THE ACICA REVIEW

JUNE 2021

ACICA
Australian Centre for International Commercial Arbitration

GLOBAL LEADERSHIP
REGIONAL EXCELLENCE

ACICA
Australian Centre for International Commercial Arbitration

Leader in International Dispute Resolution

THE
ACICA REVIEW

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Contents

THE ACICA REVIEW

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President's Welcome

Georgia Quick
ACICA President

Welcome to our June edition of the ACICA review, the first for which I have had the fortune to provide the President's welcome!

Firstly, I would like to thank our outgoing President, Brenda Horrigan, for her outstanding contribution as President over the last two initiative-packed and tumultuous years. As our first non-Australian President, Brenda provided ACICA with a distinctly global outlook. In those two years, Brenda, the Executive and our various committees have:

- set up ACICA State Committees in each of Victoria, Western Australia, Queensland, New South Wales and South Australia;
- reviewed and issued a wide sweeping ACICA Rules update;
- conducted a nation-wide survey and released the first Australian Arbitration Report;
- hosted two conferences (one in the brave new post Covid-19 virtual world);
- completed an integration of the Perth Centre for Energy and Resources Arbitration (PCERA);
- developed a series of practical resources in the Practice & Procedures toolkit and the ACICA webinar series; and
- run the first ACICA Judicial Liaison Committee Dispute Resolution Forum.

I look forward to continuing this work and delivering on my own promises to promote ACICA's primary objective of ensuring that Australia continues to provide a vibrant arbitration seat, with users who are confident in using the ACICA Rules and in appointing Australian arbitrators and counsel for cases in Australia, the region and beyond.

We also have plans for:

- more practical guidance documents and events;
- continued activity at the State level;
- education of our corporate colleagues, client users and other relevant industry bodies;
- closer ties to university programs; and
- increased collaboration with other dispute bodies inside and outside of Australia.

I welcome any suggestions that the arbitral community has and encourage you to reach out to me or any members of the Board or Executive.

In this regard, I am pleased to note that ACICA's Executive has been joined by Nick Longley from HFW in Victoria and Joshua Paffey from Corrs in Brisbane, who, together with continuing members Judith Levine (Levine Arbitration), Jonathon Redwood SC (Banco Chambers/List A Barristers), Gitanjali Bajaj (DLA Piper), Martin Cairns (Sapere Forensic), Brenda Horrigan (Independent Arbitrator and Immediate Past President of ACICA) and Ian Govey AM (Former Government Solicitor), form a diverse, highly experienced and cohesive leadership team.

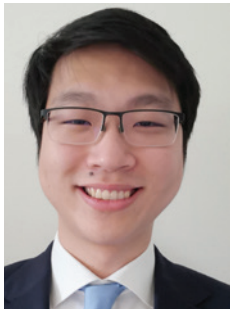
Together we thank Andrea Martignoni, who this year retired from the Executive, for his contribution to the Board over 18 years, with 4 years on the Executive. Andrea has been instrumental in driving ACICA initiatives in that time and, of significance, successfully assumed the chair role for the Marketing Committee for ICCA 2018 Sydney. That committee managed a global portfolio of outreach, marketing and promotional work, on which much of the success of the event was founded.

Our last edition of the ACICA review was issued in December 2020. Since that time ACICA has been particularly focused on the launch of the Australian Arbitration Report, the release of the ACICA Arbitration Rules 2021, new resources for parties in ACICA's Practice and Procedures toolkit, engaging with our South Pacific neighbours, organising ACICA roadshow events around Australia on the ACICA Rules and lots more.

Finally, Australian Arbitration Week 2021 will be held in the week commencing 18 October 2021. As usual, the lead event for the week will be the joint ACICA/ CIArb Australia International Arbitration Conference which will be held in Sydney on 18 October. With any luck there will be no interstate travel restrictions and we can enjoy a significant in-person presence, combined with some virtual presentations from our colleagues abroad. We look forward to seeing ACICA members and other colleagues at the conference and other events during AAW2021!

All the best
Georgia

Editorial: Improving Regional Access to Arbitration



Caroline Swartz-Zern
Counsel, ACICA

Edward Wu
Associate, ACICA

In the December 2020 ACICA Review, we wrote about the opportunities for connection and cooperation for ACICA (and the readership of the ACICA Review) and Australian practitioners more broadly. In the intervening months, there have been a number of developments that have contributed to our ability to be part of this discussion and confirm the importance of this undertaking.

The findings of the inaugural Australian Arbitration Report (the '**Report**'), the first-ever empirical study on the use of arbitration across all of Australia, confirm that Australia is in a strong position to take the regional lead in promoting international commercial arbitration.[1] Respondents provided data from 223 unique arbitrations commenced, conducted or concluded between 2016 and 2019. The diversity of sectors in the Australian market and large value of disputes (totalling over $35 billion) shows the vitality of arbitration in Australia.[2]

As the Hon Amanda Stoker, Assistant Minister to the Attorney-General, highlighted during the official launch of the Report on 9 March 2021, it now falls on us to consider *"the next steps that Australia should be taking to become a more attractive jurisdiction, a more attractive hub for arbitration, and a greater contributor to arbitration practices in the Asia Pacific region."*[3]

In the spirit of enhancing regional engagement with international commercial arbitration, ACICA hosted a webinar on 17 February 2021 on the topic of 'International Arbitration in the South Pacific'.[4] While providing her insights on the on-going international arbitration reforms in Papua New Guinea, Miriam Kias, Acting Deputy Secretary of the Department of Justice and Attorney General (PNG) noted the *"absence of an effective domestic arbitration law"* (currently under review) but expressed her hopes in using international arbitration to *"create a platform [and] environment where investors are confident in coming into our country to work with us"*.[5] Similar sentiments were echoed in the Asian Development Bank's 'Third South Pacific International Arbitration Conference', held on 17 March 2021, of which

1 https://acica.org.au/australian-arbitration-report/
2 Ibid p. 6
3 Speech found in https://acica.org.au/australian-arbitration-report/
4 https://www.youtube.com/watch?v=wq0TAhw6ahU&t=7s
5 Ibid.

ACICA was a proud partner.[6] In ACICA's event, speakers requested information and capacity building on the practice of international arbitration.

To assist users and those within the region who are becoming more interested in using arbitration to resolve disputes, ACICA has developed a range of resources aimed at providing practical guidance on arbitration in Australia. These are publicly available on the ACICA website. Under the 'Resources' tab, users will find, amongst others:

- The 'ACICA Practice & Procedures Toolkit', which includes links to model clauses, a submission to arbitration agreement, sample documents such as a sample Notice of Arbitration and Answer to the Notice of Arbitration, guidance and explanatory notes (e.g. on the use of memorials or pleadings and a step by step comparison of arbitration and litigation).[7]
- ACICA45's webinars on the 'Lifecycle of an Arbitration', an introductory series which seeks to help first-time navigators of the international arbitration landscape become familiar with fundamental arbitration terminology, concepts and processes.[8]

More resources are being developed and will be added throughout the year.

Significantly, along with other innovations (which are explored in this edition of the ACICA Review), the 2021 ACICA Arbitration Rules ('**2021 Rules**') bring technology to the fore as a means of bridging the geographical distance between Australia and its neighbours, with a view to decrease the physical barriers which may have previously impeded regional access to arbitration in Australia. In particular, amendments have been made to allow arbitration proceedings to be conducted in person or virtually, enabling maximum flexibility to accommodate the unique circumstances of each case.[9] For example, to facilitate virtually conducted arbitrations, the Arbitral Tribunal, in consultation with ACICA and the parties, is able to adopt any data protection measures required to maintain the confidentiality of proceedings. Through the changes introduced in the 2021 Rules, which envision technology playing a greater role in promoting regional arbitration, ACICA hopes to create a more accessible arbitration environment where corporations and practitioners across the South Pacific can be increasingly confident in arbitrating in Australia.

6 https://www.adb.org/news/events/3rd-south-pacific-international-arbitration-conference-de-risking-investment
7 https://acica.org.au/acica-practice-procedures-toolkit/
8 https://acica.org.au/acica45-webinars/
9 2021 ACICA Arbitration Rules, Art 25.4.

Report of the AMTAC Chair

Gregory Nell SC
AMTAC Chair

AMTAC Annual Address

Arrangements are in hand for this year's AMTAC Annual Address, which will be AMTAC's 15th Annual Address. This event is likely to be held in or around September/ October this year, although a final date has not yet been fixed. AMTAC is currently liaising with representatives of the Maritime Law Association of Australia and New Zealand (MLAANZ) with a view to coordinating the date of the AMTAC Annual Address with MLAANZ's Annual Conference for this year. A final decision has also not yet been made as to the format of this year's Annual Address, in particular whether AMTAC can revert to an in-person presentation broadcast to in person venues in other States (as was the practice pre-Covid) or as a webinar (as was done last year) or some combination of the two. Justice Angus Stewart of the Federal Court of Australia has been invited to deliver this year's Annual Address. Confirmation of the details of this event will be publicised on the AMTAC and ACICA websites once arrangements have been finalised.

Australian Arbitration Week Seminar

AMTAC has also arranged a seminar / webinar as part of this year's Australian Arbitration Week (AAW) to be held on Tuesday 19 October 2021 from 12:30 to 2:00 pm. This is likely to involve a webinar format along the same lines as the successful seminar that AMTAC held as part of last year's AAW, although possibly also with an in-person component depending on COVID-19 restrictions at that time. Arrangements are currently in hand as to the speakers at this seminar, and their topics. Once again, further details of this event will be provided via the AMTAC / ACICA / AAW websites in due course, and in advance of the seminar.

Other Seminars

In my reports last year, I noted that other seminars AMTAC had planned for last year were scuttled because of the COVID 19 crisis and attendant travel restrictions. AMTAC proposes to hold these events this year, if possible and once there is confidence that they can take place safely and will not be inhibited by COVID-19 or its attendant travel restrictions / border closures etc. In the meantime, AMTAC has also been discussing with other bodies in the shipping sphere the possibility of presenting webinar format seminars jointly with those organisations. As such events are able to be arranged, they will be publicised on the AMTAC and ACICA websites.

International Maritime Law Arbitration Moot (IMLAM) Competition

As I also reported last year, the IMLAM competition which was to be held in Singapore in July 2020 was cancelled due to COVID 19 and its associated travel restrictions. This year's competition will also not go ahead for the same reasons. Accordingly, AMTAC will not be called upon to provide its usual sponsorship of the IMLAM competition (namely the Spirit of the Moot prize) this year.

However, the organisers of the IMLAM competition have announced that the competition will return in 2022, with Murdoch University (WA) partnering with Singapore Management University Yong Pung How School of Law to run a virtual competition next year. Following that competition, an assessment will then be made as to whether face to face competition can resume in 2023.

The IMLAM competition has over the last 20 years or so grown significantly to become one of the pre-eminent university mooting competitions in the world, attracting teams from Australia, Asia-Pacific, India, the Middle East, Europe, and America. As such, the IMLAM competition has become an important vehicle for the promotion of international commercial arbitration as a means of dispute resolution in the maritime sphere amongst law students and future legal practitioners. This has been with the thinking that the earlier these students and practitioners are exposed to commercial arbitration and its application and benefits, the greater the likelihood that they will later consider, promote, and apply arbitration for the benefit of their clients and the industries in which they operate as a method (if not their preferred method) of dispute resolution.

AMTAC is and has for many years been a strong supporter and promoter of the IMLAM competition. To this end, as I noted earlier, AMTAC is a sponsor of one of the prizes awarded at the competition (the Spirit of the Moot Prize).

AMTAC has also provided support in publicizing the competition and encouraging its members to assist in the conduct of the competition. Many individual members of AMTAC have regularly participated in the IMLAM competition, including as judges of both the oral rounds and written submissions. This has included travelling overseas when the competition has been held outside of Australia.

AMTAC's support and promotion of the IMLAM competition is one of the main ways that AMTAC seeks to achieve its stated objective of supporting and facilitating international and domestic arbitration in respect of maritime and transport disputes, as well as the promotion of Australia and the Asia Pacific region as a recognised leader in maritime and transport scholarship, maritime affairs, and commercial maritime dispute resolution.

Whilst nothing is required of AMTAC and its members in this regard in the immediate future, AMTAC nevertheless looks forward to resuming its support of the IMLAM competition, both later this year (when arrangements for the 2022 competition are likely to commence) as well as at the time of that competition.

Faces of ACICA: meet James (Jim) Morrison

James (Jim) Morrison
Partner, Peter and Kim, and Arbitrator (ACICA Fellow)

Jim specialises in international arbitration, acting as an arbitrator and counsel. He has represented leading companies in a variety of high-stake commercial and investor disputes across the world. He is a founding Partner at Peter & Kim, having established the firm's presence in Australia. He has a strong interest in markets in Australia and Asia, and particularly East-Asia. He was formerly Counsel at the ICC Court of Arbitration in Paris, the Acting Secretary General of ACICA and the Co-Chair of the ACICA Rules Committee.

Q. Having spent many years overseas, what brought you back to Australia?

While family was one of the main factors that brought me back to Australia, it was also a deliberate career decision. At the time, there were few people in Australia with my particular experience and skills in the international arbitration space. Having worked at a leading arbitral institution, like the ICC, and a major Asian law firm in Korea representing clients in cases all over the world, I saw an opportunity and an exciting (but somewhat daunting) challenge in returning to Australia. International arbitration was still developing as a standalone practice here, and so the timing felt right to draw on my experiences to build a career at home. The beaches, food and lifestyle are pretty good too, hey?

Q. Which hat do you prefer, acting as an arbitrator or counsel?

That is a difficult question. The roles can be so different, often requiring you to bring polar opposites in temperament and skills to the table. While many see arbitrator appointment as a type of graduation from counsel, I think that both roles complement each other and it can be helpful to keep a foot in each camp. As an arbitrator, I see shenanigans (both "dos and don'ts") which can assist in informing and improving my practice acting as counsel. While I really enjoy both roles, I admittedly take special enjoyment being in the trenches acting for clients as counsel, knowing that I am helping them through a time of difficultly.

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

Listening skills. Not just hearing, but really listening and understanding — listening to your client, to the other side, to the arbitrator and to the parties. In most arbitrations in which I act, it is not unusual for me to be the only Australian and sometimes I am one of the only native English speakers. There is a whole cast of different nationalities, cultures, legal backgrounds and languages being spoken. Being able to properly understand all the actors in the case and effectively deliver your service as

an international arbitration lawyer requires special listening skills. In order to cross the legal and factual divide in a cross-border dispute, you need to be able to effectively cross the linguistic and cultural divide. This takes patience and an open-mind.

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

I think the main attraction of international arbitration for parties is that it truly gives them the sense of "having their day in court" without going to court. They can air their side of a dispute openly and with confidence in a way that may not be possible in a state court that does not speak their language, literally and figuratively. The key reasons we recommend international arbitration — enforceability, confidentiality, efficiency etc — naturally help in building this confidence, but I think it is the participative element that is most attractive to parties, the ability to exercise party autonomy — choosing institutions, rules, arbitral seats and arbitrators, and crafting the procedure to fit your case. Knowing that a party has relative control over how its dispute is going to be resolved is empowering.

Q. How do you view the international arbitration landscape in Australia?

The international landscape in Australia is a very fertile one. Even since I have returned to Australia, there have been significant positive shifts in culture and practice, as well as an increasing number of cases. I feel that Australia is more connected, now more than ever, to the broader international arbitration community, and this has been pivotal in increasing the percolation of best practices here. This will be even more so in the wake the COVID-inspired uptake in technology. The days of having to jump on a plane for every meeting, hearing and conference have been turned on their head. I hope that the Australian legal market will seize this as an opportunity to better project into international markets to provide services to international clients. Australian lawyers are smart, practical problem solvers, hard-working and excellent value for money. I believe there are many opportunities to service clients offshore, especially in Asia and the Pacific but also beyond. In the future, I see the international arbitration landscape in Australia being a platform that can help us project our services effectively outwards to the world, as much as one that can attract cases and parties to arbitrate here.

Q. And what's ACICA's role in facilitating this?

ACICA has drawn on its (now relatively long) history of efficiently, effectively and independently administering cases to assume a strong leadership position in promoting Australian arbitration in our region and to the world. ACICA punches above its weight in many ways. Its case load may be relatively small, but the spread in types, values and sectors of disputes arbitrated under the ACICA Rules is impressive. There have been consistent and important increases in the number of new arbitrations filed each year. ACICA's leadership and staff are world-class and strongly committed to supporting parties, arbitrators and the institution. ACICA has been creative and collaborative in engaging in initiatives with the judiciary, in-house counsel, the government and the legal community to promote, educate and facilitate. These factors have proven ACICA to be a strong ally for arbitration in Australia.

Q. What prompted the update of the ACICA Rules? What new rules are you excited to practice?

It might be easy to say "if it ain't broke don't fix it" when reading the 2016 ACICA Rules. They have proven to be markedly reliable, flexible and resilient since they were last revised. But five years can be a long time in international arbitration. Best practice can change. User expectation can change. The commercial and business environment can change (cue pesky pandemic). Also, the number of ACICA cases is increasing and their profiles changing. Given these developments, the ACICA Rules Committee, a diverse group with deep international arbitration experience in Australia and overseas, was given a broad mandate to revisit the rules to build upon what ACICA already does so well: administering cases efficiently, effectively and independently. There are a number of important changes in the 2021 ACICA Rules, but I am especially looking forward to seeing in practice the new features designed to manage time and costs (including, new time limits to render awards and powers to determine deposits), as well as the new rules on consolidation of arbitrations involving multiple contracts.

Q. COVID-19 promoted the inclusions of rules and guidelines to allow for virtual hearings, do you contemplate international arbitration will continue to be held virtually post COVID-19?

Absolutely, and so they should where appropriate. Before the pandemic, the technology and confidence in the technology (I am looking at me too!) was simply not at a point where people could resist the knee-jerk reaction to jump on a plane, even for case management conferences. The pandemic has forced us to confront our insecurities about virtually interacting. I am amazed, however, at how resilient and flexible arbitration and its users have proven to be in the face of these challenges. Clients, counsel, arbitrators and experts all embraced virtual arbitration. While elements of my practice have always been virtual because of Australia's relative geographical distance, almost overnight my whole practice became a virtual one. We should all expect more developments in the law, rules and guidelines around virtual hearings: watch this space.

Q. Any tips for virtual hearings?

Everyone should learn sign language for: "you're on mute"! While we are all getting better with dealing with the format and technology of virtual hearings, I have found that presentation style needs to be adjusted in some ways for the video-conference world. Quick interjections, snappy retorts and the figurative ability to "look a witness in the eye" can be somewhat lost in the limitations of bandwidth. If you are going to choose a background filter, make sure you aren't a cat; if you aren't going to have a background, make sure you have a bookshelf filled with impossibly interesting and eclectic books and objects … or at least have a general tidy-up.

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

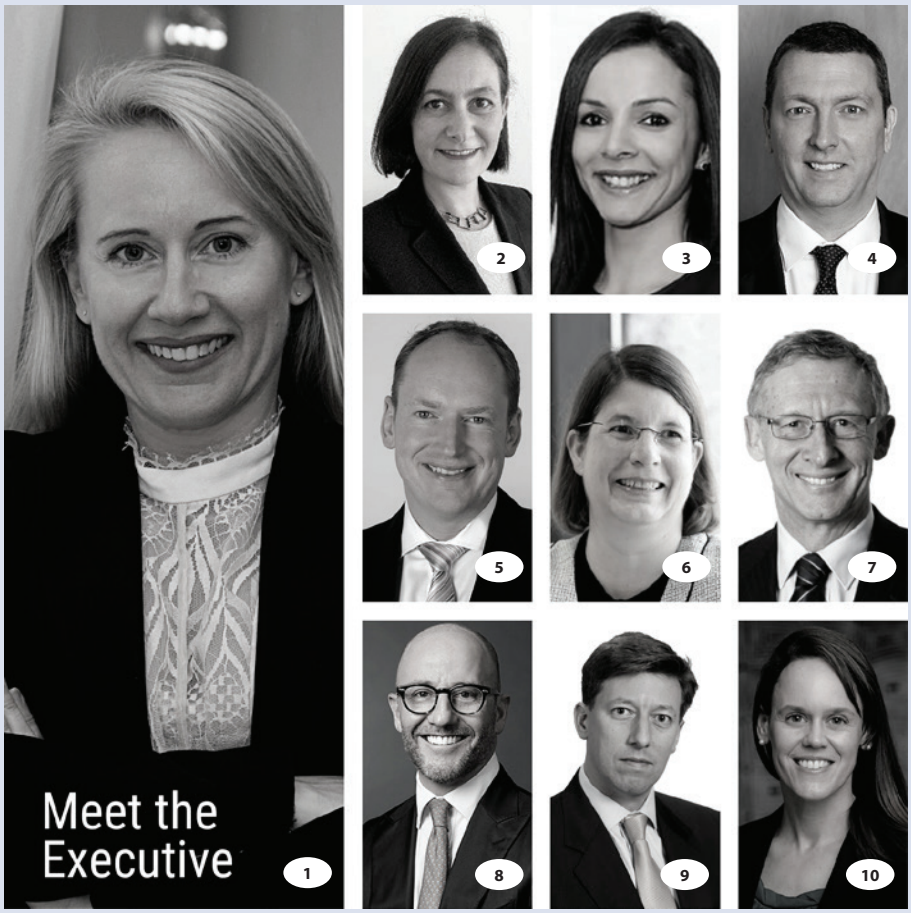
With border uncertainties, I am looking forward to visiting some more great Australian towns, like Boorowa, Boggabri, Bobadah, Bombala and Betoota. When the borders shut, I managed to get through most of Australia's "A" towns, and now I am looking forward to the Bs. When the world does open up again, I am really looking forward to jumping on a plane, not to any exotic places but simply to catch up with my internationally based buddies in a non-virtual reality.

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

News in brief

Meet the New Members of the ACICA Executive

Effective from 1 June 2021, we welcome a new ACICA Executive!



1. President: Georgia Quick, Sydney
2. Vice President: Judith Levine, Sydney
3. Vice President: Gitanjali Bajaj, Sydney
4. Vice President: Jonathon Redwood SC, Sydney
5. Treasurer: Martin Cairns, Sydney
6. Executive Director: Brenda Horrigan, Singapore
7. Executive Director: Ian Govey AM, Canberra
8. Executive Director: Joshua Paffey, Brisbane
9. Executive Director: Nick Longley, Melbourne
10. Secretary General: Deborah Tomkinson, Sydney

New Members

We welcome the following new members to ACICA:

Fellows

Andrew Battisson

Frederico Singarajah

Mediation Panel

Dominique Hogan-Doran

Associates

Jamie Calvy

Laila Hamzi

Andres Velasquez

Hannah Kim

Daniel Forster

Amy Hando

Ashley Chandler

Students

Dara Mooney

Shivam Mishra

Prashant Jhajharia

Sarashika Eakambaram

Kirti Mangesh Patil

Siddhesh Birajdar

Kumar Kartik

Estee Khoo

Ritwik

Vale Judge James Crawford AC SC FBA

ACICA pays tribute to Judge James Crawford, eminent Australian jurist and academic, who passed away on 31 May 2021, aged 72. From his early life in Adelaide, Australia, through his academic scholarship and his experiences as an international law practitioner, which culminated in a seat on the International Court of Justice, Judge Crawford had a truly remarkable career.

Judge Crawford has been described as "the outstanding public international lawyer of our age"1 – his brilliance as an international judge, advocate, advisor, teacher and scholar is widely recognised. What is also clear from the outpouring of condolences and personal reflections across the globe, even to those that did not have the benefit of ever meeting him, is that Judge Crawford also possessed greatness as a human being and he inspired those around him with his empathy, wit, generosity, wise counsel, work ethic and leadership.

Judge Crawford gave much to the Australian and international community, holding so many eminent positions, it is impossible to list them all here. In the arena of international practice, prior to his election to the ICJ bench, Professor Crawford acted as counsel in 29 ICJ cases, as counsel before other international tribunals in 23 cases and as counsel in approximately 40 arbitrations, as well as acting as judge, arbitrator and expert witness in numerous other proceedings. The inspiration he provided to a generation of young Australian lawyers to seek careers in the international arena will be just one of his legacies.

Vale James Crawford.

1 James Crawford obituary, The Guardian, https://www.theguardian.com/law/2021/jun/13/james-crawford-obituary (accessed 29 June 2021)

ACICA Rules 2021

The 2021 edition of the ACICA Arbitration Rules became effective on 1 April 2021. We would like to thank the ACICA Rules Committee for their tireless efforts and dedication to bringing the revision of the ACICA Rules to fruition. We would also like to thank everyone that took the time to participate in the public consultation for the ACICA Rules revision and provide your valuable input. A copy of the 2021 edition of the ACICA Rules can be accessed on the ACICA website.

The 2021 edition introduces amendments relevant to virtual hearings, paperless filing and electronic execution, multi-party and multi-contract arbitrations, effective case management, third party funding, enhanced oversight of costs, the early determination of disputes, alternative means of dispute resolution and time limits for the delivery of awards. These amendments are summarised in a useful explanatory note produced by ACICA and available here.

Australian Arbitration Report

On 9 March 2021 ACICA, in conjunction with FTI Consulting, Inc. and with the support of the Australian Bar Association, WA Arbitration Initiative and Francis Burt Chambers, launched the inaugural 2020 Australian Arbitration Report, analysing arbitration activity involving Australia, Australian parties and Australian practitioners. Developed from a National survey, the Report represents the first empirical evaluation of arbitration across Australia.

Key insights from the Report included:

- High volume of arbitration (more than 200 cases over three years) with an Australian connection. The total reported amount in dispute is over $35 billion.
- Arbitration is used frequently in construction and engineering disputes and oil and gas disputes, with over 50% of all reported cases relating to those industries.
- The inherent advantages of arbitration – confidentiality and international enforceability, are key factors encouraging its use.
- Parties involved in arbitration embraced the use of technology to facilitate remote hearings even before the impact of COVID-19, highlighting the robustness and flexibility of the arbitration process in the face of adverse circumstances.
- The Australian arbitration industry is maturing, and the report highlights the appetite of Australian practitioners and users to embrace modern international best practice in process and case management. Most Australian participants have been satisfied with their experience with the arbitration process.
- The Australian arbitration industry has a way to go with respect to gender equality – though ACICA sees increasing use of female arbitrators, tribunals are all-male in the majority of reported cases.

Download a copy of the Report here.

ACICA Resources

In May 2021, ACICA released its latest addition to the Practice & Procedures toolkit:

- ACICA Explanatory Note: Litigation and Arbitration – A Step by Step Comparison

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

Recent Events

***Rising Arbitrators' Initiative/ACICA45 Webinar: The Rising Arbitrator's Challenge – Navigating the Promise and Perils of your First Appointments* – 20 May 2021**

View Webinar Here

Chair: Erika Williams | Williams Arbitration

Opening Remarks: Rocío Digón | Rising Arbitrators Initiative

Speakers: Lucy Martinez, Martinez Arbitration | Anna Kirk, Bankside Chambers | Jun Wang, Fitzgerald Lawyers | Caroline Swartz-Zern, ACICA

***Mind the Gap: Fact Finding, Tactics and Adverse Inferences in International Arbitration* – 20 April 2021**

View Webinar Here

Moderator: Elizabeth Macknay | Herbert Smith Freehills

Speakers: Kanaga Dharmananda SC, Quayside Chambers | Sam Luttrell, Clifford Chance

***From Madrid to Islamabad – Recent enforcement of ICSID awards in Australia* – 20 April 2021**

View Webinar Here

Moderator: Daisy Mallett | King & Wood Mallesons

Speakers: Andrew Battisson, Norton Rose Fulbright | Professor Chester Brown, 7 Wentworth Selborne Chambers | Justin Hogan-Doran SC, 7 Wentworth Selborne Chambers | Tamlyn Mills, Norton Rose Fulbright

***Behind the Bench – Illuminating Arbitration Practice in the Court* – 16 March 2021**

Moderator: The Hon. Justice James Stevenson, NSW Supreme Court

Speakers: The Hon. Justice Andrew Bell, NSW Court of Appeal | The Hon. Justice David Hammerschlag, NSW Supreme Court | The Hon. Justice Angus Stewart, Federal Court of Australia | Karen Petch, New Chambers

***International Arbitration in the South Pacific* – 17 February 2021**

View Webinar Here

Chair: Deborah Tomkinson | ACICA

Speakers: The Honourable Deputy Chief Justice Ambeng Kandakasi CBE (Papua New Guinea) | Brenda Horrigan, ACICA President & Partner, Herbert Smith Freehills | Daniel Meltz, 12 Wentworth Selborne Chambers | Jo Delaney, Partner, Baker McKenzie

ACICA Supported Events

- India ADR Week, 6-10 April 2021
- Meet the Female Arbitrator in Asia, organised by Equal Representation in Arbitration Pledge, 31 March 2021
- 2021 CIArb Australia and the Federal Court of Australia International Arbitration Series: Implications for Australia and Beyond, 30 March 2021
- CIArb YMG ADR World Tour: Australia and New Zealand, 24-25 March 2021
- 3rd South Pacific International Arbitration Conference: De-Risking Investment in the South Pacific International Arbitration Conference, Sydney & Virtual 17 March 2021
- R.E.A.L Virtual Inauguration Launch, 18 January 2021

Book Releases

Alan Anderson and Ben Beaumont (eds), *The Investor-State Dispute Settlement: Reform, Replace or Status Quo?* (Wolters Kluwer, 2020)

The investor-State dispute settlement (ISDS) system provides a mechanism, based on international arbitration, to resolve disputes between foreign investors and States. The number of ISDS arbitrations has increased significantly over the past decade. Drawing contributors from around the world, the authors provide insights into critical topics regarding possible ISDS reforms, their feasibility and alternatives.

Get a 25% discount when you use the discount code 25ISDS21 ordering here. It is valid through 1 September 2021.

Luke Nottage, *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts* (Edward Elgar Publishing, 2021)

This thought-provoking book combines analysis of international commercial and investment treaty arbitration to examine how they have been framed by the twin tensions of 'in/formalisation' and 'glocalisation'. Taking a comparative approach, the book focuses on Australia and Japan in their attempts to become regional hubs for international arbitration and dispute resolution services in the increasingly influential Asia-Pacific context as well as a global context.

Get a 35% discount by quoting the discount code NOTT35 when you order here. Offer ends soon.

Out with the Old, in with the New: 2021 ACICA Arbitration Rules Implemented

Meghan Keary
Senior Associate, Corrs Chambers Westgarth

Amanda Staninovski
Lawyer, Corrs Chambers Westgarth

In recent times, the inclusion of an arbitration clause in contracts has become increasingly frequent, with a growing number of companies choosing to nominate the ACICA Arbitration Rules as the governing rules for a dispute.[1] As a consequence there will likely be an increase in the number of disputes administered under the ACICA Arbitration Rules. Following an extensive public review process, ACICA has released an updated edition of the ACICA Arbitration Rules (the **2021 Rules**). The 2021 Rules, which took effect on 1 April 2021, aim to modernise the arbitration process and address contemporaneous concerns arising out of the COVID-19 pandemic, such as the use of technology and electronic communication.

This article provides an overview of the notable amendments and additions to the 2021 Rules being:

- the process of consolidation, joinder and multi-party contracts;
- rules facilitating virtual hearings and electronic communications;
- disclosure of third-party funding agreements;
- case management provisions; and
- cost settling provisions.

Unless otherwise stated in an arbitration clause that refers to the ACICA Arbitration Rules, the 2021 Rules will be the default governing rules to an arbitration commenced on or after 1 April 2021. This includes an arbitration with an underlying agreement that refers to undefined ACICA Rules. Parties should be aware of the additions and differences between the 2016 ACICA Arbitration Rules (the **2016 Rules**) and 2021 Rules[2] and can, by agreement, choose to use the 2016 Rules.

Join the Club: Wider Scope for Consolidation, Joinder and Multi-Contract Proceedings

The 2021 Rules have widened the scope of arbitrations involving multiple proceedings, parties and contracts ('multiple' situations), now clarifying the permissibility of the joinder of third parties, initiation of a single arbitration for claims arising out of multiple contacts, or consolidation of the same.

In relation to consolidation of proceedings, while the 2016 Rules provided a mechanism for consolidation, the

1 ACICA Arbitration Report (2020) available at: https://acica.org.au/wp-content/uploads/2021/03/ACICA-FTI-Consulting-2020-Australian-Arbitration-Report-9-March-2021.pdf.

2 Notwithstanding the implementation of the 2021 Rules, parties may still rely upon earlier iterations of the ACICA rules if it is specifically stated in an arbitration agreement.

revised rules now provide an extended scope in respect of the types of claims able to be consolidated into one proceeding. The 2016 Rules provided that consolidation may occur in the following circumstances (emphasis added):

(a) the parties have agreed to the consolidation;

(b) all the claims in the arbitration are made under the same arbitration agreement; or

(c) the claims in the arbitrations are made under more than one arbitration agreement, *the arbitrations are between the same parties*, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and ACICA finds the arbitration agreements to be compatible.

The key change relates to (c), with the omission of the requirement of the 'same parties' (compare Article 16.1(c) of the 2021 Rules and Article 14.1(c) of the 2016 Rules). This change effectively broadens the scope of consolidations, and emphasises that the compatibility of the relevant arbitration agreements is a central consideration in consolidation of proceedings.

Further, ACICA has provided clarity on joining additional parties to proceedings, where the additional parties are not bound by the same agreement and when joined by ACICA or the Arbitral Tribunal.

Under the 2016 Rules, Article 15.1 provided that a joinder could occur where "prima facie, the additional party is bound by *the same arbitration agreement between the existing parties* to the arbitration".[3] The drafting in the 2021 Rules reflects a more liberal approach by expressly allowing the joinder even in circumstances where the additional party is not a party to the arbitration agreement (see Article 17 of the 2021 Rules).

In contrast, the the 2021 Rules do not amend ACICA's power to join parties prior to the date the Arbitral Tribunal is confirmed and maintain that ACICA can only join a party provided that the additional party is bound by the same arbitral agreement (see Article 15.8 of the 2016 Rules and Article 17.8 of the 2021 Rules).

In any event, should the question arise as to whether the Arbitral Tribunal or ACICA have properly allowed the joinder of a party, the Arbitral Tribunal has the power to make a decision on its jurisdiction (Articles 17.2 and 17.9 of the 2021 Rules).[4]

In respect of claims arising out of multiple contracts, the 2021 Rules provides new rules that have not been featured in any previous iteration. Parties are now able to file a single notice of arbitration for claims arising out of, or in connection with, more than one contract (see Article 18 of the 2021 Rules). At first instance, these claims are deemed to initiate separate arbitrations, however the rules require a consolidation request in the 'composite' Notice of Arbitration. As is the case for a Request for Consolidation discussed above, the 'composite' notice must include the threshold requirements for consolidation, a statement identifying each arbitration agreement, facts and legal arguments in support (see Article 18.2 of the 2021 Rules).[5]

Together, these rules acknowledge the complex nature of arbitrations involving multiple elements and facilitate efficient mechanisms for overcoming the issues previously experienced when attempting to overcome these obstacles.[6]

Embracing the Electronic Era: Procedural Clarity

Virtual hearings

As readers are undoubtedly aware, the legal industry adapted quickly to the effects of COVID-19 and proved that the world can operate just as efficiently online and virtually as in real life. In light of the greater emphasis on working remotely and digitally, ACICA has modernised the Rules and provided clarity on the interaction between virtual and traditional appearances.

Most notably, ACICA has clarified that it is now open to

3 While this provision specifically stated that there must be a contractual relationship with the party, in the appropriate circumstances, ACICA had the discretionary power to join a party (even without a contractual relationship).

4 ACICA's decision to reject an application for joinder under Article 17.8, in whole or in part, is without prejudice to any party's or third party's right to apply to the Arbitral Tribunal for joinder pursuant to Article 17.1 (see Article 17.9).

5 Note that consolidation in these circumstances is also subject to the requirements of Article 16.

6 Note that ACICA will consult its protocol on consolidation and joinder when making decisions on applications: https://acica.org.au/wp-content/uploads/2021/05/Protocol-for-decisions-on-consolidation-joinder-and-challenges-under-the-ACICA-Rules-2021.pdf.

the Arbitral Tribunal (and the parties) to conduct virtual hearings. Arbitral hearings and preliminary conferences can now proceed in a myriad of ways, with the Arbitral Tribunal having the 'fullest authority' to establish the conduct of the hearing (in consultation with the parties, see Article 35.5 of the 2021 Rules). This includes holding a hearing in person, completely virtually by conference call or videoconference, by any other form of communication, or in a 'hybrid' form. To note, any virtual hearing is deemed to be held at the seat of the arbitration (see Article 27.2 of the 2021 Rules).

While the rules do not prescribe the exact manner in which virtual or 'hybrid' hearings are to be performed, the fact that the arbitrator is afforded the widest of powers in respect of the conduct of the hearing suggests complete flexibility in the way conferences (both preliminary and final) are held. This allows for the parties to work collaboratively with the Tribunal to establish the conduct of proceedings to suit the specific proceedings and matter at hand.

Electronic communications

ACICA's new rules embrace electronic communications by prescribing e-filing as the default method for filing notices of Arbitration and Answer (as well as other notices). This includes filing notices electronically, by email or any other form that provides a record of delivery (see Article 4.1 of the 2021 Rules).

In addition, the arbitral award itself may now be signed electronically or in counterparts (and then assembled into a single instrument, see Article 42.4 of the 2021 Rules). Arbitrators may also transmit the award electronically (see Article 42.5 of the 2021 Rules). Most importantly, the 2021 Rules provide that in the event of any disparity between electronic and paper forms, the electronic form shall prevail.

Three's a Party: Third-Party Funding

The last few years has seen an increase in the use of third-party funders. ACICA's new requirements relating to the disclosure of third-party funders are an interesting addition to the rules, particularly where these obligations are not widely replicated in overseas institutional rules.

Parties now have a positive obligation to disclose the existence and identity of any third-party funders (see Article 54 of the 2021 Rules). Further, the Tribunal may order a party to disclose the existence and identity of a funder at any time during the proceedings (see Article 54.3 of the 2021 Rules).

The introduction of this rule addresses concerns around confidentiality and seeking damages where third-party funders are involved.

A Penny for Your Thoughts: Costs and Fees

While, for the most part, the 2016 Rules on costs have been carried over to the 2021 Rules, the new Rules feature expanded and detailed provisions aimed at facilitating transparency and accountability.

At a high level, these changes are:

- The definition of "costs of the arbitration" is more expansive. Previously, the proviso to the article limited the costs of the arbitration to "includ[ing] only" the items listed (see Article 44 of the 2016 Rules). The 2021 Rules omit the limitation of "only" (see Article 48).
- In addition, the detailed list comprising the costs of the arbitration has been slightly broadened. Item (c) now provides "the fees and expenses of any expert" (compared to previously "the costs of expert advice"). Further, item (d) relating to the parties' legal and other costs has been widened to include (but not be limited to) in-house costs, third party funds and other direct costs reasonably incurred (compare Articles 44(c) and (d) of the 2016 Rules to Articles 48(c) and (d) of the 2021 Rules).
- The Rules now make clear ACICA's and the Tribunal's respective abilities to make decisions on costs. Article 50 of the 2021 Rules details ACICA's costs powers, which include imposing interim payments for the parties to pay the Tribunal's fees in appropriate circumstances and fixing a payable portion of ACICA's fee at any time. Separately, Article 51 of the 2021 Rules addresses the Tribunal's costs decisions. This list of powers includes the Tribunal's ability to make an order for costs in a final award, and additionally make an order for costs at any time during the course of the arbitration.

As a result of the above amendments, the 2021 Rules aim to resolve previous ambiguities and uncertainties surrounding costs and provide a clear delineation of the Tribunal and ACICA's financial oversight powers.

Get the Ball Rolling: Case Management

ACICA has introduced new case management requirements, particularly focusing on the timing for the final award.

Unless a shorter time has been agreed upon between the parties (or by law), Article 39.3 of the 2021 Rules provides that the final award must be delivered no later than:

- 9 months from the date the file is transmitted to the tribunal; or
- 3 months from the date the tribunal declares the proceedings closed.

This timeframe can be extended by ACICA if appropriate.

Conclusion

The ACICA Rules Committee has successfully revised the ACICA Rules to reflect the rapidly shifting dispute resolution environment. The 2021 Rules are a product of evaluating the current climate and practitioner's feedback to ameliorate the dispute process for all parties involved. By prioritising efficiency and clarity, the 2021 Rules have addressed a range of important procedural and case management requirements, including the utility of electronic communications, virtual hearings, and payment of costs. With the implementation of these rules, practitioners and parties will enjoy a more predictable and accessible process, allowing for the quick and just resolution of disputes in the modern era.

Apparent Bias and the Duty to Disclose: Consideration of the English Position in *Halliburton v Chubb* and Consequences for Australia

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On 27 November 2020, the United Kingdom Supreme Court delivered its judgment in *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (**Halliburton v Chubb**). Arguably one of the most significant authorities on international arbitration in a decade, the decision clarifies the English law position on apparent bias, in particular, when an arbitrator should make disclosure of circumstances which may give rise to justifiable doubts as to their impartiality.

The appeal deals with allegations made by Halliburton relating to the chairperson's failure to disclose his appointment (in one case, by the same counter-party) in certain other arbitrations relating to the same incident. The unanimous decision of the Court (Lady Arden separately concurring) dismissed Halliburton's appeal finding that, at the time of the hearing, a fair-minded and informed observer would not conclude that there were circumstances that would give rise to justifiable doubts about the impartiality of the chairperson of the tribunal in question. Although the challenge to the arbitrator was not successful, the decision provided much-needed clarification on a number of key issues common to all international arbitrations, regardless of where they are seated – the arbitrator's duty of disclosure and duty of impartiality, the test for removal, and at what points in time both an assessment of the duty to disclose and an assessment of bias should take place.

Clearly, the decision in *Halliburton v Chubb* is of significance to international arbitration practitioners around the world. However, it is important to recognise that international arbitrations seated in Australia involve a different statutory framework to the United Kingdom – most notably because Australia has adopted the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law (**Model Law**)[1] under the *International Arbitration Act 1974* (Cth) (**IAA**).

In that context, this article will consider the implications that the decision may have for international arbitrations seated in Australia.

1 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006* ('**Model Law**').

I Background and Facts

The dispute between Halliburton Company (**Halliburton**) and Chubb Bermuda Insurance Ltd (**Chubb**) originated from the Deepwater Horizon oil spill off the Gulf of Mexico in April 2010. The rig was owned by an offshore oil drilling company, Transocean Holdings LLC (**Transocean**), and leased to BP Exploration and Production Inc (**BP**). Halliburton was a sub-contractor engaged by BP to provide cementing and monitoring services and had insured its activities with Chubb.

After the disaster, a number of claims were commenced against Transocean, BP and Halliburton. Halliburton settled an action for damages and subsequently sought indemnification of the excess liability policy it had with Chubb under its Bermuda Form liability policy. Chubb refused the claim and, in January 2015, Halliburton commenced a London-seated arbitration against Chubb (**the Halliburton Arbitration**).

The parties each selected a party-appointed arbitrator but failed to agree a chairperson. The English Commercial Court appointed Chubb's preferred chairperson, Mr Kenneth Rokison QC. After taking up his appointment – and without Halliburton's knowledge – Mr Rokison accepted two further appointments arising out of the Deepwater Horizon disaster. In December 2015, Mr Rokison was appointed by Chubb in an arbitration commenced by Transocean regarding the same excess liability policy and in August 2016, he was appointed as a substitute arbitrator on the joint nomination of the parties in a claim commenced by Transocean against a different insurer.

After discovering these appointments in November 2016 (some 18 months into the Halliburton Arbitration), Halliburton called for Mr Rokison's resignation as arbitrator. When that did not occur, Halliburton applied to remove Mr Rokison as chairperson under s 24(1)(a) of the *Arbitration Act 1996* (UK) (**Arbitration Act (UK)**), which allows removal of an arbitrator if 'circumstances exist that give rise to justifiable doubts as to his impartiality'.

Halliburton argued that justifiable doubts arose from Mr Rokison's acceptance of the appointments, the failure to disclose them and the failure to resign from the Halliburton Arbitration, giving rise to an appearance of bias.

The application was unsuccessful at first instance before the High Court.[2] Halliburton appealed to the Court of Appeal, which dismissed the appeal.[3] Halliburton then appealed to the Supreme Court.

II Decision of the Supreme Court

The Supreme Court dealt with two overarching issues in its judgment. First, whether Mr Rokison had a duty to disclose his subsequent appointments to Halliburton and second, whether his non-disclosure in the circumstances would give rise to justifiable doubts about his impartiality (leading to an appearance of bias).

The Court held that Mr Rokison had a duty to disclose his subsequent appointments to Halliburton and he had failed to do so.[4] It was held that, at the time of his appointment, the potentially overlapping arbitrations could have reasonably given rise to a real possibility of bias. However, by the time the application to remove Mr Rokison was heard, the Court determined that a fair-minded and informed observer would not infer from his non-disclosure that there was a real possibility of bias.

A. Duty of Impartiality

In its decision, the Court considered ss 1 and 33 of the *Arbitration Act* (UK) pursuant to which arbitrators have a duty to 'act fairly and impartially as between the parties'. Halliburton claimed that circumstances existed which gave rise to justifiable doubts about Mr Rokison's impartiality, including his acceptance of the subsequent appointments, his failure to notify Halliburton or give them an opportunity to object, and his failure to resign from the Halliburton Arbitration.[5]

The Court observed that, despite differing views in different jurisdictions, the content of the duty applies equally to party-appointed arbitrators and independently

2 *H v L* [2017] EWHC 137 (Comm) ('**H v L**').
3 *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817 ('**Halliburton**').
4 *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (Respondent)* [2020] UKSC 48, [145] ('**Halliburton v Chubb**').
5 Ibid [28].

appointed arbitrators.[6] Importantly, the Court also concluded that this statutory duty also gives rise to an implied term in the contract between the arbitrator and the parties.[7] Once appointed as the chairperson in the arbitration between Halliburton and Chubb, Mr Rokison became subject to the statutory duty of fairness and impartiality under s 33 of the *Arbitration Act* (UK), which he owed to both parties, and became subject to an implied term of similar ambit in the contract by which he was appointed as arbitrator by the parties.

B. Duty of Disclosure

Having considered the duty of impartiality, the Court then turned to consider the duty of disclosure. While the *Arbitration Act* (UK) contains an express provision requiring an arbitrator to be impartial, it does not contain an express provision requiring disclosure. It is this legislative 'gap' that the Court sought to address in the *Halliburton v Chubb* decision.[8]

The Court noted that:

- an arbitrator is under a continuing duty to disclose any potential conflicts of interest that may give rise to justifiable doubts about their impartiality.[9]
- disclosure is not simply good practice but is a legal obligation which 'is encompassed within the statutory obligation of fairness' and is 'an essential corollary of the statutory obligation of impartiality'.[10]
- an assessment of the duty of disclosure can only be made by reference to circumstances at the time the duty arose and while the duty subsisted (ie it cannot be 'answered retrospectively by reference to matters known to the fair-minded and informed observer only at a later date').[11]
- circumstances may change before there is disclosure and although this would not remove any breach of the obligation to disclose, it could render any continuing failure a 'less potent factor in an assessment of justifiable doubts as to impartiality'.[12]

Applying these principles to the facts in *Halliburton v Chubb*, the Court held that there had been a breach of Mr Rokison's duty of disclosure. His subsequent appointment by Chubb in related arbitration proceedings was a circumstance that might have reasonably given rise to the real possibility of bias. The Court noted that there was no established custom and practice for multiple appointments in Bermuda Form arbitrations (which, if there was, may have supported a view that there was no need for disclosure as the parties would be aware of the customary position). The Court expressly acknowledged that multiple, related appointments are common practice in some industries; it is common practice, for example, in re-insurance arbitrations.[13] Accordingly, Mr Rokison was under a legal duty to disclose the subsequent appointments to Halliburton. The Court held that he had breached this duty by failing to make the disclosure.

C. The Test for Apparent Bias

Having found that there was a breach of the duty to disclose, the Court turned to the core question before it – whether this breach of the duty of disclosure gave rise to apparent bias that impugned Mr Rokinson (and the award).

The test for apparent bias under English law is an objective test of whether a 'fair-minded and informed observer would conclude that there was a real possibility of bias.'[14] Unlike the timing for assessment of the duty of disclosure, the broader question of whether there is a real possibility of bias must be assessed at the time of the hearing to remove the arbitrator.

It was found that an arbitrator's acceptance of multiple appointments involving a common party, facts or subject matter *may* give rise to an appearance of bias, depending

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6 *H v L* (n 2) [19]; *Halliburton v Chubb* (n 4) [151], [63]–[64] citing Sundaresh Menon, 'Adjudicator, Advocate or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator' (2007) 34(3) *Journal of International Arbitration* 347.

7 *Halliburton v Chubb* (n 4) [76].

8 See *Arbitration Act 1996* (UK) s 24(1)(a) ('**Arbitration Act**'). Cf *Model Law* (n 1) art 12.

9 *Halliburton v Chubb* (n 4) [116].

10 Ibid [77]–[78], [107]–-[116].

11 Ibid [119].

12 Ibid [120].

13 Ibid [91].

14 *Arbitration Act* (n 8).

on the realities of international arbitration and the customs and practices of the relevant field of arbitration.[15] A failure to disclose an appointment is a factor to be considered.[16]

Additionally, the Court placed great weight on the following state of affairs in assessing whether there was a real possibility of bias:

- at the time it was unclear as to whether there was a legal duty of disclosure under English law;
- both subsequent arbitrations commenced several months after the Halliburton Arbitration;
- it was likely that both of the subsequent arbitrations would be resolved on preliminary issues and as such there would be no overlap in evidence or legal submissions;
- Mr Rokison received no secret financial benefit from the appointments; and
- there was no unconscious ill will toward Halliburton on Mr Rokison's part.[17]

Considering these factors, the Court concluded that a fair-minded and informed observer would not infer from Mr Rokison's oversight that there was a real possibility of unconscious bias on his part at the time of the hearing on his removal in January 2017.

III Significance in the Australian context

A. Is There a Duty of Impartiality in the Australian Context?

In Australia, the IAA adopts the UNCITRAL Model Law, which has no express equivalent of the English statutory duty of impartiality on arbitrators.[18] Under ss 1 and 33 of the *Arbitration Act* (UK) arbitrators have a duty to 'act fairly and impartially as between the parties'.

In the Australian context, the IAA acknowledges impartiality but does not express it as a duty on an arbitrator. Instead the provisions of the IAA recognise that the arbitral process should generally be impartial.[19] The Model Law also provides that that the appointment of an arbitrator can be challenged if there are justifiable doubts to their impartiality.[20] On this basis there seems to be at least a plausible argument that, on a purposive construction of the IAA, the legislature intended arbitrators to be subject to a statutory duty of impartiality. If such a finding was ever made by an Australian court, that would pave the way for an Australian court to find that the statutory duty also gives rise to an implied term in the contract between the arbitrator and the parties. Beyond this, the decision in *Halliburton v Chubb* is helpful for a number of other reasons. It confirms that the duty of impartiality should apply equally between a co-arbitrator (often a party-appointed position) and a chairperson. It also highlights the difficulty in challenging an arbitrator on the basis of impartiality, demonstrating that the failure to disclose multiple appointments is not necessarily enough to successfully challenge an arbitrator's impartiality.

B. What is the Content of Any Duty of Disclosure in Australia?

The Australian statutory framework under the IAA and the English framework under the *Arbitration Act* (UK) relating to disclosure are quite different. The *Arbitration Act* (UK) does not contain any express provision for disclosure. However, the decision in *Halliburton v Chubb* confirmed that a legal duty of disclosure exists under English law, as a component of the statutory duties under s 33 of the *Arbitration Act* (UK) to act fairly and impartially. The duty requires disclosure of facts or circumstances which might reasonably give rise to the appearance of bias.

In contrast, the IAA does have an express obligation of disclosure. Article 12(1) of the Model Law states:

> *When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence…* (emphasis added).

15 *Halliburton v Chubb* (n 4) [128], [130]–[131].
16 Ibid [117]–[118], [133], [155].
17 Ibid [149].
18 Although there is implicit recognition that the process should be impartial under the *International Arbitration Act 1974* (Cth) s 39(2)(b)(i) ('IAA').
19 Ibid s 39(2)(b)(i).
20 *Model Law* (n 1) art 12.

The question then arises: is the content of the express statutory duty of disclosure that applies in Australia any different to the duty of disclosure that the Supreme Court declared in *Halliburton v Chubb*?

On a review of the authorities, it appears that the two jurisdictions diverge regarding the threshold of relevance of facts required to be disclosed by an arbitrator.

Halliburton v Chubb clarified that, under English law, arbitrators have a duty to disclose facts that *would* or *might* lead the fair minded and informed observer to conclude that there was a real possibility of bias.[21] Accordingly, this captures borderline facts that 'might' give rise to justifiable concerns about impartiality, even if upon further scrutiny they are determined to be unfounded.

In Australia, the Model Law requires disclosure of information that is *likely* to give rise to justifiable doubts. Accordingly, the UK requires that the facts *would* or *might* give rise to a real possibility of apparent bias, while Australia requires they *likely* give rise to a real danger of impartiality. The two tests diverge to the extent that the UK test imports a slightly lower threshold – facts that *would* or *might* have an impact require more caution than facts that are *likely* to have an impact. At its highest, Australia applies a test that is slightly more favourable to arbitrators in terms of the risk of being removed or an award being set aside. However, whether there is any practical difference when applying the two thresholds remains to be seen. In both jurisdictions, it is clear that arbitrators will be best placed to disclose details regarding multiple related appointments and the identity of any common party in order to comply with their duty of disclosure.

Halliburton v Chubb confirmed that the duty of disclosure does not override the arbitrator's duty of privacy and confidentiality under English law. In relation to what could be disclosed, the Court considered that the arbitrator could exercise a limited form of disclosure on the facts before it. In absence of agreement to the contrary by the parties allowing greater disclosure, the arbitrator could disclose the existence of the arbitration and the identity of the common party without obtaining express consent of the relevant parties.[22]

In Australia, ss 23C to 23G of the IAA prohibit parties and the arbitrator or tribunal from disclosing confidential information and specify when confidential information can be disclosed, such as by consent of all the parties. However, the IAA does not explicitly note that an arbitrator has a duty of privacy and confidentiality and the boundaries of such a duty remain unclear. Additionally, Australia's common law position is informed by the High Court's decision in *Esso Australia Resources Ltd v Plowman*,[23] which found that arbitrations (and generally the documents or information provided in them) were private but not confidential. Accordingly, Australia's position in relation to what an arbitrator can disclose is somewhat unclear. This is an area that requires development in the Australian law. For present purposes, following the limits of disclosure set by *Halliburton v Chubb* is probably a safe approach for arbitrators grappling with exactly what they must, and can, disclose.

Finally, it is worth also noting that in *Halliburton v Chubb*, the Supreme Court held that determining whether there is a duty to disclose will be influenced by established customs and practices in particular fields of arbitration.[24] The relevant practices in re-insurance arbitration, for example, might differ from those in shipping arbitrations. The content of the duty will, to an extent, depend on the expectations of users of arbitration in any specific field.

We can expect to see the influence of *Halliburton v Chubb* arising in Australia in the context of construction / project disputes and gas pricing arbitrations. Both fields are often defined by multiple tiers of contracts and disputes and usually involve a relatively small group of arbitrators considered to have the necessary experience. Further, both fields are sometimes susceptible to a perception of 'contractor / principal' or 'producer / buyer' friendly appointments in the selection and conduct of arbitrators. It remains to be seen how the principles of *Halliburton v Chubb* might be applied in this context in Australian seated arbitrations.

21 *Halliburton v Chubb* (n 4) [37], [70], [74], [108], [110], [136].
22 Ibid [104].
23 (1985) 183 CLR 10.
24 *Halliburton v Chubb* (n 4) [137].

C. Removal of Arbitrators – The Test for Apparent Bias

As confirmed in *Halliburton v Chubb*, the test for apparent bias under English law is an objective test of whether a 'fair-minded and informed observer would conclude that there was a real possibility of bias.'[25]

A question arises as to how different this is to the test in Australia.

Under art 12(2) of the Model Law, an arbitrator may be challenged if circumstances exist that give rise to 'justifiable doubts' about the arbitrator's impartiality or independence. Section 18A of the IAA clarifies the meaning of 'justifiable doubts' stating:

> *there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration* (emphasis added).

Australia adopted the 'real danger of bias' test into its statutory scheme under s 18A of the IAA from the English decision in *R v Gough*.[26] The English common law progressed and in *Porter v Magill*,[27] Lord Hope made a 'modest adjustment' to the Gough test by reformulating the test as 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.[28] *Porter v Magill* is the line of English authority that binds English courts today and is the formulation of the test which was applied in *Halliburton v Chubb*.[29] However, it is not presently clear whether the common law in Australia has followed suit.

There are two potential differences between these tests: first, the language of 'real danger' vs 'real possibility' and second, the vantage point, being the court and the reasonable man, respectively.

In relation to the first point, the dominant view is that there is no practical difference between the two tests. Both use the sematic commonality of 'real' and as between a 'real danger' and 'real possibility'; a 'danger' is just a possibility of a bad thing.[30] The test is concerned with the *possibility*, not probability, of bias.[31] Cases and academic writings from common law jurisdictions have considered whether the 'real danger' test is a higher threshold. Some have opined that while 'real possibility' merely requires showing it was possible there was bias, 'real danger' requires that the possibility of bias is proven.[32] However, such a distinction has not been formally endorsed and practically speaking, the two tests are unlikely to lead to different outcomes in the vast majority of cases.

Whether the Australian vantage point is that of the court or the reasonable man has also evolved over time. In the decision of *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* (**Sino Dragon**),[33] Beach J held that whether there is a 'real danger of bias' is to be considered from the perspective of the court as opposed to that of a reasonable lay person.[34] However, this was overturned when, in *Hui v Esposito Holdings Pty Ltd* (**Hui v Esposito Holdings**),[35] his Honour found the correct perspective was that of the 'reasonable bystander' or 'reasonable man'.[36] His Honour was persuaded to change his view for two reasons. First, because s 18A is silent on perspective. Second, because the English cases post *R v Gough* have

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25 *Arbitration Act* (n 8).

26 [1993] AC 646, 670 ('*R v Gough*'). The full text of the *R v Gough* test is:

> Having ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.

27 [2002] 2 AC 357.

28 For further discussion of whether there is any difference between the 'real danger' test and the 'real possibility' test, see Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law International, 2009) ch 2.

29 *Halliburton v Chubb* (n 4) [52].

30 This conclusion was reached by Lord Phillips in *Re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700, 726–7 and was adopted by Sam Luttrell in his extensive consideration of the tests in Luttrell (n 28) 38–9.

31 *R v Gough* (n 26) .

32 Lionel Leo and Siyuan Chen, 'Reasonable Suspicion or Read Likelihood: a Question of Semantics? Re Shankar Alan s/o Anant Kulkarni' (2008) (1) *Singapore Journal of Legal Studies* 446.

33 [2016] FCA 1131 ('*Sino Dragon*').

34 Ibid [197].

35 (2017) 345 ALR 287.

36 Ibid [241].

shifted the perspective from that of the court, as originally stated by Lord Goff, toward the perspective of the reasonable man. In adopting the perspective of the 'reasonable bystander' or 'reasonable man', Justice Beach took a significant step in bringing the Australian position in line with that of the UK.

This leaves a position where both tests are objective, apply the same vantage point of the reasonable man, and apply the substantially similar tests of 'real possibility' and 'real danger'.

As noted above, the tests diverge to the extent that the UK test imports a slightly lower threshold regarding facts that *would* or *might* have an impact as opposed to facts are *likely* to have an impact. Despite having different statutory schemes originating from different formulations of the test for bias under English law, interpretation by the courts in the UK and Australia has progressively aligned the provisions and considerably narrowed any gaps between the two jurisdictions. As a result, challenges for apparent bias in Australia will, for all intents and purposes, be resolved in a substantially similar manner to those in the UK.

There is limited authority on removal of an arbitrator under Australian law. The following authorities deal with arbitrations under State legislation prior to the uniform adoption of the Model Law (not the IAA), but are persuasive to the extent they illustrate the approach of Australian courts in considering removal of an arbitrator for apparent bias. The decision of *Giustiniano Nominees v Minister for Works*[37] concerned a construction industry arbitration and resulted in the successful removal of an arbitrator. The Supreme Court of Western Australia was satisfied that the arbitrator's conduct in failing to disclose that he was giving training seminars to one of the parties while the arbitration was on foot gave rise to a reasonable apprehension of bias. The Victorian case of *Gascor v Ellicott* (**Gascor**)[38] involved an unsuccessful challenge to remove an arbitrator. The arbitrator had not disclosed that he had been appointed in a previous gas arbitration in which he had decided a technical issue in favour of the sellers (who were not the sellers in the challenged arbitration), which were said by the buyer to be substantially the same as the issues in the challenged arbitration. The arbitrator in this case had also been counsel in an earlier arbitration and had cross-examined witnesses (and moderately criticised them in his written submissions) who were again to be called as witnesses. The Court was satisfied that, although there were similarities in the subject matter of the arbitrations, the arbitrator had fulfilled his role as counsel in the earlier arbitration and there was no reasonable apprehension of bias.

D. The Time of Assessment of the Possibility of Bias

In *Halliburton v Chubb* the Court found that the relevant point in time for determining whether there is a 'real possibility' of bias is at the date of the first instance hearing of the application to remove the arbitrator, not at the time of the non-disclosure. This conclusion was reached in large part because the *Arbitration Act* (UK) uses the present tense 'exist' in directing the court to assess the circumstances as they exist at the date of the hearing of the application to remove.[39]

This led to a somewhat curious result. The finding of the Court that Mr Rokison had breached his legal duty in failing to disclose the second and third appointments was ultimately of little consequence. The Court assessed apparent bias at the date of the hearing of the application to remove Mr Rokison in January 2017 and not at the time he was appointed in the second reference, back in December 2015. During that time, there had been significant developments, including that the subsequent arbitrations were to settle at preliminary stages and Mr Rokison had provided explanations for his conduct in correspondence with Halliburton. Accordingly, the Court was satisfied that by January 2017, the fair-minded and informed observer would not conclude there was a real possibility of bias.

It is easy to see why such an outcome might cause concern to Halliburton. Facts that come to light that give rise to a reasonable apprehension of bias (including by accident, as was the case in *Halliburton v Chubb*) will only be assessed at some point in the future, potentially years after disclosure should have been made.

As Lady Arden noted in her separate judgment, this can result in a situation where an arbitrator may have

37 (1995) 16 WAR 87.
38 [1997] 1 VR 332 ('*Gascor*').
39 *Halliburton v Chubb* (n 4) [121].

breached their terms of appointment, but due to the time at which the conduct is assessed, face no sanction or liability as a result.[40] Lord Hodge postulates that an arbitrator could be ordered to pay costs in some challenges but seeking such a remedy would not be straightforward because, among other reasons, arbitrators are unlikely to be a participating party in the court proceedings and may have immunity if the costs are claimed as damages, limiting a party to try and recover fees and expenses. Such a remedy is, in any case, usually not the focus of the challenging party's application (which is focused on removal), and such an approach is unlikely to instil confidence in the challenge process.

It remains to be seen how *Halliburton v Chubb*, particularly the finding in relation to timing of assessment, will be applied in Australia. Australia adopts a two-step challenge procedure under the IAA.[41] First, the arbitral tribunal hears a challenge brought by a party against an arbitrator. If the challenge is unsuccessful before the tribunal, a challenging party has 30 days to request the court decide the challenge. The tribunal, including the impugned arbitrator, may continue proceedings and make an award while the challenge is heard. This procedure under the IAA poses the question – is the relevant time to decide bias at the date of the tribunal or court hearing?

As no Australian case authority has considered this point to date, the position is not clear. However, the logical view seems to be that the time to decide bias would be at the date of the tribunal hearing, given this is the first time at which the potential bias of the arbitrator is tested. This view would certainly be more favourable to challenging parties. In light of the somewhat uncomfortable findings in *Halliburton v Chubb* in relation to timing, this area is ripe for judicial consideration in Australia.

IV Additional Observations

A. A Duty for Arbitrators to Investigate?

Halliburton v Chubb leaves the door open for further consideration of the extent to which an arbitrator is required to investigate when faced with a question of whether to disclose information. The judgment notes that generally, an arbitrator is 'not required to search for facts or circumstances to disclose', but that the possibility of circumstances requiring an arbitrator to make reasonable enquiries to comply with their duty of disclosure 'should not be ruled out'.[42]

The Court pointed to a possible business relationship or financial interest between a potential arbitrator and a party as an example of when an arbitrator may be under a duty to make reasonable enquires, but did not consider it necessary to determine whether such a duty forms part of English law or is merely good practice.

In Australia, the IAA does not contain any provisions which expressly require an arbitrator to investigate, nor has a court concluded to date that a duty to investigate forms part of the disclosure requirement under Article 12 of the Model Law. There is a paucity of case law on the subject in Australia. In *Gascor*,[43] Orminston JA (in obiter) was hesitant to accept such an obligation, or even consider it good practice. That case involved an arbitrator who was challenged on the basis that, as counsel, he had previously cross-examined at length an expert witness who was also a witness in the arbitration over which he presided as arbitrator. Orminston JA was not attracted to a duty to investigate, noting that it 'might lead to the conclusion that every judge or barrister/arbitrator would be obliged to seek out and disclose every occasion upon which he had cross-examined particular expert witnesses on similar issues, a task which might be very burdensome, if not impossible, for those who practise… in speciali[s]ed jurisdictions'.[44]

The law on disclosure has developed slowly since this decision in 1997, and further judicial consideration of a duty to investigate is needed. Indeed, no English or Australian authorities regarding an arbitrator's duty of

40 Ibid [169].
41 *Model Law* (n 1) art 13.
42 *Halliburton v Chubb* (n 4) [6].
43 *Gascor* (n 38).
44 Ibid 356.

disclosure were put before the Court in *Gascor*, with counsel relying heavily on authorities from the United States.[45] However, in light of *Halliburton v Chubb* the question is ripe for judicial consideration. Like in *Hui v Esposito Holdings*, Australian courts may now be persuaded to adopt the reasoning in *Halliburton v Chubb* as evidence of the development of the duty of disclosure post *R v Gough*.

B. When Assessing Apparent Bias Australian Courts are Likely to Rely on Soft Law such as the IBA Guidelines on Conflicts of Interest

Halliburton v Chubb confirmed that the 'fair-minded observer' must undertake an objective assessment, having regarding the 'realities of international arbitration and the customs and practices of the relevant field of arbitration'.[46] Since Australia adopted the same vantage point of the reasonable man in *Hui v Esposito Holdings*, the question arises: will Australian courts consider questions of custom and practice when determining whether to remove an arbitrator for apparent bias?

In *Halliburton v Chubb*, the UK Supreme Court had the benefit of hearing from independent organisations who were permitted to intervene in the case, receiving submissions from the Chartered Institute of Arbitrators (**CIArb**), the International Chamber of Commerce (**ICC**), the London Court of International Arbitration (**LCIA**), the Maritime Arbitration Association and the Grain and Feed Trade Association. The Court paid particular attention to fields of arbitration where multiple appointments are common, such as treaty re-insurance arbitrations which are often conducted by a limited pool of specialist arbitrators and involve multiple disputes on the same subject matter.[47] However, the Court will not always have the benefit of parties intervening or appearing as amicus curiae and, going forward, it will fall to parties to lead evidence in order to show what is 'industry practice' in a particular arbitral field.

The recent decision of *Newcastle United Football Company Limited v The Football Association Premier League Limited* (**Newcastle United**)[48] provided insight into how courts will look to soft law for guidance when applying the principles set out in *Halliburton v Chubb*. In *Newcastle United* the Commercial Court dismissed an application to remove an arbitrator under s 24 of the *Arbitration Act (UK)*. In considering whether the arbitrator should have made disclosure, the Court relied heavily on the IBA Guidelines on Conflicts of Interest in applying an objective assessment based on industry custom and practice, reiterating that they are a 'practical benchmark' (but not a binding resource) against which apparent bias can be assessed.[49]

Prior to *Halliburton v Chubb*, in *Sino Dragon* Beach J used the IBA Guidelines on Conflicts of Interest to 'calibrate' his Honour's conclusion that the arbitrator should not be disqualified as no reasonable apprehension of bias existed.[50] His Honour noted that most of the matters raised fell into 'green list' matters under the IBA Guidelines which did not require disclosure, let alone disqualification.[51] In light of *Halliburton v Chubb* we can expect to see Australian courts place even greater reliance on soft law resources such as the IBA Guidelines and use them as a 'practical benchmark' when assessing apparent bias. These resources are a convenient means for Courts to understand what is acceptable common practice in the arbitral process (which is generally cloaked in confidentiality).

C. Requirements for Disclosure in English Law Compared with International Institution Guidelines

Finally, it is notable that, had the *Halliburton v Chubb* arbitration been conducted under institutional rules, the arbitrator would likely have been removed and (given Halliburton's opposition) may never have been appointed in the first place. The ICC[52] and LCIA[53] rules all require

45 See, eg, Ibid 355–6.
46 *Halliburton v Chubb* (n 4) [3].
47 Ibid [128].
48 [2021] EWHC 349 (Comm).
49 *Newcastle United Football Company Limited v The Football Association Premier League Limited* [2021] EWHC 349 (Comm).
50 *Sino Dragon* (n 33) [194].
51 Ibid.
52 *International Chamber of Commerce: Arbitration Rules 2021*, art 11(2).
53 *London Court of International Arbitration: Arbitration Rules 2020*, art 5.4.

arbitrators to disclose facts or circumstances which might call into question the arbitrator's impartiality or independence in the eyes of the parties, rather than in the eyes of a fair-minded and objective observer. Others, such as the LCIA, the Australian Centre for International Commercial Arbitration (ACICA), Hong Kong International Arbitration Centre (HKIAC) and the CIArb[54] adopt a standard of whether the circumstances are *likely* to give rise to justifiable doubts as to impartiality or independence – more akin to a balance of probabilities test.[55]

V Conclusion

Halliburton v Chubb is a significant case in the international arbitration sphere and clarifies, at least for English-seated arbitrations, a number of key aspects of an arbitrator's duty of disclosure, duty of impartiality and the test for apparent bias. Although the IAA (adopting the Model Law) diverges from the *Arbitration Act* (UK), case law in both jurisdictions has progressively narrowed these gaps and it seems likely that *Halliburton v Chubb* will precipitate consideration of apparent bias of an arbitrator in Australian-seated arbitrations.

The decision will be significant in informing other areas such as the impact of industry practice in a particular type of arbitration on a court's decision, the existence and extent of any duty to investigate on an arbitrator, and the court's use of soft law guidance when assessing apparent bias. The somewhat unusual result in *Halliburton v Chubb* whereby the arbitrator breached their duty to disclose, but this did not give rise to apparent bias (largely due to the time of assessment), will undoubtedly be grappled with by commentators and parties alike. It remains to be seen whether a similar set of circumstances will arise in an Australian context and present Australian courts with an opportunity to clarify the position in relation to the pivotal concepts of disclosure, impartiality and bias.

54 *Chartered Institute of Arbitrators: Arbitration Rules 2015*, art 11.

55 The Singapore International Arbitration Centre (SIAC) adopts a similar standard of 'any circumstances that *may* give rise to justifiable doubts as to his impartiality or independence' in *SIAC Rules 2016*, r 13.5.

Due Process in a Virtual World

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Introduction

COVID-19 has caused an array of issues, challenges and opportunities in international arbitration. One question that has arisen is whether a tribunal will proceed with a virtual hearing despite insistence from one party on an in-person hearing. Reasons for resisting a virtual hearing can range from perceived issues in cross-examining witnesses, 'time-zone lag' as opposed to jetlag for parties appearing from different time zones, and issues with technology and internet capabilities. This article considers the Australian approach to due process in the present pandemic-affected climate.

What is due process?

Article 18 of the UNCITRAL Model Law on International Commercial Arbitration[1] reflects the 'golden rule' of arbitration (that is, fairness), and states:

> *'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'*

In Australia, the *International Arbitration Act 1974* (Cth) (**IAA**) provides that the Model Law has the force of law in Australia.[2] However, the IAA specifically qualifies Article 18 of the Model Law by providing that parties have a right to a *'reasonable opportunity'* to present their case.[3] This modification is reflected in the uniform commercial arbitration acts in each of the states and territories in Australia[4] that govern domestic arbitrations and was made to give arbitral tribunals a wider degree of flexibility in controlling arbitral proceedings.[5]

However, the parties' right to due process needs to be balanced against the overriding objective and commercial appeal of arbitration which, according to the IAA, is that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes.[6]

Does a party have a right to an in-person hearing?

With this background in mind, I consider what the position is in Australia as to whether a party has a right to an in-person hearing, given that so such right is expressly stated in the rules and regulations governing arbitrations in Australia. For an in-depth look at this issue, I refer you to the report on the position in Australia on whether a right to a physical hearing exists in international arbitration, authored by Lucy Martinez and Jay Tseng.

The rights to **equality** and a **reasonable opportunity to present its case** are the only express rights in the IAA.[7] These rights do not necessarily encompass a right to an in-person hearing, as demonstrated by the pre-Covid, 2016 Federal Court case of *Sino Dragon Trading v Noble Resources International*.[8]

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1 *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* (**Model Law**).

2 IAA, s 16.

3 IAA, s 18C.

4 *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (QLD); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (TAS); *Commercial Arbitration Act 2011* (VIC); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2017* (ACT).

5 Revised Explanatory Memorandum, International Arbitration Bill 2010 (Cth), [95]-[96].

6 IAA, s 39(2)(i).

7 Model Law, Art 18; IAA, s 18C.

8 [2016] FCA 1131.

Sino Dragon contended that it had been denied natural justice in consequence of technical faults and mistranslation in the giving of video evidence by its witnesses.

The issues play out like a highlight reel of what can go wrong in virtual hearings, including:

(i) the planned video-conferencing format (a Chinese platform called 'WeChat) did not work;

(ii) during the hearing alternative arrangements to have the evidence received over poor quality internet and telephone connections were made such that the video and audio components were being received by the Tribunal over two platforms;

(iii) witnesses could not access relevant documents;

(iv) the interpreter was not qualified and had to be replaced; and

(v) another fact witness was apparently present in the room with one witness during his testimony.

Before the Federal Court, Sino Dragon alleged that the procedure for the giving of evidence was unfair, that its witnesses were mistranslated and misunderstood, and that it was denied a proper opportunity to present its case.

Justice Beach rejected these contentions, noting that the issues were not raised with the tribunal at any stage during or after the hearing. In fact, in his closing address during the arbitration, counsel for Sino Dragon said that the witnesses 'gave their evidence clearly'.[9] In light of this, Beach J said that Sino Dragon's later assertions of injustice were 'puzzling to say the least'.[10] The application to set aside the award was refused.

This case demonstrates the Australian courts' high threshold approach that a procedural fairness challenge may only be successful if a party can demonstrate **real unfairness** or a **real practical injustice**.

Court cases where adjournment has been considered in Australia

Given the confidential nature of arbitration, it is difficult to ascertain any statistics on proceedings that have been delayed due to the pandemic or those arbitral proceedings that have moved to virtual platforms or hybrid platforms. However, we can look to court cases in Australia to get a sense of how the courts are dealing with whether a hearing should be adjourned or proceed by virtual means.

There have been numerous recent adjournment applications where one of the reasons cited for the adjournment is the inadequacy of conducting witness testimonies, or the entire trial, via video. A number of these cases are referred to an article I co-authored on adjournment applications arising from COVID-19.[11]

Although some applications were granted early into the pandemic for reasons such as:

(i) the potential unlawfulness in a foreign jurisdiction for a witness to give evidence in an Australian proceeding;[12] and

(ii) the key witnesses were so crucial to a case and interpreters were involved that an adjournment was considered warranted.[13]

However, many adjournment applications have been dismissed because judges have found that:

(i) conducting the witness testimony or trial via video would not be inadequate;

(ii) technical difficulties could be resolved effectively;

(iii) witnesses can give evidence remotely;

(iv) the demeanour of witnesses can be observed via video; and

(v) whilst challenging, witnesses can be cross-examined via video.[14]

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9 Ibid, [152].

10 Ibid.

11 Peter Stokes and Erika Williams, *Adjournment Applications in Light of the Impacts of COVID-19 on witnesses 'appearing' from China*, McCullough Robertson Blog on Cross-Border Disputes, 3 September 2020.

12 *Motorola Solutions Inc v Hytera Communications Corporation Ltd (Adjournment)* [2020] FCA 539; *Motorola Solutions Inc v Hytera Communications Corporation Ltd (Second Adjournment)* [2020] FCA 987; *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732.

13 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732.

14 See *JKC Australia LNG v CH2M Hill Companies Ltd* [2020] WASCA 38; *ASIC v GetSwift Limited* [2020] FCA 504; *Capic v Ford Motor* Company of Australia Limited [2020] FCA 486.

In April 2020, in an application for an adjournment of Federal Court proceedings,[15] said by Justice Perram to have already had a *'tortured procedural history'*, his Honour outlined a number of considerations particularly arising from the COVID-19 pandemic. In refusing the application, his Honour observed:

> *'Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But 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.'*

It is easy to see how an arbitral tribunal would adopt the same approach when faced with the question of whether or not to postpone a hearing when the timeline for the return to normal travel is both long and unclear.

Conclusion

What is clear from the consideration of case law and our own experiences in international arbitration is that, when considering virtual hearings, each case turns on its own facts but the focus should be on affording the parties due process. In times where *'to adjourn the trial because of the pandemic … may be to adjourn it for an indeterminate period'*,[16] tribunals may well be persuaded to proceed with virtual hearings despite one party's resistance.

15 *Capic v Ford Motor Co of Australia Ltd* [2020] FCA 486 [25].
16 Ibid [24].

A 'Real' Step Towards Racial Diversity: Launch of Racial Equality for Arbitration Lawyers

Abhay Bhushan Bhandari

As the world recognises the importance of recognising diverse talent, it is time to take the next step in the campaign for racial equality – formulating mechanisms provoking tangible change. On 18 January 2021, over 700 participants from across the globe attended the launch event of Racial Equality for Arbitration Lawyers ('**REAL**'), an initiative for racial equality and diversity in international arbitration. Led by co-chairs Kabir Duggal, Rekha Rangachari and Crina Baltag, the initiative was launched on Martin Luther King, Jr. Day drawing inspiration from the influential leader's momentous fight for equal rights.

In furtherance of its key goals of "access" and "advocacy", REAL aims to promote diversity and racial equality in the field of international arbitration with specific attention paid on intersectionality. It aims to tackle the problems of systemic and implicit bias by collaborating with similar initiatives, creating a safe space for discourse through dialogue and process-oriented action.

To facilitate access, REAL does not charge any membership fee. Further, it also aims to conduct workshops, mentorship programs and provide scholarships to members from minority communities to facilitate their participation. REAL has already offered scholarships to several participants from all over the world to facilitate greater access and level the playing field.

Gaining recognition for its socially relevant goals, REAL garnered support from leading arbitration practitioners, arbitral organisations, and think tanks. REAL's Steering Committee includes leading arbitration practitioners from several ethnicities and countries. Further, over 70 arbitral institutions backed the initiative on the day of the launch.

REAL's launch event took place in two sessions and was graced by six highly revered keynote speakers. The speakers have been personally involved in the advancement of racial equality in various fields of international law, including international arbitration.

Judge Navanethem Pillay: The Importance of Diversity in International Adjudicatory Bodies

The first keynote speaker at the launch event was South African jurist, Professor Dr. Navanethem Pillay. Judge Pillay was the first non-white judge of the High Court of South Africa. She was also the only female sitting judge on the International Criminal Tribunal for Rwanda, and has served as a judge at the International Criminal Court.

Having tackled racial and gender-based oppression throughout her professional career, Judge Pillay spoke about the significance of diversity and inclusivity in international adjudicative bodies. She initially believed that racial equality and representation hold importance on an international plane as they reflect reality, demographics and different perspectives. However, having been deeply involved with the subject of human rights, Judge Pillay stated that she believes that the correct reasoning behind the importance can be traced to guaranteeing individuals their rights – the right to inclusion and non-discrimination.

Judge Pillay narrated various instances of racial discrimination, such as when her competence as a judge was questioned as an agenda in an official meeting solely on the basis of her race. Further, she also narrated

instances where diversity positively impacted judicial decision-making. Judge Pillay recounted that her lived experiences in Apartheid South Africa enabled her to understand the victim's experiences and focus on a restorative form of justice. Similarly, she observed that the presence of female judges enabled the bench to take cognizance of sexual offences such as rape, which were often left unaddressed if there were no female judges.

Judge Pillay concluded by expressing appreciation for initiatives such as REAL, which promote the advancement of racial equality and inclusivity on the international plane.

Mr. Kevin Kim: "The Root of Lack of Diversity Lies in Lack of Access"

The second keynote speaker was Mr. Kevin Kim, a Senior Partner at Peter & Kim in South Korea. Having made a mark for himself in the international arbitration community as a Korean lawyer, Mr. Kim has personally encountered the difficulties that a lawyer from a diverse background would face in the field.

Narrating instances from his professional journey, Mr. Kim shared that he was surprised to see clients from his own country relying upon big international law firms. He shared that he was often a 'token' for diversity at events and conferences. He observed a general lack of faith that outsiders have towards lawyers from diverse backgrounds in international arbitration.

Mr. Kim remarked that the root of lack of diversity lies in the lack of access and that people can perform wonders if equipped with the right tools. Hence, he dedicated his career to sharing his know-how and increasing inclusivity for Korean lawyers. Mr. Kim also stated that active efforts must be made to showcase the work of diverse lawyers, bringing them into the limelight.

Mr. Kim expressed that there needs to be a change in the way that diversity is defined. One must move away from the notion of diversity for the mere sake of ensuring diversity, but should respect diversity for the unique skill and lived experience that individuals' racial identity provides them with. Mr. Kim concluded by highlighting the importance of initiatives like REAL in increasing access and achieving the goal of racial equality.

Dr. Nayla Comair-Obeid: Battling Intersectional Experiences

Dr. Nayla Comair-Obeid was the third keynote speaker at the launch event and the final speaker for the first session. Dr. Obeid is the founding partner of Obeid Law Firm and has acted as an arbitrator in various domestic and international arbitrations. She has also held the position of President of the Chartered Institute of Arbitrators (CIArb).

Dr. Obeid faced various difficulties and discrimination due to her ethnicity and gender throughout her professional career. Initially, she had to routinely face stereotypes and bias as a woman lawyer and arbitrator in her home jurisdiction, as law was a field predominantly reserved for men. She expressed that these difficulties only grew further as she established herself as a professional on an international level.

To establish the importance of racial equality, Dr. Obeid narrated three instances involving conscious and subconscious bias due to her ethnicity and gender. *First*, Dr. Obeid spoke about her appointment as the President of CIArb. She was the first Middle-Eastern woman to hold the post. Despite her vast experience as an arbitrator, she was faced with sceptical comments regarding her appointment due to her ethnicity.

Second, Dr. Obeid narrated an incident wherein a party challenged her institutional appointment as an arbitrator for an ICSID arbitration. The basis of the challenge was that she was a Lebanese national. Dr. Obeid gave this example to establish that while arbitral institutions attempt to promote diversity in arbitral appointments, the parties to a dispute have an unconscious bias and prejudice against arbitrators from diverse backgrounds.

Third, Dr. Obeid recounted an incident wherein she was acting as a sole arbitrator and was intimidated by a witness, who was the chief of police of the seat of the arbitration. She expressed that this incident probably would not have happened if she were a man.

Dr. Obeid stated that there have been certain improvements with respect to the appointments in international institutions, and that these bodies play an instrumental role in the advancement of racial equality. She expressed that the need for international solidarity and collaboration has increased further during the COVID-19 pandemic, and timely initiatives such as REAL would go a long way in achieving the goal of racial equality.

Ms. Meg Kinnear: Promoting Diversity and Inclusivity in ICSID

Ms. Meg Kinnear, the Secretary-General of ICSID, was the first speaker for the second session of the launch event.

Ms. Kinnear expressed that the best part about her international career has been the chance to know and work with people from diverse racial, ethnic and cultural backgrounds. She also spoke about the inclusivity and diversity initiatives undertaken at the World Bank. With respect to international arbitration, Ms. Kinnear stated that it is instrumental to nurture diversity in the field. She said that inclusivity could be demonstrated by appointing arbitrators from diverse backgrounds and highlighting the achievements of such professionals. She expressed ICSID's progress in this regard and shared that arbitrators from over 40 nationalities were appointed in 2020. ICSID's case review and comment section is also an initiative that has had a positive impact in promoting diverse opinions.

Finally, Ms. Kinnear emphasised the importance of accountability regarding ensuring equality and inclusivity. She expressed that the starting point in arbitration could be focussing on diverse arbitrator appointments.

Dr. Emilia Onyema: Challenging Yourself and Challenging the System

Dr. Emilia Onyema, a Professor at SOAS University of London, was the next keynote speaker at the REAL launch event. Dr. Onyema's research has been dedicated to fostering inclusivity of the African community in international arbitration.

In furtherance of increasing access for diverse lawyers including Africans, Dr. Onyema discussed the various initiatives she has participated in, such as the Arbitration Fund for African Students. While expressing her views regarding fostering diversity and inclusivity, Dr. Onyema remarked that everyone must challenge themselves and challenge the system to promote greater diversity. She encouraged the participants to walk-the-talk, and challenge themselves by stepping out of their comfort zones and uplifting those who need it. In this regard, Dr. Oneyma specifically appreciated Ms. Kinnear's constant efforts to promote diversity and inclusivity in the ICSID framework.

Further, Dr. Onyema expressed that one must also have the courage to challenge the system and call out the problematic aspects which hinder the growth of inclusivity and diversity in the international arbitration circuit. She also stressed upon the importance of personal accountability for the aforementioned challenges to bring about real and practical change.

Dr. Ucheora Onwuamaegbu: Destigmatizing Diversity

Dr. Ucheora Onwuamaegbu was the sixth and last keynote speaker at the launch event of REAL. Dr. Onwuamaegbu has worked in law firms, the United Nations Compensation Commission and arbitral institutions like ICSID.

Dr. Onwuamaegbu described REAL as a bold move, as he felt that diversity is an area of discussion that people are often uncomfortable addressing, and there is a certain extent of professional risk involved. However, he expressed that there have been advancements in this regard. For instance, he stated that there were times during his career at ICSID when he felt unwelcome due to his race, in contrast with the diversity-friendly environment in ICSID today.

Deriving from the experiences gained by working in various regions in Africa, Europe, the Middle East and the United States, Dr. Onwuamaegbu shared five lessons. *First*, he stated that one must be open to different approaches and work cultures. External factors such as the accent of an individual only reflect the skill and ability of the person to speak multiple languages. *Second*, he expressed that the only difference between experts in international arbitrations and people in the beginning stages of their career is that the former were afforded an opportunity to grow. Further, he stated that second chances are a privilege given to people only from certain segments of society; and that this must be equally given to everyone. *Third*, Dr. Onwuamaegbu emphasised that racial equality is not mere rhetoric but is instrumental to international arbitration. It promotes cultural diversity, highlights different perspectives, and ensures balanced results. *Fourth*, he stated that achieving racial equality in international arbitration is possible if equal opportunities are provided to people from diverse backgrounds. *Fifth*, he expressed that all the stakeholders have an active role to play in achieving racial equality. This includes the practitioners, parties to the disputes, arbitral institutions and academics.

Key Takeaways from the Launch Event

As rightly stated by REAL's co-chair Kabir Duggal, international arbitration, as the name implies, must be 'international'. Regardless of race, gender, or ethnicity, every individual must have an equal and fair right to participate. While the keynote speakers' experiences reflect that there has been some advancement in this regard, much still remains to be done to achieve true equality and inclusivity for racial diversity. This can also be concluded from the two polls conducted at the end of the REAL launch event sessions. For instance, 85 percent of participants voted that they have not participated in an arbitral proceeding where the majority of the tribunal was a racial minority. Hence, the way forward is for all the stakeholders to come together – to bring about real change in international arbitration. The REAL launch event was an inspiring initial step towards this goal.

Australia's National Sports Tribunal: One Year On

Judith Levine[1]

Domenico Cucinotta[2]

I Introduction

In 2017, Australia's Federal Government looked towards 2030 and started preparing its National Sports Plan for the future of Australian sport. The National Sports Plan was to be built upon four pillars: Participation, Performance, Integrity and Industry.[3]

Integrity in sports has always been a hot topic in Australia given the nation's strong sporting culture, but there were a series of notable sports integrity issues throughout the 2010s, including:

- an investigation by the Australian Olympic Committee (**AOC**) over the use of a sleeping drug by the Australian Swimming Team at the London 2012 Olympics;[4]
- scandals over performance enhancing drugs at the Essendon Football Club in the Australian Football League (**AFL**) and the Cronulla Sharks in the National Rugby League (**NRL**);[5]
- an Australian Crime Commission Report in 2013 regarding links between organised crime and performance and image enhancing drugs in professional sport;[6] and
- ball-tampering by the Australian Men's Cricket team touring South Africa in 2018.[7]

As part of the Integrity pillar, the Federal Government commissioned a review of Australia's sports integrity arrangements, by a panel chaired by former NSW Supreme Court judge, the Honourable James Wood AO QC. The panel's report (**Wood Report**), delivered in 2018, made 52 recommendations, including the establishment of a National Sports Tribunal for the more efficient and comprehensive conduct of sports-related disputes in Australia.[8]

The Federal Government adopted the Wood Report's recommendations and enacted the *National Sports Tribunal Act 2019* (Cth) establishing the National Sports Tribunal (**NST**) as a statutory authority with an Anti-Doping Division, General Division and Appeals Division. Its object was to provide "an effective, efficient,

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2 Domenico Cucinotta is a Senior Associate at King & Wood Mallesons in Sydney.

3 Commonwealth of Australia, National Sports Plan, "Sport 2030: Participation, Performance, Integrity and Industry", available at: <https://www.sportaus.gov.au/__data/assets/pdf_file/0005/677894/Sport_2030_-_National_Sport_Plan_-_2018.pdf>.

4 Australian Olympic Committee, "*AOC Reaction to Swimmers Using Stillnox*" (22 February 2013) <https://www.olympics.com.au/news/aoc-reaction-to-swimmers-using-stilnox/>.

5 *World Anti-Doping Agency (WADA) v Thomas Bellchambers & Ors* (CAS Arbitration, 2015/A/4059), Award, 11 January 2016;: Brad Walter, "*Cronulla Sharks players accept doping bans*" (Sydney Morning Herald, 22 August 2014) <https://www.smh.com.au/sport/nrl/cronulla-sharks-players-accept-doping-bans-20140822-10728y.html>.

6 Australian Crime Commission, "*Organised Crime and Drugs in Sport*", February 2013, available at: <https://ssaa.org.au/assets/news-resources/research/2013-02_acc-organised-crime-and-drugs-in-sport.pdf>.

7 Ethics Centre, "*Australian Cricket, A Matter of Balance*", Report Commissioned by Cricket Australia, October 2018, available at: <https://www.cricketaustralia.com.au/the-ethics-centre-organisational-review-players-pact>

8 Department of Health, "*Report of the Review of Australia's Sports Integrity Arrangements*" (3 September 2018), available at: <https://ris.pmc.gov.au/sites/default/files/posts/2019/03/1_independent_review_-_review_of_australias_sports_integrity_arrangements.pdf> (the "**Wood Report**"). Also on the panel were Mr David Howman CNZM and Mr Ray Murrihy.

independent, transparent and specialist tribunal for the fair hearing and resolution of sporting disputes".[9] The NST began operations on 19 March 2020 with John Boultbee AM (a leading sports administrator, lawyer, and arbitrator) at the helm as CEO.

In this article, we review the objectives and structure of the NST and the activities during its first year of operations, a period punctuated by the COVID-19 pandemic.

II Resolution of Sporting Disputes and the Objectives of the NST

Many will have heard of the Court of Arbitration for Sport (**CAS**), based in Lausanne, Switzerland, but the reality is that CAS does not provide a one-stop shop for all sporting disputes. Rather, the landscape for resolving sports disputes is far more disjointed than one might think, because of the numerous stakeholders and organisations involved in sports administration, from the grassroots to the elite levels.

Indeed, a professional sportsperson at the international level, may be subject to the rules of, *inter alia*:

(a) their national sporting organisation (e.g. the AFL; Swimming Australia);

(b) a regional sporting organisation (e.g. UEFA or the Asian Football Confederation);

(c) a global sporting organisation (e.g. the International Cricket Council; FIFA);

(d) the World Anti-Doping Authority (**WADA**) and local anti-doping authorities (here, the Australian Sports Anti-Doping Authority (**ASADA**), which has now morphed into Sport Integrity Australia (**SIA**)); and

(e) an Olympics Committee or tournament authority (e.g. the AOC).

While most participants and spectators will be interested primarily with on-field action, the increased professionalisation and corporatisation of sport has led to a slew of off-field sports-related disputes for matters such as team selection, player eligibility and transfer, financial rule violations, and anti-doping breaches.

Six national sporting organisations in Australia (or **NSOs**), namely the NRL, AFL, Cricket Australia, Tennis Australia, the Football Federation of Australia and Rugby Australia, maintain their own disciplinary tribunals to deal with, among other things, first-instance anti-doping rule violation disputes, with these tribunals approved by ASADA.[10] There are no approved disciplinary tribunals for any other sporting organisations, meaning that first-instance anti-doping rule violation disputes in those sports had to go to the CAS. This could be an expensive and relatively lengthy process for smaller Australian sports.

In general, sports-related disputes need to be resolved as quickly as possible since athletes and sporting organisations rarely have the luxury of time to wait for a national court to resolve the disputes while the athlete's opportunity to participate in a major international event like an Olympic Games or World Cup passes by. Historically, arbitration has been the dispute resolution method of choice for sports-related disputes since the flexibility in arbitral procedures make it well-suited to providing practical justice in an efficient manner. However, as the Wood Report pointed out, the sports arbitration model is not without its shortcomings, and five "inherent weaknesses associated with private arbitration" of sporting disputes were identified in the Report (and addressed by the establishment of the NST) as follows:[11]

(1) Private arbitral tribunals lack procedural powers to order or compel the gathering of information and evidence from third-parties. The Wood Report observed that "the inability of sport-run tribunals or CAS to compel third-party witnesses to give evidence, or provide documents or things for the purposes of arbitration, represents a weakness in the current ADRV process which can disadvantage one party or the other" which was likely to be an important impediment "at a time when cases are likely to become more reliant on intelligence-based evidence which will need to be supported by witnesses." Section 42 of the NST Act now provides for notices to be given to persons reasonably believed capable of

9 *National Sports Tribunal Act 2019* (Cth), s 3(1): https://www.legislation.gov.au/Details/C2021C00107
10 Wood Report, p. 146.
11 Wood Report, pp. 147-151.

giving relevant evidence or providing information. Failure to comply with such notices is an offence attracting criminal or civil penalties.[12]

(2) CAS awards are confidential unless the parties to the dispute give consent for the award to be published.[13] The Wood Report considered "transparency in decision-making [to be] critical in circumstances where there are currently seven separate arbitral bodies (including sports' in-house dispute resolution tribunals) conducting first-instance hearings" so as to ensure consistency and certainty in the resolution of sports-related disputes and to contribute generally to the anti-doping jurisprudence to better avoid inconsistency and fairness.[14] Consistent with his recommendation, the NST publishes determinations in arbitrations where the parties so consent or if there is precedential value. Additionally, it publishes redacted summaries of outcomes from other processes.[15]

(3) While the six sports with their own tribunals offered a relatively cheap method of resolving disputes, athletes in the other sports who are forced to go to a first-instance hearing at CAS are likely to incur significant legal costs. A recent Australian example of the costs associated with a CAS matter is swimmer Shayna Jack establishing a crowd-funding page to finance her appeal to the CAS against her original four-year ban imposed by ASADA (which was reduced to a two-year ban by the CAS at first instance but is currently being appealed by the WADA) for an anti-doping rule violation.[16] The Wood Report considered that "the NST would offer a low-cost jurisdiction, first-instance and appeal, lessening the burden for participants in those sports that do not provide their own tribunal." This has proved to be the case in practice. NST fees are already relatively modest and may be waived in situations of financial hardship.[17]

(4) While sports arbitrations are resolved relatively quickly, the ASADA submission to the Wood Report explained that it had "increasingly experienced lengthy delays in obtaining first instance decisions from the CAS", possibly due to the CAS Secretariat in Switzerland scrutinising awards prior to publication.[18] By comparison, the in-house tribunals of the six major Australian sports did not experience such delays. In order to minimise potential delays, Section 40(1) of the NST Act provides that NST arbitration "must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit".

(5) The Wood Report identified a potential concern regarding the independence of decision-making by tribunals established by the sporting body itself. In this regard, the Wood Report noted that "some stakeholders expressed concern that sports adjudication of their own matters can give rise to bias, either actual or perceived" and that tribunal members may suffer from "the perception of a potential conflict of interest […] because they have been appointed by the Sports".[19] The Wood Report noted that there were "no incidents of actual bias or conflict of interest" but explained that the perception of independence was crucial and so considered the "existence of an independent statutory NST would address such concerns."[20] The independence of the NST is recognised as one of its key attributes in the object of the NST Act.

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12 No such notices have been issued, and it is expected that the power would only be used in the most exceptional cases. See: https://www.nationalsportstribunal.gov.au/resources/anzsla-webinar-qa-session-18-march-2021

13 CAS Code of Sports-related Arbitration, rule 43 (cited in Wood Report, p. 148).

14 Wood Report, pp. 148-149.

15 See ss. 56 & 57 of NST Practice and Procedure Determination 2020 (available at: https://www.legislation.gov.au/Details/F2020N00029). See also https://www.nationalsportstribunal.gov.au/decisions.

16 *Shayna Jack v Swimming Australia & Australian Sports Anti-Doping Authority*, (CAS Arbitration A1/2020) Award, 16 November 2020, <https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_A1_2020__FINAL__for_publication.pdf>.

17 National Sports Tribunal, *Cost of using NST services* (Web Page) <https://www.nationalsportstribunal.gov.au/dispute-resolution-services/cost-using-nst-services>.

18 Wood Report, p. 150.

19 Wood Report, p. 151.

20 Wood Report, p. 151.

III The National Sports Tribunal's First Year

As noted above, the Federal Government adopted the recommendations of the Wood Report and created the NST by way of the *National Sports Tribunal Act 2019* (Cth), commencing operations in March 2020. The NST is currently in a "pilot phase", which was recently extended to March 2023, to enable the NST to determine the level of need and refine its services.[21]

The NST has three divisions – the Anti-Doping Division, the General Division and the Appeals Division. The inaugural membership comprised 40 members (21 men, 19 women) with expertise and experience in a range of sporting, legal and medical fields.[22]

In order to bring a dispute before the NST, either the parties to the dispute must all agree to submit the dispute to the NST, or the agreement may already be embedded within a sporting body's regulations, rules or contract with the other person.[23] In this regard, the NST has been working hard to have reference of disputes embedded into SIA's mandated anti-doping policy, which has been adopted by approximately 90 National Sporting Organisations. Many of the six major sports for the time being continue to prefer using their own tribunals to deal with Anti-Doping Rule Violations, but some are considering adopting the NST for first instance doping cases, and are very likely to adopt the NST for appeals due to the new WADA Code requiring Appeal Hearing Bodies to be "institutionally independent" of the bodies involved in the results management process.[24] Rugby Australia has notably proposed to adopt the NST for its first-instance and appeal hearings.[25]

At this stage, the NST can only deal with the following: anti-doping rule violations; disciplinary matters; selection and eligibility issues; bullying, harassment and discrimination; and other disputes approved by the NST CEO.[26] Consequently, certain disputes – for example, contractual or remuneration disputes; employment matters; and disputes concerning conduct 'in the field of play' are not able to be referred to the NST.[27]

In its first year of operation, the NST has fielded a large number of enquiries, resulting in 11 finalised matters with decisions or summaries published on the NST website.[28] These matters run the gamut of the NST's jurisdiction and include each of the NST's various dispute resolution methods, from conciliation, to mediation, and full-fledged arbitration. The speed with which these disputes have been resolved is impressive, with conciliations taking an average of 29 days to resolve, mediations an average of 79 days, and arbitrations an average of 103 days (which is to be expected given the submission and hearing process required in arbitration proceedings). The first appeal at the NST was resolved on an urgent basis, within 14 days from validation of the dispute to the issuance of a reasoned determination.[29]

COVID-19 has impacted both the procedure and content of NST proceedings. All proceedings, including preliminary conferences, mediations, conciliations and arbitration hearings, have been held virtually, which may

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21 Department of Health, "*$13.7 million to further strengthen integrity in Australian sport*" (Web Page, 17 December 2020) <https://www.health.gov.au/ministers/senator-the-hon-richard-colbeck/media/137-million-to-further-strengthen-integrity-in-australian-sport>.

22 See: National Sports Tribunal, *National Sports Tribunal Members* (Web Page, 19 March 2020) <https://www.nationalsportstribunal.gov.au/resources/national-sports-tribunal-members>. Among the members are arbitrators who are also fellows of ACICA and/or members of the CAS list of arbitrators.

23 National Sports Tribunal, *Accessing the NST* (Web Page) <https://www.nationalsportstribunal.gov.au/dispute-resolution-services/accessing-nst>.

24 See WADA Code 2021, art. 13.2.2 available at https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf (however, anti-doping appeals involving 'international-level athletes' are exclusively within the jurisdiction of CAS).

25 See Rugby Australia Anti-Doping Code, effective January 2021, art. 6: https://australia.rugby/-/media/rugbyau/documents/rugby-australia-anti-doping-code-2021.pdf?la=en&hash=5D79BE22C45B0C320AF46809686E8818

26 National Sports Tribunal, *Types of disputes and appeals* (Web Page) <https://www.nationalsportstribunal.gov.au/dispute-resolution-services/types-disputes-and-appeals>.

27 National Sports Tribunal, *Types of disputes and appeals* (Web Page) <https://www.nationalsportstribunal.gov.au/dispute-resolution-services/types-disputes-and-appeals>; see ss. 7-9 of the NST Rule.

28 https://www.nationalsportstribunal.gov.au/decisions. For a description and discussion reviewing the NST's first year, see presentation from the ANZSLA Webinar of 18 March 2021 https://www.nationalsportstribunal.gov.au/resources/anzsla-webinar-presentation-18-march-2021; video at https://www.youtube.com/watch?v=yX8r3JR0P1U and Q&A available at: https://www.nationalsportstribunal.gov.au/resources/anzsla-webinar-qa-session-18-march-2021

29 *Perth Heat v. Canberra Cavalry & Baseball Australia*, NST-E21-4222, www.nationalsportstribunal.gov.au/decisions/nst-e21-4222

well have contributed to speed and cost-effectiveness. For most of 2020, all NST fees were waived due to the financial repercussions of COVID-19 on sports and athletes.[30] The pandemic has obviously impacted sports dramatically.[31] It is thus unsurprising that disruptions caused by the pandemic have also given rise to uncertainties in the application of sporting rules, and disputes before the NST, including the impact of travel bans on proceeding with and scoring scheduled games in the Australian Baseball League.[32]

Other arbitrations at the NST have involved allegations of bullying and harassment in equestrian and doping consequences in powerlifting. The mediations, conciliations and case appraisal at the NST have concerned athlete registration, safety issues, and internal disputes between state and national arms of a sporting body. In many cases, parties appeared without legal representation, which can entail additional assistance by the NST Registry staff to navigate the processes.

IV Conclusion

The interest in and breadth of disputes handled by the NST in its first year of operations in what can only be described as an atypical year reinforces the need for an independent and integrated national sports dispute-resolution centre like the NST. With Australian sport slowly returning to normal and major international competitions like the Tokyo Olympic Games, Tokyo Paralympic Games and Birmingham Commonwealth Games all taking place in the next 12-18 months and during the extended pilot of the NST, there is no doubt that the NST will see many more sports-related disputes coming through its doors needing efficient, just and cost-effective resolution so as to ensure that athletes are treated fairly while maintaining the high level of integrity in Australian sports that is expected by the Australian public.

30 National Sports Tribunal, "*Cost of using NST services*" (Web Page) <https://www.nationalsportstribunal.gov.au/dispute-resolution-services/cost-using-nst-services>.

31 For discussion of the plethora of ways in which sport has been impacted by COVID-19, see multiple webinars on the topic arranged by ANZSLA at https://www.anzsla.com/events; and the range of analyses at Law-in-Sport https://www.lawinsport.com/topics/covid19-impact.

32 *Perth Heat v. Canberra Cavalry & Baseball Australia*, NST-E21-4222, www.nationalsportstribunal.gov.au/decisions/nst-e21-4222.

Africa in the Moot – An Initiative Making International Arbitration More International

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In the December 2020 issue of this journal, the Editors asked whether the "new normal" surrounding COVID-19 can make international arbitration more international.[1] An initiative called "Africa in the Moot"[2] is answering this question whilst making progress in bridging the geographic boundaries which restrict the full potential of international arbitration.

This article will introduce "Africa in the Moot" (1), and outline its goals and activities (2), whilst demonstrating how Australia has already been involved in this initiative and can sustain contribution to further internationalisation (3).

(1) What is Africa in the Moot?

Africa in the Moot is a young initiative that was founded in late 2020 by four coaches of African teams for the Annual Willem C. Vis International Commercial Arbitration Moot Court (or in short, the Vis Moot). The Vis Moot – together with its sister competition, the Vis Moot East – is the largest educational experience of its type worldwide. The popularity of the competition is booming and saw the participation of almost 400 teams from all over the world this year. But were they really from all over the world?

Traditionally, universities from Sub-Saharan Africa have been underrepresented in the Vis Moot. In fact, only 5 out of the almost 400 teams this year came from Sub-Saharan Africa. To put this into perspective: there are at least 54 countries and many more universities on the African continent. As a result of the on-going global pandemic and its respective traveling restrictions, the two Vis Moot competitions were held virtually by video conference instead of traditional in-person pleadings in Hong Kong and Vienna. No one had to travel anywhere. No visas were required. No flights and no hotel-associated costs. The only financial burden for each team was the participation fee. This was Africa's chance.

Through a series of lucky connections on LinkedIn, Michael, one of the authors of this article, became the coach of Team University Eduardo Mondlane in Maputo. They were the first ever Vis Moot team from Mozambique and from any Portuguese-speaking African country. All coaching activity took place virtually through email exchange and video conferencing. The team members and coach have not met in person to this day, with Michael working as an attorney in Munich, Germany, and the team consisting of five dedicated students in Maputo: Deyse, Thaís, Ângela, Verman, and Hendro. Again, through another series of lucky connections on LinkedIn, Michael met Stephen Fleischer, a graduate of Loyola University Chicago School of Law. Stephen now lives in Nairobi, Kenya, and has been the coach of the Vis Moot Team from Strathmore University in Nairobi for the past three years. In addition, Stephen has close ties to the new Vis

1 Caroline Swartz-Zern, Julie Litver, Christian Santos & Oliver Sestakov, *Editorial: Can the 'new normal' make international arbitration more international?*, The ACICA Review, December 2020, p. 3 et seq.

2 The official homepage of Africa in the Moot is www.africainthemoot.com.

Moot Team from the University of Nairobi. Michael further met Tijmen Klein Bronsvoort and Mick Gerrits – two attorneys from the Netherlands who, since 2019, have been supporting efforts to help the University of Lagos from Nigeria to participate in the Vis Moot.

Tijmen, Stephen, Mick, and Michael readily joined forces to facilitate the participation of more African teams in future Vis Moot competitions. Floor Wijffels and Henriëtte Kasteel – two Dutch attorneys remotely coaching the team of University of Pretoria in South Africa – quickly joined the initiative. Tijmen and Michael then presented the initiative during a video conference ceremony in which the finalist teams in Hong Kong were announced. Following that presentation and several posts on LinkedIn, many international arbitration enthusiasts heeded the call and offered their support for Africa in the Moot.

(2) What Does Africa in the Moot Do?

Africa in the Moot has several goals. Primarily, it aims at enabling more African students to demonstrate their talent and to participate in international exchange. Further, the initiative seeks to raise awareness of arbitration and the law governing contracts for the international sale of goods. In doing so, Africa in the Moot's goal is to help with the education of future thought leaders in international commerce.

Africa in the Moot currently supports five Vis Moot Teams from Nigeria, South Africa, Kenya, and Mozambique in their preparation for and participation in the Vis Moot. There are already concrete plans to expand this list to universities in Lesotho, Tanzania, and Rwanda next year as well as some other promising leads.

The support given by Africa in the Moot is always tailor-made and responds to each individual university's needs. One area of support is coaching. Africa in the Moot works together with a large network of coaches from different legal backgrounds and at different stages in their careers. All coaches pledge to dedicate their time to support African teams – sometimes remotely, sometimes on the ground. By bringing in coaches from outside each African jurisdiction and cooperation with coaches from the jurisdiction itself, the coaching also becomes an experience of cultural and legal exchange for everyone involved.

For the written phase, Africa in the Moot strives to provide access to legal databases and to hardcopy literature for the teams. In addition, the coaches or external speakers engaged by Africa in the Moot show the students how to draft memoranda from the perspective of an attorney.

Success in the oral phase of the Vis Moot is dependent upon practice. To provide as much practice as possible to the teams, Africa in the Moot arranges for practice pleadings between individual teams and with one or several outside arbitrators. The initiative also helps teams to participate in so-called 'Pre-Moots', where several universities meet each other for friendly practice. Finally, Africa in the Moot encourages African arbitration practitioners and academics to arbitrate in the Vis Moot.

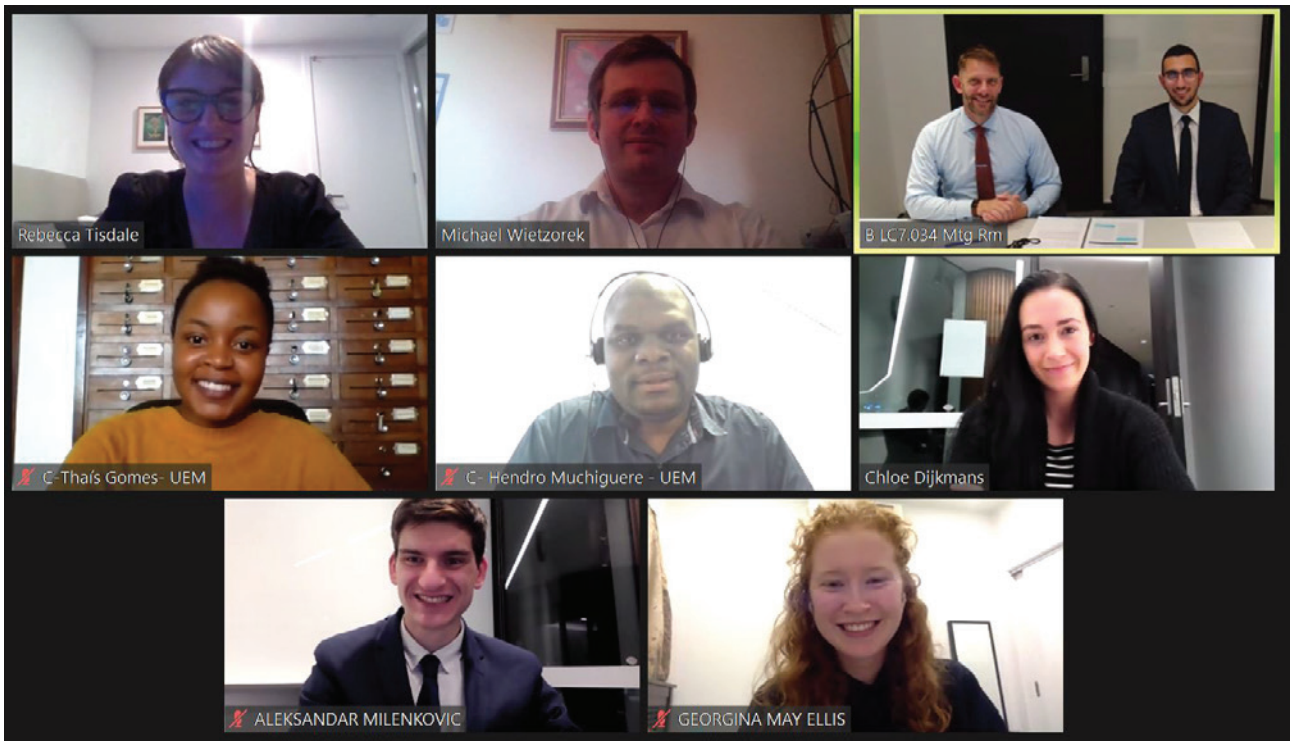
Participating in an in-person event in Hong Kong or Vienna can be expensive for an African team. During the pandemic, whilst everything is virtual, there is still a participation fee that must be settled. Where necessary, Africa in the Moot connects teams with dedicated domestic or international sponsors.

(3) Australia's Past, Present, and Future Involvement

Past and Present Involvement

It is evident that the Vis Moot was the platform which ultimately facilitated the first collaboration between Africa in the Moot and Australia. Through the new-founded connections fostered by Africa in the Moot, Team Maputo and an Australian team representing Deakin University in Melbourne held a practice pleading on 25 March 2021 in preparation for the Vienna competition.

During this practice pleading, two teams from completely different countries and legal systems – Mozambique is a civil law system, influenced to some degree by Portuguese law – were able to practice their arguments together and demonstrate the differences in their approaches. Thereby, both teams were fostering the international character of the Vis Moot and making the geographical gap a little smaller. Rebecca Tisdale, coach of Team Deakin, and Michael Wietzorek, coach of Team Maputo, were able to gain invaluable insights from arbitrating this pleading through witnessing the different styles and techniques used between Australian and



Mozambican teams. These insights will allow the coaches to expand their own techniques and foster new ideas into their future students. Through this experience, the horizon of internationality for both Australia and Mozambique was virtually shared and enhanced, and new friendships were formed between team members.

This was the first time ever that Deakin University, one of the five universities that has participated in every Vis Moot since the first edition in 1993,[3] had the opportunity to practice with an African Vis Moot team. This milestone was achieved solely through Africa in the Moot, which only exists because of the virtual reality created by the hardships of COVID-19.

Future Involvement

Whilst this practice pleading marked the first collaboration between a team supported by Africa in the Moot and a team from Australia, it will definitely not be the last. Indeed, the pleading has set a precedent for future African and Deakin University Vis Moot teams (and potentially other Australian teams) to continue collaboration and practice together. In fact, this friendship formed during COVID-19 goes beyond even the four walls of Vis Moot. This is seen by Africa in the Moot's efforts to support African teams' participation in Deakin University's very own "Alfred Deakin International Commercial Arbitration Moot".[4] This Moot competition is going to expand its international reach this year by offering participation from a wider range of countries due to the pandemic-induced virtual reality of competing. Africa in the Moot currently have concrete plans to support at least two African teams, from Strathmore University in Nairobi, Kenya, and from the National University of Lesotho with their application to participate in the Deakin Moot. This will already present a significant growth in the collaboration between various African countries and Australia since the original Vis Moot practice pleading.

Another plan derived from this friendship is that Chloe, one of the authors of this article and a recent Vis Moot participant for Deakin University, will join Michael as a coach and offer support to a team from an African country in the next round of the Vis Moot. With these plans already looming, and growth occurring in every direction, who knows what the future has in store for Australia's collaboration with African countries?

3 Deakin University, '*Vis Moot*', available at www.deakin.edu.au/law/study-opportunities/vis-moot (accessed on 1 May 2021).

4 Deakin University, '*Alfred Deakin International Commercial Arbitration (ICA) Moot*', available at www.deakin.edu.au/law/study-opportunities/alfred-deakin-ica-moot (accessed on 1 May 2021).

Reforming The Investor-State Dispute Settlement System: Increasing Transparency and Efficiency

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Introduction

The Investor-State Dispute Settlement (ISDS) system allows a foreign national, either an individual or an entity, with an investment in a State, to assert a claim directly against a sovereign State. ISDS represented a major change to the international judicial system which generally foreclosed such direct actions and, instead, relied on diplomacy to resolve investment-related disputes.

International investment treaties were conceived to encourage foreign investment in States which were parties to the treaties and, often, were under-developed nations desiring foreign direct investment. Such agreements seek to provide foreign investors with a degree of confidence in the stability and safety of their investments, including substantive guarantees that impose enforceable obligations on States. These include undertakings by States to provide fair and equitable treatment for the foreign national and, also, to protect against expropriation and discriminatory treatment.

ISDS Reform

Today, more than sixty years after adoption of the first bilateral investment treaty (BIT), over 2,500 BITs have been executed world-wide. Additionally, more than 3,250 international investment agreements (IIAs) exist.[1] These agreements have spawned more than 1,000 treaty-based ISDS cases. Fifty-five publicly-known cases were filed in 2019 alone, with seventy-one decisions issued that year by arbitral tribunals. Damages awarded against States ranged from a few million dollars to USD 8 billion.[2]

The increased number of ISDS cases and the frequently substantial awards against States, however, led to increased criticism of the entire ISDS system. Many commentators contended that the ISDS system was unfair, lacked transparency, and resulted in inconsistent or incorrect decisions.[3]

As a result, in 2015 the United Nations Commission on International Trade Law (UNCITRAL) considered whether to begin discussion of potential reforms of the ISDS system. In 2017, UNCITRAL assigned its Working Group III (WG III) 'with a broad mandate to work on possible reform of ISDS.' WG III was instructed to '(i) first, identify and consider concerns regarding ISDS; (ii) second, consider

1 See Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford, 2008), 2; United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development* (United Nations, 2006), 26; UNCTAD, *World Investment Report 2020: International Production Beyond the Pandemic: Key Messages and Overview* (United Nations, 2020), xii.

2 UNCTAD, *World Investment Report 2020, supra* n.1, at xii.

3 See, e.g., Michael Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System', 5 *Am. U. Bus. L. Rev.* (2015), 429-445; Raphael Lencucha, 'Is It Time to Say Farewell to the ISDS System?', 6 *Int'l J. Health Policy Manag.* (2016), 289-291. See generally Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Clair Balchin, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010).

whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.'[4]

WG III began its work in Vienna in November 2017. It soon became apparent that the discussions would be intense, often controversial, and not easy. The number of State and non-State participants in the sessions has increased significantly since WG III began its work.[5] At its continued 40th Session on 4-5 May 2021, WG III debated a plan of action that would require increasing the number of annual sessions (presently, two) and adding multiple informal intersessional meetings over the next few years with the aim of concluding ISDS reform by 2026. This increased work tempo will require more than USD 4 million to be added to WG III's budget.[6]

WG III has identified many topics for discussion. They include: the duration and cost of ISDS; lack of transparency in ISDS proceedings; lack of an early dismissal mechanism to eliminate meritless claims; the lack of a mechanism to address counterclaims by respondent States; the apparent lack of consistency and coherence in ISDS decisions, including review mechanisms; and issues regarding arbitrators, including their appointment and ethical requirements.[7] It has raised possible reforms of the ISDS system, some of them far-reaching. These include: the creation of a multi-national investment court or ISDS court of appeal; creation of an advisory centre similar to the World Trade Organisation's Advisory Centre; development of a code of conduct for ISDS arbitrators; improving security for costs; and addressing claims by shareholders for reflective loss.[8]

Consideration of all the reforms and issues now being debated – and others likely to arise over the next several years – will require a lengthy discussion.[9] The focus of this article is on proposals to increase transparency, particularly the issue of 'double-hatting' in ISDS cases; the thorny questions surrounding third-party funding; and some of the proposals being considered to increase efficiency and reduce costs. Clear disclosure obligations regarding 'double-hatting' will almost certainly be imposed. The latter two issues are still in the early stages of discussion, but more concrete proposals to address them are certain to result from WG III over the next several years.

Increasing Transparency – The Issue of 'Double-Hatting'

At its first meeting in late 2017, WG III recognised that 'enhancing public understanding of ISDS was key in addressing the perceived lack of legitimacy of the system.'[10] Both prior to and during the following session, some States focused on the biases and repeated appointment of arbitrators and 'double-hatting' – arbitrators who act as counsel and arbitrators in similar disputes.[11] Empirical evidence showed that 'double-hatting' was endemic in ISDS, and that it created a number of issues, including actual and potential conflict

4 UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS): Note by the Secretariat', A/CN.9/WG.III/W.P.142 (18 Sept. 2017), s 2-3.

5 Alan M. Anderson & Ben Beaumont, 'Introduction', in *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?*, Alan M. Anderson & Ben Beaumont, eds. (Kluwer Law International, 2020), 3.

6 UNCITRAL, 'Workplan to implement investor-State dispute settlement (ISDS) reform and resource requirements: Note by the Secretariat', A/CN.9/W.G.III/WP.206 (17 Mar. 2021), s 5-33.

7 UNCITRAL, A/CN.9/W.G.III/W.P.142, *supra* n 4, s 20-44.

8 See, generally, UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), Part I', A/CN.9/930/Rev. 1 (19 Dec. 2017), s 11-16; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018)', A/CN.9.935 (14 May 2018), s 12-97; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October-2 November 2018)', A/CN.9/964 (6 November 2018), s 14-134; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019)', A/CN.9.970 (9 April 2019), s 14-40; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019)', A/CN.9/1004 (23 October 2019), s 28-104; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session', A/CN.9/1004/Add. 1 (28 January 2020), s 6-9.

9 For consideration of many of the reform issues under discussion at WG III, see generally Anderson & Beaumont, eds., *Investor-State Dispute Settlement System*, *supra* n 5.

10 UNCITRAL, A/CN.9/930/Add. 1/Rev.1, *supra* n 8, s 1-7.

11 See, for example, UNCITRAL, 'Possible reform of Investor-State dispute settlement (ISDS): Comments by the Government of Thailand', A/CN.9/WG.III/WP.147 (11 April 2018), s 6-14.

situations. There was a consensus ISDS reform should address the concerns surrounding 'double-hatting'.[12] WG III also discussed whether there were sufficient guarantees of an arbitrator's independence and impartiality. Further, there was much criticism of the party-appointment process and the incentives emanating from that process. Evidence was presented of investors or States repeatedly appointing the same individuals. There were preliminary discussions of possible solutions which led to broad agreement on the need for a mandatory ethical code for arbitrators. Other approaches raised included: the creation of a system whereby arbitrators are appointed by an independent body, not the parties; the creation of a body with permanent judges; and greater transparency regarding the appointment process by administering arbitral institutions.[13] At the WG III sessions in October 2019, January 2020, and online February 2021 session, further discussions regarding the selection and appointment process for ISDS tribunal members were held. The focus of these deliberations was revisions to the arbitrator appointment process; in part, to ameliorate 'double-hatting' by individuals.[14] WG III reached a consensus that a mandatory code of conduct should be drafted applicable to arbitrators in ISDS cases and that such a code should address the issue of 'double-hatting'.[15]

The result is a draft code of conduct, prepared in conjunction with the International Centre for Settlement of Investment Disputes (ICSID). This code, now in its second iteration, explicitly addresses 'double-hatting' and allows such conduct only 'with [the] informed consent of the disputing parties.' Draft Article 4 of the code provides, 'Unless the parties agree otherwise, an [arbitrator] in an [ISDS] proceeding shall not act concurrently as counsel or expert witness in another [ISDS] case…'. It remains unresolved whether this prohibition will be limited to another case 'involving the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity' or be more generally applicable.[16]

Discussion of other means to increase transparency in ISDS will continue, and further changes relating to the appointment of arbitrators are likely. There is little doubt that a mandatory code of conduct for ISDS tribunal members will be adopted and that such a code will preclude 'double-hatting' except with full disclosure and agreement by all parties to the dispute.

Third-Party Funding

Third-party funding, and its increasing use in ISDS disputes, raises many issues.[17] The question of third-party funding was highlighted early in the WG III discussions, particularly the current lack of transparency and regulation. Discussions have focused on possible regulation of third-party funding in ISDS disputes; the need for a clear definition of what it is for any such regulation to be effective; the need for disclosure relating to third-party funding; and the possibility of requiring security for costs in cases where third-party funding exists. WG III has asked the UNCITRAL Secretariat to prepare draft provisions on third-party funding. The Secretariat also was asked to coordinate its work with that of ICSID and other institutions to avoid gaps or inconsistencies in any proposed third-party funding regulations.[18] While relatively early in the process, increased disclosure requirements, and regulation of third-party funding in ISDS disputes is likely to come from WG III.[19]

12 UNCITRAL, A/CN.9/935, *supra* n 8, s 78-88.

13 *Ibid*. s 45-68.

14 *See* UNCITRAL, A/CN.9/1004, *supra* n 8, s 51-77; UNCITRAL, A/CN.9/1004/Add. 1, *supra* n 8, s 95-133; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its fortieth session (Vienna, 8-12 February 2021), A/CN.9/1050 (17 March 2021), s 17-56.

15 UNCITRAL, A/CN.9/1004, *supra* n 8, s 78.

16 UNCITRAL & ICSID, 'Draft Code of Conduct for Adjudicators in International Investment Disputes: Version Two', Art 4 (19 April 2021) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_code_of_conduct_v2.pdf >.

17 For analyses of third-party funding and its impact on ISDS, see generally Brooke S. Güven, Frank J. Garcia, Karl M.F. Lockhart & Michael R. Garcia, 'Regulating Third-Party Funding in Investor-State Arbitration Through Reform of ICSID and UNCITRAL Arbitration Rules: Holding Global Institutions to Their Development Mandate', in Anderson & Beaumont, eds., *Investor-State Dispute Settlement System, supra* n.5, 287-318; Victoria Shannon Sahani, 'Addressing Financial Access to Justice in Investment Treaty Arbitration, in Anderson & Beaumont, eds., *Investor-State Dispute Settlement System, supra* n 5, 271-286.

18 *See* UNCITRAL, A/CN.9/1004, *supra* n 8, s 79-98.

19 The draft Code of Conduct, for example, requires potential ISDS tribunal members to disclose any financial, business or personal interest with any third-party funder within the previous five years at the time of possible appointment. See UNCITRAL & ICSID, 'Draft Code of Conduct', *supra* n.16, Art. 10.

Increasing Efficiency

Reforms to the ISDS system to increase its efficiency – both in terms of duration and expense – are a key element of the discussions in WG III. The topic spans several areas, including dispute prevention and settlement, procedural rules reforms, and the imposition of costs. States have raised the use of expedited procedures, the need for principles on the allocation of costs and security for costs, and possible streamlined procedures and approaches to manage costs for consideration. Overall, 'the systematic nature of the concerns identified indicated a need for systemic solutions, which would bring with them the reduction of the overall costs through enhanced predictability and a greater ability to control proceedings themselves'.[20] Thus far, these issues, while identified, have not been subjected to detailed scrutiny or debate.[21] WG III has tasked the UNCITRAL Secretariat with preparing and providing further information on best practices, possible model investment treaty clauses, and to coordinate its efforts with other relevant organizations, such as ICSID as well as interested stakeholders.[22] Under the recently-presented revised workplan for WG III, consideration of procedural rules reforms extends into 2025. Regardless, substantive revisions to the present ISDS system to increase efficiency and reduce costs, for the benefit of all parties to a dispute regardless of their size or status, is certainly looming on the horizon.

Conclusion

UNCITRAL's WG III has already spent over three years and multiple formal and informal sessions tackling the question of whether and how to reform the ISDS system. Whether to reform the system has been answered with a resounding 'yes.' *How* to reform a system that has grown considerably over the past sixty years is the more difficult task. Increased transparency – and elimination of 'double-hatting' by arbitrators absent full disclosure – is a near certain outcome of the process. The use of third-party funding also will undoubtedly be subject to full disclosure requirements as well as other regulations, including possibly making third-party funders responsible for any cost awards against their client. Changes to procedural rules and methods to streamline the ISDS arbitral process, shorten its length, and thereby reduce costs, also are forthcoming. While the work of WG III is now expected to extend over the next four or five years, there is one certainty: reforms are coming that will significantly and substantively change the ISDS system, hopefully for the benefit of all stakeholders in the ISDS system.

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20 UNCITRAL, A/CN.9/930/Rev. 1, *supra* n 8, s 34-78.

21 See UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5-9 October 2020), A/CN.9/1044 (10 November 2020), s 17-89.

22 *Ibid*. s 21, 26, 32-34, 61-63, 74-77, 84-89.

Revision of the IBA Rules on the Taking of Evidence in International Arbitration

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Introduction

The IBA Rules on the Taking of Evidence in International Arbitration ('**IBA Rules**') were recently revised in December 2020, replacing the 2010 version.

As arbitral practitioners will be familiar, the IBA Rules are designed to be used in conjunction with institutional, ad-hoc or other rules governing international arbitrations.

Most arbitral rules rarely provide guidance to the tribunal or to the parties as to how the tribunal will exercise their power in the event of a dispute as to evidential matters or as to how evidentiary hearings will be conducted. In these circumstances, the IBA Rules are often adopted as they provide mechanisms regarding the conduct of evidentiary hearings, disclosure, lay and expert witnesses, tribunal appointed experts, inspections and the admissibility of evidence.

The IBA Rules are often included as binding in procedural orders at the initial procedural hearing. They are also used by tribunals as providing non-binding guidance and may be adopted by the tribunal in amended or partial form, typically with the aim of promoting flexibility in the arbitral process.

The advantages of adopting the IBA Rules are well known, particularly when parties from different legal cultures may have different expectations as to the conduct of evidential matters.

Revision of the IBA Rules

A number of changes have been made to the IBA Rules which are relatively minor or reflect international best practice and are not discussed here.[2] The main changes are briefly summarised below.

Article 2: Article 2.2(e) provides that the tribunal's initial consultation with the parties on evidentiary issues can include the treatment of any issues of cybersecurity and data protection. The Commentary to the revised text points to resources that parties and tribunals may find useful in considering these issues, such as the ICCA-IBA Roadmap to Data Protection in International Arbitration and the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration.[3]

Article 8: Article 8.2 has been included to provide that the evidentiary hearing may be conducted as a remote hearing, at the request of a party or on the tribunal's own motion. Article 8.2 also provides that the tribunal shall consult with the parties with a view to establishing a remote hearing protocol, and includes certain matters that the remote hearing protocol may address such as technology, technology testing and how documents may be placed before a witness and tribunal.

The Commentary notes that the IBA Rules were amended

1 Katie has acted and advised in international arbitrations and domestic proceedings relating to award recognition, enforcement and execution. Katie has experience in arbitrations including under the ICSID, UNCITRAL, ICC and LCIA Rules.

2 For example, the inclusion of new Articles 3.12(d)-(e), which provides that translations of documents to be produced by a party need not be translated, unless they are to be submitted into evidence.

3 IBA Task Force for the Revision of the IBA Rules on the Taking Of Evidence in International Arbitration / Consolidated Amendments, *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration*, January 2021, pp. 6-7 ('**Commentary**').

in response to the global COVID-19 pandemic which affected the conduct of in-person evidentiary hearings. Article 8.2 encourages tribunals to be pro-active and consider time, cost and environmental concerns when assessing whether the evidentiary hearing should be conducted remotely and that the details regarding who prepares the remote hearing protocol was left open in the interests of flexibility.[4]

The Commentary also points to methods to ensure that witnesses giving evidence remotely are not improperly influenced or distracted (Article 8.2(e)), such as questioning the witness at the outset of the examination about the room in which the testimony is being given, the persons present and documents available, installation of mirrors behind the witness, use of fish-eye lenses or the physical presence with the witness of a representative of opposing counsel.[5]

Article 9: Article 9.3 provides that the tribunal may, at the request of a party or on its own motion, exclude evidence obtained illegally. By way of example, if the law of a country where a recording of a conversation was made prohibits recording conversations without consent, such recording may be considered to have been illegally obtained and may be excluded from evidence by the tribunal.[6]

Article 9.3 is discretionary, it is not mandatory that such evidence be excluded. The Commentary notes that this discretion was intentional, given the variance in national laws on this issue and the different conclusions that arbitral tribunals have reached in the past on this issue, depending on, for example, whether the party offering the evidence was involved in the illegality, considerations of proportionality and whether the evidence is material and outcome-determinative, whether the evidence is already public through 'leaks' and the clarity and severity of the illegality.[7]

Conclusion

The revisions to the IBA Rules, while relatively minor, are a welcome addition to providing further guidance to reflect changing practices and developments in arbitral proceedings, especially in relation to virtual hearings following COVID-19, while retaining the necessary flexibility and party autonomy that is a central feature and advantage of international arbitration. The IBA Rules reflect international best practice and Australian parties and lawyers should always consider their adoption at the first procedural conference with the arbitral tribunal for any significant arbitration, international or domestic.

4 Commentary, p. 25.
5 Commentary, p. 25.
6 Commentary, pp. 30.
7 Commentary, pp. 30-31.

Heating Up: Emerging Issues in Climate Change-Related Investment Arbitration

Harry Thompson[1]

Introduction

Reconciling tensions between international investment agreements (IIAs) and climate change mitigation strategies is an emerging legal and public policy challenge.[2] This article explores how investment arbitration jurisprudence is developing in response to regulatory measures adopted by states to address climate change. Treaty interpretation tools in tandem with evolving state practice present fresh opportunities to align IIAs and climate change mitigation strategies. As the clock runs down for states to meet emissions reduction targets, the need for swifter progress means that states must implement increasingly innovative and disruptive regulatory measures to mitigate the effects of climate change. Lawyers advising on new investment claims relating to either stranded carbon-intensive assets or renewables projects, must remain abreast of these issues and their impact on prospective claims.

Investment arbitration and climate change

Climate change adaptation strategies are affected by the principal-agent problem and complex questions of intergenerational ethics.[3] As a transboundary environmental harm, unilateral action by some states alone is insufficient to address the associated negative effects.[4] Accordingly, a degree of legal regulatory flux exists due to uncertainty about how to effectively address economic activity that contributes to climate change. IIAs have a critical role in framing international legal responses to climate change. They can facilitate foreign investment for sustainable development and emission reduction projects by providing economic incentives for the transition to a low-carbon economy.[5] In light of this potential, changing expectations about the functions of IIA are accelerating. Climate change-related investment arbitration will likely increase as the provisions within the Paris Agreement facilitate and complement the existing legal architecture designed to promote cross-border finance flows in the form of IIAs.

International investment law standards and climate change

The 'fair and equitable treatment' (FET) standard most significantly affects the right of states to regulate. The critical challenge is to craft policy measures that effectively respond to climate change, while remaining within the parameters of this standard. Most IIAs contain clauses requiring contracting states to provide 'fair and equitable treatment' to foreign investments. As the

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2 This umbrella term encompasses agreements between two or more states in the form of bi-lateral investment treaties (BITs), plurilateral investment treaties and the investment chapters included within broader trade and investment agreements including free trade agreements (FTAs).

3 Ngaio Hotte, Colin Mahony and Harry Nelson, 'The principal-agent problem and climate change adaption on public lands' (2016) 36 *Global Environmental Change* 163.

4 Daniel M. Firger and Michael B. Gerrard, 'Harmonizing Climate Change Policy and International Investment Law: Threats, Challenges and Opportunities' (2010) *Yearbook on International Investment Law & Policy*, 5-6.

5 Alessandra Asteriti, 'Climate Change Policies and Foreign Investment: Some Salient Legal Issues' in Y Levashova, T Lambooy and I Dekker (eds), *Bridging the gap between international investment law and the environment* (Elven International Publishing, 2015) 145.

provisions of individual IIAs are *lex specialis*, each treaty must be interpreted on its own terms and in accordance with the provisions contained in the Vienna Convention on the Law of Treaties (VCLT).[6]

As the concepts of 'fair' and 'equitable' are themselves inherently subjective, the FET legal standard creates the most challenges for states exercising their right to regulate.[7] FET is a flexible standard – an assessment of what is fair and equitable is highly contextual in nature and cannot be reached in the abstract.[8] For example in *Saluka Investments*, the tribunal called for a 'balanced approach to the interpretation of the Treaty's substantive provisions' noting that the protection of foreign investment was not the sole aim of the treaty but 'a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations.'[9] This logic could affect future assessments of climate change-related measures. Modern IIA preambles frequently refer to a variety of other aims and objectives, such as sustainable development.[10] Foreign investment provisions are increasingly housed as standalone chapters within free trade agreements and are accordingly part of a wider political, economic and social relationship.

While the core function of FET as a means to guarantee justice to foreign investors remains constant, its application is inevitably influenced by contemporary developments. This is because as part of customary international law, the minimum standard of treatment is constantly in a process of development.[11] According to investment tribunals, the protection of 'legitimate expectations' of a foreign investor are said to be 'the dominant element' of the FET standard and hence a component of the customary international law minimum standard of treatment.[12] Ascertaining these expectations has proven to be a controversial task in the context of renewable energy subsidies, with investors invoking IIA protections through investor-state dispute resolution against arbitrary changes to existing regulatory regimes.

Several proceedings have been brought in this context under the Energy Charter Treaty (ECT).[13] The commonality among the respondent states is that they adopted ambitious strategies to promote investment in the renewable energy sector through the use of subsidies and feed-in-tariffs.[14] However, each state also changed their carefully calibrated regulatory regimes which significantly impacted the profitability of investments. These cases are particularly interesting because of *how* tribunals articulated the FET standard. A significant factor in *Eiser* was that Article II of the ECT emphasised 'promoting long term cooperation in the energy field' which the tribunal interpreted as requiring an element of stability.[15] The tribunal also resorted to the 1991 European Energy Charter, a precursor document to argue that 'in interpreting ECT's obligation to accord fair and equitable treatment, interpreters must be mindful of the agreed objectives of legal stability and transparency.'[16] While the tribunal was willing to rely on both these sources (including one extrinsic to the treaty itself), it did not resort to the ECT preamble which recalled 'the United Nations Framework Convention on Climate Change', and recognised 'the increasingly urgent need for measures to

6 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

7 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, 244-245.

8 *Mondev International Ltd. v United States of America (Award)* (ICSID, Case No ARB(AF)/99/2, 11 October 2002) [118].

9 *Saluka Investments B.V. v The Czech Republic (Partial Award)* (Ad hoc arbitration under the 1976 UNCITRAL Rules, 17 March 2006) [300].

10 For example, Switzerland and Japan in their Agreement on Free Trade and Economic Partnership state in the preamble their determination, 'to adequately address the challenges of climate change.'

11 *ADF Group Inc. v United State of America (Award)* (ICSID, Case No ARB(AF)/00/1, 9 January 2003) [179].

12 *Generation Ukraine, Inc v Ukraine (Award)* (ICSID, Case No ARB/00/9, 16 September 2003) [20.37]; *Glamis Gold Ltd. v United States (Award)* (NAFTA Chapter 11 Panel, 8 June 2009), [620]; *Saluka Investments* [264].

13 *The Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998); *Charanne B.V. & Construction Investments S.A.R.L v The Kingdom of Spain (Award)* (SCC, Case No V 062/2012, 21 January 2016); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v The Kingdom of Spain (Award)* (ICSID, Case No ARB/13/36, 4 May 2017); *9REN Holding S.a.r.l v Kingdom of Spain (Award)* (ICSID, Case No. ARB/15/1, 31 May 2019); *Cube Infrastructure Fund SICAV and Others v Kingdom of Spain (Award)* (ICSID, Case No. ARB/15/20, 26 June 2019).

14 N Bernasconi-Osterwalder and L Johnson (eds), *International investment law and sustainable development: Key cases from 2000–2010* (International Institute for Sustainable Development, 2011) 11.

15 *Eiser*, [378].

16 Ibid [379].

protect the environment'. Similarly, in each of *Charanne, PV Investors, Cube Infrastructure, 9REN* and *Isolux*, the tribunals had recourse to the preamble of the Spanish legislative amendments but made no similar reference to the ECT preamble despite citing Article 31(2) of the VCLT.[17] In *PV Investors* while the tribunal did not refer to the preamble of the ECT, it did refer to other cases and rely on references to stability in other articles to "view [stability] as a requirement that is intertwined with and closely linked to FET."[18] The ECT cases indicate that tribunals will resort to statements of purpose and extrinsic material as an aid to treaty interpretation as per Article 31 of the VCLT both in defining FET and in ascertaining legitimate expectations. This trend will take on increasing importance as object, purpose and preamble clauses in new treaties develop to accommodate objectives beyond the purely commercial aspects of foreign investment. If tribunals are willing to give credence to investors' expectations based on notions of cooperation and stability, then logically they should give equal weight to other *explicitly* defined objectives such as climate change mitigation.

Potential interpretative approaches

In response to the ECT decisions, states have modified their treaty drafting practice to reinforce their view that legitimate expectations form no independent basis for an actionable claim under FET.[19] Potestà explains that the words 'legitimate expectations' previously had no explicit anchoring in the text of applicable investment treaties and were included in the lexicon of investment arbitration through a 'cascading effect' of tribunals referring to previous arbitral awards.[20] The majority of new IIAs include words such as: 'For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.'[21] UNCTAD notes that of the 15 IIAs concluded in 2019, 14 circumscribe the FET obligation, with various different carve outs.[22] The practical effect is to create a higher standard against which the harm to an investor and state regulatory action must be measured.[23] For example, Australia, in the recent Australia-Indonesia Comprehensive Economic Partnership Agreement, which came into force in July 2020, has immunised regulation in key policy areas such as the environment, health and social welfare.[24] Modifying the threshold of FET or outright excluding claims relating to climate change mitigation measures are future possibilities open to states.

Investment arbitration practitioners must be aware of the new and unconventional way investment tribunals may approach the question of legitimate expectations in future climate change-related disputes. The ECT cases illustrate that investment tribunals proactively use an array of sources in justifying findings of 'legitimate expectations' and in articulating the content of the FET standard. However, there is a risk that placing undue emphasis on the perceived object and purpose of a treaty can encourage the use of teleological interpretative methods that deny the relevance of the express written intention of state parties.[25] Investment arbitrators are aware of this risk based on their preference to rely on other investment arbitration awards as opposed to treaty related sources. Statistical analysis of legal reasoning used by ICSID tribunals has found that the decisions of other arbitration panels accounted for 38 per cent of interpretative citations in surveyed awards

17 *Isolux Infrastructure Netherlands B.V. v Kingdom of Spain (Award)* (SCC, Case No. 2013/153, 17 July 2016).

18 *The PV Investors v Spain (Award)* (PCA, Case No 2012-14, 28 February 2020) [563], [567].

19 States frequently object to the legal basis behind investors raising legitimate expectations claims. For example, see Statement of Defence dated 26 June 2020 in *Westmoreland Mining Holdings, LLC v. Canada* (ICSID, Case No. UNCT/20/3) [88].

20 Michele Potestà, ‹Legitimate expectations in treaty law: Understanding the roots and the limits of a controversial concept› (2013) 28(1) *ICSID Review* 88, 90.

21 *United States-Mexico-Canada Agreement (USCMA)*, signed 10 December 2019, (entered into force 1 July 2020) art 14.6(4); *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, 8 March 2018, (entered into force 30 December 2018) art 9.6(4); *European Union-Singapore Investment Protection Agreement*, signed 19 October 2018, (entered into force 21 November 2019) art 2.4(3)

22 UNCTAD, 'The Changing IIA Landscape' (July 2020 Issue 1), *IIA Issues Note* 6.

23 Kendra Leite, 'The Fair And Equitable Treatment Standard: A Search For A Better Balance In International Investment Agreements' (2016) 32(1) *American University International Law Review* 363, 391.

24 *Indonesia-Australia Comprehensive Economic Partnership Agreement*, signed 4 March 2019 (entered into force 5 July 2020) art 14.21.

25 *Plama Consortium Limited v. Republic of Bulgaria (Decision on Jurisdiction)* (ICSID, Case No ARB/03/24, 8 February 2005) [193].

whereas preparatory work, treaties themselves, model treaties and the object and purpose described in treaties accounted for only 29 per cent.[26]

A key consideration in providing legal advice is how investment tribunals might better take into account values external to foreign investment when interpreting treaties. One possibility is greater reliance on Article 31(3)(c) of the VCLT which indicates that in the interpretation of treaties 'there shall be taken into account, together with the context… any relevant rules of international law applicable in the relations between the parties.' Van Aaken points to the conceptual distinction 'between the *application* of other (general or special) norms of international law in investment disputes directly on the one hand *and the interpretation of investment norms by considering non-investment law, indirectly, mainly through Art. 31 (3) (c)*… on the other hand.'[27] For example, if two state parties to an IIA are also bound by the Paris Agreement, then in an appropriate circumstance this may influence the content of the particular FET standard or legitimate expectations of an investor under the IIA. The purpose of the Paris Agreement includes making finance flows consistent with a pathway to low greenhouse gas emissions and climate-resilient development. It may make it less likely that a tribunal would find a climate change mitigation measure a violation of an IIA.[28] For another treaty to be taken into account in interpreting an IIA, there must be a connection between the subject matter of the treaties and the other treaty must be legally binding on the parties to the IIA.[29] Parameters are critical given the risk of using Art 31(3)(c) as a 'master key' to marry disparate legal regimes or as 'a general licence to override the treaty terms'.[30] Art 31(3)(c) could be a useful interpretative tool in the face of increasing pressure to weigh up investment protection with other policy goals reflected in new IIA language. It affects how the standards of FET are set within any particular factual scenario and can therefore make it easier or harder for a regulatory measure to breach the standard.

Application to stranded carbon assets

Sweeping regulatory changes to de-carbonise and transition to sustainable sources of energy will radically affect existing carbon-intensive investments. While much will turn on how the specific host state implements such measures, external environmental norms and considerations could influence how a tribunal views the 'reasonableness' of a disputed measure. For example, the ongoing investment arbitration *Westmoreland v. Canada* concerns the phasing out of coal fire-powered energy in Alberta, Canada.[31] This is a tangible example of an IIA being used as a shield to protect stranded carbon-intensive assets. Westmoreland alleges that the Province of Alberta's Climate Leadership Plan (CLP), which seeks to phase out all electricity generated from coal by 2030, violates its legitimate expectations. The policy arguably treats Westmoreland unfairly and in a discriminatory manner by providing transition payments to three coal-fired generating unit owners impacted by the CLP, but not to Westmoreland for its coal mine assets.[32] The way the scheme is designed, in specifically targeting coal fire powered generators, means that there is no interference with any Westmoreland proprietary rights such as coal mining licences or operating assets. Westmoreland argue 'the mines are commercially inseparable from the electricity utilities because the chemistry of the coal at the mines is such that it cannot be transported economically for use anywhere else.'[33] These undeveloped arguments

26 Ole Kristian Fauchald, 'The Legal Reasoning of ICSID tribunals – An Empirical Analysis' (2008) 19(2) *European Journal of International Law* 321; Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World' (2015) *OECD Working Papers on International Investment,* 13.

27 Anne van Aaken, 'Interpretational Methods as an Instrument of Control in International Investment Law' (2014) 108 *Proceedings of the Annual Meeting* 196, 198; Anne van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection' (2006) 17 *Finnish Yearbook of International Law* 91, 100 (emphasis altered).

28 Firger and Gerrard (n 3) 32.

29 Philippe Sands, 'Treaty, Custom and the Cross-fertilization of International Law' (1998) 1(1) *Yale Human Rights and Development Journal* 85, 102.

30 Asteriti (n 4) 172; *RosInvest Co UK Ltd v The Russian Federation (Jurisdiction)* (SCC, Case No V079/2005, 1 October 2007) [39].

31 *Westmoreland Mining Holdings, LLC v. Canada* (ICSID, Case No UNCT/20/3) ('**Westmoreland**').

32 Notice of Arbitration and Statement of Claim dated 12 August 2019 in *Westmoreland*.

33 Ibid [101].

suggest a lack of evidence that any legitimate expectations were engendered by Canada or the provincial government of Alberta. If the case proceeds to the merits, it will be significant.[34]

The regulatory actions, the subject of the ECT cases, were clearly problematic in the way they were implemented and applied to investors as these renewables incentive schemes utilised novel and untested subsidies and tariffs. Governments may encounter similar tensions as they attempt to calibrate transition programs that sufficiently balance legitimate expectations of foreign investors with other pressing government objectives such as a financial crisis, global pandemic or climate change.[35] This is illustrated by the Westmoreland case which suggests that stranded carbon assets will become an increasingly urgent issue for both governments and foreign investors. The reframing of IIAs away from an investor-centric view through positioning clauses on these topics within broader trade and economic agreements combined with more holistic methods of treaty interpretation may preserve sufficient regulatory flexibility for host states.[36] Manifestly arbitrary behaviour, conduct sufficiently egregious and shocking, gross denials of justice and a flagrant lack of due process will rightfully remain actionable by investors.

Conclusion

Emerging issues in climate change-related investment arbitration will require sound legal analysis and policy advice. Governments must balance economic imperatives with political, social, technological, environmental and legal policy drivers as they transition from carbon-intensive activities to renewable energy sources. IIAs support the flow of capital globally and provide an important framework to protect the rights and obligations of the host country as well as the investing entity. However, IIAs as they currently stand have limitations that need to be understood and addressed so that these instruments can better facilitate future investment. Legal advisors must provide pragmatic and balanced interpretations that considers the contours of the FET standard, the role that the legitimate expectations of an investor serve and the reality of changing regulatory dynamics.

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34 On 20 October 2020 the proceedings were bifurcated between temporal jurisdictional objections and the merits of the case. *Westmoreland*, Procedural Order No. 3.

35 UNCTAD (n 21).

36 Anthea Roberts 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56(2) *Harvard International Law Journal* 353, 375.

Arbitrating Over Spilt Milk:

A Case Note on *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172

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I. INTRODUCTION

Jurisdictional headaches are often a symptom of complex cross-border disputes. Parties can find themselves in murky water where the competence of an arbitral tribunal to hear a particular claim is challenged, or where domestic laws raise questions that strike at the validity of the parties' agreement to arbitrate. This was the case in *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172 (**Freedom Foods**), where a party sought to restrain international arbitration proceedings commenced in the United States on the grounds that the putative tribunal did not have jurisdiction. The case raises important principles that are critical to international arbitration practice in Australia and the application of Australia's mandatory laws in international arbitrations seated outside of Australia, including:

(a) the arbitrability of claims under Australian statutory provisions:

(b) the position of the kompetenz-kompetenz principle under Australian law; and

(c) the approach of Australian Courts in applying mandatory domestic law to determine the validity of arbitration agreements that provide for arbitration outside of Australia.

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(d) An overview of the decision is set out below along with our observations on the ways that the jurisprudence may impact the future development of Australian international arbitration law.

II. THE FACTS

Freedom Foods concerned a license agreement (**License Agreement**) between Blue Diamond Growers (**BDG**), a cooperative of almond growers based in California, and Freedom Foods Pty Ltd (**FFPL**), an Australian food and beverage manufacturer.

Under the License Agreement, BDG granted FFPL an exclusive license to manufacture and sell nut beverage products under the 'Almond Breeze' brand (**Products**) in Australia, New Zealand and various 'Oceania Countries' (**the Territory**) (clause 3). FFPL agreed that it would not, without BDG's prior consent, directly or indirectly manufacture, package, distribute or sell any nut beverage products other than the Products (**Exclusivity Clause**) (clause 10). This clause was subject to a number of exceptions, including that FFPL was not precluded from launching an organic almond milk product under its 'Australia's Own' brand.

Any controversy *'as to the meaning or operation of the [License Agreement]'*, other than certain equitable claims for relief, was to be resolved by international arbitration seated in Sacramento, California, USA, before a sole arbitrator (clause 28). The License Agreement also included an express choice of law clause under which the License Agreement was to be governed by the laws of California, USA (clause 27). Clause 28 did not have an express choice of law governing it, thereby falling for determination by the Federal Court.

The dispute between the parties concerned the manufacture and sale by the Freedom Foods Group of 'private label' almond milks and a new almond milk product branded as 'MILKLAB', all of which used locally sourced almond base (**Local Products**).

On 25 September 2020, five years after the Freedom Foods Group began selling the Local Products, BDG commenced arbitration proceedings in California against FFPL (alone) claiming that it had breached the Exclusivity Clause by manufacturing, selling, and distributing the Local Products (**California Arbitration**).

On that same day, BDG also commenced proceedings in the US District Court, Eastern District of California (**US District Court Proceedings**) alleging that FFPL had failed to comply with an oral forbearance agreement, which permitted FFPL to manufacture and sell the Local Products only on the condition that they were exclusively manufactured using BDG's almond base. It is not clear from the decision why BDG elected to commence the separate US District Court Proceedings, but as discussed below, BDG ultimately conceded that its claim in relation to the forbearance agreement ought to have been brought in the California Arbitration.[2]

On 29 September 2020, FFPL and a number of related companies within its corporate group, including Pactum Australia Pty Ltd (a company related to FFPL) (**Pactum**), (together, the **Freedom Foods Parties**) commenced proceedings in the Federal Court of Australia (**Federal Court Proceedings**). The Freedom Foods Parties sought an anti-suit injunction restraining BDG from prosecuting the California Arbitration and the US District Court Proceedings. Among other things, they sought declarations that:

(a) none of the Freedom Foods Parties had breached the License Agreement by manufacturing and selling the Local Products;

(b) BDG had engaged in misleading and deceptive conduct and unconscionable conduct contrary to ss 18 and 21 of the *Australian Consumer Law*, having made representations to the effect that it would permit FFPL to manufacture and sell the Local Products (**ACL Claim**); and

(c) the License Agreement amounted to a 'franchise agreement' under the Australian *Franchising Code of Conduct* (**Franchising Code**), which rendered the parties' arbitration agreement invalid under clause 21 of the Franchising Code.[3]

BDG brought an interlocutory application seeking that the Federal Court Proceedings be stayed pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth) (**IAA**) on

2 *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172 (**Freedom Foods**), [68].

3 Schedule 1 to the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth).

the basis that the Freedom Foods Parties' claims ought to be referred to arbitration under the License Agreement. This application was the subject of the Federal Court's decision in *Freedom Foods*. It involved the determination of the following issues:

(a) first, whether the claims made by the Freedom Foods Parties (specifically the ACL Claim), were capable of being resolved by arbitration before an arbitrator in California for the purpose of s 7(2) of the IAA (**the Arbitrability Issue**);

(b) second, whether the Court should leave the determination of the validity of the parties' arbitration agreement to an arbitrator in accordance with the *kompetenz-kompetenz* principle (**the Competence Issue**); and

(c) third, if the Court did decide to determine the validity of the arbitration agreement, whether the Franchising Code rendered the parties' arbitration clause invalid (**the Validity Issue**).

III. THE ORDERS

The Court granted the order for a stay of the Federal Court Proceedings under s 7(2) of the IAA for the reasons discussed below. In granting the order, the Court noted a number of undertakings provided by BDG, including that it would:

(a) accept that the arbitrator in the California Arbitration must apply ss 18 and 21 of the ACL as mandatory laws, and must apply Australian law to assess the ACL Claim; and

(b) discontinue the US District Court Proceedings with a view to bringing the claims therein within the California Arbitration.[4]

IV. THE DECISION

A. Arbitrability Issue

The parties did not dispute that an arbitration agreement existed between them.[5] The central area of contention instead, was whether the California Arbitration involved the *"determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration"* and thus capable of being stayed under s 7(2)(b) of the IAA. This required a determination of, first, whether the ACL Claim could be heard by a California-seated arbitration panel, and second, whether the claims by the Freedom Foods entities that were not party to the arbitration agreement could be heard in the California Arbitration.

1. Could the ACL Claim be heard in the Californian Arbitration?

Applying the High Court's reasoning in *Tanning Research Laboratories Inc v O'Brien*[6] and *Rinehart v Hancock Prospecting Pty Ltd* (**Rinehart**),[7] the Federal Court first identified the 'matter' or 'matters' of controversy that fell for determination.[8] These were held to be the relief sought by the Freedom Foods Parties; including the ACL Claim which arose under Australian domestic law.[9]

Determining whether those 'matters' could be resolved by arbitration, pursuant to the parties' arbitration agreement,[10] was a more complex question. As mentioned above, the parties had agreed to refer to arbitration any controversy *'as to the meaning or operation of the [License Agreement]'*. It was straightforward that most of the Freedom Foods Parties' claims (such as the claim for a declaration that no breach of the License Agreement had occurred) involved a controversy as to the meaning or operation of the License Agreement.[11] But whether this was also the case for the ACL Claim required the Federal Court to decide whether, as a matter of Californian law, an arbitrator in the California Arbitration

4 *Freedom Foods*, [141] and [145].
5 In satisfaction of s 7(1)(a) of the IAA which requires that '*the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country*'. See *Freedom Foods* at [61]-[63], [81].
6 (1990) 169 CLR 332, 350.
7 (2019) 366 ALR 635, [67].
8 *Freedom Foods*, [82].
9 Ibid.
10 *Freedom Foods*, [83].
11 See *Freedom Foods*, [83]-[86].

could hear and determine the misleading and deceptive conduct and unconscionable conduct allegations. For this, the Court had regard to expert evidence led by both parties as to the position under California law.[12]

The evidence of the Freedom Foods Parties' Californian law expert was that Australian statutory claims could not be pursued in a California-seated arbitration where the proper law of the contract is Californian law. BDG's expert on the other hand considered that the ACL Claim could be heard and determined by a California-seated tribunal applying Australian law.[13] On balance, the Federal Court preferred the evidence of BDG's expert, which was more aligned with U.S. authorities, including the seminal decision of *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*,[14] in which the U.S. Supreme Court held that antitrust claims under the *Sherman Act*[15] arising in connection with a franchise agreement (governed by Swiss law) were capable of settlement by arbitration in Japan.[16] The Federal Court was thus persuaded that, as a matter of law in California, the ACL Claim could be heard and determined in the California Arbitration and that, insofar as it prohibited misleading conduct, the ACL was a mandatory law that the tribunal was bound to apply.[17]

2. Could the non-party claims be heard in the California Arbitration?

The second question was whether the further Freedom Foods companies that were party to the Federal Court Proceedings (and central to the ACL Claim), but not direct signatories to the arbitration agreement, could nevertheless be treated as parties to the arbitration agreement pursuant to s 7(4) of the IAA. This provision provides that, for the purpose of enforcing foreign arbitration agreements, a reference to a party includes a reference to a person claiming 'through or under a party' to an arbitration clause. The Court considered whether the Freedom Foods Parties were in fact claiming 'through or under' FFPL, such that their claims also fell within the ambit of the arbitration agreement. Applying the reasoning in *Rinehart*, the Court held that the following factors led to a conclusion that Pactum and the other Freedom Foods Parties were claiming 'through or under' FFPL:

(a) all of the Freedom Foods Parties made claims in substantially the same terms, and sought the same relief (e.g., relief in connection with the ACL Claim);

(b) Pactum and the other Freedom Foods companies had invoked rights vested or exercisable by FFPL as a party to the arbitration agreement, and had therefore placed in issue rights or liabilities that were susceptible to settlement under the arbitration agreement; and

(c) preferring the evidence of BDG's Californian law expert, the Court found that as a matter of Californian law, Pactum and the other Freedom Foods companies could bring their claims in the California Arbitration.[18]

Accordingly, the Court held that, subject to the Validity Issue, the Federal Court Proceedings involved the determination of matters that were capable of settlement by arbitration; enlivening the Court's discretion to stay the proceedings for reference to arbitration.

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12 *Freedom Foods*, [66] and [87].

13 See *Freedom Foods*, [83]-[86]. Interestingly, as a peculiarity of Californian law, until recently only California lawyers could represent parties in an arbitration seated in California. Following recommendations from a working group, the *Californian International Commercial Arbitration and Conciliation Act* was amended to allow, as of 1 January 2019, lawyers qualified in a recognized foreign jurisdiction to participate in California-seated arbitration, meaning in practical terms that the applicants would be able to engage Australian qualified lawyers to argue the ACL Claim (see: CIAC, 'International Arbitration in California': https://www.ciac.us/international-arbitration-in-california/; Article 1.5 of the California International Commercial Arbitration and Conciliation Act (Title 9.3 of the California Code of Civil Procedure ("Cal CCP"), § 1297.11 et seq.).

14 473 US 614 (1985), cited in Freedom Foods, [87]. The U.S. Supreme Court in this case found (at [26]-[27]) that: *"[by] agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum… Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."*

15 *Sherman Antitrust Act of 1890.*

16 The Court also took into account a concession by BDG that, insofar as the ACL prohibited certain conduct, it was a mandatory law that the arbitrator would be bound to apply and that there was no doubt the arbitrator would apply Australian law in determining those claims, see *Freedom Foods*, [87].

17 *Freedom Foods*, [87]

18 See *Freedom Foods*, [89]. The applicants' expert focussed her evidence on whether non-signatories can be compelled to arbitrate, rather than whether they are able to arbitrate claims. The Court also took into account BDG's willingness to provide an undertaking that it would consent to the other Freedom Foods companies joining the arbitration.

B. Competence Issue

The Federal Court then turned to consider whether it was competent to decide the Validity Issue raised under the Franchising Code. BDG argued that the Court should not make a decision on this issue and should instead leave it for the arbitral tribunal to determine in accordance with the *kompetenz-kompetenz* principle.[19] This is a key principle of law under which an arbitral tribunal is held to be competent to rule on its own jurisdiction, including deciding upon the existence or validity of an arbitration agreement.[20]

In the circumstances of the present case, the Court found it more practical, efficient, and just to determine the validity of the parties' arbitration agreement itself. The Court considered that the Validity Issue, including questions as to the applicability of the Franchising Code and whether the License Agreement was a franchise agreement for the purpose of the Franchising Code, were *'relatively confined… both legally and factually'* and the Court was therefore well placed to determine them in the context of the parties' applications before the Court.[21]

It is worth noting that, in dealing with the *kompetenz-kompetenz* principle, the *Freedom Foods* decision does not grapple with the issue of whether an examination by a court of the existence or validity of an arbitration agreement should be undertaken on a *prima facie* or a full review basis.[22] Consequently, the correct approach for the way the *kompetenz-kompetenz* principle is applied in Australia remains unsettled.

C. Validity Issue

Having decided to determine the Validity Issue itself, the Court then considered the impact of clause 21 of the Franchising Code on the parties' arbitration agreement. In effect, this provision operates to invalidate agreements which require the resolution of disputes under a 'franchise agreement' in a jurisdiction other than Australia (such as by international arbitration). The Freedom Foods Parties advanced two propositions here: first, that the Franchising Code was a mandatory law of the forum and must be applied; and, second, that the License Agreement amounted to a 'franchise agreement' under the Franchising Code, such that clause 21 rendered the parties' arbitration agreement 'null and void' or 'inoperative' for the purpose of s 7(5) of the IAA.[23]

As mentioned above, the License Agreement was governed by Californian law. However, the parties had not expressly made a choice of law with respect to the validity of the arbitration agreement. The Court accepted that the question of validity is generally to be determined by the putative law of the arbitration agreement (in this case, the parties' choice of Californian law).[24] However, it held that this was subject to overriding legislation of the forum (***i.e.***, mandatory domestic laws) which apply irrespective of the governing law.[25] The mandatory laws in the Franchising Code were therefore applicable to the validity of the arbitration agreement.

On the second question, the Court ultimately held that the License Agreement was not a 'franchise agreement' for the purpose of the Franchising Code, and thus clause 21 of the Code did not invalidate the parties' agreement

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19 See *Freedom Foods*, [76]. In support of its argument, BDG relied upon *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, [372]-[379], [390], [394]; *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476, [157]-[160].

20 The principle is a key doctrine of international arbitration and is enshrined in Article 16(1) of the UNCITRAL Model law on International Commercial Arbitration (which forms Schedule 2 of the IAA). It provides: *"the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement"*.

21 *Freedom Foods*, [94].

22 This has been a topical issue in recent years under Australian law, with a decision of the Western Australian Supreme Court, *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2016] WASC 193, attracting some criticism for adopting a full review approach that was seen as unfaithful to the kompetenz-kompetenz principle and inconsistent with international arbitration jurisprudence in the region. This issue was also discussed in Hancock *Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 where the Full Court of the Federal Court noted that a 'rigid taxonomy' in the approach was unhelpful.

23 Section 7(5) of the IAA provides that a court cannot make an order to stay court proceedings and refer the matter to arbitration if the arbitration agreement is "null and void, inoperative or incapable of being performed".

24 In reliance on *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, 2012), rule 64(1), [16-008], [16-013]-[16,016], [16-022], see *Freedom Foods*, [136].

25 As recognised in fn 49 to [16-022] in *Dicey, Morris and Collins on the Conflict of Laws*; cited in *Freedom Foods*, [136].

to arbitrate in California. This was because the terms of the License Agreement were insufficient to establish that the relevant marketing arrangements were *'substantially determined, controlled or suggested'* by BDG (as the alleged franchisor); and as such, the License Agreement failed to satisfy a crucial limb of the definition.[26]

Under s 7(5) of the IAA, a Court must refrain from staying a proceeding for reference to arbitration if it finds that the arbitration agreement is 'null and void' or 'inoperative'. While strictly unnecessary to decide this issue in light of its finding above, the Court made a number of useful observations in *obiter* about whether clause 21 of the Franchising Code would render an arbitration agreement 'null and void' or 'inoperative' for this purpose. The Court observed that:

(a) the Franchising Code formed part of the law of the forum (irrespective of the governing law);

(b) the effect of clause 21 is that a particular species of regulated contract (franchise agreements) 'must not' contain a clause that requires a party to bring an action or proceedings in relation to a dispute under the agreement in any jurisdiction outside Australia, and if it did contain such a clause, 'the clause is of no effect'; and

(c) having regard to the text, context, and purpose of clause 21, the Court was of the view that its application to an arbitration clause in a franchise agreement would render the clause 'null and void' or 'inoperable' for the purpose of s7(5) of the IAA.[27]

The Court considered that this position was consistent with the observation of the Full Court of the Federal Court in *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 (**Hancock FFC**) where the phrase *'null and void'* in the IAA was viewed as being limited to internationally recognised circumstances that nullify a contract (e.g., duress, mistake, fraud and fundamental policies).[28] In *Freedom Foods*, the Federal Court was of the view that the expression 'fundamental policies' was apt to include provisions such as clause 21 of the Franchising Code, which evinces a strong policy position in respect of a particular class of agreements.[29] Thus, if the Court had concluded that the License Agreement in *Freedom Foods* did properly meet the definition of a 'franchise agreement', the parties' arbitration clause would almost certainly have been found inoperable and of no effect, and no stay of the Federal Court Proceedings would have been ordered.

V. APPEAL

The Freedom Foods Parties have since appealed the Court's findings in *Freedom Foods* on the grounds that the primary judge erred in concluding that the License Agreement was not a 'franchise agreement' for the purposes of the Franchising Code. However, while leave to appeal was granted the appeal was unsuccessful. The appellate decision turned on whether the technical criteria in the definition of 'franchise agreement' had been satisfied; with the Full Court upholding the findings of the primary judge.[30]

VI. CONCLUSION AND KEY TAKEAWAYS

Freedom Foods offers a reminder to parties in international arbitration cases that issues of foreign law are generally proved as matters of fact, both under Australian law and in an international context, and will usually be proved by expert evidence. As was highlighted in a decision of the Supreme Court of Western Australia, once the content of the foreign law is proved, it then becomes a matter of law for the Court to apply in the usual way.[31]

Overall, the approach in *Freedom Foods* demonstrates that Australian courts will honour the *kompetenz-kompetenz* principle insofar as it is practical, efficient and just to do so. This means that Australian courts may be inclined to rule on the validity of an arbitral agreement that provides for arbitration outside of Australia, for the

26 See discussion of the relevant terms of License Agreement against the Franchising Code requirements in *Freedom Foods*, [107]-[112].
27 *Freedom Foods*, [137].
28 (2017) 257 FCR 442, [381]
29 *Freedom Foods*, [137].
30 See: *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCAFC 86.
31 *Avwest Aircraft Pty Ltd as Trustee for Avwest Aircraft Trust v Clayton Utz (A Firm) [No 2]* [2019] WASC 306, [192].

purposes of deciding whether to stay proceedings under s 7(5) of the IAA – although the standard against which this ruling would be made remains unsettled. In the writers' view, this line of reasoning should not be seen to detract from the pro-arbitration approach that has been a hallmark of Australian jurisprudence in recent years. It appears born from convenience and commerciality; with the Court able to quickly address the validity of the arbitration agreement in Freedom Foods in the context of an interlocutory decision, rather than imposing delay to permit the tribunal to hear and determine the issue.

The decision also confirms the ability of arbitral tribunals seated outside of Australia to determine the application of Australian mandatory and statutory laws provided it is permissible for the tribunal to do so under the applicable law. This aspect of the Court's reasoning should give comfort to Australian parties involved in cross-border disputes; as Australia's statutory remedies such as those under the ACL are often a vital tool for seeking relief in commercial cases with a connection to Australia.

Although clause 21 of the Franchising Code is a very specific provision of Australian law (applying to a particular species of contracts), the Court's *obiter* remarks in *Freedom Foods* foreshadow the approach that Australian courts are likely to take in relation to the application of any similar domestic laws in Australia. Where those domestic provisions cut across the validity of an arbitration agreement, they are likely to be construed as being capable of rendering the agreement as 'null and void' or 'inoperable' for the purpose of s 7(5) of the IAA, and may defeat the availability of a stay of domestic proceedings for reference to arbitration.

The views and opinions set out in this article are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

Venetian v Weatherford [2021] WASCC 137[1]

Inigo Kwan-Parsons[2]

I Introduction

A recent decision from the Supreme Court of Western Australia (**Supreme Court**) has issued stern warnings to any unsuccessful party to an arbitration considering to 'roll the dice' in applying to have the award set aside, camouflaging appeals as allegations of being denied procedural fairness.

Kenneth Martin J's decision has lambasted parties 'manufacturing a pathway to a court' by utilising 'strained procedural unfairness arguments', noting that these '[c]urial challenges attempted against non-appealable award decisions continue to bedevil and undermine legislative policy endeavours to entrench arbitration as a quick, relatively inexpensive and final medium for private dispute resolutions'. Where such 'backdoor strategy is unsuccessfully deployed', Kenneth Martin J has foreshadowed that such an application should be met with 'a punitive costs sanction'.[3]

This decision solidifies Western Australia's arbitration friendly stance, emphasising a policy of minimal curial intervention towards arbitral proceedings.

II Circumstances

This proceeding arose when the unsuccessful party to the arbitration,[4] Venetian, applied to the Supreme Court to have the arbitration award set aside on the basis that it was unfairly unable to present its arbitral case.[5] The successful party to the arbitration, Weatherford, opposed Venetian's application.

The essential question for the Supreme Court to determine was:[6]

> *whether Venetian, in a context of a two-day arbitral hearing in circumstances where the participating parties had been offered the opportunity by the learned arbitrator at the end of that hearing to file further written submissions and any extra materials - were treated with equality and whether Venetian overall was afforded a 'reasonable opportunity' to present its case.*

In determining whether Venetian had a 'reasonable opportunity' the Supreme Court noted the following aspects of the arbitral proceeding:[7]

(i) The arbitration hearing was conducted on 31 March and 1 April 2020.

(ii) Prior to the hearing, various procedural orders had been issued by the arbitrator to facilitate the hearing

(iii) Given a prevalent COVID-19 pandemic afflicting Western Australia at the time and restrictions upon

1 Per Kenneth Martin J.

2 Associate at Jackson McDonald; LLM candidate at the University of Melbourne. Any view(s) expressed in this article are solely the author's and do not necessarily reflect the views of Jackson McDonald.

3 *Venetian v Weatherford* [2021] WASC 137, [1].

4 Concerning a money dispute arising out of the parties' written lease agreement, conducted under the *Commercial Arbitration Act 2012* (WA).

5 *Venetian v Weatherford* [2021] WASC 137, [93].

6 Ibid, [47].

7 Ibid, [32]-[35].

gatherings as then imposed, the arbitration was conducted remotely by telephone links over two days of hearing. There does not appear to be any issue taken by Venetian over the fact of the hearing taking place by audio-link.

(iv) The parties did not ever arrange for a transcript of the two days of arbitral hearing to be produced.[8]

(v) At the conclusion of oral submissions, Venetian filed a Summary of Respondent's Oral Submissions on 3 April 2020.

(vi) Similarly, Weatherford also filed responsive written submissions in response to Venetian's summary on 6 April 2020.

(vii) Those written submissions were referred to by the arbitrator in its reasons award.

(viii) The arbitrator delivered reserved reasons for decision constituting his determination and forming a part of the Award on 29 June 2020.[9]

(ix) By that determination over some 34 pages of reasons, the arbitrator comprehensively traversed the parties' rival submissions and positions, over what ultimately was the parties' basal dispute.[10]

Accordingly, it was in light of the above circumstances of the arbitral proceedings, in which Venetian brought its application alleging it was not afforded a 'reasonable opportunity' to present its case.

III Reasoning

Referencing earlier decisions of the Supreme Court,[11] Kenneth Martin J noted the very limited scope in which arbitral awards can be challenged under the *Commercial Arbitration Act 2012* (WA) (**Act**).

Kenneth Martin J also recited key policies which underpin the the Act:[12]

> *The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases.*
>
> *[. . .]*
>
> *courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration. A prime example of this would be a challenge based on an alleged breach of natural justice.*

Upon considering the circumstances upon which the arbitral proceeding was conducted against the above authorities and principles, Kenneth Martin J held that Venetian's application *'is a poorly disguised attempted appeal raised against a decision reached against it'*[13] and that Venetian's contentions were untenable.[14] In reaching this conclusion, Kenneth Martin J's commented:[15]

> *Venetian received an entirely fair two-day arbitral hearing. The process followed by the learned arbitrator, on my assessment, was perfectly fair. I repeat that an opportunity for the arbitrating parties to file even further materials given at the conclusion of two days of arbitral hearing, was afforded. The indulgence provided a more than fair opportunity to address any issues as regards further legal submissions or extra documentary expert evidence that Venetian may have wished to have further submitted, arising in the wake of the two days of hearing. But no extra evidence was sought to be added to*

8 The Supreme Court noted its disapproval of this aspect of the arbitration, noting that the lack of transcript meant there was *'no independent verbatim record of what transpired across the hearing days'*. The absence of which *'is simply hopeless towards reliably evaluating, after an event, what happened at the hearing from an overall fairness perspective'*.

9 *Venetian v Weatherford* [2021] WASC 137, [50].

10 Ibid, [50].

11 *Spaseski v Mladenovski* [2019] WASC 65 (in which the Singapore Court of Appeal decision AKN v ALC [2015] SGCA 18 is cited); *The State of Western Australia v Mineralogy Pty Ltd* [2020] WASC 58; *Ivankovic v West Australian Planning Commission* [2020] WASC 401.

12 *AKN v ALC* [2015] SGCA 18, [37], [39] per Menon CJ, the basis of which lead to the enactment of the *Commercial Arbitration Act 2012* (WA).

13 *Venetian v Weatherford* [2021] WASC 137, [49].

14 Ibid, [139].

15 Ibid, [126].

> *Venetian's case. Yet there is a process grievance raised to this court. That is truly breathtaking in its audacity.*

While Kenneth Martin J's reserved to make a decision as to the costs of the application, given his strong denunciation of Venetian's conduct in attempting to 'appeal' the award, a punitive costs order would appear to be a likely outcome.

IV Concluding Remarks

Kenneth Martin J's comments no doubt come as welcoming to arbitration partitioners and parties alike, reaffirming the Supreme Court's limited interference with arbitral proceedings and denouncing frivolous challenges to an arbitral award, to ensure arbitral proceedings resolve disputes expeditiously.

The Supreme Court's decision hopes to serve as an indication of a precedent ordering punitive costs in similar situations. However, whether such precedent will set by reference to Kenneth Martin J's comments, will remain to be seen by the determination of future applications challenging arbitral awards.

ACICA Essay Competition 2021

TOPIC: Arbitration, But Not as We Know It

ACICA is pleased to launch its essay competition for 2021. Entries to the competition are invited and encouraged from students based in Australia who are studying a Bachelor, Juris Doctor or Masters level law degree in 2021, and to lawyers based in Australia in their first five years of practice. *There is no requirement to be an ACICA member.*

The topic of the 2021 Competition is ***Arbitration, But Not as We Know It***. Essays are invited to address the topic without limitation. Some suggestions for potential areas of focus include:

- Statutory arbitration schemes (eg. Media Bargaining Code): Good or Evil?
- Expert Determination: when not acting as an arbitrator
- Arbitral appeal mechanisms: what trumps finality?
- Arb-Med: confusion or clarity?

SUBMISSION REQUIREMENTS

All entry submissions must:

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

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

Entry submissions are to be directed to the ACICA Secretariat at secretariat@acica.org.au. The final date for submissions is 31 July 2021 at 5pm (AWST).

JUDGING PANEL

Entry submissions will be judged by an eminent panel of international practitioners and academics, chaired by **Alex Baykitch AM** (Independent arbitrator) and consisting of **Gowri Kangeson** (Partner, DLA Piper), **Professor Janet Walker** (Independent arbitrator, Sydney Arbitration Chambers), **Russell Thirgood** (Independent arbitrator) and **Professor Robert Cunningham** (Dean & Head of Curtin Law School).

ANNOUNCEMENT OF WINNER

The winner will be announced by 17 September 2021 and will be awarded a guest seat at the ACICA table for the ADC ADR Awards Night Dinner in 2021, a cash prize of AUD1,100.00, a year's complimentary ACICA Associate membership and publication of the entry submission in the December edition of the ACICA Review.

ACICA may also arrange for submissions or extracts of submissions to be published in other publications.

INQUIRIES

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

ACICA/CIArb Australia International Arbitration Conference 2021

CALL FOR EXPRESSIONS OF INTEREST

Arbitration Incubation: Ideas from the Next Generation

ACICA and CIArb Australia are pleased to announce that the upcoming ACICA/CIArb Australia International Arbitration Conference, being held on 18 October 2021, will include a 'Next Generation' panel to showcase new ideas from, and the talent of, the next generation of arbitration thought leaders.

The panel will feature four exciting presentations on topics of fresh interest, emerging jurisdictions and current controversy. We invite topic proposals to be submitted by **2 August 2021**.

All proposals must:

- Be the author's own original work, the substance of which is unpublished[1].
- Be submitted in a word document not exceeding 500 to 800 words.
- Clearly identify in the covering email the author's nationality/nationalities, age (applicants must be under 45 years of age[2]), location, affiliation, and qualifications. Applicants should also indicate if they agree to attend in person (subject to applicable restrictions)[3].
- Be submitted by email to secretariat@acica.org.au.

Each proposal will be reviewed by a review committee consisting of members from both the ACICA45 Steering Committee and CIArb YMG. The review committee will submit a shortlist of names to the conference organising committee to select four panellists. The selection results will be announced by **early September 2021**. Panellists are expected to bear their own travel expenses if attending in person, but will receive a full waiver of the conference fee.

Panellists selected must be prepared to speak for ten minutes on their topic at the conference. The panel will be moderated by Caroline Swartz-Zern (ACICA45) and Kristian Maley (CIArb YMG).

1 The four proposals selected for presentation must not published (or included in any publication) until after 18 October 2021.

2 The review committee retains a discretion to consider proposals from applicants older than 45 years of age as at 18 October 2021 if they can conclusively demonstrate less than 5 years' practice in arbitration. Please contact secretariat@acica.org.au in advance of making a submission to confirm eligibility.

3 The review committee will consider applicants that wish to attend to speak via web conference however this will be subject to ensuring the correct in-person balance for the conference.

ACICA
Australian Centre for International Commercial Arbitration

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Australia Branch

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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