THE ACICA REVIEW

JUNE 2022

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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Contents

THE ACICA REVIEW

Editorial Board:
Dr Benjamin Hayward (General Editor), Meghan Keary, Gianluca Rossi, Cara North and Stewart McWillam.

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President's Welcome

Georgia Quick
ACICA President

Welcome to the June edition of the ACICA Review.

We thank all of the authors for their submissions. It has been a very busy and productive last few months for ACICA since the December edition of ACICA Review in 2021. The ACICA Secretariat has now settled into its new office premises in the heart of Sydney's central business district. We have also been planning and delivering some exciting initiatives and events. Some of the highlights are described below.

ACICA Executive

In May 2022, the ACICA Board of Directors elected the ACICA Executives for 2022-2023. I am pleased to continue as President of ACICA and to work with a dedicated and experienced Executive team. We welcome a new face onto the ACICA Executive, Elizabeth Macknay (Partner, Herbert Smith Freehills) based in Perth, Western Australia. We are delighted to see the ACICA Executive has reached gender parity for the first time. We also have an ACICA Executive that is geographically diverse with members from Brisbane, Canberra, Melbourne, Perth, Singapore and Sydney. This has been a critical issue for ACICA as we strive to be a truly national body and ensure we work together in our efforts to promote international arbitration initiatives in Australia and abroad.

Australian Arbitration Week 2022

We have been busy planning for another stellar Australian Arbitration Week. The premier event of arbitration week is our ACICA and CIArb International Arbitration Conference. We are excited to have the conference in-person for the first time in two years. It will be held in Melbourne on 7 November 2022 and the theme for this year's conference will be on Future Frontiers in international arbitration. Australian Arbitration Week continues to grow each year and we already have a full calendar of planned events already on the Australian Arbitration Week website. We hope to you see you at Australian Arbitration Week!

Arbitrator Workshops

ACICA has started to roll out a series of workshops for our ACICA Fellows, who form our panel of arbitrators. The workshops explore the interaction between the ACICA Secretariat and arbitrators operating under the 2021 ACICA Rules. It also provides insight into how the Secretariat works in collaboration with arbitrators to assist with providing timely, cost effective and fair arbitrations, being the overriding objective under the ACICA Rules. We held our first workshop in Sydney on 8 June 2022 and plan on holding other events around Australia and virtually for our internationally based colleagues.

Tribunal Secretary Course/Launch of Commercial Arbitration in Australia under the Model Law

ACICA held its Tribunal Secretary Course from 25-26 June 2022. We are fortunate to have Professor Doug Jones AO and Professor Janet Walker CM as course directors. Participants had the opportunity gain invaluable insights and practical tips from our experienced course directors and tutors.

Prof. Jones and Prof. Walker recently launched their new book, Commercial Arbitration in Australia Under the Model Law, the Third Edition at an event hosted at the Federal Court last week. I was very proud to provide a welcome address as ACICA's President to one of ACICA's former Presidents. The Keynote address was given by the Honourable Chief Justice James Allsop AO. The textbook, which is in an annotated form, is a great resource for arbitration practitioners!

ACICA Review Editorial Board

We would like to thank the outgoing members of the ACICA Review Editorial Board including General Editor, Erika Williams, and Board members, Julian Sher and Guillermo Garcia-Perrote. Their invaluable contributions have made our bi-annual ACICA Review a fantastic publication for our arbitration community. We are pleased to have Dr Benjamin Hayward (Monash University) as General Editor, and Cara North (Corrs Chambers Westgarth) and Stewart McWilliam (Herbert Smith Freehills) as Board members joining the ACICA Review Editorial Board.

Report of the AMTAC Chair

Gregory Nell SC
AMTAC Chair

As I noted in my Report in December last year, with the then lessening of COVID-19 restrictions in New South Wales and Victoria, there was a gradual return to what might be described as a pre-COVID normalcy in those States. Since then, that process has continued, not only in those two States but also in the other States of Australia, resulting in (by the time of this Report) an almost complete return to pre-pandemic conditions – with both international and inter-State borders have reopened and international and inter-State travel not only readily accessible once again but also being increasingly used; in person seminars and functions returning with greater frequency (albeit in many instances now coupled with online access as well); the return of in person hearings in the Courts; and the reported increase in the number of employees returning to work in their offices in the CBDs around Australia, despite many organisations continuing to allow their employees to work from home for a portion of the working week at least.

In my Report in June 2020, I asked (rhetorically) to what extent the introduction and increase of the use of (for example) online measures (such as Zoom) in the conduct of arbitrations and mediations brought about by the COVID pandemic and the restrictions introduced to deal with the pandemic would continue to be availed of once those restrictions were lifted and the initial impact of the pandemic had abated. At that time I suggested that the continued use beyond the pandemic of such measures in both inter-State and international arbitration was likely not only to offer the parties to such arbitrations potential savings in time and costs, but also to reduce the so-called tyranny of distance that has often been said to hinder both the use of arbitration in Australia and the development of Australia as an international arbitral centre. With the current return to a pre-COVID normalcy, presumably we will see whether arbitrators and arbitral institutions (not just in the maritime and transport sphere) continue to use these pandemic induced measures, especially to the extent that they continue to offer parties the time and costs savings referred to above without detracting from the fairness of the arbitral process, or whether there is a tendency for arbitrators to return to the pre-pandemic practices and approaches of the past.

Despite the return to a pre-pandemic position referred to above, the ongoing results of the pandemic are nevertheless still being felt in some areas. For example, whilst the lessening of the impact of COVID worldwide has allowed the resumption of the International Maritime Law Arbitration Moot (IMLAM) Competition (after a pandemic induced hiatus of 2 years), this year's Competition will be a virtual one. This year's Competition (which is the 22nd year of the IMLAM Competition) is being hosted by the Yong Pung How School of Law, Singapore Management University, Singapore, and will be held from 3 to 8 July 2022. Details of the Competition can be found at https://www.murdoch.edu.au/School-of-Law/International-Maritime-Law-Arbitration-Moot/2022-Competition-and-Team-Info/. As the arbitral hearings in this year's Competition will be conducted virtually (that is,

on-line), an inability to be in Singapore during the above period offers no excuse for those who are willing and able to assist with the Competition – in particular in acting as arbitrators in the early rounds – from doing so from the comfort to their own home or office. In my Report in June last year, I referred not only to AMTAC's continuing support of the IMLAM Competition but also to the reasons why the Competition should be supported by the Australian arbitration community generally. For those reasons, I urge any arbitration practitioners, especially in the maritime / transport sphere, who are able to offer their time in support of this year's IMLAM Competition to do so and to that end to register on the IMLAM web site https://www.murdoch.edu.au/School-of-Law/International-Maritime-Law-Arbitration-Moot/Registration-for-Arbitrators/.

As many will already be aware, Australian Arbitration Week (AAW) is to be conducted in Melbourne this year, in the week commencing 8 November 2022, and as an in person event. As in the past, AMTAC will be holding a seminar as part of the AAW events. This will be held on Tuesday 9 November 2022 from 12:30 to 2:00 pm. It is planned that this also be an in-person event, which will not only allow in person participation in a seminar on topics of current interest but also the opportunity for those attending to network in person over a light lunch. Further details of this event (including the speakers and topics) will be provided via the AMTAC / ACICA / AAW websites shortly.

Prior to then, AMTAC will also be holding its signature event, the AMTAC Annual Address. This year's Address, which will be the 16th AMTAC Annual Address, will be held in or around September this year. Further details (both as to venue and speaker) will be publicised on the AMTAC and ACICA web sites shortly.

In the meantime, practitioners are reminded that papers for all of the previous Annual Addresses, as well as of other seminars that AMTAC has held over the past few years (including its AAW seminars), are accessible on the Publications, Presentations & Papers page of the AMTAC website. This includes the first 10 years of Annual Addresses (from 2007 to 2016) in a booklet that can be downloaded for free.

Finally, in my report last December, I referred to the recent retirement from the AMTAC Committee of both Peter McQueen (as immediate past President) and Tony Pegum (as one of AMTAC's several Vice Chairs) and their respective contribution to AMTAC over their many years of service. Since then, Mark North has been appointed to fill the position on the Committee vacated by Tony Pegum. Mark is a Principal Sales and Shipping at Atlas Iron Pty Ltd based in Western Australia, has had a long career in the shipping industry and has presented at several AMTAC seminars in the past. In addition, Dr Pat Saraceni has accepted an invitation to join the Committee and assist in its work. Pat, who is a director, litigation and dispute resolution at Clifford Chance in Perth, requires no introduction to the maritime community, having previously served as the President of both the WA Branch and national body of the Maritime Law Association of Australia and New Zealand (MLAANZ). I welcome both Mark and Pat to the AMTAC Committee, thank them both for agreeing to assist the Committee in achieving AMTAC's stated objectives and look forward to working with them in the future.

Faces of ACICA: Meet Kate Brown de Vejar

Kate Brown de Vejar
Partner and the Global Co-Chair of International Arbitration at DLA Piper LLP

Q Firstly, Kate, please provide our readers with a brief introduction of yourself.

I am a Partner and the Global Co-Chair of International Arbitration at DLA Piper LLP. I am also the Deputy Managing Partner of the Mexico City office and the Vice President of ANZMEX, the Australia, New Zealand, Mexico Business Council. Outside of the law, I'm a Mum of two young children – Natalia (9) and Finn (7) – an avid reader, a fan of British Bake-Off, and an ex-rock climber (I'm hoping to get back into it one day).

Q Before we discuss your amazing career, can you tell our readers a little about how your interest in international arbitration began?

My interest in international arbitration started as a love of languages. I had majored in French in my arts degree, and I decided to take a year off from my law degree to live and work in France as an Au Pair. Towards the end of that year, I desperately wanted to stay or at least to return to France. Even though I had not yet finished my law degree in Australia, I started sending my CV to international law firms in Paris, to see if they needed a native English-speaking intern. Of the 50 CV's I sent, I got two interviews, and one of these was with Shearman & Sterling's international arbitration group. They offered me an internship the following year. At the same time, I was selected to represent the University of Queensland at the Willem C. Vis International Commercial Arbitration Moot (the Vis Moot) in Vienna. After those two experiences, I was hooked.

Q How does an Australian lawyer find herself in Mexico City?

The Vis Moot is once again responsible. At the competition, I met my now husband, Rodolfo, who was a member of the Panamericana University team from Mexico. After the moot, I returned to Australia, finished my law degree in Brisbane, and started working at Allens in Sydney. I left to do my LLM at Harvard, which led me to take a job at White & Case in New York. Rodolfo moved to New York with me and did his LLM there, and after almost 5 years in New York, we decided to move to Mexico. I love living in Mexico. I love the fact that our kids are Aussie-Mexican, with everything that entails in terms of languages and culture and diversity of experiences and role models. Living in Mexico and becoming somewhat "tropicalized" (tropicalizada) myself, in terms of Latin American culture and thinking, has afforded me opportunities for growth, learning and friendships (both professional and personal) that I never would have had otherwise.

Q In addition to your role as Deputy Managing Partner and Global Co-Chair of International Arbitration, you appear to wear many hats (Vice-President of the

LCIA's Latin American Users' Council and Member of the LCIA Court, Co-Chair of the IBA's Arbitration Committee Subcommittee on Recognition and Enforcement of Arbitral Awards, a Member of the Law 360 International Arbitration Editorial Board Member of CAIC (the Arbitration Center for the Construction Industry in Mexico), a member of the ICDR-CANACO Joint Committee, and Vice President of ANZMEX, the Australia, New Zealand, Mexico Business Council). How do you juggle all these responsibilities?

With difficulty, and it's only possible because I have a great team, in the broadest possible sense of the word. I love being busy and having a diverse range of things to turn my mind to. I started my professional career amongst practice groups with senior practitioners who dedicated significant time to thought leadership and the proliferation of best practices. I admired that and I have now tried to emulate it.This type of work is also a wonderful source of professional friendships outside of your own law firm. So, you give, and you also receive. In terms of time management, I simply do what I can, when I can, and it will always be in fits and bursts. When I have a hearing coming up, that's where my focus is. When I'm on vacation, that's my focus. And when I have a bit of a slower patch, I'll jump in and help organize a conference or edit an article. Being in a large firm with a vibrant and enthusiastic team also means that I can have a more junior lawyer shadow me on some of these roles, help me direct traffic and manage correspondence, keep an eye on deadlines, and haul my attention back to something urgent if required.

Q Do you prefer acting as counsel or arbitrator? If you have a preference, why is that?

For now, I prefer the counsel role. I love designing the strategy of a case. I get a real burst of energy from working with witnesses and experts and learning more about an industry or a sector. I love being on my feet at hearings. I have also found that I really enjoy the management, planning, and strategy sides of building, and being responsible for, a global team. When it's time, I bury my nose in the exhibits too, but I've learned that I'm very much a people person, a project manager. I plan to make myself available for more arbitrator appointments someday, but right now, my focus is on the DLA Piper team and our clients.

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

I still believe in the basics – attention to detail, effective written and oral persuasion, and directness/honesty. Present the most thorough, persuasive case you can, and be direct about the weaker areas. Your credibility in front of the tribunal is key. The pandemic has also taught me – and this is true in any professional field – the importance of taking the time to check in on people, and the importance of being kind. You can command great results, but at the same time you can also be gentle with people, listen to what's going on with them personally and professionally, and be supportive. I don't profess to always get this right, but I'm learning.

Q What do you consider to be the main attractions of international arbitration, and the key reasons for recommending international arbitration?

The ability to enforce an award internationally is still the biggest drawcard, followed closely by the ability to tailor the procedure, control the breadth and cost of discovery, and maintain the confidentiality/privacy of the dispute.

Q COVID-19 significantly propagated the use of virtual hearings in international arbitration. Do you contemplate that international arbitrations will continue to be held virtually post COVID-19?

I think much will continue to be done virtually. I have an ICC case now where the Tribunal offered an in-person initial case conference and both sides expressed a preference that it be done virtually. In the end, no conference was even necessary as all procedural matters were agreed on the papers. I think there's a heightened appreciation of efficiency, and I think that this will remain. That said, for larger cases with a significant number of witnesses/experts, interpretation needs, and participants located all around the globe, in-person hearings will still be preferable. Having a headset on for 8 hours a day during a 14-day hearing just hurts your head. And keeping the tribunal (and yourself!) focused for long periods of time virtually is an undeniable challenge. Besides, it's nice to actually see each other again!

Q Based on your experience, do you have any advice for women seeking to further their careers in international arbitration, whether as counsel, as arbitrator, or both?

Having a number of trusted women friends and colleagues whom you can reach out to for advice or a gut check, is important. Ideally some of these will be more senior, some your peers, some in your workplace and some from outside, some with a family situation like yours, and some in completely different situations. There will be many moments – whether you're thinking about starting a family or want to ask the partner you work with for one of the cross examinations at an upcoming hearing, or where you want to make a push for promotion – when the advice of others who have also navigated (or who are currently navigating) a similar situation will really help. Even if all it tells you is how not to go about something! Also: podcasts ... I really appreciate HBR's "Women at Work" and "IdeaCast", and TED's "Work Life" with Adam Grant. They have so many good ideas and practical tips. Sometimes I relate profoundly to an issue being discussed, and other times it's a wake-up call to pay more attention to something that I've been blind to. In addition, at key junctures in your career, a professional or executive coach can provide valuable structure and strategy as you navigate new challenges. I'd also suggest getting good at networking and doing a lot of it early in your career. Later is actually harder, as the demands on your time multiply. And finally … be kind to yourself.

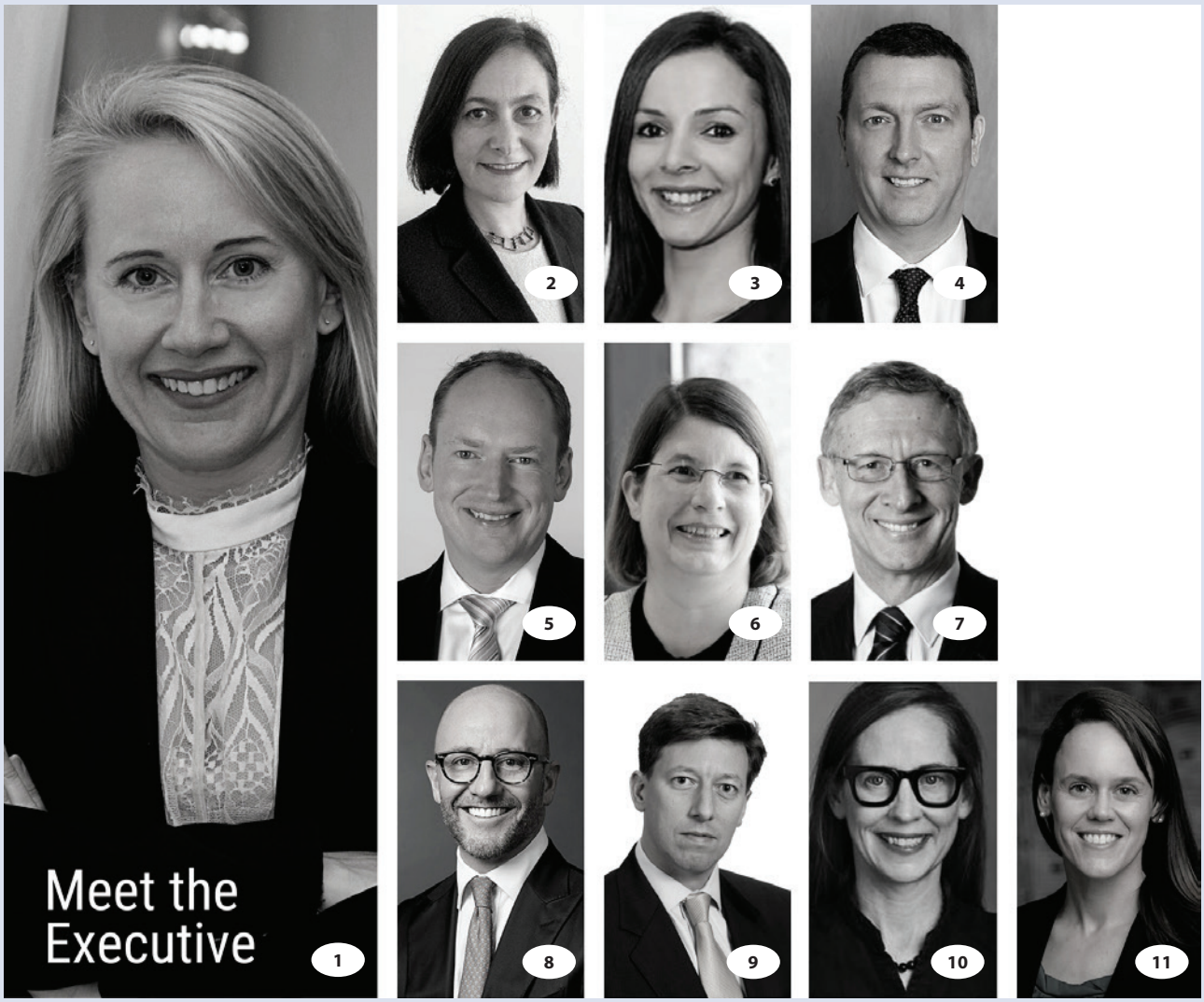
Q Lastly, I am sure that you have travelled extensively. What are the top spots on your travel list?

Oh dear. The list has just become so long during the pandemic. Iceland, Uzbekistan, Algeria, and I also want to take my parents on a glamping safari in Africa. I've always wanted to attend Wimbledon. Now that the kids are hiking age (there is no way I can carry them!), we're keen to do an RV trip through the Southern Utah National Parks. And Natalia and Finn still haven't seen snow! We had planned a ski trip in March 2020, and well …

News in brief

Meet the New Members of the ACICA Executive

Effective from 1 June 2022, we welcome a new ACICA Executive!



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

ACICA Events

Recent Events

***ACICA45 Panel Discussion: Building an Arbitration Profile* – 24 February 2022**

Moderators: Chris Holland, Senior Associate, King & Wood Mallesons | Imogen Kenny, Senior Associate, Herbert Smith Freehills

Speakers: Dr Vicky Priskich, Barrister and Arbitrator | Dr Benjamin Hayward, Senior Lecturer, Monash University | Chad Catterwell, Partner, Herbert Smith Freehills

***Australia's Investment Position in the Indo-Pacific* – 4 May 2022**

Host: Corrs Chambers Westgarth

Moderator: Deborah Tomkinson, Secretary-General, ACICA

Keynote: Senator the Honourable Amanda Stoker

Panellist: Joshua Paffey, ACICA Executive Director, Head of Arbitration & Partner, Corrs Chambers Westgarth | Shane Doyle QC, Barrister, Level Twenty Seven Chambers | Anthony Durkan, Strategic Advisor, JX Nippon Oil & Gas Exploration Co

***ACICA45 Panel Discussion: Engaging an Expert* – 12 May 2022**

Host: KordaMentha

Moderator: Domenico Cucinotta, Senior Associate, King & Wood Mallesons

Panellist: John Temple-Cole, Partner and Forensic Accounting Expert, KordaMentha | Jacqueline Koo, Associate Director and Forensic Accounting Expert, KordaMentha | Professor Chester Brown, Barrister, 7 Wentworth Selborne Chambers, and Professor of International Law and International Arbitration, University of Sydney | Tim Ash, Director, TBH – Engineering, Infrastructure, and Construction Delay and Disruption Expert.

***Arbitrator Appointments: A Practical Discussion on Tips and Trick* – 2 June 2022**

View Webinar

Chair: Julia Dreosti, Counsel, Clifford Chance

Speakers: Jeremey Chenoweth, Partner, Ashurst | Benjamin Hughes, Independent Arbitrator | Karina Travaglione, Senior Associate, Allen & Overy

***Arbitrator Workshop: Enhancing you ACICA Experience (Sydney)* – 8 June 2022**

Host: Jo Delaney, Partner, HFW

Speakers: Deborah Tomkinson, Secretary-General, ACICA | Erika Williams, Counsel, ACICA

Commentary: James Morrison, Partner, Peter & Kim | Judith Levine, Independent Arbitrator, Levine Arbitration

***ACICA45 Panel Discussion: The Art of Persuasion* – 9 June 2022**

Host: Chad Catterwell, Herbert Smith Freehills
Moderator: Ashley Chandler, Jones Day | Oliver Cook, Barrister, Level Twenty Seven

Speakers: Dr Sean Brady, Managing Director, Brady Haywood | Erika Williams, Independent Arbitration Practitioner, Williams Arbitration | Melissa Yeo, Partner-Elect, Ashurst

***Launch of the Third Edition of Commercial Arbitration in Australia Under the Model Law* – 22 June 2022**

Moderator: Lucy Zimdahl, Allens

Speakers: Georgia Quick, ACICA President | The Honourable Chief Justice James Allsop AO, Federal Court of Australia | Professor Doug Jones AO | Professor Jane Walker CM

ACICA Supported Events

Current Topics in International Arbitration, CIArb Australia and Federal Court of Australia – 29 March 2022

Energy and Resources Law Association, Energy Transition Conference – 4 May 2022

Secretariat: Australia Arbitration Virtual Conference – 3 June 2022

New Members

We welcome the following new members to ACICA:

Ordinary Member:

Hemmant's List

Fellows

Nick Hopkins QC

William Smith

Robert Heath QC

Cecilia Flores Rueda

Matthew Harvey QC

The Hon Tom Bathurst AC QC

Sarah Grimmer

Andrew Jeffries

Associates

Fiona Cameron

Julia Cheeseman

Joel Di Qual

Courtney Furner

Terry Palmer

Ramzy Mansour

Oluwakemi Olafuyi

Students

David Loynd

Benjamin Wilkie

Shauryaman Dhiman

Shruti Aggarwal

Prijwal Kumar

Abolfazl Khabiri

Wen Zhihao

Nandini Hirani

Riya Yadav

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 Essay Competition 2022

Topic: Arbitration in the Digital World

ACICA is pleased to launch its essay competition for 2022. Entries to the competition are invited and encouraged from students based in Australia who are studying a Bachelor, Juris Doctor or Masters level law degree in 2022, and to lawyers based in Australia in their first five years of practice. *There is no requirement to be an ACICA member.*

The topic of the 2022 Competition is ***Arbitration in the Digital World***. Some suggestions for potential areas of focus include arbitration in connection with:

- Cryptocurrency
- Cybersecurity
- Non-fungible tokens
- Blockchain arbitration platforms
- Digital arbitral awards
- Innovations to arbitral procedure.

Entries are not limited to the above topics and we invite entrants to explore other ideas connected with ***Arbitration in the Digital World***. However, due to the abundance of material on virtual hearings that has been proliferated in recent years, ACICA will not be accepting essays on the topic of virtual hearings.

SUBMISSION REQUIREMENTS

All entry submissions must:

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

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

Entry submissions are to be directed to the ACICA Secretariat at secretariat@acica.org.au. The final date for submissions is 31 July 2022 at 5pm (AWST).

JUDGING PANEL

Entry submissions will be judged by an eminent panel of international practitioners and academics, chaired by **Duncan Watson QC** (Partner, Quinn Emanuel, Hong Kong and Perth) and consisting of **Dr Anne Matthew** (Senior Lecturer, School of Law, Queensland University of Technology, Brisbane), **Daniel Meltz** (Barrister, 12 Wentworth Selborne Chambers, Sydney), **Rebecca Yorston** (Principal, LK Law, Adelaide), and **Raini Zambelli** (Barrister, List A Barristers, Melbourne).

ANNOUNCEMENT OF WINNER

The winner will be announced by 16 September 2022 and will be awarded a guest seat at the ACICA table for the 2022 ADC ADR Awards Night Dinner, a cash prize of AUD1,100.00, a year's complimentary ACICA Associate membership and publication of the entry submission in the December edition of the ACICA Review.

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

INQUIRIES

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

ACICA
Australian Centre for International Commercial Arbitration

Efficiency, Comity and Physical Hearings: Enforceability in International Arbitration

Inigo Kwan-Parsons
Solicitor, Herbert Smith Freehills

I The Right to a Physical Hearing in International Arbitration[1]

The International Council for Commercial Arbitration (**ICCA**) has recently issued a series of reports addressing the following question: Does a right to a physical hearing exist in international arbitration?[2] In undertaking its analysis of key legislation and relevant case law in multiple jurisdictions, the ICCA identified several jurisdictions whereby there is indeed a right to a physical hearing in international arbitrations, where those jurisdictions provide the *lex arbitri* of the arbitral proceedings.

Conversly, the ICCA's analysis also identified jurisdictions where the *lex arbitri* provides an arbitral tribunal the express power to order a virtual (i.e. not a physical) hearing.[3] In these jurisdictions, a potential issue arises: when the parties to the arbitration have agreed to a physical hearing, yet the arbitral tribunal has proceeded to hold a virtual hearing pursuant to the *lex arbitri*, how does this effect the enforceability of any award rendered?

This article considers the potential for arbitral awards rendered in such circumstances to be unenforceable in Australia.

II Conducting Efficient Arbitral Proceedings

As identified by the ICCA's reports,[4] there are jurisdictions which have legislation allowing for an arbitral tribunal to order that the parties' hearing(s) be held virtually, despite the parties having already agreed that any hearing(s) be held physically. Brief summaries of the relevant laws of those jurisdictions are provided below.

A. Ecuador

In Ecuador, the ***lex arbitri*** is derived from its Arbitration and Mediation Law 1997[5] (**AML**). The AML does not contain any provisions regarding the conduct of hearings, thus the right to a physical hearing is not codified in the AML.

However, article 37 of the AML does provides for the Organic Procedural Code 2015 (**OPC**) to supplement the provisions of the AML, where the AML is silent on such matters: [6]

> For what has not been foreseen by this Law, the rules of the Civil Code, Civil Procedure Code or Commercial Code and other related laws will apply to supplement arbitrations to be resolved under the applicable rules of law.

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1 Dispute Resolution Lawyer at Herbert Smith Freehills (Perth), LLM. Any view(s) expressed in this article are solely the author's and do not necessarily reflect the views of Herbert Smith Freehills.

2 https://www.arbitration-icca.org/right-to-a-physical-hearing-international-arbitration, retrieved on 27 April 2022.

3 Jurisdictions such as: Ecuador and Qatar.

4 See J R Orellana et al., 'National Report Ecuador' in *Does a Right to a Physical Hearing Exist in International Arbitration?*, at p 5; and T Williams et al., 'National Report Qatar' in *Does a Right to a Physical Hearing Exist in International Arbitration?*, at p 3-4.

5 Subsequently amended in 2015.

6 Although article 37 of the AML identifies the 'Civil Procedure Code' as the supplementary law, the Civil Procedure Code was repealed by the OPC in 2015, thus article 37 is understood to refer to the OPC.

Drawing upon the provisions of the OPC, article 86 stipulates that parties are obliged to appear in court personally, save for specific circumstances, including where a party is authorised to appear by way video conference. Further, article 4 of the OPC, stipulates that: '[h]earings may be held by videoconference or other means of communication of similar technology, when personal attendance is not possible' [emphasis added].

Accordingly, the AML and OPC when read together, have potential application for an arbitral tribunal to bypass the parties' agreement for a physical hearing, and order a virtual hearing, should it consider that personal attendance is not possible (assuming that article 86 of the OPC extends to requiring parties to appear before a tribunal also).[7]

B. Qatar

In Qatar, an arbitral tribunal's power to hold a virtual hearing derives from two key provisions of its Arbitration Law.[8] Article 24(1) of the Arbitration Law provides:

> The Arbitral Tribunal shall hold hearings in order to enable each Party to explain the subject-matter of the case and present its arguments and evidence or in order to hear their oral submissions, unless the Arbitral Tribunal considers written documents and statements as sufficient, or the Parties agree otherwise.

The second key provision, article 18 of the Arbitration Law, requires an arbitral tribunal 'shall also avoid any delays and unnecessary expenses to ensure a fair and swift means of resolution'.

Thus, article 24(1) expressly provides for a right to a hearing, but it does not require such hearing to be held physically, and article 18 grants an arbitral tribunal the power to conduct hearings in such a way to avoid 'any delays'. Together, these provisions empower an arbitral tribunal to disregard the parties' agreed arbitral procedure to have hearings held physically and proceed to having hearings held virtually.

As identified by the statutory regimes above, the apparent intent of such provisions is to favour the efficacy of arbitral proceedings over comity, by empowering a tribunal to hold virtual hearings despite an agreement between the parties that a physical hearing is required.

III Implications as to Enforcement in Australia

As alluded to above, where an arbitral tribunal has engaged its powers to have the hearing(s) held virtually instead of physically, there are potential risks to the enforcement of any award rendered.

Enforcement of a foreign arbitral award is governed by article 8 of the *International Arbitration Act 1974 (Cth)* (**IAA**). Article 8(1) recognises the principle of comity and reflects the overarching purpose of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (**Convention**) through stipulating 'a foreign award is binding by virtue of this Act for all purposes on the parties to the award', limited only by the exceptions specified under article 8(5) of the IAA.

Relevantly, for the purposes of this article, article 8(5)(e) of

7 The author notes that article 4 of the OPC does not stipulate whose personal attendance must be deemed impossible to allow the tribunal to order a virtual hearing (i.e. parties' counsel, a witness, the parties' representative etc).

8 Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law, English translation.

the IAA provides a basis for refusing enforcement on the grounds that the arbitral procedure was not conducted in accordance with the agreement of the parties:

> **8 Recognition of foreign awards**
>
> (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the award.
>
> [. . .]
>
> (5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:
>
> [. . .]
>
> (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

The application of article 8(5)(e) was considered by the Full Court of the Federal Court of Australia in its decision of *Hub Street v Energy City Qatar Holding Company,*[9] in which the enforcement of an arbitral award rendered by a tribunal seated in Qatar, was refused.[10]

The background to the enforcement proceedings were that a dispute arose between the parties in Qatar under a contract for the supply and installation of street lighting and street furniture in Energy City. The governing law of the contract was Qatari law. The contract included an arbitration clause providing, amongst other things, that the arbitration be seated in Qatar. Relevantly, the contract stipulated procedures for:

a. the appointment of a three-member arbitral tribunal, requiring each party to nominate an arbitrator, with the president of the tribunal to be selected by the two nominated arbitrators; and
b. all matters relating to the contract to be conducted in English.

The Respondent, *Energy City Qatar Holding Company* (**ECQH**), made an advance payment to Hub Street but subsequently reneged on the contract, and sought repayment of the advance payment. Instead of following the arbitral procedure as per the contract, ECQH applied to Qatar's Municipal Court for orders to appoint the three-person arbitral procedure. The Qatari Court granted the orders sought by ECQH and appointed a tribunal who ultimately rendered an award in favour of ECQH. The award was issued in Arabic, with an English translation. Hub Street boycotted both the Qatari Court proceeding and the arbitral proceedings. ECQH then sought to enforce the arbitral award in Australia. In the first instance, the Court found that the arbitral tribunal had not followed the parties' agreed procedure, but Hub Street had not suffered any unfairness as it had the opportunity to participate in the court and arbitral proceedings, so held the that the award was enforceable.[11] Hub Street appealed that judgment on two grounds:

a. first, whether enforcement of the award should be refused on the basis that Hub was not given proper notice of the arbitration proceeding and the tribunal was not constituted in accordance with the parties' agreement; and
b. second, where a ground for non-enforcement was established, whether enforcement should nevertheless be granted by virtue of the residual discretion conferred under section 8(5) of the IAA.

The Full Court granted Hub Street's appeal and refused to enforce the arbitral award.[12] In issuing the primary judgment, Stewart J noted that the failure to adhere to the parties' agreed procedure was indeed a ground for refusing enforcement pursuant s 8(5) of the IAA, reflecting article V(1)(d) of the Convention:[13]

> There is no detraction from the principle of comity, so understood, by not enforcing the award in this case on the basis that the Qatari Court acted on a

9 [2021] FCAFC 110.

10 For a fuller discussion on this decision it's ramifications, see: A Monichino QC and G Rossi, 'The Limits of 'Pro-Arbitration' Bias in the Enforcement of Foreign Awards: *Hub Street v Energy City Qatar Holding Company* [2021] FCAFC 110' (December 2021) *the ACICA Review* 50.

11 *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116 at [60].

12 At [14] as per Stewart J, Allsop CJ and Middleton J agreeing.

13 At [82].

> misapprehension of the true position in appointing the arbitral tribunal. There are several considerations that lead to that conclusion. First, there is no disrespect of, or lack of goodwill towards, the Qatari Court to recognise that it acted upon a misapprehension of what we now know the facts to be. Secondly, any exercise of jurisdiction of the Qatari Court to appoint arbitrators to the dispute of the parties rested on the parties' agreement, and since what they agreed was not followed the basis for the exercise of that jurisdiction was lacking; the failure goes to the very heart of the decision that ECQ would have this Court recognise. […] Hub Street has the right (subject to the question of discretion which I will come to) under the law of Australia to not have enforced against it here an arbitral award by an arbitral tribunal that was not composed in accordance with what it had agreed. Section 8(5)(e) of the IAA is a law of the Commonwealth of Australia that the Court cannot merely brush aside in the interests of comity; the Court is duty bound to apply it.
>
> [emphasis added]

After holding that a ground for refusing enforcement had been established, the Court then turned to the question of whether it should exercise its discretion to do so in light of the existence of material prejudice. The Full Court did exercise its discretion to refuse to enforce the award and in doing so, the Court made specific reference to article V(1)(d) of the Convention:[14]

> There is, however, no justification in the text and structure of the Convention to justify a broad-ranging or unlimited discretion to enforce even when one of the narrow grounds for non-enforcement is made out. There is, equally, no justification in the text and structure to conclude that there is no discretion, or to limit it to such an extent that in cases of irregularity that has caused no material prejudice the court must nevertheless not enforce the award.
>
> [emphasis added]

While the Full Federal Court's decision to refuse enforcement in *Hub Street v ECQH* was premised primarily on the failure to compose the arbitral tribunal in accordance with the parties' agreed procedure (i.e. the irregularity referred to by Stewart J), the judgment's significance regarding failure to adhere to the parties' agreed procedure cannot be overlooked. Following the reasoning of the Full Court, it is likely that where a tribunal fails to follow the parties' agreed procedure to hold a physical hearing, and instead orders a virtual hearing, any award rendered seeking to be enforced in Australia would face criticism by Australian Courts and risk being unenforceable.

IV Conclusion

For parties participating in an international arbitration, an important consideration to keep in mind is where any award rendered, that award will likely be sought to be enforced by the successful party. As indicated by *Hub Street v ECQH*, for an award to be enforceable in Australia, the tribunal rendering that award must have paid respects to the procedure agreed to by the parties participating in the arbitration, or risk falling foul of article 8(5)(e) of the IAA. Thus, in circumstances where the tribunal has utilised the relevant *lex arbitri* to circumvent the parties' agreement requiring a physical hearing be held, that award would likely be unenforceable in Australia.

14 At [102].

Reforming Investor-State Dispute Settlement in Australia

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Introduction

Over the last three decades, the Australian government has entered into a number of trade and investment treaties with countries across the Indo-Pacific and Europe. Those treaties have protected investors from unfair treatment, discrimination and expropriation and, in some cases, they have permitted investors to seek compensation for treaty violations through investor-State dispute settlement (ISDS). In recent years, Australia has updated a number of its older treaties. In July 2020, the Australian government commenced a comprehensive review and update of Australia's investment treaty framework in order to align it with contemporary best practice.

This review is an opportunity for Australia to modernise and extend its investment treaty framework, both to protect Australian investors abroad, and to encourage greater investment into Australia. This article examines Australia's existing treaty coverage, identifying those countries in which investors enjoy ISDS protections and those countries where investors would benefit from such protections. Against this background, it outlines the scope of the review being conducted by the Department of Foreign Affairs and Trade (DFAT), and considers the path towards Australia modernising its investment protections.

ISDS provisions in Australia's BITs and FTAs

ISDS is a mechanism included in an investment treaty (such as a bilateral investment treaty, or BIT) or a free trade agreement (FTA), or included in a contract between a foreign investor and a host State, enabling a foreign investor (whether an individual or an entity) to bring claims against the host State before an independent arbitral tribunal. It can offer important protections to foreign investors by ensuring a neutral forum for any claim, and the global enforceability of any award made against the State. To date, Australian investors have used Australia's BITs and FTAs to bring ISDS claims against States on at least seven occasions.[1]

1 Those seven being: *White Industries Australia Limited v The Republic of India*; *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Arbitral Tribunal, Case Nos ARB/12/40 and ARB/12/14); *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* (ICSID Arbitral Tribunal, Case No ARB/12/1); *Kingsgate Consolidated Ltd v The Kingdom of Thailand* (Permanent Court of Arbitration, Case No 2017-36); *Emerge Gaming Ltd and Tantalum International Ltd v Arab Republic of Egypt* (ICSID Arbitral Tribunal, Case No ARB/18/22); *Barrick (PD) Australia Pty Limited v Independent State of Papua New Guinea* (ICSID Arbitral Tribunal, Case No ARB/20/27); and *Prairie Mining Limited v Republic of Poland.*

Globally, Australia has a limited number of BITs and FTAs. Australia has:

- 15 BITs in force which provide for ISDS: with Argentina, Australia-China IPPA, Australia-the Czech Republic IPPA, Australia-Egypt IPPA, Australia-Hungary IPPA, Australia-Laos IPPA, Australia-Lithuania IPPA, Australia-Pakistan IPPA, Australia-Papua New Guinea IPPA, Australia-the Philippines IPPA, Australia-Poland IPPA, Australia-Romania IPPA, Australia-Sri Lanka IPPA, Australia-Turkey IPPA, and Australia-Uruguay IPPA;[2] and
- Ten FTAs in force that provide for ISDS: the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, the *China-Australia Free Trade Agreement*, the *Korea-Australia Free Trade Agreement*, the *Australia-Chile Free Trade Agreement*, the *Singapore-Australia Free Trade Agreement*, the *Thailand-Australia Free Trade Agreement*, the *ASEAN-Australia-New Zealand Free Trade Agreement*, the *Peru-Australia Free Trade Agreement*, the *Australia-Hong Kong Free Trade and Associated Investment Agreement*, and the I*ndonesia-Australia Comprehensive Economic Partnership Agreement (IACEPA)*,[3]

amongst several other FTAs that do not provide for ISDS.

In total, this framework provides ISDS protection to Australian investors in 30 countries.[4] By comparison, investors from the United Kingdom (UK) are afforded protection in more than double this number of countries under the UK's BITs.[5] While Australia's framework offers protection to Australian investors in some host States that are Australia's key trading partners, including China and Japan, it does not necessarily offer protection in countries that are the most common destinations for Australian investors investing abroad, or in countries where Australian investors are most likely to experience sovereign risk.

Australian investors in countries lacking the protection of a BIT or an FTA containing ISDS (such as Tanzania, Ghana, and the Democratic Republic of the Congo),[6] who seek specific protections, would need to negotiate those directly with the host government. This is particularly important for Australian companies investing in Africa and in Latin America, where a number of significant ISDS claims have been made in the past in the context of volatile political and policy environments.

The use of ISDS by Australian investors

As noted above, ISDS is an important tool for ensuring that foreign investors can enforce substantive treaty protections against their host States. However, there is an ongoing debate as to whether countries should include ISDS provisions in their BITs and their FTAs. Opponents of ISDS recommend excluding the mechanism altogether on the basis that the patchwork of applicable rules and procedures creates uncertainty, and leads to the inconsistent interpretations of treaty standards across different tribunals. National governments also fear baseless but costly claims and exorbitant awards of compensation arising from the introduction of health, environmental, or other public interest measures.[7]

Australian investors have submitted to the government that robust ISDS mechanisms are key to ensuring that investment protections conferred by treaties are actually enforceable.[8] This enforceability is especially important for

2 For details, and copies of the relevant agreements: see Australian Government, 'Australia's Bilateral Investment Treaties', *Department of Foreign Affairs and Trade* (Web Page) <https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties>.

3 For details, and copies of the relevant agreements: see Australian Government, 'Investor-State Dispute Settlement', *Department of Foreign Affairs and Trade* (Web Page) <https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement>.

4 Argentina, China, the Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, the Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay, Singapore, Thailand, Chile, Brunei Darussalam, Cambodia, Indonesia, Myanmar, Vietnam, Republic of Korea, Hong Kong, Canada, Japan, Mexico, and Peru.

5 This article has not focussed on the UK's FTAs, as prior to Brexit taking effect these were negotiated by the European Union.

6 These African countries are host to some of the largest numbers of Australian investors, particularly Western Australian-based mining companies.

7 See e.g. Possible reform of Investor-State dispute settlement (ISDS): Comments by the Government of Indonesia, Note by the Secretariat, United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) A/CN.9/WG.III/WP.156, 37th sess (9 November 2018) [8], [9] <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/075/93/PDF/V1807593.pdf?OpenElement>. Minerals Council of Australia, *Submission to the Department of Foreign Affairs and Trade Review of Australia's Bilateral Investment Treaties (Submission) (29 September 2020) 9.*

8 See e.g. Minerals Council of Australia, *Submission to the Department of Foreign Affairs and Trade Review of Australia's Bilateral Investment Treaties (Submission) (29 September 2020) 9.*

investors operating in emerging markets where domestic governance and capacity issues can lead to unsatisfactory commercial and legal outcomes when disputes arise.

Frequently, ISDS offers the only effective remedy available for wrongs done to a foreign investor by a host country. Australian companies, for example, have used ISDS to claim compensation for decisions of foreign courts that harm the companies' projects in those countries.

The cases of *White Industries* and *Tethyan Copper* are two prominent examples:

- In 2010, White Industries Australia Limited brought the first ever ISDS claim by an Australian company against a foreign State. White Industries claimed that judicial delays in proceedings to enforce an arbitral award rendered under the ICC International Court of Arbitration rules, which exceeded some 9 years, violated India's obligations under the Australia-India BIT.[9] White Industries succeeded, and was awarded US$4.1 million in compensation.
- In 2012, the Australian joint venture Tethyan Copper Company Pty Ltd brought an ISDS claim against Pakistan, arising out of Pakistan's decision to refuse the claimant's local operating subsidiary's application for a mining lease in respect of the Reko Diq copper-gold mine. Tethyan alleged breach of the Australia-Pakistan BIT. Tethyan succeeded, and was awarded US$5.8 billion in compensation.[10]

Australia's future ISDS directions

In recent years, Australia's focus has been on negotiating FTAs. This, arguably, has limited the scope of Australia's ambition to protect its investors abroad through ISDS. FTAs are pursued on the basis of two-way trade flows. That calculation prioritises partner countries representing a source of inward foreign direct investment for Australia, and is less likely to prioritise countries where Australian investors focus their outward investment.

DFAT's BIT review provides an opportunity to rethink Australia's approach to stand-alone investment treaties, and an opportunity to focus on the particular interests of Australian investors. BITs can offer protection for Australian companies operating in countries with a high degree of inward foreign direct investment, but which lack the strong two-way trade that is required to encourage Australia to pursue an FTA.

For example, many Australian mining companies have significant investments in African countries. These investments provide an important contribution to developing economies. They supply critical capital that is used to fund education, healthcare and infrastructure. They also contribute important knowledge to local economies that is required to monetise key natural resources. However, Australia's existing BITs and FTAs provide no protection for these investors, with the effect that companies who want such protection from sovereign risk will need to negotiate directly with their host State.

History has demonstrated the importance of these protections. The United Nations Conference on Trade and Development, for example, records that some 150 ISDS claims have been filed against African countries since 1987.[11] Egypt, Libya, and Tanzania are amongst the countries recently confronted with significant ISDS claims.[12]

Australian investors would benefit from greater BIT and FTA coverage with countries in Africa, for example with the Democratic Republic of the Congo (DRC), Senegal, and Tanzania.[13] Such an expansion of Australia's treaty

9 *White Industries Australia Limited v The Republic of India*, Award, 30 November 2011.

10 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan, ICSID Arbitral Tribunal, Case No ARB/21/1, Award, 12 July 2019.*

11 United Nations Conference on Trade and Development, 'Investment Dispute Settlement Navigator', Investment Policy Hub (Web Page, 31 December 2021) <Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub>.

12 Consider, for example, the recent action commenced against Egypt by an Australian-based investor in *Emerge Gaming Ltd and Tantalum International Ltd v Arab Republic of Egypt* (ICSID Arbitral Tribunal, Case No ARB/18/22). According to the United Nations Conference on Trade and Development's Investment Dispute Settlement Navigator, Egypt has been the Respondent State to 46 ISDS claims since 1998; Libya to 20 claims since 2008; and Tanzania to nine claims since 2005.

13 To note, the DRC, Tanzania, and Senegal have had at least four, nine, and four ISDS claims brought against them respectively. For the DRC, these are: *Patrick Mitchell v Democratic Republic of the Congo* (ICSID Arbitral Tribunal, Case No ARB/99/7); *Miminco LLC v Democratic Republic of the Congo* (ICSID Arbitral Tribunal, Case No ARB/03/14); *African Holding Company of America, Inc and Société Africaine de Construction au Congo SARL v Democratic Republic of the Congo* (ICSID Arbitral Tribunal, Case No ARB/05/21); *American Manufacturing & Trading, Inc v Republic of Zaire* (ICSID Arbitral Tribunal, Case No ARB/93/1). For Tanzania, these are: *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* (ICSID Arbitral Tribunal, Case No ARB/05/22); *Standard Chartered Bank v United Republic of Tanzania* (ICSID Arbitral Tribunal, Case No

regime would pose minimal risk of ISDS claims against Australia, given Australia's strong legislative and judicial processes, the inclusion of express safeguards in investment treaties, and the limited inward foreign direct investment flowing from African investors into Australia.

New protections for Australian investors do not necessarily create new risks for Australia.

A renewed focus on ISDS protections in treaties need not expose Australia to a greater risk of claims. Australia has already adopted particular drafting techniques to ensure greater certainty against the risks posed by ISDS claims in its FTAs and in its re-negotiated BITs. These techniques, including the following types of provisions, aim to overcome concerns raised in relation to ISDS provisions and the inconsistent interpretation of treaty standards by tribunals:

- expressly re-iterating a country's right to regulate for, and the exclusion of ISDS claims in relation to, public health measures;
- expressly including early dismissal procedures to deal with claims that are manifestly without merit;
- including denial of benefits provisions to exclude claims by investors that lack substantial business activities in their purported home State;
- limiting forum shopping; and
- setting out detailed rules on arbitrator ethics and conflicts of interest.

These safeguards are expressly reflected in Australia's modern FTA investment chapters. In recent years, Australia has also reviewed and updated a number of older BITs that contain ISDS, to expressly reflect such provisions, including:

- Uruguay: negotiations commenced in December 2016 to update the *Australia-Uruguay Investment Promotion and Protection Agreement* (**IPPA**).[14] Australia and Uruguay have since agreed to terminate that BIT upon entry into force of an updated agreement, which was signed on 5 April 2019 and which entered into force on 23 January 2022.[15]
- Mexico: the *Australia-Mexico IPPA*[16] was terminated on 30 December 2018, following the entry into force (subject to transitional arrangements) of the CPTPP to which both Mexico and Australia are parties, and which contains ISDS.
- Vietnam: the *Australia-Vietnam IPPA*[17] was terminated on 14 January 2019, following the entry into force (subject to transitional arrangements) of the *CPTPP* to which both Vietnam and Australia are parties, and which contains ISDS.
- Hong Kong: the *Australia-Hong Kong IPPA*[18] was terminated on 17 January 2020, following the entry into force of the Hong Kong FTA package, which contains ISDS.
- Peru: the *Australia-Peru IPPA*[19] was terminated on 11 February 2020, following the entry into force of the

ARB/10/12); *Agro EcoEnergy Tanzania Limited, Bagamoyo EcoEnergy Limited, EcoDevelopment in Europe AB, EcoEnergy Africa AB v United Republic of Tanzania* (ICSID Arbitral Tribunal, Case No ARB/17/33); *Sunlodges Ltd (BVI) and Sunlodges (T) Ltd v United Republic of Tanzania* (Permanent Court of Arbitration, Case No 2018-09); Ayoub-Farid Michel *Saab v United Republic of Tanzania* (ICSID Arbitral Tribunal, Case No ARB/19/8); *Paul D Hinks, Symbion Power Tanzania Limited and Richard N Westbury v United Republic of Tanzania* (ICSID Arbitral Tribunal, Case No ARB/19/17); *Nachingwea UK Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel Limited v United Republic of Tanzania* (ICSID Arbitral Tribunal, Case No ARB/20/38); *Winshear Gold Corp v United Republic of Tanzania* (ICSID Arbitral Tribunal, Case No ARB/20/25); *Montero Mining and Exploration Ltd v United Republic of Tanzania* (ICSID Arbitral Tribunal, Case No ARB/21/6). For Senegal, these are: *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal* (ICSID Arbitral Tribunal, Case No ARB/15/21); *Millicom International Operations BV and Sentel GSM SA v Republic of Senegal* (ICSID Arbitral Tribunal, Case No ARB/08/20); *VICAT v Republic of Senegal* (ICSID Arbitral Tribunal, Case No ARB/14/19); *Ibrahim Aboukhalil v Republic of Senegal*.

14 Done at Punta del Este on 3 September 2001, entered into force 12 December 2002.

15 *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*. Done at Canberra on 5 April 2019, entered into force 23 January 2022.

16 *Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments*, and *Protocol*. Done at Mexico City on 23 August 2005, entered into force 21 July 2007.

17 *Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments*. Done at Canberra on 5 March 1991, entered into force on 11 September 1991.

18 *Agreement between the Government of Australia and the Government of Hong Kong on the Promotion and Protection of Investments*. Done at Hong Kong on 15 September 1993, entered into force on 15 October 1993.

19 *Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments*, and *Protocol*. Done at Lima on 7 December 1995, entered into force on 2 February 1997.

Peru-Australia Free Trade Agreement (subject to transitional arrangements), which contains ISDS.

- Indonesia: the *Australia-Indonesia IPPA* was terminated on 6 August 2020, following the entry into force of the *IACEPA*[20] on 5 July 2020. Australian investors are now protected in Indonesia under that instrument.

DFAT's BIT framework review

In July 2020, DFAT commenced a comprehensive review of Australia's BIT framework to ensure that it reflects contemporary best practice. That review is set to conclude by July 2024. DFAT recognises that its approach must be tailored to each treaty party, taking into account Australia's relationship with that country, the dominant type of investment originating from that country, and the legal risks specific to that BIT. DFAT has identified a range of methods for the review and reform of BITs, including:

- full renegotiation or replacement;
- making amendments to specific provisions;
- negotiating and adopting Joint Interpretative Notes;
- adopting Unilateral Interpretive Notes;
- termination;
- continuation; or
- replacement of a BIT with an FTA chapter, that may or may not contain ISDS.

Stakeholder submissions were open until 30 September 2020, and 27 submissions were made.[21] Interested parties included law firms, universities, and industry councils. Submitters were invited to respond to a number of specific queries, and could also raise other relevant matters. The responses addressed a variety of issues including: the utility of current BITs to Australian companies investing overseas; concerns regarding older-style BITs; and suggested amendments to address those concerns.[22]

What's next?

ISDS is an important tool for protecting investors. It is particularly important to ensure that investors feel comfortable investing in emerging markets, where political, economic or judicial systems may still be maturing but where local economies depend on foreign investment.

For Australia, the inclusion of ISDS provisions in BITs and FTAs offers significant protections for Australian investors abroad. At present, Australia has limited BIT and FTA coverage in some key foreign investment destinations. DFAT's review into Australia's BIT framework provides an opportunity for Australia to consider expanding its coverage, with agreements that reflect modern best practice, and that balance the interests and concerns of both States and investors.

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20 *Agreement between the Government of Australia and the Government of the Republic of Indonesia on the Promotion and Protection of Investments*, and *Exchange of Letters*. Done at Jakarta on 17 November 1992, entered into force on 29 July 1993.

21 Department of Foreign Affairs and Trade, Australian Government, Review of Australia's Bilateral Investment Treaties (Discussion Paper, 2020) 4; DFAT has indicated that additional submissions may have been received by authors requesting that they remain confidential, in which case the total number of submissions may actually be higher.

22 Department of Foreign Affairs and Trade, 'Discussion Paper: Review of Australia's Bilateral Investment Treaties', *Australia's Bilateral Investment Treaties* (Web Page) <https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties#submissions>.

Exercise An Existing Muscle: Activate the Role of the Court of Arbitration for Sport

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Russia's invasion of Ukraine has transgressed the global stage and played out on the sporting field. FIFA and Europe's regional body, UEFA, have suspended Russian teams and clubs from international competitions. In March 2022, the Court of Arbitration for Sport (**CAS**) rejected a request from Russia's football team to freeze the suspension. Russia has since been kicked out of qualifying for this year's World Cup, Paralympic Winter Games in Beijing, Wimbledon and barred from qualifying for the 2023 Women's World Cup. Of course, Russia has vowed to fight some of this punishment. Nearly a dozen complaints have been filed with CAS already.

Recent geo-political events stress the importance of CAS providing a dispute-resolution forum that is independent and impartial, making it an opportune time to revisit one of the harshest criticisms levelled against CAS – that the unilateral and repeat appointment of arbitrators from the closed-list system (a feature peculiar to CAS) creates systemic bias and undermines its integrity. It is hoped that in theorizing some potential points of reform, this paper makes space for a more productive dialogue as to the capability of CAS in efficaciously (and consistently) resolving sports disputes. Now more than ever, procedural fairness must be secured if CAS is to stand on the podium as the 'world's supreme court for sports'.

Issue

The closed-list system is a defining feature which arguably curtails the independence and impartiality of CAS.[2] Members on the closed-list are appointed by the International Council of Arbitration for Sport (**ICAS**).[3] ICAS is composed of representatives of sports governing bodies[4] and is also responsible for the administration and financing of CAS.[5] Critics contend that CAS is therefore seen to be perfectly circular.[6] By comparison, the Swiss Federal Tribunal (**SFT**) argued that in arbitration, a

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2 Louise Reilly, 'An Introduction to the CAS & The Role of National Courts in International Sports Disputes' (2012) 1(5) *Journal of Dispute Resolution* 63, 65.

3 *CAS Code* ss S3, 6(4).

4 *CAS Code* s S4.

5 *CAS Code* s S6(6).

6 Despina Mavromati and Matthieu Reeb, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials* (Kluwer Law International, 2015) 588; Stephen Schill, 'Five Times Transparency in International Investment Law' (2014) 15(3) *The Journal of World Investment and Trade* 369; Rachelle Downie, 'Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport' (2011) 12(1) *Melbourne Journal of International Law* 1, 12; A & B v IOC (2003) 129 III BGE 445 (27 May 2003) (Federal Supreme Court of Switzerland.

closed-list system is 'the rule rather than the exception',[7] and it is justified because it ensures sports-related disputes are consistent, fast and issued by sports experts.[8] Under the present status quo, this rationale is persuasive only insofar as one believes that efficiency should be prioritised over transparency and impartiality.

Even accepting that it is not uncommon, there is an argument to be made that sports arbitration is not truly specialised enough to justify a closed-list, which is better suited to highly-specialised tribunals such as the Grain Trade Australia.[9] While the existing status quo may be efficient,[10] perhaps this is symptomatic of the *personalities* on the closed-list, as opposed to CAS's procedure. This inference is strengthened by the fact that a small number of arbitrators deliver a disproportionately large number of decisions. In 2008, 17 sports arbitrators held approximately 45 percent of all appointments.[11] One innocuous explanation for the inequitable distribution of appointments could be that because these individuals were appointed when CAS first started, they have now established a social and professional standing which has translated into repeat appointments.[12] This in turn, has solidified their reputation, and resulted in further reappointment. The issue is cyclical and reinforced by the '*The CAS Code of Sports-Related Arbitration*' (**the Code**)[13] which both places no limits on tenure,[14] and empowers ICAS as the appointing body to create the list from 'names and qualifications [who] are *brought to the attention* of ICAS'.[15] Cynics, therefore, have some standing when they call arbitrators 'hired guns'.[16] As a side, it would be reasonable to similarly be concerned with whether there is diversity in representation (in both the expertise in sport, variance in nationality, gender, and socio-economic background).

Further issues abound. Front of mind is that that funding structures between CAS and the International Association of Athletics Federations and International Olympic Committee overlap. In the *Pechstein v Switzerland* decision an athlete sought to challenge sanctions imposed by CAS, for the reason that CAS allegedly lacked sufficient independence and/or impartiality. When the appeal of the CAS Award to the SFT was rejected, Pechstein appealed to the European Court of Human Rights. Pechstein complained, *inter alia*, about: the way CAS was funded; the lack of arbitrators appointed by athletes, rather than sporting federations; and the absence of any public hearing of the arbitral process. Although the arguments on funding were ultimately rejected, it was accepted that a public hearing should have occurred.[17] Further, when the German Bundesgerichtshof (German's highest court) heard similar arguments, it pointed out that issues pertaining to

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7 Born (n 33) 1752; See further *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 574 UNTS 159 (entered into force 14 October 1966) art 14(1); Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 255, 263; Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009) 252-253; Charles Brower and Charles Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded' (2013) 29(1) *Arbitration International* 7, 12-13.

8 Kane (n 31) 9; Downie (n 43) 7; Simon Gardiner et al, Sports Law (Cavendish Publishing, 3rd ed, 2006) 137; Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (Speech, University of Miami School of Law, 29 April 2010) 11; Gundel v Federal Equestrian Federation, *CAS Digest* (Digest No 1 of 1993) 115.

9 'Grain Trade Australia's Dispute Resolution Rules' (*Grain Trade Australia*) (Web Page, June 2014) <https://www.graintrade.org.au/sites/default/files/file/Dispute%20Resolution/GTA%20Dispute%20Resolution%20Rules%20Final%20June%202014.pdf> art 6.2; See further, Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 1456.

10 *4A_506/2007* [3.1.1]; Philippe Cavalieros and Janey Kim, 'Can the Arbitral Community Learn from Sports Arbitration?' (2015) 32(2) *Journal of International Arbitration* 237, 246; Waincymer (n 43) 255, 262; *Larissa Lazutina v International Olympic Committee* (Arbitral Award, Court of Arbitration for Sport, CAS 2002/A/370, 29 November 2002); Reilly (n 39) 65.

11 Lindholm (n 1) 233.

12 See, for example, Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) *The European Journal of International Law* 387, 406; Lindholm (n 1) 226.

13 See, 'Code of Sports-Related Arbitration' (*Court of Arbitration for Sport*) (Web Page, 1 January 2019) <https://www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf> ('*CAS Code*').

14 *CAS Code* s S5.

15 *CAS Code* s S14 (emphasis added).

16 Brower and Rosenberg (n 44) 15; Will Sheng Wilson Koh, 'Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges' (2017) 34(4) *Journal of International Arbitration* 711, 723; Christopher Drahozal and Richard Naimark, *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law International, 2005) 267.

17 *Pechstein v Switzerland* [2018] (67474/10) Eur Court HR.

independence (or lack thereof) were symptomatic of the structure and membership of CAS.[18]

While there is certainly room for improvement, one might challenge the claim that repeat appointment *automatically* increases partiality. This begs the question; can arbitrators truly ever be 'gowned robots'[19] perfectly indifferent to their appointer's concerns? Unlikely. The focus must instead be on implementing sufficient safeguards to ensure that justice is not only done, but seen to be done.

Perhaps this is optimistic. Admittedly arbitration is a lucrative occupation.[20] Repeat appointment has obvious perks. Yet arbitrators (surely) remain cognisant that their reputation depends on their capacity to exercise independent judgement. Put another way, factors which might drive a susceptibility to influence, also furnishes the incentive to remain independent. Indeed, the literature overwhelmingly suggests that arbitrators are considered more reputable, and more likely to be selected (and re-appointed) if they remain truly independent, than for any associated 'benefits' that may flow from impropriety.[21] In this prism, finding a tension between the desire for reappointment, against the duty of independence and impartiality is then a false dilemma.

Supporters would argue that CAS's procedural safeguards ensure a fair hearing: arbitrators must sign a declaration affirming their independence and impartiality,[22] the Panel must provide reasons for their decisions,[23] and a Party may seek to annul an award if an arbitrator is found to be partial.[24] Many, however, are sceptical of arbitrators self-regulating.[25] Albeit pessimistic, this is supported by empirical evidence which demonstrates that the internal appeals division rarely sets aside CAS Awards.[26] Between 1989 and 2013, only 9.52% of applications challenging an arbitrator's independence were successful.[27] (One can plausibly question whether this statistic may be worse if it were broken down by the socio-economic position of the aggrieved party). On the other hand, it might be reductionist to use this statistic to conclude that the system is ineffective. After all, academics point to the size of this statistic to demonstrate that bias challenges are baseless tactics deployed in arbitration to merely 'play dirty'[28] to either delay proceedings or resist enforcement of a resulting Award.[29]

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18 *Deutsche Eisschnellauf-Gemeinscharft v International Skating Union* (Federal Court of Justice, 7 June 2016) (Web Page) <https://www.isu.org/claudia-pechstein-case/2082-german-supreme-court-decision/file> para. [50].

19 Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test* (Kluwer International Law, 2009) 264.

20 Catherine Rogers, 'The Politics of International Investment Arbitration' (2014) *Santa Clara Journal of International Law* 223, 226; See also, Koh (n 52) 717.

21 Mourre (n 56) 385; Koh (n 52) 717-9; Brower and Rosenberg (n 52) 15-16; Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25(1) *ICSID Review* 339, 349; *Caratube International Oil Company LLP v MR Devincci Sarah Hourani v Republic of Kazakhstan (Decision on the Proposal for Disqualification of Mr Bruno Boesch*) (ICSID Arbitral Tribunal, Case No ARB/13/13, 20 March 2014) [31]; William Park, 'Arbitrator Integrity' in Michael Waibel et al (ed) The Backlash Against Investment Arbitration (Kluwer Law International, 2010) 209; Susan Franck et al, *International Arbitration: Demographics, Precision and Justice in Legitimacy: Myths, Realities, Challenges, ICCA Congress Series* (Kluwer Law International, 2015) 117; Charles Brower and Stephen Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9(1) *Chicago Journal of International Law* 471, 492; Luke Sobota, Repeat Arbitrator Appointments in International Investment Disputes in Chiara Giorgetti, *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill Nijhoff 2015) 294; *Tidewater Inc v Bolivarian Republic of Venezuela (Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator*) (ICSID Arbitral Tribunal, Case No ARB/10/5, 23 December 2010) [64].

22 *CAS Code* ss S5, S18.

23 Ibid s R46.

24 Ibid s R34.

25 Soboto (n 57) 295-6; Helen Lenskyj, 'Gender, Athletes' Rights, and the Court of Arbitration for Sport' (Emerald Group Publishing, 2018) 29; Jan Paulsson, 'Ethics, Eliticism, Eligibility' (1997) 14(4) *Journal of International Arbitration* 1, 14; Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer Law International, 2012) 269, 344; *Tidewater Inc v Bolivarian Republic of Venezuela* (n 57) [13].

26 See, eg, Downie (n 43) 9, 12; Gardiner (n 44) 243; *A & B v IOC* (2003) 129 III BGE 445 (27 May 2003) (Federal Supreme Court of Switzerland); *X & Y, 4A_506/2007* (Federal Supreme Court of Switzerland, 1st Civil Chamber, 20 March 2008); Antonio Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1 *Journal of International Dispute* Settlement 217, 219; Sergei Gorbylev, 'A Short Story of an Athlete: Does He Question Independence and Impartiality of the Court of Arbitration for Sport?' (2013) 12(1) *International Sports Law Journal* 294, 294; Christoph Schreur, *The ICSID Convention: A Commentary* (Cambridge University Press, ed, 2009) 1201; Lucy Reed, Jan Pualsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International, 2 ed, 2011) 134.

27 Philippe Cavalieros and Janey Kim, 'Can the Arbitral Community Learn from Sports Arbitration?' (2015) 32(2) Journal of International Arbitration 237, 244.

28 Luttrell (n 54) 4.

29 Margaret Moses, The Principles and Practice of International Commercial Arbitration (Cambridge 2008) 141.

The insular and privately regulated nature of CAS was evidenced in *4A_506/2007*.[30] There, the SFT found no issue with the chairman, the respondent's party-appointed arbitrator and their counsel, all being members of the same professional sporting organisation.[31] In dicta, the SFT held that the disputant, '*could not simply rely* on the general statement of independence made by each arbitrator on the *ad hoc* form'.[32] Pausing here, respectfully, to imply that the onus of due diligence should fall onto the athlete, is somewhat ignorant of reality. Not to mention, for one-time CAS users, it is practically impossible. Putting arguments of cost and resources aside, confidentiality is a defining feature of arbitration.[33] Therefore, the information asymmetry (often between sporting federations and individual athletes) is compounded by the fact that sporting federations are continuously before CAS and amass a repository of otherwise confidential decisions.[34] Therefore, this proactive obligation to undertake excessive and invasive searches to verify an arbitrator's independence effectively renders the declaration requirements meaningless.[35] On another view, the SFT's conservative approach in *4A_506/2007* demonstrates that institutions are aware that wily defendants are susceptible to cry bias as a 'dirty' attempt to resist enforcement. In sum, while there is some truth to the criticisms levelled against the closed-list, it would be an overreaction to overhaul the system. There must instead be modifications to the process.

Recommendations

Turning first to CAS's appointment procedure. As the appointment body for CAS, the ICAS membership should not be imbalanced against athletes. S4 of the Code must be amended to mandate that ten – and therefore half – of ICAS members are former professional athletes or advocates. Also, R33 of the Code which empowers ICAS to determine CAS' arbitrators must be amended to develop an interview protocol and compel the publication of: (a) the name of the institution/body who submitted the nomination; (b) questions asked in the pre-appointment interview; and (c) an explanation justifying the arbitrator's suitability. These are straightforward, cost-effective and pragmatic solutions. Certainly, it will be time-intensive to complete this due-diligence reporting, but in the long term this is offset by increased transparency, which would in turn legitimise the closed-list system. Even so, an open-source data system with the arbitrators' prior contractual relationships would go some way towards equalising the information asymmetry between the well-resourced, and less so users of CAS. Artificial intelligence could be used to scrape and analyse this data to drive efficiencies, and thus satisfy CAS's objectives. This solution is practically possible, and has been employed by other tribunals.

Transparency is advantageous for all involved. For the arbitrator it rebukes the complaint that they are partial to its appointed party. For the tribunal and opposition, it secures procedural fairness. Reticence to absorb the financial and administrative burdens of effectuating this reform are easily rebutted when considering that in the long-term this amendment militates against the duplicity in time and cost incurred when a dissatisfied party (eventually) seeks to annul an award.

The final recommendation responds to *4A_506/2007*. The liberally drafted R33 of the Code must be revised to adopt the IBA Guidelines[36] which includes a clear list of circumstances, colour-coded in order of severity, that endanger an arbitrators' impartiality and independence such as to either warrant disclosure by or disqualification of the arbitrator. Or, to put it in the language of the IBA Guidelines, what was previously 'green' may now be turning 'orange'. However, the criticism levelled against

30 '4A_506/2007' (Federal Supreme Court of Switzerland) (Web Page, 20 March 2008) <http://www.swissarbitrationdecisions.com/sites/default/files/20%20Mars%202008%204A%20506%202007.pdf> ('4A_506/2007').

31 Ibid [3]-[3.1.2].

32 Ibid [3.2] (emphasis added).

33 Jan Paulsson, 'Assessing the Usefulness and Legitimacy of CAS' in Jörg Risse, Guenter Pickrahn, et al (eds) *German Arbitration Journal* (Kluwer Law International, 2015) 263, 267.

34 Bersagel (n 19) 189; Downie (n 43) 23; Adam Samuel and Richard Gearhart, 'Sporting Arbitration and the International Olympic Committee's Court of Arbitration for Sport' (1989) 6(4) *Journal of International Arbitration* 39, 40.

35 Rigozzi (n 2) 238; Downie (n 43) 11.

36 International Bar Association Council, *IBA Guidelines on Conflicts of Interest in International Arbitration*, 23 October 2014.

the IBA Guidelines – as being 'lazy'[37] in failing to provide a holistic assessment – can be applied by analogy. Additionally, if bias can truly be inferred from a number, then surely that number should be based on a percentage of an arbitrator's total appointments? The same number of repeat appointments will mean a lot more to a newly minted, than to a seasoned arbitrator. Comparatively, defenders maintain that the mechanical application of clear standards is far superior to a nuanced multifactorial approach that is opaque, inconsistent[38] and therefore uncertain[39] – features all contrary to the ethos of CAS. Needless, the stronger position is to find that the IBA Guidelines have proven successful and enjoy 'wide usage and recognition'.[40] On balance, they provide a suitable framework, and point of reform.

Conclusion

This article has disrupted the view that the unconventional features of CAS undermine its effectiveness. Recent events demonstrate that sporting disputes are epicenters of geo-political tension. And, since CAS is uniquely placed to offer a unified and global system for resolving sports-related legal disputes, now more than ever, must its utility not be undermined. To remain fit for purpose, two possible reforms have been suggested. First, to address the concern that CAS ignores procedural rights, the introduction of an independent external regulator was suggested. Second, concerns pertaining to independence and impartiality could be offset by implementing a transparent, publicly accessible information suppository.

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37 Susan Franck et al, International Arbitration: Demographics, Precision and Justice in *Legitimacy, Myths, Realities, Challenges, ICCA Congress Series* (Kluwer Law International, Albert van den Berg, ed, 2015) 79.

38 *Devas (Mauritius) Ltd v Republic of India (Decision on the Respondent's Challenge to the Honourable Marc Lalonde as Presiding Arbitrator and Professor Francisco Orrego Vicuña as Co-Arbitrator)* (Permanent Court of Arbitration, PCA Case No 2013-09, 30 September 2013) cf OPIC Karimum Corp v Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Professor Philippe Sands (ICSID Arbitral Tribunal, Case No. ARB/10/14, 5 May 2011).

39 Downie (n 43) 26; Anne Hoffman, 'Duty of Disclosure and Challenge of Arbitrators: The Standard Applicable under the New IBA Guidelines on Conflicts of Interest and the German Approach' (2005) 21(3) *Arbitration International* 427, 430.

40 '2018 International Arbitration Survey: The Evolution of International Arbitration' (*White & Case*) (Web Page, 2018)<https://www.whitecase.com/sites/whitecase/files/files/download/publications/2018-international-arbitration-survey.pdf> 37; See, further *OPIC Karimum Corp v Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify Professor Philippe Sands (ICSID Arbitral Tribunal, Case No. ARB/10/14, 5 May 2011) [40], [55]; *Cofely Ltd v Anthony Bingham* [2016] EWHC 240 [104].

International Arbitration Reform in the Indo-Pacific: First-Hand Lessons from the Field

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An anomaly evident to any practitioner engaged in the conduct of international arbitration cases in the Indo-Pacific region over the last decade was why so few of the 14 states comprising the South Pacific were signatories to the *United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958* (**Convention**). The South Pacific was remarkable for being one of the last geographical zones where, *en globo*, the Convention had failed to take root.[1] Along with the increase in foreign investment in the region there was a growing case for change.

Impetus for reform

This lacuna in international arbitration in the South Pacific was taken up by the Asian Development Bank (**ADB**) which, along with the World Bank, is actively engaged in law reform to strengthen developing economies. How and why did this reform occur? The initial impetus emerged from an unsolicited concept paper for a whole-of-region reform submitted for consideration to the ADB in early 2016.[2] Following involvement in several regional arbitrations it was evident that enforcement complications might flow from the fact that one party to the arbitration was domiciled in a non-Convention country, and that this was a feature then common across the South Pacific.

The rationale underpinning the initial concept paper was twofold: first, to address the regional anomaly of the South Pacific lagging behind other developed and developing states in joining the then approximately 150 states which had acceded to the Convention, and second, to demonstrate a credible economic development case for implementing the reform. After a period of internal deliberation, the ADB undertook its own independent work on the feasibility of the concept resulting in the establishment of a technical assistance program entitled *'The Promotion of International Arbitration Reform for a Better investment Climate in the South Pacific'*. The project was put to competitive tender with the result that the ADB retained Gary Born and the author as Expert International Arbitration Consultants to undertake the technical assistance program under the leadership of ADB Special Counsel, Christina Pak.

The South Pacific comprises diverse developing economies. Some states are rich in minerals and natural resources,[3] others in fishing and agriculture[4] and many depend heavily on tourism and tourism infrastructure.[5] The fact that arbitration was being used without the benefits and recourse available under the Convention was sub-optimal, not only for investors but also for the states which lost out by guaranteeing that arbitration

1 The Marshall Islands and the Cook Islands were the exceptions in the South Pacific. Fiji had signed the Convention in 2010 but did not implement the Convention by legislation until 2017.
2 The concept paper was prepared by the author.
3 Timor-Leste and Papua New Guinea.
4 Fiji and Tonga.
5 In the case of Palau in certain years tourism comprises as much as 55% of GDP and Fiji's tourism sector accounts for approximately 40% of GDP. Both figures are outside of COVID-19 years.

Parliament House, Tonga

would be conducted offshore with limited enforcement options, especially where reciprocity reservations were in place.

In terms of economic development, the case for arbitration reform was clear; academic research strongly supports the proposition that foreign direct investment flows correlate with accession to the Convention and this is especially pronounced where institutions are considered weak. This is because the reform allows businesses the confidence to invest, in the knowledge that a neutral and enforceable outcome to a dispute is available without solely having to rely upon unfamiliar local courts.[6]

Lessons learned from the reform process

Now in its fifth year, the ADB's program of international arbitration law reform has had considerable success. Prior to the program, of the 14 states in the South Pacific, only the Marshall Islands, the Cook Islands and Fiji were signatories to the New York Convention. Fiji had not, at that time, implemented the Convention which it signed in 2010. After many ADB 'missions' (as they are formally referred to in the international development community) to Papua New Guinea, Fiji, Tonga, Timor-Leste, Palau and Samoa, all states (except for Samoa) have acceded to the Convention or adopted modern best-practice international arbitration legislation, or done both. Advising on accession to the Convention and legislative reform has required spending considerable time on the ground with governments, judiciary, businesses and the legal community in the South Pacific. This first-hand experience has revealed several common themes in undertaking this type of work in the region.

First, the development of personal relationships is the cornerstone of being able to conduct law reform in the South Pacific. As locally unknown consultants flying in from London or Sydney, even under the rubric of the ADB, time is needed to develop trust within government, as the proposal of accession to an international convention and accompanying legislative reform is a significant undertaking for a state. This is particularly the case where the recipient country may only have limited or no international arbitration experience. Even in the

6 Andrew Myburgh and Jordi Paniagua, 'Does International Commercial Arbitration Promote Foreign Direct Investment?' (2016) 59(3) *Journal of Law and Economics* 597-627.

countries with considerable arbitration experience, such as Papua New Guinea and Timor-Leste, the reform is a significant one, with potential sovereign risk and benefit implications for state-owned or part state-owned entities.

Second, it is natural to expect a degree of initial healthy wariness, which can only be overcome with significant stakeholder engagement. This involves regular meetings with ministers, judiciary, the legal profession and, most importantly, businesses who will be the end users of arbitration. Practically, this involves multiple in-country missions for on-the-ground meetings and developing a deep understanding of the legislative process which varies from state to state. In Tonga, for example, the assent of His Majesty the King is required for accession to any international convention. While there has been a certain adaptation to meetings by video-conference platforms in the South Pacific as elsewhere, person-to-person contact is highly regarded and necessary to progress reforms and initiate new ones.

Third, the policy case for the reform needs to be underpinned by sound reasoning and not predicated on a case that other countries have acceded to the Convention so the state in question should, *ex hypothesi*, follow suit. There must be a demonstrable and tangible benefit to that state from undertaking the reform, and that benefit must be communicated concisely and convincingly. Usually, at first instance, the communication must be to Cabinet, as it will make the initial policy decision to set in motion the reform. It must also be observed that, from time to time, a friendly inter-Pacific rivalry has also marginally assisted in this regard. Where one Pacific neighbour has adopted the reform, another Pacific jurisdiction considering the reform may have a higher level of confidence in undertaking the process and, in some cases, be keen to cross the reform finish line before the other state.

Fourth, the reform needs to be undertaken respectfully of, and with sensitivity to, local conditions; that is to say without the host state feeling rushed or pressured into adopting such a reform, nor being presented a *fait accomplis* legislative package devoid of local input. The process by which draft legislation becomes a final Bill presented to parliament is often a long and complex road.[7] Although much of the legislation reform has had the UNCITRAL Model Law as the basis, together with best

7 Fiji was the first state to adopt the reform and implement the *International Arbitration Act 2017*, which occurred within the first year of the commencement of work on ABD's technical assistance reform project.

practice from other countries such as Australia, Hong Kong, England and New Zealand, such legislation requires extensive consultation, including public consultation, before being presented to Parliament for a vote. Along the reform road, ministers and governments change, election cycles often bring long pauses to the process and Parliamentary sitting calendars are full with other competing reforms and business.

Fifth, a key component of the reform has been a dedication by the ADB to capacity building. This has been universally welcomed across the South Pacific. There has been a genuine interest in, and openness to, learning and unlocking the benefits of the reform. There is little point in a state adopting the reforms without local lawyers knowing how to draft arbitration clauses or conduct an arbitration, what institutions to use or how to enforce or resist an award. Similarly, unless businesses have a sound understanding of the circumstances in which arbitration should be used, there will be no uptake.

Sixth and finally, the ADB has invested in training judges to highlight the role and responsibilities of local courts under the legislation.[8] This is conducted in order to avoid the missteps of those jurisdictions which come from a zero or low knowledge base of arbitration and where decisions have, on occasion, required further legislative reform. In some states arbitration as a means of dispute resolution needs to be explained delicately to avoid the perception that the court's work is being usurped elsewhere and without adequate safeguards.

The legacy of reform

The legacy of this reform in the South Pacific is a meaningful one. The hope is that it will bring with it an increase in foreign direct investment to developing states. These states need every suite of measures available after having their economies severely impacted by COVID-19. Similarly, a new cadre of South Pacific lawyers and arbitrators, proficient in advising on and conducting arbitration, will emerge. Australian businesses, already significant investors in the region, can have a high level of confidence that awards will be enforceable and enforced in reformed jurisdictions, without having to rely on litigation in local courts which experience has shown is rarely the optimum forum for specialist commercial cases.

The ADB has made a leading contribution to arbitration reform to date in the South Pacific. It is hoped that the remaining non-Convention states in the South Pacific will have the opportunity to benefit from a like engagement by joining the 166 United Nations Member States currently party to the Convention.

8 For example, the ADB conducted several colloquia for the judiciary with presenters which included the Hon. Michael Hwang SC and Justice Anselmo Reyes.

Declining Professional Diversity in International Arbitration

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On 20 June 2016, the Australian Centre for International Arbitration (ACICA) signed the *Equal Representation in Arbitration Pledge*, to improve the profile and representation of women in arbitration.[2] Since then, we have witnessed the international arbitration (IA) community's significant collective progress towards greater diversity, especially over the last few years. These initiatives include Racial Equality for Arbitration Lawyers (REAL), the Rising Arbitrators Initiative (RAI) and the appointment of first woman President of the ICC International Court of Arbitration. We should certainly celebrate this advancement of equality in race, age and gender, although the main beneficiaries of the diminishing gender gap are reportedly white women based in Europe or North America.[3]

In addition, we should be aware that the burgeoning debate seems to leave out discussion of a further area where diversity is lacking in the IA community – an analysis of professional diversity. While the key groups and publication outlets for IA are dominated nowadays by those practising primarily as full-time lawyers, there is hardly any awareness or sustained discussion about the limitations of overlooking diversity of professional backgrounds, perhaps partly because arbitration rules usually do not require arbitrators to have any specific experience, training or qualifications. Nonetheless, for example, the ACICA Guidance Note on the Appointment of Arbitrators prompts parties to consider 'diversity and issues of equal representation, such as gender, age, geography, culture, ethnicity, and *professional background of the arbitrator*'.[4]

Involving more non-lawyer practitioners (NLPs, such as

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1 This article is a version of Nobumichi Teramura, Luke Nottage and James Tanna, 'Declining Professional Diversity in International Arbitration', *Kluwer Arbitration Blog (Blog Post, 3 April 2022)* <http://arbitrationblog.kluwerarbitration.com/2022/04/03/declining-professional-diversity-in-international-arbitration/>.

2 ACICA, 'Media Release: Australian Centre for International Commercial Arbitration Signs Equal Representation in Arbitration Pledge' (20 June 2016) <https://acica.org.au/wp-content/uploads/2016/06/Media-Release-Equal-Representation-in-Arbitration-Pledge.pdf>.

3 Kiran Nasir Gore, '2021 In Review: Continued Strides in Favor of Diversity and Sustainable Development in International Arbitration', Kluwer Arbitration Blog (Blog Post, 27 February 2022) < http://arbitrationblog.kluwerarbitration.com/2022/02/27/2021-in-review-continued-strides-in-favor-of-diversity-and-sustainable-development-in-international-arbitration/>.

4 See <https://acica.org.au/wp-content/uploads/2022/01/ACICA-Guidance-Note-on-the-Appointment-of-Arbitrators-FF1.pdf> (emphasis added), available via <https://acica.org.au/acica-practice-procedures-toolkit/>.

engineers, architects, accountants) or those who are primarily academics could significantly reduce the persistent formalisation in IA.[5] Expanding professional diversity could also lead to other benefits, including indeed more gender diversity, given that academia does not have the same non-linear remuneration structures for lawyers that disadvantage career progression for many women.[6] These and other issues associated with professional diversity are outlined in our recent research article entitled "Lawyers and Non-Lawyers in International Arbitration: Discovering Diminishing Diversity".[7] That research article also empirically analyses the ways legal practitioners have come to prevail across the key nodes of influence within the IA sector. The rest of this blog post introduces our key empirical findings.[8]

Associations and Institutions Promoting Arbitration

First, we examined key groups that promote IA but do not themselves administer arbitration cases. The influential groups examined were the International Council for Commercial Arbitration (ICCA), the Chartered Institute of Arbitrators (CIArb) and the International Bar Association (IBA).

The ICCA Board as of September 2021 largely comprised individuals falling primarily in the category of practising "Lawyer" (84%), executives of "International or Arbitral Organisations" (IAOs, typically leaders within arbitral institutions) (5%), "Mixed" (typically those having multiple professional engagements) (5%) and "Academic" (4%, essentially full-time). We also examined the composition of ICCA Taskforces for all years: Lawyer (61%), IAOs (18%), lawyers and NLPs working in Litigation Finance (7%), Mixed (7%) and Academic (6%). Authors of entries in the Young ICCA Blog between 19 October 2010 and 17 February 2021 fell into the categories of Lawyer (86%), Academic (10%) and Mixed (2%). Analysis of presentations in ICCA Congresses and related chapters in the ICCA Congress Series over the last 30 years also indicated the growing prevalence of Lawyers (60% over the entire period) within ICCA publications, and in parallel reflecting only small proportions of IAOs (14%), Academic (12%) and Mixed (9%).

The lack of diversity in professional backgrounds was also salient in the other groups. For example, the vast majority of CIArb Board Members in 2021 were from the Lawyer category (78%), in contrast to NLPs making up 15% of the Board (despite the earlier influence of NLPs in CIArb until around the 1990s) and no members falling into the Academic category. Speakers in CIArb Webinars from July 2020 to March 2021 comprised Lawyers (75%), Academic (12%), NLPs (9%) and IAOs (2%).

Meanwhile, the data is comparable at the IBA. As for the committee membership for proliferating IBA instruments, such as the Evidence-Taking Rules, there was an even heavier prevalence of Lawyers (95%) although this was less surprising given that the IBA is essentially a global federation of lawyers' associations. Similarly, for IBA webinars, mostly from 2020 but also some from 2021, 94% of the key participants were Lawyer; only 4% could be coded as IAOs, while 2% were Academic.

Arbitration Institutions and Their Leaders

Next, we analysed the international and regional arbitration institutions having high caseloads and/or those deemed reasonably representative of civil or common law traditions and geographical diversity. These were ACICA, the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), the

5 Nobumichi Teramura, *Ex Aequo et Bono as a Response to the 'Over-Judicialisation' of International Commercial Arbitration (Wolters Kluwer, 2020).*

6 Claudia Goldin, *Career and Family: Women's Century-Long Journey toward Equity (Princeton University Press, 2021).*

7 Luke Nottage, Nobumichi Teramura and James Tanna, 'Lawyers and Non-Lawyers in International Arbitration: Discovering Diminishing Diversity' (September 2021) manuscript at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3926914>. A shorter version of that paper is also forthcoming in Shahla Ali, Filip Balcerzak, Giorgio Fabio Colombo and Joshua Karton (eds), *Diversity in International Arbitration: Why It Matters and How to Sustain It* (Elgar, 2022).

8 As elaborated in the research article, including the methodological Appendix, we basically categorised all individuals in accordance with their primary profession at the time they were a member of the relevant arbitral organisation, the relevant publication was written, or the relevant presentation was given.

Swiss Arbitration Centre, the International Centre for Dispute Resolution (ICDR), the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKAIC), the China International Economic and Trade Arbitration Commission (CIETAC), the Asian International Arbitration Centre (AIAC), the Japan Commercial Arbitration Association (JCAA), the Korean Commercial Arbitration Board (KCAB), the Thai Arbitration Institute (TAI) and the newer Thai Arbitration Centre (THAC).

To discern professional diversity within the leadership of these arbitration centres, we looked overall at the membership of various Boards, Councils, Committees, Taskforces and Courts as of 2021. The combined analysis confirmed Lawyers' predominance (76%), as well as the comparatively small ratios of NLPs (11%), Academics (6%) and IAOs (1%). We further investigated speakers and moderators at webinars and conferences organised by those arbitration centres in 2020 and the first half of 2021: Lawyers (80% in 2020 and 83% in 2021), IAOs (8% and 4% respectively), Academics (5% and 6%) and NLPs (4% and 5%).

Indicative Journals, Books and Blogs

We also considered major journals for international arbitration, complementing an earlier analysis of periodicals and other publications.[9] These were Arbitration International (associated with the LCIA), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management (CIArb), Asian International Arbitration Journal (SIAC) and the Journal of International Arbitration (published by Wolters Kluwer). Again, the overall extent of Lawyer involvement was striking. Editors of these four journals as of September 2021 were mostly Lawyer (75%), although there were somewhat more Academic (22%) than say for the leadership of the arbitration institutions as examined above. Then, we examined all the discernible articles (other than book reviews) published in the four journals from the late 1980s, when three were being published and some debate emerged about the role of NLPs in arbitration.[10] Sampling the journals essentially at five-yearly intervals (in 1989, 1994, 1999, 2004, 2009, 2014 and 2019-21) gave the following proportions for authors: Lawyer (71%), Academic (19%), IAOs (2%), NLPs (4%) and Mixed (3%). Analysing authorship categories over time found that absolute numbers and proportions of articles written by Lawyers had grown, especially over 2000-2010.

We further studied editors and authors of influential books and blogs. For books, for example, we investigated the International Arbitration Law Library Series published by Wolters Kluwer, with 59 titles since 1993 when the first volume of the Series was published. Coding editors and authors of these volumes and individual chapters demonstrated the dominance of Lawyer (50%) although a significant minority were from Academic (39%). Other professions such as IAOs, NLPs and Mixed occupied relatively small proportions (3%, 2% and 6%, respectively). On blogs, our analysis concentrated on Kluwer Arbitration Blog (KAB), as one of the most well established and widely read arbitration-related blogs. Comparing the KAB's editorial team for August 2021 and 2018 (the latest year for which the Wayback Machine online allowed us to access a snapshot of the list of all editors), 80% were Lawyers and 20% were Academics. In addition, we studied backgrounds of blog authors in February, June and November in 2009, 2014 and 2019-21. The sampling found a similar prevalence of postings by Lawyer (79%), some by Academic (16%) and very occasionally by authors from an IAO (2%).

Concluding Remarks

9 Luke Nottage, 'International Arbitration and Society at Large' in Andrea Bjorklund, Franco Ferrari and Stefan Kroll (eds), Cambridge Compendium of International Commercial and Investment Arbitration (Cambridge University Press, forthcoming 2022), manuscript at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116528>.

10 The Asian International Arbitration Journal was published from 2005.

The phenomena confirmed by our empirical research are clear: the entrenchment of lawyers through the world of IA, and the corresponding decline in involvement and influence of full-time academics and especially other NLPs. This growing lack of diversity in professional backgrounds contrasts with gender diversity, which has experienced some statistical improvements in appointments of arbitrators or other leadership positions in some arbitration centres.[11] One response to that ongoing "diversity deficit" might be to encourage more involvement of academics and NLPs in the leadership and activities of the significant arbitration associations and centres, as well as leading publication venues.[12] Such a response will help the IA sector develop diversity of perspectives because, as Joshua Karton suggests, such diversity may be enhanced by arbitrators with varied experiences who may think differently from the arbitration mainstream.[13] At least, we need more discussion and ongoing debate about the remarkable and continuing decline in professional diversity within IA.

11 ICCA, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings (The ICCA Reports No 8, 2020).*

12 Andrea K Bjorklund et al, 'The Diversity Deficit in International Investment Arbitration' (2020) 21(2-3) *The Journal of World Investment & Trade 410.*

13 Joshua Karton, 'Diversity in Four Dimensions: Conceptualizing Diversity in International Arbitration' (March 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054031>.

International Commercial Arbitration and Sustainability

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At first glance, international commercial arbitration and sustainability[1] seem rather an odd couple. Sustainability, however, is becoming increasingly important, not only in global politics, but in all areas of life and work. Private individuals and the private sector are increasingly addressing the issue of sustainability, as is international commercial arbitration.[2] This article examines the impact international commercial arbitration can have on the progress of sustainability by serving as a forum for disputes that intersect with this topic.

Growing importance of sustainability

Sustainability is a broad topic and covers a wide range of subject areas, from clean water, responsible consumption and production to climate change.[3] Several of these sustainability areas can affect business relationships. Climate change, for instance, might negatively impact the parties' performance of contracts in several ways.[4] An example is force majeure events, such as landslides caused by climate change impacts, which can evoke claims and disputes, such as insurance disputes or disputes resulting from the fact that a contractual obligation became unenforceable due to the natural event. Equally the parties' contractual relationship might be affected in other ways. For example, a dispute might arise due to the termination of a contract because a change in national environmental laws or administrative rulings renders performance of contractual obligations impossible due to the fact that it conflicts with the new legislation. International commercial arbitration will often be the forum of choice for such types of disputes.[5] Indeed, given the increasingly tangible effects of climate change and corresponding changes in legislation and policies, the number of such disputes – and hence their determination by international commercial arbitrations – are likely to increase.[6]

Similar considerations were also made in the International Chamber of Commerce (**ICC**) Report on the Resolution of Climate Change Disputes through Arbitration and Alternative Dispute Resolution (**ICC Report**). The purpose of this report is to examine the role for Arbitration and ADR in the resolution of international disputes related to climate change. The ICC Report has divided climate change disputes into the following three

1 This articles' understanding of 'sustainability' refers to the understanding of the term as in the United Nations 17 Sustainable Development Goals which are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental. *Transforming our world: the 2030 Agenda for Sustainable Development,* GA Res 70/1, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015).

2 See, eg, Lucia Bíziková, 'On Route to Climate Justice: The Greta Effect on International Commercial Arbitration' (2022) 39(1) *Journal of International Arbitration* 79, 91-3.

3 See *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015).

4 See generally 'Climate change and sustainability disputes: International arbitration perspectives', (Web Publication) <https://www.nortonrosefulbright.com/en-us/knowledge/publications/b4cbedfe/climate-change-and-sustainability-disputes-international-arbitration-perspective>.

5 See generally ibid.

6 Ibid.

categories: (i) direct disputes arising from contracts to implement and adapt to the climate change targets agreed in Paris;[7] (ii) indirect disputes arising from contracts affected by climate change or environmental issues, (for example, due to changes in laws or due to environmental impacts of climate change such as those described in the previous paragraph;[8] and (iii) submission disputes, where the arbitration agreement is entered into after the parties have already been involved in a dispute.[9]

Accordingly, international commercial arbitration not only can be, but already is to a certain extent, a forum for the resolution of disputes concerning sustainability issues. Given the importance of sustainability on the global and various national political agendas the volume of contracts implementing and aligning with sustainability goals, as well as the volume of contracts affected by environmental issues, will very likely increase. As a logical consequence, this increase will also lead to more disputes related to issues intersecting with sustainability.[10] Statistics from arbitration institutes point to this trend – some even predict exponential growth.[11] Moreover, the energy[12] and construction industry sectors, which are likely to be significantly affected by adaptions to new environmental legislation and new regulatory regimes addressing sustainable development, often use international commercial arbitration as their preferred dispute resolution method where there are international elements to their contracts.[13]

A panel discussion held during the recent Australian Arbitration Week 2021 (**AAW**) is reflective of the growing awareness of the international trend concerning sustainability as an emerging issue in international commercial arbitrations. That panel discussion included debate concerning the sufficiency and existence of mechanisms for resolving transnational environmental disputes related to climate change. It was suggested, during that panel discussion, that arbitration has a role to play in resolving such disputes. In addition, renewable energy sources were seen as an important part of the response to climate change. It was discussed that energy markets in particular will be subject to stricter regulation as climate change becomes an increasingly important political issue.

A convenient forum for resolving sustainability disputes

As a dispute resolution mechanism, international commercial arbitration offers advantages, and is well-suited to serve as a forum, for resolving sustainability disputes. Those advantages are briefly addressed below.

Sustainability is a global target, climate change a global problem and disputes related to environmental issues are often transboundary in nature.[14] International commercial arbitration, which is international by its very definition,[15] meets the need for an international forum to adjudicate such matters with its delocalised method, whereby the parties can agree on hearing venues different to their physical location and regardless where the seat of the arbitration proceeding is.[16]

Moreover, international arbitration can provide the parties with arbitrators with specific expertise, including arbitrators with non-legal expertise.[17] Disputes intersecting with sustainability issues will invariably

7 ICC Commission on Arbitration and ADR, *ICC Commission Report: Resolving Climate Change Related Disputes through Arbitration and ADR* (International Chamber of Commerce (ICC), November 2019) 8-9 [2.4].

8 Ibid 9-10 [2.5].

9 Ibid 10-12 [2.6].

10 'Climate change and sustainability disputes: International arbitration perspectives' (n 4).

11 See Lucy Greenwood, 'The Canary Is Dead: Arbitration and Climate Change' (2021) 38(3) *Journal of International Arbitration* 309, 318-9. For example, the London Court of International Arbitration (**LCIA**) records an increase in energy and resources disputes from 19% in 2018 [LCIA 2018 Annual Casework Report, 5] and 22% in 2019 [LCIA 2019 Annual Casework Report, 7] to 26% in 2020 [LCIA 2020 Annual Casework Report, 11]. All reports available under 'Reports', LCIA Arbitration and ADR worldwide (Web Page) <https://www.lcia.org/LCIA/reports.aspx>.

12 'Climate change and sustainability disputes: International arbitration perspectives' (n 4).

13 Greenwood (n 11) 318-9.

14 Bíziková (n 2) 94.

15 Born, *International arbitration: law and practice* (Kluwer Law International, Second ed 2016) 6.

16 See generally ICC Commission on Arbitration and ADR (n 7), 17 [4.4].

17 See, eg, ICC Commission on Arbitration and ADR (n 7) 21 [5.13].

involve complex and multifaceted legal and non-legal issues. Therefore, it is advantageous if an arbitral tribunal can consist of a mix of experts on the subject matter and lawyers with experience in a field.[18] For example, an arbitral tribunal for a sustainability-related dispute may include an environmental scientist, such as a climatologist, marine biologist, environmental chemist or geologist. This, of course, depends on the discipline(s) involved and can vary significantly. For the construction industry, the ICC Report mentions, for example, that engineers and architects are the preferred expert arbitrators. Further, it is highlighted that the ICC Rules support such appointments of non-legal arbitrators giving the parties a decisive impact on the choice of arbitrators, including reasons related to competence and skills.[19] In a similar way, and consistently with the principle of party autonomy, the Australian Centre for International Commercial Arbitration (**ACICA**) Rules also provide a flexible appointing approach by leaving it to the parties to choose who they appoint as an arbitrator.[20] Nevertheless it should be noted that expert arbitrators are appointed for their ability to better understand technical information proposed by the parties and not apply their own expertise in first line to resolve the dispute.[21] They have to comply with the same procedural standards as any other arbitrator.[22]

In addition, the ability to choose the governing law of a contract can include the parties' corporate sustainability considerations. For example, parties may explicitly refer to international climate change obligations, specific domestic climate law requirements or even industry specific 'best' practices in the preamble or applicable law provision of their contracts.[23] Such an express reference may be an important factor for an arbitral tribunal to consider in reaching its decision.[24] However, such obligations or requirements would likely be insufficient to fully resolve the legal issues in dispute.[25] In this regard, the ICC Report further mentions Art. 21.2 ICC Rules which refers to national laws and trade usage and notes that the ICC is currently considering whether to propose further recommendations for guidelines for parties and arbitrators on sustainability considerations as part of the chosen law.[26]

Furthermore, the arbitration rules of various international arbitral institutions contain different procedural provisions that can promote a way to meet the requirements of environmental disputes. Their speed and flexibility are often cited as ideal for a forum for sustainability disputes.[27] For instance, the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources are specifically tailored to the needs of environmental disputes.[28] They provide for example to expedite proceedings by granting the arbitral tribunal the power to issue interim measures to protect the environment.[29] Similar procedural mechanisms, however without specific reference to environmental issues, are also incorporated, for example, in the Swiss Rules of

18 See Ibid 19-20 [5.8]; see also Bíziková (n 2) 94.
19 ICC Commission on Arbitration and ADR (n 7), 19-26 [5.8-5.33].
20 *Arbitration Rules of the Australian Centre for International Commercial Arbitration 2021* Art. 12-14 ('*ACICA Rules 2021*').
21 ICC Commission on Arbitration and ADR (n 7), 19 [5.8].
22 Ibid.
23 Ibid 39 [5.64]
24 Ibid.
25 Ibid.
26 Ibid 39 [5.64-5].
27 See, eg, Bíziková (n 2) 95.
28 Ibid 99.
29 See, eg, *The Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources 2001* Art. 26 ('*Environmental Rules*').

International Arbitration (**Swiss Rules**),[30] the ACICA Rules,[31] and the Hong Kong International Arbitration Centre (**HKIAC**) Rules.[32]

Sustainability disputes not only affect the disputing parties, but may also have an impact on the general population and the public interest. In recent years, various international arbitration rules have started to foresee the possibility of involving or allowing third parties to participate in arbitral proceedings; e.g. the ICC Rules 2021,[33] the ACICA Rules 2021[34] or the Swiss Rules 2021[35] to name but a few. However, some authors want to go further and have suggested allowing amici curiae submissions[36] or aligning with the Hague Rules[37] given the parallels with human rights disputes.[38] In this way, interested third parties such as NGOs would be entitled to apply to the arbitral tribunal for the right to make submissions on the basis of public interest and thus participate in the arbitral proceeding.[39]

As always, there are two sides to every coin. The advantages international commercial arbitration offers for sustainability disputes are also countered by some weaknesses. The key tenet of confidentiality of arbitration proceedings among the parties leads to tension with the public interest in sustainability disputes,[40] which would support publication of an arbitral award.[41] This desire for more transparency in matters putting public interest at stake is widely recognised,[42] and there have been several proposals made to meet this aim. An example is the proposal to preserve the parties' interest in privacy by publishing only some of the information about the proceedings.[43]

Conclusion

In summary, international commercial arbitration already serves as a forum for sustainability disputes. The international character, the expertise provided, the flexibility of the applicable law and the procedural processes, including the possibility to involve third parties all contribute to the unique and prominent position that international commercial arbitration could occupy as a forum for sustainability dispute resolution. The predicted future exponential growth of sustainability-related disputes will offer the opportunity for the international arbitration community to further consider how it will play its part in such issues.

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30 *Swiss Rules of International Arbitration 2021* which provide e.g. for an expedited procedure (Art. 42) and emergency relief (Art. 43) ('*Swiss Rules 2021*').

31 See 'ACICA Arbitration Rules Key Amendments', *ACICA Australian Centre for Internaitonal Commercial Arbitration - ACICA Rules 2021* (Web Page). The key amendments of the ACICA Rules 2021 provide for effective case management in the constitution of the tribunal (see art. 12-14, 16.8, 17.4, 20, 22.5 and 23) and raise other techniques to facilitate settlement of the dispute including mediation and other forms of alternative dispute resolution (see art. 55).

32 In aid of the arbitration proceedings, the HKIAC can offer arrangements on interim measures ordered by courts of Mainland China and the Hong Kong, see 'Interim Measures Arrangement', HKIAC, (Web Page) <http://hkiac.org/arbitration/arrangement-interim-measures>.

33 ICC Commission on Arbitration and ADR (n 7) 45 [5.84].

34 'ACICA Arbitration Rules Key Amendments' (n 28) 2; The ACICA Rules 2021 have expanded the scope of registered arbitration and now provide for consolidation as well as multi-party and multi-contract and arbitration.

35 *Swiss Rules 2021* (n 27) for example, Art. 7 provides for consolidation and Art. 6.4 gives the tribunal the authority to involve a third party to participate in the proceedings, after hearing and obtaining the consent of all parties.

36 Bíziková (n 2) 106.

37 *The Hague Rules on Business and Human Rights Arbitration 2019* ('*Hague Rules*'). The Hague Rules on Business and Human Rights Arbitration Project resulted from a private initiative by a diverse team of international practitioners and academics for the promotion of the use of arbitration as a remedy in the important field of business and human rights inspired by the UN Guiding Principles on Business and Human Rights.

38 Bíziková (n 2) 108.

39 *Hague Rules* (n 34) Art. 28.2.

40 ICC Commission on Arbitration and ADR (n 7) 40 [5.66]; Bíziková (n 1) 111; Laurent Gouiffes and Melissa Ordonez, 'Climate change in international arbitration, the next big thing?' (Pt ABINGDON: TAYLOR & FRANCIS LTD) (2021) *Journal of energy & natural resources law* 1.29) 14.

41 Climate Change Justice and Human Rights Task Force, *Achieving Justice and Human Rights in an Era of Climate Disruption* (International Bar Association, 2014) 158-9.

42 Kun Fan, 'Expansion of Arbitral Subject Matter: New Topics and New Areas of Law', *The Evolution and Future of International Arbitration* (Kluwer Law International : Wolters Kluwer, 2016) 299, 312 [18.30], 314 [18.37].

43 Gouiffes and Ordonez (n 37) 14.

Will your Cybersecurity Expert Stand Up in Court?

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As the number of costly cyber attacks on companies has increased, so too has the demand for full-service cyber experts who can gather evidence securely, produce comprehensive reports, explain those findings to clients and act as expert witnesses in a court of law.

According to the Australian Cyber Security Centre's second annual report[1], a cybercrime is reported every eight minutes in Australia, with criminals taking advantage of our working-from-home arrangements to launch attacks. The devastating and costly nature of these ransomware and phishing attacks call for a level of forensic ability and experience that is second to none. Indeed, as cyber attacks have become increasingly sophisticated, so too has the expertise required to bring the threat to heel, document the exfiltration competently, mitigate impacts and appear as a reliable expert witness in court, if need be. Finding cyber professionals who excel in all these areas is more important than ever.

Considerable pressure is building on businesses to engage with suitably experienced cyber professionals to stem the financial, legal and reputational damage of breaches. Companies are now obliged to notify individuals, as well as the Office of the Australian Information Commissioner, if a cyber breach involves the release of personal or financial data, or information that may cause harm to individuals. In 2020, ASIC commenced proceedings in the Federal Court against RI Advice Group for a lack of "adequate cyber security systems", after a hacker spent more than 155 hours logged into the server of RI Advice-licensed Frontier Financial Group.[2]

In news that should act as a wake-up call to boardrooms across the country, the Federal Government has also flagged making company directors personally liable[3] for cyber breaches, paving the way for costly class actions by shareholders in the wake of a cyber breach. The Federal Government's Critical Infrastructure Bill also allows the government to take over the cybersecurity system of

1 Andrew Green, *Online activity during COVID lockdowns sees surge in cyber attacks and espionage* (15 September 2021) ABC News <https://www.abc.net.au/news/2021-09-15/cyber-attacks-surge-activity-covid-lockdowns/100461626>

2 Australian Securities and Investments Commission, 'ASIC commences proceedings against RI Advice Group Pty Ltd for alleged failure to have adequate cyber security systems' (Media Release, 20-191MR, 21 August 2020), 1 <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-191mr-asic-commences-proceedings-against-ri-advice-group-pty-ltd-for-alleged-failure-to-have-adequate-cyber-security-systems/>

3 Anthony Galloway, '*Real and present danger': Government considers making company directors personally liable for cyber attacks* (13 July 2021) Sydney Morning Herald <https://www.smh.com.au/politics/federal/real-and-present-danger-government-considers-making-company-directors-personally-liable-for-cyber-attacks-20210712-p588vz.html>

major companies — such as health, energy and infrastructure providers — should they be hit by a debilitating attack.[4]

The good news is that some companies are starting to invest in cybersecurity at a level commensurate with the risk of attacks. However, it is worth highlighting the skills that chief information security officers (CISOs), directors and management should be looking for when engaging cyber professionals to ensure they are hiring the best person for their needs.

The Investigative Mindset

When hiring consultants, companies would be wise to check that the cybersecurity expert has a clearly delineated methodology for the collection and presentation of evidence. Is the consultant investigating and securing evidence in accordance with a clear framework, or do they appear to be merely documenting a version of events? Can the consultant collate relevant evidence from swathes of data or are they struggling to locate the devil in the detail?

It is vital that the integrity of the data is preserved and handled with utmost care from collection through to analysis. Should the matter end up in court, easily defensible reports which outline the chain of custody and analytical methodology are crucial.

It is also important that the analysis detailed in reports is repeatable, which means findings can be provided to another independent forensic expert who can clearly see the methodology and evidence-gathering process and replicate it to test the conclusions.

Truly Qualified

Whenever a cyber breach has occurred, there is a considerable amount of sensitive data at stake. Companies must trust their cybersecurity expert has the qualifications and acumen to handle such sensitive information.

According to ABS Census data 2016, most cybersecurity professionals hold an advanced diploma or higher qualification, although several have no formal qualifications. While there is no national standard for cybersecurity expertise, experienced and highly qualified professionals are easy to recognise.

To begin with, they should possess a history of complex engagements in evidence collection and documentation, investigation and analysis.

Cybersecurity experts also should have previous experience as expert witnesses in court to indicate they can present their findings and respond to challenges to their credibility by opposing counsel under cross examination.

The independence of the cybersecurity expert is equally important. As a court will likely frown upon a company's internal IT report, suspecting, quite rightly, that company employees are not the most effective, nor objective, chroniclers of their own incidents.

Bringing in an outside expert makes sense on a practical level, too, as IT staff often do not have the time to devote themselves to the investigation of a cyber breach. An independent external investigator, on the other hand, can give the breach the attention it deserves, respond quickly and without bias and ensure the requirements are met for admissible legal evidence.

Communication Skills

Perhaps one of the most overlooked skills in the cyber expert's toolkit is clear and effective verbal communication. At the end of the day, what clients are seeking is comfort and reassurance that the threat has been identified, and they rely on the cyber consultant to outline the steps they took in collecting and analysing evidence in lay terms.

Cyber experts must also be able to present their findings to a court of law and distil technical concepts into accessible language. This is where confidence, borne out

4 Department of Home Affairs, Australian Government, *Protecting Critical Infrastructure and Systems of National Significance* (1 June 2021) <https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/protecting-critical-infrastructure-systems>

of experience and knowledge, separates the true experts from the less experienced hires.

The communication shortcomings of an inexperienced cyber expert often become apparent once the matter proceeds to court, exposing haphazard data collection methods, incomplete notetaking, crucial evidence missed and the inability to adequately justify the approach.

If cyber experts fail to articulate their work and explain the decision-making process, then the court will struggle to understand the methodology and the evidence will be deemed inadmissible.

Companies, therefore, have much at stake. Cyber breaches are likely to continue, and even escalate, in the years to come, causing huge financial losses and much anxiety among some employers. However, the extent of the fall-out can be curtailed if managers undertake their due diligence and seek out qualified, articulate and competent cybersecurity experts.

If managers panic and hire the wrong consultant, the damage will only multiply.

- Cybersecurity expert Brendan Read is a Partner at KordaMentha and former police detective from the Queensland Police High Tech Crime Investigation Unit.
- An ACICA Webinar on this article, Is it Admissible? A Cyber Expert's View, with Brendan Read and ACICA Secretary-General, Deborah Tomkinson, can be viewed here.

Instagram Inc v Dialogue Consulting Pty Ltd [2022] FCAFC 7

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I Introduction

A recent decision by the Full Court of the Federal Court of Australia has clarified the circumstances where parties will be found to have waived their right to arbitration. It serves as a cautionary tale for parties to not '[sit] on their hands' in relation to arbitrating their dispute, while taking active steps to litigate,[1] and to make a firm decision on their preferred method of dispute resolution from the outset.

II Background

Dialogue is an Australian start-up offering a subscription-based software product named 'Sked Social', which automates the publishing of social media content. Clients provide Dialogue with their login details on a confidential basis, enabling Dialogue to access and use their accounts on their behalf. From January 2014 onwards, Dialogue operated Instagram accounts on behalf of itself and its clients, meaning it was bound by Instagram's Terms of Use dated 19 January 2013 ('2013 Terms').[2]

The 2013 Terms, which applied until 19 April 2018, contained an arbitration clause, which provided:

> Except if you opt-out or for disputes relating to… ("Excluded Disputes"), **you agree that all disputes between you and Instagram… with regard to your relationship with Instagram… will be resolved by binding, individual arbitration under the American Arbitration Association's rules for arbitration of consumer-related disputes and you and Instagram hereby expressly waive trial by jury…**
>
> **This dispute resolution clause will be governed by the Federal Arbitration Act...** (emphasis added).[3] This clause was eventually removed from Instagram's updated Terms of Use.

A dispute arose when Instagram informed Dialogue that its collection of user login information was in breach of the 2013 Terms, eventually revoking Dialogue's access to Instagram, and its director's access to his personal Facebook account.[4]

III Procedural History

On 11 April 2019, Dialogue commenced proceedings in the Federal Court against Facebook and Instagram (the **Meta Parties**), seeking final injunctive and declaratory relief. Dialogue relied on apparent breaches of the *Competition and Consumer Act 2010* (Cth) (the **Competition** Claims), as well as the Australian Consumer Law (ACL).[5]

1 *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846, [589] ('*Dialogue v Instagram*').
2 *Instagram Inc v Dialogue Consulting Pty Ltd* [2022] FCAFC 7, [13] ('*Instagram v Dialogue*').
3 Ibid, [11].
4 Ibid, [14].
5 Ibid, [15].

Over the course of 2019, the parties took steps to further the progress the proceeding, including the filing of pleadings, notices to produce and requests for particulars, alongside extensive correspondence on discovery.[6] However, on 9 April 2020, the Meta Parties filed an interlocutory injunction seeking a stay of the proceeding under s 7(2) of the *International Arbitration Act 1974* (Cth) (*IAA*).[7]

IV The Federal Court Decision

At first instance, Justice Beach held that, despite the *Kompetenz-Kompetenz* principle, he was better placed to decide on issues relating to choice of law, and in particular, on the ACL, than a Californian arbitrator.[8] His Honour then concluded that the parties were bound by an arbitration agreement within the meaning of s 3(1) of the *IAA*, as Dialogue had validly accepted the clause in the 2013 Terms, under Victorian law.[9]

A Requirements for a stay under s 7(2)

Next, Beach J considered whether the two requirements under s 7(2) were satisfied. The first, that the relevant 'proceedings… are pending in a court', was made out.[10] The second requirement was that the proceedings involved the determination of issues arbitrable within the scope of the arbitration agreement.[11] Examining the arbitration agreement, Beach J held that 'all disputes… with regard to [Dialogue's] relationship with Instagram' should be read as all disputes arising between the parties while the 2013 Terms applied (that is, until 19 April 2018).[12] Dialogue's alleged conduct, and the dispute between the parties, commenced and continued during this time, falling within the scope of the agreement. Although there were claims falling outside this scope (e.g. claims outside the period, claims between Facebook and Dialogue, the Competition Claims), s 7(2)(b) was satisfied.[13]

B Bars to a stay

However, Beach J determined that a stay should nevertheless not be granted, as under s 7(5) of the *IAA*, the agreement was 'null and void, inoperative or incapable of being performed'. Justice Beach rejected Dialogue's arguments pertaining to breaches of the ACL, but accepted that the Meta Parties had waived their right to arbitrate.[14] Therefore, the agreement was inoperative.[15]

In reaching this conclusion, his Honour addressed two questions:

1. Which law was applicable to determine the issue of waiver?
2. Was waiver established under the applicable law?

As to the first question, the US Federal Arbitration Act had been expressly chosen as the law governing the arbitration agreement, and therefore, its validity.[16] Given the close connection between the issues of validity and inoperability, consistent laws should be applied to both.[17] Thus, Beach J applied US federal law to the issue of waiver.[18]

Turning to the second question, Beach J considered evidence given by an expert, the former Chief Judge of the US District Court for the Northern District of California.[19] The expert gave evidence of factors relevant to waiver, including the opinion that prejudice was

6 Ibid, [20].
7 ('*IAA*'); Ibid, [27].
8 *Dialogue v Instagram*, [200]–[201].
9 *Dialogue v Instagram*, [216], [317].
10 *IAA* s 7(2)(a).
11 Ibid s 7(2)(b).
12 *Dialogue v Instagram*, [443].
13 Ibid, [442]–[443].
14 Ibid, [393], [590].
15 Ibid, [360], [393], [599].
16 Ibid, [476].
17 Ibid, [480].
18 Ibid, [476].
19 Ibid, [499].

essential. However, Beach J found prejudice to be a merely relevant factor, given the differing positions in US case law.[20] Other factors, including

a. the nature of the Meta Parties' previous participation in the litigation;

b. the state of the pleadings;

c. the duration of the litigation; and

d. Dialogue being deprived of the public policy benefits of arbitration,[21]

further weighed in favour of waiver.

Even if prejudice were required, the lower standard under US law, of 'affected, misled ***or*** prejudiced' (emphasis added) would apply, and was satisfied,[22] given the 'unnecessary expense, delay and inefficiency' caused.[23]

V The Decision On Appeal

The Full Court granted Meta leave to appeal, but ultimately dismissed the appeal. The Court focussed on two key grounds:

First, whether Beach J should have determined the question of waiver instead of the arbitrator, per the *Kompetenz-Kompetenz* principle (**The Competence Issue**);

Second, whether Beach J was correct in finding that Dialogue suffered prejudice under US law and whether the Meta Parties waived their right to arbitrate (**The Waiver Issue**).[24]

The Meta Parties also argued that Beach J erred in failing to follow uncontradicted expert opinion on US law that prejudice was essential to waiver. However, this was unnecessary to consider, as the Court held that Beach J had not erred on the other grounds.[25]

A The Competence Issue

The Meta Parties accepted that the question whether the issue of waiver should be determined by an arbitrator was discretionary. However, they argued that this discretion miscarried, because Beach J had met considerable uncertainty as to the content of the US law of waiver after conducting his own research, while it had been 'absolutely clear and simple' in the hearing before him.[26] Therefore, he should have referred the question to the arbitrator.

This argument was rejected, because 'the question… was very much a contested and live issue before his Honour',[27] and had not arisen only through independent research. This uncertainty had in fact, prompted numerous questions to the expert witness, and statements that his Honour intended to review the cases himself, which were met with no objection.[28] Moreover, Beach J had implicitly taken this uncertainty into account when exercising the discretion to decide the question himself. This was evident in the lengthy consideration and discussion of the uncertain state of the law in his Honour's reasons.[29]

Accordingly, this discretion had not been miscarried, and the first ground of appeal failed.

B The Waiver Issue

Next, the Court considered whether Dialogue had suffered prejudice, and ultimately, whether the Meta Parties had waived their right to arbitrate. Assuming the higher standard of actual prejudice needed to be satisfied,[30] the Court focussed on the Meta Parties' litigation conduct, including:

a. the filing of defences which failed to rely on the arbitration agreement;

b. the delay of almost one year in asserting the right to arbitrate;

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20 Ibid, [572].
21 Ibid, [502]–[509].
22 Ibid, [556]–[557].
23 Ibid, [588].
24 *Instagram v Dialogue*, [48].
25 Ibid, [49].
26 Ibid, [52].
27 Ibid.
28 Ibid, [55].
29 Ibid, [56].
30 Ibid, [65].

c. the multiple notices to produce and requests for further and better particulars; and

d. the extensive correspondence on discovery.[31]

The Court drew particular attention to the notices to produce and requests for particulars, which constituted 'voluntary use of the litigation machinery… [and were] not merely responsive and defensive', being made after the Meta Parties had filed defences.[32] They were accordingly 'steps taken in contemplation of litigating the factual allegations made by Dialogue in the court proceeding and not in arbitration',[33] and the Meta Parties' conduct was 'inconsistent with reliance on the right to arbitrate'.[34]

The Court then turned to consider whether the impact of this conduct amounted to prejudice. It focussed on two factors from the expert evidence, including whether the public policy advanced by arbitration was substantially undermined, and whether the party relying on arbitration used the judicial process to gain something that could not have been gained in arbitration.[35]

i. Loss of the benefits of arbitration

The Court agreed with Beach J that the Meta Parties' conduct had caused undue delay and expense to Dialogue, the latter being required to respond to various notices to produce, requests for particulars, and correspondence on discovery, encompassing both key arbitrable and non-arbitrable issues (i.e. the claims after 19 April 2018 and relating to Dialogue's use of Facebook).[36]

The Meta Parties argued that Dialogue's steps and delay in respect of the non-arbitrable claims were irrelevant, relying on *Fisher*,[37] a US case where effect was given to one party's reliance on its right to arbitration, three-and-a-half years after the initial complaint. However, the Court distinguished this case, as in *Fisher*, the extensive discovery undertaken would remain useful for the non-arbitrable claims, which would continue to be heard in Court, parallel to arbitral proceedings. In contrast, the Meta Parties were seeking a stay of the entire proceeding.[38]

Accordingly, granting a stay would cause Dialogue to 'lose the benefits of arbitration, namely the expedient, efficient and cost-effective resolution of disputes', given the delay and expense incurred through litigation.[39]

VI Gaining something unavailable in arbitration

The Court also held that the Meta Parties took advantage of a process not available in arbitration, in serving two notices to produce. Under r 20.31(2) of the *Federal Court Rules 2011*, Dialogue was required to respond to the notices in a certain manner and within a certain time, undertaking an extensive, time-consuming amount of work.[40] In contrast, under the American Arbitration Association's rules, there is no equivalent mechanism to require the production of documents by service of a notice by one party on another. The Meta Parties thereby gained an advantage not available in arbitral proceedings.[41]

Both factors together amounted to sufficient prejudice to establish waiver, with the Court ultimately dismissing the appeal.

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31 Ibid, [67]–[84].
32 Ibid, [86].
33 Ibid.
34 Ibid.
35 Ibid, [89].
36 Ibid, [91]–[92].
37 *Fisher v AG Becker Paribas Inc*, 791 F 2d 691 (9th Cir, 1986) ('*Fisher*').
38 *Instagram v Dialogue*, [95].
39 Ibid.
40 Ibid, [102].
41 Ibid, [104].

VII Conclusion

The decision of the Full Federal Court provides a stern warning to parties that the right to arbitrate is not absolute, alongside emphasising the critical importance of relying on the right to arbitrate in a timely manner. Although costs and delays will not necessarily, of themselves, justify waiver,[42] the longer a party delays relying on their right to arbitrate, the less likely a court is to give effect to it.

In a similar vein, the decision highlights that the *Kompetenz-Kompetenz* doctrine is not absolute. A court may be justified in choosing not to give effect to the doctrine in the interests of practicality and efficiency, such as to avoid delay, or where the court has a better knowledge of the subject matter.

However, these takeaways should not deter parties from viewing Australia as an arbitration-friendly jurisdiction. In making these decisions, courts seek to reach a commercial, convenient, and just outcome, consistent with the goals of arbitration. Ultimately, parties will avoid similar difficulties if they remember the paramount importance of practicality and efficiency in administering disputes, and strive to avoid 'unnecessary expense, delay and inefficiency' in their dealings with courts.[43]

42 Ibid, [88].
43 Ibid, [91].

What's in a Name? – Case Note on Re Shanghai Xinan Screenwall Building & Decoration Co., Ltd [2022] SGHC 58

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When opting for arbitration, one of the pertinent points of discussion either during the contract negotiation phase, or when entering into a submission agreement, is whether the arbitration should be administered by an arbitral institution or conducted on an ad hoc basis. Where there is a desire for the former, the next topic of discussion is selecting which arbitral institution, and consequently which set of institutional rules, the parties should designate as the administering authority and as the procedural rules.

The plethora of arbitral institutions across the globe, and the variety of products and services on offer, generally gives parties an abundance of choice in selecting an arbitral institution. This, however, does not always translate into the parties properly naming their desired arbitral institution in the arbitration clause or the submission agreement.

This begs the question: When should an error or a misnomer in the name of an arbitral institution have a bearing on the validity of the arbitration clause?

The Singaporean High Court recently had the opportunity to consider this question, in *Re Shanghai Xinan Screenwall Building & Decoration Co., Ltd* [2022] SGHC 58.

The case concerned an application brought by a Chinese company, Shanghai Xinan Screenwall Building & Decoration Co., Ltd. (**Xinan**), which sought leave under s 19 the *Singapore International Arbitration Act* (Cap 143A, 2002 Rev Ed) (**IAA**) to enforce a foreign arbitral award against a Singaporean company – Great Wall Technology Aluminium Industrie Pte Ltd (**Great Wall**). Great Wall filed an application pursuant to Section 31 of the IAA, challenging the enforcement of the award on the basis that:

1. Great Wall was not given proper notice of the appointment of the arbitral tribunal, or of the arbitral proceedings, or was otherwise unable to present its case, because the relevant notices were sent to its previous registered and business address (***cf.*** Section 31(2)(c) of the IAA);
2. the arbitration clause was not valid under Chinese Law because there is no arbitral institution by the name of "China International Arbitration Centre" (***cf***. Section 31(2)(b) of the IAA); and
3. the arbitral procedure was not in accordance with Chinese law because Great Wall did not agree to the China International Economic and Trade Arbitration Commission (**CIETAC**) administering the arbitration, and in any case, CIETAC incorrectly applied its domestic arbitration provisions to the matter (***cf***. Section 31(2)(e) of the IAA).

The award concerned claims brought under two contracts between the parties which related to the same housing project in Singapore for the supply and installation of certain materials (**Contracts**). The Contracts contained the following identically worded arbitration clause:

> Any dispute arising from or in relation to the contract shall be settled through negotiation. If the negotiation fails, the dispute shall be submitted to **China International Arbitration Centre** for arbitration in accordance with its arbitration rules in force at the time of submission. (emphasis added)

Proper Notice of the Arbitration

With respect to the first ground for setting aside, Great Wall contended that it changed its physical place of business on 15 July 2020 and its registered address on 2 November 2020; however, all the documents in the arbitration, from the delivery of the notice of arbitration on 5 June 2020 to the delivery of the award on 3 December 2020, were effected on its previous address. The High Court dismissed this ground for challenge *inter alia* on the basis that the notice of arbitration was delivered before 15 July 2020, which was then both the place of business and the address for service in the contractual documents. The delivery was also in accordance with the Section 387 of the *Singapore Companies Act* (Cap 50, 2006 Rev Ed) and Section 3(1) of the IAA (which reflects Article 3(1) of the UNCITRAL Model Law). There was also no evidence of non-receipt to rebut the presumption of deemed service in this instance.

Related to the above was the question of whether the award had become binding since it was delivered to Great Wall's previous address *after* the registered address had been formally changed. The High Court also dismissed this ground of challenge on the basis that Great Wall had failed to notify Xinan of its change of address – in such a circumstance, given that the award was sent to the address stipulated in the contracts, there was good service. The High Court also commented that it was erroneous to suggest that an award only becomes binding upon service since Section 19B of the IAA clarifies that an award is binding once made.

Validity of the arbitration clause

With respect to the third ground, the High Court emphasised that it is well established that Chinese law requires the parties to specify an arbitral institution in the arbitration clause, or to enter into a supplementary agreement to choose an arbitral institution. In the absence thereof, the arbitration agreement is void and the parties will need to seek recourse from the national court that has jurisdiction over the matter (***cf***. Articles 16 and 18 of the *Arbitration Law of the People's Republic of China*). However, as neither party had properly adduced expert evidence on Chinese law, the Singaporean High Court, in this instance, assumed Chinese law is the same as Singaporean law.

In response to the question of whether the parties had agreed to have their arbitration administered by CIETAC, as opposed to the non-existent or incorrectly named institution "China International Arbitration Centre", the High Court ruled in the affirmative and made the following observations:

i. the question of whether the Contracts did specify an arbitral institution, and whether that institution was CIETAC, is a matter of construction. CIETAC would have turned its mind to this question when deciding to accept the case under Article 13 of the CIETAC Rules (at [43]);

ii. "*an arbitration agreement is to be construed like any other commercial agreement, with a view to giving effect to the intention of the parties as objectively expressed in it*"; for an arbitration clause to be effective and workable, it needs to be interpreted in a manner which facilitates and protects party autonomy (at [47] summarising the principles in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 2 SLR(R) 939);

iii. "[r]*ational commercial parties would not deliberately choose a non-existent institution any more than they might invent a fictitious seat. The objective intention of the parties must be that an existing arbitral institution administer the potential arbitration. The question is thus whether the arbitration agreements evince a common intention that CIETAC would be that arbitral institution*" (at [48]);

iv. although the parties did not adopt the official name of CIETAC, they used the first two words contained in CIETAC's name – namely, "China" and "International" – as well as a third word – "Arbitration" (at [49]); and

v. from the list of the five major arbitral institutions in China, as provided by a Chinese law expert engaged by Great Wall – namely, CIETAC, Shenzhen Court of International Arbitration, Beijing International Arbitration Centre, Shanghai International Arbitration Centre and China Maritime Arbitration Commission – only two of the names contained the critical word "China"; the other three adopted the names of Chinese cities. Of these two arbitral institutions, one qualified the word "China" immediately with the word "Maritime" – given that the underlying dispute did not relate to a maritime matter, it was unlikely that the parties to the contracts, being commercial people,

would have intended to select a maritime arbitral institution to administer a non-maritime dispute (at [50]).

Interestingly, Great Wall's bundle of authorities also made reference to a Chinese case where both the Court of first instance and the Court of Appeal held that a reference to "China International Arbitration Centre" in the relevant contract did not correlate to a reference to CIETAC.[1] In considering this decision, the High Court of Singapore noted that that case was confined to its facts given that it related to a different contract and concerned different parties. However, the decision was considered to implicitly reflect Singaporean law in that *"the exercise is one of contractual interpretation to ascertain whether parties objectively intended to refer to a specific arbitral instruction (sic) by the misnomer"* (at [57]). The Singaporean High Court concluded that the objective intention of the parties to the Contracts was that their disputes should be referred to CIETAC.

Arbitral procedure was not in accordance with Chinese law

On the final issue of the arbitral tribunal having applied the wrong procedure in adopting the "Special Provisions on Domestic Arbitration" in the CIETAC Rules, the High Court noted that although this was certainly an error, *"Great Wall could not identify any impact or consequence that this error had on the conduct of the arbitration, let alone on the making of the Award"* (at [61]).

Concluding observations

In Australia, the specific issue of an award being sought to be set aside on the basis of a misnomer in the name of the administering authority has yet to be considered by courts. However, given the commonality of this issue in contracts across the globe, it is highly likely that the issue has been considered by arbitral tribunals in Australian-seated arbitrations at some point in time.[2]

Furthermore, given Australia's pro-arbitration stance, it is highly likely that the Australian courts will follow a similar approach to that taken by the Singaporean High Court. To use the words of Allsop J, this is because the approach of Australian courts is to *"construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration"*.[3]

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1 *Civil Ruling of the Zhejiang High People's Court (2016) Zin Min Xia Zhong No. 278. Appeal Case of Dispute over International Goods Sales Contract between Shennong Resources Limited and Ningbo Cimei International Trade Co., Ltd).*

2 Similar issues have also been considered by common and civil law courts across the globe, where the general approach has been to either sever the reference to a non-existent arbitral institution from the arbitration agreement, thereby retaining the validity of the remainder of the arbitration agreement, or to correct a misnomer in the name of an arbitral institution as a reference to an existing arbitral institution (see *Lucky-Goldstar International (HK) Limited v Ng Moo Kee Engineering Limited* [1993] 2 HKLR 73 (Hong Kong High Court); *Judgment of 5 December 2008, A. v B. Ltd.*, 4A_376/2008 (Swiss Federal Supreme Court, First Civil Law Chamber); *Pricol Ltd v Johnson Controls Enterprise Ltd* [2015] 4 SCC 177; (2015) 2 SCC (Civ) 530 (16 December 2014) (Indian Supreme Court); see also Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2021) ch 5, 832 – 838)).

3 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) FCAFC 192 [164]; see also *Robotunits Pty Ltd v Mennel* [2015] VSC 268; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 165.

Australian Centre for International Commercial Arbitration

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