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ACICA
Australian Centre for International Commercial Arbitration

GLOBAL LEADERSHIP
REGIONAL EXCELLENCE

ACICA
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Leader in International Dispute Resolution

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President's Welcome

Brenda Horrigan
ACICA President

Welcome to the December edition of the ACICA Review, which we hope that you enjoy. We thank all of the authors for their submissions. The months since our last edition in July have been busy as we have all settled into a new way of working and gathering (often virtually) for events. A few highlights are described below.

ACICA Judicial Liaison Committee Dispute Resolution Forum

The ACICA Judicial Liaison Committee organised and held a Dispute Resolution Forum on 20 November 2020, in virtual format. The Forum, which included 6 sessions on topics of interest to the judiciary, the arbitration community and the broader legal community, was aimed at enhancing the dialogue between those constituencies on best practices in improving the efficiency and cost effectiveness of various forms of dispute resolution and sharing learnings from the last several months. The invitation-only event saw registration from nearly 150 practitioners and members of the judiciary from across Australia, all courts and some government departments. Feedback was very enthusiastic.

Australian Arbitration Week

Australian Arbitration Week was held the week of 12 October, with 21 (mostly virtual) events spread across the week. The ACICA/CIArb conference on Monday 12 October was a global event, with speakers from 15 jurisdictions and more than 220 registrants from around the world. Feedback on the conference, and the other events during the week, was overwhelmingly positive.

Event recordings can be accessed from the AAW website: https://aaw.acica.org.au/aaw-2020-recordings/

Arbitration Week 2021 will be held in Sydney, hopefully in a melded in-person and virtual format, in the week commencing 18 October 2021.

Webinars

Both ACICA and ACICA45 have held a number of webinars over the last several months, which have been very well received with registrants from across the world. This virtual format has been a great opportunity to reach a wider audience, and increase our global recognition and footprint. All of the ACICA Webinars and ACICA45 Webinars from this period have been recorded, and are available for viewing on the ACICA website, at https://acica.org.au/acica-webinars/

ACICA Rules Revision

The consultation period for the proposed revisions to the ACICA Rules ended on 30 September 2020, and substantive feedback was received both through the online survey option and virtual consultation sessions. The Rules committee is currently considering the comments received and preparing an updated draft.

ACICA Nationwide Survey

A report of the results of ACICA's nationwide survey of arbitration involving Australia and Australian participants is nearing finalisation, and will be launched early in the new year.

Editorial: Can the 'new normal' make international arbitration more international?

Caroline Swartz-Zern[1] **Julie Litver**[1] **Christian Santos** [1] **Oliver Sestakov**[1]

International Arbitration, like many things, benefits from informed practitioners who have access to a wide range of resources from which to draw and enable their development and growth. Unlike litigation, where practice information is found within a national system and instilled into practitioners from the time they commence practice (if not earlier), the resources that allow practitioners to efficiently use and practice international arbitration as 'best practice' are not necessarily available to all.

International arbitration requires a willingness to seek out different resources and an understanding of how those resources work. To truly practice international arbitration, that is, not just litigation under different rules, practitioners need access to training, recent developments, and an understanding of international practice. As a regional centre of expertise, Australia is well placed to assist the virtual spread of arbitration best practice in this region and beyond.

Enter COVID-19, the effects of which on the health and economies of the world's population are likely to be felt for years if not decades. While undeniably awful, one positive outcome has been the exponential uptake in the use of videoconferencing and webinars. It seems strange in our highly globalised and digital age to say that the COVID-19 pandemic alone has forced a shift in the dissemination of information in the international arbitration community. Instead, we believe there has been a shift in attitude.

Given the increased user comfort with web conferencing technology, effective utilisation of these tools should increase the potential for greater dissemination of information and practical experience in international arbitration to users throughout the world. In this way, can COVID-19 bridge geographic distance and make international arbitration more international?

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Expanding the networking of arbitration

Prior to the global pandemic, information in international arbitration was largely found in physical 'hubs'. In 2015, Emmanuel Gaillard identified three distinct social actors operating in the field of international arbitration:[2]

essential actors - parties and arbitrators;

service providers - arbitral institutions like ACICA, the International Chamber of Commerce, Hong Kong International Arbitration Centre and the London Centre for International Arbitration, all of which aim to provide cost-competitive and efficient case management services to parties from all over the world; and

value providers - international organisations, arbitration clubs, professional organisations and academic institutions specialising in arbitration.

These social actors, along with the resources and expertise they provide (for instance conferences, speaker events and university courses) have largely been concentrated in 'hubs', such as Paris, London, Geneva, Hong Kong, and Singapore.[3] Information from the hubs has flowed readily to other actors in each respective network via spokes, educating local practitioners and filling their toolboxes with essential arbitral 'tools'.

The flow of key resources to more geographically isolated jurisdictions, can be slower and may impact the pace of growth. This is a part of what is often referred to as the 'tyranny of distance'.

In the COVID-19 period, videoconferencing and webinars have transformed from a mere anomaly to indispensable tools in the day-to-day operation of the legal sector. It is possible that such technology can give practitioners around the world access to previously unattainable arbitral expertise: one can simply 'join' a webinar from one's own home and listen live to developments around the globe, and even ask questions of arbitration experts. At the same time, arbitral institutions and other organisations are building know-how and best practice guidance for these web-based practices with unprecedented speed.[4]

Taking advantage of these technologically driven advances will undoubtedly expand existing 'hubs' as they become responsible for disseminating arbitral knowledge and expertise. Shifting the traditional hub/spoke model to one that is 'virtual' could see information that is largely available to regional centres of expertise be widely and more openly distributed. This presents a more equitable path for the distribution of information than a traditional hub, reducing the cost involved and removing barriers imposed by geographic and time zone differences.

A peer leadership network could also work in tandem to the virtual hub approach.[5] This type of network is characterised by leaders who are highly connected, and thus willing and able to share information and resources, provide advice and support and learn from one another.[6] By bolstering their reach through technology, these leaders can be located in more jurisdictions, and also reach out to more jurisdictions. In practice, this enables arbitration practitioners, including those located in jurisdictions that may be on the 'network periphery' to take on this role as arbitration leaders. In turn, this promotes the growth of arbitration knowledge and the development of expertise and skill. As confidence in emerging jurisdictions grows, this will ultimately encourage parties to select those jurisdiction as arbitral seats. We believe this transformation is already underway.

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2 Emmanuel Gaillard, 'Sociology of International Arbitration' (2015) 31 *Arbitration International*, 1-18.

3 White & Case, Queen Mary Study '2018 International Arbitration Survey: The Evolution of International Arbitration' (2018), 9. These jurisdictions are not only the five preferred seat, but contain four of the five most used institutions, according to the Survey.

4 See 'Managing the Impact of COVID-19: Use of Arbitration to Mitigate Risk' (April 2020) available at https://acica.org.au/wp-content/uploads/2020/04/Managing-the-Impact-of-COVID-19_Use-of-Arbitration-to-Mitigate-Risk.pdf; See ACICA Online Arbitration Guidance Note (May 2020) available at: https://acica.org.au/wp-content/uploads/2020/05/ACICA-Online-Arbitration-Guidance-Note.pdf (last accessed 25 May 2020) See also 'ICC Guidance on Mitigating Effects of COVID-19' available at: https://iccwbo.org/dispute-resolution-services/hearing-centre/icc-virtual-hearings/; HKIAC Press Release 'Virtual Hearings at HKIAC: Services and Success Stories' (06 May 2020) available at: https://www.hkiac.org/news/virtual-hearings-hkiac-services-and-success-stories.

5 Bruce Hoppe and Claire Reinelt, 'Social network analysis and the evaluation of leadership networks' (2010) 21 *The Leadership Quarterly*, 600-619.

6 Ibid, 601.

Expanding Access to Information

Through a conscious acknowledgement of the power of these models, the spread of information can be directed to jurisdictions beyond the traditional reach of a 'hub'. For example, just to the East of Australia, the Asian Development Bank has conducted a project in the Pacific Islands[7] since 2016 to boost international investor confidence.[8] So far, the project has supported Tonga (2020), Palau (2020) and Papua New Guinea (2019) in acceding to or ratifying the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('New York Convention')[9], has encouraged the adoption of the UNCITRAL model law – to date Fiji is the only Pacific Island country to have adopted it[10] - and conducted seminars to assist with capacity building.

While there is certainly an appetite for these changes, the relatively recent adoption of the New York Convention by some Pacific Island countries and the focus of international arbitration activity at more established seats in the region may have limited the exposure that South Pacific judges and lawyers have previously had to international arbitration.[11] Limited exposure to best practice in international arbitration may mean users either avoid arbitration as an unfamiliar practice or their experience of arbitration in practice is not as positive as it could otherwise be.

If we continue to distribute international arbitration information by the traditional means of physical conferences and events, geographical distance, among other issues, would likely continue to be a barrier to the accessibility of international arbitration information for more isolated jurisdictions.

Providing training and information to lawyers, judges and the private sector in countries where international best practice is evolving may operate to raise awareness and assist those jurisdictions grow more comfortable with new legal reforms, with international arbitration practice and to develop their own expertise in this area.[12] This will ultimately enable these jurisdictions to become full participants in the global international arbitration community. However, this effort must be ongoing, and accessible (from a cost and time perspective) which is why it is particularly important to use 'virtual hubs' and peer leaders to ensure ongoing connections and sharing of information.

We believe ACICA, and other institutions, have an opportunity arising out of the increased use of technology from COVID-19 to assist with the virtual spread of arbitration training and provide best practice guidance to a greater number of users. This requires a conscious effort, but offers lasting benefit to all users: by increasing access to arbitration knowledge and expertise, users are more likely to adopt best practice and develop a positive view of arbitration practice.

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7 The Pacific Island countries include: the Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu; See Pacific Island Forum Secretariat, 'The Pacific Islands Forum', *Pacific Islands Forum Secretariat* (Web page) <https://www.forumsec.org/who-we-arepacific-islands-forum/>.

8 See 'Regional: Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific' (2016) available at: https://www.adb.org/projects/50114-001/main .

9 Fiji acceded to the New York Convention in 2010.

10 UNCITRAL Secretariat, 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006', *United Nations Commission on International Trade Law* (Web page) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

11 Colin Ballantine, 'Opening Oceania: Reforming International Arbitration Regimes Across the Pacific Islands', *United Nations Commission on International Trade Law* (Paper) <https://www.uncitral.org/pdf/english/congress/Papers_for_Programme/100-BALLANTINE-Arbitration_Regimes_Across_the_Pacific_Islands.pdf>.

12 Asian Development Bank, 'Promotion of International Arbitration Reform for Better Investment Culture in the South Pacific' (Technical Assistance Report, Asian Development Bank, November 2016) 3.

Report of the AMTAC Chair

Gregory Nell SC
AMTAC Chair

2020 will be remembered as the year of COVID-19. From February this year, commercial activities both in Australia and elsewhere in the world, have been severely disrupted by both this novel coronavirus and the measures that governments, including the State and Federal Governments of Australia, have taken to prevent its spread. International commercial arbitration, including in the shipping sphere, was not immune from that impact. Nor, as I noted in my report last June, were the activities of AMTAC.

Australian Arbitration Week Seminar

As a consequence of the pandemic and associated restrictions, including in particular on travelling both to and from and within Australia, Australian Arbitration Week (AAW) this year was held (notionally) in Sydney as an almost completely virtual conference. On the one hand, this militated against the networking and social functions usually associated with the various seminars and conferences conducted during this week-long event, and which are an important aspect of events such as these. However, on the other hand, it did allow the main conference and other events held under the auspices of AAW not only to take place despite the pandemic, but also to benefit from the participation of experienced practitioners from both Australia and overseas who may not have otherwise been able to travel to Sydney for the whole or any part of the week's events.

As in the past, AMTAC hosted a seminar as part of the AAW 2020 events. As a consequence of the pandemic, this year, this was as a lunchtime webinar. It was entitled *"The show goes on… recent developments in arbitration despite COVID-19"* and involved presentations by:

- **Jesse Kennedy** – Barrister, New Chambers, speaking on *"Inghams v Hannigan, when chickens come home to roost: is old authority holding back contemporary arbitration";*
- **Geoff Farnsworth** – Partner, Holding Redlich, speaking on *"Further limits on limited recourse: the Court's discretion in enforcement of a foreign award in Energy City v Hub Street"; and*
- **Chris Sacre / Ryan Hunter** – Partner / solicitor (respectively) HWL Ebsworth, speaking on *"Is your arbitration agreement all double Dutch ?"*.

The first two presentations looked at recent Australian judgments dealing with different aspects of the enforcement of arbitration clauses, and in the second case, an award made pursuant to that clause. The third was a call to both practitioners and parties to consider the terms of their arbitration clause at the time of its agreement, so as to ensure that it adequately describes the matter in which the parties wish any disputes between them to be resolved in accordance with that agreement.

The webinar was recorded and may be viewed on the AMTAC website at Publications, Presentations & Papers – AMTAC, along with the PowerPoint displays that accompanied these presentations.

AMTAC Annual Address

This year's AMTAC Annual Address was delivered on 18 November 2020. Again it was delivered as a webinar as a result of the pandemic. This year's Address – which was the 14th AMTAC Annual Address – was delivered by Rod Nairn AM, the Chief Executive Officer of Shipping Australia Limited (SAL). SAL is the peak industry body promoting and advancing the interests of ship owners and shipping agents in Australia in all matters of shipping policy and safe environmentally sustainable ship operations.

Appropriately, the topic of this year's Address was *"Charting the unknown – how COVID-19 has impacted international shipping"*. In his Address, Rod provided a comprehensive survey of the impact of COVID-19 on various aspects of the shipping industry worldwide (both cargo and passenger vessels) including, inter alia, the regulations introduced in Australia to deal with pandemic and its impact; the effect and some of the problems associated with them, those regulations and their implementation; and the deleterious impact of both the pandemic and the regulations promulgated to deal with it on the crews of commercial shipping, including in Australian ports and waters. This year's Annual Address was topical, interesting and illuminating, at least to those of us who are not working at the coal face of the shipping industry. Some of the comments made were also potentially controversial.

This year's Annual Address was recorded and is available on the AMTAC website at Publications, Presentations & Papers – AMTAC. A copy of Rod's paper will also be available there for downloading shortly. For those who missed this year's Annual Address, it is well worth viewing.

AMTAC appreciates the support that it has received from SAL (as well as AMTAC's other institutional and individual members), including during what has been a difficult year. I therefore wish to take this opportunity to thank Rod Nairn not only for this year's Annual Address, but also for his (and SAL's) support of AMTAC and its activities this year and in previous years. Rod is stepping down as CEO SAL at the end of this year to go *"messing about in boats"* and I wish him well in that endeavour. AMTAC also looks forward to working with his successor, Melwyn Noronha, in continuing to promote the benefits of international commercial arbitration in Australia as an efficient, economical, and effective means of resolving disputes involving members of the Australian shipping industry.

Other seminars

As a consequence of the pandemic, AMTAC has had to postpone other seminars that it had originally planned for this year, including a seminar on arbitration practice and procedure / mock arbitration in Sydney along the lines of similar seminars that AMTAC has previously held in Perth and Melbourne. As the effects of the pandemic abate, social distancing restrictions are further eased, overseas and interstate travel is possible once again and some normalcy returns, it is expected that these postponed seminars will be able to be held in 2021.

As I noted in my report last June, the 21st International Maritime Law Arbitration Moot (IMLAM) competition which was to be held in Singapore this year, was cancelled due to COVID-19 and its associated travel restrictions. Regrettably, for the same reasons, the IMLAM competition will also not proceed in 2021.

The IMLAM competition has for many years now been an important means of promoting both maritime law and maritime arbitration to law students in not only Australia, but Asia, the sub-continent and more recently Europe and the Americas. This has been with a view to encouraging in those students an interest in these areas of law, in the hope that (once they have entered legal practice) they will embrace and promote the use of commercial arbitration as a means of resolving their clients' disputes. AMTAC has for many years now been and remains a proud sponsor of the IMLAM competition. In the past, many of AMTAC's members have also assisted in the competition once underway, in particular in judging the moots. It is hoped that the IMLAM competition will be able to resume in 2022, and when it does, AMTAC looks forward to continuing to sponsor and provide support for that competition and its worthy goals.

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

Faces of ACICA: meet Lucy Martinez

Lucy Martinez
Independent Counsel
and Arbitrator

In this new edition of Faces of ACICA, I had the privilege of having a very interesting discussion with Lucy Martinez about ACICA and international arbitration from an Australian perspective. The discussion took place over email and telephone.

Lucy is an independent counsel and arbitrator, based in Australia and the UK. She has extensive experience advising and representing private and sovereign clients in disputes relating to investment treaties, contracts, and/or national investment legislation, including in various institutional and ad hoc arbitrations. As an arbitrator, Lucy has sat in ACICA, HKIAC, ICC, LCIA, and SIAC disputes (as sole, co-, or presiding arbitrator), seated in Australia, Hong Kong, London and Singapore. Her industry experience includes energy (oil, gas, electricity, mining), tele-communications, satellite technology, banking and finance, insurance and reinsurance, trademarks, shipping, and gambling.

Q. Hi Lucy, you usually divide your time between Australia and the UK – how are you finding these challenging Covid-19 times?

A. This is the longest period I've stayed in one place, without international travel, in twenty years, so it's been quite an adjustment! With no travel on the horizon, I've fully embraced the new Zoom reality - with the concomitant Zoom fatigue.... More broadly, I'm proud of Australia's handling of the pandemic, yet of course also concerned about friends, family, and colleagues in other countries.

Q. Covid-19 has been a catalyst for virtual hearings. In this context, there has been some discussion around arbitrators' powers to hold remote hearings over one party's objection and related due process concerns. What are your views on this?

A. I have co-authored a short article on this topic, which appears in this newsletter, so please read that for more detailed analysis. The short answer is that each case will turn on its own facts, but in the current unprecedented Covid-19 circumstances: (i) tribunals generally have the power to order remote/ virtual hearings over one party's objection; and (ii) due process challenges to awards issued after such hearings are unlikely to succeed, absent unusual and egregious circumstances. For completeness, I also note that challenges to tribunals ordering virtual hearings during the pandemic have generally not been successful, which should provide additional comfort to tribunals in these circumstances.

Q. Any tips for virtual hearings?

A. Speak slowly. Fix your lighting and camera angle before joining the hearing. Test the technology. Have a back-up plan. Triple-check the recipients before you hit "send" on any chat message. Beyond these basic tips, review the plethora of protocols and guidance notes on virtual hearings. And be prepared for something to go wrong – this tip applies for all hearings, whether virtual or in-person!

Q. Going back to your profile, how has your experience studying and working in Australia, the US and the UK served you in international arbitration?

A. I've been lucky to experience law and life (not in order of importance) in three common law countries, Australia, the US and the UK, on disputes involving common law, civil law, and international law, while working (and socialising!) with smart and dedicated people from all over the world. These professional and personal experiences have been extremely helpful in international arbitration because they enable me to keep an open mind on substantive, procedural, strategic, and cultural issues, adapting as necessary to the unique contours and characteristics of each individual case, client, co-counsel, expert, tribunal, and (more recently) co-arbitrators. Also, I

can order bread, coffee, and red wine in most countries, which is obviously extremely useful at the moment….

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

A. Genuine interest in and curiosity about international and comparative law, politics, culture, and economics. Collegiality. A sense of humour. Willingness to work hard, to work as part of a team, and to travel (pre- and post-COVID). Resilience. Ability to master new industries, legal systems, factual and legal issues, and technology, quickly and cost-efficiently. And last but certainly not least – kindness and compassion.

Q. What are the main attractions of international arbitration, and the key reasons for recommending international arbitration?

A. Neutrality of forum; ease of enforcement; and flexibility of procedure. With the ongoing rise of globalisation, international arbitration is the dispute resolution mechanism of the future.

Q. Which "hat" do you enjoy the most, your "arbitrator hat" or your "counsel hat"?

A. I actually wear three professional hats – arbitrator, counsel, and academic. I enjoy each for different reasons, best discussed in more detail over a coffee/cocktail, although they are all stimulating and challenging in different ways. In the arbitrator and counsel roles, I enjoy getting to the heart of a case, through understanding the facts, law, and quantum. There are no short-cuts, so you have to roll up your sleeves and get familiar with all the fact exhibits, legal authorities, and witness statements. In the academic role, I enjoy reading cases simply to understand the law, not to deploy or distinguish the case (as counsel), or to understand how the case affects a draft award (as arbitrator).

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

A. Slowly increasing in visibility and importance, particularly over the last five years, which is great to see and be a small part of. The pandemic will bring new opportunities and challenges to the international arbitration market, and I'm sure ACICA will continue to adapt and thrive.

Q. More generally, how do you see the international arbitration landscape in Australia?

A. It is slowly becoming more "mainstream", which is also great to see and be a small part of. Five or ten years ago, international arbitration in Australia seemed to be regarded as a niche or boutique area of law, but that is slowly changing. With the pandemic, the tyranny of distance has been replaced by the tyranny of the time zone, but as long as we are willing to (continue to) work at unusual hours, Australian arbitration practitioners and arbitrators will continue to rise in the international market. We are also supported by a high-calibre, independent, pro-arbitration judiciary, which will continue to enhance Australia's reputation in the international arbitration market.

Q. Lastly, what's at the top of your travel list?

A. For pure tourism/ animal ogling: the Galapagos. For all other purposes: London, Singapore, Hong Kong, and New York to catch up with friends, family, and colleagues, once travel resumes. And as I write this in mid- November 2020, following the (nerve-wracking) US election results: Wisconsin, Michigan, Pennsylvania, Arizona, and Georgia!

Interview conducted by Guillermo García-Perrote, Senior Associate, Herbert Smith Freehills (ACICA Review Editorial Board member)

Covering all the bases – the rise of baseball arbitration in Australia

Gitanjali Bajaj
Partner, DLA Piper Australia
(ACICA Executive Member)

Adriana Abu Abara
Solicitor, DLA Piper Australia

I Introduction

An emerging trend in the Australian arbitration space over the past year has been the increased take-up of an arbitration process known as 'baseball arbitration' or 'final offer arbitration'. This is a process by which each party proposes a final, conclusive sum to determine an amount to be paid in resolving a dispute, one of which is then chosen by an arbitral tribunal without any variation.

The two most notable instances of this process in recent months have been by government bodies, with the Australian Competition and Consumer Commission (**'ACCC'**) using the process to address bargaining power imbalances between news media businesses and digital platforms, and the Australian Tax Office (**'ATO'**) to resolve instances where a taxpayer has been subject to double taxation by Australia and a second country.

This article provides an overview of the baseball arbitration process, its recent formulation in the Australian context, and a preliminary view as to the scope of its application.

II What Is Baseball Arbitration?

Baseball arbitration has its origins in the USA, where it was used to resolve labour disputes in the public sector and in the baseball league. While there are different iterations of the process, it generally involves each party to the dispute submitting a proposed award to an arbitral tribunal consisting of a sum it proposes be paid, and submissions.

Traditionally, the arbitration is conducted entirely on the papers, without a hearing. The arbitral tribunal then considers both submissions and proposals and decides which of the two it will accept, without any amendment. What this means is that the arbitral tribunal has no discretion to arrive at a 'mid-point', as it were, between the two positions – there is no splitting the baby.

The rationale behind such a procedure is that, given that the arbitral tribunal needs to decide exclusively between

the two offers, parties fear losing the entire case and are incentivised to make realistic quantum proposals. Putting forward an unreasonable position will likely mean an arbitral tribunal is more inclined to accept the competing offer.

The benefit of this type of arbitration is seen principally to be that parties are encouraged to take a reasonable, measured approach to resolving the dispute, given the system is set up in a way that favours the most reasonable party. In light of the all-or-nothing outcome, parties are also encouraged to engage in negotiations and settlement discussions to resolve the dispute before an outcome is reached by an arbitral tribunal.

Two recent examples of this process in use in the Australian context demonstrate the influence of this traditionally American process on dispute resolution involving Australian government agencies.

III Recent Use In Australia

A ACCC – News Media and Digital Platforms

In August 2020, the ACCC released an exposure draft of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill* 2020 (Cth) ('Mandatory Bargaining Code'). The proposed Mandatory Bargaining Code is designed to give Australian media businesses the ability to bargain with digital platforms (such as Google and Facebook) to secure fair payment for news content. Under the Mandatory Bargaining Code, in circumstances where media businesses and digital platforms are unable to reach agreement through negotiation, they may commence baseball arbitration to determine the amount to be paid by the digital platform for the use of news content.

The process of baseball arbitration under the Mandatory Bargaining Code requires that the news business and digital platforms attempt to negotiate in good faith to resolve the dispute for at least three months before initiating baseball arbitration. The key features of the procedure set out in the Mandatory Bargaining Code are:

- the party wishing to commence arbitration issues a notification to the ACCC, stating that 'arbitration about the remuneration issue should start';[1]
- the parties must agree to either one or three arbitrators within five days of the notice of commencing arbitration, failing which, the Australian Communications and Media Authority appoints an arbitrator, who will then notify of an arbitration start date;[2]
- within 10 business days of the start of arbitration, each party must submit its final offer for what the remuneration amount should be;[3]
- a reply can be issued within five business days, however there is no opportunity to make a revised offer;[4] and
- the arbitral panel must accept one of the bargaining parties' final offers within 45 business days of the start of the arbitration.[5]

In the usual form, the arbitral tribunal can only accept one of the parties' final offers. However, the Mandatory Bargaining Code provides a single exception to this in instances where the arbitral panel considers that each final offer 'is not in the public interest because it is highly likely to result in serious detriment' to 'the provision of covered news content in Australia' or 'Australian consumers'.[6] In such circumstances, the arbitral tribunal can adjust one of the final offers 'in a manner that results in that offer being in the public interest'.[7]

In its media release announcing the Mandatory Bargaining Code, the ACCC stated the baseball arbitration mechanism provides a compelling incentive for each party to make reasonable and fair proposals.[8]

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1 *Mandatory Bargaining Code* s 52ZF(2).
2 Ibid ss 52ZG and 52ZH.
3 Ibid s 52ZO(2)
4 Ibid s 52ZR(1)
5 Ibid s 52ZQ(1)
6 [INSERT CITATION]
7 Ibid ss 52ZO(5)-(6).
8 ACCC, 'Australian news media to negotiate payment with major digital platforms' (Media release, 31 July 2020) <https://www.accc.gov.au/media-release/australian-news-media-to-negotiate-payment-with-major-digital-platforms>.

B ATO – Mutual Agreement Procedure Disputes

In January 2019, the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (**'the Multilateral Instrument'**) took effect as an instrument of tax dispute settlement based on diplomatic agreements between governments. Under the Multilateral Instrument, Australia has adopted mandatory binding arbitration for mutual agreement procedure (**'MAP'**) disputes (disputes involving cases of double taxation where the same profits have been taxed in two countries).[9]

The default mode of arbitration under the Multilateral Instrument is baseball arbitration, which can only take place once disputes have been unresolved for a period of two years. A party will be unable to commence arbitration where disputes have been subject to a decision of a court or administrative tribunal not eligible for arbitration or will cause an existing arbitration to terminate, or where parties have made specific reservations under the Multilateral Instrument on the scope of issues eligible for arbitration.[10]

The arbitration will be conducted pursuant to the governance of the Multilateral Instrument and the relevant treaty and will be supplemented through a bilateral memorandum of understanding (**MoU**). The MoU will be negotiated for each case on a country-to-country level and is expected to be modelled off the sample agreement Annexed to the OECD Commentary on Article 25 of the Model Tax Convention (**'OECD Sample Agreement'**).[11] The MoU will establish the framework in respect of the procedure of the arbitration, including the terms of reference, evidence rules, notice procedures, timelines, confidentiality provisions, and structure of the arbitration – some of the elements one would expect to find in a preliminary procedural order.

Pursuant to the Multilateral Instrument and OECD Sample Agreement, the process for arbitration is expected to involve the following:[12]

- three months after a notice of arbitration is received from a taxpayer who is the subject of double taxation, the relevant competent authorities (in Australia, the ATO) agree to terms of reference and communicate it to the taxpayer;
- the competent authorities each appoint one arbitrator within two months, who will then appoint a third arbitrator to be Chair of the tribunal, failing which, the OECD Sample Agreement suggests the Director of the OECD Centre for Tax Policy and Administration to appoint the arbitrators;[13]
- each party will within two months submit a proposed resolution, comprising:
- a best and final offer on the monetary amount; and
- a position paper containing the key facts, the case made by the taxpayer, the view of the merits of the taxpayer's case, how the competent authority proposes to resolve the dispute, and supporting arguments and evidence relied upon by the competent authority;[14]
- each party shall then submit a reply to the alternative resolution;[15] and
- the arbitral tribunal's decision must then be communicated to the competent authorities (the OECD Sample Agreement suggests this be done within 60 days of the last reply submission or, if no reply submission is made, within 150 days after the appointment of the Chair of the arbitral tribunal).[16]

Unlike the ACCC process, this model does not provide any scope for the arbitral tribunal to elect a mid-point between the parties' offers.

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9 *Multilateral Instrument* art 19.

10 [INSERT CITATION]

11 OECD, 'Commentary on Article 25: Concerning the Mutual Agreement Procedure', *Model Tax Convention on Income and on Capital 2017* (OECD Publishing, 2019) at C(25)-50 <https://doi.org/10.1787/b3dc13d5-en>.

12 *Multilateral Instrument* art 19-23.

13 *Multilateral Instrument* art 20; OECD (n 9) at C(25)-52.

14 *Multilateral Instrument* art 23(1)(a)-(b).

15 *Multilateral Instrument* art 23(1)(b).

16 OECD (n 9) at C(25)-54.

IV Comment

In the age of blown-out timetables and growing concerns about over-judicialisation of the arbitration process, baseball arbitration offers certain merits in contrast. It is an attractive tool to resolve relatively straightforward quantum disputes in a cost effective and timely manner. The process encourages reasonable engagement and settlement prospects. In the Australian examples discussed above, it presents an innovative and practical form of dispute resolution to address emerging issues.

While this approach may work well when the only issue in dispute is an amount due, as is the case in the instances of the ACCC and the ATO, this type of arbitration may not be suited to complex commercial disputes which involve questions beyond a matter of quantum.

The tight deadlines imposed in a baseball arbitration procedure, notably the 45-day time limit in the ACCC's Mandatory Bargaining Code, may compromise the ability of the tribunal to address the key issues in dispute. The process for appointing an arbitral tribunal is also relatively short in the ACCC iteration, which underestimates the delicacy of such a process in the commercial arbitration context. While both the ATO and ACCC models of arbitration allow for continued settlement discussions,[17] generally speaking, a short timeframe may also hinder settlement discussions if parties are too far apart commercially to arrive at a palatable negotiated position by the time the process is complete.

It is also unclear as to parties' entitlement to recourse following the determinations. In the ATO process, the OECD Sample Agreement suggests that the decision can only be challenged in certain instances, where issues were previously determined in a domestic court or administrative tribunal. The ACCC Bargaining Code contains no such provision. That said, there is a question of whether the baseball arbitration process is caught under the definition of 'arbitration' for the purposes of the UNCITRAL Model Law on International Commercial Arbitration (Model Law), and in turn, whether it can be seen as an 'international commercial arbitration' under Australia's arbitration acts regime. If the answer is in the affirmative, certain mandatory rules under the Model Law will apply, and recourse under the existing arbitration regime in Australia will be limited to annulment which, in an increasingly pro-arbitration judicial environment, raises further questions about the suitability of this process for more complex commercial arbitration.

V Conclusion

Baseball arbitration is a new phenomenon in Australia, and it remains to be seen whether the recent instances of its use by the ACCC and ATO will catch on more broadly. It is clear that the process is an innovative dispute resolution approach in certain circumstances, such as where the dispute mainly centres on quantum. However, in the context of international commercial arbitration in Australia, as explained above, the approach presents some legal and practical challenges.

Nevertheless, given the current trend we see in government bodies, practitioners should cover all bases and familiarise themselves with the ins and outs of baseball arbitration as the process may become more relevant in the Australian arbitration scene sooner than we think.

17 *Mandatory Bargaining Code* s 52ZM; *Multilateral Instrument* art 24.

News in brief

New Members

We welcome the following new members to ACICA:

Fellows

Dean Lewis

Andrew de Pasquale

John Livermore

Associates

Leonard Watt

David Jenaway

Mark van Brake

Paul Tracey

Margaret Ninsin

Roderick Air

Oliver Gayner

Kate Grimley

Maria Mulla

Students

Ajay

Samiksha Sharma

Arafat Ibnul Bashar

Alexander Humphreys

Akshat Sati

Achintaya Soni

Naina

Karen Wang

Sixing Li

Shikhar Kumar

Muhammad Sakif Jawad

P. Vipul

Minting Luo.

ACICA Rules Revision Consultation

The public consultation process for the proposed new ACICA Arbitration Rules closed on 30 September 2020. Our thanks to everyone who took the time to contribute their input on the consultation draft. All submissions and feedback are now with the ACICA Rules Committee for consideration. It is anticipated that the next edition of the ACICA Arbitration Rules will be released in the first half of 2021.

ACICA Resources

ACICA can play a vital role in, and provide significant value at, all stages of the life cycle of an arbitration. The key areas of ACICA input are summarised in this new resource that was recently added to the ACICA Practice & Procedures toolkit:

- Value of ACICA Input on Life Cycle of Arbitration

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

ACICA Judicial Liaison Committee Dispute Resolution Forum: *Taking Advantage of Technology – Dispute Resolution Best Practice*, 20 November 2020

The ACICA Judicial Liaison Committee convened an invitation-only forum on 20 November 2020 to explore *Taking Advantage of Technology – Dispute Resolution Best Practice*.

This initiative, the first of its kind, brought together 150 members of the judiciary, government and dispute resolution practitioners from across Australia in a virtual forum to consider best practice, the creation of efficiencies in all aspects of dispute resolution and learnings from collective experiences over the course of 2020, particularly in light of COVID-19 enforced operations.

The forum program commenced with *Chief Justice Allsop AO in conversation with Doug Jones AO* in a session that explored methods for the creation of efficiencies in dispute resolution practice. Panel sessions followed on topics covering the whole spectrum of dispute resolution - document management and cyber security, procedural fairness, advocacy, alternative dispute resolution and cooperation between the courts and arbitration.

The half day forum was moderated by Judith Levine, independent arbitrator and Vice President of ACICA, and featured expert speakers from around Australia and the region including judicial officers from various Australian courts and leading international and domestic dispute resolution practitioners.

The ACICA Judicial Liaison Committee anticipates convening other forums focused on dispute resolution in the future.

Read the full media release here.

ACICA Events

A new series of ACICA events will be launched in early 2021 so keep an eye on the ACICA Events page for more details!

Recent Events

Webinar: *Impact of COVID-19 on Quantum: Insights from Around the World* – 19 November 2020

View Webinar Here

In this engaging Q&A Panel discussion international experts from FTI Forensic & Litigation Consulting (www.fticonsulting.com) from key jurisdictions around the world discussed the impact of COVID-19 on quantum, comparing observations across jurisdictions and highlighting some challenges and opportunities ahead.

Moderator: John-Henry Eversgerd

Panellists: Dawna Wright (Melbourne) | Stephen Rae (Perth) | Alexander Davie (London) | Steve Harris (Dubai) | James Nicholson (Singapore).

AMTAC Annual Address 2020: *Charting the Unknown – how COVID-19 has impacted international shipping* – 18 November 2020

View Webinar Here

The 14th AMTAC Annual Address was delivered by Mr Rod Nairn AM, CEO of Shipping Australia exploring the varied impacts of the COVID-19 virus on all aspects of international shipping operations.

Australian Arbitration Week 2020 and the ACICA/CIArb Australia International Arbitration Conference 2020 – 12 October to 16 October 2020

Obtain and View Event Recordings Here

A full editorial on Australian Arbitration 2020 may be found at page 35.

ACICA Supported Events

- Asian Development Bank Webinar: *Timor-Leste, Promoting Business Confidence Through International Commercial Arbitration* – 8 December 2020 (Timor-Leste, Virtual)
- Fordham University School of Law Conference on International Arbitration and Mediation: *Key Issues in International Dispute Resolution 2020* (New York, Virtual)
- FDI Moot 2020 Global Rounds – 6 November 2020 (Seoul, Korea)
- ADR in Asia Conference: *Redesigning Arbitration* – 21 & 23 October 2020 (Hong Kong, Virtual)
- USC Gould/JAMS Webinar: *Global Construction Dispute Resolution Update 2020* – 14 September 2020 (United States of America, Virtual)

Corruption and International Arbitration – Toils and Tools for Tribunals

Judith Levine
Independent Arbitrator, Levine Arbitration
(ACICA Vice President, ACICA Fellow)[1]

Corruption allegations frequently arise in international arbitration, particularly in disputes involving infrastructure projects and investments in the extractive or defence industries. The approach of arbitrators towards corruption has 'evolved from an initial quasi-indifference, towards a constant care to avoid arbitration be[ing] used for concealing illicit trade practices.'[2] The evolution of this more robust approach has occurred around the same time as the United Nations Convention against Corruption ('UNCAC')[3] came into effect, evincing a worldwide condemnation of the evil of corruption.

Heralding the UNCAC as a new stage in the fight against corruption, in 2006 the arbitral tribunal in *World Duty Free v. Kenya* found 'that bribery is contrary to the international public policy of most, if not all, States' and found it could not uphold claims 'based on contracts of corruption or on contracts obtained by corruption.'[4] A decade later, the tribunal in *Croatia v. Mol Hungarian Oil and Gas* observed, based on UNCAC and other international instruments, that it is 'generally accepted that corruption is a cancer that eats into the body politic,' and that despite efforts to stamp it out, corruption remained endemic in certain parts of the world.[5] The tribunal 'seriously' examined the allegations before it but in the circumstances was not convinced there was sufficient evidence for a finding of corruption.

Despite the consistent condemnation of corruption generally, there remains a lack of consistency in what arbitral tribunals actually do in the face of corruption allegations. While there is agreement that 'difficult factual and legal issues at practically every stage of the process'[6] when corruption is raised, many bemoan that 'the law is far from settled' and lawyers 'operate in largely uncharted terrain.'[7] It is thus 'important for arbitrators to develop a coherent approach to cases of corruption in arbitration.'[8] This article describes common scenarios in which arbitration parties raise corruption allegations, both as a 'shield' and as a 'sword'. It then canvasses some issues of proof and practical matters arising in the course of proceedings. Finally, it draws attention to recent efforts to equip arbitrators with better tools to address corruption allegations.

A. Common Scenarios of Corruption Allegations in Arbitration

Corruption as a Shield

The most common scenario is for corruption to be raised as a shield by respondents to defend against claims for breach of contract or of protections in an investment treaty. The first type of shield cases stem from 'contracts of corruption.' These typically involve cases where companies hire intermediaries to conduct business in a

1 Independent Arbitrator, www.levinearbitration.com. This article is adapted from remarks at the launch of C.E. Rose, M. Kubiciel & O. Landwehr (eds), *The United Nations Convention Against Corruption: A Commentary* (OUP, 2019).
2 A. Crivellaro, 'Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption', 3 *TDM* (2013).
3 *United Nations Convention Against Corruption* (adopted 31 October 2003, 2349 UNTS 41).
4 *World Duty Free Company Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006) at [157].
5 *Croatia v. Mol Hungarian Oil and Gas Plc*, PCA Case No. 2014-15 (23 December 2016) at [92].
6 M. Hwang, K. Lim, "Corruption in Arbitration—Law and Reality" 1 *Asian Int'l Arbitration Journal* (2012), p. 2; See also C. Rose, 'Questioning the Role of International Arbitration in the Fight Against Corruption', 31 *Journal of Int'l Arbitration* (2014) 183.
7 J. Reynoso et al., 'The Corruption Defense: Practical Considerations for Claimants' *Kluwer Arbitration Blog* (22 January 2019).
8 K. Betz, 'Arbitration and Corruption: A Toolkit for Arbitrators', 2 *JACL* (2018), pp. 183-195 at 195.

foreign country.[9] The contract may be in the form a consultancy or agency agreement that on its face looks legitimate but may be used as a cover for paying bribes. The contract contains an arbitration clause, which the agent uses to sue the principal for unpaid agent fees. As a defence, the principal might argue that the claim should be dismissed because the contract was void for corruption. This happened in two ICC cases relating to consultancy agreements where the tribunals were convinced that the commissions paid were intended to be used to bribe state officials in order to win contracts. The contracts were held to be void, and the consultant could not recover its unpaid commissions (nor could the principals claim back commissions already paid).[10]

The second type of case where corruption is used as a shield is for 'contracts tainted by corruption.' This is when a contracting party sues its counterpart (often a State) in respect of performance of a contract. The respondent then defends the claim on the basis that the contract was tainted by corruption. For example, in *Vantage v. Petrobas*,[11] Vantage drilling company sued Petrobas for breach of contract. Petrobas argued that the contract was void, on the basis of Vantage's knowledge of illegal bribes. The tribunal found no convincing evidence to demonstrate bribery and in any event held that subsequent novations and amendments estopped Petrobas from claiming the contract was void. A Texas court declined to relitigate bribery claims.[12] Another example is *World Duty Free*.[13] The unique aspect of that case was the direct evidence of bribery – the claimant himself testified that he had delivered a suitcase of $2 million in cash as a donation to the president of Kenya, in exchange for the duty free lease at Nairobi airport. When the investor later sued for breach of the lease, Kenya argued the investor was not entitled to pursue its claim because the contract was procured by bribery. The tribunal dismissed the claim, setting out a zero tolerance approach, such that contracts obtained by corruption cannot be upheld as matter of national and international public policy.

The third type of shield case is when a respondent State alleges that corrupt conduct by an investor removes the benefit of any investment protections under a treaty. In *Metal-Tech v. Uzbekistan*, the claimant sued for expropriation of its investment in a chemical plant. The State alleged corruption in the making and operating of the investment. There were unexplained services for which a consultant with government contacts was paid $4 million. The tribunal dismissed the claim because the investment was not implemented 'in accordance with law', as required by the treaty.[14] There are similar examples where investors have been denied claims due to fraud in the making of investment.[15]

Fourthly, corruption has also been raised as a shield at the award enforcement or set aside stage. For example, in 2019, alleging that investors had engaged in corrupt conduct, the Russian Federation unsuccessfully urged a Dutch court to suspend enforcement of a $160 million award rendered under the Ukraine-Russia investment treaty for expropriation of real estate in Crimea.[16] More recently, the High Court of Justice in London allowed Nigeria to ask for a set-aside of an award after the usual time limit, on the basis of a strong prima facie case of bribery and dishonesty.[17]

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9 *See supra* n.2 at 1-2; 14. See also ICC, 'Tackling corruption in arbitration', and V. Khvalei, 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption' (both in ICC *Int'l Court of Arbitration Bulletin*, Vol. 24/ Special Supplement 2013); and ICC Guidelines on Agents, Intermediaries and Other Third Parties (ICC Commission 2010).

10 *See* ICC Case 13515, Final Award (Apr. 2006), ICC Bulletin Vol. 24/Special Supplement (2013), at 66; *See also* ICC Case 13914, Final Award (March 2008) (in same volume) at 77. The evidence of bribery will vary, and there may be a fine line between acceptable 'lobbying' and undue 'influence peddling'. See A. Llamzon, Trading in Influence, in C. Rose et al. *supra* n.1.

11 *Vantage v Petrobras*, ICDR Case No. 01-15-0004-8503, Final Award (28 June 2018) at 272-292. See also example discussed by A. Llamzon, in Rose et al, *supra* n.1, citing *NIOC v Crescent Petroleum* [2016] EWHC 510 (Comm).

12 *Vantage Deepwater Company v. Petrobras America Inc.*, Civil Action No. 4:18-CV-02246 (S.D. Tex. May 17, 2019).

13 *Supra* n.4.

14 *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 Oct. 2013), paras 86, 197, 204, 278-390.

15 E.g., *Inceysa Vallisoletana SL v. El Salvador*, ICSID Case No. ARB/03/26, Award (2 Aug. 2006), paras 230, 238-239, 242.

16 'Russia fails to suspend enforcement of Crimea award' *Global Arbitration Review* (12 June 2019), citing *Russia Federation v. Everest Estate LLC et.al.*, Case No. 200,250,714-01, Hague Court of Appeal (12 June 2019).

17 'English court allows Nigeria to argue that P&ID mega-award should be set aside' *IA Reporter*, 4 September 2020, *citing Federal Republic of Nigera v. Process & Industrial Developments Ltd* [2020] EWHC 2379 (Comm).

Corruption as a Sword

Corruption has also been raised by claimants as a sword in international arbitrations. In *Chevron v. Ecuador*,[18] Chevron claimed denial of justice under the US-Ecuador BIT, pointing to corrupt judicial processes. The tribunal found that a $US 9.5 billion judgment by an Ecuadorian judge was procured through fraud, bribery and corruption, and had not been drafted by the judge. After consulting forensic experts, the tribunal observed that the evidence establishing the ghost-writing 'must be the most thorough documentary, video and testimonial proof of fraud ever put before an arbitral tribunal.'

Another example of a foreign investor alleging corruption is *EDF v. Romania*.[19] EDF obtained a license for airport services and claimed the license was not extended because the investor refused to pay a bribe. The tribunal examined the documents and witnesses but was not ultimately convinced that the allegations were sufficiently made out by the claimant to discharge its burden with 'clear and convincing evidence.'[20] The tribunal has been criticized for acknowledging that corruption is notoriously difficult to prove while at the same time requiring, due to the seriousness of the accusation, that allegations be proved to a heightened standard.[21]

A third example, from the commercial context, is *Vale v. BSG Resource*, concerning a mining joint venture in Guinea.[22] Vale claimed BSGR bribed various officials in order to obtain mining concessions. A bribery investigation led to revocation of the mining licenses and Vale sued BSGR, seeking over a billion dollars in damages

18 *Chevron & Texaco v. Ecuador*, PCA Case 2009-23, Second Partial Award on Track II (30 August 2018) at 8.12, 8.54.
19 *EDF' (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009).
20 *Ibid*. para. 221; *See also EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, PO3 (29 August 2008), para. 28.
21 C. Partasides; 'Proving Corruption in International Arbitration' 25 *ICSID Review* 47 (2013).
22 *Vale SA v. BSG Resources Limited*, LCIA Arbitration No. 142683, Award (4 April 2019) at 7, 297-299, 360-367, 454-477, 492.

for fraudulent misrepresentations and for breach of warranties. An LCIA tribunal found BSGR fraudulently induced Vale to enter into the JV and had bribed Guinean officials. The award observes that the task of arbitral tribunals is 'not to be engaged in fights against corruption' nor to 'accept bribery as a fact of life in some countries and keep eyes shut' but rather to find a 'middle course' in view of the 'limited evidentiary and coercive powers in private commercial arbitration and the uphill task of establishing corruption.'

B. Issues of Proof and Other Practical Matters

As noted by the *EDF* and *Vale* tribunals, corruption can be notoriously difficult to prove because it is inherently secretive and the various actors will have taken steps to conceal it.[23] Arbitrators do not have coercive powers and have limited means of investigation.

Tribunals have also not been uniform in their approach to proof. Most accept that the burden of proving a fact rests on the party alleging it, but there are differing opinions on whether that burden should shift once allegations are made. There have also been different approaches with respect to standard of proof. Current trends suggest that the civil standard of balance of probabilities is sufficient, though there have also been decisions raising the bar to something higher, such as "clear and convincing" evidence. Direct evidence of bribery, such as the testimony in *World Duty Free* is rare. Most often, tribunals will need to rely on circumstantial evidence. The following approaches have been deployed by tribunals:

Use of 'red flags' or 'indicia of corruption', for example the modalities and amounts of payments to consultants, which have triggered tribunals to raise questions as to the genuine nature of an agency or identity of third parties.[24]

Tribunals may draw adverse inferences following failure to comply with document production orders, as was done in the *Vale* case.[25]

Tribunals might call witnesses on their own initiative, as was done in *Metaltech*.[26]

Tribunals might retain independent forensic experts, as was done in *Chevron v. Ecuador*.[27]

Toolkit for Arbitrators to Address Corruption Allegations

To address some of the practical challenges of conducting an arbitration involving corruption allegations, and the lack of uniformity of approach to date, some practitioners and scholars have teamed up to produce a 'Toolkit for Arbitrators' ('Toolkit').[28] This was an initiative of the Basel Institute on Governance and Competence Centre for Arbitration and Crime. It aims to assist arbitrators who face the dilemma of not wanting to condone corruption, but at the same time not wanting to let parties use corruption as a means to escape their obligations. It helps arbitrators address issues in a systemic and comprehensive manner and to find solutions in accord with applicable laws. The expressed hope is that using the toolkit may lead to 'a greater chance of enforcement.' The Toolkit appears to be a useful starting point in terms of:

- using of red flags to help arbitrators identify potential corruption;
- directing attention to sources like UNCAC to help define corruption and bribery concepts;
- suggesting ways in which to request information from the Parties;
- setting out options on standard of proof;
- assuring arbitrators that there is no need for direct evidence of corruption;
- encouraging arbitrators to use adverse inferences; and
- basic guidelines on legal consequences of corruption in investment and contract disputes.

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23 See M. Hwang, *supra* n.6 at paras. 28-47; C. Partasides, *supra* n.21 at paras. 9, 22; ICC, "Tackling corruption", *supra* n.9.

24 ICC "Tackling corruption", *supra* n.9.

25 *Supra* n.21

26 *Supra* n.14, paras. 93-99. For witnesses concerned for safety, practical measures can be taking to ensure safe passage or participation by video, as has been done in several PCA cases.

27 *Supra* n.17, para. 11.

28 Basel Institute on Governance, 'Corruption and Money Laundering in International Arbitration – A Toolkit for Arbitrators' (2019).

The Toolkit is a welcome initiative, which will become even more useful with annotations or commentaries pointing to more actual examples from practice. One hindrance to gaining insights and understanding of the true extent of corruption in international arbitration is that most arbitration takes place in private. Several of the cases mentioned above only came to light as a result of set-aside or enforcement applications in courts. Occasionally, the ICC Bulletin has published special editions summarising and extracting confidential cases. There has, however, been a notable trend towards greater transparency, initially in the investor-state context[29] and more recently in commercial arbitration.[30] The more information there is available about how corruption is and should be dealt with in international arbitration, the more practitioners can digest it, comment on it, and synthesize approaches. This in turn can only serve to complement and enrich projects like the Toolkit.

29 *See* ICSID, 'Proposals for Amendment of the ICSID Rules', Working Paper 4 (February 2020), Rules 62-68; UNCITRAL Rules (2013), Art. 1(4); UN Convention on Transparency in Treaty-based Investor-State Arbitration (2015).

30 The default in ICC arbitrations as of January 2019 is that awards will be published within 2 years of their issuance. *See* ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration,' 1 January 2019, 40-42.

Virtual Hearings and Due Process: Recent Australian Court Decisions

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I INTRODUCTION

Before the COVID-19 pandemic, international arbitration merits hearings were usually held in-person, with occasional video-conference testimony from witnesses unable to travel due to individual visa or health restrictions.[1] During the pandemic, almost all international arbitration merits hearings are being conducted by video-conference, or in hybrid virtual/in-person formats. With this sudden shift, some losing parties will inevitably seek to set aside awards, and/or resist recognition and enforcement, on the basis of alleged lack of due process at the virtual hearing.[2] In this context, this article briefly summarises pre- and mid-pandemic Australian court decisions regarding virtual hearings and due process, and sets out certain conclusions based on this jurisprudential review.

II Pre-Pandemic Precedent: *Sino Dragon v Noble Resources*

The leading Australian pre-pandemic precedent on the issue of virtual arbitration hearings and due process is *Sino Dragon v Noble Resources* (**'Sino Dragon'**).[3] The dispute arose out of an iron ore sales contract, which provided for UNCITRAL arbitration.[4] At the merits hearing, held in Sydney, certain witnesses proffered by Sino Dragon (**'SD'**) gave evidence by video-conference, at SD's request.[5] Various 'technical difficulties in the mode of communication' arose, including the planned video-link not working and instead evidence was given by another platform; a 'split format' was adopted, with video transmitted via computer, and audio by a separate telephone link; witnesses could not access relevant documents; the interpreter was not qualified and was replaced; and another fact witness was apparently present in the room with one witness during his testimony.[6] In the final award, the tribunal ruled in favour of Noble Resources (**'NR'**); NR successfully enforced the award in Hong Kong and also filed a winding-up petition against SD in Hong Kong courts.[7]

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1 See, eg, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, [23]; I*slamic Republic of Pakistan v Republic of India (Indus Waters Kishenganga Arbitration)*, PCA Case No. 2011–01, Partial Award, 18 Feb. 2013, [105]-[111] (discussing relative merits of in-person, telephone, and video-conference evidence; the relevant witness testimony in that case was ultimately withdrawn).

2 For purposes of this article, "virtual hearings" means hearings conducted in whole or in part by video-conference or tele-conference, as opposed to in-person hearings where all participants are physically present in one location. "Procedural fairness" and "due process" are used interchangeably to refer to the ability to present one's case, the right to be notified of the proceedings and the other side's case, the rights to be heard and to be treated equally, and similar "natural justice" principles, which may potentially overlap with issues regarding public policy, under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, and implementing legislation, such as the *International Arbitration Act* 1974 (Cth).

3 *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131.

4 Ibid [1]-[3].

5 Ibid [3], [149].

6 Ibid [149] (quoting paragraphs from the award, summarising the technical difficulties).

7 Ibid [3]-[4].

SD then applied to set aside the award in the Federal Court of Australia (**'FCA'**), alleging, *inter alia*, lack of procedural fairness, unequal treatment, and inability to present their case.[8] SD alleged that the video-conference evidence 'was beset by technical difficulties, which meant that such evidence could not be properly presented'.[9] The FCA (Beach J) rejected SD's arguments noting, *inter alia* that SD chose the mode for its witness evidence; SD selected the video-conference technology, and did not properly test it before the hearing; the technical difficulties did not result in the exclusion of SD's witness evidence; SD did not object during the video-conference hearing, nor in closing submissions; to the contrary, SD's closing submissions emphasised the clear testimony of SD's witnesses and the consistency of that testimony with SD's case theory; and the video-conference difficulties mainly caused issues for NR, as the cross-examining party, and not SD.[10] Critically for present purposes, the FCA found that 'the mode of evidence by telephone or video conference, although less than ideal compared with a witness being physically present, does not in and of itself produce "real unfairness" or "real practical injustice"'.[11]

Sino Dragon sets a high bar for due process challenges to awards rendered after a virtual hearing. The decision also confirms the importance of contemporaneous objections to any perceived due process issues before, during, and after the virtual hearing; and testing video-conference technology, and using trusted providers, before the virtual hearing.[12]

III Mid-Pandemic Precedents

A Virtual Hearing Appropriate

During the pandemic, a number of Australian courts have accepted that virtual hearings are appropriate, and rejected arguments based on alleged unfairness or lack of due process – albeit in the context of litigation, not arbitration.[13] For example, *Capic v Ford Motor Co.* was a class action alleging defective gear boxes, scheduled for a six-week hearing in mid-2020, potentially involving 50 witnesses.[14] Ford applied for an adjournment based on the pandemic, arguing that the trial should be conducted in-person. Capic submitted that the trial should proceed in a virtual format.[15] In a carefully detailed opinion, the FCA (Perram J) rejected Ford's objections based on, inter alia, technological limitations, physical separation of legal teams, cross-examination of expert and lay witnesses, document management, and trial length and expense associated with virtual hearings.[16] The FCA noted that technological challenges involved with virtual hearings were 'tiresome' and 'aggravating' but 'tolerable' and 'not insurmountable', and concluded:

Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. Nonetheless, these are not ordinary circumstances and we have entered a period in which much that is around us is, and is going to continue to be, unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try.[17]

8 Ibid [5]-[6].

9 Ibid [6(b)] (summarising SD's arguments).

10 Ibid [155]-[178].

11 Ibid [154].

12 The judgment is also notable for its use of the term "floccinaucinihilipilification", the action or habit of estimating something as worthless. Ibid [116(d)], in dismissing other arguments by SD.

13 See, eg, *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486 (Perram J); *ASIC v GetSwift Limited* [2020] FCA 504 (Lee J); *Wharton on Behalf of the Kooma People v State of Queensland* [2020] FCA 574 (Rangiah J); *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd* [2020] FCA 1153 (Stewart J); *Long Forest Estate Pty Ltd v Singh* [2020] VSC 604 (Dixon J); *Ozemac Pty Ltd v Jackanic* [2020] VCC 790 (Ryan J); *Ascot Vale Self Storage Centre Pty Ltd (In Liquidation) v Nom de Plume Nominees Pty Ltd* [2020] VSC 242 (McDonald J); *McDougall v Nominal Defendant* [2020] NSWDC 194 (Abadee DCJ); *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38 (Buss P, Vaughan JA).

14 *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486, [1], [16], [18].

15 Ibid [1].

16 Ibid [10]-[26].

17 Ibid [10]-[12], [25].

One additional example is *ASIC v GetSwift Limited* concerning an action by the regulator together with a class action alleging breaches of securities laws, with some defendants based in the United States.[18] The case was scheduled for a ten-week hearing in mid-2020, potentially involving 41 witnesses.[19] The defendants applied for an adjournment based on the pandemic, arguing that the trial should be conducted in-person; ASIC submitted that the trial should proceed in a virtual format.[20] The FCA (Lee J) rejected the defendants' objections noting, *inter alia*, that the witness evidence was 'relatively confined', and cross-examination of the US witnesses and defendants would be at hours convenient to them (and not necessarily convenient to the FCA and counsel).[21] Whilst acknowledging criticisms about virtual hearing technology, the FCA noted that there was nothing 'second rate' about virtual hearings, including virtual cross-examination, and 'at least in some respects, it was somewhat easier to observe a witness closely through the use of the technology than from a sometimes partly obscured and … distant witness box.'[22]

These cases (like *Sino Dragon*) are potentially helpful to parties seeking to uphold arbitration awards issued after virtual hearings, particularly where such a hearing was held over the objection of one of the parties.

B Virtual Hearing Not Appropriate

By contrast to the cases discussed above, during the pandemic a number of Australian courts have concluded that virtual hearings are *not* appropriate, and accepted arguments based on alleged unfairness or lack of due process – albeit in the context of litigation, not arbitration.[23] For example, *ASIC v Wilson* involved alleged breaches of statutory directors' duties and misleading or deceptive conduct.[24] The case was scheduled for a 15 day hearing in mid-2020, potentially involving 11 witnesses.[25] One key issue was the credibility of a US-based witness, who would testify on matters not covered by contemporaneous documents.[26] The defendants applied for an adjournment based on the pandemic, arguing that the hearing should be conducted in-person.[27] ASIC submitted that the cross-examination should proceed in a virtual format.[28] The FCA (Jackson J) accepted the defendants' objections, declined to order a virtual hearing, and adjourned the proceedings until an in-person hearing could be held.[29] The FCA found that there was 'a real risk that [the defendant] will not have a fair and proper opportunity to test the evidence of [the US witness] if that evidence is not given in-person' and the risk of injustice to the defendant outweighed the risk of injustice to ASIC and any resulting harm to the public interest.[30]

Australian courts have also refused to order virtual hearings in litigation (not arbitration) involving allegations of fraud, misrepresentation, forged documents, self-represented litigants, employment

18 *ASIC v GetSwift Limited* [2020] FCA 504.
19 *ASIC v GetSwift Limited* [2020] FCA 504, [1]-[3], [13]
20 Ibid [4], [9], [11]-[23].
21 Ibid [29], [36].
22 Ibid [25], [33].
23 See, eg, *Roberts-Smith v Fairfax Media Publications Pty Limited (No 4)* [2020] FCA 614 (Besanko J); *ASIC v Wilson* [2020] FCA 873 (Jackson J); *Tetley v Goldmate Group Pty Ltd* [2020] FCA 913 (Bromwich J); *Rooney v AGL Energy Limited (No 2)* [2020] FCA 942 (Snaden J); *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430 (Delany J); *Quince v Quince* [2020] NSWSC 326 (Sackar J).
24 *ASIC v Wilson* [2020] FCA 873.
25 Ibid [2]-[4], [13].
26 Ibid [15]-[16], [26]-[28].
27 Ibid [4]-[5].
28 Ibid.
29 Ibid [37].
30 Ibid [26], [34]-[38]. Contra *ASIC v GetSwift Limited* [2020] FCA 504 (discussed above - Lee J reached the opposite conclusion, ie a virtual hearing was appropriate; contemporaneous documents were available on the relevant issues).

disputes, defamation, and national security concerns.[31] In addition, some Australian courts have refused to order virtual hearings in litigation involving witnesses based in the People's Republic of China ('PRC'), based on potential PRC civil procedure law restrictions on such evidence[32] - although these restrictions may not apply in the context of arbitration.

These cases are potentially helpful to parties seeking to challenge arbitration awards issued after virtual hearings, particularly where such a hearing was held over the objection of one of the parties.

IV Conclusion

Based on our research to date, it appears that no arbitration award, whether issued pre- or mid-pandemic, has been set aside on the basis of lack of due process at a virtual hearing, and such challenges are unlikely to succeed absent exceptional circumstances – at least in Australian courts. Such challenges will naturally turn on the facts and circumstances of individual cases, including, *inter alia*:

- the nature of the allegations and evidence, including complexity and quantum, whether the case involves allegations of fraud, availability of contemporaneous documents, the number of witnesses, and the need for translation;
- the parties' conduct during the arbitration, including any agreement to the virtual hearing, and the complaining party's conduct before, at, and immediately after the virtual hearing;
- parity of treatment, or lack thereof, between the parties at the virtual hearing, for example whether all witnesses were cross-examined virtually and at a time-zone convenient to the witnesses, and 'digital equality' between the parties and their counsel in terms of stable and reliable Internet access;
- the tribunal's reasoning in relation to the virtual hearing and any procedural fairness objections, ideally set out in a detailed procedural order, and in a detailed 'procedural history' section of the award; and
- the applicable institutional rules, including the scope of the tribunal's authority to decide procedural and evidentiary matters.[33]

Finally, it is worth noting that enforcing courts will inevitably view award challenges through the prism of their own (positive and negative) experience with virtual hearings, which will inevitably accrue in the coming months.

The authors will continue to monitor relevant Australian court decisions as part of our work as national reporters for Australia for the forthcoming ICCA Report on "Does a Right to a Physical Hearing Exist in International Arbitration?". The authors are also conducting research in other "arbitration-friendly" jurisdictions, such as Hong Kong, Singapore, the United Kingdom, and the United States,[34] which will be published in due course.

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31 See supra note 22.

32 See, eg, *Motorola Solutions, Inc. v Hytera Communications Corporation Ltd (Adjournment)* [2020] FCA 539 (no virtual hearing), [2020] FCA 987 (video-conference evidence appropriate because witnesses could travel to Macau, thus avoiding potential application of PRC law) (Perram J); Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd [2020] NSWSC 732 (Robb J); but see Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd [2020] FCA 1153 (Stewart J) (approval granted by relevant PRC authority).

33 See, eg, *ACICA Rules 2016*, Arts 21.1, 21.4; *HKIAC Rules 2018*, Arts 13.1, 22.5; *ICC Rules 2021* (forthcoming), Arts 22(2), 26(1); *ICDR Rules 2014*, Art. 20.1, 23.3, 23.5; *LCIA Rules 2020*, Arts. 14.2, 14.5, 19.2; *SCC Rules 2017*, Art. 23(1); *SIAC Rules 2016*, Arts. 19.1, 25.3; *UNCITRAL Rules*, Arts. 17(1), 28(2), 28(4).

34 See, eg, *Legaspy v. Financial Industry Regulatory Authority*, Case 1:20-cv-04700, US DC ND Ill., Opinion and Order, 12 August 2020 (during pandemic, court rejected procedural challenge to FINRA arbitration proceeding via video-conference; court denied motions for temporary restraining order and preliminary injunctions).

The Law Governing the Arbitration Agreement: An Underrated but Important Lex

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1 One of the complexities about international commercial arbitration is the range of different national laws that can apply to distinct issues in a proceeding.[1] There is the law governing the substance or merits of a dispute (the *lex causae*) which is normally, but not always, chosen by the parties in the main or host contract that contains the arbitration clause. Secondly, there is the curial law or *lex arbitri* which defines the procedural powers of the court and the arbitral tribunal in relation to the arbitration, such as whether and how an arbitrator may be appointed and removed, whether interim measures of protection may be granted and whether an award can be set aside by the courts. Such law is almost always the law of the 'seat' or location of the arbitration. Thirdly, there is the law of the country in which a foreign arbitral award may be enforced. Finally, there is the law—often overlooked by practitioners—known as the law governing the arbitration agreement.

2 Since it is a well settled proposition in all major arbitration jurisdictions that an arbitration clause is a separate agreement from the main or host contract in which it is physically contained, it follows that such agreement must have its own governing law.

3 Why is the law governing the arbitration agreement important? This law resolves key issues such as the scope and interpretation of the arbitration agreement and whether it is valid or inoperative. These issues can arise at various stages of proceedings involving arbitration: when a defendant applies for a stay of court proceedings in favour of arbitration,[2] when there is a challenge to the arbitral tribunal's jurisdiction during the arbitral proceeding,[3] and when there is an application to set aside an award for lack of jurisdiction.[4] In essence, the law governing the arbitration agreement is the foundation and defining point of the arbitral tribunal's jurisdiction.

(a) Express choice of law

4 How is the law governing the arbitration agreement determined? In a straightforward case the parties may choose such law by simply stating 'this arbitration agreement shall be governed by the law of New South Wales' but this almost never occurs in practice because advisers are unaware of the separate existence of the law governing the arbitration agreement. Where no choice of the law of the arbitration agreement is made, the question of identifying the applicable law becomes more complex.

5 In a recent decision of the English Court of Appeal,

1 See generally Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (Lexis-Nexis 4th ed 2019) 178-182.
2 International Arbitration Act 1974 (Cth) (IAA) s 7, UNCITRAL Model Law on International Commercial Arbitration (Model Law) (enacted in IAA s 16, Sch 2) art 8
3 Model Law art 16
4 Model Law art 34

the court took a very broad and flexible approach to identifying the law governing the arbitration agreement. In *Kabab-Ji SAL (Lebanon) v Kout Food Group*,[5] the court found that the parties had made an express choice of the law governing the arbitration agreement arising from two provisions in the host contract. The first provision, article 1, provided that 'this Agreement … shall be construed as an integral part of this Agreement and shall be interpreted as complementing the others' and the second provision, article 15, provided that 'this Agreement shall be governed and construed in accordance with the laws of England'. The arbitration agreement was contained in article 14. The court concluded that the combined effect of articles 1 and 15 was to make it clear that all provisions in the agreement, including the arbitration clause, were governed by English law. The court emphasized that it was not necessary, for an express choice of the law of the arbitration agreement to exist, that the parties use more explicit language such as 'this Agreement shall be governed by English law'.[6]

6 The *Kabab* case is interesting because it shows a court's willingness to find an express choice of law governing the arbitration agreement even where the language was not entirely clear. Practitioners, however, would be advised to make any choice of such law more direct and emphatic.

(b) No express choice of law

7 What happens, however, when there is no express choice of the law governing the arbitration agreement? English and Australian private international law rules state that the court (or arbitral tribunal) must first look for an 'implied' choice and, if this does not exist, seek the legal system with which the contract has its closest connection.

5 [2020] EWCA Civ 6
6 Ibid [67]

8 The question has been only briefly considered in two Australian cases, *Recyclers Australia v Hettinga Equipment Inc*[7] and *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd*.[8] In both decisions it was assumed that the governing law of the host or main contact in which the arbitration clause was contained also applied to resolve the questions of the validity and scope of the arbitration agreement. Note, however, that no other law was relevant on the facts of each case since the law of the seat of the arbitration was the same as that governing the host contract.

9 The issue however has been more extensively considered in English decisions. Historically, there have been two views expressed. The first is that where the parties have expressly chosen the law governing the main or host contract then this is a strong indicator or inference that the same law applies to the arbitration agreement: see *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission*[9] and *Sonatrach Petroleum Corp v Ferrell International*.[10] The rationale for this view is that from the point of view of business persons, the arbitration agreement is simply another term of the main contract, and so a choice of law for the contract as a whole would be most likely intended to apply to the arbitration agreement as well.[11] Where however there is no express choice of law in the host contract, the law governing the arbitration agreement should be the law of the seat of arbitration: see *Deutsche Schachtbau GmbH v Shell International*[12] and *Habas Sinai v Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd*.[13]

10 The alternative line of authority provides that the curial law or the law of the seat of arbitration should apply to determine the law governing the arbitration agreement, regardless of whether there is an express choice of law in the host contract. The curial law, it is argued, has a closer connection to the arbitration agreement than the law of the host contract because it defines the powers and rights of both the arbitral tribunal and the supervisory court of the arbitration. See *C v D*[14] and *XL Insurance Ltd v Owens Corning*.[15] The separability doctrine, which treats an arbitration agreement as legally distinct from the host contract in which it is located, has also been relied upon to reduce the weight to be given to the law of the host contract.[16]

11 The English Court of Appeal in *SulAmerica Cia Nacional de Seguros SA v Enesa Engenharia SA*[17] attempted to synthesize the competing views. The contract in that case contained a London arbitration clause and Brazilian choice of law and jurisdiction clauses. In an application for an anti-suit injunction to restrain the insured from suing in Brazil, the English court had to consider what law applied to the arbitration agreement. The Court of Appeal appeared to side with the first approach above by declaring that the express choice of Brazilian law in the host contract gave rise to a presumption that the parties had impliedly chosen that law to govern the arbitration agreement. A different choice of seat, on its own, is not sufficient to rebut the presumption. In *SulAmerica*, however, not only was there a different seat (London) but the arbitration clause was likely void under Brazilian law. Consequently, the seat of the arbitration assumed greater significance and English law was found to be the law governing the arbitration agreement, as it was the law with which the contract was most closely connected.[18]

12 The more recent statement on the issue comes from

7 [2000] FCA 847
8 [2008] FCA 551
9 [1994] 1 Lloyd's Rep 45
10 [2001] EWHC 481 (Comm) [103]
11 See Adrian Briggs, *Private International Law in English Courts* (OUP 2014) [14.41].
12 [1990] 1 AC 295, 310
13 [2013] EWHC 4071 (Comm) [103]
14 [2008] 1 All ER (Comm) 1001
15 [2000] 2 Lloyd's Rep 500
16 See generally Peter Ashford, 'The Proper Law of the Arbitration Agreement' (2019) 85 *Arbitration* 276.
17 [2012] EWCA Civ 638
18 The reasoning in the *SulAmerica* case was approved by the Singapore Court of Appeal in *BNA v BNB* [2019] SGCA 84.

the decision of the UK Supreme Court in *Enka Insaat Ve Sanayi AS v 000 Insurance Company Chubb*.[19] The *Enka* case involved a company Energoproekt who had been engaged by Unipro as the main contractor in a project to build a power plant in Russia. Enka was the sub-contractor and entered into a contract with Energoproekt that contained a London arbitration clause. There was no express choice of law in either the main contract or the arbitration agreement. Energoproekt assigned its rights under the contract to Unipro and, after a fire occurred at the power plant, Unipro made successful claim on its insurance policy. Chubb Russia, the insurer, then sued Enka in the Russian courts with Enka in turn seeking from the English courts (a) a declaration that Chubb Russia was bound by the arbitration clause in the contract and (b) an anti-suit injunction restraining Chubb Russia from continuing with the Russian proceedings.

13 The key question for the UK Supreme Court, on appeal, was what law governed the arbitration agreement. The majority judges (Lords Hamblen, Leggatt and Kerr) first considered the situation where the parties had not specified the law governing the arbitration agreement but had expressly chosen the law of the host contract. In that context, the governing law of the host contract will 'in the absence of a good reason to the contrary' also apply to the arbitration agreement. The majority considered that the presence of the arbitration clause in a wider host or main contract created an inference or presumption that the arbitration agreement should be subject to the same law as that which expressly applied to all the contract's provisions. This analysis seems a clear endorsement of the first approach above, as approved in *SulAmerica*.

14 There are however two other elements which, if present, may overcome the inference or presumption in favour of the law of the main contract and point instead to the law of the seat as the applicable law. The first element is where there is a serious risk that the arbitration agreement would be invalid under the law applicable to the main contract. It should be assumed that when parties enter a contract that they intend all its provisions to be valid and effective. Such a 'validation' analysis again is consistent with *SulAmerica*. The second exceptional factor would arise if there is a provision in the law of the seat that states that where parties have chosen that place as the seat, the arbitration agreement will be regarded as governed by the law of the seat. This factor, with respect, rather begs the question: why should a court look at the content of the law of the seat to determine if such law should be applied? Arguably, if the above inference or presumption dictates that the law of the host contract amounts to an implied choice of the law of the arbitration agreement and the arbitration agreement is effective under such law, then the law of the seat is irrelevant. Yet, the majority emphatically rejected the view in *C v D* that a presumption existed that where the parties chose a different country as the seat, they impliedly chose that law to govern the arbitration agreement.

15 The majority then reaffirmed the view common to both approaches above: that is, where there is no express or implied choice of the law governing the arbitration agreement, the law with the closest connection to the arbitration agreement applies, which will be the law of the seat. This conclusion follows even if a different law would apply to govern the main contract. The rationale for such an approach is that the arbitration is conducted at the seat with the local court supervising the proceeding and deciding any issue relating to the validity and enforceability of the agreement. This conclusion is not entirely accurate since other courts, outside the seat of arbitration can also decide questions concerning the scope or validity of an arbitration agreement, for example on a stay application.[20] Yet, the majority is surely correct that where there is no other 'choice' of law, the seat is an important expression of party will. On the facts of the case, the parties had made no express choice of law in the host contract and so the law of the seat (English law) was applied as the law with the closest connection to the arbitration agreement.

16 Lords Burrows and Sales dissented, with the main point of difference being the weight attached to the governing law in the main contract. Lord Burrows

19 [2020] UKSC 38

20 Briggs, n11 above, [14.41]

would have extended the presumption in favour of such law to include the case where no choice of law had been made in the main contract. Lord Sales considered that an arbitration agreement was more closely connected with the law governing the main contract than the law of the seat.

17 The effect of both majority and dissenting judgments is to place strong emphasis on the law of the main or host contract in determining the law governing the arbitration agreement. Hopefully, such analysis will be valuable to both Australian courts and arbitrators on questions relating to the scope and validity of the arbitration agreement.

(c) Mandatory rules

18 A final point with relevance to Australian practitioners is that the above choice of law principles can be overridden by statutes in certain circumstances. For instance, the Australian Parliament may provide that an arbitration agreement is invalid, whatever its status under the governing law, to further local policies such as consumer protection. Examples include section 11(2) of the Carriage of Goods by Sea Act 1991 (Cth), section 43 of the Insurance Contracts Act 1984 (Cth), clause 21(2)(a)(ii) of the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Cth) and section 67 of the Australian Consumer Law 2010 (Cth). The effect of such provisions is apparent where a party seeks a stay of Australian court proceedings in favour of foreign arbitration and the claimant argues that no stay should be granted because the arbitration agreement is invalid under Australian law. Such an argument is permissible under section 7(5) of the IAA which creates an exception to court enforcement of an arbitration agreement where the agreement is null and void.[21]

19 Such overriding mandatory rules may however have more limited effect in other circumstances. First, they may not bind arbitral tribunals in arbitrations seated in Australia given that mandatory rules are not mentioned in article 28 of the Model Law, which addresses choice of law in arbitration. Where, for example, a tribunal found that English law governed the arbitration agreement then an Australian mandatory statute may not apply. Yet the risk could be in this situation that an Australian court may set aside or refuse to enforce an award on public policy grounds where a tribunal failed to apply Australian mandatory legislation.[22] Foreign arbitrators and courts, by contrast, would not be required to apply Australian mandatory rules unless the law of an Australian State or Territory was found to govern the arbitration agreement.

(d) Conclusion

20 The law governing the arbitration agreement has received little attention from Australian courts and commentators despite it dealing with key issues such as scope and validity. The English experience should therefore be valuable to Australian practitioners in informing them of the relevant principles in this area.

21 See also art 8(1) of the Model Law.

22 See art 34(2)(b)(ii) and 36(1)(b)(ii).

Expert evidence - the value-add of virtual

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Introduction

When the impact of the pandemic hit in early 2020, several articles addressed the factors to consider in proceeding with, or deferring, a virtual hearing (when the option was available). The factors many practitioners outlined included whether expert evidence, particularly in the context of large and complex matters, could be properly or usefully heard in a virtual environment. The clear and effective explanation of technical issues during a long hearing and the potential limitations of cross-examination were raised as factors impacting the assessment of witness credibility and considered as significant disadvantages of a virtual hearing.

Six months on, and with a transition towards working in the new, 'Covid normal' environment, the question to delay proceedings until a time when live hearings are possible may no longer be practical or commercial. With recent experience gained in working in a virtual environment, factors previously considered to be an almost insurmountable challenge, such as the use of technology, may no longer be so. When combined with the recognition of time and cost savings and environmental benefits, virtual hearings may become the norm, rather than the exception.

Understanding where experts can continue to add value and enhance efficiencies of arbitral proceedings should be a focus for everyone involved. In this article, we consider some of the factors which we have seen work over many years, as well as those that have emerged and proven advantageous in the more recent virtual environment. This article is written from the perspective of the expert rather than the instructing party or counsel and draws on personal experience in various arbitration, as well as court roles.

Initial briefing of Experts

There are several factors to consider in determining the expertise needed and when to brief an expert. These include establishing the key issues to the dispute, those that require expert or factual evidence, the arbitration timetabling and cost considerations. We consider an early briefing to be invaluable and, where possible, this should be conducted face-to-face (although of late, virtual briefings are certainly prevalent). Involvement of key client personnel should ensure that the retained expert is able to assist the client in defining the appropriate questions, relevant information and issues and identifying previously unknown issues with the opposing party's case or its expert evidence.

The early input of the quantum expert can assist in establishing where lay evidence may be required, and better informing decisions about settlement strategy. While the early appointment may affect costs in the early stages, this can prove a strategic advantage and save time in latter stages of the case. The expert's knowledge and expertise can assist in identifying required factual evidence, real issues and relevant information early. Without this, there is a substantial risk of time being wasted on preparation of superfluous draft reports before finalisation and/or the preparation of a report that does not address the real issues of the dispute.

Expert evidence is, by its nature, difficult to understand for a lay person. The expert's knowledge and insights should be used to assist the legal team so that they can understand the strengths and weaknesses of the case and help frame an appropriate case strategy.

Financial models

Most quantum expert reports include opinions supported by financial models and supporting data sets prepared by the expert. In large and complex matters, the models analyse large volumes of data and include extensive and complex formulas to enable the expert to reach conclusions. It is critical that the model is well-structured and transparent to help communicate how the expert has reached their opinion/s and should commence with, and be sourced from, the actual financial results and position. Such models enable non-technical people, including members of the tribunal, to better understand the complex analysis, the sources of the information, underlying assumptions and how the calculations relate to the factual evidence and/or the actual financial position. While the 'building' of the model may initially appear time consuming, a well prepared model will add credibility to the expert's evidence. Where the tribunal requires a calculation of an award, it is not uncommon for one of the expert's models to be chosen and this is likely to be the model the tribunal feels most comfortable with and understands. Occasionally in the joint expert process, the expert will be comfortable to use the other experts' model in the preparation of the report. It is reasonable to assume that the credibility of the expert whose model is agreed to be used could be enhanced.

Interacting with other experts

We have found that many of the disagreements between experts result from information asymmetry. An expert may report, for example, that the basis of a particular calculation or assumption is 'management information', without specific reference to particular documents. At least at the initial reporting stage, the lack of access to, or proper understanding of, that information limits the ability of the responding expert to properly assess and challenge the information as it may only become

available closer to the hearing. The expert can assist in identifying such information gaps in the information audit trail so that efforts can be made to seek its production earlier in the process.

A more challenging, and sometimes confronting, issue arises from an encounter with an expert who does not necessarily understand their role and who seeks to adopt views on interpretation of facts. This can extend beyond the report to oral evidence at trial and is seen both in respect of professional advisers who are retained (and perhaps have less familiarity with the expert process and duties) and of 'in-house' experts who are held out to be less than independent.

We believe it is best to stay true to the principle that the expert is there to assist the arbitral tribunal. Whilst it may be necessary for the expert to ensure that the client is made aware of apparent differences in opinion caused by information issues, differing assumptions or through a failure to understand the expert role, this must not detract from maintaining the expert's independence.

Joint Expert Reports

Whilst it is usually the case for orders to be made requiring a report be prepared jointly by the experts (in addition to their separate reports), there are occasions where two separate joint reports are ordered: one setting out areas agreed, and a separate joint report on areas of difference . We believe, that the arbitral tribunal is best assisted when dealing with a joint expert report that presents the key issues and components of the calculations. For each of those components, there should be a brief statement on each of the experts' positions and whether they agree or disagree in respect of each component and, where the latter, the reasons for disagreement.

A well-written and structured joint report prepared in this way will provide a more concise and logical presentation of the issues and potentially alleviate the need for cross-examination of the experts on their original reports. The report can provide the arbitral tribunal and counsel with a convenient agenda for cross-examination as well as clear statements on each expert's position. The original reports will include the more detailed analysis and could be used in cross-examination depending on the issue.

Additionally, the preparation of the joint report should not be thought of as arising from a single meeting. More often, it involves a process extending over a period of time, face-to-face communications and the exchange of various drafts. Where possible, it is considered best practice to start with a face-to-face meeting between the experts to maximise mutual understanding of each expert's approach in the development of their opinions. This also enhances identification of whether different opinions flow from different instructed facts or from differences in methodology. Subsequent meetings can then be effectively conducted through virtual meeting platforms. The use of document-sharing platforms can also assist in the efficiencies of preparing a joint expert report, by allowing both experts to work on the one document simultaneously, and assist in managing version control.

Preparing for and giving evidence

The expert's written evidence is usually provided in one or more independent reports, and/or in a joint expert report. Notwithstanding this, the court or tribunal may prefer oral summaries by the expert of the key issues and conclusions. A PowerPoint presentation is a useful aid which allows the tribunal to concentrate on the determinative issues. This allows the expert's analysis of these issues to have the greatest impact and is even more powerful in a virtual hearing where the absolute focus of the tribunal is on the screen. The engagement of the tribunal is crucial and is more challenging in the virtual environment than during a physical hearing.

The use of presentations with graphics, a 'walk through' of a financial model and dashboards displaying the analysis of large volumes of data based on various assumptions or scenarios are examples of where technology has yet to be fully embraced by experts in the provision of evidence. The use of these varied forms is a non-technical and transparent way to provide an explanation of technical accounting or costing conclusions and any detailed analysis which supports the conclusions. An expert's evidence presented in this manner may also be more impactful, thereby increasing the likelihood of a fully engaged tribunal.

Becoming familiar with the virtual hearing platform and the functionality, including the use of screen sharing where models or presentations are presented by the expert, is crucial. Fumbling with the technology would not only be distracting to the tribunal, it could also

impact the expert's concentration and demeanor. The expert should ask the legal team to conduct at least one 'in-house' test to ensure they are prepared in relation to the basic technical features of the virtual hearing. An expert in a virtual hearing, like a physical hearing, should address the tribunal, not the counsel. Accordingly, the positioning of the camera is important. Given the expert will be referring to documents shown on the screen, the camera should be arranged in a way that allows them to appear to be looking into the camera – and at the tribunal.

While the virtual environment is generally considered a less intimidating setting for providing evidence, the expert should not be lulled into any sense of casualness and must treat the hearing like a physical hearing both in terms of dress and protocols.

Conclusion

Experts will continue to play a critical role in assisting the arbitral tribunal to understand key aspects of the case before it. Factors such as early briefings, well-structured models and joint expert reports are some examples of areas where experts can be most impactful, applicable to both live and virtual hearings alike.

The sharing of a well-structured model on the screen or dashboards showing various trends and conclusions can be a powerful way of explaining technical matters. In a virtual environment this is even more the case with the tribunal's focus squarely on the screens. While there are some perceived limitations in the ability to engage a tribunal and effectively explain large and complex technical matters in a virtual hearing, the opportunities that technology provides to enhance the presentation of impactful and credible expert evidence are great, though yet to be fully applied.

Australian Arbitration Week 2020 – A Virtual Extravaganza!

The 8th annual Australian Arbitration Week (**AAW2020**) was held virtually for the first time in 2020, offering unparalleled access to the 21 different events that were held over 5 days.

The opening event of AAW2020, the **ACICA/CIArb Australia International Arbitration Conference**, was held on 12 October, bringing together eminent speakers from 15 global locations in 8 stimulating virtual sessions. The conference organisers were pleased to host delegates from across the globe, located in as diverse jurisdictions as Ghana, Mexico, Saudi Arabia and New Zealand!

The conference focused on the theme of *Bridging the Distance – Arbitration in the New Normal*, with a broad programme covering current issues for the dispute resolution community during the COVID-19 pandemic such as Advocacy in the Virtual Environment and Technology as an Enabler in International Arbitration as well as other topical themes including Third Party Funding, The Future of Investor-State Dispute Settlement, and Enhancing Efficiencies in the Arbitral Process.

The Honourable Chief Justice Thomas Bathurst AC, Supreme Court of New South Wales welcomed delegates and opened the conference. Participants were treated to a conversation with Chief Justice Sundaresh Menon, Chief Justice of the Supreme Court of Singapore, and an "Around the Globe in 60 minutes" session exploring hot topics in international arbitration with experts from various jurisdictions. The day ended with a lively panel discussion on Mega Projects in the "New Normal". Conference recordings are now available to purchase here.

The following morning (13 October) commenced with a fireside chat, led by Erika Williams (Independent Arbitration Practitioner), with **ArbitralWomen** President Dana MacGrath (Investment Manager and Legal Counsel Omni Bridgeway) focused on diversity initiatives during the pandemic and the recently released **Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings**. (View event recording here).

This was followed by a **DLA Piper** panel discussion, moderated by Gitanjali Bajaj (Partner, DLA Piper) and Erin Gourlay (Solicitor, DLA Piper) exploring *Third Party Funding in International Arbitration: Trends and Perspectives from Asia-Pacific*. (View event recording here).

Corrs Chamber Westgarth held a panel event focused on *International arbitration: critical developments of 2020 and what to expect in 2021* chaired by Joshua Paffey (Partner, Corrs Chambers Westgarth) to consider noteworthy developments of the last 12 months, together with views on the most highly-anticipated arbitration developments for next year. (View event recording here).

AMTAC then hosted a webinar, chaired by Gregory Nell SC (Barrister, New Chambers & AMTAC Chair) entitled *The Show Goes On....Recent Developments in Arbitration Despite COVID-19* in which guest speakers discussed three recent cases of interest to the arbitration community. (View event recording here).

In the afternoon, the **ICC Australia** held a webinar to discuss *ICC in a World of COVID-19*, providing updates on activities and statistics, the work of the ICC Commission and taskforces and revision of the ICC Rules.

The day concluded with the **CIArb Australia Annual Lecture** supported by Allens Linklaters on *Dispelling due process paranoia: Fairness, efficiency and the rule of law* with guest speaker Chief Justice Sundaresh Menon, Chief Justice of the Supreme Court of Singapore.

Wednesday, 14 October kicked off with **ACICA**'s invitation-only Arbitrator Roundtable hosted by **DLA Piper**. The final event of the *ACICA45* Lifecycle of an Arbitration series was held simultaneously. This workshop,

led by a faculty of highly experienced younger arbitration practitioners, explored *After the Award - Enforcement & Challenges*.

Resolution Institute hosted an event on the topic of *Can domestic arbitration distinguish itself from litigation in court?* chaired by Russell Thirgood, (Chair, Resolution Institute).

The evening brought the **CIArb Young Members** event on the exciting topic of *Pulp Jurisdiction - An arbitral tale set in the time of COVID*, supported by **Clifford Chance**, where speakers assumed the role of key players in an international arbitration case disrupted by COVID-19, exploring the challenges through a series of vignettes.

The day ended with the **19th Annual Clayton Utz / University of Sydney International Arbitration Lecture** delivered by Professor Zachary Douglas QC on *A Response to DFAT's Review of Australia's Bilateral Investment Treaties* exploring the announcement from Australia's Department of Foreign Affairs and Trade (DFAT) that it will review 15 bilateral investment treaties to which Australia is a party and inviting submissions on that proposal. (View event recording here).

Thursday, 15 October was off to a hot start with a **Baker McKenzie** addressing the climate change debate in a webinar entitled *Heating up: Trends in litigation and arbitration concerning climate change*. (View event recording here). This event was followed by a fascinating **Corrs Chambers Westgarth** panel on *Diversity in arbitral proceedings: opportunities and challenges in the wake of remote work and virtual hearings*. (View event recording here).

Next, **ACICA** hosted an *ACICA Rules Revision Consultation Q&A session* to discuss the ACICA Arbitration Rules Consultation Draft that had been launched in August 2020 and exploring some of the keys areas of feedback that had been received in the consultation phase. The webinar was hosted by members of the ACICA Rules Committee Robert Tang (Clifford Chance), Luke Nottage (University of Sydney & Williams Trade Law) and Amanda Lees (Simmons & Simmons) and moderated by Rules Committee Chair, James Morrison (Peter & Kim).

In the afternoon, **Lipman Karas** hosted a seminar on *Insolvency Risks and Arbitration Opportunities*, chaired by David Marshall (Partner, Lipman Karas) examining the opportunity for the arbitration of disputes arising in an insolvency context, which look set to increase in light of COVID-19 and recent trade tensions. **King & Wood Mallesons** organised an interesting Insights Roundtable on *China's place in the global order: Insights and predictions on international arbitration* with panel members from Australia, Beijing and Hong Kong.

The day concluded with the **Australian Disputes Centre'**s 3rd Annual Supreme Court *ADR Address* presented by The Hon Justice A S Bell, President of the Court of Appeal of NSW. Justice Bell discussed *The rise of the anti-arbitration injunction*. This event was held at the Supreme Court of New South Wales with limited seating due to Covid-19 restrictions but also streamed virtually. (View event recording here).

The final day of AAW2020 began with a virtual seminar hosted by **7 Wentworth Selborne Chambers**, chaired by Mark Dempsey SC, on *Arbitration at the new Coal Face - The Advocates' Perspective*. This event addressed a range of interesting topics including *Construction Arbitration – Everything Old is New Again, Investor-State Disputes – Australia as a new frontier in enforcement against States* and *ADR in a time of COVID*.

Norton Rose Fulbright held a webinar exploring *Global Perspectives on International Arbitration* with a diverse panel of experts and highly regarded arbitration lawyers sharing unique insights from across the world. AAW2020 ended with an **ICC YAF Panel Discussion** on *Virtual hearings absent one party's consent* with an experience panel of practitioners that considered the challenges and risks involved in holding a virtual hearing without one party's consent and how this issue may evolve over time. (View event recording here).

ACICA is very grateful to all host organisations, sponsors, speakers and delegates of AAW 2020, who contributed to ensuring the success of the Week. Despite the challenges that hosting these events virtually created, it also provided a significant opportunity to bring together talent and expertise from across the world.

ACICA is pleased to announce that AAW2021 will be held in Sydney in the week commencing 18 October 2021. Stayed tuned for more information and we look forward to again welcoming a broad audience to these events, in person and virtual, next year!

ACICA ESSAY COMPETITION 2020 WINNING ESSAY

Can Climate Change Policy and Investor-State Dispute Settlement Coexist: Evaluating the Role of Investor-State Dispute Settlement in Renewable Energy Production

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Abstract

Growing discontent with investor-state dispute settlement mechanisms has seen its future as an investment protection mechanism questioned. In recent times, Bolivia, India and South Africa are just some of a growing number of countries that have begun the process of excluding investor-state dispute settlement from their investment treaties. Opposition to investor-state dispute settlement has largely stemmed from the inundation of cases against developed countries that have undermined genuine public interest regulations and consequently inhibited the ability of governments to enact vital legislation. Investor-state dispute settlement was originally envisaged as a means of protecting investors in countries with weak or unstable legal frameworks, but many feel the power balance has shifted dramatically in favour of the investor. However, for all its criticisms, investor-state dispute settlement has been critical in recent times in protecting a number of renewable energy investments. This essay argues that retaining ISDS is essential for investment in the renewable energy sector, but in order for this to be effective, current ISDS regimes must be adapted to meet the changing needs of the environmentally focused world. There is no shortage of innovation as to how ISDS needs to change. Proposals range from carving out more explicit exceptions to the EU's more radical proposal to replace ISDS with a multilateral investment court. ISDS can still be used as a tool to help countries achieve their climate change policy goals and not inhibit it as long as the necessary changes are made.

I Introduction

Investor-state dispute settlement (ISDS) has been facing mounting opposition in recent times with concerns over its intrusion on state sovereignty. This has led to a number of states looking to exclude ISDS from their investment treaties. Opposition to ISDS grew steadily in Canada after they were subjected to the preponderance of ISDS claims filed under the North American Free Trade Agreement (NAFTA).[1] This distrust of ISDS culminated in Canada electing to opt out of the significantly narrowed ISDS provisions contained in the NAFTA's successor – the United States-Mexico-Canada Agreement (USMCA).[2] Similarly, South Africa responded to its first and only ISDS challenge by withdrawing from bilateral investment treaties that have ISDS and instead focussing on strengthening domestic investment protection laws.[3]

1 Friends of the Earth Australia, Submission No 15 to Senate Standing Committees on Foreign Affairs Defence and Trade, Parliament of Australia, *Proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (April 2018) 10.

2 *United States-Mexico-Canada Agreement*, signed 10 December 2019 (entered into force 1 July 2020) art 14.2 ('USMCA').

3 Dumisani G Mlauzi, Solutions to Investor-State Dispute Settlement: Republic of South Africa Vis-à-vis Australia' (Research Paper, Faculty of

They are just some of a swathe of countries across the globe that have begun to question the efficacy of ISDS. In contrast, ISDS remains a strong feature of the investment environment in countries like Japan and Australia where there have been minimal threats of ISDS by foreign investors. ISDS is undoubtedly in need of reform, but it appears to still be in the future plans of many countries.

Investor-state dispute settlement is a mechanism found in a number of investment treaties that gives foreign investors exclusive access to arbitration. The purpose of this is to create a favourable investment environment by protecting foreign investors from substantial changes in the legal framework and ensuring neutrality in dispute resolution.[4] However, a desire to protect investors from legislative change directly conflicts with the desire to preserve regulatory space for governments. This conflict is particularly evident in the area of climate change because of the radical nature of the measures that are required by governments in order to meet their environmental obligations. The fundamental goal of the Paris Agreement is to hold average global temperatures to well below 2ºC above pre-industrial levels.[5] This is to be achieved through a bottom-up regulatory model through which states individually determine their emissions targets and implement policies to achieve those targets.[6] Therefore, to the extent that ISDS undermines the sovereignty of states to enact environmental measures, it poses a serious threat to the achievement of these environmental aspirations.

However, climate change and environmental law do not operate in a vacuum. Sustainable development relies on having trade and environmental goals that are mutually supportive.[7] In its archaic interpretation, ISDS fails to adequately support environmental goals due to the proliferation of its use as a sword for industries that have significant detrimental impacts on the environment. For example, 26% of ICSID cases involved oil, gas or mining.[8] However, ISDS is not intrinsically bad for environmental policy. It has also been used extensively by renewable energy investors to protect their investments from host states scaling back investment incentives. Furthermore, the narrowed scope of many investment protection provisions allows them to more robustly distinguish genuine public interest policy objectives from measures enacted in bad faith. This essay argues that the benefits ISDS offers to the renewable energy sector justifies persistence with the mechanism, but the scope of ISDS needs to be narrowed to prevent environmentally harmful sectors stalling genuine public interest policy.

II The Development Of International Investment Protections

The origins of ISDS date back as far as the 1960s when it was originally used to protect former coloniser's property assets from newly independent states. The fundamental rationale for ISDS in that context was to protect foreign investments in countries with weak judicial systems or unstable legal frameworks.[9] With globalisation in full force in the 1990s, the popularity of ISDS grew sharply with the proliferation of bilateral investment treaties (BITs). Many of these BITs included a guarantee of fair and equitable treatment (FET) and protection from indirect expropriation. However, the broad interpretation of these protections and the burden this placed on a country's right to regulate was not fully anticipated at the time.[10]

FET provisions are designed to protect investors from governments enacting new measures that are unduly onerous or burdensome on their investments. However,

Law, University of Western Cape, 12 January 2017) 19; *See Protection of Investments Act 2015* (South Africa)

4 Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) *Transnational Environmental Law* 229, 231.

5 *Paris Agreement*, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016) art 2.1(a) ('*Paris Agreement*').

6 Philippe Sands et al, *Principles of International Environmental Law* (Cambridge University Press, 4th ed, 2018) 295.

7 Ibid 842.

8 Tienhaara (n 4) 231.

9 Uche Ewelukwa Ofodile, 'African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges' (2019) 34(2) *ICSID Review Foreign Investment Law Journal* 296, 338.

10 Hamed El-Kady and Mustaqeem De Gama, 'Reform of the International Investment Regime: An African Perspective' (2019) 34(2) *ICSID Review Foreign Investment Law Journal* 482, 487.

they have received incoherent interpretation by tribunals and leave host states particularly vulnerable in highly regulated areas such as energy where policy measures are particularly susceptible to change.[11] A breach of FET will fundamentally come down to whether there has been a breach of the investor's 'legitimate expectations'.[12] However, due to the absence of an obligation to follow precedent in arbitration, what constitutes the legitimate expectations of the investor has been subject to significant disparities. For example, the tribunal in *Tecmed v Mexico* established a fairly low standard for 'legitimate expectations' by suggesting that the investor has the right to rely on the legal framework existing at the time the investment is made.[13] In contrast, the tribunal in *Parkerings-Companiet AS v Lithuania* suggested that it is unreasonable for the investor to expect the investment environment to stay the same, unless there is a stabilisation clause.[14] The uncertainty this creates is a recipe for regulatory chill.

Interpretations of indirect expropriation have been similarly inconsistent. Direct expropriation without compensation is unambiguous and is now quite rare in developed countries because of the detrimental impact it has on attracting future foreign investment.[15] However, indirect expropriation involves determining whether acts by the state have deprived the investor of all or a substantial part of the investment's economic value,[16] although a non-discriminatory regulation for a public purpose enacted in due process will not amount to expropriation unless specific commitments were made.[17]

Consequently, an important distinction must be made between regulations made to regulate morals, health and the environment and regulations made in order to make private interests subservient to the general interests of the community.[18] However, determining where the conduct falls is uncertain and subject to discretion. The tribunal in *Gold Reserve v Venezuela* set a low threshold by suggesting that a decision to terminate concessions will not be indirect expropriation as long as the measure has a plausible justification.[19] In contrast, the tribunal in *Tecmed v United States* suggested that a state's measure for a public purpose is only justifiable if it is proportionate to achieving that purpose.[20]

The inconsistency in interpretations may just be a symptom of poor drafting of investment protection provisions. Consequently, it is imperative that host countries clarify and narrow the scope of investment protection in order to prevent genuine legislative activity made in good faith from subjecting governments to costly arbitration threats.[21] There needs to be balance between protecting the legitimate interests of the host state, such as enacting vital environmental regulations, and the need to protect investments from excessive interference.[22] However, it is also possible that diverging interpretations of investment protections could be reflective of the fundamental flaws with ISDS as a dispute resolution mechanism. The ad hoc nature of tribunals and the lack of binding precedent results in a lack of cohesion in outcomes.[23] Similarly, the private nature of arbitration means that documents and award amounts are often

11 Eric De Brabandere and Tarcisio Gazzini, *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (Brill Publishers, 2014) 26.

12 Yulia S Selivanova, 'Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases' (2018) 33(2) *ICSID Review Foreign Investment Law Journal* 433, 440.

13 *Técnicas Medioambientales Tecmed v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB/00/02, 29 May 2003) [154].

14 *Parkerings-Companiet v Republic of Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 11 September 2007) [332].

15 Ying Zhu, 'Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?' (2019) 60(2) *Harvard International Law Journal* 377, 380.

16 De Brabandere and Gazzini (n 11) 26.

17 *Methanex Corporation v United States of America (Final Award of the Tribunal on Jurisdiction and Merits)* (2005) 44 ILM 1345, Part IV-D-4 [7].

18 Zhu (n 15) 386.

19 *Gold Reserve v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB/09/1, 22 September 2014) [667]

20 *Técnicas Medioambientales Tecmed v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB/00/02, 29 May 2003) [122].

21 De Brabandere and Gazzini (n 11) 27.

22 Sands et al (n 6) 901.

23 Colin Brown, 'The European Unions approach to investment dispute settlement' (Speech, The 3d Vienna Investment Arbitration Debate, 22

kept confidential.[24] The lack of transparency and consistency in ISDS creates uncertainty for both investors and host states. This is unsatisfactory for all involved. Investors need to have confidence that their rights will be protected while uncertainty exacerbates the effects of regulatory chill for the host state. Although there are benefits to the neutrality offered by international arbitration, the scope of investment protections need to be defined with greater specificity in order for ISDS to be an effective dispute resolution mechanism.

III Regulatory Chill And Climate Change

The main criticism of ISDS is that it impedes a state's right to regulate by creating regulatory chill. This refers to the situation where a government refrains from enacting measures that are justified and necessary because of concerns of liability under ISDS.[25] Furthermore, the indirect nature of regulatory chill means that it can manifest itself in a number of different ways. Even though tribunals cannot require governments to change or remove laws, the mere threat of ISDS can often pressure governments into retracting measures in an attempt to avoid large compensation orders.[26] For example, after a number of foreign mining companies threatened to use ISDS in response to the Indonesian government banning open-pit mining in protected forests, the Indonesian government later reversed the ban because they could not afford to compensate investors.[27]

Governments refusing to enact justified public interest measures due to regulatory chill are not basing their decisions on technical legal conclusions. Investment protections almost universally provide exclusions from ISDS for government measures made for public interest purposes. Therefore, governments acting in good faith should theoretically have nothing to worry about. However, regulatory chill is the reluctance of governments to risk legislating in the 'grey area' between legitimate and illegitimate measures. As uncertainty in arbitration outcomes increases, the size of the perceived 'grey area' increases due to increased risk of adverse tribunal decisions. This has the effect of stifling bona fide regulatory change.

This is a particular concern in relation to climate change policy. The imminent threat of climate change demands drastic policy measures to be enacted and ultimately requires governments to make whole industries obsolete. The issue with this is that investment protection measures fundamentally operate by protecting the incumbent investors from legislative changes.[28] However, it is the incumbent investors such as the fossil fuels industry that have played a significant role in causing climate change in the first place. Consequently, as long as ISDS provisions fail to discriminate against industries that operate contrary to sustainable development objectives, the status quo will continue to be preserved at the cost of the environment. In contrast, the threat of arbitration from investors in environmentally friendly sectors, such as renewable energy, incentivises the government to adopt more climate change conscious measures. The challenge is successfully restricting ISDS to investors from industries that align with the government's sustainable development goals.

IV The Importance Of ISDS For Renewables

ISDS is increasingly being employed by renewable energy investors. Since 2011, 69 out of the 102 applications for ISDS under the Energy Charter Treaty (ECT) have been in relation to legal reforms affecting the renewable energy sector – primarily against Spain, Italy and the Czech Republic. This shift reflects the growing business opportunities available to investors in the renewable energy sector due to significant investment

June 2018) 5.

24 Friends of the Earth Australia (n 1) 9.

25 Sam Luttrell, 'Environmental Protection and International Investment Law: An Introduction to the Issues' (2014) 29(4) *Australian Environment Review* 102, 102.

26 Tienhaara (n 4) 232.

27 Stuart G Gross, 'Inordinate Chill: BITs, Non-NAFTA MITs, and Host-State Regulatory Freedom: An Indonesian Case Study' (2003) 24(3) *Michigan Journal of International Law* 893, 894-895.

28 Tienhaara (n 4) 231.

incentives being created by countries looking to fulfil their environmental obligations.[29] However, providing incentives for investment does not translate into foreign investment unless investors have confidence that the incentives will be sustained for long enough for them to make a profit. Although it is hard to accurately quantify the influence of ISDS on foreign direct investment inflows, UNCTAD suggests that there is a positive correlation.[30] Furthermore, the unique characteristics of the renewable energy industry make ISDS particularly critical to the industry thriving into the future.

Firstly, renewable energy projects are very capital intensive and have expensive set-up costs.[31] Furthermore, these projects are often long-term commitments for investors who will not see profits until years later.[32] This increases uncertainty for investors and makes renewable energy projects a less viable investment opportunity. This is because investors are potentially exposed to significant losses in the event that the investment environment drastically changes. Especially in an infant industry like renewable energy where there is a cheaper competitor in the form of fossil fuels, the need for ISDS to give investors confidence in the stability of the legal framework is imperative. This was the case in *PV Investors v Spain* where the investor stated that without the investment incentives, they would not have made the investment due to the exorbitant start-up costs of the project.[33]

Secondly, the highly regulatory nature of the energy sector means the investment environment is more susceptible to change.[34] ISDS has been a useful tool to promote confidence in investors as FET and indirect expropriation in particular protect investors against drastic changes in regulations that undermine their investments. This is particularly helpful to investors in circumstances where governments want to cut back renewable energy incentives as an easy way of reducing budgetary deficits as was the case in Spain. Furthermore, these safeguards are particularly important in the renewable energy sector where a number of investments are only economically feasible with ongoing incentives and thus investments are made in reliance on these representations.[35] The threat of ISDS has been vital in preserving the feasibility of essential sustainable development infrastructure through either compensating aggrieved investors or pressuring host states into reinstating the favourable investment incentives.

Thirdly, arbitration awards have the benefit of enforceability across a number of jurisdictions. Under the New York Convention, over 160 countries have agreed to reciprocal recognition and enforcement of arbitral awards.[36] This gives multinational investors added protection and flexibility in seeking enforcement of arbitral awards. This is of particular importance in the energy sector where many infrastructure projects have supranational benefits, but the ambitions of these projects can only be realised and funded with transnational coordination. Promoting joint projects was a specific focus of the EU's approach to climate change policy with their revised renewable energy directive actively providing for mechanisms to facilitate cooperation.[37] Similarly, it may bode well for large multinational renewable energy companies such as Terrawatt who are looking to build standardised solar power contracts.[38]As such, arbitration may serve as more appealing to investors involved in cross-border projects.

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29 International Chamber of Commerce, *Resolving Climate Change Related Disputes through Arbitration and ADR* (Report, 2019) 13.

30 Edna Sussman, 'A Multilateral Energy Sector Investment Treaty: Is it Time for a Call for Adoption by All Nations?' (2010) 44(3) *International Lawyer* 939, 953.

31 Philip Lowe, 'Regulating Renewable Energy in the European Union' (2010) 1(1) *Renewable Energy Law and Policy Review* 17, 20.

32 Sussman (n 30) 958.

33 *The PV Investors v Spain (Final Award)* (PCA, Case No 2012-14, 28 February 2020) [227].

34 International Chamber of Commerce (n 29) 14.

35 Sussman (n 30) 958.

36 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) art III.

37 *Directive 2018/2001/EU of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable resources* [2018] OJ L 328/82, art 9.

38 International Chamber of Commerce (n 29) 57.

V Evaluation Of Current ISDS Mechanisms

Attitudes towards ISDS differ quite substantially and this causes discrepancies in the content and manner of ISDS provisions in different treaty agreements. An individual country may even find they have broad ISDS powers under one treaty, but very narrow or even non-existent ISDS access under another. For example, Canada excluded itself from the ISDS provisions in the USMCA, but still has access to ISDS against Mexico under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This is likely an attempt by Canada to avoid claims from US investors who are not covered by the CPTPP, while retaining protection for Canadian investors in Mexico. However, it is not just a question of whether or not to employ ISDS in investment treaties anymore, but a question of how ISDS should be reformed to meet the unique needs of each country. Accordingly, recent investment treaties have diverged in the operation of ISDS.

A Energy Charter Treaty

The ECT is a multilateral treaty that offers investment protection for investments in the energy sector. It originated from a desire to protect foreign investments in former Soviet satellite states,[39] but it was expanded to include countries such as Australia and Japan. The ECT provides for a broadly drafted obligation of FET with host states required to ensure they do not enact unreasonable or discriminatory measures that impair the use or enjoyment of the investment.[40] This offers minimal protection from liability under FET for government

39 Emmanuel Gaillard and Mark McNeill, 'The Energy Charter Treaty' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, 2010) 37, 38.

40 *Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 100 (entered into force 16 April 1998) art 10(1) ('ECT').

measures enacted in the interest of environment. Similarly, the protection of investments from expropriation includes indirect expropriation, but provides an exception for measures implemented for a public interest purpose, that is non-discriminatory, carried out under due process, and accompanied by compensation.[41] However, even if it is a measure genuinely made in the public interest, the government will still be expected to pay compensation under the ECT.

The ECT has probably served as the greatest protector of renewable energy investments with 69 applications for ISDS registered in relation to changes to regulations affecting renewable energy investments. However, tribunals have been reluctant to excessively encroach on regulatory space even when it involves retractions of investment schemes set up in the interests of environmental protection. The tribunal in *Plama v Bulgaria* established that FET only protects the investor if there is a breach of the reasonable and justifiable expectations of the investor.[42] Consequently, tribunals have been reluctant to accept investor expectations that renewable energy incentives would remain unchanged as reasonable, unless specific commitments were made.[43] In the absence of specific commitments, the tribunal in *Charanne v Spain* limited protection to renewable energy investors to changes in regulations that "suddenly and unexpectedly eliminate the essential features of the regulatory framework in place".[44] Consequently, measures are only likely to amount to a breach of FET where they completely undermine the economic feasibility of the project or the host state makes explicit representations that the incentives will remain in place for the duration of the plant life.

The fundamental issue with ISDS under the ECT is its outdated and broad scope. The ECT protects investments for all types of energy projects including fossil fuels. Consequently, the environmental benefits provided by the ECT through greater protection of renewable energy investments is effectively cancelled out by similar protections for the fossil fuel industry. The failure of the ECT to offer a mechanism to preserve regulatory space for genuine public interest policy means it lacks the nuance to effectively make a meaningful contribution to sustainable development. As long as the fossil fuels industry is able to use ISDS under the ECT as a sword, the ECT is not the answer.

B Comprehensive and Progressive Agreement for Trans-Pacific Partnership

The CPTPP is the successor to the Trans-Pacific Partnership (TPP) except with the notable absence of the United States. Investment protections under the CPTPP are largely the same as under the TPP except that foreign investors will no longer be able to access ISDS for violations of private investment contracts with the government.[45] This reflects the commitment of a number of CPTPP signatory states to ISDS as a mechanism for protecting investment. The treaty provides for FET,[46] as well as protection from both direct and indirect expropriation.[47] However, it also attempts to preserve regulatory space by making the investment protections subservient to measures that are appropriate for ensuring investment activity is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[48] Furthermore, Annex 9-B clarifies that there will not be an indirect expropriation where the measures are non-discriminatory and applied to protect legitimate public welfare objectives such as the environment, except in 'rare circumstances'.

These inclusions evince an intention to prevent ISDS being exploited by fossil fuel industries to hold governments ransom. However, whether these measures

41 Ibid art 13(1).

42 *Plama Consortium Limited v Republic of Bulgaria (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/24, 27 August 2008) [176]

43 *Charanne and Construction Investments v Spain (Award)* (SCC, Case No V 062/2012, 21 January 2016) [503].

44 *Charanne and Construction Investments v Spain (Award)* (SCC, Case No V 062/2012, 21 January 2016) [513]-[514].

45 See suspension of "investment agreement" and "investment authorisation" as reasons to submit a claim to arbitration under CPTPP art 9.19.

46 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed on 8 March 2018, [2018] ATS 23 (entered into force 30 December 2018) art 9.6 ('CPTPP')

47 Ibid art 9.8

48 Ibid art 9.16

will be interpreted by tribunals to reflect this intention is yet to be seen. The use of vague wording such as 'rare circumstances' makes it difficult for tribunals to make a clear distinction between compensable indirect expropriation and legitimate environmental regulation.[49] Accordingly, if tribunals are going to find it difficult to make this distinction, governments' legislators stand no chance and regulatory chill in relation to climate change regulations is likely to persist.

C United States-Mexico-Canada Agreement

The USMCA is the successor to the NAFTA, which is a free trade agreement between the United States, Mexico and Canada. The USMCA retains a broad exclusion from ISDS for measures considered appropriate to ensure investment activity is undertaken in a manner sensitive to environmental concerns.[50] Unfortunately, the weight of ISDS cases involving environmental legislation brought under the NAFTA reflected the weakness of these exceptions. This failure was best highlighted by the tribunal's decision in *SD Myers v Canada* where an environmental law to ban the disposal of the toxic chemical polychlorinated biphenyl was deemed to be a breach of FET on the basis that there was not a legitimate environmental reason.[51] This eventually resulted in Canada lifting the ban, only for the United States (the origin of the investor who claimed ISDS against Canada) to ban exports of the chemical due to environmental concerns only months later. Whilst the ability of the NAFTA to preserve legitimate environmental regulatory space was undermined, the NAFTA was also successfully used to protect environmentally friendly ventures. In *Windstream Energy v Canada*, the tribunal found in favour of a wind energy investor after its investment was adversely affected by Canada's decision to suspend offshore wind development.[52] However, overall the NAFTA must be considered a monumental failure for the environment.

The scope of the ISDS provisions in the USMCA are significantly narrowed. However, this was still not enough to convince Canada to continue to participate in ISDS under the treaty. The USMCA denies investors access to ISDS for indirect expropriation and FET claims.[53] Historically, these investment protections posed the greatest threat to genuine public interest measures and thus removing the ability of investors to use ISDS to challenge environmental laws should have enable governments greater scope in enacting climate change legislation. However, these partial bans on ISDS will also negatively affect the ability of renewable energy foreign investors to get protection and thus increase the risk associated with these investments. Finally, whilst renewable energy investors with a government contract will have access to ISDS under Annex 14-E, this protection also exists for other power generation suppliers such as coal power stations and investors involved in oil and natural gas activities. Therefore, the USMCA reflects a reluctance to actively address issues with ISDS in a constructive way and instead represents an effort to stem the dangers that come out of inefficient ISDS.

D EU Treaties

The EU has been a vehement advocate for preserving regulatory space for climate change policy. For example, the European Parliament passed a resolution calling for measures adopted pursuant to the Paris Agreement to be immune from ISDS challenges.[54] Although the non-binding nature of this resolution means it has little practical effect, it still reflects the willingness of the European community to protect genuine environmental regulation.

The EU's most recent efforts involve a movement towards replacing ISDS mechanisms with a permanent multilateral investment court. Investment protection within the EU exists primarily through entitlements to

49 Zhu (n 15) 416.

50 *North America Free Trade Agreement*, Canada-Mexico-United States of America, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) art 1114 ('NAFTA')

51 *SD Myers v Canada (Partial Award)* (2000) 40 ILM 1408, [195].

52 *Windstream Energy LLC v Canada (Award)* (PCA, Case No 2013-22, 27 September 2016).

53 *USMCA* (n 2) art 14.D.3.

54 *European Parliament resolution of 14 October 2015 on Towards a new international climate agreement in Paris (2015/2112(INI))* [2015] OJ L 349/67, [80].

freedom of establishment and free movement of capital, as well as the ability to remove the dispute from national jurisdiction by going to the European Court of Justice.[55] Similarly, the primary attraction of ISDS is the ability to remove the dispute from domestic courts, but the lack of stability and consistency in tribunal decisions creates uncertainty and increases the susceptibility of governments to regulatory chill. Consequently, many within the EU have argued that a centralised investment court will preserve the neutrality of ISDS, but improve the predictability of the legal framework through the presence of a permanent body of judges.[56]

However, the multilateral investment court has not been without criticism. The insistence of the EU to move towards an investment court was seen as a major roadblock in negotiations for the EU-Japan Economic Partnership Agreement before the Japanese eventually ceded on the issue. The problem with an investment court is the difficulty of ensuring judges are independent and free of political bias in an appointment procedure that is inherently political. Consequently, the fear is that small economies will be at a disadvantage as they will lack the political influence to ensure they are not adversely subjected to politically biased permanent judges.[57] Although the neutrality of ISDS is questionable because of the ability of the parties to select the arbitrators, it is still better equipped to protect the interests of investors and small economies from political bias in adjudication.

VI Possible Solutions

A Modernising the ECT

The ECT is an outdated agreement that lacks the nuance to adequately protect legitimate public welfare measures. As long as the fossil fuel industry continues to have access to ISDS under the ECT to challenge genuine climate change policies, it will be impossible to achieve climate goals. Consequently, it is imperative that the ECT is reframed to align with the Paris Agreement and to narrow its application to only protect renewable energy investments. However, amending the ECT is not an easy task with amendment requiring unanimous approval of all member states.[58] Considering many of the members are from fossil fuel dependent economies such as Kazakhstan and Kyrgyzstan, this is unlikely to succeed.

Alternatively, a new multilateral investment treaty that exclusively covers the renewable energy sector would be an ambitious, but revolutionary project. The Paris Agreement included 197 parties that showed their willingness to commit to sustainable development and take action to reduce the effects of climate change. Therefore, previous failed attempts at global investment treaties should not discourage ambitions to establish a comprehensive investment treaty for the renewable energy sector.[59] However, even if this ambitious project received traction, the ECT still poses a significant barrier to genuine climate regulations. This is because the ECT includes a survival clause, which exposes the withdrawing party to ISDS claims for a period of 20 years from the date of withdrawal.[60] Therefore, states would still be vulnerable to ISDS claims from fossil fuel companies for the foreseeable future even if a new treaty was created to replace it.

B Clarified indirect expropriation provisions

The issue of genuine public interest environmental regulations being challenged is a common flaw in the operation of ISDS in investment treaties. The main method for limiting this occurrence is through narrowing the scope of indirect expropriation protections. At the extreme end of the spectrum, there is completely eliminating indirect expropriation as an investment protection as was done in the USMCA. However, this is flawed because it also removes the ability for investors that align with climate change objectives, such as

55 Brown (n 23) 8.
56 Ibid 5.
57 José Manuel Alvarez Zárate, 'Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?' (2018) 59(8) *Boston College Law Review* 2765, 2769.
58 *ECT* (n 40) art 42.
59 Sussman (n 30) 959.
60 *ECT* (n 40) art 47(3).

renewable energy investors, from accessing protections when their business has been unfairly burdened by dramatic changes in the investment environment.

A more nuanced approach is excluding government measures that are enacted for genuine environmental purposes from being the basis of an ISDS claims. This serves to remove ambiguity in the interpretation of the scope of the investment protections and restrict the discretion of tribunals.[61] However, the application of these clarifications in many investment treaties is still very broad and does little to quell the effects of regulatory chill. For example, the CPTPP still allows tribunals to find that non-discriminatory environmental regulations amount to indirect expropriation in 'rare circumstances'. The ambiguous nature of terms such as 'rare circumstances' and 'character of a governmental measure' are too broad and leave too much scope for ISDS to be used as a tool to stunt critical regulatory action on climate change.[62] If an environmental measure is made in good faith, is non-discriminatory and is not contrary to express commitments made to the foreign investor, this is sufficient to protect a bona fide investor.

C Carve out provisions

Finally, when addressing a specific issue like climate change, the use of carve out provisions to remove entire industries may be particularly effective. In the context of climate change, this may involve barring companies in the fossil fuel, mining and deforestation industries from making ISDS claims. A similar carve out provision exists in the CPTPP allowing governments to deny ISDS claims challenging tobacco control.[63] Although the provision is still in its infancy, it appears to be an effective obstacle for investors in this area. The main criticism of this type of carve out provision is that it is too narrow in scope and you cannot be expected to carve out all industries that negatively affect climate change.[64] However, whilst in isolation it may not solve all the issues with ISDS, it does provide unambiguous protection to climate change policy from the most dangerous threats – namely fossil fuels.

VII Conclusion

The energy sector is the largest source of greenhouse gases accounting for 34% of greenhouse gas production.[65] Accordingly, the energy sector plays a crucial role in achieving climate change goals. Although all energy supply involves some level of environmental impact,[66] replacing the burning of fossil fuels with renewable energy production will drastically reduce atmospheric pollution. However, renewable energy producers face significant barriers entering the market against significantly more cost-effective competitors in the fossil fuels industry. Similarly, the high start-up costs coupled with the high degree of regulatory change in the energy sector makes renewable energy a risky investment. As such, many renewable energy projects rely heavily on government incentives to make them economically feasible. However, the threat of changes to these incentives undermining the profitability of renewable energy projects means that many investors will refuse to invest without adequate investment protection.

ISDS mechanisms are imperative to foreign investors having confidence to invest in foreign jurisdictions. The issue with ISDS is that its broad and incoherent interpretations allow it to be exploited by environmentally harmful companies to threaten legitimate public interest regulation. However, the benefits of ISDS for renewables justifies persistence with the mechanism, but reform is needed. Aligning protection of foreign direct investment with environmental objectives yields the best results for sustainable development and that is what the use of ISDS by renewable energy investors achieves. The regulatory chill created by ISDS is the greatest threat to a government's ability to enact legitimate environmental measures, but this threat is non-existent if the only investors that can access ISDS are those whose objectives align with climate change goals.

The Paris Agreement identifies an important distinction between developed countries and developing countries

61 Zhu (n 15) 377.
62 Ibid 411.
63 *CPTPP* (n 46) art 29.5.
64 Tienhaara (n 4) 248.
65 Intergovernmental Panel on Climate Change, *AR5 Climate Change 2014: Mitigation of Climate Change* (Report, 2014) 125.
66 Rothwell et al, *International Law* (Cambridge University Press 3rd ed, 2018) 616.

in tackling climate change with reduced obligations placed on developing countries.[67] This reflects the reduced capacity of developing countries to enact environmental change and is arguably a partial admission by developing countries of responsibility for being the primary contributors to climate change. As such, it is the duty of developed countries to help developing countries, who have not had the opportunity to use cheap fossil fuels to stimulate rapid economic growth, to move towards sustainable development. An important way of doing this is through helping developing countries in setting up renewable energy production and this can only be achieved with the necessary investment protections in place. As such, ISDS still has an important role to play in encouraging investment in renewable energy and other environmentally friendly industries across the globe. However, it can only truly coexist with climate change policy if both the actual and perceived risk of challenges to genuine environmental measures under ISDS are eliminated.

67 *Paris Agreement* (n 5) art 4.

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 impacts 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 carefully consider 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.

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