technology, would that defeat a Client's purpose?

Conclusion: How to Help

This article just lightly touched certain issues in a BPO contract mediation. It is obvious that no simple solution exists. Mindful arbitrators and mediators may find themselves restrained from considering extreme scenarios such as early termination pursuant to force majeure or impossibility of performance situations. As a matter of fact, execution of a BPO contract means that parties have invested a lot of time and capital (human and otherwise) to tailor-make the agreement work within a given matrix. If a BPO contract is adjudicated to termination, the transition-out efforts should not be overlooked. If some clauses therein could be used to navigate the ship out, it may not be in the interest of both parties to abandon the ship right away.

Virtual hearings in international arbitration proceedings around the globe

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Introduction[1]

The need for virtual hearings currently is a hot topic, owing to the travel restrictions and public health concerns caused by the COVID-19 pandemic. The possibility of international and intestate travel bans remaining in place in Australia until 2021 means that, for at least the next six months, we can expect virtual hearings in international arbitration proceedings to become the norm rather than the exception.

In this article, we take a whistle-stop tour of the approach being taken by the different regional arbitral institutions and professional bodies, provide an overview of the wealth of material available to assist practitioners in proceeding with virtual hearings and discuss an example of how a virtual hearing with over 70 participants was conducted successfully.

Institutional support for virtual hearings

'Business as usual' is the message promulgated by European arbitral institutions. That is despite the ongoing travel restrictions and social distancing measures, which have made it all but impossible for participants physically to attend conferences and hearings across Europe. In the UK, the London Business and Property Court led the early charge in promulgating that message,[2] which was readily adopted by the many England-based and English qualified arbitration practitioners. Indeed, the Federal Court of Australia's recent refusal to grant an adjournment of the hearing in the case of *Capic v Ford Motor Company of Australia Limited (Adjournment)*[3] has generated a level of interest among arbitration practitioners in the UK.

To facilitate the shift towards virtual hearings, the International Centre for Dispute Resolution (located on Fleet Street, in London), working in conjunction with the London Centre for International Arbitration, presently is focusing on providing facilities and software to host virtual hearings that can readily be remotely attended by transcriptionist and evidence display operators. Recordings of the hearings can be synchronised with the transcript, allowing the parties and tribunal to re-watch what effectively is a subtitled version of each day's hearing.

1 Any views expressed in this article are strictly those of the authors and should not be attributed in any way to White & Case LLP.
2 See https://www.judiciary.uk/publications/civil-court-guidance-on-how-to-conduct-remote-hearings/.
3 [2020] FCA 486.

Across the Channel, the International Chamber of Commerce International Court of Arbitration has issued the "*ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*".[4] Within it, the ICC observes that disputes should continue to be resolved on a fair, expeditious, and cost-effective basis and it provides guidance regarding many procedural tools available to facilitate hearings.

Similarly, the Chartered Institute of Arbitrators has issued a "*Guidance Note on Remote Dispute Resolution Proceedings*".[5] Intended to be applicable to the COVID-19 crisis and beyond, the guidance note provides matters to be considered in arranging and running virtual hearings, summarised in a handy checklist.

Within Asia, the Korean Commercial Arbitration Board has led the way, with the KCAB releasing the "*Seoul Protocol on Video Conferencing in International Arbitration*" in March 2020.[6] The Seoul Protocol has seen uptake across the globe as it provides guidelines and precedent directions for the logistical and practical steps to prepare for and hold a virtual hearing.

In Northern America, arbitrator Stephanie Cohen (writing for the Transnational Dispute Management journal), has published a comprehensive draft procedural order for holding a virtual hearing specifically using Zoom.[7] It sets out options for the detailed mechanics of holding virtual hearings, from holding test run of the software at a pre-hearing conference, to actions to be taken if a witness' connection drops out during cross examination. And in Latin America, many of the regional arbitral institutions are encouraging parties to proceed with online hearings.[8]

Of course, with all the will in the world, tribunal intervention may still be necessary in situations where parties cannot agree over how to proceed with certain aspects of a virtual hearing. The general statutory powers in most arbitral seats, as well as the main institutional rules, arguably provide tribunals with the powers necessary to ensure the hearing proceeds.[9] However, to avoid any potential ambiguity over a tribunal's power to make the necessary directions for a virtual hearing, the text below is an example of the language that can be included in Terms of Reference or Procedural Orders:

> *The Parties acknowledge and agree that the Tribunal's powers include scheduling and holding virtual case management conferences and hearings, including final hearings, oral pleadings, and examination of witnesses and experts. After consulting the Parties, the Tribunal will issue appropriate procedural rules, taking into account guidelines issued by the [ICC/LCIA/HKIA/SIAC etc.].*

Security, privacy and confidentiality

With such heavy reliance on a wide range of virtual hearing platforms – as well as participants' personal computers – cyber security is an increasingly important consideration in arbitration proceedings. The International Council for Commercial Arbitration, in conjunction with the NYC Bar Association and the International Institute for Conflict Prevention & Resolution have released the 2020 Cybersecurity Protocol for International Arbitration.[10] That protocol provides practical guidance for arbitration users to refer to when assessing potential security risks and determining the information security measures to be implemented in their arbitration proceedings.

For instance, a number of bodies have raised security concerns regarding using Zoom. The "*Zoom 5.0*" upgrade released in late April 2020 appears, anecdotally, to have

4 Available here: https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/?dm=bypass

5 Available here: https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf.

6 Publically available on the KCAB website: www.kcabinternational.or.kr.

7 S. Cohen, "*Draft Zoom Hearing Procedural Order*", (TDM, ISSN 1875-4120) April 2020, www.transnational-dispute-management.com.

8 For further information, see https://www.whitecase.com/publications/alert/latin-american-arbitration-navigating-pandemic.

9 For instance, ICC 2017 Rules, Article 22(2).

10 Available here: https://www.arbitration-icca.org/publications/ICCA_Report_N6.html

appeased most practitioners' concerns who continue to use it for virtual hearings and videoconferences. However, it should be noted that Zoom does not yet provide end-to-end encryption, which may exclude it as an option for particularly sensitive hearings.

Virtual hearings in practice

Undoubtedly, many readers have by now had their own experience with virtual hearings, however there is one example the authors wish to share. A few months ago, colleagues of ours were involved in a two week, multi-party hearing, seated in Latin America. The parties' representatives, tribunal members and counsel (some 90 people in all) hailed from Brazil, Madrid, Paris, London, Washington DC, Houston, New York and Vienna. The first week was held in person, however the developing global situation meant that the second week needed to be conducted remotely.

The participants returned to their respective home offices and, with there being over 70 connections, successfully held the second week of the hearing on Zoom. The parties achieved that by agreeing a number of measures. These included holding shorter hearing days, the tribunal secretary acting as a neutral host (performing tasks such admitting attendees from the 'waiting room' and ensuring attendees' microphones were muted if not speaking) and the witnesses demonstrating that they were alone in their room and had a clear desk during cross examination.

Conclusion

Despite all of the above, the obvious question remains: is a virtual hearing as good as holding a hearing in person? Or does the physical dislocation mean the advocate loses the benefit of important subtleties during cross examination, as well as lessen the impact of oral submissions?

For the time being, those questions are largely academic. Parties are currently faced with the choice between either proceeding with a virtual hearing, or requesting the hearing be postponed for some unknown (but lengthy) duration. The important point is that virtual hearings have been shown to work and there is widespread endorsement from arbitral institutions and practitioner bodies for parties to proceed to resolve their disputes on that basis.

Federal Court of Australia enforces ICSID Awards against Kingdom of Spain

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In the June 2019 edition of the ACICA Review, the author considered the effect of a provisional stay issued by the Secretary General of International Centre for the Settlement of Investment Disputes (**ICSID**) on enforcement proceedings of an ICSID award against the Kingdom of Spain in the Federal Court of Australia.[1]

Now that the provisional stay has been lifted in the matter between Infrastructure Services Luxembourg S.A.R.L and Spain, the Federal Court of Australia has now had the opportunity to consider the enforcement of two investor-state arbitration awards against the Kingdom of Spain in circumstances where Spain asserted that it is immune from the jurisdiction of the Federal Court.

Eiser Infrastructure Ltd v Kingdom of Spain[2] is the judgment in relation to two applications for recognition and enforcement of two arbitration awards made against Spain under the auspices of ICSID. ICSID is established under the ICSID Convention[3] which contains a provision that each contracting State (including Australia and Spain) shall recognise an award rendered under the ICSID Convention as binding and enforce the pecuniary obligations imposed by that award.[4]

In one application, the two applicants were Eiser Infrastructure Ltd, incorporated in England and Wales and Energia Solar Luxembourg S.à.r.l., incorporated in Luxembourg (**Eiser Parties**) seeking to enforce a €128 million award. In the other application, the two applicants were Infrastructure Services Luxembourg S.à.r.l., incorporated in Luxembourg and Energia Termosolar BV, incorporated in the Netherlands (**Infrastructure Services Parties**) seeking to enforce a €101 million award.

Before we consider the judgment in this case, the reader may question why companies from England and Wales, Luxembourg and the Netherlands would seek to enforce an award against Spain in the Federal Court of Australia. The author suggests there are three key reasons for this course of action, (1) Spain may have commercial assets in Australia against which the applicants could seek to execute an Australian court judgment, (2) the applicants may be concerned about the application of the recent decision in *Achmea*[5] which may affect the enforceability of arbitration clauses in intra-EU investment treaties, and (3) Australia is a known arbitration friendly jurisdiction.

Original awards

The arbitration awards sought to be enforced in these proceedings both arose from the applicants' investments in solar power projects in Spain and alleged breaches of Spain's obligation to provide fair and equitable treatment under both the Energy Charter Treaty[6] (**ECT**) and international law.

In particular, the applicants made investments in Spain

1 Russell Thirgood, Erika Williams and Jemma Keys, *'A change in Investment Treaty Climate: Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain* [2019] FCA 1220' (2019) 7(2) *ACICA Review*, 39.

2 (2020) 142 ACSR 616.

3 *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 14 October 1966).

4 Ibid art 54(1).

5 *Slovak Republic v Achmea* (Court of Justice of the European Union, C-284/16, EU:C:2018:158, 6 March, 2018.

6 *Energy Charter Treaty*, signed 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998) art 10(1).

after Spain had introduced ***Royal Decree 661/2007***[7] (**RD 661/2007**) which:

> *…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.*[8]

RD 661/2007 introduced a feed-in-tariff (**FIT**) mechanism for renewable energy producers, amongst other incentives. In 2012, Spain made certain legislative changes which eliminated the right for the Claimants to receive a FIT.[9]

The Eiser Parties alleged that they invested approximately €126 million in solar projects in Spain and the Infrastructure Services Parties alleged they invested approximately €139.5 million in the Spanish renewable energy sector. In separate arbitration proceedings submitted to ICSID[10] with differently constituted tribunals, the applicants contended that the Spanish legislative changes violated Spain's obligations under the ECT. Both tribunals found that Spain had breached its obligations under the ECT to accord investors fair and equitable treatment.

The Eiser Parties were awarded €128 million plus interest. The Infrastructure Services Parties were awarded €101 million[11] plus interest and a contribution to their costs.

Stays of awards

Spain applied to ICSID for annulment of both awards which resulted in the Secretary-General of ICSID provisionally staying the enforcement of both awards. The stay of the Eiser Parties' award was lifted in March 2018 prior to the commencement of the Federal Court proceedings. However, the Infrastructure Services Parties' award was provisionally stayed after Federal Court proceedings had been commenced. That stay was also lifted in October 2019 following which both applications were heard substantively and concurrently in the Federal Court.[12] No decisions on Spain's annulment applications have been issued as at the date of the Federal Court judgment. Justice Stewart considered that, as the stays had been lifted, there was no obstacle (in this respect) to the recognition and enforcement of the awards by the Federal Court of Australia.

Federal Court Enforcement Proceedings

Justice Stewart summarised the question he was required to determine as follows:[13]

> *… is a foreign state immune from the recognition and enforcement of an arbitral award made under the* [ICSID] *Convention notwithstanding that the* [ICSID] *Convention inherently envisages arbitration awards being made against foreign states and it provides that such awards "shall" be recognised and enforced by Australian courts?*

Immunities Act

An assertion of foreign state immunity under the ***Foreign States Immunities Act 1985*** (Cth) (**Immunities Act**) was Spain's only objection or defence to the applications. Section 9 of the Immunities Act provides *'Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding'*.

Justice Stewart accepted that, on the face of it, Spain was entitled to immunity under section 9 of the Immunities Act. For the applicants to succeed, it was necessary for them to succeed on their argument that the ICSID Convention excludes a claim for foreign state immunity in

7 (Spain) 25 May 2007.
8 *Infrastructure Services Luxembourg S.à.r.l. v Kingdom of Spain (Award)* (ICSID Arbitral Tribunal, Case No ARB/13/31, 15 June 2018) [91].
9 *Royal Decree* 15/2012 (Spain) 27 December 2012, First Final Provision.
10 Pursuant to Article 26 of the ECT.
11 After the tribunal issued a decision on rectification of the award on 29 January 2019.
12 For more information on the stay application in the Federal Court of Australia, see Russell Thirgood, Erika Williams and Jemma Keys, 'A Change in Investment Treaty Climate' (2019) 7(2) *ACICA Review* 39.
13 *Eiser Infrastructure Ltd v Kingdom of Spain* (2020) 142 ACSR 616, 619 [2].

recognition and enforcement proceedings, as distinct from execution of judgment proceedings.[14]

Justice Stewart first considered the Immunities Act and observed that the general immunity from jurisdiction and the exceptions thereto are in Part II of the Immunities Act headed 'Immunity from jurisdiction', whereas 'Enforcement' was the heading for Part IV of the Immunities Act.[15] One of the exceptions to immunity from jurisdiction arises if a foreign state submits to the jurisdiction of the Australian court, by agreement or otherwise.[16] Importantly in the present context, 'agreement' is defined in the Immunities Act to include 'a treaty or other international agreement in writing'.[17] The applicants argued that by Spain being a party to the ECT and the ICSID Convention, it had submitted to the jurisdiction of the court.[18] Justice Stewart accepted that by being a contracting party to the ECT and the ICSID Convention, Spain had agreed to the designated courts of the contracting states having the power and obligation to recognise and enforce awards, including against Spain itself.[19] Spain had therefore submitted to the jurisdiction of the Federal Court of Australia and waived its claim to immunity from the jurisdiction.[20]

In relation to the enforcement provisions of the Immunities Act, Justice Stewart observed that those provisions would only apply if Spain was not immune from the jurisdiction.[21] The enforcement provisions contemplate waiver of immunity and execution against commercial property and immoveable property, etc.[22] Justice Stewart deduced from these provisions that the Immunities Act draws a distinction between immunity of a foreign state from jurisdiction and immunity of property of the foreign state from execution of a judgment or arbitral award.[23]

ICSID Convention

With that understanding of the Immunities Act, it was then necessary to consider the ICSID Convention, the relevant chapters of which have the force of law in Australia by virtue of section 32 of the *International Arbitration Act 1974* (Cth).

The relevant articles of the ICSID Convention are set out below to assist in identifying the distinction the Court was required to grapple with in relation to recognition and enforcement of an award, on the one hand, and execution of a judgment, on the other.

Article 54

(1) Each Contracting State shall **recognize** *an award rendered pursuant to this Convention as binding and* **enforce** *the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may* **enforce** *such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*

(2) A party seeking **recognition or enforcement** *in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.*

14 Ibid 624-625 [40].
15 Ibid 626 [46].
16 *Immunities Act 1985* (Cth) s 10(2).
17 Ibid s 3(1).
18 *Eiser Infrastructure Ltd v Kingdom of Spain* (2020) 142 ACSR 616, 627 [56].
19 Ibid 649 [178]-[182].
20 Ibid 649 [182].
21 Ibid 628 [59].
22 Ibid 628 [61].
23 Ibid 628-629 [63].

> *(3)* **Execution** *of the award shall be governed by the laws concerning the* **execution of judgments** *in force in the State in whose territories such execution is sought.*
>
> **Article 55**
>
> *Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from* **execution.**
>
> (emphasis added)

The court identified three concepts 'at play': recognition, enforcement and execution.[24] The Court found that:

(a) recognition is a distinct and necessarily prior step to enforcement, but recognition and enforcement are closely linked;[25]

(b) an arbitral award is enforced by entering judgment on the award;[26] and

(c) an award cannot be executed (e.g. against the property of an award debtor), without first being converted into a judgment of a court.[27]

After analysing these articles, Justice Stewart concluded:

> *it is only the foreign state immunity in relation to post-judgment execution that is preserved by Article 55 and there is no preservation of such immunity in relation to recognition or other forms of pre-execution enforcement.*[28]

Spain argued that, if immunity was only a consideration after an ICSID award has been registered as a judgment, that would lead to an 'absurdity' because the judgment could be rendered unenforceable due to immunity grounds at the execution stage, leading to a 'zombie judgment'.[29] Justice Stewart did not accept this argument.[30] His Honour also demonstrated the practical example where, if Spain has commercial property in Australia, the judgment could be executed against that property as it would come under an exception to the Immunities Act.[31] Therefore, not all ICSID awards registered as court judgments would be 'zombie judgments'.

Vienna Convention on the Law of Treaties

Spain also mounted an argument that the Court should consider the Spanish and French versions of the ICSID Convention which, Spain argued, do not distinguish between enforcement and execution.[32] Justice Stewart noted that the Spanish, French and English versions of the ICSID Convention are accepted by the parties to the ICSID Convention as being equally authentic.[33] The Vienna Convention on the Law of Treaties[34] provides that, where a comparison of the authentic tests reveals an inconsistency, the meaning which best reconciles the texts is to be adopted. After considering various commentaries on the ICSID Convention and case law from France, the United States and the United Kingdom, Justice Stewart was convinced that the distinction between recognition and enforcement on the one hand, and execution of judgment, on the other, was the only way to reconcile the authentic texts of the ICSID Convention.[35]

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24 Ibid 634 [89].
25 Ibid 634 [90].
26 Ibid 634 [91].
27 Ibid 634 [92].
28 Ibid 635 [98].
29 Ibid 636 [103].
30 Ibid 636 [104]-[106].
31 Ibid 636 [108].
32 Ibid 642 [136], [138].
33 Ibid 632, 633 and 642 [82], [87] and [136].
34 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
35 *Eiser Infrastructure Ltd v Kingdom of Spain* (2020) 142 ACSR 616, 643-648 [145]-[173].

Conclusion

Justice Stewart concluded that Spain's claim to foreign state immunity failed. His Honour made orders for Spain to pay the Eiser Parties their awarded amount of €128 million plus interest and for Spain to pay the Infrastructure Services Parties their awarded amount of €101 million[36] plus interest and a contribution to their costs. Spain has filed a notice of appeal challenging Justice Stewart's decision.

Commentary

As mentioned above, it would really only make sense for the applicants in these proceedings to seek enforcement of these ICSID awards in Australia if Spain has commercial assets in Australia against which it could seek to execute an Australian court judgment given that commercial assets are excluded from the protection a claim for sovereign immunity may provide.

Justice Stewart's judgment, should it be upheld, may set a significant precedent for other claimants who achieve a successful outcome from investor-state arbitrations and who identify assets in Australia that are potentially not protected by the Immunities Act. In fact, Spain is now facing another enforcement application which was commenced in the Federal Court of Australia by Watkins Holding S.A.R.L. and Watkins (NED) B.V. in April 2020.[37] It has a case management review hearing set for 18 June 2020. There is currently no stay (provisional or otherwise) in place in relation to this matter so the Federal Court of Australia may be able to proceed straight to determination of the enforcement application.

Another very current example of enforcement action, not in relation to Spain this time, is the Federal Court of Australia proceeding currently on foot, also before Justice Stewart, whereby Australian claimant Tethyan Copper Company Pty Ltd is seeking enforcement of a USD 4 billion ICSID award it obtained against the Islamic Republic of Pakistan.[38] Pakistan has applied to the ICSID for annulment of this award and the Secretary General of ICSID has provisionally stayed enforcement of the Award until the annulment application is determined. This has meant that Justice Stewart has adjourned the last two case management conference for this matter which were set to be held on 6 February 2020 and 7 May 2020. There is now a case management conference currently scheduled for 4 June 2020. An ICSID committee is currently conducting a hearing of Pakistan's plea for a confirmation of the stay order. If the ICSID committee decides to lift the stay order, the Federal Court proceedings may well proceed in the same manner as the successful applications against Spain considered in this article. This decision is an encouraging sign for the enforcement of ICSID Awards in Australia.

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36 After the tribunal issued a decision on rectification of the award on 29 January 2019.

37 *Watkins Holdings S.A.R.L. & Anor v Kingdom of Spain* (Federal Court of Australia NSD449/2020, commenced 17 April 2020).

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

Lessons on witness-gating CBP v CBS [2020] SGHC 23

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When can an arbitral tribunal limit witness testimony without violating a party's right to a fair hearing? The recent Singapore High Court decision of *CBP v CBS* [2020] SGHC 23 (***"CBP v CBS"***) offers principles on a tribunal's power to "gate" witnesses—choosing which witnesses to hear or to hear none. It is a warning to arbitrators not to be overzealous in the quest for efficiency at the cost of justice, and to claimants not to limit the respondent's rights so far as to undermine the final award.

Background

The arbitration in ***CBP v CBS*** was between a bank and a buyer of coal under the Arbitration Rules of the Singapore Chamber of Maritime Arbitration ("SCMA").[1] The seller had assigned its debts to the bank which then pursued the buyer.[2] A factual issue was whether the buyer and seller had reached an oral settlement before the assignment and, if so, whether the seller had performed the agreement.[3] The buyer proposed calling seven witnesses, six of whom were present at the settlement discussions, including a representative of the seller.[4]

The bank asked the arbitrator to decide whether there was any need for witness testimony, whether by written statements or oral evidence. It said there was no need for witnesses, that it did not propose to call any, and that a documents-only arbitration was appropriate, with or without oral submissions.[5] The arbitrator asked the buyer to provide "its position/reasons for calling the 7 witnesses and/or the need for their oral testimony". Without making detailed arguments, the buyer said an oral hearing was required and necessary and that the witnesses had to be examined. Not satisfied, the arbitrator again requested "a descriptive basis of what [the buyer] expects to develop with the introduction of the proposed witnesses". The buyer replied that the case did not turn solely on the documents.[6]

Taking it a step further, the arbitrator then made a direction that, before he was to rule on whether it would be a "documents-only" proceeding or if an oral hearing was necessary, he would require detailed written statements from each of the buyer's named witnesses.[7] The buyer refused, saying the requirement was a breach of the rules of natural justice.[8] The arbitrator replied,

1 *CBP v CBS* [2020] SGHC 23 [3]-[4], [20].
2 Ibid [11]-[15].
3 Ibid [19].
4 Ibid [28].
5 Ibid [29].
6 Ibid [32].
7 Ibid [33].
8 Ibid [34].

saying that under r 33.1(c) of the SCMA Rules he had the authority to "conduct such enquiries as may appear to the Tribunal to be necessary or expedient".[9]

The buyer said that the calling of witnesses was within its entitlement under r 28.1 of the SCMA Rules,[10] which said:

> Unless the parties have agreed on a documents-only arbitration or that no hearing should be held, the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions.

The arbitrator wrote asking again for written witness statements from the buyer, as well as a brief of what constitutes a breach of natural justice. He then said unequivocally that, "if the buyer still did not submit its witness statements, it would be taken to have 'waived' its right to present witness evidence if there was an oral hearing".[11] The buyer replied saying it was entitled to call witnesses despite the lack of statements. The arbitrator said he regarded the buyer's response as evidence of "non participation"[12] and later made a direction that, as the parties had not agreed on a "documents-only" arbitration, pursuant to r 28.1 there would be an oral hearing but no witnesses would be presented as the buyer had "failed to provide witness statements or any evidence of the substantive value of presenting witnesses".[13]

A day before the hearing, the buyer wrote to the arbitrator protesting the denial of witness examination and said that the hearing would be a "mere formality" and that the arbitrator had pre-judged the matter. The arbitrator assured the parties he had not.[14]

On the hearing conducted by telephone, the buyer did not attend and the bank made oral submissions for about ten minutes. No additional documents were introduced.[15] A final award was made almost three months later allowing the bank's claim in full and dismissing the buyer's counterclaim for its failure to deposit funds with SCMA.[16] The buyer applied to set aside the entirety of the award, arguing that there was no valid arbitration agreement between the buyer and the bank, that there was a prejudicial breach of the rules of natural justice, and that the buyer was unable to present its case.[17]

"Documents-only" arbitrations

What is meant by a "documents-only" arbitration? The court held that, while there is no fixed definition, this commonly refers to an arbitration that is to be determined without any oral hearing for either evidence or submissions.[18] A variant would be an oral hearing for submissions only on the witness statements and other documents submitted by the parties. A "documents-only" arbitration where parties have submitted witness statements "would only be available if **all parties** are of the view that (i) there is no need to cross-examine any of the witnesses on their witness statements, and (ii) they are content to make written submissions to the tribunal, without the need for any oral submissions".[19]

Breach of natural justice

Four matters must be shown when challenging an award for breach of natural justice,[20] namely:

1. which rule of natural justice was breached;
2. how it was breached;
3. in what way was the breach connected to the making of the award; and

9 Ibid [35].
10 Ibid [36].
11 Ibid [38].
12 Ibid [39].
13 Ibid [40].
14 Ibid [41].
15 Ibid [42].
16 Ibid [43]-[46].
17 Ibid [47]-[48].
18 Ibid [30].
19 Ibid (emphasis added).
20 Ibid [53], citing ***Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*** [2007] 3 SLR(R) 86 [29].

4. how the breach prejudiced the party's rights.

The buyer alleged the right of all parties to have an adequate opportunity to be heard, as expressed in r 28.1, had been breached. . The buyer claimed the rule required an oral hearing of witnesses and submissions if the parties did not agree on a "documents-only" arbitration.[21]The bank was of the view that the ten minute telephone hearing of oral submissions satisfied the requirements in r 28.1.[22] The question to be decided by the High Court of Singapore was whether it was within the arbitrator's power to dispense with the presentation of witnesses in circumstances where one party insisted on the need for witness testimony, ie whether witness "gating" was permissible.[23]

Witness gating under SCMA Rules

There is no provision in the SCMA Rules that permits the tribunal to limit the number of witnesses each party may call. For example, Art 16(a)(ii) of the London Maritime Arbitrators Association Terms permits the tribunal to limit the number of expert witnesses that each party may call "to avoid unnecessary delay or expense".[24] Similarly, Art 8.2 of the International Bar Association Rules on the Taking of Evidence in International Arbitration allows a tribunal to "limit or exclude any …appearance of a witness" which it considers to be "irrelevant, immaterial, unreasonably burdensome [or] duplicative".[25] In contrast to approaches adopted in other arbitration rules, r 28.1 of the SCMA Rules "has nothing to do with granting the arbitrator the power to limit the evidence that a party may adduce" and requires an oral hearing "always be held unless parties agree otherwise".[26]

Witness gating under implied powers

A tribunal's implied power to control the conduct of the arbitration proceedings for expeditious disposition "does not grant the arbitrator free reign to reject all witness evidence in the interest of efficiency". Rule 25.1 requires the arbitrator to "ensure the just, expeditious, economical and final determination of the dispute". Justice cannot be sacrificed on the altar of expedition.[27] Any power to "gate" witnesses "must be exercised subject to the fair hearing rule. If the calling of a witness is plainly relevant to a particular issue, an arbitral tribunal cannot gate the witness on the basis of its procedural powers".[28] In reaching this conclusion, the Court held: Unless the arbitral tribunal has a substantive basis to conclude that all the witnesses sought to be presented are irrelevant or superfluous, such witnesses ought not to be rejected on the basis of efficiency or savings of costs … Gating must not be utilised as an indirect means of achieving a hearing-by-submissions only, as its fundamental utility is to prevent *unnecessary* delay.[29]

Curial intervention

A key question considered in this case was: in what circumstances will the exercise of curial intervention over a tribunal's case management powers be warranted? In answer to this, it was concluded that "[T]he supervisory role of the court over the tribunal's exercise of [its] case management powers ought to be 'exercised with a light hand'" whenever the challenge is based on the fair hearing rule."[30] This is because "a tribunal has to take into account a myriad of factors when exercising its case

21 *CBP v CBS* (n 1) [56].
22 Ibid [56].
23 Ibid [57].
24 Ibid [68].
25 Ibid [68].
26 Ibid [67].
27 Ibid [71].
28 Ibid [76].
29 Ibid [77] (emphasis in original).
30 Ibid [80], quoting *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 [132].

management powers to ensure a fair and expeditious conduct of the matter".[31] But "where the conduct complained of is 'sufficiently serious or egregious so that one could say a party has been denied due process', the court may have to step in and find that there has been a breach of the rules of natural justice, in particular the fair hearing rule".[32]

Application

The purported oral settlement and its specific terms were "fundamentally important to the buyer's defence … [and] despite being alive to such issues, the arbitrator decided to reject all of the buyer's proposed witnesses, confining the parties to their oral submissions only. Even if the buyer had been uncooperative, and unclear as to precisely why the witnesses were necessary", it did not justify the arbitrator's decision "when it was obvious that the purported oral agreement was fundamental to the buyer's defence".[33] This "denied the buyer the right of a fair opportunity to present a fundamental aspect of its defence".[34]

It was held that "[E]ven if the arbitrator was empowered under the rules to gate certain witnesses" (which he did not), it was improper to have denied the buyer the right to call all of its witnesses.[35]

The arbitrator's direction that the hearing would be limited to oral submissions without witnesses "might possibly have been warranted if he had made a direction for the submission of the witness statements for the purposes of facilitating the adducing of witness testimony and the presentation of evidence at the oral hearing, and the buyer then defied, or failed without justification to comply with, such a direction". But this was not the basis of the direction, which was for the arbitrator "to decide whether to hold a documents-only arbitration".[36]

It was not open to the arbitrator to demand the buyer's witness statements before deciding whether to allow it to present such evidence at the oral hearing. "[T]he right of a party to call witnesses in support of its case is at the heart of the SCMA Rules". Obtusely, the arbitrator ignored the buyer's point that four of its witnesses were representatives of the seller and another entity, and it was impracticable to obtain the written witness statements from them.[37]

What the arbitrator could have done "was to fix the hearing dates for the presentation of evidence and direct the buyer to produce the statements for those witnesses it intended to call at the hearing, insofar as the buyer was able to do so". The buyer would then have to obtain subpoenas from the court for the other witnesses. At the hearing, the arbitrator could have set reasonable limits on the time for oral evidence, and could have further limited that time if he found the evidence irrelevant or repetitive. This could be accompanied by appropriate costs orders against the buyer in the award, even if the buyer succeeded in its defence.[38]

31 *CBP v CBS* (n 1) [80].
32 Ibid [80], quoting *Triulzi* at [134] and *ADG v ADI* [2014] 3 SLR 481 [116].
33 *CBP v CBS* (n 1) [79].
34 Ibid [80].
35 Ibid [82].
36 Ibid [90].
37 Ibid [91].
38 Ibid [92].

News in brief

New Members

We welcome the following new members to ACICA:

Ordinary Members

Lipman Karas

List A Barristers

Fellows

Richard Noel Chesterman

Glenn O'Brien

Marc Sukkar

James Morrison

Allan Myers AC QC

Gavin Denton

Erika Williams

Associates

Arnold Dix

Kevin Stewart

S M Senarath B Chanaka Senanayake

Damian Bachor

Edwina Kwan

William Wild

Students

Yash Gangwani

Sophie Richardson

Shiyi Wei

Siddhartha Kundoo

Tanmay Gupta

Pacifico Jr. Lagramada

Gunjan Malhotra

Matthew Keath

Pratyush Khanna

Allen Benny Mathews

Saransh Bhardwaj

Shiv Sang Thakur

Radhamani Saxena

Gaurav Jaiswal

Achal Jain

Abhay Sharma

Parthsarthi Hirani

Aprajita Bhardwaj

ACICA Resources

ACICA recently added the following new resources to its Practice & Procedures toolkit:

- Sample Submission Agreements
- Sample Notice of Arbitration and Answer to Notice of Arbitration
- Guidance Note for Online Arbitration

These are publicly available, free resources developed by ACICA to provide guidance on best practice standards to parties involved in arbitration in Australia and the region.

ACICA Events

Upcoming Events

ACICA45 Webinar – 9 July 2020: Lifecycle of an Arbitration Series – Conducting an Arbitration [Register now]

The second event in the ACICA45 series will address 'Conducting an arbitration: interlocutory and procedural meetings'. Co-chairs Erika Williams (Senior Associate, McCullough Robertson) and Melissa Yeo (Senior Associate, Ashurst), will facilitate a discussion with international arbitration practitioners Lucy Martinez (Independent Counsel and Arbitrator, Martinez Arbitration) and James Morrison (Partner, Peter & Kim).

Past Events

ACICA45 Seminar, Melbourne – 10 February 2020: Dispute Resolution in Europe: a Chat with Simon Greenberg (Paris)

ACICA Counsel, Caroline Swartz-Zern, moderated this special event at which attendees were provided with the opportunity to hear insights from Simon Greenberg, partner at Clifford Chance Paris and former Deputy Secretary-General of the ICC, on features of dispute resolution in Europe, followed by short networking drinks. The session covered a range of topics from differences in procedure between Europe and Asia-Pacific to recent trends in Paris.

ACICA Webinar – 13 May 2020: Arbitrability in the times of COVID-19 [view here]

In this webinar, the expert panel explored the concept and width of arbitrability, with a particular focus on the issues currently arising from the COVID-19 crisis, considering when parties can and should consider arbitration and discussing the potential options to refer existing disputes in courts to arbitration.

Chair: Brenda Horrigan, Herbert Smith Freehills & ACICA President
Speakers: Julia Dreosti, Lipman Karas | Justin Hogan-Doran, 7 Wentworth Selborne Chambers | Joshua Paffey, Corrs Chambers Westgarth

ACICA45 Webinar – 27 May 2020: Lifecycle of an Arbitration Series - How to Start an Arbitration [view here]

This first session in ACICA45's Lifecycle of an Arbitration series explored How to Start an Arbitration, with a focus on the form and content of pleadings, including the differences to court pleadings, and the appointment of arbitrators and arbitrator challenges.

Chair: Guillermo Garcia-Perrote, Herbert Smith Freehills
Speakers: Gitanjali Bajaj, DLA Piper | Robert Tang, Clifford Chance | Deborah Tomkinson, ACICA

ACICA Webinar – 27 May 2020: International Best Practice on Virtual Hearings in Arbitration: Tips for Arbitrators and Counsel [view here]

In this webinar, our expert speakers examined some of the crucial issues that arise with the growing demand for, and use of, online arbitration and the key decisions that parties need to be prepared for. What types of cases are appropriate for an online hearing? What are the considerations for parties in preparing for an arbitration being conducted on an online platform? Where do the technological risks lie? What are the due process concerns and how can parties seek to avoid these issues?

Chair: Judith Levine, Independent Arbitrator
Speakers: Justin Gleeson SC, Banco Chambers | Gitanjali Bajaj, DLA Piper | Danielle Forrester, Banco Chamber

ACICA Webinar – 10 June 2020: Arbitration of Force Majeure, Frustration of Contracts and MAEs in M&A and Loan Agreements [view here]

As a result of the business and economic disruptions caused by COVID-19, it is critical for users to understand the doctrines of force majeure, frustration and material adverse change/event and how these legal principles can apply to and affect their contractual obligations and transactions. In this webinar, our panellists discussed these principles and how they can intersect and the type of cross-border contracts most likely to be affected in the current environment.

Chair: Jeremy Quan-Sing, Allens
Speakers: Jonathon Redwood, Banco Chambers/List A Barristers | Beverley Newbold, Minter Ellison | Andrew Battisson, NortonRose Fulbright

ACICA Webinar – 24 June 2020: Interim Measures during COVID-19 [view here]

The economic consequences of the COVID-19 pandemic have given rise to unforeseeable circumstances and parties may require orders for interim measures of protection to maintain the status quo, require actions or prevent actions that are likely to cause imminent harm, preserve assets or evidence or provide security for costs. The ability to seek such orders is an important aspect of arbitration. In this webinar, our expert international arbitration panellists discussed the practical aspects of seeking interim measures in arbitration and some of the unique situations that may arise as a result of COVID-19.

Chair: Wayne Martin AC QC, Francis Burt Chambers

Speakers: Bronwyn Lincoln, Corrs Chambers Westgarth | Leah Ratcliffe, Jones Day | Edwina Kwan, King & Wood Mallesons

ACICA Supported Events

APRAG Conference 2020, Bangkok Thailand – 15 to 17 January 2020

The 2020 APRAG Conference, hosted by the Thailand Arbitration Centre, was held in Bangkok in January. The Conference focused on Innovations and Challenges Facing the Arbitration Industry. Prior ACICA Counsel, James Morrison, presented to the conference on recent ACICA developments.

ACICA & NSWYL Business Law Committee Seminar, Sydney Australia – 11 March 2020

See the ACICA website here for an event wrap up by Olga Kubyk from the NSW Business Law Committee.

Mediating in the Headlights of Litigation and Arbitration, Sydney Australia – 25-27 March 2020

The Australian Disputes Centre presented a three day online course focused on providing a real-world view of the mediation process in complex commercial matters. The interactive workshop was presented by a faculty of leading industry experts including the Hon. Wayne Martin AC QC, the Hon. Kevin Lingdren AM QC, Dr Sam Luttrell (Partner, Clifford Chance) and Deborah Lockhart (CEO, ADC).

ACICA
Australian Centre for International Commercial Arbitration

Managing the Impact of COVID-19: Use of Arbitration to Mitigate Risk

The COVID-19 pandemic is presenting unique challenges for the fair, efficient and orderly disposition of commercial disputes in Australia and world-wide. The social and economic impact of the virus will likely continue to have legal and access-to-justice implications for some time, giving rise to new disputes and delaying the progress of existing disputes before the courts. The depth of this crisis creates a need for parties and their legal representatives to consider carefully appropriate and alternative options for the efficient, timely and cost-effective resolution of disputes.

In that regard arbitration offers a high degree of flexibility, enables effective accommodation of social distancing measures and can provide commercial entities with faster resolution times and greater certainty with regard to outcome and cash flow. Arbitration can be utilised effectively to finally resolve the entirety of a dispute or to deal with a particular aspect of a dispute (eg. threshold legal issues or significant disputes as to discovery and legal professional privilege). The range of subject-matters that are capable of resolution by arbitration is very broad including the kind of disputes likely to emerge from the current crisis attributable to force majeure, frustration of contracts, material adverse changes clauses in M&A and loan agreements and cross default provisions.

As an independent not-for-profit organization, ACICA's objective is to assist parties with the conduct of arbitration proceedings to enable them to draw on these many benefits and to manage current uncertainties. ACICA has over 30 years' experience assisting parties to effectively resolve disputes.

Benefits of Arbitration during COVID-19

Arbitration offers particular advantages in the current environment. Some of these have been outlined below.

Flexibility

Arbitration enables parties to readily tailor and adapt processes to meet the specific requirements of the dispute, having regard to value and complexity. The ACICA Rules reflect international best practice, offering a high degree of flexibility to parties in dispute.

The flexibility of the arbitral process enables parties and counsel to take creative and innovative approaches to case management, including the use of virtual hearings. ACICA has issued Sample Submission Agreements which illustrate the flexibility that parties have to tailor aspects of the arbitration to suit their particular needs, including in relation to virtual hearings and timeframes from commencement of the arbitration to final award.

ACICA has made available a sample Procedural Order for the Use of Online Dispute Resolution Technologies which provides guidance on how hearings may be conducted with the use of online technology. This resource is currently being updated and further guidance will also be issued in the near future in relation to virtual hearings.

MANAGING THE IMPACT OF COVID-19: USE OF ARBITRATION TO MITIGATE RISK

Speed

Arbitration empowers parties to implement effective time management strategies. Early fixing of case timelines through to hearing, regular case management conferences and stop-clock hearings are just some of the commonly used mechanisms to monitor and control time frames in arbitration.

The overriding objective of the ACICA Rules is to provide arbitration that is timely, cost-effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved. The Rules require each Tribunal to adopt suitable procedures for the conduct of arbitration to avoid unnecessary delay or expense.

ACICA also offers a set of Expedited Rules as a cost-effective and quick alternative for smaller value or less complex disputes. The Expedited Rules provide for a sole arbitrator, no hearing unless exceptional circumstances exist and a final award within four months of appointment where there is no counterclaim. Because the parties control the process, however, they can agree to modify these provisions of the Rules (e.g. to allow for a short hearing in appropriate cases). ACICA's Sample Submission Agreements provide sample language for adaptation and the use of the Expedited Rules in this manner.

Two other aspects of arbitration also ensure its relatively greater speed than court proceedings. First, the duration of hearing time to resolve a dispute is usually substantially shorter than a court proceeding. Secondly, arbitral awards have much greater certainty because of the very restricted procedural grounds on which an award can be challenged.

Certainty

In such an uncertain time, arbitration offers parties and legal representatives a high degree of control in the resolution of disputes. Parties can agree to a process and manage its conduct, giving rise to greater certainty with regard to outcomes and managing risk profiles.

It is expected that COVID-19 will give rise to new disputes in many areas and across all business sectors. There will also be court proceedings that currently face postponement or other delays as a result of COVID-19 where the dispute may be arbitrable. It is possible for parties to agree to arbitration of these disputes, in whole or in part, and to have that arbitration agreement supersede and replace any prior dispute resolution agreement between the parties. As mentioned above, ACICA encourages parties to make use of (and adapt as needed) its Sample Submission Agreements for relevant referrals where appropriate.

Finality

Arbitration of a dispute provides a final and binding award that is readily enforceable within Australia in accordance with the provisions of the State and Territory *Commercial Arbitration Acts* and the *International Arbitration Act (Cth)* 1974, and globally pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. There is limited recourse available to challenge an award, providing confidence in outcome and finality to a dispute. This enables appropriate business planning and budgeting.

Expertise

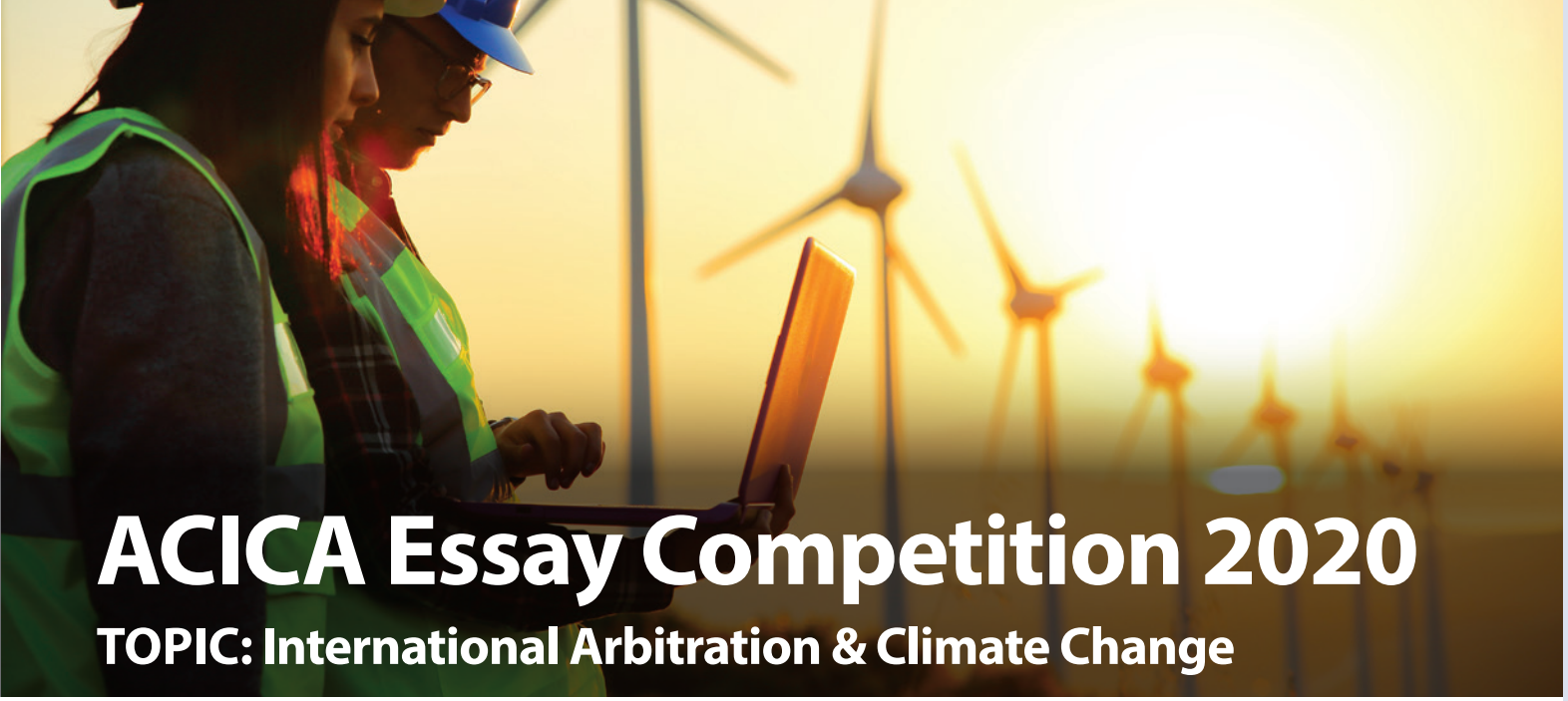
ACICA offers a streamlined administrative service, taking an active approach to case management to ensure that arbitration proceedings are conducted efficiently. ACICA draws on established pools of experienced arbitrators for ACICA appointments (parties remain able to agree to their choice of arbitrator/s) and has procedures in place to confirm arbitrator independence, impartiality and availability to hear a matter. ACICA's administrative services covers financial management of deposits in trust and payments to the tribunal.

ACICA has streamlined its own processes in response to COVID-19. ACICA remains open and is moving matters forward (see Important Information for Users). New filings may be made through ACICA's online E-filing system and support is readily available from the Secretariat.

Recognising the extraordinary toll that the crisis is having on individuals and businesses and to support the community in this time, ACICA is offering a **25% discount on all case registration fees for arbitrations commenced between 1 May and 31 October 2020.**

ACICA maintains a Resource centre on its website containing model clauses, sample pleadings and guidelines, as well as links to useful external resources to aid in the conduct of arbitration. ACICA's resources are being further developed to support the dispute resolution community in some of the unique issues currently facing it and further information will be made available on the website.

All inquiries should be directed to the ACICA Secretariat on secretariat@acica.org.au.



ACICA Essay Competition 2020

TOPIC: International Arbitration & Climate Change

ACICA is pleased to launch its inaugural essay competition in 2020. Entries to the competition are invited and encouraged from students based in Australia who are studying a Bachelor, Juris Doctor or Masters level law degree in 2020, and to lawyers in their first five years of practice. *There is no requirement to be an ACICA member.*

The topic of the 2020 Competition is ***International Arbitration & Climate Change***. Essays are invited to address the topic without limitation; suggestions for potential areas of focus include:

- The interaction between climate litigation in national courts and international arbitration
- The role and sustainability of international commercial arbitration for the new green economy
- Investor-state arbitration and climate change
- Climate disasters and international arbitration
- The potential for arbitration/ADR to be used to resolve inter-state disputes related to climate change

SUBMISSION REQUIREMENTS

All entry submissions must:

- be typed in a Word document using Times New Roman or Arial with 11 or 12 point and 1.5 line spacing
- clearly identify the entrant's name, contact details and University (if a student) or date of admission (if a lawyer).
- be limited in word length to between 3,000 and 7,000 words (including footnotes).
- be the original and sole work of the entrant.

All entry submissions will be acknowledged but will not be returned and ACICA accepts no responsibility for the safe-keeping of entry submissions.

Entry submissions are to be directed to the ACICA Secretariat at secretariat@acica.org.au. The final date for submissions is 31 July 2020 at 5pm (AWST).

JUDGING PANEL

Entry submissions will be judged by an eminent panel of international practitioners and academics, chaired by Damian Sturzaker (Marque Lawyers) and consisting of the Hon. Wayne Martin AC QC, Judith Levine (Levine Arbitration), Lucy Martinez (Martinez Arbitration) and Professor Jacqueline Peel (University of Melbourne).

ANNOUNCEMENT OF WINNER

The winner will be announced by 2 September 2020 and will be awarded a guest seat at the ACICA table for the ADC ADR Awards Night Dinner in 2020, a cash prize of AUD1,100.00, a year's complimentary ACICA Associate membership and publication of the entry submission in the December edition of the ACICA Review.

INQUIRIES

All inquiries may be directed to the ACICA Secretariat by email or on (02) 9223 1099.

ACICA
Australian Centre for International Commercial Arbitration

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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KING&WOOD MALLESONS 金杜律师事务所

holman fenwick willan hfw

MinterEllison LAWYERS

NEW SOUTH WALES BAR ASSOCIATION

sapere forensic

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