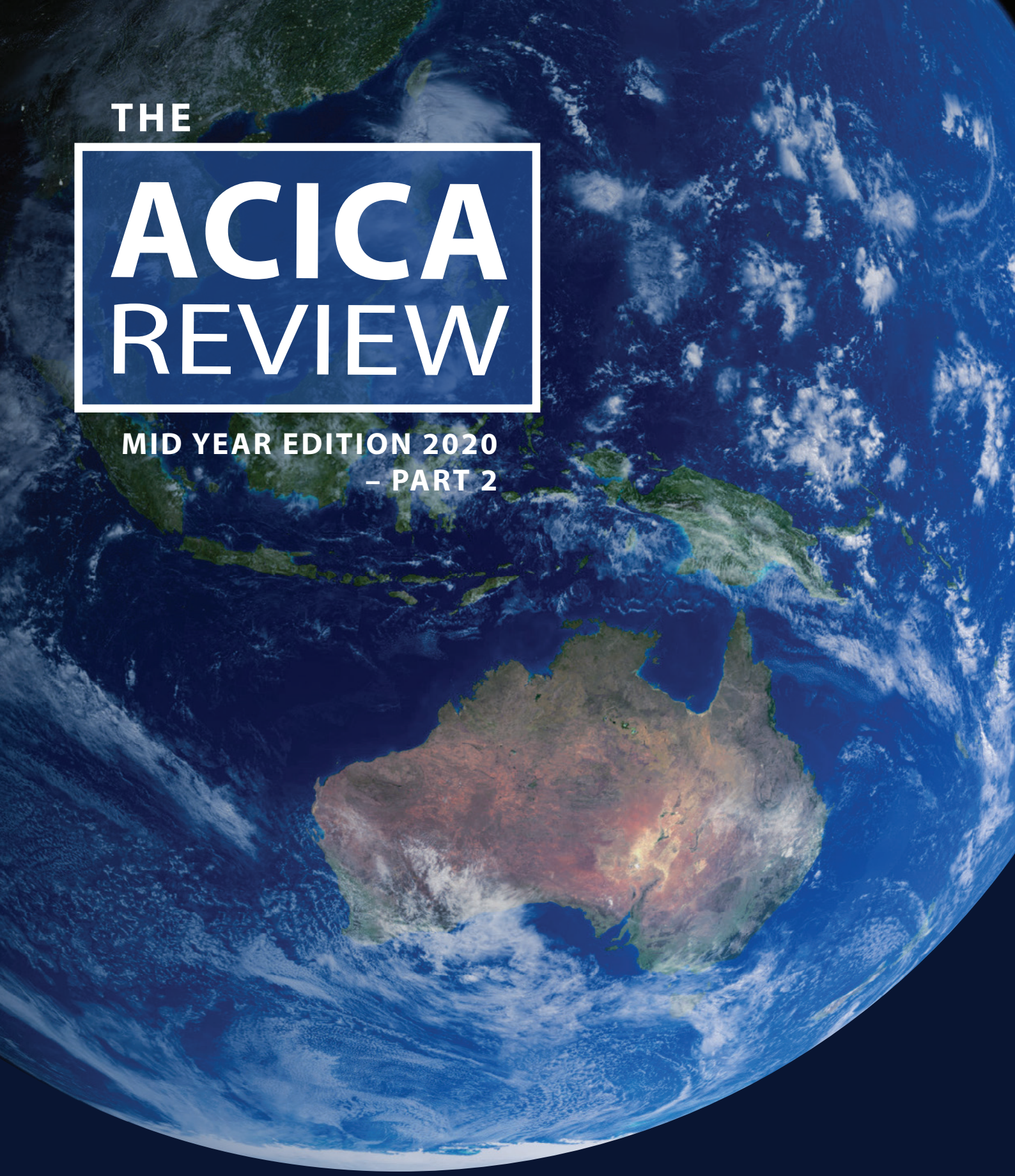

THE ACICA REVIEW

MID YEAR EDITION 2020
– PART 2

ACICA
Australian Centre for International Commercial Arbitration

GLOBAL LEADERSHIP
REGIONAL EXCELLENCE

ACICA
Australian Centre for International Commercial Arbitration

Leader in International Dispute Resolution

THE
ACICA REVIEW

Aug 2020 | Vol 8 | No 2

ISSN 1837 8994

Contents

THE ACICA REVIEW

Editorial Board:
Erika Williams (General Editor), Julian Sher, Meghan Keary, Guillermo Garcia-Perrote, Gianluca Rossi and Deborah Tomkinson.

Design and layout:
Michael Lockhart – lockhart@econation.co.nz

President's Welcome

Brenda Horrigan
ACICA President

Welcome to the second half of our mid-year edition of the ACICA Review, which follows on from our Covid-19 special edition in June 2020. In these unique times, ACICA has continued to focus on providing an uninterrupted service, and responding needs of the dispute resolution community in new and unique ways.

Australian Arbitration Week

Planning is well under way for Australian Arbitration Week, which will take place the week of 12 October 2020. The week will commence with a joint ACICA / CIArb (Australia) full-day conference on 12 October entitled "Bridging the Distance: Arbitration in the New Normal". The remainder of the week will see a number of supplemental events on various topics of interest to the community. Many of the events will be virtual, and contributions are expected from across Australia and from the global arbitration community. A calendar of events can be found at https://aaw.acica.org.au/

Recent and upcoming events

ACICA, and especially the Secretariat, have been responding admirably to the challenges brought on by the Coronavirus and resulting travel restrictions. Both ACICA and ACICA45 have held a number of webinar events with viewership from around the globe, and more are planned. Links to the sessions which have already been held can be found on the ACICA website, at https://acica.org.au/acica-webinars/

ACICA Rules Revision

The ACICA Rules Committee have proposed revisions to the ACICA Rules, and launched a public consultation process for the proposed revisions by webinar on 5 August 2020. A copy of the consultation draft, as well as an explanatory memorandum, can be downloaded from the ACICA website, at https://acica.org.au/acica-rules-revision-consultation/ Written comments on the consultation draft are welcome until 30 September 2020. A short survey has also been prepared to allow quick and easy comment on the key proposed amendments, and can be found on the same site.

ACICA Nationwide Survey

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

The Essential Practice of Finding Jurisdiction

Peter McQueen
FCIArb , Arbitrator and Mediator
ArbDB Chambers, London
(ACICA Board Member & Fellow)

The jurisdiction of the arbitral tribunal (**Tribunal**) relates to the power conferred upon it to determine the dispute between the parties and to make final decisions binding on them. That power derives from the arbitration agreement between the parties and from the steps which are taken pursuant to that agreement to refer the dispute to arbitration.

A Tribunal must not exceed its jurisdiction. It must stay within the terms of its mandate, its competence and its authority and may only validly determine those disputes that the parties have agreed that it should determine. (See *Law and Practice of International Commercial Arbitration*, Redfern & Hunter Fourth Edition 2004, pages 295-296)

Jurisdiction is fundamental to both the validity of the arbitration proceedings and to the enforceability of an award. If the Tribunal lacks jurisdiction, any award made by it will be set aside or be unenforceable and the costs incurred in the arbitration wasted. This will result in all round disappointment! Therefore it is an essential practice for every Tribunal in every arbitration proceedings to consider, and to make a finding in respect of, its jurisdiction.

What is the "jurisdiction of the arbitral tribunal"?

The UNICTRAL Model Law on International Commercial Arbitration 1985 as amended in 2006 (**Model Law**), although giving no definition, states in Article 16(1) that:

'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.'

In the United Kingdom Section 30(1) of the Arbitration Act 1996 (**Act**) states under the heading *"Jurisdiction of the arbitral tribunal"* that:

> *Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-*
>
> *(a) whether there is a valid arbitration agreement,*
>
> *(b) whether the tribunal has been properly appointed, and*
>
> *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*

The subject matter of the rulings on jurisdiction is in fact more extensive than that referred to in Section 30(1) of the Act. It includes the existence and enforceability of the arbitration agreement, whether the parties to the dispute are the same as those to the arbitration agreement, and whether the Tribunal has the necessary powers.

Both sets of provisions above reflect the widely accepted doctrine and legal fiction of *"kompetenz-kompetenz"* or "*competence de la competence*" (**competence-competence**), namely that the Tribunal may independently make a finding on the question of whether it has jurisdiction, without recourse to a court.

When should a Tribunal consider and make findings on matters relating to its jurisdiction?

The Tribunal's consideration of its jurisdiction should not wait until a party raises a jurisdictional challenge. It should commence at the outset of the proceedings.

As raised in the Chartered Institute of Arbitrators Guidelines on Jurisdictional Challenges (29 November 2016, pages 4-10) (**CIArb Guidelines**):

(1) the members of the Tribunal, upon being appointed, should satisfy themselves that the parties have entered into a valid arbitration agreement, that they have been properly appointed and that the matters in

dispute fall within the scope of the arbitration agreement and that they are arbitrable;

(2) where the Tribunal has concerns relating to jurisdictional matters which have not been raised by the parties, it should consider raising those matters with them, whilst of course being wary to avoid the appearance of bias, and invite them to provide submissions in advance of its consideration and the giving of a ruling on such matters;

(3) where there is a non-participating or defaulting party, even though no challenge to its jurisdiction has been raised, the Tribunal should consider and rule on whether it does have jurisdiction, including whether the arbitration agreement is binding on that party; and

(4) the Tribunal should request confirmation from the parties at an early stage in the proceedings of the validity of the appointment of its members and that they have no objection to the Tribunal's jurisdiction to deal with the matters in dispute, and then state these matters in the award. Also the Tribunal should make a finding to appear in both the body of the award and in its dispositive section to the effect that the Tribunal has jurisdiction to determine all matters in dispute in the proceedings.

Difference between jurisdiction of the Tribunal and admissibility of a claim

When dealing with challenges it is important for Tribunals to differentiate the difference between challenges relating to its jurisdiction and challenges relating to the admissibility of a claim.

As noted by the tribunal in *Hochtief Aktiengesellschaft v. Argentine Republic*, (ICSID Case No ARB/07/31 Decision on Jurisdiction, 24 October 2011, paragraph 90), '*jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal*'.

A challenge to the jurisdiction of the Tribunal is based on the ground that the Tribunal is incompetent to rule either as to admissibility or to the merits of a claim.

A challenge to the admissibility of a claim is based on whether it is appropriate for the Tribunal to hear the claim given it may be defective and/or procedurally inadmissible; for example, because the claim is time-barred or prohibited because a pre-condition has not been complied with under a multi-tiered arbitration provision in the arbitration agreement. Such a challenge is not a challenge to the Tribunal's competency and has nothing to do with the merits of the claim.

The significance of the distinction is that, if there is a mistaken classification, that is, a challenge on admissibility is treated as a challenge to jurisdiction, there may be an extension of the scope of the challenge to the award, given that usually only rulings on jurisdiction can be the subject of court challenge, whereas rulings on admissibility may not. As stated by Jan Paulsson (See *Jurisdiction and Admissibility, Global Reflections on International Law, Commerce and Dispute Resolution*, ICC Publishing, Publication 603 at page 601),

> I*f parties have consented to the jurisdiction of a given tribunal, its determinations as to admissibility of claims should be final. Mistakenly classifying issues of admissibility as jurisdictional may therefore result in an unjustified extension of the scope for challenging awards, and frustrate the parties' expectation that their dispute be decided by the chosen neutral tribunal.*

Timing and form of the Tribunal's ruling on jurisdiction

Clearly the Tribunal should rule on all jurisdictional challenges in a timely and effective manner.

The Model Law states in Article 16(3) that a Tribunal may rule on a challenge either as a preliminary question or in an award on the merits.

The Act at Section 32(4) states that:

> *Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has the power to rule on its own jurisdiction it may-*
>
> *(a) rule on the matter in an award as to jurisdiction, or*
>
> *(b) deal with the objection in its award on the merits.*
>
> *If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.*

Subject to the parties' agreement, and as raised in the

CIArb Guidelines (see pages 17 to 19), the Tribunal, when deciding whether to split the jurisdictional challenge from consideration of the merits, should consider the likelihood of success of that challenge and whether it can be determined without considering the merits of the claims in dispute, in addition to the possible delay to the proceedings and possible increase in costs which may result.

The Tribunal should issue its decision in the form of an award, including orders as to all costs, (see the section below on the power to so do) which is compliant with all necessary requirements, thereby allowing it to be enforced under the New York Convention 1958.

Power of Tribunal to award costs when declining jurisdiction

There is no provision in either the Model Law or in the Act which deals with the power of the Tribunal to award costs (those of the parties and its own) when it declines jurisdiction. Section 61 of the Act gives the Tribunal discretion to make an award allocating costs of the proceedings, subject to the agreement of the parties.

The question whether the Tribunal in these circumstances remains competent to determine the costs is a controversial one. One view is that the jurisdiction to award costs only flows from a valid arbitration agreement, which is not present when jurisdiction is denied, and therefore that the powers of the Tribunal are limited to decline jurisdiction and do not extend to dealing with ancillary matters including orders as to costs. The contrary, and arguably the consensus view, which is to be preferred, is that the competence-competence doctrine extends to all aspects of the Tribunal's determination on jurisdiction, including orders as to costs.

As stated by Stefan Kroll (See *Recourse against Negative Decisions on Jurisdiction, Arbitration International* 20 (2004) 55 at page 70, in support of the latter view, *'in the interest of an efficient administration of justice, the kompetenz-kompetenz provisions in various laws should be interpreted broadly to also include the power to render a decision on costs even where the tribunal denies its jurisdiction.'*

The view of the authors of *The Arbitration Act 1996: A Commentary*, Fifth Edition page 161, in relation to this question under the Act, is that the Tribunal does have the power to deal with costs as it would have in any other case, namely that *'An award on jurisdiction results from an arbitration as much as does any other award and s.61 ought, therefore to apply. Further any other view produces odd and highly inconvenient results.'*

There is also English authority on the question of the general entitlement of the Tribunal to remuneration in circumstances where jurisdiction has been in issue, to the effect that the entitlement arose as a matter of quasi-contract as against the party asserting a lack of jurisdiction but nevertheless participating in the proceedings (See *Linnett v Halliwells LLP* [2009] BLR 312).

In order to avoid the controversy on this question in circumstances where a jurisdictional challenge has been made, a prudent Tribunal could request the express written consent of the parties to the Tribunal making an assessment and allocation of costs, including its own.

Conclusion

Given it is the mission of the Tribunal to conduct valid arbitration proceedings and to render an award, which will not be set aside and which will be enforceable, the fundamental importance of the jurisdiction of the Tribunal is obvious, as is the essential practice of the Tribunal finding that jurisdiction and recording it in the award.

This article relates to a paper given at the 21st International Congress of Maritime Arbitrators (ICMA XXI) which was convened in Rio de Janeiro, Brazil, 8-13 March 2020.

Avoiding Project Disasters and Insolvencies – it's your choice!

Charles O'Neil
Chartered Arbitrator,
Contract Dynamics
Consulting (ACICA Fellow)

Ian Williams[1]
MSc, CEng, FICE, FCIArb

Published with permission of Construction Law U.K. – first published in their CL May edition 2020

KEY POINTS

- Projects continue to fail and contractor insolvencies are hitting record levels.
- Failures have their origin at the early stages of a project and at bid stage.
- Clients and contractors must change their behaviours and engage in much more detailed preparation.
- There should be no shortcuts to intensive due diligence and risk management.
- The client is key and must select the right form of contract for the circumstances.
- Contractors must ask themselves serious questions at the bidding stage to safeguard their solvency.

This paper examines how clients and contractors influence success in the early stages of a project. The key factors are competence, the right contract, right behaviours, commitment to risk management, thorough due diligence, robust processes and detailed documentation. The purpose of this review is to examine the current bidding and contracting processes, determine their strengths and weaknesses and make recommendations for positive change that will improve construction industry viability and delivery to clients.

Competence

The "success" process obviously must start with the client. The client must be competent in leadership, planning technical issues, have the right behaviours and people skills and be prepared and capable of managing risk. Likewise, the contractor must also have the same skills.

They must engage competent people and pay them the market rate. It is an industry fact that having won the contract, contractors then try to economise by "*paying peanuts*."

Commitment to Risk Management

This should be at the core of the client's management approach. In the context of this paper it is the understanding of which form of contract to adopt; a clear understanding of value, not necessarily cost; what is a project's sensitivity to cost and schedule overruns; how should the client carry out due diligence on the competence, suitability and solvency of any potential contractors.

Case study 1 - Would the NHS in the U.K. have contracted with Carillion for the Midland Metropolitan and the Royal Liverpool PPP hospitals, if they had known the true state of Carillion's financial situation? If the NHS had any sort of early warning indication, then they should have disqualified Carillion at the outset. Their collapse in January 2018 caused havoc to the construction programme and costs of these two major projects.

Carillion, with 43,000 employees, went into compulsory liquidation with reported liabilities of almost £7 billion (AUD$13 billion). The repercussions to the U.K. construction industry will continue for many years.

1 Head of Transport Operations for the 2022 FIFA World Cup QatarTM; Head of Projects for the London 2012 Olympic Games; key delivery positions on Metros in London and Singapore; Heathrow Terminal 5 infrastructure; and redevelopment of Terminals 3 & 4.

Right Form of Contract and Pre-Contract Planning

It is essential that the client makes the right choice of the type of contract for the circumstance of the project. Below we have listed the main forms:

- Competitive bidding
- Negotiated contracts
- Design & Construct (D&C)
- Fixed lump sum and programme
- Alliancing
- Construction management

Each has their place and their strengths and weaknesses. To make the right choice, the client needs to understand the characteristics of the project, such as:

- Does the client have clearly defined and developed requirements and project scope?
- Will the contract be awarded on cost alone or other factors?
- Is the project complex or is the product simple?
- What are the available timescales and funding?
- What is the appetite for risk?
- Is it a one-off project or is the client looking for a long-term relationship?
- Does the client have in-house expertise or do they need someone to manage the contract on their behalf?

Progressive clients are those that understand that the best way to get their facility with minimum cost and programme over-runs is to negotiate fairly priced contracts based on fully detailed specifications and contract terms, and that contractors need to be viable and successful.

Negotiations should take place with the preferred contractor irrespective of whether it is a government contract that has been through the competitive bidding process or a non-government commercial one.

With commercial projects, it is not uncommon to have a strong client/contractor relationship that enables contracts to be negotiated without going to competitive bidding, because everyone knows what is required. Often this trust has been built up over a series of similar projects and results in a project delivery that meets the time, cost and quality requirements, as well as being profitable for the contractor and supply chain.

It is worth spending extra months to ensure that the design documentation, specifications and terms of contract accurately reflect the client requirements; eliminate the 'unknowns'; and create a clear understanding of the risks and party responsibilities. This will lead to a more efficient construction programme, with minimum variations and increased certainty on cost and time outcomes.

To illustrate the consequences, we present below a hypothetical scenario involving a typical contract that ends up leading to nothing but serious consequences and failure for all the parties involved. An exaggeration you say? Not at all. Most readers will see a parallel with a project they have been involved in or have read about. What is clear is that both the client and the contractor make the wrong choices and hope the next roll of the dice will give them success!

Hypothetical Case - The client is in a hurry. They must open their new shopping centre in ten months, by November to catch the Christmas trade, otherwise the key tenants will not sign up. The client opts for a 'fast track' process. The design teams only issue 1:200 drawings for the bid; the output specification is sketchy; the terms of contract are full of holes. Their approach is *'let's get started and sort out the details as we go; we want to see dirt being moved'*. They hastily decide there is insufficient time for due diligence on the finances of the bidders; after all, they hold the cheque book.

Equally the selected bidders are also keen to push on. Why? They are desperate for the cash flow, having lost money on recent projects. They don't question if the client has confirmed finance; or do comprehensive risk management investigations on the client or the project. They will rely on variations as the contract has been prepared in haste, it is full of holes and there is opportunity for variations that will give them their profit margin. They conclude for example that the ground risk

contract clause is ambiguous and is surely the client's responsibility. They cut one another's throats with 'suicide bidding', with bare minimum margins that are cut even finer by the client in final negotiations.

The outcome, the variations were not forthcoming, the contractor encountered financial difficulties, the project misses the delivery target, and tenants pull out of tenancy negotiations. In summary, there are no winners in this hypothetical project. The client and contractor have both gone bankrupt.

Client's Checklist

The importance of the client's role has not been emphasised nearly enough in past years.

Below we put forward what we consider to be the main actions that a prudent and professional client should do in the planning and pre-contract stage.

- Provide evidence to bidders that their finance is approved and that they are financially sound.
- Confirm they have obtained all necessary statutory approvals; e.g. EIS, Planning, etc.
- When pre-qualifying bidders, undertake thorough due diligence on them and their supply chain.
- Produce properly detailed design documentation, precise specifications and robust contract terms that enable accurate pricing, with specific qualifications that negate potential 'grey areas.'
- Undertake proper risk management investigations and due diligence studies of all critical areas, e.g. ground risk, including underground utilities; land covenants, etc. Risk management covers any potential issue that is likely to jeopardise the project at any stage during construction or its operational life (in the case of PPP's).
- Invite bidders to advise of any gaps they see in the design documentation, specifications and the terms of contract. It is not sufficient to just put catch-all clauses into the contract that makes these gaps the contractor's responsibility. There should be a joint effort to eliminate them.
- Establish strong communications, collaboration and relationship management processes; and a project objective of "no disputes – talk first and write later, then talk and talk again".
- Agree fair payment terms, securities and retentions, with positive cash flow for the head contractor, subject to milestones, so that performance is not affected by payment issues. Construction cost inflation on major projects is often not factored in properly, or at all.
- Conduct joint risk management with 'early warning' processes (EWS) during construction, in order that all stakeholders have the opportunity to prevent or mitigate potential new risks.

Contractor's Bidding Decisions

In order to make the right decisions about bidding for a new project, a contractor needs answers to the following questions:

- Does this contract fit our core business – yes or no?
- Do we have the capability and resources for this project?
- Will our bid price be profitable, without getting any potential variations?
- Are the payment terms, retentions, securities and LD's acceptable?
- Will we be able to pay our supply chain promptly according to their terms and still have positive cash flow throughout the construction period?
- Or, are we looking to take on this contract because we have cash flow trouble and we need this next project to pay for the last one?
- And if we do take it on and it goes wrong, will it sink us?

Successful contractors usually have their own in-house risk management process and place importance on this when bidding; nevertheless, it is common place that contractors often fail to undertake in-depth risk management investigations and then wonder why they get into deep trouble during the construction.

When bidding, there should be a dedicated risk manager to whom all sectional managers should report potential risks during the construction and operational period (for PPP's). This must be a team effort.

These risks are then all assessed on a probability basis with an allocated cost and some are passed back to the client. Obviously, a cost contingency cannot be included for every potential risk, only for high risk potential and for a percentage of the others, otherwise the bid price will be uncompetitive. The key issue is that contractors should only take on the risks that they are equipped to handle and clients should likewise carry their fair share of the risks.

Early Warning Systems (EWS) – during construction the client and the contractor need to work collaboratively to ensure that potential new risks will be detected as early as possible so that they can be prevented or mitigated. There are some very effective EWS processes available.

With urban transport projects (road, rail and tramways) there have been numerous projects in several countries in which the project budget and the scope of works in the tender documents have badly underestimated the implications of the underground utilities that have to be dealt with, resulting in significant delays and cost increases.

Case study 2 - in Sydney Australia, the new $2.2 billion light rail system that opened in late 2019 was delayed for one year and incurred reported cost and delay claims of $1.2 billion from the contractor. The claims were reportedly related to the NSW government providing inadequate information on the utilities to be moved, which proved to be significantly greater than what was included in the contract. The allegation appears to be that the government had not done its pre-contract investigations and planning thoroughly and entered into a contract that may have left it heavily exposed.

If, as reported, this is what occurred, this would be a classic case of 'what happened with the detailed planning, scope of work identification, estimating and the risk management check processes, all this then flowing into the specifications and contract?'

Conclusions

- All the forms of contract outlined can work well on projects suited to them, but their success will still only be as good as the degree of pre-contract investigation and planning that takes place.
- The importance of senior management competency in recognising and implementing this cannot be over-emphasised, for both parties to the contract. Communication is the key word!
- The downfall of many clients and contractors is that they do not realise the critical importance of this, with too many contractors continuing to enter into contracts on a "wing and a prayer", aided and abetted by clients trying to extract the last ounce.
- The attitude of "start the project and sort it out later", based on skimpy design documentation, specifications and terms of contract leads to inevitable results, including:
- Cost and programme over-runs;
- Adversarial relationships develop;
- The client ends up unhappy with the aesthetics and/or functioning of the facility;
- The contractor and supply chain suffer financially;
- Disputes arise.
- Contractor insolvency is the last thing anyone wants, because it leads to significant disruption, delay and increased project cost; and to reverberating job and financial losses in the supply chain.
- Clients and contractors should be able to virtually eliminate the chance of this by being totally diligent and efficient in the pre-contract planning and preparation. There is no substitute for the hard work that is needed to start with "solid foundations". All the innovative technical developments in our current "digital age" are great, but their value can only be fully utilised if the solid foundations are there first.

Cognitive Bias in Arbitrators and their Awards

Paul Sills
Barrister, International arbitrator and mediator

> "A great many people think they are thinking when they are merely rearranging their prejudices."[1]
>
> – William James

Introduction

Whether as arbitrators, advisors or parties in dispute, we consider ourselves rational, open minded thinkers. We make decisions in an objective, non-biased fashion, don't we? Sadly, not often. We are all susceptible to a swarm of cognitive biases that affect our decisions in life, but being aware of these potential prejudices gives us an opportunity to address them and arrive at better outcomes and better arbitral awards.

Confidence in the arbitral process depends on arbitrators making well-reasoned objective decisions on liability and financially/economically sound damages awards.

What is Cognitive Bias?

Cognitive biases are errors in our thinking that influence our decision-making process. They are patterns of behaviour that draw us to particular conclusions. Our brains form these conclusions based on information gathered and stored from the past. Our decisions are subconsciously based upon:

(a) previous decisions involving similar subject matter;

(b) information we have selected that suits our preconceived ideas;

(c) emotional attachments; and/or

(d) self-interest.

Pattern recognition and emotional tagging are two processes that contribute to cognitive bias. Both relate to the idea that our brains resort to information that is already stored rather than evaluating each decision as an individual and fresh task. Heuristics encompass this idea, being mental shortcuts which aim to simplify our decision making processes. Heuristics save time when reaching conclusions but result in cognitive biases as we make false assumptions about new information and circumstances.

While cognitive biases can be good survival tools - making sure we stay safe - they can detract from logic, leading to suboptimal and poorly informed decisions.

Two Way System of Thinking

Psychologists Amos Tversky and Daniel Kahneman developed the term '*cognitive bias*' to illustrate flawed patterns of responses to decision making and judgement problems. They determined that people make decisions based on heuristics and common sense principles, not rationality or logic.

Tversky and Kahneman's experiments resulted in the development of the "*Two Way System of Thinking*". System one (thinking fast) is the intuitive, faster thought process which can be said to be the '*gut reaction*' way of making decisions. In comparison, system two (thinking slow) is the more idealised way of decision making that involves critical and analytical thinking. Most people that were tested thought they were system two thinkers but were in fact system one.

The pair's findings deconstruct ideas about the quality of our thinking - demonstrating that although we believe we are making careful decisions, our brains are merely

1 William James "Column 3" *Alexandria Daily Town Talk* (Alexandria, Louisiana, 20 September 1946) at 6.

post-rationalising decisions that have been made previously using cognitive biases. Identifying these flaws in our thinking can improve our decision making.

Examples of Cognitive Bias

Confirmation bias, the anchoring bias and the overconfidence effect, are three key biases that can be used to explain poor decision making by arbitrators.

> "A man hears what he wants to hear, and disregards the rest"[2]
>
> – Paul Simon

Confirmation Bias

American psychologist Raymond Nickerson defined confirmation bias as "*the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand*".[3]

This occurs when we '*cherry pick*' information that supports our preconceived beliefs, rather than researching and evaluating information from a range of sources and viewpoints.

There are two key reasons why we use confirmation bias when making decisions:

1 The human brain cannot carefully process all the information at hand. Confirmation bias is instinctive, acting as a reflex in tough situations like in an arbitration. Selecting and basing our decisions on information we have pre-stored in our brains saves time and energy.

2 Protection of self-image. It is important for our self-esteem that our preconceived ideas are shown to be correct. This can be especially important when we are in dispute and have reinforced our preconceived ideas over months or possibly years. Being proven wrong is a blow to our confidence and our egos. We seek to find information that justifies our preconceptions in order to achieve self-gratification and protect our identity in a conflict situation.

All arbitrators should keep an open mind throughout the hearing, while considering the evidence and drafting the award. However, Francis Bacon knew this was unlikely in 1620 when he said: "*The first conclusion colours and brings into conformity with itself all that comes after.*"[4]

Initial conclusions can be formed as early as prehearing submissions or upon listening to the opening statements.

Anchoring Bias

Anchoring is where we tend to rely on only one piece of data we have received, using this to shape our decision making. We do this rather than looking for and adopting a wider range of inputs. The primary cause of anchoring bias is our need for a starting point in our decision making. It is easier for us to start with a figure or idea and work from that - rather than to explore and research a variety of factors, without preconception, in order to reach a conclusion.

Anchoring appears in arbitration when the opening 'anchoring' claim value is used as a starting point for the damages award. If the anchor is a rational assessment of the underlying value of the claim and if the arbitrator(s) makes adjustments that are reasonable then this anchor can be a valid consideration in reaching a determination. Problems arise when the anchoring point is not an accurate valuation based on the facts of the case and any adjustments made to it are not well reasoned.

This bias is important because many arbitrators would agree that they find it more difficult to quantify damages than determine liability – thus amplifying the effect of any anchoring bias.

---

2 Simon & Garfunkel, '*The Boxer*' Verse 1, 1970.

3 Raymond S Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guise' (1998) 2(2) *Review of General Psychology*, 175.

4 Sir Francis Bacon, *Novum organum* (Wentworth Press, 2019).

Overconfidence Bias

We think confidence is an admirable characteristic - a sign of strength, control and leadership. Overconfidence can result in ignorant decision making. A consequence of overconfidence includes a strong belief that our opinion is superior, displaying an inability to see the potential risks or negative aspects of our decisions.

This occurs in arbitration when the arbitrator is over-confident of their position, leading at times to rash decisions and poorly considered awards. Arbitrators and judges are typically very confident as to the correctness of their decisions.

Negative Consequences of Cognitive Bias

Without recognising cognitive biases in our decision making, irrational and illogical judgements are made.

Our brain's focus on certain specific memories, predictions, and information causes us to ignore other important factors when making decisions. Furthermore, our decision-making process is tainted because we struggle to make decisions by drawing from a range of different viewpoints and sources, instead letting personal influences take control.

Positive Consequences of Cognitive Biases

Our brain's storage of previous emotions and memories of experiences can act as positive guides when making decisions. We can learn from our mistakes. The memories of our previous bad experiences warn us against making similar decisions again.

So, it is not all bad news for our biases: for example, a bias against the presence of a sabre tooth tiger did wonders for our ancestors. And research shows there are benefits in being biased towards optimism.

How to Improve our Decision-Making in Arbitration

Awareness

Recognising that you demonstrate cognitive biases improves your decision making. Once we accept that our decisions are affected by biases then we can work towards minimising their impact.

Data

In the absence of data, the stories that we tell ourselves are a combination of our fears and beliefs (Brene Brown). In arbitration we need to fill the gaps in our thinking with data (facts) not pre-conceived ideas or assumptions. Data analysis requires system two thinking (thinking slow).

Availability

We must be open to the ideas and opinions of others and balance these against our preconceptions. Diversity is essential to good decision-making.

We must include outside knowledge and views in our thought processes. We should challenge our preconceptions and ask for advice. Our preconceptions and the views of others can coexist if we properly consider the merits of both.

Environment

Do not rush into making decisions. If you are hungry, angry, lonely or tired, do not make that decision ("*HALT*").

Reflection

Ask yourself how you came to your conclusion? What influenced your decision? What data did you use? With more data/facts would your decision have been made differently? Slow down your thinking and decision making.

Conclusion

It is crucial that we recognise and negate cognitive biases in our decision making. In arbitration we need to ensure our decisions are a result of objective and broad system two thinking.

Awareness of our biases and how they affect others enhances the success of making good decisions when under pressure during an arbitration. We can increase the quality of our decision-making by expanding the scope of our cognitive processes to include the factors above, especially the search for facts with which to challenge our beliefs. When making decisions, be humble, be prepared to accept your mistakes and seek out new perspectives.

Developments in dispute funding in Australia and implications for arbitration proceedings

Nathan Landis
Investment Manager,
Omni Bridgeway Limited[1]

Alex McVay
Investment Manager,
Omni Bridgeway Limited[1]

The dispute finance industry has been under the spotlight in Australia in recent years. Several inquiries into the industry and important court decisions have considered various aspects of the industry and funding arrangements. Most of this has been in the context of class action proceedings.[2] However, some developments have had, or may have, wider implications and are of relevance to arbitration proceedings.

Meanwhile, the funding of international arbitration claims has been growing in recent years, and demand for funding from commercial parties is expected to rise, given the economic downturn caused by the COVID-19 pandemic. Businesses will need to conserve cash and consider ways to access liquidity. Dispute funding is one potential source of capital.

What is dispute funding?

Dispute funding arrangements are flexible and depend on the circumstances of the dispute and the needs of the funded party. In general, dispute funding involves a commercial funder agreeing to pay some or all of a party's legal fees and other expenses associated with an arbitration or litigation. In return, the funder receives a share of any sum recovered from the successful resolution of the claim (the recovery or resolution sum) whether following settlement, arbitral award or judgment. Some funders will also assume the risk of security for costs orders during the proceedings, as well

1 **Omni Bridgeway** is a global leader in dispute resolution finance, with expertise in civil and common law legal and recovery systems, and operations spanning Asia, Australia, Canada, Europe, the Middle East, the UK and the US. Omni Bridgeway is listed on the Australian Securities Exchange (ASX:OBL) and includes the leading dispute funders formerly known as IMF Bentham Limited, Bentham IMF and ROLAND ProzessFinanz.

2 The Victorian Law Reform Commission (VLRC) and the Australian Law Reform Commission (ALRC) conducted inquiries into class action proceedings and third-party litigation funders in 2018 and 2019, respectively. The VLRC's report, *Access to Justice – Litigation Funding and Group Proceedings,* was published in March 2018 and the ALRC's report, *Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders,* was published in January 2019.

as adverse costs ordered against the funded party (in jurisdictions where those orders are applicable) if the case is unsuccessful.

Unlike traditional forms of business finance, dispute finance is non-recourse. This means that the funder receives a return on its investment only in the event of a successful recovery from the arbitration or litigation. If the case is lost, the funder receives nothing i.e. no repayment is required of any of the funded costs or purchase price of a claim. Therefore, the risks of pursuing the claim are also transferred to the funder.

Recent industry trends – corporate funding and monetising legal claims

Historically, dispute funding was a means of obtaining access to justice for those without the financial means to pursue complex and costly commercial disputes. In recent years, there has been a shift in the type of users of dispute funding in Australia (and globally). Much of the dispute funding market is now aimed at meeting the increasing demands of solvent and financially stable corporations.[3]

By using external funding to finance the costs of a dispute (including lawyer and expert fees, arbitration related fees or court costs, and adverse cost protection, where required), legal claims are leveraged as assets. This means the funder pays some or all of these costs in return for a share of the outcome. In this way businesses can improve liquidity, maintain cash on the balance sheet and transfer all or a portion of the legal expenses to the funder. In some cases, the combined value of a claim or portfolio of claims may be used to secure funds, not only for legal expenditure, but also for general business purposes or simply to declare as profits.[4]

If the claim is successful, revenue can be recorded by the business without having incurred any downside costs or risk along the way. Dispute finance therefore helps transform litigation or arbitration from an expense into a cash-generating asset. Funding provides a business with the opportunity for substantial recoveries without negatively affecting its profitability along the way.

A business may have commenced an arbitration or litigation in the past, resulting in a favourable award or judgment that was not paid, often because it did not know how to enforce it in a foreign jurisdiction or against a defendant whose asset position was obscure. Some funders have expertise in enforcement and provide specialist enforcement management services, including asset tracing, and formulating and executing an enforcement strategy.[5] Alternatively, a judgment or award can be sold to a funder via an assignment which is a quick way of generating cash for a business.

Increasing use in international arbitration

Even before the current economic downturn, dispute funding of international arbitration claims has been growing in recent years. This has been largely due to the cost and complexity of international arbitration, together with increasing demands on arbitration parties and practitioners to manage the associated costs and risks.[6] Those costs are often compounded by the international nature of arbitration disputes, requiring multi-jurisdictional and often specialist legal teams, as well as institutional fees, arbitrator costs and hearing venue hire. These disputes often involve parties from states with significant enforcement risk. Dispute funding therefore offers opportunities to pursue these claims with predictable costs and mitigated risk to the claimant.

Issues in funding of international arbitration

As the funding of international arbitration claims becomes more widespread, a number of important issues have arisen, in particular in relation to conflicts of interest and disclosure of funding arrangements, and

3 This is a global trend. See the *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration,* April 2018, International Council for Commercial Arbitration and Queen Mary University of London (*ICCA TPF Report*), page 20.

4 *ICCA TPF Report*, page 38.

5 Omni Bridgeway is known as a global specialist in enforcement of judgments and awards (including against sovereigns in all continents).

6 *ICCA TPF Report*, page 17.

costs issues.[7] Key questions include whether a funded party is required to disclose the existence of a dispute funding arrangement to the arbitral tribunal and the opposing party and, if so, what is the scope of the disclosure and should the funding arrangements themselves be disclosed?[8]

There is no uniform approach to these issues. However, the prevailing consensus within the international arbitration community is that the existence and identity of funders should be disclosed. Most newly revised guidelines and institutional arbitration rules have included provisions requiring disclosure of the existence and identity of a dispute funder (without needing to disclose the commercial aspects of the funding arrangement).[9] The basis for the disclosure is that the existence and identity of funders is necessary for transparency and so that arbitrators can make appropriate disclosures in relation to any potential conflicts of interest. However, it has also been suggested that parties to an international commercial or investment arbitration are under no procedural duty to disclose the dispute funding arrangements.[10]

Where a funding arrangement is disclosed, or the opposing party becomes aware that the claim is being funded by a third party, the respondent to an arbitration may raise issues related to the funding, for example, arguments about the financial position of the claimant and consequently, security for costs. Several decisions of international investment arbitral tribunals have considered the role of the funder in the context of interim awards dealing with security for costs. For example:

- In *Manuel García Armas and others v Bolivarian Republic of Venezuela, PCA Case No. 2016-08*, the Permanent Court of Arbitration ordered the claimants to provide security for costs, finding that there were extraordinary circumstances, because the third-party funding agreement itself expressly provided that the third-party funder would not cover an adverse costs order.
- In *EuroGas Inc and Belmont Resources Inc v Slovak Republic (ICSID Case No ARB/14/14) (Procedural Order No. 3)*, the ICSID tribunal rejected an application for security for costs and found that the presence of third-party funding did not, of itself, constitute exceptional circumstances that would justify ordering security for costs.
- In *Eskosol SpA in liquidazione v Italian Republic (ICSID Case No. ARB/15/50)*, an ICSID tribunal refused a request for provisional measures against the claimant, in the form of an order for security for costs or disclosure of funding arrangements. Although the claimant was bankrupt and unlikely to be able to pay an eventual costs order, and the tribunal was not aware of any requirements in the third-party funding agreement for the funder to meet any costs award made against the claimant, there was an after-the-event insurance policy in place for an amount well above the amount sought as security.
- In January 2020, in *Dr Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan* (ICSID Case No. ARB/18/35), an ICSID tribunal ordered the administrator of an insolvent German construction

7 The ICCA-Queen Mary Task Force considered that the principal issues were potential arbitrator conflicts of interest, privilege, confidentiality and costs issues (*ICCA TPF Report*, page 1).

8 Chapter 4: 'Disclosure of Third-Party Funding in International Arbitration Proceedings', Jonas von Goeler, *Third-Party Funding in International Arbitration and its Impact on Procedure*, International Arbitration Law Library, Volume 35 (Kluwer Law International 2016), pages 125-126.

9 For example, see Article 21 of the new *draft ICSID Convention Arbitration Rule*s which imposes a new obligation on the parties to disclose whether they have dispute funding, the source of the funding, and to keep such disclosure of information current through the proceedings. Parties will not be required to disclose the funding agreement or its contents for this purpose. See also the International Chamber of Commerce's new guidance on conflict disclosure for arbitrators published in 2019 and revisions to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration in October 2014 which extended the parties' duty to disclose any relationships between the arbitrator and the party to relationships with persons or entities having a direct economic interest in the arbitration.

10 *ICCA TPF Report*, pages 83-84.

company, that had brought a claim against Turkmenistan with the benefit of third-party funding, to pay security for costs in the sum of US$3 million due to the "exceptional circumstances" of the case. The administrator in this case was seeking €37 million in damages and the third-party funder had expressly stated that it did not accept liability for any adverse costs award. Turkmenistan argued that in several other cases it had been awarded costs awards from funded claimants which had not been paid. The tribunal considered that the non-liability of the funder for an award of adverse costs gave rise to a "more extreme situation" and therefore was an exceptional circumstance.

Australian court decisions on funding arrangements

In Australia, litigation funding has been accepted as part of the legal environment for a considerable period of time.

In relation to reviewing funding arrangements in general, the Australian courts adopt the general approach that parties are free to contract as they wish and are usually only take an interest in the terms of funding arrangements in the following types of cases:

Class actions: for example, where the court is asked to make a 'common fund order'[11] or to choose between two or more 'competing' class actions[12] or to approve a settlement which includes a fee to be paid to a dispute funder.[13]

Insolvency proceedings: where a liquidator applies for approval to enter a funding agreement with a commercial dispute funder.[14]

This current approach is consistent with the observations of the High Court in the Fostif case[15] that the court does not have a role in assessing whether a litigation funding agreement is "fair". This would wrongly assume that "*there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity*".[16]

It is common for funders to agree to provide security for costs as part of a funding arrangement. The security may be provided by way of a bank guarantee, payment of cash into court or by production of a Deed Poll by the funder.

In *Birbilis Bros Pty Ltd v Chubb Fire and Security Pty Ltd & Ors* [2018] QSC 3, an application for security for costs was dismissed on the basis of undertakings given to the court by the funder (Omni Bridgeway, then known as IMF Bentham Limited) in a Deed Poll which was filed with the Court.[17]

Conclusion

In the current economic environment, many businesses are facing or will face a range of new and complex commercial disputes, including arbitration claims. Almost all businesses will need to conserve cash and consider alternative sources of finance. Dispute funding is one potential solution.

---

11 Common fund orders typically require class actions to be commenced on an 'open' class basis and all members of the class to contribute equally to the legal and litigation costs of the proceedings, regardless of whether the class member signed a funding agreement.

12 Where separate law firms, each with a different litigation funder, begin proceedings against the same defendant for the same or similar sets of claims.

13 Under section 33V of the *Federal Court of Australia Act 1976* (Cth).

14 Under section 477(2B) of the (Cth).

15 *Campbells Cash & Carry Pty Ltd v Fostif Pty Limited* (2006) 229 CLR 386. In *Fostif*, a majority held that the litigation funding arrangements in that case were neither contrary to public policy nor an abuse of process.

16 Ibid, page 434-5 at [92].

17 In most cases, when a respondent is facing a claim that is being funded by Omni Bridgeway, a request for security is satisfied by Omni Bridgeway producing a copy of a Deed Poll.

The Common Law versus Civil Law Divide in International Arbitration: Prague Rules on the Taking of Evidence

Kabir Duggal[1]
Lecturer-in-Law, Columbia Law School & Managing Editor, The American Review of International Arbitration

Rekha Rangachari[2]
Executive Director, New York International Arbitration Center

1 Introduction

One of the principle advantages of arbitration is that a tribunal is not bound by technical rules of procedure that apply to judicial proceedings. This is particularly true for principles of evidence in international arbitration.[3] Indeed, most international arbitral rules do not provide detailed guidance on evidentiary standards, leaving it to the discretion of the arbitral tribunal. For example, the 2010 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules have only one provision dealing with evidence, that provides, *inter alia*, that the arbitral tribunal "may require the parties to produce documents, exhibits or other evidence within such period of time as the arbitral tribunal shall determine" and "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."[4] Similarly, the 2012 International Chamber of Commerce (ICC) Arbitration Rules provide that the arbitral tribunal "may summon any party to provide additional evidence" and that "after the proceedings are closed" no further evidence may be produced "unless requested or authorized by the arbitral tribunal."[5] Considering the lack of guidance on evidentiary issues, the International Bar Association (IBA) prepared the IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules) to provide certain baseline guidance to assist the evidentiary process.[6]

Even though the IBA Rules were intended to be a compromise between civil and common law traditions,[7] critics of the IBA Rules argue that these Rules are premised on certain underlying common law assumptions on issues such as a voluminous document production and the detailed direct and cross examination of witnesses. They posit that, e.g., the growing Americanization of international arbitration (by the

---

1 *Dr. Kabir A.N. Duggal is Senior International Arbitration Advisor at Arnold & Porter Kaye Scholer LLP's International Arbitration Team in their New York office, a Lecturer-in-Law at Columbia Law School, and Managing Editor for the American Review of International Arbitration (ARIA).

2 Ms. Rekha Rangachari is the Executive Director of the New York International Arbitration Center (NYIAC) and Adjunct Professor at Seton Hall Law School. The views expressed herein are personal and do not reflect the views of NYIAC, Arnold & Porter, or its clients. The authors reserve the right to change the positions stated herein.

3 Nigel Blackaby and Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015), 1.77 ("There are no compulsory rules of procedure in international arbitration, no volumes containing 'the rules of court' to govern the conduct of the arbitration. Litigators who produce their own country's rulebook or code of civil procedure as a 'helpful guideline' will be told to put it aside.").

4 2013 UNCITRAL Arbitration Rules, art. 27(3)–(4).

5 **2017 ICC Arbitration Rules, arts** 25(5), 27.

6 See *IBA Rules on the Taking of Evidence in International Arbitration*, Preamble Section 1,<http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#> ("The IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economic and fair process for the taking of evidence in international arbitration, particularly those between Parties from different legal traditions.").

7 Ibid ("These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.").

perceived widespread adoption of American trial techniques) has resulted in a tedious, time-consuming arbitral process.[8]

These criticisms resulted in the formation of a new Working Group (predominantly comprised of lawyers from Russia and Eastern Europe) focused on developing a new set of rules, titled Rules on the Efficient Conduct of Proceedings in International Arbitration (the "Prague Rules").

2 Introducing the Prague Rules

The Prague Rules are a set of procedural and evidentiary guidelines that aim to further efficiency in the conduct of international arbitration from the perspective of civil lawyers. Notably, only lawyers from civil law countries comprise the Drafting Committee of the Prague Rules. An underlying theme throughout the Prague Rules is the adoption of an inquisitorial allocation of power where the arbitrator (as opposed to the parties) plays an active role than in the adversarial approach in contrast to common law jurisdictions.

This focus on the inquisitorial allocation of power presents a radically different template. To highlight these examples, a sample of key provisions are summarized below.

- Article 2.4(e) of the Prague Rules requires a tribunal to express its preliminary views on contentious points in dispute between the parties during the initial case management conference. This is in sharp contrast to the generally held view that an tribunal must operate as a neutral observer. An earlier draft of the Prague Rules provided that "[t]he Arbitral Tribunal and the Parties are encouraged to hold a case management conference by means of electronic communication."[9] The irony is that this provision was subsequently deleted, although proceedings during COVID-19 affirm the general trend towards electronic case management whereby this provision may de facto gain further credence.
- Article 7 of the Prague Rules (entitled *jura novit cura*) introduces an innovative provision wherein a tribunal "may apply legal provisions not pleaded by the Parties if it finds it necessary" after consulting with the parties. For common lawyers, this provision would implicate due process concerns – more specifically, the right to be heard, altering the generally accepted view that a tribunal resolves disputes as plead by the parties.
- Article 9 of the Prague Rules enables the tribunal to "act as a mediator" and "encourage the parties in reaching an amicable settlement of the dispute." The generally accepted practice has been to keep the roles of arbitrators and mediators separate, however, the Prague Rules expressly challenge this assumption. In civil law countries, an adjudicator does play a more active role in encouraging amicable settlement of disputes.
- Article 4 of the Prague Rules envisions a limited and carefully circumscribed role for document production, however Article 4.2 makes a clarification that parties "are encouraged to avoid any form of document production, including e-discovery."[10] Further, tribunals are encouraged to impose "cut-off" dates after which document production would not be accepted except for (undefined) "exceptional circumstances".[11]
- Article 5.1 of the Prague Rules requires the parties to identify potential witnesses and the subject of their testimonies for review by the Arbitral Tribunal. The Tribunal will then decide which witnesses to call for examination and can decline to call fact witnesses whose testimony it considers to be "*irrelevant, immaterial, unreasonably burdensome, duplicative or for any other reasons not necessary for the resolution of the dispute.*"[12] In this way, the Prague Rules create a structured sequential process for evaluation of fact witnesses with the arbitral tribunal adopting another active role.

8 **Steven Seidenberg, 'International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?'** (2010) 96 *American Bar Association Journal* 50.
9 Prague Rules (March 2018), art 3.2.
10 Prague Rules, art. 4.1.
11 Prague Rules, art. 3.3.
12 Prague Rules, art. 5.3.

3 Potential Problems with the Prague Rules

The Prague Rules fundamentally alter the way an arbitration has typically been conducted by shifting much of the responsibility to the arbitral tribunal and, by consequence, creating a more passive role for the parties. Of note, the Prague Rules envision the tribunal taking an active role at the outset of the proceeding even when the parties may arguably be in a better position to guide the process as conductors of law and fact. One major concern to the Prague Rules is the possibility of delay where an arbitral tribunal is not sufficiently read into the case.

Another concern is the accepted double-hatting of the tribunal to encourage settlement, at one moment arbitrator and at another mediator. This has the effect of blurring the important distinction in process between arbitration and mediation. For example, in mediation, parties may be willing to make compromises or share confidential information with a mediator that the same parties may be unwilling to share with the arbitrators. There is no express provision within the Prague Rule to deal with this dichotomy. Furthermore, the parties may feel compelled to adopt a mediation process if strongly recommended by the arbitral tribunal, even where the parties have no real interest in engaging in mediation, creating perceived futility of purpose with additional cost and elapsed time.

Finally, the Prague Rules have been drawn with civil law assumptions that are unlikely to gain much traction with common law practitioners.

4 Conclusion

An important aspect of international dispute resolution is its flexibility and malleability to the concerns of key stakeholders, with the Prague Rules broadening optionality of the toolkit. Having long complained about the common law assumptions underlying many international arbitration, civil lawyers collaborated to offer a different set of assumptions. Time will demonstrate the wider consumption of the Prague Rules in the international marketplace.

From 'Attired in Robes' to ADR -- a U.S. Federal Judge's Transition

The Honourable Faith S. Hochberg[1]
Former U.S. Federal Judge;
Principal, Hochberg ADR LLC

This past February (which now seems like a lifetime ago), as I fell in love with Australia and New Zealand during my first trip to these beautiful and welcoming lands, I had that rare time to ponder my own evolution from a United States Federal Judge to an International Arbitrator and Mediator. It has been an exciting five-year transition, and it was time to distill my thoughts, in the hope that my experience would be relevant to a 'transition' that has often courted controversy in many parts of the globe.

First and foremost is the crucial change in mindset. Over their decades on the Bench, Judges often gradually get accustomed to being the "customer" of the litigants, the one who "is always right", even if he or she is late, interrupts counsel, or imposes rules or deadlines without considering the impact on counsel. Those attitudes, even if far beneath one's consciousness, must change to become a successful arbitrator and mediator.

Arbitrators, unlike judges, are not "assigned"; rather, they are most often "engaged" by the parties' choice. And when sitting in three-member panels, they must work together as a collegial body, both among themselves, as well as with counsel. Especially in mediation, the tendency to want to "rule" rather than guide parties toward a fair settlement can torpedo the ADR process before it begins. And in arbitration, I often hear via the ADR and law firm grapevine that I have succeeded because I never caught "black robe disease" – that dreaded condition of believing that all should do as one says because he/she was a judge who will forever be the "ruler".

As the robe is doffed, certain things "cling" to a former judge, and they bear considering even before leaving the Bench. Most central is the judge's reputation for being open-minded, prepared, and considerate of litigants and their clients. Everyone knows that half the time, one party will lose a trial: but that party's treatment by the judge is what lingers far after the case is over.

Sometimes, little things are what become small legends. While still on the Bench, about eight years ago, in the middle of a patent case claim construction hearing, there was a surprise fire drill in the courthouse. Everyone was ordered out of the building: juries, the public, the staff in the court clerk's office, law clerks and counsel, had to leave at once. I threw my robe on my chair and asked lead counsel to lock elbows with each other, with me and my court reporter and law clerk, as I led them through the crowded stairwell, past the metal detectors, and outside the back door of the courthouse. Once outside, I assembled everyone on the one quiet grassy area away from the crowds, where there was a bench under a maple tree, and counsel continued with their arguments to conclusion. Why did I do this? Because I knew that they had flown in from over 3,000 miles away for this hearing and had flights home before nightfall. If we waited until the U.S. Marshals let us back inside, who knew how long it would be to get hundreds of people back through heavy security checkpoints, to continue the hearing?

1 The Hon. Faith S. Hochberg is a former U.S. Federal Judge and United States Attorney twice nominated by President Bill Clinton and confirmed by the Senate: first as United States Attorney and later as a United States Federal Judge, appointed by the President and confirmed by the United States Senate, under the Constitution. As a Federal Judge, she was also invited to sit by designation on the Federal Circuit Court of Appeals. She also served as a patent pilot Judge with special expertise in this complex area of law. In 2015, Judge Hochberg retired from the bench to found Hochberg ADR LLC (https://www.judgehochberg.com/) – for full-time International Arbitrator, Mediator and ADR advisory.

Two years after I retired from the Bench, I learned that one associate counsel had snapped a photo of this outdoor hearing, and that it had become (unwittingly) legendary! (maple tree photo below – enclosed to my cover email) While one small story, it illustrates the point.

Once off the bench — or "disrobed" as I jokingly call it — what are the "must learns" in the transition to ADR? First, is that the cocoon created by law clerks, courtroom deputies, and computer tech staff evaporates on day one! All of a sudden, the tasks that were always done for me became mine to do. The urge to look around for one's law clerk was hard to shake, when some legal point hadn't been addressed in a Mediation Statement. Where were they when I needed them?!

Perhaps most central to succeeding in the transition is honing our computer and technical skills with everything from making sure that the calendar correctly has the call-in numbers for conference calls, to booking a FedEx pickup, to keeping accurate time records: all require a modicum of competence. But most important is to understand the norms and expectations of practitioners: answering email and phone inquiries timely (24/7 in the U.S.; saner in Europe and, hopefully, Australia and New Zealand).

Next on the transition list is "very soft" marketing. A good website that gains traction is both informative and provides a window into a judge's past career, with information that may demonstrate skills in special areas of law developed prior to ascending the Bench. Photos are great too. But marketing isn't only a glossy website and business card: it really is a means of demonstrating the skill that can be brought to a case. While I was still a judge, I began accepting requests to speak on bar and educational panels. I agreed to speak even when it required some real work on my part to learn the latest updates in a "hot" area of patent law or antitrust (competition) law, for example. I could not accept any remuneration, but I escaped the courthouse "monastery" and really learned what practitioners needed from judges on these cases. I brought the information back to my colleagues, and I made some significant changes to my chambers processes to move cases much more swiftly through my docket.

While I didn't do this with the intention of "marketing" for that future day when I retired from the Bench, it did have that unintended effect.

5 March 2020 marked my fifth anniversary off the Bench and fully immersed in ADR. I truly love it for so many reasons. I serve as an arbitrator, mediator, court-appointed Special Master, and Monitor in major, complex cases — both in the U.S. and internationally. I have learned that there is so very much that judges should learn from arbitrators (and mediators alike) about efficiency and avoiding the bane of excessive "discovery" that make U.S. court litigation so expensive. We have the ability to make arbitration serve the interests of justice faster and better than litigation, and I firmly speak that to lawyers I meet. Therefore, to get rid of the skepticism often faced by those who retire from the Bench, I urge my fellow 'disrobees' to evolve in the manner narrated above – we must evolve our mindset and be open to sitting on a three-member tribunal, even with a 30-year old as Chair! That young arbitrator can teach us as much as we can teach them.

Finally, I have met extraordinarily talented new colleagues in many countries, who often become friends. And I hope that I have shown to all in the legal community that both men *and* women can independently build a business to become a highly sought after, and successful, arbitrator and mediator. I hope that you join our ranks! Please email me when your travels take you to New York City.

Does an arbitration clause bar a winding-up petition? The Hong Kong perspective.

Tony KO
FCIArb, Barrister-at-law, Hong Kong, Plowman Chambers

Karen Ka Wan CHEUNG
FCIArb, Solicitor, Hong Kong Partner, Li & Partners

Parties to a contract containing a valid arbitration clause may be under an expectation that any dispute arising therefrom will be resolved by their chosen arbitrator(s), and that the courts will have very little role to play regarding the substantive determination of the dispute.

However, the Hong Kong courts have traditionally held that despite the dispute being covered by an arbitration agreement, the Court shall nevertheless consider the substantive merits of the dispute. Upon such consideration, if the insolvency court is not satisfied on the evidence filed by the debtor that there exists a "*bona fide dispute on substantial grounds*" (this shall be referred to as the "merits test"), the Court will grant a winding-up order. In order to meet the merits test a debtor must "*adduce sufficiently precise factual evidence to satisfy the court that it has a bona fide dispute on substantial grounds*" and that *"This is a higher standard than that required of a defendant in resisting an application for summary judgment under O.14 of the Rules of the High Court (Cap.4A, Sub.Leg.). The burden is on the debtor to show not only that his case is believable but also that there is precise factual evidence in support of his case, which are not just mere assertions. The Court will look at the debtor's evidence against so much of the background and incontrovertible evidence that is not disputed or not capable of being disputed.* An honest belief on the part of the debtor that he has a substantial ground of defence is not sufficient to avoid a bankruptcy order"(see *Re Ip Pui Man Nina* [2011] 3 HKLRD 299).

It is thus clear that the merits test requires the Court to go reasonably deep in assessing the merits of the defence. Indeed, in order to resist a winding-up petition, the company has to do even more than to resist an application for summary judgment. This, on one view, has the effect of "short-circuiting" the role of arbitrators, as a party can simply issue a winding-up petition and ask the Court to examine the evidence and hold that the merits test is not met which, if accepted by the Court, will lead to the draconian order of winding-up.

In *But Ka Chon v Interactive Brokers LLC* [2019] 4 HKLRD 85 ("**But Ka Chon**"), the Court of Appeal noted with reservation the decision of Harris J in *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 ("**Lasmos**"), which made a substantial departure from previous first instance authorities in Hong Kong. Under the *Lasmos* approach (which adopts broadly the analysis of the English case *Salford Estates (No 2) Ltd v Altomart Ltd (No.2)* [2015] Ch 589), a winding-up petition on insolvency grounds should, without an assessment of merits, generally be dismissed save in exceptional circumstances, when three requirements are met:

(1) The company disputes the debt relied on by the petitioner.

(2) The contract under which the dispute has arisen contains an arbitration clause covering the dispute.

(3) The company has taken steps required under the arbitration agreement to commence the contractually mandated dispute resolution process, which might include preliminary stages such as mediation), and files an affirmation evidencing that.

The Court of Appeal agreed with the first instance judge that *Lasmos* was inapplicable, as on the evidence there was no bona fide and substantial dispute to be arbitrated (i.e. the respondent failed on the merits test). Further, even if the *Lasmos* approach was applicable, the Court of

Appeal agreed with the first instance judge and found that the third requirement was not satisfied, namely that the respondent had not taken any steps to commence the contractually mandated dispute resolution process. The Court of Appeal held that the respondent had not commenced arbitration by serving a notice of arbitration, despite the respondent solicitors' letter stating that they were instructed "to initiate arbitration between the parties" and requested the petitioner solicitors to reply if they had instructions to "accept service of our client's Notice of Arbitration".

The Court of Appeal further made the following *obiter* observations on the *Lasmos* approach, in view of the importance of what should be the proper approach where a petitioning debt is covered by an arbitration clause.

(1) The Court of Appeal held that insolvency proceedings does not come within article 8(1) of the UNCITRAL Model Law (which has effect in Hong Kong by virtue of section 20 of the Arbitration Ordinance (Cap 609)). There should thus be no mandatory stay of the Court proceedings for arbitration.

(2) The Court has a discretionary power to dismiss or stay a petition where the alleged debt arises out of a transaction containing an arbitration agreement.

(3) Considerable weight should be given to the factor of arbitration in exercise of the Court's discretion and such discretion should not be exercised in a way which encourages creditors to circumvent the arbitration agreement.

(4) However, the Court should continue to examine whether the merits test is met. In exercising the Court's discretion, if the merits test is not met, then a possibility is the respondent may only expect a short adjournment to enable it to commence arbitration.

The Court of Appeal in the subsequent decision of *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] 5 HKLRD 646 repeated the observations in *But Ka Chon* (again on an obiter basis), and further elaborated on the third *Lasmos* requirement (which is a requirement not found in *Salford Estates*) – "*This sensible requirement is to demonstrate to the court that the debtor has a genuine intention to arbitrate and could hardly be considered onerous…it would make no sense to dismiss or stay an insolvency petition on the mere existence of an arbitration agreement when the debtor has no genuine intention to arbitrate…*". One wonders whether the matter is really as straightforward as the Court of Appeal thought – even if the debtor has no genuine intention to arbitrate, an arbitral tribunal has at its disposal many tools to deal with non-responsive respondents and, indeed, most arbitration rules have rules dealing specifically with that (see for instance Article 30 of the UNCITRAL Arbitration Rules).

Referring to *But Ka Chon*, the Hong Kong Court of First Instance in *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd* [2020] HKCFI 311 expressly refused to follow *Lasmos* (and *Salford Estates*), applied the merits test, and ordered the company to be wound-up without requiring the parties to arbitrate the dispute.

As demonstrated above, despite the attempt in *Lasmos* to the contrary, Hong Kong Courts have embraced the merits test and insisted on examining the substantive merits of the dispute despite the existence of an arbitration agreement. A similar approach was adopted by the Eastern Caribbean Court of Appeal in *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*, BVI HCMAP 2014/0025 and 2015/0003, 8 December 2015. The Singapore Courts, on the other hand, have embraced the "no assessment of merits" approach (see *BDG v BDH* [2016] 5 SLR 977 and *BWF v BWG* [2019] SGHC 81, 26 March 2019).

From the viewpoint of the international arbitration community, one would have thought that party autonomy dictates that the parties' intention to arbitrate should be respected. Very often, arbitrators are chosen because of their knowledge of the practice of the relevant industry (i.e. an industry man). A judge and an industry man may well take a very different view as to what is arguable and what is not. Further, the parties might have chosen arbitration because of the confidentiality of proceedings it offers. Allowing a party to engage the court's winding-up jurisdiction, which hearings are held in open court, tends to defeat such expectation of confidentiality. As there is no universally

accepted practice as to how parties' choice to arbitrate should interact with insolvency law, it is interesting to see how the jurisprudence in this area will develop.

In *Dayana*, the court expressly refused to follow *Lasmos* and *Salford Estates*. The main reason proffered was that the insolvency court is not resolving the dispute between the parties, but merely establishing the petitioner's standing to issue the winding-up petition. It was further said that the decision to wind-up the company will not bar the company's liquidators from disputing the underlying debt in the insolvency process. These reasonings are technically valid. However, one must not lose sight of the reality that, without the involvement of an arbitral tribunal (despite the parties' agreement to have the dispute arbitrated), the insolvency court is now taking upon itself to decide whether there is any merit in the company's defence and, if not, to wind it up. One can hardly think of anything more draconian to a company than a winding-up order. Yet, it is exactly in a winding-up petition that the insolvency court considers it appropriate to undertake an assessment on the merits of the dispute, overriding the parties' agreed choice of dispute resolution.

Granting Injunctions in Arbitral Awards against Infringement of Intellectual Property Rights – An Act of Balancing Fair and Equitable Treatment with Proportionality and Dissuasiveness

Jayems Dhingra[1]
Principal Consultant, Tiberias Management Consultants Pte. Ltd
(ACICA Fellow)

Background

The Intellectual Property Rights ("IPR") granted by a State after having passed a stringently regulated application processes and substantial examination (in cases of patents, utility patents, trademarks and industrial designs), through registration, are worthwhile legal rights of an IPR owner, provided there is an effective protection and enforcement against infringers. In suits of infringement claims, IPR owners frequently seek interim and or permanent injunctions, in addition to claiming for damages suffered. In certain commercial Courts and specialized intellectual property ("IP") Courts, punitive damages are also permissible and granted in rare cases of wilful blatant infringements. This article is limited to the issue of granting injunctions and the criteria that must be satisfied before an injunction can be granted.

In common law jurisdictions, it is at the discretion of the Courts, with due regard to principles of stare decisis and case precedents, to grant an injunction. The decision to grant an injunction is subject to such terms as Court thinks fit, in context of the degree of infringement and conduct of the defendant. The Court may also award damages in lieu of injunction or both, to the plaintiff[2]. In the Enforcement Directive[3] of the European Union ("EU") the criteria for enforcement measures for IPR (which may include granting an injunction) is coded in Article 3 with limited discretionary grounds.

(1) … Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays.

(2) Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

These criteria though not codified are also seen in number of judgments of common law jurisdictions and is in accordance with the Article 41(1) of the Trade Related Intellectual Property Rights ("TRIPS") Agreement. Thus, the EU Enforcement Directive and TRIPS Agreement, provide a valuable evaluation criterion for granting an injunction in the context of Enforcement of the Intellectual Property Rights, which should be: Fair and Equitable, Effective, Proportionate and Dissuasive. The next requirement on implementation of such enforcement is to avoid the creation of barriers to legitimate trade and to provide safeguards against their abuse, which can be either in the form of abuse of dominant position by IPR owners, or by the defendant raising antitrust and competition laws in their defence. These factors raise number of challenges for a Court to

1 Certified International Arbitrator, Chartered Arbitrator, Accredited Adjudicator and Mediator, FACICA, FAIADR, FCIArb, FHKIoD, Member AIPN USA, LL.M. (IP Laws), M.Sc. (Maritime Studies), M. Tech. (Knowledge Engineering), MBA, B.E. (Elect), First Class CoC (DOT, UK) and Management Consultant for Maritime, Construction, Oil & Gas and Energy Sectors.

2 See for example s122, Australian Patents Act 1990; s126 of Australian Trademarks Act; s80 Hong Kong Patents Ordinance (Cap. 564) 2019; and s67 of Singapore Patents Act (Cap. 221) 2019.

3 See Art. 3 of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.

strike a balance, based on the facts of each case, evidence provided by the parties, and in context of the technology, its impact on the consumers and market participants. For instance in the case of NTP v RIM, if injunction as per the judgment of the US District Court, based on a jury trial was enforced, it would have resulted in shutdown of Blackberry Mobile Devices worldwide, including US Departments of Justice and Defence.[4]

In arbitral proceedings evidence laws do not apply. The procedural laws of the seat of arbitration generally provide for, fair and equal treatment of the parties for presentation of their case. For example, in Model Law countries (based on UNCITRAL Model Law on International Commercial Arbitration), Article 18: Equal Treatment of Parties; and §33(1) of the English Arbitration Act 1996. In determining the substantive issues and claims of infringement, the substantive laws of the contract, if any, between the parties will be applicable. However in the context of the third party infringement claims, submitted to arbitration by consent of the parties, it will impose additional responsibility on the tribunal to evaluate the remedies sought like a permanent injunction, as part of a declarative award. This will need to be reviewed in context of public policy and IPR enforcement laws of the place of infringement. The Model Law Articles 34(2)(b)(ii) Application for setting aside as exclusive recourse against arbitral award and 36(b)(ii) Grounds for refusing recognition or enforcement[5], and Article V(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) – NYC, will require special consideration, while drafting an arbitral award.[6]

Effective, Fair and Equitable

In principle, the legal rights of an IPR owner should not be treated differently from the owner of tangible property like land, a building, or a production plant. Any obstruction, trespass, expropriation, or economic damage to a physical (tangible) property necessitates prompt and effective resolution for the innocent party. Likewise, protection of legal rights of an IPR owner, should be addressed by swift and effective enforcement orders against any infringers, which cause expropriation, damage, or misuse of the economic and moral rights of its owner. In jurisdictions with a two to three tier Court system, the time and cost incurred in appeals and final appeals, may fail to deliver an effective timely protection of IPR rights, which by nature are of limited duration (e.g. about 20 years for patents, 10 years for Industrial designs). The arbitration forum can provide speed and effectiveness of such matters in arbitration friendly jurisdictions. This requires arbitrability of IPR infringements matters, including issues of validity and or invalidity as a defence if invoked, and should not be excluded from the jurisdiction of the arbitral tribunals, like in Hong Kong, Singapore, and USA. In Courts, interim injunctions may be granted swiftly but due to the appeals-based system can cause further delays. However, applications seeking permanent injunctions will be a subjected to full trial, before granting any application. In arbitration, though speed and confidentiality may be feasible, but the complexities of balancing public policy issues require specialized panels of arbitrators experienced in IP laws and relevant technological expertise.

The IPR owner starts from a position of advantage as the legitimate rights owner, but bears the burden of proof for alleged infringements, validity of its claims under IPR, and sustainable defence against potential abuse of its dominant position. As a general principle, granting an injunction is an equitable remedy, but Courts and tribunals may use its discretionary powers whether to grant an injunction. For interim injunctions it may be fair to grant such applications as a prima facie entitlement[7],

4 *NTP, Inc. v. Research in Motion, Ltd.*, 397 F. Supp. 2d 785 (E.D. Va. 2005).

5 "the Court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.

6 See Art V(2): "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: *(a)* The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or *(b)* The recognition or enforcement of the award would be contrary to the public policy of that country.

7 Based on two leading authorities *Shelfer v City of London Lighting Co Ltd [1895] 1 WLR 287 and Jaggard, cited in HTC Corporation v Nokia Corporation* [2013] EWHC 3778 (Pat).

for a limited duration against security for oppressive injunctions. However, for opposing a permanent injunction, the defendant will be expected to demonstrate with hard evidence, once an infringement is proven, as to why damages may be awarded and not an injunction. By giving a damages award, this sends a wrong signal that acts of infringement can be condoned by just paying the damages which otherwise would be due in any case under a license agreement. That means, one can continue infringing till an IPR owner initiates a legal action.

In Nokia v HTC case, at some point in 2011, Nokia communicated to HTC its belief that HTC was infringing a number of Nokia's non-essential patents and asked HTC to stop using the technology or alternatively to take a short term license, to give HTC time to work around the patents. However, HTC did neither of those things. On 2 May 2012 Nokia sued HTC for infringement of the Patent (and other patents) in Germany. (It also brought proceedings in the USA in respect of various patents[8].) HTC appealed against the decision of partial stay and injunction on new model, during which in the words of Patten LJ, "It would take off the market HTC's flagship range of phones, upon which its commercial reputation and market share appears to be largely based and, after a gap of at least six months, its ability effectively to re-enter the market and to re-establish an equivalent economic position must be at least questionable." After series of trials and appeals in UK Courts alone, HTC was found to be infringing, so a permanent injunction was granted by 3 December 2013, subject to appeal to Supreme Court.

In the matter of Huawei v. ZTE, there was no doubt that ZTE had been infringing the Standard-Essential-Patent ("SEP") owned by Huawei. The notice of infringement and offer to grant a license on FRAND terms (Fair, Reasonable and Non-Discriminatory) was also given to ZTE, which was apparently ignored and or a counterproposal was made for cross-licensing, resulting in no agreement9. Thus, ZTE continued with the use of the patent of "Long Term Evolution Standard for Telecommunications" without a license and payment of royalties, which became a case of obvious infringement. On 28 April 2011 Huawei initiated the legal action in Düsseldorf (Germany) Court, for injunctions against infringements and claim for damages. In March 2013, the Dusseldorf Court referred the matter for preliminary ruling on five questions, to the CJEU, which were answered in July 2015. The defense raised by alleged infringer ZTE was pursuant to Art. 102 of the Treaty on the Functioning of the European Union ("TFEU") inter alia abuse of dominant position, anti-competition law, prohibitory nature of injunction sought, which is unlawful in the EU. The Court decided in the present case in context of the evidence, that Huawei did not violate Art. 102 of the TFEU and neither abused its dominant position. The IPR owner Huawei spent nearly five years in litigation to get a judgment while the willful infringer misused or misinterpreted the public policy grounds.

The ironical balance between effectiveness, fair and equitable necessitated series of litigation at an expense of plaintiff's time and cost. The beneficial outcome of the case was development of a landmark jurisprudence which is being used as a guiding principle in resolving several cases of SEPs on FRAND terms in EU, since the post Huawei v ZTE period till date. The test of being Effective, Fair and Equitable enforcement of IPR is no short of fire-test for gold to show its glitter.

Proportionality

Article 46 of the TRIPS Agreement10 directs that, the judicial authorities when taking a decision against infringers and infringing goods, should give due consideration to impact on others. "In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully

8 HTC Corporation v Nokia Corporation [2013] EWHC 3778 (Pat).

9 Huawei Technologies Limited v ZTE Corp. and ZTE Deutschland GmbH, C-170/13, ECLI:EU:C:2015:477.

10 See Articles 44 to 49, in Agreement on Trade-Related Aspects of Intellectual Property Rights, as amended on 23 January 2017.

affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce." If a permanent injunction causes the shutdown of the plant producing infringing goods, this may be excessive on part of the defendant but is no defence to condone the infringing goods. The parties do have a choice to agree on licensing or royalty payments, but the jurisprudence provides for permanent injunction by default. If such a provision is not available then it will encourage widespread counterfeiting and infringement of IPR of inventors, which in turn may result in market failures[11].

However, if the infringing goods are ordered to be destroyed, which may have a serious impact on the third parties viz. consumer's health, safety, security or communications network worldwide, then an issue of proportionality and adequate damages coupled with punitive measures would be justifiable. In Nokia v HTC quoting from the dicta of Millet LJ in Jaggard case[12], "It has always been recognised that the practical consequence of withholding injunctive relief is to authorise the continuance of an unlawful state of affairs." In the same paragraph a classic example of proportionality can be useful for the tribunals to consider as follows:

> … Nevertheless, references to the 'expropriation' of the plaintiff's property are somewhat overdone, not because that is not the practical effect of withholding an injunction, but because the grant of an injunction, like all equitable remedies, is discretionary. Many proprietary rights cannot be protected at all by the common law. The owner must submit to unlawful interference with his rights and be content with damages. If he wants to be protected, he must seek equitable relief, and he has no absolute right to that. In many cases, it is true, an injunction will be granted almost as of course; but this is not always the case, and it will never be granted if this would cause injustice to the defendant. Citation of passages in the cases warning of the danger of 'expropriating' the plaintiff need to be balanced by reference to statements like that of Lord Westbury LC in Isenberg v East India House Estate Co Ltd (1863) 3 De G J & S 263, 273 where he held that it was the duty of the Court not
>
> 'by granting a mandatory injunction, to deliver over the defendants to the plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make, but to substitute for such mandatory injunction an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained.'"

Though the IPR owner has a legitimate and conclusive legal right to receive an award of permanent injunction against the infringer defendant, but its impact should not be unjustifiable to the defendant. This adds new dimension of "unjustifiability" to the discretionary measure on the grounds of proportionality.

Dissuasive

In cases of clear wilful infringements like NTP v RIM (Blackberry Case) which may be akin to counterfeiting and piracy, judicial authorities often create an effective deterrent to infringement, and send a strong signal of respecting TRIPS Agreement, as well as portray an image of inventor friendly State. In the present context of interconnected, networked economies and use of multiple patented technologies from patent pools or patent thickets, in delivery of services or goods, the probability of infringing some IPR is high, which could be either due to ignorance or misinterpretations of the claims protected under an IPR. A strict message by granting a permanent injunction to dissuade others from infringing, may not be practically feasible. This concept is well illustrated, "In a situation where even circumspect traders who honestly try to respect their competitors' intellectual property rights are more and more likely to infringe patents and where, at the same time, complex technical devices require the use of many inventions, the

11 See Recitals 22 and 29 of the Enforcement Directive of EU.

12 *Jaggard vs. Sawyer*, [1994] EWCA Civ. 1.

threat potential of an injunction may become excessive[13]." Relying on the US case of eBay v. MercExchange which states that a plaintiff will be granted an injunctive relief if it can pass a four-factor test[14]:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that ***the public interest would not be disserved by a permanent injunction.***

In both Common law and Civil law jurisdictions, the evidence on a case by case basis, are weighed against case precedents and rulings from Courts of final appeals (or CJEU in EU Member States), before exercising discretionary measures of the Courts. For arbitral tribunals to consider the applications of injunctive relief, the parties will be expected to provide conclusive evidence and strong reasoning before a tribunal can award an injunctive relief, without violating the public policy. In context of challenges to enforcement of arbitral awards, it may even be interpreted as breach of natural justice in some jurisdictions, thus leading to setting aside of an award.

Conclusion

Injunctive reliefs either as an interim measure or permanent, in the form of a declaratory award, in matters of intellectual property rights infringement, require specialised arbitral tribunals with expertise in relevant technology and IPR laws. The jurisdictions with dedicated IP Courts may be able to deliver judgments on a fast track basis, but subject to appeal process, may still take two to five years. The arbitration forum does provide an effective and timely solution for enforcement of IPRs in States, where arbitrability of IPR matters including validity and invalidity challenges is permitted. Nevertheless, the acumen of balancing between effectiveness, fair and equitable, proportionality, justifiability and dissuasiveness are an expertise by itself. The analysis for review of challenges to validity can be more complex than adopted in the granting of such IPRs, as it could be not only reverse engineering but more like reverse osmosis, to establish both validity and infringement claims, for example in pharmaceuticals, Info-Com Technologies and digital technologies.

13 Ansghar Ohly, *Three principles of European IP enforcement law: effectiveness, proportionality, dissuasiveness*. See at http://ssrn.com/abstract=1523277

14 *eBay Inc. vs. MercExchange, LLC*, 126 S. Ct. 1837 (U.S. 2006).

China Continues to Build Into An International Arbitration Centre

Qing Nancy Ao
Pinsent Masons.

With its increased international trade and investment over the world, and in particular with the launch and development of the Belt and Road Initiative, China continues to improve its dispute resolution services and boost its competitiveness as an international arbitration centre. This article contains a brief introduction to recent development in its continued efforts in raising its profile in the international arbitration industry, from the perspectives of the government, institutions and the court.

Overseas arbitral institutions allowed to establish business divisions in Lin-Gang Special Area

In the case of *Anhui Longlide Packing and Printing Co., Ltd v BP Agnati S.R.L. ([2013] Min Si Ta Zi No.13*), the Supreme People's Court of China confirmed the validity of an arbitration agreement on ICC arbitration seated in Shanghai. This was said to be a significant step for China to open its arbitration market to overseas arbitral institutions. However, debates remained in relation to the nature of awards rendered in the arbitration (i.e. "domestic awards" or "non-domestic awards"), the supervisory jurisdiction exercisable by the Chinese judicial system, and so on.

In 2015, the State Council declared in its *Plan for Further Deepening the Reform and Opening-up of China (Shanghai) Pilot Free Trade Zone* **an intention to** develop Shanghai into a global-oriented arbitration centre in Asia and the Pacific. Since then, the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre, the International Chamber of Commerce and the Korean Commercial Arbitration Board registered and established their Shanghai representative offices in the China (Shanghai) Pilot Free Trade Zone. These representative offices are allowed to carry out publicity and promotion activities, but they are not accepting arbitration cases in China.

On 27 July 2019 the State Council issued the *Framework Plan for the China (Shanghai) Pilot Free Trade Zone Lin-Gang Special Area* ("Framework"), pursuant to which well-known overseas arbitral and dispute resolution institutions are now allowed to establish business divisions in the Lin-Gang Special Area to conduct arbitral business with respect to civil and commercial disputes arising in international commerce, maritime, investment, and other fields. It is the first time that overseas arbitral institutions are allowed to "conduct arbitral business" in Mainland China. The Framework expressly states that Chinese and foreign parties' application for and enforcement of temporary measures such as property preservation, evidence preservation and conduct preservation before and during the arbitration, are legally supported and guaranteed.

The Supreme People's Court further states in its *Opinions on the Judicial Services and Guarantees Provided by the People's Courts for the Construction of the China (Shanghai) Pilot Free Trade Zone Lin-Gang Special Area* (issued on 13 December 2019) that 'judicial examination shall be conducted for arbitral awards'. This makes clear that the Chinese judicial system will exercise supervisory jurisdiction over the arbitration conducted by overseas arbitral institutions through their business division in the Lin-Gang Special Area, and awards rendered will be considered domestic awards.

An overseas arbitral institution applying for the establishment of a business division in the Lin-Gang Special Area must meet the following requirements: (i) It has been lawfully established abroad and in existence for

more than five years; (ii) It has conducted substantial arbitration business abroad, and acclaimed high international reputation; and (iii) The person in charge of the division has not been subject to criminal punishment for an intentional crime. The business divisions will be registered with the Shanghai Municipal Bureau of Justice and filed with the Ministry of Justice of China.

BAC/BIAC issued its investment arbitration rules, the second in China and the fourth worldwide

In 2017 the China International Economic and Trade Arbitration Commission (CIETAC) issued its International Investment Arbitration Rules (For Trial Implementation). These are the first set of standalone rules specifically drafted by a Chinese arbitral institution for international investment disputes. CIETAC published its Panel of International Investment Arbitrators in September 2018, consisting of 21 arbitrators with Chinese nationality and 58 with foreign nationality or from Hong Kong SAR.

In September 2019, the Beijing Arbitration Commission / Beijing International Arbitration Centre (**BAC/BIAC**) issued the BAC/BIAC Investment Arbitration Rules. These are the second set of specialised investment arbitration rules in China, and the fourth worldwide. The key innovations in the rules can be summarized as follows:

(i) Interim review. The tribunal is required to send a draft of the award to the parties before finalizing the award. It is not bound to accept the parties' comments, but may take into consideration those comments where it considers necessary. This mechanism allows the parties to highlight serious errors in the award.

(ii) Appeal proceedings. BAC/BIAC is the first arbitral institution to introduce an appellate procedure in

investment arbitration rules. The grounds of appeal are limited to a) errors in the application or interpretation of the applicable rules of law, b) manifest and material errors of fact, or c) lack of jurisdiction, which balances the desire for finality in the award. The appeal proceedings are intended to provide an alternative channel for correcting errors in the award. However, an appeal shall be based on the consent of the parties. Therefore, the utility of this procedure remains to be seen.

iii) Efficiency and expeditiousness. Several innovations are adopted to enhance arbitral efficiency, for example, a 24-month time limit for the render of awards from the constitution of the arbitral tribunal, the digitalization of the written submissions, an indicative timetable for the stages of arbitration and the rules for expedited procedure.

iv) Balance between confidentiality and transparency. The rules provide that any recordings, transcripts or documents associated with the arbitral proceedings shall remain confidential unless the parties have agreed that the hearing shall be conducted in public. On the other hand, the rules require compulsory publication of certain arbitration documents, including the Notice of Arbitration, the Notice of Appeal, orders, decisions and awards, except for confidential or otherwise protected information therein. The parties are also allowed to apply the UNCITRAL Transparency Rules 2014 to the arbitration in order to further enhance transparency.

CICC rendered rulings on validity and independence of arbitration agreement

In September 2019, the China International Commercial Court (CICC) rendered rulings[1] upholding the validity of arbitration clauses in three contracts. These rulings confirmed that under Chinese legislation an arbitration clause in a contract is an agreement independent of other terms of the contract.

All the three rulings are relevant to the sale and purchase of the shares of Newpower Enterprises Inc., a company registered at the British Virgin Islands. The parties made lots of efforts in negotiating the Equity Exchange Contract and the Debt Settlement Contract. According to the arbitration clause agreed in the contracts any dispute between the parties in relation to the contracts will be submitted to the Shenzhen Court of International Arbitration (SCIA) for arbitration.

After the transaction failed, the Buyer initiated an arbitration against the Seller at the SCIA. The Seller applied to the Shenzhen Intermediate People's Court for a ruling that there was no valid arbitration clause between the parties because the relevant contracts were never officially signed.

The Arbitration Law of China provides that an arbitration agreement exists independently, and the amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement. The law however is silent on the independence of an arbitration clause in a contract, and debates exist on this subject.

CICC decided in its rulings that although the contracts were not officially signed, the parties had reached agreement on the arbitration clause in the contracts. It confirmed that the arbitration clause is independent from the other terms of the contract, and the existence and validity of the arbitration clause should be determined independent from the contract. CICC's rulings also confirmed the judicial review of the validity of an arbitration agreement covers the review on the existence of an arbitration agreement.

Conclusion

In December 2018 China's central authorities issued a document asking for improvements to the country's arbitration system to strengthen its credibility[2]. This marks the beginning of a new era in China's construction of its international arbitration services. With efforts from stakeholders at various levels, China continues to build itself into an international arbitration centre.

1 *[2019] Zui Gao Fa Min Te 1, [2019] Zui Gao Fa Min Te 2, [2019] Zui Gao Fa Min Te 3*

2 *Several Opinions on Improving Arbitration System and Strengthening Arbitration Credibility,* effective from 31 December, 2018

News in brief

New Members

We welcome the following new members to ACICA:

Fellows

Kevin O'Gorman

Tim Breakspear

Max Bonnell

Stuart Catchpole

Associates

Stephanie Brown

Students

Pushpendra Sharma

Dimian Grey

Benjamin Talbot

Titiksha Sinha

Akshat Jaithlia

Adithya Kiliveedu

Ujjwal Maurya

Ishita Garg

Rachit Somani

Monika Saini

Ashwin Ravikumar

Ibrahim Ati

Gaurav Tripathi

Parth Shrivastava

ACICA Rules Revision Consultation

We are pleased to announce the commencement of a public consultation process for the proposed new ACICA Arbitration Rules. This consultation follows extensive work undertaken by the ACICA Rules Committee to consider recent developments in international arbitration practice and procedure. A consultation draft, incorporating proposed changes, has been developed and may be downloaded here.

The ACICA Rules were last revised in 2015 and came into effect on 1 January 2016. The current review process has focused on areas such as multiple contracts, arbitrator appointment, arbitration procedure (including preliminary disposition of issues), time and cost, third party funding and ADR processes. The proposed revisions are aimed at building on ACICA's established practice of providing a just, efficient, timely and quick, cost effective arbitral process.

The consultation draft was launched for public comment by webinar on 5 August 2020. In the webinar Co-Chairs of the ACICA Rules Committee, James Morrison and Malcolm Holmes QC explain the genesis of, and reasons for, the key proposed amendments. The webinar can be viewed here.

ACICA welcomes written comments on the consultation draft until 30 September 2020 at secretariat@acica.org.au. Comments may be provided through completion of this short survey. We look forward to receiving your feedback!

ACICA Resources

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

- ACICA Explanatory Note: Memorials or Pleadings?

The ACICA Practice & Procedures toolkit contains 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

Australian Arbitration Week 2020 – 12 to 16 October 2020

ACICA/CIArb Australia International Arbitration Conference – 12 October 2020 – Register now

We are pleased to confirm that Australian Arbitration Week 2020 (AAW 2020) will be held in the week of 12 to 16 October 2020. ACICA, together with the Chartered Institute of Arbitrators Australia (CIArb Australia), will launch AAW2020 with Australia's premier international arbitration event, the 2020 International Arbitration Conference which routinely attracts speakers and delegates from across Australia and around the world, and the support of national and global institutes, law firms, government, business, judiciary and academia. This year the conference is being offered virtually for registrants across the globe.

A Calendar of Events for AAW2020 may be found on the website.

Recent events

ACICA Webinar – 19 August 2020, 4pm (AEST): Written Submissions in International Arbitration – Memorials or Pleadings?

Watch now

The practice of International arbitration has developed over time to reflect procedures used in many different legal systems, both civil and common law based. One of the areas in which common law litigation practice differs to international arbitration, is the manner in which the written phase of proceedings is approached. In this webinar, we will explore the differences between the "pleadings" approach and the "memorials" approach to written submissions, providing an overview of the pros and cons of these approaches and some tips for best practice, with reference to the recently released ACICA Explanatory Note on this subject.

Chair: Jeremy Chenoweth, Partner, Ashurst

Speakers: Dr Sam Luttrell, Partner, Clifford Chance

Jo Delaney, Partner, Baker McKenzie

Caroline Swartz-Zern, Counsel, ACICA

ACICA45 Webinar – 27 August 2020, 1pm (AEST): *Lifecycle of an Arbitration Series – Evidence in Arbitration* – Watch Now

In this session chaired by Peter Sadler (Quinn Emanuel, Perth), our expert speakers will address Evidence in arbitration: lay and expert evidence from pen to transcript, exploring this topic from the perspective of counsel, expert and tribunal secretary. We are pleased to be joined by speakers Bruce O'Shea (KordaMentha, Brisbane), Cara North (Lipman Karas, Melbourne) and Tim Breakspear (Banco Chambers, Sydney).

ACICA Supported Events

- Australian Disputes Centre (ADC) webinar: *An India Economic Strategy To 2035* – 11 August 2020
- 2020 CIArb Australia and Federal Court of Australia International Arbitration Series: *International Arbitration in the COVID-19 Environment: Virtual Hearings and Beyond* – 15 July 2020
- Asian International Arbitration Centre's (AIAC) special edition of its ADR Online: *An AIAC Webinar Series: Diversity in Arbitration Week* - 14th to 17th July 2020
- ADC Webinar – 16 June 2020: *Party Autonomy During COVID-19* - Testing the Reach of the Tribunal's Mandate

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.

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.

ACICA Corporate Members

Allens › ‹ Linklaters

ashurst

CLAYTON UTZ

CLIFFORD CHANCE

CORRS CHAMBERS WESTGARTH lawyers

DLA PIPER

HERBERT SMITH FREEHILLS

KING&WOOD MALLESONS 金杜律师事务所

HFW

MinterEllison LAWYERS

NEW SOUTH WALES BAR ASSOCIATION

sapere forensic

VICTORIAN BAR

ACICA Ordinary Members

LK LIPMAN KARAS AUSTRALIA · HONG KONG · LONDON

LISTA BARRISTERS

ACICA

Australian Centre for
International Commercial
Arbitration