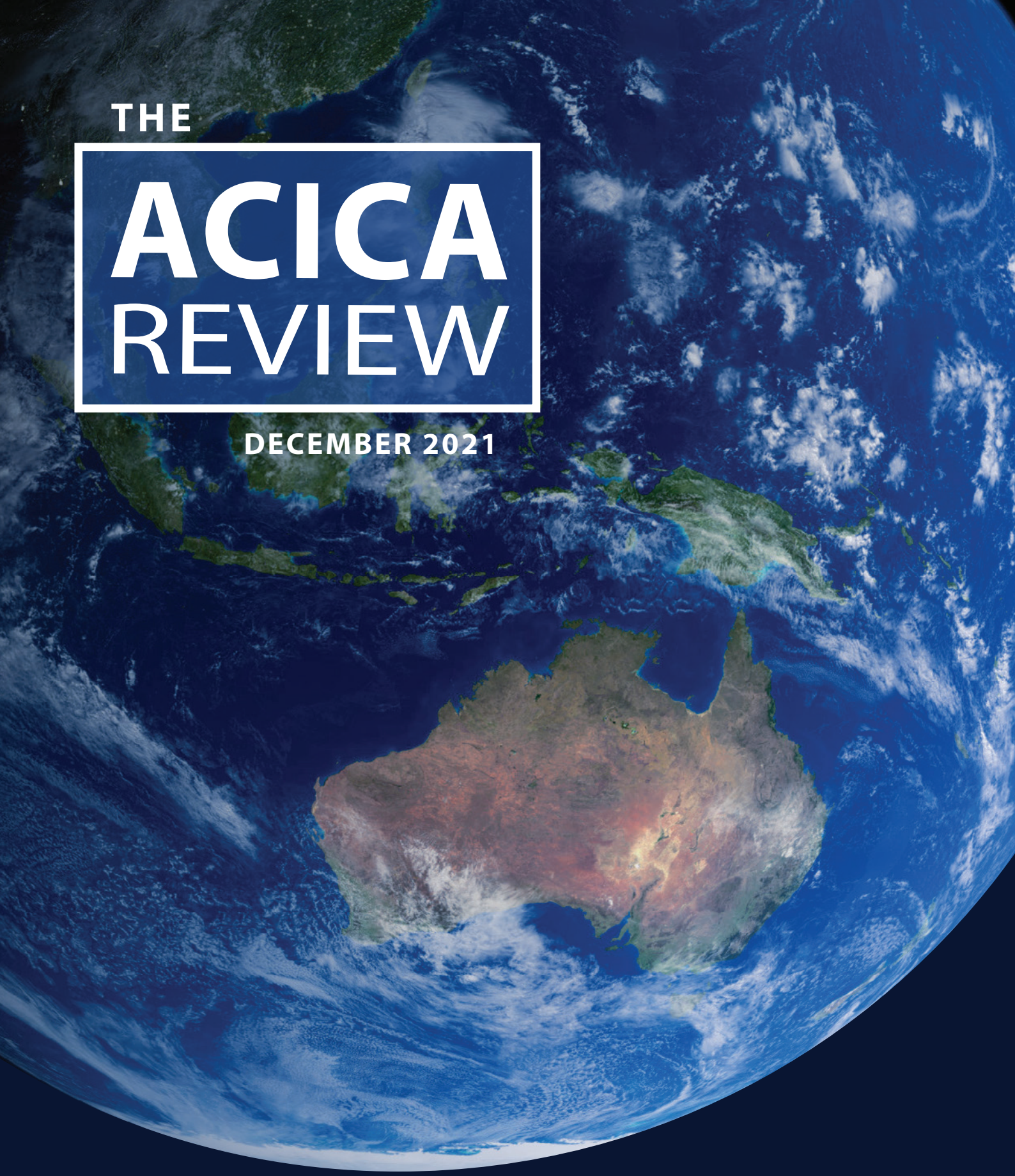

THE ACICA REVIEW

DECEMBER 2021

ACICA
Australian Centre for International Commercial Arbitration

GLOBAL LEADERSHIP
REGIONAL EXCELLENCE

ACICA
Australian Centre for International Commercial Arbitration

Leader in International Dispute Resolution

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THE ACICA REVIEW

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

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

President's Welcome

Georgia Quick
ACICA President

Welcome to the December edition of the ACICA Review. For those in parts of Australia and the world that have been significantly impacted by Covid 19 restrictions we hope that you are enjoying re-discovered freedoms.

Australian Arbitration Week

This latest edition of the ACICA Review follows hot on the heels of another successful Australian Arbitration Week which commenced on 18 October 2021. The week started with the ACICA/CIArb annual International Arbitration Conference, which was hosted virtually with the assistance of FTI Consulting. In her very warm Welcome Address the Governor of New South Wales, her Excellency Margaret Beazley AC QC noted that the roll out of ACICA's latest, up to the minute rules reflected that 'Australia was on top of its game and the game'. Our Keynote Speaker, The Honourable James Spigelman AC QC provided insightful reflections on the challenges created by virtual advocacy together with the obvious benefits it has brought, particularly for Australian arbitration practitioners. The remainder of the day brought a smorgasbord of topical discussions from climate change dispute resolution and the use of technology in arbitration to construction and energy arbitration issues. This year our conference included the inaugural arbitration incubator session from emerging practitioners who set out to challenge old norms. We had 231 registrants and speakers from nine countries[1]. With 46% of speakers being female, the conference is a great example of ACICA's efforts to increase diversity in arbitration. Another innovation this year was our virtual networking session following the conference sponsored by Clifford Chance with breakout discussions facilitated by members of the ACICA and CIArb Australia boards and Senior members of the Clifford Chance arbitration team. The suite of interesting and varied events during the remainder of the week from an assortment of barristers chambers, law firms and arbitral bodies and forums are too many to mention however the Australian Disputes Centre Australian Arbitration Week blog provided an excellent rolling summary of these.

ACICA Rules Road Show

Throughout the year a series of road shows were hosted in each of Queensland, Western Australia, South Australia and Victoria (virtually) to highlight the changes that have been made to the 2021 ACICA Arbitration Rules, which came into effect on 1 April 2021. A virtual Sydney event was also held during Australian Arbitration Week. Having our state committees on hand to deliver this training has been invaluable and I thank all those involved in these five roadshow events.

Singapore convention on mediation

On 30 September this year the Australian Government signed the United Nations Convention on International Settlement Agreements Resulting from Mediation. The Convention establishes a uniform framework for the enforcement of international commercial settlement agreements resulting from mediation and re-enforces the effectiveness of mediation in resolving disputes. The impact of the Convention will be considered as a part of ACICA's current review of its Mediation Rules.

1 Singapore, the United Kingdom, the United States of America, Hong Kong, New Zealand, the United Arab Emirates, Belgium, Lebanon and, of course, Australia

Editorial: Eight Months On - A Reflection on the ACICA Arbitration Rules 2021

Erika Williams
Counsel, ACICA

Christian Santos
Associate, ACICA

Madeleine Graveleine
Associate, ACICA

The ACICA Review readership and the wider arbitration community will be aware that from 1 April 2021 the new edition of the ACICA Arbitration Rules 2021 (**ACICA Rules**) entered into force. Unless an arbitration agreement specifies that a particular version of the ACICA Arbitration Rules apply, all arbitrations commenced after 1 April 2021 will be conducted under the new edition of the ACICA Rules.

The new edition of the ACICA Rules introduces substantive changes to procedures aimed at enhancing accountability, efficiency, and oversight in ACICA's institutional arbitrations. To acquaint users with the new provisions, ACICA presented a series of ACICA Rules roadshows across Australia, including in Brisbane, Melbourne, Adelaide, Perth, and in Sydney during Australian Arbitration Week 2021. Recordings of the Melbourne and Sydney events (held virtually due to COVID 19 restrictions) can be accessed and viewed on the ACICA website.

The ACICA Rules 2021 reflect developments in international best practice and build on the institution's established practice of providing an effective, efficient, and fair arbitral process. The amendments to the Rules add value to the arbitral experience for all users. In this editorial, we reflect on the eight months in which the new ACICA Rules have been in force and provide some practical insights to users on their operation.

Commencing arbitral proceedings

Pursuant to Article 6.2, an arbitration shall be deemed to commence on the date on which the Notice of Arbitration or registration fee is received by ACICA, whichever is the later. Payment of the registration fee can be done either by credit card payment on ACICA's E-filing system on the website or by electronic fund transfer (**EFT**) into ACICA's bank account. Parties should be aware that payment by credit card may take up to three business days to process and be received by ACICA, whereas EFT payment may be processed in a shorter timeframe. The payment method can affect the commencement date in Article 6.2. Though this article on the deemed commencement date is not new in the 2021 edition of the ACICA Rules, it is an important feature to bear in mind, especially when there is a looming expiry of a relevant limitation period.

Consolidation

A significant change introduced in 2021 is the expanded application of Article 16 on consolidation. In the predecessor provision (Article 14) of the 2016 ACICA Rules, a request for consolidation was limited in scope to

arbitrations '*between the same parties*' (Article 14.1(c) of the 2016 ACICA Rules), often referred to as 'horizontal consolidation'. This limitation has now been removed in the 2021 edition. A companion provision to Article 16 is the new Article 18, which provides for claims arising out of or in connection with more than one contract to be made in a single arbitration by filing a single Notice of Arbitration, provided the requirements for consolidation under Article 16 are satisfied. Both changes only apply to disputes arising out of contracts entered into after 1 April 2021 referred to arbitration under the ACICA Rules (see Article 2.5). This means that parties to arbitration agreements entered into on or after 1 April 2021, when the new edition entered into force, are able to rely on these expanded consolidation provisions.

A practical point parties should also be aware of when considering the approach they take to consolidation (ie. whether to submit separate Notices under Article 16 and request consolidation, or submit a single Notice under Article 18) is whether they are approaching any preclusion dates. If two or more arbitrations are brought in a single Notice of Arbitration, and the request for consolidation is rejected, then the commencement date for both arbitrations will be the date when the revised, separate notices of arbitration, and any additional payment required under the Rules, is received by ACICA, rather than when the original single Notice of Arbitration was filed. To avoid the risk of a limitation period expiring after a single Notice of Arbitration was filed (and rejected) but before the Claimant submits the separate notices of arbitration, parties should consider submitting separate notices for each arbitration and then applying for consolidation.

Alternatively, parties may make use of Article 19 of the ACICA Rules, also introduced in the new edition of the Rules to assist in the running of complex arbitrations. Article 19 empowers the Arbitral Tribunal to run concurrently, consecutively, or suspend one of, related arbitrations, where there is the same Arbitral Tribunal or similar question of law/fact. This provision can operate as a de facto consolidation provision where consolidation under Article 16 is not possible.

Constitution of Arbitral Tribunal

The new edition of the Rules introduced a system of institutional supervision and oversight to the process of constituting the Arbitral Tribunal through a confirmation of nomination process (see Articles 12.1 and 13.1 respectively). This operates to clarify the means and timing of the arbitrator's mandate becoming effective and assists with resolving questions of independence and impartiality before appointment.

Pursuant to Article 14, the ACICA Secretary-General is empowered to confirm the nomination of an arbitrator for appointment. This power can be exercised where the arbitrator has not disclosed any circumstances likely to give rise to justifiable doubts as to the arbitrator's independence, impartiality or availability or, where they have, no objections have been raised by any party. ACICA provides all nominated arbitrators with declaration forms prompting relevant declarations under Article 20.3. Should the Secretary-General decline to exercise the discretion to confirm a nomination then, pursuant to Article 14.3, the nomination is submitted to ACICA for confirmation.

As such, under the 2021 Rules the date on which the arbitrator's jurisdiction is enlivened is confirmed through an administrative decision of ACICA. The provision of disclosures by nominated arbitrators prior to constitution of the Arbitral Tribunal can assist with avoiding the need to invoke the formal challenge procedures in Articles 21 and 22 (although these remain available should a party become aware of a reason for a challenge after confirmation or appointment). This extra level of scrutiny by ACICA should give greater confidence to the parties in the arbitral process.

The formal confirmation of the Arbitral Tribunal also provides a starting point for the newly introduced time period for the rendering of an Award as ACICA will transfer the file to the Arbitral Tribunal at the time it conveys the confirmation to the Arbitral Tribunal. While the ACICA Expedited Arbitration Rules already contained a short time period for delivery of the award, the new edition of the ACICA Arbitration Rules introduces a new express time limit for non-expedited arbitrations. Pursuant to Article 39.3, the Arbitral Tribunal has nine

months from the date the file was transmitted to render the Award or three months from the date the Arbitral Tribunal declares the arbitration proceedings closed to render the Award, ***whichever is earlier***. ACICA will consult with the Arbitral Tribunal in relation to the agreed procedural timetable, consider whether a request for an extension of time is justified, the length of any time extension under Article 39.3, and if ACICA should exercise its discretion to extend the time limit if a request is received. Arbitrators should be aware that, if they request an extension of time to render their award, such a request will be carefully scrutinised by ACICA.

It is encouraging to see some Arbitral Tribunals pro-actively considering timetables and approaching the ACICA Secretariat to discuss the potential need for extensions of the time period for the Award. In circumstances where these steps are not taken by the Arbitral Tribunal, the ACICA Secretariat continually monitor the progress of the arbitration proceedings and the procedural timetable in the Arbitral Tribunal's Procedural Orders and raise this issue with the Arbitral Tribunal for discussion if it appears that an extension of time might be necessary.

Increased supervision of budgeting and costs

The ACICA Rules envision ACICA's involvement in the management of costs from the beginning to the end of the arbitration.

Soon after constitution, the Secretariat works with the Arbitral Tribunal to develop a budget estimate for the proceedings which informs decisions made with respect to the fixing of deposits under Article 49 to cover the fees and expenses of the Arbitral Tribunal, ACICA 's administration fee and any experts appointed by the Arbitral Tribunal. ACICA also considers this budget estimate in appraising requests for interim payments (Article 50.1) to the Arbitral Tribunal.

Pursuant to Article 50.3 ACICA then determines the fees and expenses of the Arbitration Tribunal prior to the issuance of the final award. ACICA may consider the Arbitral Tribunal's diligence and efficiency and any unreasonable delays in the rendering of the final award in determining whether the Arbitral Tribunal's final fees will be fixed at less than the deposit paid by the parties for those fees. Article 50.6 provides that the Arbitral Tribunal's fees and expenses shall be determined exclusively by ACICA in accordance with the Rules.

In circumstances where orders for termination, or an award on agreed terms is made, ACICA may also determine to reduce the applicable administration fee, having considered the stage attained in the arbitration proceedings and other relevant circumstances.

Resources for Users

The ACICA Secretariat is an important resource for parties, their representatives, and arbitrators. The Secretariat should be utilised throughout the arbitration proceedings. While ACICA is a neutral body and cannot provide legal advice, it can provide valuable guidance with respect to procedures under the ACICA Rules.

In addition, resources have been developed by ACICA's Practice and Procedures Board to aid users as well as to educate the wider community on arbitration best practice. Such resources are available within the ACICA Practice & Procedures toolkit and include:

- ACICA Sample Notice of Arbitration 2021 Rules;
- ACICA Sample Answer to Notice of Arbitration 2021 Rules;
- ACICA Guidelines on the Use of Tribunal Secretaries;
- ACICA Guidance Note for Online Arbitrations;
- ACICA Guidance Note on the Appointment of Arbitrators;
- ACICA Explanatory Note: Memorials or Pleadings?;
- ACICA Explanatory Note: Litigation and Arbitration – A Step by Step Comparison; and
- ACICA Checklist for Preliminary Meeting and Procedural Orders.

The ACICA Secretariat and the Practice and Procedures Board continue to monitor use of the ACICA Rules and develop additional resources to better guide users, practitioners, and arbitrators at key junctures of the arbitration lifecycle.

Arbitration in Australia

Among the findings in the significant inaugural Australian Arbitration Report published in 2021, there was recognised a need for continued education and engagement with international best practice for the efficient resolution of disputes in international arbitration. Domestic arbitration practices are not necessarily the same practices used in an international arbitration context. Australian practitioners and arbitrators ought to be aware of the different practices in these two contexts.

The Australian Arbitration Report indicates that arbitration is thriving in Australia with significant commercial disputes being arbitrated. As the ACICA Arbitration Rules 2021 become increasingly used by practitioners, parties, and arbitrators in future ACICA arbitration proceedings, the ACICA Secretariat will continue to monitor developments and practices in order to initiate guidance and resources for effective, efficient, and fair resolution of disputes.

Report of the AMTAC Chair

Gregory Nell SC
AMTAC Chair

With the recent lessening of COVID-19 restrictions in New South Wales and Victoria, there has been in those States a gradual resumption of a pre-COVID normalcy. This was most recently evident in the maritime arbitration sphere in this year's Annual AMTAC Address which was delivered on 18 November last to an in-person audience in the Federal Court of Australia's No. 1 Court in Sydney, as well as being live streamed to attendees through-out Australia and overseas.

This year's Address – which was the 15th AMTAC Annual Address – was delivered by his Honour, Justice Angus Stewart of the Federal Court of Australia. The topic of his Honour's Address was "*Navigating the Rough Seas of Enforcement*".

After referring to the decision of the Full Court of the Federal Court of Australia in *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110 and the issues of comity and pro-enforcement bias discussed in that case – a case in which his Honour delivered the leading judgment, being a judgment with whom the Chief Justice and Justice Middleton both agreed – Justice Stewart then went on in his Address to consider the question whether a Court asked to enforce an arbitral award could and/or should do so where that award had been successfully challenged by a Court at the arbitral seat, and the principles by which that question might be answered. This is a question on which there is currently no reported or unreported judgment in Australia. Following a survey of relevant cases from the US, Asia and Europe, and identification of the different approaches that have been taken to this question in those cases, and the different principles underlying those differing approaches, his Honour concluded by noting that it remains to be seen how an Australia Court would treat an application for enforcement of an arbitral award that has been annulled at the arbitral seat. On the one hand, as his Honour observed, if regard is had to the judgment of the Full Court of the Federal Court in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; (2013) 304 ALR 468 and its citation with approval of the dicta of Colman J in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 331, it might be thought that it would generally be inappropriate for the enforcement Court to reach a different conclusion to that reached by a Court at the seat of the arbitration. On the other hand, again as his Honour observed, the decision of the Full Court in *Hub Street* (in which the Full Court of the Federal Court found that the arbitral tribunal had not been validly constituted despite that having been done by the Qatari Court) might be thought to tend against a wholesale acceptance of both a monolocal theory of arbitration (under which the arbitration is anchored to a single national legal order, namely the seat of the arbitration) and the assumption that an enforcing Court will treat itself as being bound by the decision of a Court at the arbitral seat. However, as his Honour also explained in his Address, the Full Court's explanation in ***Hub Street*** as to why comity did not require the award in that particular case to be enforced may be taken to implicitly accept the

primacy of the arbitral seat, consistent with approach of the Full Court in *Gujurat*.

A copy of his Honour's Address is available on the Publications, Presentations & Papers page of the AMTAC website. For anyone who may have missed it, I would commend this year's Address, not only as required reading (and a draft list of authorities) for any one asked to enforce or resist the enforcement in Australia of an arbitral award that has been challenged elsewhere, but also for an understanding of the competing theories underlying international arbitration and its "*real world consequences*", especially in the area of enforcement.

A month earlier, AMTAC held a lunchtime seminar as part of this year's Australian Arbitration Week (AAW) events. Given the COVID-19 restrictions and lockdowns still in place then, this was a virtual event, in which presentations were delivered by:

(a) Geoff Farnsworth (from Holding Redlich) on "*Energy City v Hub Street - 15-Love, or Advantage Arbitration?*" (which touched on some of the issues that Justice Stewart subsequently also commented upon in his Annual Address);

(b) Hazel Brasington and Michael Weatherley (both from Ashurst) on "*'Witness gating': pitfalls and possible solutions concerning oral testimony at the hearing*" (a discussion of the implications of an arbitral tribunal refusing to allow oral evidence at the hearing of the claimant's claim, especially the potential for giving rise to grounds upon which any consequent award may be later challenged and its enforcement resisted) This presentation is included as an article at page [X] of this edition of the ACICA Review; and

(c) Samuel Walpole (Barrister, Queensland) on "*Corporate Attribution in Admiralty*" (which addressed the law relating to the identification of those individuals within a corporation whose acts are to be treated as if they were the acts of the corporation itself, for example for the purposes of establishing liability on the part of the corporation, or for breaking any limited liability that the corporation may otherwise be entitled to).

These presentations are also available on the Publications, Presentations & Papers page of the AMTAC website. AMTAC is a proud supporter of AAW, which not only promotes arbitration as a preferred means of commercial dispute resolution but also Australia as a leading arbitration venue. With the assistance of members of the maritime and arbitral community, AMTAC looks forward to continuing that support of and its connection with AAW in future years.

After 15 years of continuous service to AMTAC and the AMTAC committee, both Peter McQueen and Tony Pegum have recently announced their retirement from the committee. As many will know, Peter was instrumental in the formation of AMTAC and until 2017 served as its first President. Since then, Peter has been an ex officio member of the AMTAC committee as immediate past President. Tony was also appointed to the AMTAC committee upon its inception and has served on that committee continuously since then, in particular representing the interests of the shipping industry and Western Australia. I wish to record AMTAC's thanks and appreciation to both Peter and Tony for their 15 years of uninterrupted service to AMTAC and the AMTAC committee.

Finally, on behalf of myself and the AMTAC Committee, I wish the members of AMTAC and ACICA all the best for the coming festive season, and New Year.

News in brief

New Members

We welcome the following new members to ACICA:

Corporate Member

Norton Rose Fulbright

Ordinary Member:

KordaMentha

Fellows

Guillermo Garcia-Perrote
Simon Davis
Anna Kirk
Gabor Damjanovic
Donna Ross
Tom Clarke
Premala Thiagarajan
Sean Marriott
Stephen Strick

Associates

Shane Ogden
Petrina Macpherson
Christopher Hey
Anita Hormis
James Hoy
Aravina Prakash
Subroto Roy
Daniel Chaney
Chris Hodges
Amarzaya Gantumur
Dan Xie

Students

Jacob Fowler
Jack McNally
Ajay Pal Singh
Aparna Tripathi
Pratham Malhotra
Abhilasha Agarwal
Animesh Puneet Gupta
Aryan Batra
Aravina Prakash
Benjamin Roff
Tom Flaherty
Akanksha Trivedi
Nimisha Dublish
Paras Nath Mishra
Jordan Dittloff

ACICA Resources

In November and December 2021, ACICA released its latest additions to the Practice & Procedures toolkit:

- ACICA Guidance Note on the Appointment of Arbitrators
- ACICA Checklist for Preliminary Meeting & Procedural Orders

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

Australian Arbitration Week 2021 was successfully held from 18 to 22 October 2021. A full wrap up of the Week can be found on page 11.

***International Arbitration & the Australian Consumer Law* – 8 December 2021**

Panellists: Lucy Martinez | Independent Arbitrator, London and Australia, Terry Mehigan SC | 12 Wentworth Selborne Chambers and Tim Breakspear SC | Banco Chambers

***Arbitration & Litigation - A Step by Step Comparison* – 25 November 2021**

View Webinar

Chair: Bill Smith | Ashurst

Speakers: Mark Mangan | Dechert LLP, Nuala Simpson | 7 Wentworth Chambers, Bradley Jones | Wentworth Chambers, Nicole Gardner | Ashurst

AMTAC Annual Address 2021 – 18 November 2021

View Paper

Speaker: The Honourable Justice Angus Stewart, Federal Court of Australia

***Is it admissible? A cyber expert's view* – 10 November 2021**

View Webinar

Introductory remarks: Deborah Tomkinson | ACICA

Speaker: Brendan Read | KordaMentha

***What's the bottom line? Management of Costs in International Arbitration* – 22 October 2021**

View Webinar

Chair: Deborah Tomkinson | Secretary General, ACICA

Speakers: Jo Delaney | Partner, HFW, Cameron Hassall | Partner, Clifford Chance, Jonathon Redwood SC | Barrister, Banco Chambers, Matt Lee | Principal, Burford Capital

ACICA Rules 2021 Roadshow (Sydney) – 21 October 2021

View Webinar

Host: Edwina Kwan | King & Wood Mallesons

Moderator: Gitanjali Bajaj | DLA Piper

Speakers: The Hon. Kevin Lindgren AM QC | Independent Arbitrator, Mark Dempsey SC | 7 Wentworth Selbourne Chambers, Damian Sturzaker | Marque Lawyers, Tom McDonald | Vannin Capital, Erika Williams | ACICA

AMTAC Seminar: *Avoiding Obstacles on the Pathway to Enforcement* – 19 October 2021

View Webinar

Chair: Gregory Nell SC | AMTAC Chair, New Chambers

Speakers: Geoff Farnsworth | Holding Redlich, Hazel Brasington | Ashurst, Michael Weatherley | Ashurst, Samuel Walpole | Barrister

***Insolvency & Arbitration* – 19 October 2021**

View Webinar

Speakers: Bronwyn Lincoln | Corrs Chambers Westgarth, Monique Carroll | Cite Legal, Jonathon McTigue | Clayton Utz

Panellists: Professor the Honourable Clyde Croft AM SC | Monash University, Raini Zambelli | List A Barristers, Francisco Malaga| Linklaters, Swee Im Tan | 39 Essex Chambers, Bishwajit Dubey | Cyril Amarchand Mangaldas

ACICA Rules 2021 Roadshow (Melbourne) – 2 September 2021

View Webinar

Host: Chad Catterwell | Herbert Smith Freehills

Moderator: Leah Ratcliffe | Jones Day

Speakers: The Honourable Clyde Croft AM SC, List A Barristers | Bronwyn Lincoln, Corrs Chambers Westgarth | Monique Carroll, Cite Legal | Siba Diqer, LCM Finance | Erika Williams, ACICA

ACICA45 and SoCLA – *Expert Evidence in Construction Arbitration* – 29 July 2021

View Webinar

Moderator: Lucy Zimdahl |Allens

Speakers: Gitanjali Bajaj | DLA Piper, Karen Wenham | RPS Group, Christopher Daubney | gb2

ACICA Supported Events

- Hemmant's List International Arbitration in Oceania webinar, 14 September 2021
- ADR in Asia Conference, Hong Kong, 27 October 2021
- FDI Moot Global Rounds, 31 October - 3 November 2021
- Fordham University Conference on Mediation and Arbitration, 19 November 2021
- New York State Bar Association, International Section webinar on the Arbitration of Insurance Disputes, 24 November 2021
- ADC Australia-Latin America Business Forum, 14 December 2021

Arbitration Week 2021 Event Wrap Up

Stephano Salani
ACICA Intern

Australian Arbitration Week 2021 flew by as it began on Monday, 18 October with the *International Arbitration Conference* and finished with *Arbitration and Dispute Resolution in the Space Sector* on Friday, 22 October after covering numerous cutting-edge issues throughout the week. Some of the major themes that resonated throughout the week included issues arising from the obviously relevant COVID-19 pandemic as well as developing topics such as arbitration in environmental sectors, energy and renewable sectors, and changes in rules and practices that are evolving together with advances in technology.

Environmental-wise, climate change is the biggest headline. In Tuesday's session on *The Future of Arbitrating Environmental, Climate Change and Sustainability Disputes*, a panel discussed how there are few mechanisms for addressing transnational environmental disputes relating to climate change and how arbitration is emerging as a means of bridging this gap. With the backdrop of an impending zero emissions target from the federal government, the COP26 Climate Change Summit in Glasgow, and transnational commercial contracts in relation to these issues, the legal community needs to develop a body of environmental law that can quickly adapt to the rapidly changing climate issues. Disputes can vary from regulatory disputes where states are involved to private disputes between commercial parties.

There will be a proliferation of disputes as more nation states impose climate change-addressing policies such as emissions trading schemes. As discussed on the Wednesday of Australian Arbitration Week in *Developments in the Australian Energy Sector and International Arbitration*, energy markets will be subject to more stringent regulation as climate change becomes a more politically salient issue. Thus, arbitration will be critical to responding to these changes as many parties will need to reconsider their contractual arrangements.

Renewable energy sources appear to be a significant part of the answer to climate change. However, the renewable energy sector has its own plethora of disputes and issues that are increasingly being addressed in arbitrations. In *Arbitrating Renewable Energy Disputes – An Australian Perspective*, a key takeaway was that the push towards renewable energy around the world is becoming less politically driven and more economically driven, and this is being seen in Australia as well. This push has led to great progress but has also opened several vulnerabilities in the renewable energy sector. For one, contracts may sometimes be adapted from other technologies in a rush to implement emerging technologies thus creating ambiguities that later form the crux of disputes. Experience has shown that issues of modeling and infrastructure vary from country to country and culture to culture. Other notable issues that have arisen in renewable energy disputes that have been submitted to arbitration include intellectual property matters for new technologies, assessment of risk taken by renewable energy companies, and the intersection of private sector with government regulation of energy infrastructures.

Arbitration in general has also been undergoing a "climate change" of its own right. Tuesday morning of Australian Arbitration Week started off with *New and Emerging Norms: Diversity, the New Normal* discussing the changing landscape for women in the arbitration field and the growing interest in increasing diversity among the ranks of arbitrators and other arbitration practitioners. The panel in *Avoiding Obstacles along the Pathway to Enforcement* delved into cases demonstrating a reigning in of the pro-arbitration movement by limiting the discretion of arbitrators by courts with the threat of non-enforcement of awards. Decisions in current caselaw such as *Hub Street Equipment Pty Ltd v Energy City Qatar*

Holding Company [2021] FCAFC 110 and *CBS v CBP* [2020] SGCA 4 were discussed as well as the practical ramifications of these decisions to the discretionary powers of an arbitrator in an arbitral proceeding. For example, a holistic reading of Singapore Chamber of Maritime Arbitration (SCMA) Rule 28.1 of SCMA does not give the arbitrator the right to gate witnesses or condition their appearance or choose the type of hearing in the absence of party agreement. Also, the case management powers of SCMA Rule 25 limit the oral examination of witnesses but do not grant arbitrators unfettered powers that would override the rules of natural justice. As such, more care must be taken by arbitrators in exercising their discretion in procedural matters in light of the decision in CBS, which demonstrates that an award may be rendered invalid for procedural decisions made by arbitrators that are contrary to the rules of natural justice.

In Tuesday's session on *The NRF Hypothetical: Perspectives on Current Issues in International Commercial Arbitration*, the panel explored many of the potential obstacles that have arisen through a roleplay of the parties involved. Among many other practical aspects, we learned about the promotion of efficient, cost-effective proceedings, achieving fairness and commerciality in outcomes, and how arbitration practice has adapted to the COVID-19 pandemic. Developments resulting from the COVID-19 pandemic were further discussed in Thursday's session, *The COVID 19 Pandemic and International Arbitration: where do we stand, 18 months in?* In this session, panellists offered various perspectives on trending topics that have arisen due to the pandemic such as virtual hearings and due process challenges, *force majeure* and economic hardship defences, damages and quantum calculations, and opportunities and obstacles experienced by Asia-Pacific-based international arbitration practitioners and arbitrators.

With an eye to the day-to-day practical matters relevant in arbitration, several sessions throughout Arbitration Week 2021 shed light on current issues and practical tips for arbitral proceedings. These enlightening sessions included Tuesday's session on *Insolvency & Arbitration*, Wednesday's sessions on *Practicalities of Procedure, Career Pathways in International Arbitration, and Parallel Proceedings in International Arbitration: Theoretical Analysis and Search for Practical Solutions*, Thursday's session on *Flexibility vs. Efficacy in the Battleground of Disclosure*, and Friday's sessions on *Functus Officio in Arbitration, Banco Chambers Panel*, and *What's the bottom line? Management of Costs in International Arbitration*. A few examples of the numerous takeaways from these sessions include (i) that practitioners need to consider the impact of insolvency before, during and in the enforcement of arbitration proceedings, (ii) parallel proceedings may lead to issues with inefficiency, harassment, and inconsistent decisions, and (iii) in light of the UK Supreme Court decision in *Halliburton v Chubb* [2020] UKSC 48, arbitrators may have a duty to disclose appointments in overlapping arbitrations as there may be an appearance of bias.

In Thursday's session on *Trends, Statistics and Updates from the ICC*, the responsibilities of the ICC were outlined, and the panel delved into the workings of the court, including the focus on transparency and flexibility of arbitration procedures with an emphasis on the diversity of members and arbitrators. In *Investor-State Disputes, Infrastructure and Construction Arbitration, and New Technology in Arbitral Disputes*, we considered the global enforcement of Investor-State arbitral awards in Australia, continuing reform in Investor-State dispute settlement in 2021, and the implications of the recent abolishment of the Dubai International Financial Centre-London Court of International Arbitration Arbitration Centre.

In some of the most current news, ACICA has published new rules for 2021 and put them to the test in a hypothetical dispute during Thursday's *ACICA Rules 2021 Roadshow*. The new rules address issues arising in 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. Many of the changes to the rules facilitate clarity and efficiency in the arbitration process in general but are especially useful in a virtual setting.

In Wednesday's session, *The Great Debate; the best forum for resolving corporate disputes: to arbitrate or to litigate? It's not rocket science*, two teams went head-to-head in the classic debate between arbitration and litigation as dispute resolution mechanisms. While the decision to

arbitrate or mediate is complex, consideration of the pros and cons of each mechanism with respect to the dispute at hand is key to determining which mechanism is best for resolving the dispute. As stated in the title – it is not rocket science. However, if you are interested in rocket science, our final Friday session may have been an interest to you. As mentioned earlier, Arbitration Week 2021 ended with *Arbitration and Dispute Resolution in the Space Sector*, which discussed industry developments in the space sector, the frequency and types of disputes that arise in the sector, the range of issues space-related contracts should contemplate, and the role of investment treaty arbitration in resolving disputes. Now that Australia has a space agency, it has opened its doors to collaborations and commercial endeavors with other countries' agencies. Many disputes that arise in the space sector are in regard to supply chain issues such as the supply of components, preparation for launch, and maintenance of key components in space. Disputes in the space sector are more complex than most disputes due to the interplay between public actors, such as space agencies and defence sectors, and private commercial actors.

With such a high volume of issues and developments to cover, Australian Arbitration Week 2021 did not disappoint in engaging many of the most relevant issues to date in international arbitration. We extend a big thank you to all the sponsors, panelists, and everyone else that joined in the engaging discussions this year's Australian Arbitration Week had to offer. We look forward to seeing everyone again next year, and in case you missed out this year, having you join us then.

'Witness gating': pitfalls and possible solutions concerning oral testimony at the hearing[1]

Michael Weatherley
Partner, Ashurst Singapore

Hazel Brasington
Consultant, Ashurst Australia

In the recent case of *CBS v CBP* [2021] SGCA 4 ('**CBS v CBP**'), the Singapore Court of Appeal confronted the issue of 'witness gating', the practice of an arbitrator excluding witnesses from giving oral evidence at the final hearing. In considering whether such conduct constituted grounds for setting-aside an award, the Court provided salutary lessons for counsel and arbitrators alike about how to balance the perennial tension between an arbitrator's robust use of procedural discretion and the natural justice principle enshrined in Article 18 of the *UNCITRAL Model Law on International Commercial Arbitration* ('**Model Law**').

Brief summary of the case

CBS v CBP concerned the sale of coal from Australia pursuant to two sale and purchase agreements ('**SPAs**'). Those SPAs referred disputes to Singapore-seated arbitration under the Rules of the *Singapore Chamber of Maritime Arbitration 2015* ('**SCMA Rules**').

The seller of the coal (the '**Seller**') had entered into an Accounts Receivable Purchase Facility with a bank incorporated in Singapore (the '**Bank**'), which provided for the assignment of the seller's trade debts to the Bank, including in respect of the two SPAs.

The first shipment of 30,000 metric tonnes ('**MT**') proceeded without incident but problems arose in respect of the second shipment of 20,000 MT. The second shipment was duly delivered but, in short, the buyer of the coal (the '**Buyer**') failed to pay. While the Buyer initially admitted the debt (citing temporary cash flow issues and poor market conditions for delay in payment) the Buyer later performed a *volte face*, alleging that it received only 15,000 MT and also that, given the steep decline in the price of coal, it was 'not inclined' to pay for the coal at the prices in the second SPA.

The Buyer then offered to bear some of the price fluctuation and proposed a settlement meeting with the Seller, which took place in December 2015. What happened at that meeting was ultimately disputed. The Buyer alleged that the parties had reached an oral agreement for a reduced price of coal for the full 50,000 MT. The Seller and the Bank denied that any such agreement was reached.

The Bank commenced arbitration under the *SCMA Rules*,

1 This article is adapted from a presentation given by the authors at AMTAC's 2021 Australian Arbitration Week event, 'Avoiding obstacles along the pathway to enforcement', 19 October 2021.

before a sole arbitrator, seeking payment in full at the original price. During the arbitration, the Buyer engaged in tactics which the Singapore Court of Appeal later described as '*dilatory*' and '*less than cooperative, to say the least*'.[2] This included an unmeritorious jurisdictional objection, a challenge to the award dismissing that objection – that challenge being brought in the Indian Courts not the Courts of the seat of arbitration – and non-participation by the Buyer right up until just before the hearing. At that point, the Buyer then suddenly informed the arbitrator that it intended to contest the claim on its merits, albeit under protest as to his jurisdiction.

The Buyer eventually submitted a statement of defence and list of witnesses. The Buyer stated that it needed to call seven named witnesses, six of which were present at the December 2015 settlement meeting where, according to the Buyer, the parties had agreed to a reduction in the price.

The crucial juncture for the case then came when the arbitrator sought the parties' submissions as to whether an oral hearing was necessary. The Bank said no hearing was necessary because the dispute turned on issues of contractual interpretation, and the Buyer had not explained the reasons for calling the seven proposed witnesses. The Buyer said it needed a hearing to examine witnesses, but aside from referencing its pleadings, the Buyer did not give any further detail as to '*its position/ reasons for calling the 7 witnesses and/or the need for their oral testimony*'.[3]

The arbitrator then repeated his request for a '*descriptive basis of what [the Buyer] expects to develop with the introduction of the proposed witnesses*', but the Buyer did not elaborate further, beyond reiterating the necessity of examining the witnesses. The arbitrator then wrote to the parties as follows:[4]

> ***Before I rule on whether the arbitration will be on documents only or an oral hearing is necessary*** *I require the following:*
>
> *a. Detailed written statements from each of the witnesses [the Buyer] plans to call…*
>
> *b. A brief submitted separately by [the Bank] and [the Buyer] regarding what constitutes 'breach of natural justice' under the laws of Singapore.*

Thereafter followed a chain of correspondence demonstrating two fundamentally opposing views on what the SCMA Rules and the rules of natural justice required in terms of holding a hearing for the presentation of evidence by witnesses. Those opposing positions are explained below (noting they remained fundamentally the same all the way through to the Court of Appeal). Ultimately, however, the Buyer refused to put on witness statements and, after a peremptory order, the arbitrator made a ruling that there will be a hearing for oral submissions only but not for examination of witnesses because the Buyer had failed to explain the value of presenting those witnesses. The hearing proceeded, but, in protest, the Buyer did not attend. There was no witness testimony and the arbitrator later rendered an award allowing the Bank's claim in its entirety.

The scene was thus set for a setting-aside show down in the Singapore Courts and the ventilation of the two opposing views foreshadowed above, both going to the question of whether the Buyer was granted a 'full opportunity' of presenting its case pursuant to Article 18 of the *Model Law*.

The Bank's view – which reflected the ultimate approach taken by the arbitrator – was essentially this:

1. The arbitrator had wide-ranging witness-gating powers such that, if he was not satisfied that there was value in the witness evidence proposed to be led at the hearing, he could preclude it in its entirety;

2 *CBS v CBP* [2021] SGCA 4 ('*CBS v CBP*') at [78].
3 Ibid [19].
4 Ibid [20] – [21] (emphasis added).

2. This discretion, it was said, was apparent in two key provisions of the SCMA Rules. The first was Rule 28.1, which provides that:

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

   On the Bank's case, this Rule provides that if the parties do not agree on a documents-only arbitration, the arbitrator has discretion to decide whether to hold a hearing for the presentation of witness evidence or only for oral submissions – in other words, the 'or' should be read disjunctively.

3. The second was Rule 25, which gave the arbitrator broad case management powers in the following terms:

   25.1 The Tribunal shall have the widest discretion allowed by the [Singapore International Arbitration] Act (where the seat of the arbitration is Singapore) or the applicable law (where the seat of the arbitration is outside Singapore) to ensure the just, expeditious, economical and final determination of the dispute.

   25.2. Subject to these Rules, it shall be for the Tribunal to decide the arbitration procedure, including all procedural and evidential matters subject to the right of the parties to agree to any matter.

While the Singapore Court of Appeal clearly had some sympathy for the arbitrator, in light of the Buyer's uncooperative approach,[5] it found itself unable to agree with the Bank. The Court instead agreed with the Buyer that the arbitrator's conduct, on these facts, constituted a breach of the Buyer's right to a full opportunity to present its case.[6] There were three crucial elements of the Court's reasoning:

1. Rule 28.1 of the SCMA Rules had to be read holistically, not disjunctively, such that:

   (a) unless the parties have agreed a documents only arbitration, then the Tribunal must hold a hearing for the presentation of evidence by witnesses; and

   (b) unless the parties have agreed that no hearing should be held, then a hearing must be held for oral submissions.[7]

   Rule 28.1 did not give the arbitrator the power to gate witnesses, condition their appearance on having first provided a witness statement or otherwise choose the type of hearing in the absence of an agreement. The Buyer was unequivocal in seeking a hearing to present oral evidence and was entitled to that hearing under this provision.[8]

2. While broadly worded case management powers like those in Rule 25 allow tribunals to limit the oral examination of witnesses, they do not grant tribunals unfettered powers that otherwise override the rules of natural justice. This was evident not only from prior authority but from the words in Rule 25 itself that the arbitrator had the widest discretion 'allowed by' the Singapore International Arbitration Act,[9] an Act which of course contains clear natural justice constraints.[10]

3. The arbitrator's mission was to balance efficiency and efficacy against the right to be heard, and this balance would turn on the precise facts and circumstances of each case.[11] On the facts here, the Court felt the arbitrator went too far. The Court was satisfied that the Buyer had made sufficiently clear, through its pleadings, the purpose and importance of the seven

5 Ibid [78]
6 Ibid [52]-[79].
7 Ibid [55]-[56].
8 Ibid [57], [69], and [71].
9 *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed).
10 *CBS v CBP* (n2) [61]-[62].
11 Ibid [68].

named witnesses it intended to call – namely, that they would be giving evidence as to what happened at the December settlement meeting and whether there was an oral agreement to amend the price. In those circumstances, it could not count against the Buyer that it refused to furnish witness statements.[12] The Court accepted that the tribunal had the power under the SCMA Rules to ask for witness statements but noted that this was to help facilitate the presentation of evidence at the oral hearing not, as the arbitrator used it, for the purposes of determining whether or not he would hold an oral hearing in the first place. Rule 28.1 required that oral hearing to take place.[13]

The Court said that, in these circumstances, the arbitrator's denial of the entirety of the witness evidence of the Buyer fell outside the range of what a reasonable and fair-minded tribunal might have done in similar circumstances and therefore constituted a breach of natural justice.[14]

So what can we learn from this case with the benefit of hindsight?

Lessons for parties and counsel

Many arbitral rules do not contain the ambiguity present in Rule 28.1 of the *SCMA Rules*. The 2021 Australian Centre for International Commercial Arbitration Rules ("**ACICA Rules**"), for example, require a hearing for the presentation of evidence by witnesses, including expert witnesses, and/or for oral argument *'if either party so requests'*.[15] = Rule 28.1 of the *SCMA Rules* itself has now been overhauled to similar effect.[16] The enduring lesson for parties, therefore, lies not in the specific rules but in the Bank's requests for the arbitrator to invoke its broad procedural discretion to exclude the entirety of the witness evidence of the Buyer.

Requests for such robust exercises of the tribunal's procedural discretion have always been risky business in arbitration in light of the natural justice principles identified by the Court of Appeal (principles which are made explicit in some institutional rules – the *ACICA Rules*, for example, make it clear in articles 25.1 and 25.2 that the Arbitral Tribunal's discretion as to how to conduct proceedings is subject to equal treatment of the parties and affording the parties a reasonable opportunity to present their case). Because of those principles, the Bank's short term win in having that evidence excluded came at a heavy ultimate price. The practical lesson for parties and counsel is perhaps to think twice about seeking to exclude evidence in its entirety. Seeking to limit the *extent* of the evidence or make submissions as to why it should be given *little weight* may achieve the same outcome and involve considerably lower risk to the sanctity of your final award.

Lessons for arbitrators

The Court of Appeal did not shy away from identifying the arbitrator's mistakes and what he should have done differently. The Court made clear that the arbitrator's initial mistake was when he conditioned his decision on whether to hold an oral hearing on the receipt of witness statements. He simply did not have the power to do that under the *SCMA Rules*.[17]

By giving the Buyer this 'Hobson's choice' (as the Court of

12 Ibid [71]-[74].

13 Ibid [75]-[77].

14 Ibid [78] and [79]. In subsequent paragraphs, the Court went on to deal with the further questions of whether the breach affected the Final Award and whether that breach prejudiced the Buyer's rights in that the material which it did not get to present could reasonably have made a difference to the arbitrator. The Court answered both of these questions in the affirmative and set aside the award in full.

15 Rule 35.4 of the *ACICA Rules*.

16 The *2022 SCMA Rules* were released on 1 December 2021 and will enter into force on 1 January 2022. New Rule 25.1 provides that "*[t]he Tribunal shall decide if a hearing should be held or if the matter is to proceed on documents only, save that there shall in any event be a hearing so long as any party requests one.*" The SCMA did not include express witness-gating powers as are present in some other rules (see, e.g., Rule 25.2 of the SIAC Rules (2016)).

17 *CBS v CBP* (n2) [78].

Appeal called it),[18] the arbitrator made it very difficult for himself to back away, having all but committed to excluding the witnesses at the hearing if the Buyer did not put on the requested witness statements. He did follow through and that was when the breach of natural justice occurred.

A better course, according to the Court, would have been to fix a hearing for the presentation of the Buyer's witness evidence and at the same time ask for the witness statements from the Buyer.[19] If the Buyer refused to provide those witness statements, the arbitrator might have been on surer ground in limiting or at least discounting the value of any witness evidence at the hearing. While the Court noted it would generally accord a '*margin of deference to the tribunal's decisions, especially on procedural matters*', it went on to state:[20]

> … *this is a clear case of a serious breach of the rules of natural justice and to decide otherwise would be to reduce the content of those rules to a vanishing point.*

18 Ibid [74].
19 Ibid [78].
20 Ibid [78].

With a wave of large construction and project disputes anticipated, is it time for an added perspective?

Owain Stone
Partner, KordaMentha

There seems little doubt that in Australia and across the world that there is a growing wave of investment in infrastructure and other major construction projects. A recent research report from Cerulli Associates showed private global infrastructure investment growth at a rate of US$583 billion by the end of 2020[1]. A White & Case survey found that respondents said 54% of their total infrastructure spend is in the Asia-Pacific region, was up from 50% in their 2019 survey[2].

The discussions of net zero emissions may mean we do not see as many LPG terminals and jetties being built in Australia. However, the rise of alternative power generating technologies, such as solar, wind and hydrogen, is likely to see increased investment in these newer technologies. Looking overseas, it has been estimated that Asia will need to invest US$26 trillion from 2016 to 2030 to maintain the region's growth momentum[3]. Much of this will be in power related assets, but there is also a significant need for transportation, telecommunications and water and sanitation.

Construction = disputes

Almost anyone who has experience of construction and related industries knows that disputes follow these waves of investment. More than many other sectors, construction has long favoured arbitration and this is not showing any sign of changing, at least in the short term. This is particularly the case for international disputes, especially where joint ventures of entities from different legal backgrounds and countries are involved; arbitration provides a (usually) private dispute arena, less likely to be impacted by local legal nuances and issues, with greater certainty over the international enforcement of awards.

So, what does all this have to do with forensic accountants? We are not engineers, scheduling experts or quantity surveyors, much less lawyers, so what role can, or do, we play in large construction disputes (primarily arbitrations)?

In our experience, the right forensic accountant can bring a different skill set and perspectives, which can augment the skills of those more traditionally involved in disputes of this nature.

Different skills

In construction disputes, damages or quantum is often assessed by quantity surveyors ('**QSs**'). In many, if not most, cases, it is entirely appropriate that the QSs are used in this role. However, we would suggest that, especially for larger and more complex disputes, one should consider augmenting the skills of a QS expert with those of a forensic accounting expert. There are several

1 The Cerulli Edge—U.S. Asset and Wealth Management Edition, January 2021 Issue.
2 Asia-Pacific Infrastructure 2021: Strong Foundations in a changing world; White & Case January 2021
3 Meeting Asia's Infrastructure Needs, ADB February 2017

reasons for this, which can be summarised as relating to one or both of:

- A different skill set
- A different perspective

Forensic accountants, many of whom were once financial auditors, bring verification skills. This includes statistical sampling and analysis of large populations which can be essential when one is considering the fundamental question of, "How much did it cost to complete this project?" Obviously, that doesn't directly answer the question of whether those costs are recoverable by a particular party. But they do help to set up the playing field on which that and related questions can be considered. Furthermore, the forensic accountant's familiarity with financial records, including the likely structure of general ledgers, ERPs, payroll and procurement records can often help the disclosure/discovery process. The ability to robustly interrogate source payroll records can be particularly useful where the amount of labour which has been expended on a project is not clear. For instance, where multiple claims for additional hours have been made – perhaps in a manual form. Often records that a QS may find useful for quantum questions can be extracted in a cost-effective way from the financial records by leveraging that accounting knowledge and experience.

This highlights another skill set which can be particularly well honed by forensic accountants – the ability to manage, analyse and visualise large quantities of data. Traditionally, this has been structured, financial data. However, increasingly forensic accountants augment this with rigorous analysis of unstructured data, such as emails, as well as non-financial structured data, such as records of weather and travel. Forensic accountants with such experience will know when to augment their own skills by leveraging the deeper analytical expertise of data analysts, where the data set requires this.

These skills are, we would suggest, complementary to those from QSs or others who work on quantum and cost of materials, rather than the costs incurred, overheads allocated and charged to the project by the parties.

Proportionate response – what are we arguing about?

The overriding objective of the ACICA Arbitration Rules (2021) states that the:

> *"overriding objective of these Rules is to provide arbitration that is timely, cost effective and fair, considering especially* ***the amounts in dispute*** *and complexity of issues or facts involved". (emphasis added)*

Whilst it does not include the word 'proportionate', this is very similar to the overarching obligation in the *Civil Procedure Act 2010* (Vic) to "ensure costs are reasonable and *proportionate*"[4] (emphasis added). This is clarified as relating to the "*complexity or importance of the issues in dispute*" and "*the amount in dispute*".

It would, therefore, seem an essential pre-requisite to assessing the approach to be taken in a particular dispute – whether in litigation or arbitration – that a reasonable and well-informed position is established as to the amounts in dispute.

Unfortunately, our experience is that too many times the amounts in dispute, as initially set out by the parties involved, are often not stress-tested until relatively late in the dispute process.

Investment decision

A key feature in many arbitration conferences and publications over recent years has been panels and individuals discussing the developing role of litigation funders in arbitrations in Australia and, increasingly, around the globe. As with concurrent evidence, litigation funding is, arguably, an Australian invention which has now spread far and wide. However, it should be remembered that every client is already funding disputes – they invest in every dispute they are involved in, both in terms of legal and other fees, but also in the amount of management time that is absorbed. Litigation funders

4 *Civil Procedure Act 2010* (Vic) – Section 24.

have encapsulated the need for rigour in the assessment of those investment decisions.

Accountants are well-equipped to help lawyers and their clients undertake a rigorous decision tree analysis. This analysis seeks to identify the key legal and factual elements which can be won or lost in a dispute, and how combinations of these variables can lead to different financial outcomes for the parties. The lawyers and their clients can then put probabilities to these (normally five outcomes are sufficient – very likely, likely, 50/50, unlikely and very unlikely), which drives the expected outcome from investing in a particular course of action. A well-designed model can help to focus on the amounts in dispute and, more importantly, the likely impact of not winning all the points being claimed.

Such a model can provide an invaluable, dynamic tool to explain the dispute issues and structure to senior management/boards, particularly important where joint ventures may answer to several different boards with differing degrees of understanding of the underlying project and dispute. It also provides a structure for explaining how things change over time, as they inevitably will as more information becomes available. This sort of financial modelling is something that forensic accountants have the skills and investment analysis experience to lead and design. But a team effort is essential as many of the elements are legal or construction related.

Doing this sort of analysis at an early stage can help to ensure that the approach to a construction or project dispute is proportionate, contextually relevant, auditable and justifies the investment.

Different perspective, holistic approach

Forensic accountants bring to bear a different perspective (or perspectives) from those traditionally involved in construction disputes; not better, just different. However, the ability to see the same things in a different light can add value. One way of thinking of this is that QSs, through training and experience, tend to look from materials to dollars, perhaps through a bill of materials to the invoice. Conversely, forensic accountants, through different training and experience, tend to look from dollars to materials, perhaps starting from invoices or cost records in the general ledger. Each of those perspectives may not fully grasp the import of a particular aspect of the materials/dollars, but if both perspectives are shared and explored, it can add considerable insight for the dispute process.

This can be particularly relevant where there are charges for labour, materials or services from entities that are related to one or more of the contracting parties. Does the hourly labour rate simply pass on costs, which are sometimes described as 'fully loaded'? Or has the rate been loaded with a profit element? Complex corporate structures and practices can sometimes make it difficult to understand exactly what a true, underlying cost is and what is an uplift, and even more difficult to find out whether that uplift is cost or profit. The answer will often require a forensic accounting analysis of accounting and payroll records.

Another example of this need for different, and broader,

perspectives can be seen in respect of the treatment of overhead and profits in extensions of time and other construction disputes. Whilst there is no one solution to assessing how much (if any) allowance should be made for these in a construction dispute, there are several 'rule of thumb' equations, such as the Eichleay, Emden and Hudson formulae, which are sometimes used in claims. A forensic accountant may be familiar with these formulae, but they may also be familiar with a series of intellectual property damage and account of profit cases which consider similar issues in a different context. These cases serve to highlight the underlying assumptions inherent in, but often not directly considered, using the various construction formulae. Drawing from the intellectual property cases brings a useful new perspective to an aspect of construction disputes.

Conclusion

Forensic accountants often work on a wide range of commercial disputes. Whilst we may have less experience wearing a hard hat and lack engineering insights, the lessons from other commercial disputes can help to avoid groupthink on construction disputes.

For larger, more complex construction disputes, especially if there are joint ventures and related party transactions, it is important to involve forensic accountants, at an early stage, with a wide range of experience in commercial disputes of all types – not just arbitrations, and not just construction.

New and increased investment in infrastructure and major construction projects is expected to be followed by a wave of related disputes. To ensure the approach to any dispute is reasonable, well-informed and proportionate, and justifies the investment of time and money, calling on multiple specialist skill sets is critical. Forensic accountants bring verification skills, familiarity with accounting records and ability to manage, analyse and visualise the vast amounts of often-disparate data associated with these disputes. Engaging the right forensic accounting experts serves to augment the skill sets and perspectives of providers traditionally involved.

JKC Australia LNG Pty Ltd v AkzoNobel (No 3) [2021] FCA 1217 (8 October 2021)

Bronwyn Lincoln
Partner, Corrs Chambers Westgarth, International Arbitrator

The Federal Court of Australia has recently considered two applications for a release from the 'Harman undertaking' to enable the use of documents produced in litigation for use, inter alia, in related arbitration proceedings. The Harman undertaking is an implied undertaking given to the court which prohibits parties from using documents disclosed in a proceeding by way of discovery or in response to a subpoena for purposes other than the litigation in which the documents were produced[1].

The applications arose from the same factual matrix[2] - JKC Australia LNG Pty Ltd (**JKC**) entered into a contract with INPEX Operations Australia Pty Ltd (**INPEX**) for engineering, procurement, supply, construction and commissioning of a project called the Ichthys Project. There were issues with the coating system used in the project (referred to as **Intertherm 228**) and JKC commenced proceedings against the suppliers (**AkzoNobel parties**) for, amongst other things, misleading and deceptive conduct.

The first application concerned documents received by JKC in the Federal Court proceeding from AkzoNobel (**first application**). JKC sought a release from the Harman undertaking to enable it to use the documents for the purpose of exploring separate claims against INPEX. JKC then made a further application later in the proceeding (**second application**).

There was evidence before the court in the first application that the documents which were the subject of the application were available through other processes, including preliminary discovery.

The relevant principles were enunciated by Banks-Smith J when determining the first application, quoting from the Full Federal Court decision of *Liberty Funding Pty Ltd v Phoenix Capital Ltd*[3], including:

> *In order to be released from the implied undertaking it has been said that a party in the position of the appellants must show 'special circumstances' […]. The notion of 'special circumstances' does not require that some extraordinary factors must bear on the question before the discretion will be exercised. It is sufficient to say that, in all the circumstances, good reason must be shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of a party in another piece of litigation or for other non-litigious purposes. The discretion is a broad one and all the circumstances of the case must be examined. In Springfield Nominees, Wilcox J identified a number of considerations which may, depending upon the circumstances, be relevant to the exercise of the discretion. These were:*
>
> - *the nature of the document;*

1 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; see also *Hearne v Street* (2008) 235 CLR 125
2 *JKC Australia LNG Pty Ltd v AkzoNobel NV* [2019] FCA 1032; *JKC Australia LNG Pty Ltd v AkzoNobel NV (No 3)* [2021] FCA 1217
3 [2005] FCAFC 3

- *the circumstances under which the document came into existence;*
- *the attitude of the author of the document and any prejudice the author may sustain;*
- *whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;*
- *the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information);*
- *the circumstances in which the document came in to the hands of the applicant; and*
- *most importantly of all, the likely contribution of the document to achieving justice in the other proceeding.*

(Internal footnotes omitted)

The court acknowledged that some of the documents which were the subject of the first application were confidential; a confidentiality regime was proposed to address this concern. The second issue of particular concern was the value of the documents in relation to the potential claims. The court concluded that access to the documents *would contribute to the [advice on those claims]* and a release from the undertaking and consequential disclosure of the documents was therefore *in the interests of justice*.

The second application concerned a much larger number of documents. In relation to these documents, JKC sought a release from the undertaking to use the documents in two sets of related proceedings: an arbitration between it and INPEX (foreshadowed in the first application) and proceedings in the Supreme Court of Western Australia concerning insurance policies in place in respect of the project. There was evidence before the court that experts retained in the arbitration had been provided with documents which were the subject of the first application. These documents and additional documents (those additional documents being the subject of the second application) were briefed to the expert retained in the present litigation. Absent leave (or other order), the experts in the arbitration may not be fully briefed.

Not surprisingly the view was taken that experts in both proceedings (dealing with the same issues) ought be briefed with the full scope of documents. The documents were also relevant to issues raised in the insurance litigation, with her Honour observing (at [28]) that *[i]t is therefore apparent that under both insurance policies it is relevant to establish that damage has occurred and whether the cause of any damage excludes or otherwise affects insurance cover*.

It was again acknowledged that the documents which were the subject of the second application could be obtained by other procedures (albeit with additional costs and time).

Banks-Smith J referred to the principles relied upon in relation to the first application. Her Honour accepted, on the evidence, that there were overlapping matters in the present litigation, the arbitration and the insurance litigation and observed (at [39]) that:

> *It is also apparent that it is not in the interests of the just disposal of the various matters for [the expert] to be in a position to rely on some documents in this proceeding but not in the Insurance Proceedings. Questions arise as to how his accumulated knowledge might properly be dealt with. Similarly, and assuming different experts are required and retained for the Arbitration, it is not in the interests of justice that JKC be placed in a position where those experts might come to different views as a result of the provision of different sets of briefing documents.*

The second application was granted, with the court having specific regard to the overarching purpose set out in s 37M(1) of the *Federal Court of Australia Act 1976* (Cth).

The willingness of the court to release a party from the Harman undertaking to enable the use of documents in both related arbitration proceedings and related litigation was pragmatic and consistent with the efficient resolution of commercial disputes. Whilst determined under the applicable civil procedure rules in the Federal Court, there is also no doubt that the decision, from the perspective of the arbitration proceeding, also strongly aligned with the objects of the I*nternational Arbitration Act 1974* (Cth)[4].

4 Section 2D

Arbitrating Space Exploration and Mining Disputes: An Area Set to Skyrocket as Technological Advances and Space Missions Continue to Make Leaps and Bounds

Eden Jardine, LL.M.
Associate at LALIVE (London) LLP

I Introduction

Space, mining and arbitration are currently three distinct areas of specialisation. But what if these subjects merge? There is an upswing in worldwide conversations and events relating to climate change, artificial intelligence and space travel of late. The 2019-2020 Australian bushfires, mobile devices that unlock themselves using facial recognition and billionaires such as Sir Richard Branson and Mr Elon Musk launching private rockets into space, are all timely examples. And while bushfires, iPhones and billionaires do not directly correlate to space, mining and arbitration, they are arguably a precursor of emerging trends, future issues and a potential solution. What is more, Australian lawyers and mining companies, domiciled in one of the world's leading mining jurisdictions, may have a vested interest to keep an eye on this budding field.

II Mining in Space

There are increasing social, economic and legal pressures for mining companies to be conscious of their carbon footprint on Earth. Environmental damage caused by mining companies make unwanted news headlines. Banks and investors evaluate companies' environmental protection policies before injecting capital into mining projects. And environmental counterclaims raised by host States in mining arbitrations are on the rise.[1] Further, underground resources on our planet are of finite supply. While such checks and balances are undoubtedly important, mining is not going anywhere – it is fundamental to economies, businesses and individuals. In a nutshell, 'the modern world simply can't function without mining'.[2]

Since mining is here to stay, we must consider how can we continue mining in a clean, environmentally friendly way and overcome finite resource supply issues on planet Earth. Scientists and economists are of the view that the sky is indeed not the limit; space exploration and mining might be our answer. Mining on the Moon, Mars and asteroids would open a whole new world of possibilities. Advances in technology, artificial intelligence and

1 Yasmine Lahlou and Rainbow Willard, 'The Rise of Environmental Counterclaims in Mining Arbitration' in Jason Fry QC and Louis-Alexis Bret (eds), *The Guide to Mining Arbitrations* (Global Arbitration Review, 2021) 49.

2 Fabio Mielli, '5 Reasons Why the World Needs Mining… And Always Will', *Schneider Electric*, (Blog, 19 February 2016), <https://blog.se.com/mining-metals-minerals/2016/02/19/5-reasons-why-the-world-needs-mining-and-always-will/>.

individuals pushing the stratospheric boundaries to facilitate space travel, are transforming the fanciful sounding concept of mining in space into a genuine reality.

In fact, the race to commercial space mining has already begun. Last year, NASA concluded contracts with four private companies to extract lunar regolith (i.e., soil) by 2024.[3] Time will tell if we are on the cusp of a literal out-of-this-world mining boom. Until then, developing space law and ensuring there is the necessary legal infrastructure to resolve the inevitable complex commercial and investment international disputes that would follow space exploration, will likely play a key role in the fate of mining in space.

III International Space Law

The rise of private individuals and companies engaging in outer space activity is provoking calls for an overhaul of international space law,[4] especially given the patchwork of domestic laws currently being developed (e.g., in the United States, Luxembourg and the United Arab Emirates).[5] For example, American citizens are legally authorised to obtain their own asteroids, mine them and then keep what they find, pursuant to the *U.S. Commercial Space Launch Competitiveness Act*, 51 USC § 51303 (2015). Questions have arisen over whether this is compatible with international space laws, such as the 1967 Outer Space Treaty[6] and the 1979 Moon Agreement[7], which appear to prohibit private ownership of outer space resources.

Amid the legal grey areas concerning our access and use of outer space, there has been a recent suggestion to adopt the Investor-State Dispute Settlement legal framework to address the growing issue of space debris in outer space.[8] Similarly, arbitration can be considered as another building block in adding clarity to our international space laws. Regardless of the applicable substantive laws, international arbitration has the requisite procedural functionalities to resolve future international disputes arising out of exploration and mining in space – provided the arbitration community and interested players help develop this field.

IV Arbitrating International Space Exploration and Mining Disputes

Significant resources will be invested into space exploration and mining projects which means commercial space mining companies, sovereign States and other stakeholders will rightly expect a robust legal avenue to effectively remedy disputes, regardless of where such disputes arise.

Arbitrating space exploration and mining disputes will likely share characteristics typically seen in arbitrating mining disputes on Earth. This is because of the many cross-border elements that frequently feature in mining disputes. For instance: contracting parties, assets and projects are often based in differing jurisdictions; commercial or investment relationships are governed by multiple laws and/or contracts; and arbitrators have specialised industry knowledge to understand the dispute, which domestic judges may lack. Moreover, national courts do not offer the almost global enforcement possibilities, which thanks to the New York Convention, international arbitration does. Space exploration and mining disputes will be no different.

V Recommendations for Today, to Create Tomorrow

Specialised knowledge of space law, mining and arbitration law will be essential in navigating these

3 Alex Gilbert, 'Mining in Space Is Coming' (26 April 2021) *Milken Institute Review*.

4 Jonathan Ames, 'Space, the final frontier, needs modern regulation', *The Times* (online, 29 July 2021).

5 Alex Gilbert, 'Mining in Space Is Coming' (26 April 2021) *Milken Institute Review*.

6 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967 (entered into force 10 October 1967) art 2: 'Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.'

7 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature on 18 December 1979 (entered into force on 11 July 1984) art 11(7)(d): 'An equitable sharing by all States Parties in the benefits derived from those [lunar] resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.'

8 Laura Yvonne Zielinski, 'Space Arbitration: Could Investor-State Dispute Settlement Help Mitigate the Creation of Space Debris?', *European Journal of International Law*, (Blog, 19 March 2021), < https://www.ejiltalk.org/space-arbitration-could-investor-state-dispute-settlement-help-mitigate-the-creation-of-space-debris/>.

futuristic disputes. Whilst arbitration is arguably best placed to resolve inevitable disputes stemming from exploration and mining in space, the arbitration community needs to be proactive in fostering the development of this area. This can be achieved in various ways.

An important first step is holding consultations with interested stakeholders including miners, technology and space companies, government bodies, as well as space and mining interest groups, which would help to understand what the industry will likely need from international dispute resolution service providers.

With this understanding, arbitral institutions, such as ACICA, may consider creating specific space law arbitration rules[9] and/or develop a panel of arbitrators and experts acquainted with the intricacies of amalgamating mining, space and arbitration into one field.

Additionally, establishing an International Space Arbitration Court ('**ISAC**') could provide all interested parties with a one-stop shop to resolve international space law issues. General (e.g., commercial) and specialised (e.g., space exploration, mining, investment) chambers of ISAC could cater to the specific needs of parties in dispute, with arbitrators, experts and legal counsel acquainted with the necessary specialised knowledge of each chamber.

Finally, this area is particularly noteworthy to Australian lawyers and mining companies. From a substantive law perspective, globally renowned mining jurisdictions such as Australia and Canada have an opportunity to utilise their expertise to help shape international laws governing space exploration and mining. Taking an active, leading role in this developing area is an exciting prospect; not only because of commercial first mover advantages, but because the possibilities are potentially infinite.

9 Akin to the Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities* (effective 6 December 2011).

The United Nations Convention on International Settlement Agreements Resulting From Mediation ('The Singapore Convention On Mediation')[1]

Mary Walker OAM
Barrister, 9 Wentworth Chambers

The *Singapore Convention on Mediation* ('**The Convention**') is described as 'an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes'.[2] Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDG), mainly the SDG 16.[3] The Convention was originally promulgated by UNCITRAL through its mandate to remove legal obstacles to international trade by progressively modernising and harmonising trade law.[4] The Convention is modelled on the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958), ('**New York Convention**'), however it is intended to stand alone. Mediation is not seen through the prism of arbitration but as the 'missing third piece' in the international dispute resolution enforcement framework. At the ceremony for the signing of the Convention held on 7 August 2019, the Singaporean Prime Minister, Lee Hsien Loong stated:

> *Today, for cross border disputes, many businesses rely either on arbitration, enforced via the New York Convention, or on litigation. The Singapore Convention on Mediation is the missing third piece in the international dispute resolution enforcement framework. Businesses will benefit from greater flexibility, efficiency and lower costs, while states can enhance access to justice by facilitating the enforcement of mediated agreements.* [5]

Historically, two instruments were aimed at harmonising international settlement processes. The instruments were the *UNCITRAL Conciliation Rules* (1980) with the *Model Law on International Commercial Conciliation* (2002) and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958), (*'*New York Convention'*)*. These instruments formed the basis of the international framework for the development of the Convention. UNCITRAL does not differentiate between

1 ACICA provides mediation as well as arbitration services including mediation rules and a panel of mediators; https://acica.org.au/mediation/.

2 https://uncitral.un.org/en/news/general-assembly-adopts-united-nations-convention-international-settlement-agreements-resulting.

3 https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements. One of the 17 Sustainable Development Goals established by the United Nations in 2015, the official wording is: 'Promote peaceful and inclusive societies for sustainable development, provide access to justice ...' https://www.un.org/sustainabledevelopment/peace-justice/.

4 Ibid.

5 https://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-Singapore-Convention-Signing-Ceremony-and-Conference.

the terms 'mediation' and 'conciliation' in its instruments.[6] The *UNCITRAL Model Law on International Commercial and International Settlement Agreements Resulting from Mediation* 2018 ('Model Law'), at 1.3[7] notes:

> *'mediation' means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ('the mediator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.*[8]

The *Model Law on International Commercial Conciliation* was amended in 2018 with the addition of a new section on international settlement agreements and their enforcement. The Model Law has been renamed *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.*[9]

In view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial mediation practice, UNCITRAL recommended that all States consider the enactment of the UNCITRAL Model Law when States enact or revise their domestic laws.[10] Each Party to the Convention may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement.[11]

Australia became a signatory of the Convention on 10 September 2021. The Convention now has 55 signatories including two of the world's largest economies the United States of America and China. There are currently eight parties which have ratified the convention: Singapore, Fiji, Qatar, Saudi Arabia, Belarus, Ecuador, Honduras, and Turkey.[12]

All relevant issues cannot be canvassed in this short note however a summary is provided. The Preamble to the Convention identifies the incentives for its development. In signing the Convention, States are:

> ***Recognizing*** *the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,*
>
> ***Noting*** *that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,*
>
> ***Considering*** *that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States, [and]*
>
> ***Convinced*** *that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations.*[13]

The Convention applies to international commercial disputes. Article 1 of the UNCITRAL Model Law notes that the term 'commercial' should be given a wide interpretation to cover matters arising from all relationships of a commercial nature whether contractual or not, to include:

> …but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement;

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6 Corinne Montineri, *The United Nations Commission on International Trade Law (UNCITRAL) and the Significance of the Singapore Convention on Mediation*, Singapore Mediation Convention Reference Book, Cardozo Journal of Conflict Resolution, Vol 20. No. 4. 2019 at 1023; https://cardozojcr.com/wp-content/uploads/2020/01/Singapore-Mediation-Convention-Reference-Book.pdf.

7 Reflects Article 2.3 of the Convention; https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf

8 Ibid; see also United Nations Commission on International Trade Law, Fifty-first Session (25 July-13 July 2018), Annex II, Article 3, A/73/17 p.56; see also, Report at 5.

9 https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation

10 https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Final_Edited_version_in_English_28-8-2018.pdf; p.12.

11 Amending the UNCITRAL Model Law on International Commercial Conciliation 2002; https://www.uncitral.org/pdf/english/commissionsessions/51st-session/Final_Edited_version_in_English_28-8-2018.pdf; p.11.

12 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en

13 https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf, p.3.

commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail, or road.[14]

The Convention does not apply to disputes arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes, family, inheritance, or employment law.[15]

The operative articles of the Convention are Articles 1-5: Article 1 outlines the scope of the application of the Convention; Article 2 notes the definitions (see Article 2.3); Article 3 identifies the general principles; Article 4 notes the requirements for reliance on settlement agreements; and Article 5 identifies the grounds for refusing to grant relief.

The Convention provides a list of grounds in which a Court may refuse to grant relief in Article 5. The grounds are grouped into three main categories:

(i) *in relation to the parties, their incapacity;*

(ii) *in relation to the settlement agreement, its invalidity, or the fact that the settlement agreement is not final, not binding or has been subsequently modified, the fact that the obligations in the settlement agreement have been performed or are not clear and comprehensible, or that granting relief would be contrary to the terms of the settlement agreement;*

(iii) *in relation to the mediation procedure, due process issues regarding the procedure or the independence and impartiality of the mediator.*[16]

A key differentiator is noted in Article 5.1(e) and (f) which relate to the activities and performance of the mediator. 5.1(e) refers to a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach a party would not have entered into the settlement agreement and 5.1(f) where there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence which failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement. The Convention provides for both the enforcement of settlement agreements and the right of a disputing party to invoke the settlement agreement for the purpose of seeking relief, as noted above.[17]

UNCITRAL, in referring to the adoption of the Convention, noted that:

> *Until the adoption of the Convention, the often-cited challenge to the use of mediation was the lack of an efficient and harmonized framework for cross-border enforcement of settlement agreements resulting from mediation. In response to this need, the Convention has been developed and adopted by the General Assembly.*
>
> *The Convention ensures that a settlement reached by parties becomes binding and enforceable in accordance with a simplified and streamlined procedure. The Convention provides a uniform and efficient international framework for mediation, akin to the framework that the New York Convention has successfully provided over the past 60 years for the recognition and enforcement of foreign arbitral awards.*[18]

At the same time as strengthening access to justice and the rule of law for those who engage the Convention, the Convention has been designed to facilitate international trade and commerce by creating a forum for negotiation and consensual dispute resolution in cross-border commercial disputes.[19] The Convention promotes mediation as an effective method of resolving international commercial disputes by providing an effective enforcement mechanism for agreements resulting from mediation.[20] A new era of international dispute resolution has commenced.

14 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf, FN 2, p.1.
15 Article 1.2.
16 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/singapore_convention_accession_kit.pdf; p.3.
17 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/singapore_convention_accession_kit.pdf; p.2.
18 https://uncitral.un.org/en/news/general-assembly-adopts-united-nations-convention-international-settlement-agreements-resulting.
19 https://uncitral.un.org/en/news/general-assembly-adopts-united-nations-convention-international-settlement-agreements-resulting.
20 http://www.unis.unvienna.org/unis/en/pressrels/2020/unis1293.html.

Scope and Application of Dispute Resolution Agreements: Four Recent Cases in the NSW Court of Appeal

David Smallbone
FCIArb, Barrister

I Introduction

In four recent cases the New South Wales Court of Appeal reviewed the well-trodden ground of construction, scope and application of dispute resolution clauses, variously applied to choices of jurisdiction of courts, expert determination and arbitration. The decisions illustrate how this jurisprudence remains connected with its setting in general contractual principle, and the particular contractual text and factual circumstances of any given case.

II Australian Health v Hive Marketing

Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd[1] concerned four companies (one of which was English) and two agreements, each with a jurisdiction clause. Each agreement had only three parties. One agreement contained an exclusive jurisdiction clause for English courts, for which the only English party had stipulated. The other (between the three Australian parties) provided for non-exclusive submission to the Courts of New South Wales.

Two of the parties commenced proceedings in New South Wales as plaintiffs, naming the other two parties as defendants. Only one of the plaintiffs was a party to the contract with the English defendant and only that plaintiff claimed relief against that defendant. On the English defendant's application, McDougall J dismissed the proceedings against the English company, but allowed them to proceed against the Australian defendant.[2]

In the Court of Appeal, Bell P stated the following principles.

Where a commercial dispute only involves contracting parties, respect for party autonomy and for holding parties to their bargain will usually mean that the Court will stay, or grant an anti-suit injunction to restrain, proceedings commenced in a forum other than that nominated in an exclusive jurisdiction clause. In such a case, there is a firm presumption in favour of maintaining the bargain unless strong reasons be adduced against a stay.[3]

However, when not all of the parties to the suit are parties to the exclusive jurisdiction agreement, there is no such pre-disposition in favour of a stay. In such cases, two powerful policies may be in tension. First, the importance of holding parties to their bargain. Conversely, the policy against multiplicity of suits and against the risk of inconsistent judgments on the same dispute, may in the particular circumstances come into collision with the first policy.[4] Where this occurs, these considerations may be finely balanced.[5] Bell P's discussion of the authorities

1 (2019) 99 NSWLR 419.
2 *Australia Health & Nutrition Association Limited v Hive Marketing Group Pty Limited* [2018] NSWSC 1236 at [10], [50]-[51].
3 (2019) 99 NSWLR 419 at [76]-[79].
4 Ibid, [80]-[97].
5 Ibid, [11], [71], [93].

illustrated how practically the risk of inconsistent judgments may be less or more present or significant in particular circumstances.[6]

All members of the Court observed that deference will be given to the primary Judge's evaluation and, particularly, to the discretionary element in the primary Judge's orders.[7] In this case there was no error or sufficient reason to disturb the careful decision of McDougall J, examining whether the risk of multiple suits and inconsistent decisions was sufficient to dispel the right of the English defendant to insist on its contract for exclusive English jurisdiction. That there had been opportunity to investigate the terms of the English contract was significant in the view of McDougall J.[8] Bell P observed also that there was no guarantee that a multiplicity of suits would arise, but that a failure of one plaintiff's claim against the Australian defendant, would not preclude the other plaintiff from claiming in England against the English defendant.[9]

III Inghams v Hannigan

Inghams Enterprises Pty Ltd v Hannigan[10] decided the scope in a particular contract of the words 'any monetary amount payable and/or owed by either party to the other under this Agreement' to which an arbitration clause was limited. The arbitration clause followed a wider mediation clause prohibiting commencement of court proceedings 'in respect of a dispute arising out of this agreement' until after the mediation.

The decision illustrates the decisive impact of the contract text. The majority noticed provisions in the contract providing in various ways for liquidated debt obligations to arise under its terms, and concluded that the subject matter described by the arbitration clause was limited to obligations to *pay money* 'arising under' the agreement and did not extend to unliquidated *damages for breach* of the contract.[11] Important to this conclusion was the principle that liability for damages arises by operation of law as a secondary obligation and is not one that "is created by or arises under the contract".[12]

In finding its scope, the majority contrasted the *breadth* of the mediation clause, containing the words 'arising out of' the agreement, with the *subset of the universe of disputes* described in the arbitration clause. The contrast in the contractual text distinguished the case from the more common situation where a clause refers to arbitration all disputes 'arising under' the agreement, making it unnecessary for the Court to resolve the controversy whether in *such cases* there is any difference between 'arising under' and 'arising out of'.[13]

The Court was divided. The dissent of Bell P established as the ground of decision the majority's view that contractual damages are payable by operation of law and are not money payable 'under this agreement'.[14] This will be important for any case involving a similar clause, where the contractual text *itself* distinguishes 'arising under' as narrower than 'arising out of' but, given that every contract must be construed as a whole, it will still be important to attend to differences.

Moreover, the clause in this case was unusual in prescribing a broad scope for mediation and a relatively narrow scope for arbitration. For that reason, this particular decision may find limited direct application, though it has subsequently been referred to in some cases construing the word 'under' in relation to a contractual or legislative provision, most notably in *Freedom Foods Pty Ltd v Blue Diamond Growers*[15] and *Chief Commissioner of State Revenue v Downer EDI Engineering*

6 Ibid, [82]-[89], [94].
7 Ibid, [13], [97]
8 [2018] NSWSC 1236 at [45].
9 99 NSWLR 419, at [96].
10 (2020) 379 ALR 196.
11 Ibid {147]-[151].
12 Ibid [147].
13 Ibid [134]. See the strikingly different outcome on "any dispute under this deed" in *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13; (2019) 267 CLR 514 including at [18]-[25] comment on the *Fiona Trust* controversy; and compare *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at [199] with *Rinehart v Welker* (2012) 95 NSWLR 221.
14 Ibid [86].
15 [2021] FCAFC 86 at [75].

Pty Ltd.[16]

IV Lepcanfin v Lepfin

Lepcanfin Pty Ltd v Lepfin Pty Ltd[17] concerned the scope of the dispute defined in a submission agreement for expert determination (no issue was raised concerning whether this agreement was in substance an arbitration agreement). The appellant contended the defined dispute was limited to whether the claimed fee had been waived. The expert determiner (Professor Peden) had found it had not been waived, but upheld a defence that it was a penalty. The Appellant then sued to recover the fee, and Hammerschlag J summarily dismissed the action, finding that Prof. Peden's determination was within the scope of her reference.[18]

An appeal was dismissed. Bell P developed two reasons. First, his Honour applied the well-known line of cases concerning construction of dispute clauses, including the cases calling for broad and liberal construction.[19] This approach assisted in understanding the word "and" disjunctively in the phrase defining the submission: '… whether Lepcanfin waived the obligation … and Lepcanfin's entitlement to the … Fee …'. His Honour found also that as a matter of plain English the word "entitlement" in this clause captured whether or not there was any reason precluding the assertion or enjoyment of the contractual benefit otherwise conferred. This included the defence that it was a penalty. [20]

A second path to finding that the submission included the penalty issue was found in the identification of the contract terms. The submission agreement contained no entire agreement clause. It described its own description of the dispute as a 'brief description' of the dispute's 'essence'.[21] In those circumstances, Bell P referred to the Points of Claim and Defence exchanged by the parties before the last of them signed the submission agreement. Those pleadings alleged and denied that the fee was a penalty. Bell P held that these pleadings were part of the conduct by which the parties defined their agreed submission of the dispute to Prof. Peden, finding an inferred contract to that effect on the principle stated in *Integrated Computer Services Pty Ltd v. Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117, that 'a contract may be inferred from acts or conduct of the parties as well as or in the absence of their words'.[22]

Had it been necessary, his Honour would have reached the same conclusion based on an estoppel, where the Respondent would have been entitled to trigger a reference of the penalty issue under an earlier expert determination agreement, had the Appellant refused to include it in the actual submission agreement. His Honour found it was fanciful to suppose that such a reference would not also have gone to Prof. Peden. This simple means to refer the issue was an element in finding that the Appellant's stance lacked ultimate utility and was unmeritorious, conclusions that supported a finding that its conduct was unconscionable in resiling from the position taken in its Points of Defence (which had engaged on the merits with the penalty issue).[23]

V Qantas v Rohrlach

Qantas Airways Ltd v Rohrlach[24] concerned an exclusive jurisdiction clause in an employment agreement, nominating the courts of Singapore. It also contained a post-termination restraint of employment and an entire agreement clause *as to its subject matter*. The parties varied this agreement in connexion with a posting to Japan. The variation agreement annexed a deed poll, containing a separate post-termination restraint on employment. The deed poll was held to have an

16 [2020] NSWCA 126 at [123].
17 (2020) 102 NSWLR 627.
18 *Lepcanfin Pty Ltd v Lepfin Pty Ltd* [2019] NSWSC 1328.
19 Collected in summary at (2020) 102 NSWLR 627, [78]-[94].
20 Ibid, [99], [102]-[103], [106].
21 Ibid, [101], [102].
22 Ibid, [106].
23 Ibid, [107]-[109].
24 [2021] NSWCA 48.

independent and binding effect in its own right,[25] though forming part of the suite of agreements governing the parties' relationship.

Mr Rohrlach resigned and notified his intention to work for Virgin Australia. Qantas put him on gardening leave during his notice period and threatened proceedings. Mr Rohrlach commenced proceedings in Singapore for negative declaratory relief. Qantas subsequently sued in New South Wales to enforce the deed poll restraint, disclaiming reliance on the earlier restraint clause. Hammerschlag J stayed the NSW proceedings and dismissed Qantas' motion for an anti-anti-suit injunction.[26]

On appeal, Qantas emphasised that the deed poll was a distinct instrument, and did not incorporate the jurisdiction clause. The central point in the decision is that that submission 'missed the mark'.[27] The scope of the jurisdiction clause turned on construction of the employment agreement (as varied) and 'could not be affected by any of the terms of the Deed Poll'[28] *in the absence of* the deed poll containing 'its own' exclusive jurisdiction clause, or an entire agreement clause (a clause of either type in the Deed Poll would likely have excluded the extrinsic jurisdiction agreement). This was an instance of the scope of a disputes clause extending

25 Ibid [54].
26 *Qantas Airways Ltd v Nick Rohrlach* [2021] NSWSC 260.
27 *Qantas Airways Ltd v Rohrlach* [2021] NSWCA 48, [78] (Bell P).
28 Ibid. See also [56], [86] and [92].

beyond purely contractual claims arising under the particular contract in which it was contained.[29]

The second decisive question was the *scope* of the jurisdiction clause itself. Elliptically, it failed to spell out in words what disputes it would apply to. The Court construed it to extend to 'any dispute relating to or in connection with the subject matter of the Employment Agreement', which from an examination of its terms, included confidential information, termination and obligations after termination.[30] Bell P derived support for this conclusion from the very fact that the clause did not in terms delimit its own scope[31] – suggesting a broad reach, as well as from the commercial sense of having a broad reach, and authorities favouring broad interpretation of jurisdiction and arbitration clauses.

VI Conclusion – Finding the Limits

These decisions continue the supportive approach of Australian Courts to alternative dispute resolution, within the limits of orthodox principle. They demonstrate, however, the importance of attending to ordinary contractual principles, as well as to the specific jurisprudence concerning dispute resolution clauses, always within the specific context of the parties' contract(s) and such extrinsic material as it may be permissible to refer to.

29 Ibid [57].
30 Ibid [69].
31 Ibid [61]-[68].

ODR[1] and the Role of In-House Counsel in Management & Corporate Governance

with particular reference to dispute avoidance and dispute management in the Construction Industry.

Philip Loots[2]
Independent Arbitrator

Catherine Anne van der Horst[3]
Independent Arbitrator

PART I: The Impact of Exponential Change in Technology

"Rationalising disputes is a necessity. Disputes disrupt business, they divert the time and effort of the company's staff and management from its 'core competencies', which inevitably impacts the business, its development, its opportunities… These hours spent on a dispute are so many hours not spent on a profit generating activity. Most companies are not in the business of litigation, they are in the business of what they have been created for. Implementing systems and processes, shifting towards a more business oriented culture in legal departments facilitates the company's income generating activity. These processes are elements that compose a company-wide self-regulatory system." [4]

Professor Doug Jones AO has commented that *"The difficulty and the cost (both in time and money) of resolving construction disputes has been persistent and universal. New ideas on how to manage this have been legion, and the magic bullet has not been found."* [5]

There is a need for legal departments to be more responsive to the needs of business units aligned with the company's goals and focused as much on enabling business development as on managing risk.[6]

The rapidly changing business environment calls for a recognition of the interconnectivity between business and disputes, where *"the general counsel reports to the CEO, controls the selection of and the contacts with outside counsel and is an integral part of the management team of the company."* [7]

All in-house lawyers and in particular General Counsel should be equipped and empowered to make informed choices as to the most appropriate Information and Communication Technology ('**ICT**') platform for use by the parties to a dispute.

ICT and its use in alternative dispute resolution ('**ADR**'),

1 Online Dispute Resolution

2 Philip Loots FACICA, FCIARB, FSAArb, is a construction lawyer with extensive international experience on mega construction projects, is past General Counsel, international mediator, arbitrator, author, PMD Harvard Business School and Harvard-trained negotiator.

3 Catherine Anne van der Horst is experienced in international trade finance law; has an MBA from (Sciences-Po, Paris); PDGL BPP Law School London. Catherine is Past in-house counsel at Standard Chartered Bank (Structured Agricultural and Commodities Finance); Rand Asia Trade Finance Business Development; International Trade Consultant.

4 Jean-Claude Najar, 'Corporate Counsel in the Era of Dispute Management 2.0' [2014] 15 *Business Law International* 237.

5 Doug Jones, 'Adjudication: should it be encouraged?', paper presented at the International Construction Law Conference, London, 6 October 2008.

6 Najar (n 4) 244.

7 Ugo Draetta, 'The Role of In-House Counsel in International Arbitration' [2010] (4) *International Business Law Journal* 385.

known as Online Dispute Resolution ('**ODR**'), is an evolutionary development which promises to provide revolutionary changes to the way we avoid and resolve disputes in the near future. If ODR is to be resorted to, users will look to price, convenience, trust and a perception of low risk. Three of the central features of ICT are that it gives us more communication channels, it helps us deal with information in ways that were heretofore not possible, and it helps us redefine groups and group dynamics.[8] There is now a working group in the United States involving the American Bar Association, the Association for Conflict Resolution and the American Arbitration Association, looking at updating their Model Rules for Mediators to take into consideration changes based on the use of ICT. The metaphor employed to explain the use of ODR is the "Fourth Party"[9] in which the Fourth Party primarily assists the third-party neutral, (e.g. mediator, arbitrator or adjudicator) generally providing conveniences and efficiencies. Software manages the flow of information and therefore with the appropriate software, interactions between disputants might be managed online in a manner that would lead to an agreement.

Issues to be addressed by in-house counsel include increasingly deep cultural change, including institutionalised ADR programmes, changing how lawyers view their role, how the company views its case, and how managers work with lawyers to handle disputes, and above all, in-house lawyers conduct their business, taking ownership of and embracing ICT and ODR. Dispute avoidance warrants increased attention and ADR coupled with ICT and ODR may be used to conduct more dispute avoidance and dispute resolution in-house. When combined, they present a radically different way of conducting both domestic and international legal practice.

As to how lawyers view their changing role, and are permitted to conduct their role within the bounds to their professional rules, it is interesting to note the comment made some time ago that *"Lawyers are taught to know the law, not to become business people"*. Perhaps times have changed, and so has the demand for pure specialist lawyers in corporations.[10] Najar points out that in France, for example, the law school of Sciences Po and the private venture of HEAD, Haute Etudes Appliquees au Droit, present novel approaches to teaching law. Knowing the business and having a business background streamlines communication with management, helps the in-house counsel have a better understanding of the requirements in drafting a contract, of the transaction's risks and of how to mitigate them. More 'classical' law schools are also adapting their curricula to changing needs and to globalisation.[11] The need to be aware of the benefits and risks of using the ever-increasing number of online platforms and to be proficient at using the medium agreed upon by the parties has become an essential part of the lawyer's toolbox.

Speed, cost and certainty are paramount. Of these three, perhaps speed is the essence of modern dispute resolution procedures. *"The longer the process takes, the greater the stress on the parties. In too many cases, that stress becomes too great to bear and a party with a good claim will abandon it, or a party with a good defence will admit liability rather than protract the agony. In those cases, there is doubt that justice has been denied."*[12]

"The construction industry (is) another driving force of change: used to complex chains of contracts and the inevitable breaches thereof, it explored new approaches to managing disputes, diversifying dispute resolution methods, favouring dispute boards and tailored interventions 'as strategies for the early and informal resolution of the disputes'".[13]

ICT and ODR are ideally suited to the construction industry which often involves parties from different countries and work carried out in relatively hostile and inaccessible places. It might come as a surprise to some

8 Daniel Rainey, 'Conflict Engagement and ICT: Evolution and Revolution' (2016) 3(2) *International Journal on Online Dispute Resolution* 77.

9 Ethan Katsch and Janet Rivkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001).

10 Najar (n 4) 242.

11 Najar (n 4) 242.

12 Wayne Martin, 'Timeliness in the Justice System: Ideas and Innovations: Because Delay is a Kind of Denial' (Speech, Australian Centre for Justice Innovation, 17 May 2014).

13 Najar (n 4); Thomas J Stipanowitch and J Ryan Lamare, 'Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations' (Research Paper No 2013/16, Pepperdine University School of Law, 2013).

lawyers that, while Najar[14] says that a global approach depends on the place of the legal department in the company, the legal culture of the country[15], the laws, the role of corporate counsel, he adds in, are most importantly, the 'legal-friendliness of the management'. If management are not 'legal-wise' and do not trust and are not aligned with the legal function in the company, its litigation outcomes are likely to be less than optimal. The identification and abatement of risk, giving the business people the tools to help them perform their duties while abating the risks identified, and enabling the company to remain in control of its disputes in order for it to remain in control of its business, now form part of General Counsel's job description.[16]

The ability of in-house counsel to master and use ICT and ODR effectively is likely to enhance management's trust and respect, and therefore its confidence in and reliance on in-house counsel.

As is so often the case, *"one of the main cultural obstacles to early dispute resolution…is the unwillingness of business people to cooperate in early case evaluation, and manage the paperwork that goes with it. Even today, the idea of disclosing information to the opposing party is frowned upon by some lawyers, not to mention business operatives, in countries such as Italy and France. It is simply not in the 'dispute resolution culture' of these countries, used to the 'philosophy of litigation by surprise'".*[17]

What is clear is that there is a growing awareness that dispute management policy with an effective dispute management process has cost saving effects and corporate counsel are striving to "control costs better".[18]

Often methods of contractual dispute resolution require that the proceedings and the outcome are confidential to the contracting parties. This is often one of the most important criteria in opting for ADR in preference to litigation in the courts. For public policy reasons that justice must not only be done but must be seen to be done, hearings in the courts are open to the public, unless there are compelling reasons to the contrary - which would rarely apply to construction disputes. Large, high-worth companies will often, for understandable reasons, seek to avoid being exposed to the negative effects of unwanted media reporting, and for that reason may choose ADR procedures in which confidentiality can be enforced and maintained.

If ODR is to be used, the ability of certain platforms to protect confidentiality by end-to-end encryption is a major consideration in the choice of which platform to use.

Each method of contractual dispute resolution has advantages and disadvantages.[19] What they all have in common is that they rely on contractual provisions to compel the parties to engage in the dispute resolution process, and to the extent provided for in the Contract, to implement the resolution of a dispute as determined by application of the process. It is, however, always open to the parties to agree on a better dispute resolution method, subject to corporate governance considerations and legislation.[20]

Some modern systems have taken into account the latest technological developments. In Italy, GE Oil & Gas implemented an online system for cyber-settlement in order to deal with small manufacturing disputes of less than €50,000.[21] If no settlement is reached, the parties may then proceed with cyber-arbitration (no hearing, the arbitrator deals with the parties only via internet tools). The resolution is particularly quick – less than 3 months. Approximately 65% of the cases are settled (in line with

14 Najar (n 4) 241.

15 Najar comments that in jurisdictions of civil law culture, lawyers traditionally tend to follow the letter of the law. Finding creative business-driven solutions is not what is taught in law schools at undergraduate level: at ibid 241.

16 Ibid 240.

17 Ibid 243.

18 Queen Mary, University of London and PricewaterhouseCoopers, *Corporate Choices in International Arbitration: Industry Perspectives* (Report, 2013) 4 and 9.

19 Conciliation, Early Neutral Evaluation, Expert Determination, Mini-Trial, Statutory Adjudication, Dispute Boards, Domestic and International Arbitration.

20 Such as Statutory Adjudication.

21 GE was one of the pioneers of the corporate response to the necessity of taking into account legal disputes in the global business strategy and using the Six Sigma methodology as a matrix for developing its dispute management system. Six Sigma is also used in its different forms by many other major companies including Xerox, Dupont, Sun Microsystems, Alsthom, Lockheed Martin, Chevron and Bechtel. <http://www.ge.com/en/company/companyinfo/quality/whatis.htm>.

the rate of settlement of disputes before litigation/ arbitration)[22]

The lack of congruence between the business culture and drivers of the employer and its contractors was highlighted in an article in 2014 which suggested that these differences might lead the parties naturally down the path of a distributive bargain, unless active intervention steers them on a different course.[23] It suggested the importance not to make assumptions but to look at the overall situation and make an assessment of strengths and weaknesses before negotiations are started. The threat of litigation and the potential of the attendant adverse publicity causing reputational damage to large multinational corporations was also mentioned. This underlines the importance of the prevention of disputes, and where disputes cannot be avoided, managing them so as to optimise the outcome.

Now, more than ever before, changes in the way people do things, (individual behavioural changes), changes in the very nature of who we are, how we think and feel (psychological, cognitive and physical changes); and changes in the ways we engage with others (interactional changes) continue to take place[24], and may accentuate this lack of congruence.

Whether it is our banking, shopping or search for a life partner, we have changed the way we do many things. Cognitively, we have changed the ways in which we seek, access, verify, process and analyse information; we have changed the way we navigate from one place to another, and we have changed the degree to which were able to concentrate on tasks.[25] The radically different communication patterns and preferences of the younger generation must also be addressed.[26] Your new telephone is half the size of your old device yet has twice the processing power. This increasing rate of processing drives innovation, technological advancement and the potential for disruption faster than ever before, and this exponential growth in processing power is likely to continue.[27] MIT created an algorithm for Uber and Lyft that would "eliminate the need for 75% of all NYC taxis".[28] It is becoming abundantly clear that in the legal field advances in technology will fundamentally disrupt the profession. Such as the rise of LegalZoom offers an online service offering cheap and unbundled legal services such as DoNotPay[29] which is a free app which allows users to contest parking tickets and file suits in small claims courts across the U.S.

Emotionally, we face new conditions of connection, belonging and loneliness.[30] We face new challenges to empathy.[31] We communicate with new people and new networks using new platforms and methods, learning new communication abbreviations and new languages.[32] These changes affect the parties involved in dispute resolution behaviourally, cognitively and emotionally. How we negotiate, how we engage in conflict and how

22 Najar (n 4)

23 Philip Loots and Donald Charrett, 'Being held to Ransom or "Wielding the Whip or the Rod": How Unscrupulous Dealing, Illegitimate Pressure And Tough Negotiating Tactics Can Be Overcome By The Legal Remedy Of Economic Duress' [2014] *International Construction Law Review* 135, 211.

24 Noam Ebner, 'Negotiation is Changing' [2017] (1) *Journal of Dispute Resolution* 99, 110–111.

25 *"Human capacity for paying deep attention seems to be on a downswing, and the price we pay is measured in the lost terms of efficiency, productivity and intelligence"*: at ibid 116.

26 David Allen Larson, 'Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR' (2006) 21(3) *Ohio State Journal on Dispute Resolution* 629.

27 In 1965, Gordon Moore who would later become one of the founders of Intel, wrote a paper noting that the number of electronic components which could be crammed into an integrated circuit was doubling every year. This exponential increase came to be known as *'Moore's Law'*. See 'After Moore's Law: Double, Double, Toil and Trouble', *The Economist* (London, 10 March 2016).

28 Leanna Garfield, 'Uber and Lyft Carpools Could One Day Replace Most New York City Taxis', *Business Insider* (New York City, 4 January 2017).

29 See Caroline E Brown, 'LegalZoom: Closing the Justice Gap or Unauthorized Practice of Law?' (2016) 17(5) *North Carolina Journal of Law and Technology* 219.

30 A professor at MIT whose research focuses on the impact of the Internet and Society and on people's relationship with technology has summed this upas 'We are increasingly connected to each other, but only more alone: in intimacy, new solitudes.': Sherry Turkle, *Alone Together: Why We Expect More from Technology and Less from Each Other* (Basic Books, 2011) 19.

31 Lauren ANewell has studied the causes and effects of declining empathy, particularly with regard to younger people: Lauren A Newell, 'Rebooting Empathy for the Digital Generation Lawyer', (2019)34(1) *Ohio State Journal on Dispute Resolution* 1, 58–9.

32 Ebner (n 2) at 100: "many of us are, by now, familiar with a substantial dictionary of Internet age abbreviations; similarly, emotions have emerged from a smiley and a frowning face into a highly nuanced set of emoji mini-images, capable of supporting entire messages, full conversations, and even literature."

we engage in resolving conflict has changed.[33]

In the mid-1990s, courts began to face jurisdictional questions such as where an event occurred if parties were in different places and were interacting online.[34] At the same time, land-based courts and systems were not really useful options for persons who felt aggrieved in the majority of situations where parties were in different places. The Network's rapid communication and information processing capabilities have opened up opportunities for creative approaches and responses to problem-solving for cases that did not go to court. There are a greater number of disputes stemming from online activities than anyone predicted. ODR has also been applied to traditional kinds of disputes occurring off-line, and the boundary line between the online and off-line worlds is much less clear than it used to be: "the digital world merges with the physical world".[35] The new challenge is finding tools that can deliver trust, convenience and expertise for many different kinds of conflicts.[36]

eBay introduced a feedback system which made users feel more confident about the resolution of problems between buyers and sellers. In 1999 eBay asked the University of Massachusetts Amherst Centre for Information Technology and Dispute Resolution to conduct a pilot project to mediate disputes between buyers and sellers.[37] This prompted eBay to include dispute resolution as an option for buyers and sellers in the event a transaction was unsuccessful. By 2010, the number of disputes handled by eBay reached the phenomenal figure of 60 million.[38] Since then how and when ODR is being used has expanded. The tools for such active intervention are now with us, setting aside or assisting in-person processes, and are being rapidly enhanced at an exponential rate.

90% of e-commerce disputes are 'resolved' by "Fourth Party" algorithms created to provide information and other parts to resolution without the 'interference' of a human third-party. Already online apps encourage parties to engage in direct negotiation by leading them through rational decision-making steps without third party. Rainey[39] anticipates that in the not-too-distant future Artificial Intelligence (AI) will enable true driverless mediation - not just leading the parties through a series of steps but actually operating as a virtual Third/Fourth Party.

China says that millions of legal cases are being decided by "internet courts" that do not require citizens to appear in court. The "smart court" includes non-human judges powered by AI and people seeking legal action can register their case on the Internet. They can then take part in a digital court hearing. China's first Internet court was established in Hangzhou in 2017. From March to October 2019, China's official Xinhua news agency reported that users completed more than 3.1 million legal activities through the Court system. The internet court system operates 24 hours a day 7 days a week and even though virtual judges are used, human judges observe the process and can make major rulings. Ni Defeng, VP of the Hangzhou Internet Court has said that the use of blockchain is particularly useful in helping to reduce paperwork and create clearer records of the legal process. Courts nationwide are using some form of online tools to help deal with cases. He thinks that the system's ability to provide quick results helps give citizens more quality justice.[40]

At present many construction disputes have too many variables to employ robo-dispute resolution, but watch this space…it may be not too far away. It remains for us to become more proficient in the application of the tools

33 Alyson Carreland Noam Ebner, 'Mind the Gap: Bringing Technology to the Mediation Table', 2019(2) *Journal of Dispute Resolution* 1.

34 See, eg, *Zippo Manufacturing Co v Zippo Dot Com, Inc.*, 902 F.Supp. 1119 (W.D.Pa. 1997) and *Bensusan Restaurant Corp v King*, 126 F.3d 25 (1997).

35 Neil Gershenfeld, *When Things Start to Think* (Coronet Books, 1999) 10.

36 Katsch and Rivkin (n 9) 73: "No ODR system will be successful unless it is convenient to use, provides a sense of trust and confidence in its use, and also delivers expertise. Described a little differently, such systems need to facilitate access and participation, have legitimacy, and provide value".

37 Ethan Katsch, Janet Rifkin and Alan Gaitenby, 'E-commerce, E-Disputes and E-Dispute Resolution: In the Shadow of eBay Law', (2000)15(3) Ohio State Journal on Dispute Resolution705, 708–9.

38 Ethan Katsch and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press, 1st ed, 2017) 35.

39 Daniel Rainey, 'Conflict Engagement and ICT: Evolution and Revolution' (2016)3(2) *International Journal on Online Dispute Resolution*77, 82.

40 Bryan Lynn, 'Robot Justice, The Rise of China's 'Internet Courts'', VOA News (Dec 11 2019) <learningenglish.voanews.com/amp/robot-justice-the-rise-of-china-s-internet-courts-/5201677.html>.

that are available in the resolution of construction related disputes.

Systems such as eBay's private Resolution Centre or public systems such as court ODR systems have focused on a number of areas such as the application of artificial intelligence to dispute resolution using information gathered from parties to automate steps in the process, provide guidance or even determine optimal outcomes for disputes. ADR processes have been replicated by convening and conducting them wholly online, focusing on using technology as a communication intermediary for party-party and party-mediator interaction.[41]

"An analysis of the history of technology shows that technology changes exponentially, contrary to the common-sense 'intuitive linear' view. So, we won't experience 100 years of progress in the 21st century - it will be more like 20,000 years of progress (at today's rate). The 'returns', such as chip speed and cost effectiveness, also increase exponentially … Human life has changed far more in the 20th century than in the 19th century. Human life expectancy went from 39 years in 1800 to 47 years in 1900, a 20% increase. It then increased to 77 years by 2000, a 64% increase. Although the railroad was unquestionably important, very few people were impacted by electricity, electric light, telephones, or cars by 1900. These innovations took decades to be adopted by even a quarter of the US population. Adoption of innovations today is faster by an order of magnitude." [42]

PART II: The Application of Technology

Part I sketched the impact of technology on modern dispute avoidance and dispute management. Here we highlight some of its practical applications.

The development and increasing use of the Web has led to the creation of powerful new tools and increased ease-of-use to web users. Recent advances in communications capabilities have been:

- Speed - Dial-up connectivity to wired broadband to wireless;
- Portability and mobility - Desktop to laptop to network to smartphone/tablet;
- Storage - Megabytes to gigabytes to terabytes;
- Communications - Costly telephony to free (almost) telephony;
- Digitised currency - Reliance on paper money to reliance on money in electronic form.[43]

In 1997, the Hewlett Foundation provided a grant to the University of Massachusetts to establish the Center for Information Technology and Dispute Resolution (later the National Centre for Technology and Dispute Resolution).[44] The goal of the Center was to support the development of the field of ODR. ODR has gained traction around the world through the Center's Cyberweek, an all online conference, and physical conferences held around the world in Geneva (2002 and 2003), Melbourne (2004), Cairo (2006), Liverpool and Victoria (Canada)(2008), Haifa (Israel) (2009), Buenos Aires (2010), Chennai (India) (2011), Prague (2012) and so on.

Daniel Rainey says that *"ODR, in the broader sense, is simply the intelligent application of information and communication technology to any conflict engagement process. I say 'intelligent' application, but in many cases it's probably the 'unwitting' application of ICT - we have integrated technology into what we do professionally because we have integrated the same technology into our everyday lives."* [45] On the most basic level, he says we have taken the normal functions that we have to fulfil as third parties as we walk through the steps of our standard mediation models, and used online technology to help us fulfil those functions. For example, it is common to use survey and scheduling platforms to help handle intake, get agreements to mediate in place and gather all of the information needed to convene meetings of the parties. Mediators regularly use web-video systems to discuss and share documents in real time with parties in dispersed locations. Third parties use online mind-maps to conduct online brainstorming, and use various

41 Ayelet Sela, 'Can Computers be fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration' (2018)33(1) Ohio State Journal on Dispute Resolution 91, 100.

42 Ray Kurzweil, 'The Singularity, The Reality Club, <www.edge.org/discourse/singularity.html>

43 Ethan Katsh, 'ODR: A Look at History' in Ethan Katsch et al (eds), *ODR Theory and Practice* (Eleven International Publishing, 2013), 30.

44 The National Centre for Technology & Dispute Resolution <www.odr.info>

45 Rainey (n 41) at 81.

document handling platforms to engage in single-text editing of draft agreements etc. None of this is revolutionary, doing the same old thing using ICT to make it more convenient for the parties and the third parties.

In other areas evolutionary technology is delivering numerous apps designed to make the law and lawyers more accessible, for example, 'Quick Legal - Ask A Lawyer' that lets one ask questions directly to a lawyer from a mobile phone, to the mobile 'Oh Crap App' that gives guidance and connects to lawyers when those blue and red lights of the police car are behind you in traffic.[46]

In the USA, Government agencies, such as the National Mediation Board[47] and the Office of Government Information Services (OGIS)[48] are adopting and promoting ODR as a means of resolving problems with citizens. Cybersettle has moved beyond its original focus on insurance disputes and is helping to resolve claims brought against New York City. The marketplace for ODR is now in off-line disputes as well as those originating online, and as well as public sector disputes and those originating in the private sector.[49] The United Nation's Commission on International Trade Law (UNCITRAL) is working on rules and policies for ODR in cross-border disputes.

Tasks have been performed more quickly already over distance, but in future ODR is likely to involve greater advances in information processing. It is said that when a negotiation problem is modeled, a computer can act as an intelligent agent using optimisation algorithms that seek the best solution. Optimisation algorithms utilise detailed and highly accurate information from all parties, information that they would never provide each other and in some cases not be of interest to a human mediator. With anything other than the very simplest of cases, this optimisation is beyond the capabilities of any unassisted human. One trajectory of ODR may be in the direction of the role that information can play not only on how disputes are resolved but how they can be prevented.

Technology is helping lawyers utilise information in areas of case management,[50] legal research, in which legal software harnesses the power of artificial intelligence and machine learning to generate query results and assess the research and drafted pleadings to ensure lawyers cite cases correctly and use the most significant relevant cases.[51]

An increasing number of choices of appropriate software for ODR is available, some of which are in general use, and some of which were specifically developed, such as Community Court of Modria.com, the Web based applications of Juripax.com and FairOutcomes.com. The parties may be looking for a system that can deal with the whole dispute resolution process for online disputes. For off-line disputes the most sought-after tools will be those that can enhance elements in the process rather than managing the whole process. If mediation consists of several processes linked together, for example, brainstorming, caucusing, prioritising options, drafting, etc, software can be targeted to a particular process.[52] The University of Massachusetts developed STORM, which facilitates brainstorming at a distance. The need for face-to-face meetings is reduced and it has the added benefit of allowing, if the mediator so desires, brainstorming to be conducted anonymously.[53]

E-Discovery can be applied where discovery has become extraordinarily difficult due to the terabytes of information in the form of emails, text messages, photos,

46 'Ask A Lawyer' (App) <https://play.google.com/store/apps/details?id=com.quicklegal.app&hl=en>; 'Oh Crap' (App) App <http://oh-crap-app.com/>.

47 National Mediation Board <www.nmb.gov>.

48 Office of Government Information Services, National Archives <www.nara.gov/ogis>.

49 Katsch (n 45)

50 See, eg, Law Fuel, 'Embracing Technology Changes in Your Law Practice' (Blog Post, July, 13 2018) <http://www.lawfuel.com/blog/embracing-technology-changes-in-your-law-practice/>.

51 See, eg, Steve Lohr, 'AI is Doing Legal Work, But It Won't Replace Lawyers, Yet', New York Times (29March 2017) <https://w.w.w.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html>; Karen Turner, 'Meet 'Ross', the Newly Hired Legal Robot', Washington Post(16 May 2016) <https://www.washingtonpost.com/news/innovations/ep/2016/05/16/meet-ross-the-newly-hired-legal-robot/>.

52 Ethan Katsh, 'ODR: A Look at History' in Ethan Katsch et al (eds), *ODR Theory and Practice* (Eleven International Publishing, 2013) p28.

53 Ethan Katsch and Leah Wing, 'Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future' (2006)38 University of Toledo Law Review 1.

videos etc. that can pertain to any case.[54] Software can detect duplicates in a matter of seconds, and pull out only those documents containing new information, saving lawyers hundreds of hours of work ("technology-assisted review also includes tools to identify near duplicate documents and latest in-thread emails").[55]

Data analytics analyses large amounts of information to glean insights and trends. Legal data analytics software can analyse thousands of court filings and their results to predict case outcomes, allowing improved legal decision-making.[56] "The modern business world is increasingly reliant on data for its planning and marketing, and we both frequently heard from well-placed individuals in the corporate world that they would use arbitration, mediation and other forms of ADR with more confidence if relevant and accurate process data was available"[57] The assessment of the benefits and risks of using one ADR process over another and one third party over another is now facilitated by evaluations based on a dataset of cases from hundreds of judges over the relevant time span which is far more accurate.[58]

It is said that fast, inexpensive, informal and extrajudicial processes that currently motivate courts to implement ODR systems which include online and automated case management, automated and assisted negotiation processes and the diversion to online mediation as currently contemplated by court administrators, marginalise or eliminate traditional roles and activities of lawyers, a development that is expected to have deep and destructive ramifications for the legal field.[59]

While it can be expected that future increases in power and reductions in cost will occur, increasingly powerful information technology provides capabilities for manipulating and, to a considerable extent removing constraints of time and space that are present in the physical environment. "The lack of attention to dispute resolution in many entrepreneurial efforts is a flaw that is compounded by the irrelevance of courts for many if not most disputants."[60] It has been said that our society is honeycombed with disputes. Disputes actual and potential, disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of law … This doing something about disputes, this doing of it reasonably, is the business of law".[61] It has also been commented that today, the business of law seems less and less to include "doing something about disputes" and it is even more difficult to find examples of it being done "reasonably". As a result, we are in an age where "alternative" dispute resolution has become the primary model for responding to conflict.

Daniel Rainey provides valuable comparisons across a number of online applications that may be useful for online dispute resolution - mediation, facilitation, arbitration, negotiation, etc., as part of the ODR Practitioner Certification Program including Web Video Applications, Text Applications, e-Mail Services, E-Signature Services and Online Voting Platforms.

Dispute resolution practitioners and parties who find themselves working in different contexts, cultural locations, legal jurisdictions and organisational frameworks might require different technological toolboxes. Practitioners will have to develop perspectives best suited to their own workflow, subjective experience of the dispute resolution cycle, dispute resolution practices, evolution with technology, contextual needs or way of addressing problems.[62]

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54 See Gabe Friedman, 'Poll: Data Volume Caps Still Largest Obstacle in eDiscovery', *Bloomberg Law* (19 Aug 2015) <https://biglawbusiness.com/poll-data-volume-still-largest-obstacle-in-discovery/>.

55 See Edward Sohn, Association of Corporate Counsel, 'Top Ten Concepts to Understand About Predictive Coding', (22 May 2013) <https://www.acc.com/legalresources/publications/topten/ttctuape.cfm>.

56 Laura Olsen, 'Data-Driven Decisions: Using Legal Analysis to Up Your Game', State Bar of Wisconsin(4 Apr 2018), <https://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?Volume=10&Issue=6&ArticleID 26261>.

57 Mark Baker and Ayaz Ibrahimov, 'Data Insights: Q&A with Bill Slate, Chairman CEO and Co-founder of Dispute Resolution Data', (2017)9(2) International Arbitration. Report.

58 Rory Cellan-Jones, 'The Robot Lawyers Are Here - And They're Winning', *BBC News* (1 Nov 12017), <https://www.bbc.com/news/technology-or one and 2954>.

59 Noam Ebner & Elayne Greenberg, 'What Dinosaurs Can Teach Lawyers About How to Avoid Extinction in the ODR Evolution', (Research Paper No 19-0004, St John's University School of Law, 17 January 2019).

60 Ibid 31.

61 Karl Llewellyn, identified by the *Journal of Legal Studies* as one of the most cited American legal scholars of the 20th century.

62 Carrel and Ebner (n 35) at 27; see also Noam Ebner, 'The Technology of Negotiation', in C Hoenyman and AK Schneider (eds), *The*

In conclusion, the need for active intervention to avoid and resolve conflict by providing ODR, the "Fourth Party"[63] in which the Fourth Party primarily assists the third-party neutral, (eg mediator, arbitrator or adjudicator) has been clearly demonstrated. It is astonishing how we have integrated technology into our everyday lives."[64] This can give us increased confidence in our ability to avoid and resolve disputes. But the individual behavioural, psychological, cognitive, physical, and interactional changes referred to above may not have received adequate attention and require us to also carefully consider a "Fifth Party" in the transaction and its dispute resolution process. This is the ICT-empowered 'outside' influencers, stakeholders and the forces of public opinion. The power of ICT to facilitate external influence via social media, the internet, should not be underestimated. There appears to be an increasing tendency for so-called "confidential information" and "fake news" to be leaked by disgruntled losers, woke interventionists, influencers, hackers and activists with minority or hidden agendas claiming to represent "public opinion". What may be legitimate for the company from a technical and ethical point of view may be portrayed to be socially unacceptable. Reality and perceptions become intentionally blurred. Legitimate and truly beneficial solutions arrived at by parties may be adversely affected.

But genuine stakeholders and the 'silent majority' now have a stronger voice provided they are skilled in ICT. Fact-checking[65] and polling[66] are easier than in the past.

To ignore the good and the bad in "The Fifth Party", in the daily conduct of business, and in particular in dispute avoidance and dispute resolution, may result in failed outcomes and catastrophic reputational damage. The result is that ICT has brought us evolutionary and revolutionary advantages, but also significant dangers, which we must be aware of.

Implementing systems and processes, shifting towards a more business oriented culture in legal departments facilitates the company's income generating activity.

It has been said that *"Conflict is a growth industry."* [67] It remains to be seen whether technology will drive us to become less litigious in our business dealings.

Negotiator's Desk Reference: Volume 2 (DRI Press, 2017) 174, which identifies 3 phases of a cycle: "negotiators… go through as cyclic process which includes learning about negotiation in general, preparing for a specific negotiation, and conducting that negotiation … reflection on this negotiation experience adds to the negotiators general stockpile of knowledge, and the negotiators cycle continues".

63 Katsch and Rivkin. (n 9)

64 Ibid 81.

65 www.snopes.com

66 https://pollev.com/home

67 Roger Fisher and William Ury, *Getting to Yes* (1st ed, Penguin Books, 1981) xvii.

The Alfred Deakin International Commercial Arbitration Moot Rained in Africa

Chloe Dijkmans
Africa in the Moot
Deakin University, Burwood, Australia

Tabitha Joy Raore
Africa in the Moot
Anjarwalla & Khanna, Nairobi, Kenya

Michael Wietzorek
Africa in the Moot
Taylor Wessing, Munich, Germany

In the June 2021 edition of this journal, we spoke of Africa in the Moot's '…concrete plans to support at least two African teams … with their application to participate in the Deakin Moot.'[1] What an understatement this turned out to be. The Deakin Moot was a great success in many aspects of the word: Not the envisaged two, but a total of eight teams from six African universities in four countries participated.[2] An outstanding achievement for everyone involved.[3] Now supporting fourteen universities from ten countries with their participation in the Willem C. Vis Moot, Africa in the Moot seeks to showcase the talent on the African continent. Therefore, this article provides a platform for six students from Kenya, Lesotho, Mozambique, and Tanzania to share their experience in the fifth Alfred Deakin International Commercial Arbitration Moot.

Mark Malekela – Mzumbe University, Tanzania

"When the rain starts to fall it doesn't seem so serious. It doesn't feel like it will turn into a mass of water, gushing in alleys, sweeping debris, twigs and later trees, felling walls, breaching and defying everything man had tried to build in the face of nature. It seems like any other time it rained in Africa; a blessing.

Africa had a blessing. The Deakin Moot rained in Africa. Because our rain feeds our lives. It turns the leaves green again with life, washes dust off our roofs and roads. The Deakin Moot experience rained blessings to law students in Africa, and in particular, to us, Mzumbe University law students from the United Republic of Tanzania.

1 Chloe Dijkmans & Michael Wietzorek, *Africa in the Moot – An Initiative Making International Arbitration More International*, The ACICA Review, June 2021, p. 41, 43.

2 Deakin University, '2021 Alfred Deakin International Commercial Arbitration Moot – another outstanding online success', 13 September 2021, available at https://lawnewsroom.deakin.edu.au/articles/2021-alfred-deakin-international-commercial-arbitration-moot-another-outstanding-online-success (accessed on 18 November 2021).

3 Deakin University, 'Making mooting more international: DLS builds ties with 'Africa in the Moot'', 28 September 2021, available at https://lawnewsroom.deakin.edu.au/articles/making-mooting-more-international-dls-builds-ties-with-africa-in-the-moot (accessed on 18 November 2021).

As I reflect on my time as a Deakin Moot participant and the wholesome academic experience that I gained, I am forever grateful for all the pieces that came together. I emerged from my international moot court experience refined. I came out more skilled in verbal communication. I emerged having greatly improved on legal research and writing skills and I may now be far from where I started. The Deakin Moot experience enlightened me on the dynamics of working as part of a team and the beauty of considering and appreciating what each team member brings to the table in order to reach a successful result. More importantly, effective time management, the ability to efficiently multi-task and prioritise were vital lessons learned.

Above all, I emerged fully understanding the importance of preparation, which is what I consider one of the bedrocks of a successful lawyer. In order to adequately and competently represent one's clients or carry out responsibilities, one must be well prepared irrespective of how arduous or easy the process is. Preparation speaks volumes."

Phoebe Mwangi – Strathmore University, Kenya

"This was my first experience at any international moot and incredibly eye-opening and insightful. Right from the onset of memorandum writing, my teammate Irene Muhoro and I worked together tirelessly on the moot problem and we enjoyed every bit of the challenge. Each day we spent researching, brainstorming and discussing our arguments, presented with an opportunity to learn something new.

Towards the mooting event, we were fortunate to hold practice sessions with other participating students from Africa in the Moot. We had lots of fun interacting with each other and sharing perspectives on the moot and so much more. The three-day moot event was incredibly well-organised and that made it extremely worthwhile. I especially liked how the structure catered for everyone's unique needs and circumstances despite the challenges of hosting a virtual event. The arbitrators were all very pleasant and understanding throughout. Despite being thousands of kilometres away from Australia, Irene and I really felt included and seen. It felt like we were right there with everyone, learning and having fun. Most importantly, I made friends from across the world and expanded my career network. I am really excited about what the future holds, all thanks to the benefits of the Deakin Moot experience."

António Óscar Alfredo – Eduardo Mondlane University, Mozambique

"The Deakin Moot was more than a competition to us. To our team, it was about learning, acquiring new skills, challenging ourselves, making new friends, and having fun. During the two months of drafting our memoranda and practising our oral submissions, we learned a lot about international commercial arbitration and contracts for the international sale of goods, legal research, legal writing, and oral advocacy. We acquired and polished a lot of new skills, such as analytical, oratory and legal researching and writing skills. The competition was held virtually, but somehow we were together and made new friends. The Deakin Moot was an invaluable platform."

Victor Mugambi – University of Nairobi, Kenya

"My personal experience in the Deakin Moot was phenomenal. Drafting the memoranda in response to the moot problem enabled me to think critically while analysing the facts of the case. My participation in the competition would not have been possible without the combined efforts of my teammate Maryanne Thuita and our coaches. The Deakin Moot was well organised. I am glad that I was able to interact with students and arbitration practitioners from all over the world. Further, having participated in the moot, I renewed my interest in arbitration and my willingness to learn more and participate in more mooting competitions.

I am also glad that our team participated in the competition as a member of Africa in the Moot. Africa in the Moot is an organisation formed with the objective of helping African teams participate in international commercial arbitration

mooting competitions. The organisation is made up of various individuals such as alumni of the Willem C. Vis Moot, including lawyers that practice in and outside of Africa. The coaches were very hands on and committed. They ensured that the teams adhered to the set deadlines, provided guidance on how to approach the moot question and organised mock moot trials and virtual social events where the teams interacted and networked with each other. The organisation was instrumental to the performance of the African teams in the Deakin Moot."

Eric Molapo – National University of Lesotho

"In September 2021, two teams from the National University of Lesotho participated in the Deakin Moot. Our teams were not deterred by the fact that they came from a university with minimal resources. Our teams made history being the first teams from the university who had participated in the prestigious Deakin Moot.

Luckily, our teams were supported by Dr Letzadzo Kometsi, a lecturer at the university and one of the few arbitration practitioners in our mountain kingdom. Our teams were also supported by Africa in the Moot as a result of a partnership formed through a coincidental meeting on LinkedIn. The partnership between the Lesotho teams and the initiative has created fantastic memories for us students from Lesotho so far. The law firm Tharollo Consultancy provided office space and catering to our teams for the oral rounds. It was humbling and encouraging to get this support from a local firm considering that the university was closed during the competition. The facilities, which also included free internet access, played a big part in our success in the competition.

There were moments when we felt like giving up, particularly at the beginning, when it seemed as if we were learning what seemed like Greek. The support we received from our partnership with Africa in the Moot and our coaches inspired us to keep going. In hindsight, I am glad that we did not give up because we would not have made the progress we have or what we believe in our view, is unprecedented history because of the tremendous knowledge we attained. In addition to these accomplishments, all members feel that participating in the Deakin Moot, particularly as a member of Africa in the Moot, has helped the team broaden its horizons and meet amazing people from all over the world."

Irene Muhoro – Strathmore University, Kenya

"Preparing to participate in the Deakin Moot was a lively experience. The Strathmore team worked very closely with coaches and students from Africa in the Moot, so aside from serious and focused practice pleadings, we had virtual social gatherings where we got to know one another over snacks, icebreaker games, and entertaining anecdotes. It takes a village to prepare a team to moot and I was incredibly lucky to have former successful Vis Mooties helping me think through my arguments.

This year's moot problem was an exciting challenge to take on and my favourite part of the entire process was talking to my teammate Phoebe Mwangi before a round where we both told each other exaggerated versions of the facts to truly make ourselves believe in the strength of our case. We began and ended each round with motivating conversations with our head coach Stephen Fleischer who did his best to make us laugh and keep us energised throughout the busy sessions. The moot itself was a perfectly organised and coordinated event. When we were not actively engaged in a round, we had the chance to have a friendly chat with the organisers and some of the arbitrators, which gave it a warm and personal feel that is difficult to achieve in virtual events. All in all, it was an enjoyable encounter and I look forward to seeing more Strathmore teams join the Deakin Moot community."

Reflections

Travelling to another continent is difficult as it is for many law students in Australia, Africa, and anywhere around the world. Then Covid-19 came along, with its malicious plan to make it even harder to gain international experience and make new friends from outside home. Together, Deakin Law School and Africa in the Moot smiled in the face of these challenges and created a memory with predicted lasting effects. The result of these connections enjoys both academic and personal benefits.

Saying that something is 'life-changing' can quickly become an exaggeration. Yet, this time, it is justified. Thanks to the Deakin Moot, several law students from African countries now want to become experts in international arbitration and commercial law. Several Australian and other law students now know how their newly found friends in Africa approach a case. Arbitrators from Africa, Australia, and elsewhere formed valuable ties. To paraphrase the headline of our last article: International arbitration is becoming more international.

The Limits of 'Pro-Arbitration' Bias in the Enforcement of Foreign Awards: *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110

Albert Monichino QC[1] **Gianluca Rossi**[2]

I Introduction

In *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110, the Full Court of the Federal Court of Australia ('**FCAFC**') refused to enforce an international arbitral award, holding that a failure to compose the arbitral tribunal in accordance with the agreement of the parties was fundamental to the jurisdiction of the tribunal and, accordingly, there was no scope for the Court to exercise its residual discretion to enforce the award.

II Facts

Energy City Qatar ('**ECQ**') was a company incorporated in Qatar. It entered into a contract with Hub Street Equipment Pty Ltd ('**Hub**'), a company incorporated in Australia, under which Hub was to supply and install street lighting equipment and accessories, and street furniture and accessories in Doha, Qatar ('**Contract**').

Article 46 of the Contract contained an arbitration agreement which contemplated that any dispute not resolved amicably within 28 days would be referred to arbitration, to be conducted in accordance with the rules of arbitration in Qatar, before a three-member arbitral tribunal, with each party appointing an arbitrator and the party-appointed arbitrators appointing the chair of the tribunal. Art 47 contained a governing law clause providing that the Contract was governed by Qatari law. Art 44 provided that any notice under the contract should be given by prepaid post or fax, with the delivery address for Hub being a street address in Sydney.

ECQ made an advance payment to Hub under the Contract, and later decided not to proceed with the Contract. It then sought repayment of the advance payment. In response, Hub informed ECQ that it would identify its position after obtaining legal advice. However, it never communicated again with ECQ, and simply retained the money ECQ had paid to it.

ECQ commenced an arbitration in Qatar, without sending a notice to Hub under Art 46 of the Contract, which would have given Hub 45 days to appoint one member of the arbitration tribunal. Instead, ECQ applied to the Plenary Court of First Instance of the State of Qatar ('**Qatari Court**') seeking orders that the Qatari Court appoint an arbitral tribunal of three arbitrators, including an arbitrator nominated by ECQ, under Art 195 of the Qatar Civil Procedure Code. The relevant parts of Art 195 stated: '***[i]f a dispute arises*** *between the parties prior to an agreement between them* ***as to the arbitrators****… the court which has jurisdiction to consider the dispute shall appoint*

1 LLM (Cambridge), FCIArb, FACICA. Barrister, Chartered Arbitrator and Mediator. Past President of the Australian Branch of the Chartered Institute of Arbitrators.

2 Lawyer at Patrick & Associates, LLB (Honours) (ACU), ACIArb.

the necessary number of arbitrators at the request of one of the parties…' (emphasis added).

ECQ gave notice of the Qatari Court proceedings to Hub, albeit not sent to Hub's Sydney address, being the address stipulated in the Contract for Hub to receive notices. Nevertheless, the notice reached Hub. Hub therefore had knowledge of the Qatari Court proceeding but chose not to participate in that proceeding.

The Qatari Court made orders appointing an arbitral tribunal under Art 195 of the Qatar Civil Procedure Code (which did not include the arbitrator nominated by ECQ). Thereafter, the arbitral tribunal sent six notices in English to Hub's Sydney address informing Hub of the arbitration proceedings. The tribunal adjourned the arbitration proceedings on three occasions due to Hub's failure to attend. Ultimately Hub did not participate in the arbitration proceeding at all.

In Hub's absence, the arbitral tribunal conducted the arbitration, and made an arbitral award, in Arabic. The award contained a determination that Hub:

(a) repay ECQ the advance payment;

(b) pay damages to ECQ; and

(c) pay the full costs of the arbitration.

ECQ applied to enforce the award in Australia under the *International Arbitration Act 1974* (Cth) ('IAA'). Hub resisted enforcement. At first instance,[3] Jagot J held that:

1. Hub had made a deliberate decision not to participate in the arbitration proceeding and therefore suffered no prejudice on account of the proceeding being conducted in, and the arbitral award being issued in, Arabic; [4]
2. Hub did not prove that the appointment of the arbitrators by the Qatari Court was not in accordance with Art 46 of the Contract which provided that the referral to arbitration was to be in accordance with the rules of arbitration in Qatar;[5] and
3. even if a ground for resisting enforcement under ss 8(5) or (7) of the IAA had been made out by reason of the fact that the arbitration had not been conducted in English and/or that the arbitral tribunal was not constituted in accordance with the agreement of the parties, as a matter of discretion, the award should nevertheless be enforced,[6] particularly having regard to the considerations in section 39 of the IAA.[7] This was because Hub deliberately chose to '[sit] on the sidelines of the arbitration'.[8] In her Honour's view, no unfairness arose given Hub had an adequate opportunity to engage in the arbitral proceeding which was constituted and carried out in accordance with the laws of Qatar, which governed the contract.[9]

In the end result, her Honour enforced the foreign award as if it were a judgment of the Federal Court.[10]

III On Appeal

Hub appealed the first instance decision to the FCAFC. There were effectively two dispositive issues in the appeal:

1. first, was the appointment of the arbitral tribunal in accordance with the Contract ;[11] and
2. secondly, in the event that the Tribunal was appointed contrary to the Contract (assuming an affirmative answer to the first question) or given that the arbitration was conducted in Arabic (and not in English) contrary to the Agreement, should the Court exercise its discretion under s 8(5) of the IAA to enforce the award? [12]

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3 *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116.

4 Ibid [30].

5 Ibid [59].

6 Ibid [29]. The discretion is apparent from the word "may" in section 8(5), which mirrors Article V of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3, entered into force 7 June 1959 ('New York Convention')

7 Ibid [61]. Section 39(2), in part, specifies various considerations that the Court should take into account in the exercise of the power to enforce a foreign award. This includes the fact that arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and, further, that arbitration awards are intended to provide certainty and finality.

8 Ibid [52].

9 Ibid [27] and [61].

10 Ibid [62].

11 *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110, [42].

12 Ibid [43].

The appeal was successful and Justice Jagot's decision was overturned. The leading judgment was delivered by Stewart J (with whom Allsop CJ and Middleton J agreed).

A Composition of the arbitral tribunal

Justice Stewart referenced the Qatari Court's judgment, which suggested that the Qatari Court appointed the three members of the arbitral tribunal labouring under the misapprehension that after commencing the Qatari Court proceeding, ECQ had invited Hub to appoint an arbitrator, and that Hub had failed to do so, such that the parties had failed to agree upon the arbitral tribunal as provided in Art 46 of the Contract.[13] His Honour considered that the evidence of a Qatari law expert adduced at first instance did not support the proposition that Art 195 of the Qatari Civil Procedure Code empowered the Qatari Court to override the agreement of the parties as to the appointment of the arbitral tribunal, but rather, that Art 195 gave to the Qatari Court the power to appoint arbitrators only where the procedure in Art 46 of the Contract had failed.[14] In the present case, the contractual procedure had not failed. Rather, ECQ had not followed the contractual procedure and instead had prematurely approached the Qatari Court, resulting in the appointment of a tribunal, the composition of which, was contrary to the parties' agreement.[15] Accordingly, the operation of s 8(5)(e) of the IAA was enlivened.[16]

B The nature and exercise of the residual discretion

The structure of Article V of the New York Convention (which is given effect to in s 8 of the IAA) is such that even if one of the limited grounds for resisting enforcement is made out, the enforcement court has a discretion to nevertheless enforce the foreign award. This discretion emanates from the word 'may' in Article V(1) and (2) of the New York Convention. Justice Stewart noted that there was no authoritative statement in Australia of the nature of the discretion to enforce an award conveyed in ss 8(5) and (7) of the IAA.[17]

As to the irregularity constituted by the conduct of the arbitration in Arabic (as opposed to English), Justice Stewart held that Hub had not established that the trial judge's discretion had miscarried as the procedural defect had not caused material prejudice to Hub, because Hub elected not to participate in the arbitral proceedings.[18] Therefore, the FCAFC would not have interfered with the decision to enforce the award if this was the only procedural defect.

On the other hand, as to the irregularity concerning the composition of the Tribunal, Justice Stewart held that there was '*little if any scope*' for the Court to exercise the residual discretion under s 8(5) of the IAA to enforce the award.[19] This was because the defect was '*fundamental to the structural integrity of the arbitration [and] it [struck] at the very heart of the [T]ribunal's jurisdiction*'.[20] Therefore, the FCAFC refused to exercise its discretion to enforce the award.

V Comment

A Primacy of the parties' arbitration agreement

Where an arbitration agreement provides that each party is to appoint an arbitrator, that right is a fundamental element of due process and is not to be discarded. Therefore, if the tribunal is constituted in a manner contrary to that agreed procedure,[21] the structural integrity of the tribunal is affected. This will justify refusal of enforcement of an arbitral award on the basis that the composition of the arbitral tribunal was not *in accordance with the agreement of the parties*, under the New York Convention, or alternatively under the UNCITRAL Model Law on International Commercial Arbitration.[22]

The basic paradigm in international arbitration is for each

13 Ibid [52] – [59].
14 Ibid [59] – [60].
15 Ibid.
16 Ibid, [60].
17 Ibid [92].
18 Ibid [103].
19 Ibid [82].
20 Ibid [104]. Another example of a fundamental defect is an award made without jurisdiction.
21 Whether laid out in the original arbitration agreement or a subsequent agreement that amends the original arbitration agreement as to the manner of constituting the arbitral tribunal.
22 Art 34(2)(a)(iv).

party to appoint its arbitrator and the two arbitrators to then appoint a chairperson. The right of parties to nominate arbitrators of their own choice to determine their dispute is generally considered to be a fundamental right which promotes the concept of party autonomy. Why is the right of party appointment so important? In an international context — where the parties are likely to be of different nationalities — it ensures that a party may appoint an arbitrator of the same nationality who thus understands the legal and/or cultural norms of that party (and thus has some affinity with it), which in turn promotes confidence that the case presented by the party is properly understood by the other members of the three member tribunal who may come from widely different cultural and/or legal backgrounds.

B Standard of Proof and Residual discretion

The FCAFC clarified that although the grounds for resisting enforcement under the IAA are finite and narrow, that does not translate to the award debtor facing a standard of proof higher than the ordinary civil standard when seeking to resist enforcement of an award. The case therefore confirms that the standard to be applied in resisting enforcement of an arbitral award, is the civil standard, being the balance of probabilities.

The FCAFC's decision is also instructive in addressing the application of the residual discretion to enforce an award, notwithstanding that one of the limited grounds for resisting enforcement has been established. The Court drew a distinction between technical procedural defects which cause no material prejudice (on the one hand) and fundamental defects which affect the structural integrity of the arbitration (on the other hand). The judgment confirms that the residual discretion has little or no application to the latter.[23] This distinction should provide useful guidance for future cases.

C Comity

The FCAFC decision is a somewhat controversial decision in that it may be perceived to second guess the decision of the supervising court in the exercise of that court's power to support the arbitration in question. Based on the exceptional facts, we submit that the FCAFC has not infringed the concept of comity in refusing to enforce the award.

Justice Stewart noted that:

(a) although the Qatari Court was involved at the stage of appointment of the arbitral tribunal, it did not provide any endorsement of the award that was subsequently produced;[24]

(b) the notion of comity is neither an obligation nor a mere courtesy or goodwill, and that therefore, 'it is nuanced and depends on the nature of what is sought to be recognised';[25] and

(c) its refusal to enforce the award did not involve any detraction from the principle of comity as the Qatari Court had acted on a misapprehension of the true position in respect of compliance with the contractual procedure for appointing an arbitral tribunal. In those circumstances:[26]

  (i) there was no disrespect or lack of goodwill to the Qatari Court;

  (ii) the appointment of the arbitral tribunal was not in accordance with the parties' agreement;

  (iii) Hub was entitled to have the contractual procedure for the appointment of the arbitral tribunal followed; and

  (iv) the defect in the appointment of the tribunal was attributable to the premature involvement of the Qatari Court at the instigation of ECQ.

While it is exceptional for an enforcement court to disregard a decision of the court of the seat, the implication of the FCAFC's decision is that Australian courts exercising an enforcement role will not uncritically follow decisions of the court of the seat where the Australian court is persuaded that the court of the seat has made a fundamental error supervising the arbitration which materially affects the rights of the parties as set out in the arbitration agreement. In these circumstances, the Australian court will not blindly enforce a foreign award. That is not to derogate from Australia's reputation as an arbitration-friendly jurisdiction.

23 Absent perhaps, an estoppel arising in an exceptional case.
24 Ibid [80].
25 Ibid [81].
26 Ibid [82]-[85].

ACICA ESSAY COMPETITION 2021 WINNING ESSAY

Iura Novit Curia and Due Process

Dan Xie[1]

I Introduction

The principle of *iura novit curia* (judges know the laws) is often followed by certain civil law courts. According to this principle, the judge can apply the law *ex officio* without being bound by the legal arguments raised by the parties. This principle, to some extent, still influences arbitral practices, especially when arbitrators, counsel and parties are from different jurisdictions. When applied to international arbitration, the question becomes whether the tribunal can investigate the content of the applicable law *ex officio* and whether the tribunal is bound by the parties' legal arguments in their submissions. In practice, there is a risk of violating parties' right to be heard when arbitrators take initiatives to investigate the content of the applicable law without giving parties an opportunity to present their case.

This article proceeds as follows. Section II examines the national law rules on proof of foreign law. Section III discusses whether arbitral tribunals have the power to conduct independent investigations of law. Section IV explores whether arbitral tribunals have the duty to investigate the content of law *ex officio*. Section V discusses due process in proof of law. Section VI explores the impacts of expert arbitrators upon the applicability of *iura novit curia*. Section VII concludes the article.

II Analogy with National Courts — National Law Rules on Proof of Foreign Law

The tribunal's power to investigate the law in the arbitral proceedings brings up the question of the applicability of *iura novit curia* to arbitration. This principle is based on the premise that the court knows the law and will therefore apply it *sua sponte* beyond parties' submissions of legal arguments and legal reasoning.[2] It is logical that the court only knows its own laws. However, unless the arbitrator is an expert in certain national laws, it is hard to say that the arbitrators know the content of the applicable laws in international commercial arbitration, especially when the disputes are transnational, and parties usually come from different jurisdictions.

In contrast, ascertaining the content of the applicable law by arbitral tribunals may resemble the practice of national courts when faced with the issue of determining the content of any applicable foreign law. Additionally, the legal traditions of arbitrators and counsel may impact their approaches to ascertaining the content of the applicable law in arbitration. Most importantly, the issue of the applicability of the *iura novit curia* principle in international arbitration cannot be entirely delocalised. The arbitral awards may be reviewed by the courts of the arbitral seat or the enforcing forums in annulment or enforcement proceedings. These local courts may be influenced by the application of *iura novit curia* in court litigation when reviewing the challenges of awards. Thus, whilst the concern here is who takes the burden to prove the content of the applicable law in international arbitration — the arbitrators or the parties, the starting

1 *Dan Xie, UNSW LAW, email: dan.xie@unsw.edu.au.

2 Filip JM De Ly, Mark Friedman and Luca Radicati di Brozolo, 'International Law Association International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration"*Report for the Biennial Conference in Rio de Janeiro, August 2008' (2010) 26(2) *Arbitration International* 193, 193-220.

off points are the national laws on proof of foreign law and how national courts apply them.

National courts frequently encounter the content of law problems when a dispute involves or requires the application of foreign law. It is the *procedural law of the forum* to decide whether the judge should apply foreign law *ex officio*, and by which means he may ascertain the content of foreign law.[3] As explained below, there are significant differences in national procedural rules regarding proof of foreign law between civil law and common law jurisdictions.[4] Even within civil law systems or common law systems, their application differs. Such differences in national courts can influence arbitrators and the parties, especially when they are from different legal systems.

As discussed above, in curial proceedings, the applicable law will, most often, be from the same legal system, and therefore it is reasonable to assume that the court only knows its own laws. However, judges in certain jurisdictions also follow *iura novit curia* when deciding the content of foreign law (*iura aliena novit curia*). For instance, Switzerland, Germany, and Italy consider that knowing the law also means that the court will research and find the 'foreign' law, and the court could take the necessary action to find the content of foreign law in whatever way it considers appropriate.[5] Under this approach, the court can generally establish the content of foreign law by the authority of its own motion beyond the common pleading of the parties. The court may research the foreign law itself, seek expert advice from competent third parties (eg, academic experts or institutions) or require the parties to provide the law. Nevertheless, under German law, when the judge introduces his or her own knowledge on foreign law into the proceedings, he or she should inform the parties of his self-made opinions on foreign law and give them an opportunity to comment on it.[6]

In contrast, French courts distinguish between the dispositive rights of the parties and rights that the parties cannot freely dispose of and, accordingly, apply different rules on proof of foreign law. Specifically, French courts are not obliged to apply foreign law when the subject matter of the action only concerns dispositive rights of the parties. At the same time, they must apply the foreign law *ex officio* whenever the matter is governed by an international convention or the claims involve rights of which the parties are not free to dispose.[7] Even when the French courts have the power to ascertain the content of foreign law *ex officio*, according to Article 16 of the French Code of Civil Procedure, they should ensure parties' right to be heard and cannot apply foreign law *ex officio* without having given the parties opportunities to comment thereon.[8]

Under English law, courts only know their own laws and thus regard foreign law as a fact.[9] Since judges are deemed ignorant of facts until proven, they are ignorant of unproven foreign law. This rationale prevents English judges from conducting personal research on foreign law and requires the parties to prove the content of foreign law as other facts. Accordingly, English judges require the parties to plead and prove the content of foreign law and how to apply it by presenting evidence and expert opinions in court as a matter of facts.[10] In that case, the English courts have neither the power nor the duty to introduce or prove foreign law *ex officio*. Instead, they must rely on the materials provided by the parties and cannot go beyond these materials to decide issues.

Whilst the principle remains that the parties must plead

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3 Rainer Hausmann, 'Pleading and Proof of Foreign Law — a Comparative Analysis' (2008) (1) *The European Legal Forum* 1, I-1.

4 For a comprehensive analysis of the application of foreign law by national courts, see Sofie Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (Oxford University Press, 2004); Maarit Jänterä-Jareborg, 'Foreign Law in National Courts: a Comparative Perspective' in *Collected Courses of the Hague Academy of International Law* (Brill, 2003) vol 304, 181-386; Trevor C Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared' (1996) 45(2) *International and Comparative Law Quarterly* 271

5 Switzerland: *Swiss Private International Law Act*, art 16; Germany: *Zivilprozessordnung* [Code of Civil Procedure](Germany) art 293; Italy: *Italian Private International Law*, art 14(1).

6 *Zivilprozessordnung* [Code of Civil Procedure](Germany) art 278.

7 Hartley (n 3) 279.

8 *Code de procédure civile* [Code of Civil Procedure] (France) art 16.

9 Gisela Knuts, 'Jura Novit Curia and the Right to Be Heard — An Analysis of Recent Case Law' (2012) 28(4) *Arbitration International* 669, 672; Hartley (n 3) 282-283.

10 Civil Procedure Rules (UK), Rule 33.7; Lord Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) 318.

foreign law as a fact, the position in the US is not as evident as in the UK. In determining foreign law, according to the US Federal Rules of Civil Procedure, the US courts 'may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence'.[11] US judges have different views on the application of this rule. Some consider that a judge could merely rely on expert testimony on foreign law, while others hold that a judge may reject such expert testimony provided by the parties and research the law on his own.[12]

It is difficult to say that the *iura novit curia* principle has been well accepted by most jurisdictions when ascertaining the content of foreign law. As shown above, *iura novit curia* is inconsistent with the division of civil law and common law jurisdictions. Even within civil law systems with the inquisitorial tradition, there are jurisdictions, such as France, not following *iura novit curia* in determining the content of foreign law. Most importantly, even when the French and German courts have the power to ascertain the content of foreign law *ex officio*, they still have the obligation to ensure parties' right to be heard and cannot apply foreign law *ex officio* without having given the parties opportunities to comment thereon. In common law systems with the adversarial tradition, the principle remains that the parties must plead foreign law as a fact and judges are deemed ignorant of facts until the parties prove them. Accordingly, judges of common law systems adopt a restrictive approach to *iura novit curia* and usually do not look beyond the parties' legal submissions.

III Do Arbitral Tribunals Have the Power to Investigate the Law on Their Own?

The problem to ascertain the content of the applicable law is manifestly amplified in international commercial arbitration. Unlike judges of national courts, arbitrators have no forum and procedural law thereof which guide them as to who is obliged to identify the content of the applicable law.[13] Also, concepts like domestic law and foreign law bear no relevance in international arbitration, as opposed to court litigation distinguishing those two.[14]

At least in international arbitration, *iura novit curia* does not apply to arbitrators automatically. The *iura novit curia* principle applies as a component of civil procedure governing judges' behaviour in state courts.[15] This principle only applies to the forum's judges knowing the law of their own forum. In contrast, arbitrators do not have a *lex fori* as judges. Often, arbitrators are called upon to decide matters of law under legal systems of which they have little or no experience or training. Most importantly, arbitration is a mechanism based on parties' consent. Arbitrators derive their authority to resolve disputes from the parties, as opposed to national courts that possess the *jure imperi* of the State.[16] Also, the tribunal has no nationality in international commercial arbitration as opposed to judges. Instead, it emphasises the neutral and non-national nature of the international arbitral tribunal.

As discussed above, it is the *procedural law of the forum* to decide who has the burden to prove the content of foreign law in litigation. Indeed, some jurisdictions apply the *iura novit curia* principle in civil litigation where the applicable law is foreign law. However, the civil procedural rules for courts to ascertain foreign law in the arbitral seat or the enforcement forum do not necessarily apply to international arbitration.

Instead, the procedural issues in arbitration, such as the pleading and proof of the content of the applicable law, are mainly governed by the parties' agreement, the *lex arbitri*, and applicable arbitration rules.[17] Party autonomy is the guiding principle in determining the arbitral

11 *Federal Rules of Civil Procedure*, 28 USC § 44.1 (2020)

12 *Bodum USA Inc v La Cafetiere Inc*, 621 F 3d 624, 633, 638-9 (7th Cir, 2010).

13 Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 692.

14 Knuts (n 8) 672; Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 442-443.

15 Phillip Landolt, 'Arbitrators' Initiatives to Obtain Factual and Legal Evidence' (2012) 28(2) *Arbitration International* 173, 184.

16 Teresa Giovannini, 'Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?' in Bernd Ehle and Domitille Baizeau (eds), *Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E Schneider)* (Kluwer Law International, 2015) 63.

17 Nigel Blackaby et al, Redfern and Hunter on International Arbitration (Oxford University Press, 6th ed, 2015) 166-171, 353-359.

proceedings.[18] In the exercise of their autonomous authority, the parties may confer upon the arbitral tribunal the power to raise legal arguments that are not pleaded by the parties as they consider appropriate to the specific case. In the absence of parties' express authorisation, it resorts to the *lex arbitri* and applicable arbitral rules to determine whether the arbitral tribunal has such power. As shown below, *iura novit curia* is generally not a part of the *lex arbitri* in most jurisdictions,[19] with some exceptions in Switzerland, Finland, and Sweden.

Most national arbitration statutes and applicable arbitration rules rarely regulate whether the tribunal should plead and prove the content of law *ex officio*. In contrast, they usually provide the tribunal with broad discretion on the conduct of arbitral proceedings, subject to ensuring the parties have the opportunity to present their case.[20] However, there are a few exceptions where positive statements confer arbitrators the power to ascertain the content of the applicable law on their own. As explicated below, the inquisitorial-adversarial dichotomy between civil law and common law litigations does not apply to the analysis of arbitrators' power to investigate the law *ex officio* in international commercial arbitration. For instance, the Hong Kong Arbitration Ordinance, the English Arbitration Act 1996, and the LCIA Rules contain specific provisions empowering the arbitrators to decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law *unless otherwise agreed by the parties.*[21] They appear to grant arbitrators a certain degree of autonomy in taking the initiative to ascertain the content of applicable law, provided that the hearing is conducted fairly and gives the parties a reasonable opportunity to present their cases.[22] However, it cannot say that the Hong Kong Arbitration Ordinance, the English Arbitration Act 1996 and LCIA Rules adopt the *iura novit curia* principle because they still obligate the arbitral tribunal to ensure that parties have the opportunity to comment.

In contrast, Switzerland, Sweden, and Finland adopt the opposite position on the applicability of *iura novit curia* in arbitration. Although their national arbitration statutes do not expressly empower the tribunal to apply legal arguments or legal reasoning that are not invoked in the parties' submissions *ex officio*, their case law has confirmed the applicability of *iura novit curia* in arbitration without giving parties an opportunity to comment. For instance, the Swiss Supreme Court has consistently held that the arbitrators may apply legal arguments *ex officio*, which will not violate the right to be heard insofar as a legal argument or the authority that the arbitrators relied upon in the award would not surprise the parties.[23] The Swiss Supreme Court confirmed that this principle also applies to arbitration in which the parties and their counsel are non-Swiss.[24]

While the Swedish Arbitration Act is silent on the issue, the *travaux préparatoires* to the Act addressed the applicability of *iura novit curia* and stated that it must assume that 'for the time being' the *iura novit curia* principle applies to arbitral proceedings 'at least in

18 It is a principle that is endorsed not only in national laws, but also by leading arbitral institutions, as well as by international instruments such as the New York Convention. See, *UNCITRAL Model Law on International Commercial Arbitration* (4 December 2006), art 19(1); *ICC Arbitration Rules* (adopted 1 January 2021) art 19; *LCIA Arbitration Rules* (adopted 1 October 2014) art 14(2); *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, open for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) art V(1)(d).

19 Landolt (n 14)184.

20 *UNCITRAL Model Law on International Commercial Arbitration* (4 December 2006) arts 18, 19; *UNCITRAL Arbitration Rules* (6 December 2010) art 17(1); *ICC Arbitration Rules* (adopted 1 January 2021) art 22; *LCIA Arbitration Rules* (adopted 1 October 2014) art 14(4)(i); *SCC Arbitration Rules* (adopted 1 January 2017) art 23(2); *HKIAC Administered Arbitration Rules* (adopted 1 November 2018) art 13(1).

21 *Arbitration Ordinance* (Hong Kong) cap 609, s 56(7); *Arbitration Act 1996* (UK) c 23, s 34; *LCIA Arbitration Rules* (adopted 1 October 2014) art 22(1)(c).

22 In terms of the right to be heard, see *Arbitration Ordinance* (Hong Kong) cap 60, s 46; *Arbitration Act 1996* (UK) c 23, s 33; *LCIA Arbitration Rules* (adopted 1 October 2014) art 14(4).

23 BGer.4A_46/2011 para. 5.1.1; BGer. 4A_254/2010 para. 3.1; BGer. 4A_392/2010 para. 5.1; BGer. 4A_10/2010 para. 2.1; BGer. 4A_440/2010 para. 3.1.

24 BGer. 4A_544/2013 para. 3.2.2. With respect to opposite views, Kaufmann-Kohler argued that a 'hard and fast *iura novit curia*' is inappropriate in international arbitration, see Gabrielle Kaufmann-Kohler, 'The Governing Law: Fact or Law? — A Transnational Rule on Establishing Its Conteents' (2006) 26 *ASA Special Series* 79, 84.

domestic disputes'.[25] In contrast, Swedish courts' attitude towards *iura novit curia* is less clear when one party or both are non-Swedish.[26] Similarly, the Finish Supreme Court held that the arbitrators were not restricted to the point of law pleaded by the parties and thus refused to set aside an award governed by the Finnish law even though the tribunal did not bring its research of law to parties' attention.[27] The authors of the commentary to the 2017 SCC Rules consider that *iura novit curia* applies in domestic arbitration in Sweden while 'this practice is not widely accepted in international arbitration'.[28] Some Swedish commentators, such as Hobér, argued that, even in domestic arbitration, arbitrators should ensure that the parties are *properly informed* of how and which laws and legal principles might be applied by the arbitrators to avoid surprises to the parties once the award is rendered.[29]

The general conclusion that can be drawn from these examples of national laws and applicable arbitration rules is that few national arbitration laws and applicable arbitration rules have developed default rules about the applicability of the *iura novit curia* principle. As discussed above, the proof of the content of the applicable law in arbitration is a matter of procedure and should be mainly determined by the *lex arbitri* and the applicable arbitration rules. Accordingly, it is not encouraged for arbitrators to look beyond parties' legal submissions when the *lex arbitri* or the applicable arbitration rules do not empower them to do so.

IV Do Arbitral Tribunals Have the Duty to Investigate the Law on Their Own?

It is worth noting that arbitration places the primary responsibility for initiatives to obtain the content of law upon parties while the role of arbitrators in this regard is supplementary. The arbitrator's obligation to apply the law usually does not exceed the scope of application based on parties' legal opinions. They have the power but not the duty to conduct its own legal investigations. As Gabrielle Kaufmann-Kohler considered that:

> The parties shall establish the content of the law applicable to the merits. The arbitral tribunal shall have the power, but not the obligation, to conduct its own research to establish such content. If it uses such power, the tribunal *shall give the parties an opportunity to comment on the results of the tribunal's research*. If the content of the applicable law is not established with respect to a specific issue, the arbitral tribunal is empowered to apply to such issue any rule of law it deems appropriate.[30]

First, due to party autonomy and predictability, the parties' interests are best determined by the parties themselves. The role of arbitrators should be subsidiary to that which can be accomplished by the parties each pursuing its self-interest and that which the parties together agree.[31] It is more consistent with party autonomy when arbitrators put their suggestions on legal evidence initiatives to the parties rather than prosecuting such initiatives themselves.

Also, arbitrators' initiatives to request additional documents or suggest new legal arguments after parties' pre-hearing submissions, such as suggesting new legal arguments at or after the hearing, would increase time and costs. If the arbitrators interfere excessively with the legal evidence of the parties, it will affect the parties' control over arbitration costs. There would be uncertainty in costs due to the variable of costs incurred to respond to arbitrators' initiatives. It seems highly desirable that the parties be allowed to determine their own investment in the arbitration since they bear all costs of arbitration.

Further, arbitrators' legal investigations may violate

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25 Christer Danielsson, 'Chapter 8: Applicable Law' in Anneette Magnusson and Jakob Rognwaldh (eds), *International Arbitration in Sweden: A Practioner's Guide* (Kluwer Law International, 2nd ed, 2021) 210.

26 Kaj Hobér, *International Commercial Arbitration in Sweden* (Oxford University Press, 2011) 257, 317.

27 *Werfen Austria GmbH v Polar Electro Europé BV, Zug branch*, Case No. S2006/716, decision by the Finnish Supreme Court of 2 July 2008, reported in 2008(3) *Stockholm International Arbitration Review* 259 (in this case, both parties were non-Finnish).

28 Jakob Ragnwaldh, Fredrik Andersson and Celeste E Salinas Quero, *A Guide to the SCC Arbitration Rules* (Wolters Kluwer, 2019) 86.

29 Hobér (n 25) 317.

30 Kaufmann-Kohler (n 23) 84.

31 Landolt (n 14) 201.

parties' right to heard, equality of arms between the parties, impartiality, and *ultra petita*. If an arbitrator takes the initiatives to obtain the content of law, there is every prospect that the new legal arguments will bear upon the substantive outcome, which is beneficial to one party and against the other side. This may raise concerns about arbitrators' impartiality and the equality of arms between parties.[32] Further, if the award is based on the legal reasoning beyond that of the parties, such an award may be annulled or unenforceable on the grounds of *ultra petita*, which has been confirmed in Article V(1)(c) of the New York Convention and Article 34(2)(a)(iii) of the UNCITRAL Model Law.

It will only be in limited exceptional circumstances where arbitrators will take initiatives in obtaining the law independently of the parties' submissions. Exceptions mainly concern circumstances where there are mandatory rules to apply or where one party is defaulting.

When the application of mandatory public policy rules may be at stake (eg, competition law, money laundering and anti-corruption laws), it is justified that the arbitrators have the duty to apply such mandatory rules despite that the parties did not invoke them.[33] This has been endorsed by the Prague Rules providing that the arbitral tribunal may apply public policy rules not pleaded by the parties if it finds it necessary.[34] In these circumstances, there may be a greater burden on an arbitrator to conduct independent factual investigations and constructing legal arguments on his or her own motion than the parties since the parties are unlikely to be willing to propose such illegal facts and mandatory rules. Also, this duty may be seen as deriving from a general mandate to ensure that an award rendered is 'enforceable at law'. Arbitrators' intervention can reduce the risks of annulment or non-enforcement of the award based on the violation of public policy.

Another situation that may encourage arbitrators to investigate the law more actively beyond the parties' legal arguments involves cases where one party is not present. Most, if not all, national arbitration statutes and institutional arbitration rules, such as ACICA, ICC, LCIA, SCC, HKIAC, and SIAC, allow the tribunal to proceed with the arbitration despite the respondent's absence.[35] For instance, Article 25 of the UNCITRAL Model Law sets forth that where a respondent fails to communicate its statement of defence, 'the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations', and where a party fails to appear or to produce documentary evidence, 'the tribunal may continue the proceedings and make the award on the evidence before it'.[36] In cases of the defaulting party, the tribunal still needs to review the evidence presented to it, satisfy itself that claims are well-founded in law and facts and reach an independent conclusion.

A situation where one party is defaulting 'obviously has a negative impact on the sound administration of justice',[37] since only one party submitted the files to support the facts and legal arguments. The principle of *iura novit curia* can relieve the imbalance between the parties in proof of law. The prototype case of the *iura novit curia* principle in international arbitration is an investment arbitration case of *BP v Libya* in which Libya failed to participate in the arbitral proceedings.[38] The arbitrator of this case, Judge Lagergren, developed what later became known as the

32 Knuts (n 8) 674.

33 For more information, see Giovannini (n 15) 67-70; Landolt (n 14) 215; Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) 409; Ieva Kalnina, 'Iura Novit Curia: Scylla and Charybdis of International Arbitration?' (2008) 8(1) *Baltic Yearbook of International Law* 89, 97-104. With respect to opposite views, see Alexis Mourre, 'Part II Substantive Rules on Arbitrability, Chapter 11 – Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal' in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009) 207, 229; Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) 1998.

34 *Rules on the Efficient Conduct of Proceedings in International Arbitration* (Prague Rules, adopted 14 December 2018) art 7.2.

35 *ICC Arbitration Rules* (adopted 1 January 2021) art 6(8); *LCIA Arbitration Rules* (adopted 1 October 2014) art 15(8); *SCC Arbitration Rules* (adopted 1 January 2017) art 35(2); *HKIAC Administered Arbitration Rules* (adopted 1 November 2018) art 26; *SIAC Arbitration Rules* (adopted 1 August 2016) art 20(9); ACICA Arbitration Rules (adopted 1 April 2021) art 38.

36 *UNCITRAL Model Law on International Commercial Arbitration* (4 December 2006) art 25; *Arbitration Act 1996* (UK) c 23, s 41; *SIAC Arbitration Rules* (adopted 1 August 2016) art 24(3).

37 *Goetz and others v Burundi*, 10 February 1999, Award, ICSID Case No ARB/95/3, para 53.

38 *BP Exploration Co (Libya) Ltd v The Government of the Libyan Arab Republic*,10 October 1973, Award on the Merits, reported in (1979)53 International Law Reports 297.

Lagergren theory. Judge Lagergren considered that he was both entitled and compelled to undertake an independent review of the legal issues involved. He held that while an arbitrator may not engage in an independent factual investigation, he or she does remain free in analysing these facts and conducting independent legal research beyond the legal arguments pleaded by the claimant. Lagergren's approach is followed by some latter cases.[39] However, this does not mean that the arbitral tribunal's initiative to investigate the law can exempt it from its obligation to ensure parties' right to be heard. This has also been confirmed by the latter case *Bogdanov v Moldova*. It shows that, while the arbitrators may be more active in carrying out legal research *ex officio* in the context of a defaulting party, it is necessary to inform the parties of the legal arguments or reasoning that the tribunal would rely on for comments.[40] This approach would strike a good balance between a comprehensive examination of the case before the tribunal and due regard to due process when one party is defaulting.

Investment arbitration may involve public interests, which requires the arbitral tribunal to exercise its power to ascertain the content of law more actively. Unlike investment arbitration, international commercial arbitration resolves the disputes between commercial parties. Thus, in international commercial arbitration, the arbitral tribunal should be cautious in using this power to investigate the law on its own. The tribunal should always be independent and impartial between the parties rather than act as an advocate for the defaulting respondent, even in the cases of the defaulting party. As Lord Denning MR recognised in the context of domestic arbitration:

> An arbitrator's function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him…he cannot use his special knowledge, or at any rate he should not use it, so as to provide evidence on behalf of the defendants which they have not chosen to provide for themselves, for then he would be discarding the role of an impartial arbitrator and assuming the role of advocate for the defaulting side.[41]

To sum up, arbitrators usually do not have the duty to investigate laws independently. Only when it is necessary to apply the mandatory rules, or one party is defaulting does the arbitrator justify an independent investigation of law. Even in these circumstances, arbitrators should exercise utmost caution to reconcile pro-active approaches with due process principle. This requires the parties to be informed of legal arguments introduced by the tribunal for comments. That is especially the case where the tribunal bases its award on a legal source that a reasonable and prudent party could not have foreseen. The following section discusses the practice of courts in the cases where the parties raised due process violation based on the fact that the arbitral tribunal conducted an independent investigation of law.

V Arbitral Tribunals' Independent Investigations of Law and the Right to Be Heard

As explained in Section III, the tribunal generally does not have the power to investigate the content of the applicable law beyond parties' submissions unless the parties' agreement, national arbitration statutes or applicable arbitration rules empower such authority. Also, the applicability of *iura novit curia* in international arbitration is not fully consistent with the divide between civil law and common law traditions. It is the parties' agreement, *lex arbitri*, applicable arbitration rules that together determine whether the arbitral tribunal has the authority to investigate the law that the parties do not advance.

The real issue does not seem to be whether the *iura novit curia* principle applies in international arbitration, but rather whether the application of that principle has a negative impact on parties' right to be heard. The exercise of parties' autonomous authority in arbitral proceedings is, however, limited by due process requirement.[42] Also, national arbitration statutes and applicable arbitration

39 *Bogdanov v Moldova*, 22 September 2005, SCC Case 93/2004 <https://jusmundi.com/en/document/decision/en-iurii-bogdanov-agurdino-invest-ltd-and-agurdino-chimia-jsc-v-republic-of-moldova-i-award-thursday-22nd-september-2005>.

40 Ibid.

41 *Fox v PG Welfair Limited* (1981) 2 Lloyd's Reports 514, 522.

42 Blackaby (n 16) 356.

rules usually require that the arbitral tribunal should ensure parties' due process rights.[43] Regardless of whether the tribunal has such authority based on the above normative rules, a converging trend among commentators is that the tribunal should give parties reasonable opportunities to comment on the legal arguments or authorities advanced by the tribunal.[44] This is also followed by the Prague Rules with strong inquisitorial characters, which provide that:

> [T]he arbitral tribunal may apply legal provisions not pleaded by the parties if it finds it necessary, including, but not limited to, public policy rules. In such cases, the arbitral tribunal shall seek the parties' views on the legal provisions it intends to apply. The arbitral tribunal may also rely on legal authorities even if not submitted by the parties if they relate to legal provisions pleaded by the parties and provided that the parties have been given an opportunity to express their views in relation to such legal authorities.[45]

Similarly, Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce go further:

> An award may not be based on legal grounds different from those relied on by either of the parties unless the Arbitral Tribunal notifies the parties in advance and gives them an opportunity to be heard concerning such legal grounds.[46]

The case law in most jurisdictions, not only the common law systems (eg, UK and Hong Kong) but also civil law jurisdictions (eg, France and Quebec), shows that the right to be heard should prevail no matter whether the *iura novit curia* principle applies. Where a tribunal undertakes independent research to decide legal issues, it must provide parties with the opportunity to comment on the result of the tribunal's investigations. As discussed above, on the one hand, the English Arbitration Act and Hong Kong Arbitration Ordinance allow the tribunal to decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law *unless otherwise agreed by the parties***.** On the other hand, they require the tribunals to guarantee due process.

English courts have consistently shown a rigorous concern for protecting the right to be heard properly undistorted by any effects of the *iura novit curia* principle. In *Malicorp*, for instance, the English court refused to enforce an award where the remedies granted by award on a basis which was neither pleaded nor argued by the parties.[47] In this case, the tribunal did not rule on the respondent's claim that it was entitled to avoid the concession contract for fraud. Instead, the tribunal ruled that there had been an 'essential mistake' under Article 142 of the Egyptian Civil Code that the parties had not pleaded or argued. Based on this 'essential mistake', the tribunal then granted damages to the claimant

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43 See, eg, Hong Kong: *Arbitration Ordinance* (Hong Kong) cap 609, s 46(2); Germany: Zivilprozessordnung [Code of Civil Procedure] (Germany) § 1042< https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3674>; Japan: *Japanese Arbitration Act* (Japan), art 25 [Arbitration Law Follow-up Research Group trans, Arbitration Law <https://japan.kantei.go.jp/policy/sihou/arbitrationlaw.pdf>] (implementing Article 18 of UNICTRAL Model Law); France: *Code de procédure civile* [Code of Civil Procedure] (France) 13 January 2011, art 1510 [Emmanuel Gaillard et al, Code of Civil Procedure<https://sccinstitute.com/media/37105/french_law_on_arbitration.pdf>] ('the arbitral tribunal shall ensure that the parties are *treated equally* and shall uphold the principle of *due process*'); Switzerland: *Federal Act on Private International Law* (Switzerland) 18 December 1987, art 182(3) [Andreas Bucher trans, *The English translations of Federal Act on Private International Law* <http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf>] ('the arbitral tribunal shall *ensure equal treatment* of the parties and the right of both parties to be heard in *adversarial proceedings*'); Italy: *Italian Code of Civil Procedure*, art 816 (the arbitrators must 'respect in any case the principle of adversarial process by granting both parties reasonable and equivalent opportunities to present their case'); the Neverlands: Wetboek van Burgerlijke Rechtsvordering [Dutch Code of Civil Procedure] (Netherlands) art 1036 (2). See also applicable arbitral rules: *UNCITRAL Arbitration* (6 December 2010) art 17(1); *ICC Arbitration Rules* (adopted 1 January 2021) art 22(4); *SIAC Arbitration Rules* (adopted 1 August 2016) art 17(1); LCIA *Arbitration Rules* (adopted 1 October 2014) art 14(4)(i); *HKIAC Administered Arbitration Rules* (adopted 1 November 2018) art 13(1); *SCC Arbitration Rules* (adopted 1 January 2017) art 23(2).

44 Knuts (n 8) 673, 680; Kalnina (n 32) 101; Maxi Scherer, 'New York Convention: Violation of Due Process, Article V (1)(b)' in Reinmar Wolff (ed), *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Commentary* (C.H. Beck • Hart • Nomos, 2012) 279, 307; Claus Werner Von Wobeser Hoepfner, 'The Effective Use of Legal Sources: How Much Is Too Much and What Is the Role for Iura Novit Curia?' in Albert Jan Van den Berg (ed), *Arbitration Advocacy in Chaning Times* (Kluwer Law International, 2011) 207, 213-214; Gaillard and Savage (n 12) 692.

45 *Rules on the Efficient Conduct of Proceedings in International Arbitration* (Prague Rules, adopted 14 December 2018) art 7.2.

46 Polish Chamber of Commerce, *Arbitration Rules* (adopted on 1 January 2015) art 6(2).

47 *Malicorp Ltd v Government of the Arab Republic of Egypt, Egyptian Holding Co for Aviation & Egyptian Airports Co* [2015] EWHC 361 (Comm) (19 February 2015) ('Malicorp').

(Malicorp).[48] The English High Court considered that a grant of remedies on a basis which was neither pleaded nor argued would be capable of falling within 'unable to present its case'.[49] The English High Court further argued that the award of damages under Article 142 of the Egyptian Civil Code had been a complete surprise to the respondent (Egypt), and it was necessary for the respondent to be informed of the basis on which the tribunal would grant any remedy and decide the amount of any monetary award.[50] Even though the English High Court had the discretion to enforce the award violating the due process, it declined to exercise this discretion in the case at hand because the failure of the tribunal to ensure that parties had been informed with the basis constituted a serious breach of natural justice under English Law.[51]

French courts take the same approach as English courts. Malicorp also applied for the enforcement of the award in France. The French Court of Cassation refused Malicorp's application for enforcement in France for the same reasons as those of the English High Court.[52] The French Court held that the tribunal's decision, which was based on Articles 120, 121 and 142 of the Egyptian Civil Code that the parties did not argue, violated the due process and could not be enforced.[53] In a similar case before the Court of Appeal of Paris, the tribunal had decided on a legal principle of Austrian law that neither party had advanced.[54] The Court of Appeal of Paris held that the tribunal had not respected the due process principle since it had based its decision on the legal principle on its own motion without giving the parties an opportunity to comment on the application of such principle.

The French approach is followed in Quebec. In *Dreyfus v Tusculum*,[55] the tribunal issued a partial award in which it awarded the termination of the joint venture agreement based on the doctrine of frustration under New York Law that applied to the main contract, but neither party had pleaded this doctrine as grounds of termination. The Quebec Supreme Court held that the tribunal had violated the due process by addressing a remedy that neither party had pleaded.

A similar result was reached by the Hong Kong court in *Brunswick Bowling*, where the tribunal applied its own assessment of contractual requirements under Chinese law without considering the evidence adduced by the parties on Chinese law and other applicable laws and awarded the claimant's claim for damages for conversion under Chinese law even though both parties had contended that Illinois law applied to the conversion. The court held that the parties had not been given an opportunity to present their cases on the tribunal's views on contract validity and conversion under Chinese law.[56] Hong Kong courts have consistently held that it was open to the tribunal to raise a new issue of its own motion and to rule upon it 'provided that the parties were given the opportunity to deal with the issue'.[57]

The Swiss cases, however, constitute exceptions to this line of reasoning. As discussed in Section III, the Swiss case law held that *iura novit curia* applies to arbitration as well. Although the Swiss Private International Law provides that the tribunal shall ensure the parties' right to be heard in adversary proceedings,[58] the case-law of the Swiss Supreme Court has consistently confirmed that there is no violation of the right to be heard insofar as a legal argument or the authority that the arbitrators relied upon in the award were not such as would come as a

48 Ibid [35].
49 Ibid [31].
50 Ibid [32], [41].
51 Ibid [42].
52 Cour de cassation [French Court of Cassation], 23 June 2010 reported in (2011) *Rev Arb* 446.
53 Ibid 448.
54 Case Reference CA Paris, Pôle 1, 1 Re Ch, 3 Dec 2009, No RG:08/13618, Cour d'appel de Paris [Paris Court of Appeal]. See also Case Reference CA Paris, Pôle 1-Chambree1, 15 March 2016, Cour d'appel de Paris [Paris Court of Appeal] <https://www.italaw.com/sites/default/files/case-documents/italaw7208.pdf>; Court of Cassation, First Civil Chamber, 29 June 2011, No 10-23.321 <https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/785_29_20477.html>.
55 *Louis Dreyfus SAS v Holding Tusculum BV*, 2008 QCCS 5903.
56 *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd*, [2011] 1 HKLRD 707, [67].
57 *Tronic International Pte Ltd v Topco Scientific Co Ltd*, [2016] HKEC 1780, [20]-[21]. See also *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39.
58 *Federal Act on Private International Law* (Switzerland) 18 December 1987, art 182(3) [Andreas Bucher trans, *The English translations of Federal Act on Private International Law* <http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf>].

surprise to the parties.[59] The Swiss Supreme Court held that the parties' right to be heard primarily relates to the facts and not the law.[60] This imposes restrictions on parties' right to be heard in international arbitrations seated in Switzerland since the arbitral tribunal are entitled to apply the legal arguments not advanced by the parties. Under the Swiss Supreme Court's jurisprudence, an exception to *iura novit curia* applies if the parties could not reasonably have foreseen that the legal provision or principle that neither party had invoked would be relevant for the tribunal's decision.[61] Accordingly, the arbitral tribunal should give the parties an opportunity to comment when it bases the award on the legal arguments that the parties could not have foreseen.

However, Swiss courts adopt a narrow approach to interpreting whether the tribunal's application of law constitutes an unforeseeable surprise to the parties, which has a negative impact on parties' right to be heard. The court justified its restrictive interpretation on the 'surprise application of the law' because this can prevent a party from exploiting the surprising argument to obtain a review of the merits of the award by the court.[62] However, Swiss courts' jurisprudence on the 'surprise application of the law' and judgement of foreseeability bring uncertainty in criteria.[63] It is not always easy to determine the extent to which a legal argument or provision would surprise the parties. Most importantly, such examination of courts in 'surprise application of the law' may result in the review of merits, which is forbidden by most national arbitration statutes. It is not advisable for courts to adopt Swiss courts' jurisprudence on the 'surprise application of the law', which may lead courts in various jurisdictions to approach this issue in different ways and based on various criteria.

VI. Expert Arbitrators

It is questionable whether the 'expert arbitrator' who are chosen for their expertise in a particular field may apply their expert knowledge legal issues without giving parties a reasonable opportunity to make submissions on the matter. In *Grand Pacific Holdings*, the Hong Kong Court of First Instance held, which was confirmed by the Court of Appeal, that the award based on New York law authorities that had not been disclosed to the parties for further submission thereon was not such a serious matter as to constitute a violation of parties' right to present their case. The court reached this conclusion on the basis that the tribunal members all received legal education or were licensed to practice law in New York and were 'perfectly capable' of dealing with New York law issue without reference to the parties and without the benefit of evidence on the matter in hand.[64]

However, the rationale in *Grand Pacific Holdings* is controversial in both theory and practice and may not be accepted by other courts. It is problematic how or why the parties' choice of expert arbitrators can impact their right to present their cases. Parties may agree that the expert arbitrators use their specialised knowledge to decide their disputes by raising new arguments or issues not raised by the parties. Nevertheless, this does not mean that parties intended to allow expert arbitrators to resolve the dispute based on their secret arguments and issues without inviting parties to make submissions thereon. The only thing that can be implied is that parties desire that the appointed arbitrators are more capable of addressing the dispute owing to their knowledge and experience, no more than this.

Sometimes, it is not the parties' agreement to appoint an expert arbitrator. Instead, it may be that one party manifestly nominated an arbitrator owing to this arbitrator's particular skill and experience in respect of certain factual or legal matters. The tribunal has to balance one party's desire for a more active tribunal and the other party's request for the tribunal's autonomy. In such a case, it would violate the equality of arms if the expert arbitrator distinguished between the parties in taking initiatives. Arbitrators should be responsible for

59 Swiss Federal Tribunal Decision, No 4P.100/2003, 30 September 2003 reported in (2004) 22 ASA Bulletin 574; Manuel Arroyo, 'Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 190 [Finality, challengee: principle]' in Manuel Arroyo (ed), *Arbitration in Switzeerland: The Practitioner's Guide* (Kluwer Law International, 2nd ed, 2018) 315-316; Knuts (n 8) 675-676.

60 4A_525/2017, 9 August 2018, Swiss Federal Supreme Court; 4A_554/2014, 15 April 2015, Swiss Federal Supreme Court.

61 BGer. 4A_544/2013 para. 3.2.1; BGer.4A_46/2011 para. 5.1.1; BGer. 4A_254/2010 para. 3.1; BGer. 4A_10/2010 para. 2.1.

62 BGer.4A_46/2011 para. 5.1.1; BGer. 4A_254/2010 para. 3.1; BGer. 4A_10/2010 para. 2.1; BGer. 4A_392/2010 para. 5.1.

63 Knuts (n 8) 682-686.

64 *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd*, [2011] 4 HKLRD 188, [142]-[145].

keeping independent and impartial and giving equal treatment between the parties through the whole arbitral proceedings. In such cases, it would seem advisable in the first instance for arbitrators to request parties' views on its mandate of taking factual or legal initiatives and guarantee parties' right to be heard. Where a tribunal uses its own knowledge to decide the factual or legal issues, it should provide parties with the opportunity to comment on the result of the tribunal's investigations.[65] The failure of this may breach the right to be heard and violate arbitrators' impartiality.

VII Conclusion

To sum up, the arbitral tribunal has no power to conduct its own research on points of law not argued by the parties unless the parties' agreement, the *lex arbitri* or applicable arbitration rules authorise this power. Accordingly, arbitral tribunals have no duty to apply legal grounds *ex officio* except for public policy rules. Even though the arbitral tribunal has such authorised power (or duty), its application should always be subject to due process. This means that the parties should be expressly provided with the result of arbitrators' independent legal research and given a reasonable opportunity to comment on that result, including the opportunity to submit further legal evidence of their own in response.

65 Court of Appeals Munich, 34 Sch 18/06, 22 January 2007.

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