THE

ACICA REVIEW

DECEMBER 2022

ACICA
Australian Centre for International Commercial Arbitration

GLOBAL LEADERSHIP
REGIONAL EXCELLENCE

Leader in International Dispute Resolution

THE
ACICA REVIEW

DEC 2022 | Vol 10 | No 2

ISSN 1837 8994

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THE ACICA REVIEW

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President's Welcome

Georgia Quick
ACICA President

Welcome to the December 2022 edition of the ACICA Review.

We thank all the authors for their submissions and valuable insights. As the year ends, we reflect on some of the achievements and initiatives throughout 2022 in our editorial from the ACICA Secretariat team. We can confidently say that 2022 has been another successful and productive year for ACICA promoting the use of arbitration, administering cases, and promoting Australian cities as seats for arbitration. Some of the highlights are described below.

International Council for Commercial Arbitration Congress – Edinburgh 2022

After much anticipation, the ICCA Congress 2022 was finally held on 18-21 September 2022 in Edinburgh, Scotland. It has been four years since ACICA hosted ICCA in Sydney back in 2018. ACICA was excited to meet old friends and make new ones and to be one of the exhibitors at ICCA 2022. We hosted a drinks reception at the ACICA booth with Australia wines, which was a remarkable success! Many thanks to everyone that came by the booth during ICCA and to Deborah Tomkinson, ACICA Secretary-General, and Christian Santos, ACICA Managing Associate, for promoting ACICA and Australia in Scotland.

Friends of ACICA – London

On 15 September 2022, ACICA held a pre-ICCA networking event in London to launch a new outreach program that aims to bring together Australian arbitration practitioners and those with Australian connnections and interests practicing across the globe. The festivities included a welcome from Hilary Heilbron KC (Brick Court Chambers, ACICA Fellow & Council Member) and a short update from me on the latest developments in arbitration activity in Australia. Many of ACICA's Executive team were in attendance including Judith Levine, Jonathon Redwood SC, Brenda Horrigan and Joshua Paffey and we enjoyed the opportunity to meet together in person with overseas colleagues while enjoying some Australian wine. We look forward to doing future Friends of ACICA events to build this important network and community.

Australian Arbitration Week 2022

We were immensely pleased to be back in person again for Australian Arbitration Week! At the ACICA & Ciarb Australia International Arbitration Conference we were pleased to welcome a record number of attendees – a testament to the continuing growth of Australian Arbitration Week! A further 23 events were held throughout the week which was packed with high level content and fantastic speakers.. Thank you to all our supporting organisations and partners who have supported Australian Arbitration week and the ACICA & Ciarb Australia International Arbitration Conference. We hope to see you in Perth for Australian Arbitration Week 2023!

ACICA/FTI Consulting Australian Arbitration Survey

ACICA with the support of FTI Consulting launched a second survey on international arbitration during Australia Arbitration Week. This time we focused on evidence in international arbitration and the survey was open to anyone around the globe to participate. The empirical data gathered will be used to better understand evidence in international arbitration and inform the arbitral community on what works and what can be improved. We thank all who have given their time to provide their feedback to the survey.

On behalf of ACICA I would like to wish you all a happy holiday season and a happy new year! ACICA is looking forward to another great year ahead full of initiatives, events and leadership in international arbitration.

Editorial: 2022 – A Reflection On The Year That Was

Christian Santos
Managing Associate, ACICA

Madeleine Graveleine
Associate, ACICA

This year has been another busy year for ACICA with our office move in April, the return to in-person events both in Australia and around the world, the development and launch of the ACICA Reflections Report, a successful Australian Arbitration Week and the introduction of many new projects and committees. As 2022 draws to a close, we at the Secretariat reflect on the achievements and contributions ACICA has made this year.

Reflections Report

On the occasion of Australian Arbitration Week 2022 held in Melbourne, ACICA launched its latest report *Reflections on the Last Decade of Activity at the Australian Centre for International Commercial Arbitration*, which reflects on the developments of arbitration in Australia and highlights ACICA's achievements between 2011 and 2021. The Reflections Report offers a qualitative and quantitative assessment of ACICA's activities, with a statistical analysis of ACICA cases over the last ten years. It unveiled key statistics on the value of cases referred to ACICA, the nationality of parties, diversity in arbitrator appointments and the length of proceedings.

Cases referred to ACICA over the last decade have a cumulative value of almost $24 billion. In 39% of cases, at least one party was not based in Australia. It is interesting to note that this figure does not include the common circumstance in which an international party engages in an ACICA arbitration through a locally established subsidiary. In the important area of diversity, the Reflections Report underlines ACICA's efforts to promote diversity in arbitrator appointments with 40% of arbitrators appointed in 2021 being female. ACICA administered arbitrations have also proven efficient with more than half proceeding to the issue of final award within 12 months.

A few other key items outlined in the Reflections Report that may be of interest to readers:

- This year ACICA's Executive team reached gender parity for the first time and achieved greater geographical diversity - the Executive now has representation from the ACT, WA, VIC, QLD and NSW.
- With the move to new premises at Martin Place in April 2022, ACICA entered into a referral relationship with Dexus Place under which ACICA members, parties conducting arbitration under ACICA's Rules or utilising other ACICA services such as deposit-holding or appointment services, and even those simply referred through the website, obtain a discount (at differing levels) for the use of Dexus Place facilities nationally.

ACICA's new office space is located in 25 Martin Place

- ACICA established a new legislative committee in 2022 whose role is two-fold: firstly to assist ACICA in developing regular submissions to the Australia Government outlining proposed legislative reforms to the IAA for consideration and secondly to consider the potential implications for Australia's arbitration regime of cases before the Australian courts.
- ACICA also established a diversity committee to assist ACICA with the development of a diversity and inclusion program, including events and training to support the institution's policy objectives, drive inclusive behaviour and foster equity.
- Prior to ACICA attendance at the much-anticipated International Council for Commercial Arbitration (ICCA) Congress in Edinburgh where we promoted Australia, we launched the Friends of ACICA network outreach program at an event in London. The aim of this program is to bring together the network of Australian practitioners, or Australian supporters based overseas, to ensure that they are aware and up to date with what is happening in Australia and can actively promote Australia in their practice where relevant and appropriate.

Australia is well positioned to be a leading arbitral seat in this region. The ACICA Reflections Report shows that progress has and continues to be made. However, cooperation amongst all arbitration stakeholders in Australia is vital to the process of developing and enhancing Australia's reputation as a seat for international arbitration and whilst this requires commitment from all stakeholders, equally everyone benefits. We continue to seek the assistance of ACICA and Australia's supporters to enable us to draw on, develop and showcase Australia's network of talent.

A few simple things that can be done to contribute to this effort include:

- If you are not already, become a member of ACICA and if you meet the criteria, consider becoming a Fellow which enables you to be included in ACICA's Panel of Arbitrators.
- Ensure that your firm or chamber publications refer to Australian seats and the ACICA Rules as options.
- Indicate to the Secretariat interest in being considered for ACICA committee work or other initiatives.
- Notify the Secretariat of events or initiatives that ACICA should consider being involved with.
- Promote the use of the ACICA Rules wherever appropriate and the use of ACICA resources such as the ACICA Practice & Procedures toolkit which is an excellent set of resources developed by the Practice and Procedures board providing thought leadership and guidance on best practice standards in arbitration.

The Reflections Report confirms the central role that ACICA has played in promoting the use of, and developing best practice in, arbitration in Australia over the last 10 years and supports the case for continued growth of arbitration activity at ACICA and more broadly in Australia. We encourage readers to access the full Reflections Report through the ACICA website to learn more about ACICA's activity and offerings, and arbitration in Australia. ACICA will be looking to provide future statistical updates as we enter the next decade.

International Arbitration Surveys

In 2021, ACICA with the support of FTI Consulting, the WA Arbitration Initiative, Francis Burt Chambers and the Australian Bar Association, successfully launched the Australian Arbitration Report. The report, which indicates that arbitration as a dispute resolution mechanism in Australia is thriving, received much attention in Australia and internationally, including being nominated for the *Jurisdiction that has Made Great Progress* category in the Global Arbitration Review Awards in 2022.

To build on the knowledge developed through the first survey and Report, this year ACICA and FTI Consulting launched the second Australian Arbitration Survey which focuses on Evidence in International Arbitration. The survey, which closed on 16 December, sought responses from to local and international contributors and aimed to give in-house lawyers, counsel, experts and arbitrators a chance to provide feedback to the arbitral community about current practice in the preparation and presentation of evidence in international arbitration and where potential improvements may lie. ACICA and FTI Consulting will be analysing the data from the survey in early 2023 and we will be looking forward to releasing the results in due course. So, watch this space for future updates! ACICA surveys are intended to provide a vehicle through which the arbitration community is able to have its say in shaping the development of arbitration practice in Australia and beyond.

Thought Leadership & Events

ACICA continues to make great strides in its international outreach and profile. The return to in-person events and travel in 2022 provided ACICA with the opportunity to attend the ICCA Congress in Edinburgh, Scotland, launching our Friends of ACICA Network initiative beforehand in London. Not long after returning, ACICA hosted a very successful hybrid Australian Arbitration Week in Melbourne from 7-11 November 2022, which you can read and see more about on pages 18 to 31. Australian Arbitration Week for ACICA was a huge success! At the ACICA and Ciarb Australia International Arbitration Conference, we had our highest attendance to date at the conference with 176 delegates, featuring 41 speakers from 8 countries and nearly 43% of the speakers were women. In addition to the conference, there were another 23 events run over the course of the week with 20 participating organisations and diverse speakers from

Members of the ACICA Executive and Secretariat team

around the globe discussing cutting-edge content. ACICA ran another 5 fully booked ACICA and ACICA45 events during the Week, which is our most to date.

We look forward Australian Arbitration Week 2023, which will see us back in Perth for the first time since 2018.

ACICA continues to promote and provide important thought leadership in the development of arbitration in Australia and internationally through focused events and initiatives. In response to feedback received from corporate users in the ACICA Users' Council for an increased focus on the advantages of expedited arbitration and the circumstances in which it should be considered, ACICA rolled out a national roadshow showcasing the ACICA Expedited Arbitration Rules 2021. The roadshow was held in Sydney (July), Perth (August), Adelaide (August), Brisbane (September) and Melbourne (November). Described by audience members across Australia as *'surprisingly gripping'* and *'the best way to describe changes to Arbitration rules'*, the Roadshow was an interactive enactment of an expedited arbitration proceeding using the ACICA Expedited Rules 2021. It was an excellent opportunity for audience members to

ACICA table at the Australian Disputes Centre ADR Awards Night in 2022. Deborah Tomkinson collected the Arbitrator of the Year award on behalf of ACICA Vice President Judith Levine.

experience an expedited proceeding and ask questions to the arbitrators, practitioners, third-party funders and ACICA to better understand an expedited process. Interestingly, in recent months the Secretariat has seen an increase in cases commenced under the ACICA Expedited Arbitration Rules.

In 2022 ACICA also launched a five-part series of events focused on 'Conducting Arbitration in the South Pacific'. As readers will be aware, the Secretariat team wrote two editorials in the December 2020 and June 2021 editions of the ACICA Review on the issue of greater access to information, capacity building and internationalisation in international arbitration and the importance of regional access and engagement. Australian practitioners have a great opportunity to contribute to capacity building and the development of best practice in the South Pacific, working with our colleagues in that region. The first South Pacific event was held online in August and addressed the state of play in the South Pacific and when pacific parties should arbitrate. The second event was a hybrid event held during Australian Arbitration Week and considered when and how South Pacific parties should commence arbitration proceedings. The next three sessions in this five-part series will be held in 2023. All sessions will be made available for viewing online.

To enhance our Fellow member experience when arbitrating under the ACICA Arbitration 2021, ACICA commenced running Arbitrator Workshop events in 2022, providing Fellows the opportunity to know key members of the Secretariat and how the Secretariat can assist them in the conduct of ACICA arbitrations. The first workshop was held in-person in Sydney in June followed by another workshop in Melbourne during Australian Arbitration Week in November. Further workshops are planned for 2023.

ACICA also held its second Tribunal Secretary course as a hybrid event over the weekend of 25 and 26 June 2022 with course directors Professors Doug Jones AO and Janet Walker CM. Participants who successfully completed this course became eligible to apply for listing on the ACICA Tribunal Secretary Panel, a complimentary resource provided by ACICA

In addition to ACICA conferences, event series and courses, many other ad hoc seminars and events have been held through the course of the year. To wrap up the year, ACICA Secretary General, Deborah Tomkinson attended an ACICA and AMTAC members' networking event in Perth in November and an in-person event in Brisbane in December with Neil Kaplan CBE KC SBS *In Conversation With* the Honourable Wayne Martin AC KC and Rt Honourable Lord David Neuberger of Abbotsbury GBS PC. Finally, ACICA's commission, AMTAC, hosted its 16th Annual AMTAC Address on 12 December at the Federal Court of Australia in Melbourne.

ACICA45

ACICA's young practitioner group, **ACICA45**, has also continued to grow. The ACICA45 steering Committee has had several new members join, including Ashley Chandler (Brisbane), Oliver Cook (Brisbane), Rozelle Macalincag (Adelaide), and ACICA45's first international committee member, Courtney Furner (Zurich). Foundational members of ACICA45, Caroline Swartz-Zern and Erika Williams, moved to a new advisory role with ACICA45 to allow the next generation of arbitration practitioners to grow and steer ACICA45. We thank them and the ACICA45 Steering Committee for the important work that they do. This year ACICA45 had a particular focus on building members' soft skills in arbitration with events held in all major Australian states. ACICA45's first event of the year was a virtual panel on Building an Arbitration Profile in February. The second ACICA45 event was held in-person in Sydney in May, at which the panellists discussed the intricacies of engaging an expert witness. The Sydney event was followed by an in-person ACICA45 event in Brisbane in June on the art of persuasion in written and oral advocacy. In September, ACICA45 held an online event at which Australian arbitration practitioners gathered from various regions to provide their insights on pursuing a truly international career in international arbitration. In September, ACICA45 held an in-person event in Adelaide discussing the soft skill of managing people in large and complex arbitrations. This event was followed soon after by an in-person event in Sydney in October in collaboration with the Society of Construction Law Australia on soft skills in construction arbitration. ACICA45's last event of 2022 was a workshop during Australia Arbitration Week on the enforcement of arbitral awards. One key takeaway from the esteemed panel of speakers is to ensure that you carefully consider the drafting of an arbitration agreement and use the model clause from the institution!

2023

ACICA continues to take pride in the work it undertakes to promote the appropriate and efficient use of arbitration in Australia and regionally, and promote Australian seats. Under the leadership of the ACICA Executive, the Board of Directors and Secretary-General, we look forward to furthering our engagement in 2023. In the meantime, on behalf of the ACICA Secretariat team, we would like to wish our readers a safe and happy holiday season and a very Happy New Year!

Reflections on a Decade of Activity at ACICA

Launched November 2022

Faces of ACICA: Meet Dr Matthew (Matt) Secomb

Dr Matthew (Matt) Secomb
Partner, White & Case, Singapore, Arbitrator, and Adjunct Associate Professor at the National University of Singapore (ACICA Fellow)

Matt Secomb is an international arbitration practitioner, is the Head of White & Case's international arbitration practice in the Asia-Pacific, and he has a particular expertise (amongst other areas) in energy-related and construction disputes. Matt has previously worked at the ICC International Court of Arbitration, and in the Paris office of White & Case. In his role as an Adjunct Associate Professor at the National University of Singapore, Matt teaches a course on energy arbitration. He also regularly writes and speaks on international arbitration topics.

Recently, I had the chance to 'sit down' with Matt – from a distance, so to speak, as we are all so used to doing these days! – to learn a bit more about his experiences working in the international arbitration field. We hope that you enjoy the interview!

Benjamin Hayward

General Editor, The ACICA Review

Q Dr Secomb, you are currently the Head of the Asia-Pacific International Arbitration practice at White & Case. Can you tell our readers a little about the kinds of cases you handle, what it's like to manage that team, and how you find working across the Asia-Pacific's different jurisdictions?

I would describe my work as fun, but challenging.

From a geographic perspective, Asia is both big and culturally diverse. We work with clients, lawyers and arbitrators from China to Australia, and from Pakistan to Korea. It's wonderful to learn about and work with people from such diverse countries (not to mention experiencing the wonderful food!)

That said, it's also hard sometimes. You have to take extra time in communicating with people, and misunderstandings are all too frequent.

It's also challenging to deal with the region's different legal systems. Take the example of China and India, the world's two largest countries by population. We work frequently in both, but the two legal environments are radically different. The superficial difference is that one is a common law jurisdiction while the other is a civil law system. But the differences run much deeper than that. The whole approach to arbitration taken in just these two jurisdictions is really quite radically different.

Given these challenges, I think it's critical to build a team that matches the work you do. I'm super lucky to have built up a small, but diverse team that does that.

Q How did you find your way into the world of international arbitration?

The Vis Moot. I was lucky enough to do the moot as a student back in 1999. It opened the world of arbitration up to me, as it has done for many, many people over the years. On the back of the moot, I got the opportunity to do an internship at the ICC Court's Secretariat in Paris, which really jumpstarted my career in the field.

I'm eternally grateful to the moot, and am always keen to give back. I've returned as part of the Moot Alumni Association, as a coach, as an arbitrator, etc).

Q You have experience handling ICSID arbitrations, and international commercial arbitrations, both institutional and ad hoc. As an experienced practitioner, do you have any advice for our readers in approaching these different categories of case?

It might sound like a clichéd lawyer's answer, but every case is different. That's the beauty of arbitration in many ways. For example, when it comes to procedure, in each case, you write the procedure on a blank piece of paper.

But that said, investment arbitration does have some differences in practice to commercial arbitration. One key thing is that the parties are, by definition, always the same – a state, and a purported investor into that state. That, along with the applicable law, tends to mean that the same issues often come up again and again in investment arbitration (although with meaningful nuances).

Commercial arbitration, by contrast, is more like a free-for-all. You can have a crazy variety of constellations of parties, contracts, and applicable laws.

I can see that you've studied in both Australia and Switzerland. What motivated you to pursue a PhD at the University of Fribourg? Did you study remotely, or in-person in Switzerland, or a combination of the two?

I've always combined practice and academia to some extent. The mix has just varied over time. Given that, I was always keen to do a doctorate. When I finally got around to it, I was living in Paris and was looking for a suitable law school. Through some research and a little luck, I happened upon a brilliant supervisor, Prof. Christiana Fountoulakis, who is based in Fribourg. That, along with the law school's bilingual French/German background, really attracted me.

I did my thesis on the side while I was working, so I never lived in Fribourg, but I did go there from time to time. It's a beautiful town – I would highly recommend a visit if you're in the region.

Q You've maintained a busy speaking profile across the COVID-19 pandemic. How did the pandemic, and all its associated disruptions, affect the way that you stay connected with the arbitration community?

It was hard. Human beings are designed to interact in person. That's always been the case throughout human history.

Thus, trying to maintain contacts (and expand them) was really challenging during the COVID era. You could have virtual coffees, and meet online in other ways, but it always felt (to me anyway) really artificial.

So, I'm happy that COVID seems to be behind us, to the extent that we can meet again in person: the recent Australian Arbitration Week being a great example!

Q The pandemic has obviously had a huge impact on the conduct of arbitrations, too. What COVID adaptations do you think will remain in common use as the emergency eases, and what do you think might snap back to the 'old ways'?

The pandemic has had a number of positive developments, which I hope are here to stay.

First, is paperless arbitration. The arbitration community was inching that way pre-pandemic, but now we are seeing broad acceptance of the idea that paperless arbitration is not just desirable, but is also both possible and indeed optimal.

Second, is an acceptance that substantive hearings can be done virtually. I remember huge fights pre-pandemic when one party proposed that a single witness testify by video conference. I also remember in-person procedural conferences. I think that both of those are very much a thing of the past. I think that now if a witness has a reason for wanting to testify virtually, arbitrators will allow it.

However, the snap back that we're already seeing is the in-person default for substantive hearings. I think that it will remain the rule (subject to exceptions) that main substantive hearings will be in person. That's because it is ultimately a better experience for all involved, and the marginal benefit of in-person hearings outweighs their marginal cost (certainly for bigger cases).

Q You've published a book on interest in international arbitration with Oxford University Press, and you also teach arbitration as an Adjunct Associate Professor at the National University of Singapore. Do you find that your academic activities complement your practice?

Absolutely! I think that academia and practice really help build on each other. I find that teaching and writing definitely make me a better lawyer; and being a lawyer makes me a better arbitration academic too.

In fact, I would suggest that it's particularly difficult to be an arbitration academic without a hand in practice. Due to arbitration's inherent flexibility, it's hard to teach about arbitration procedure in particular if you haven't practiced. That's because there are – by definition – no 'rules' of procedure to teach. What you have to teach is how the procedure is defined in each arbitration.

Q What's the biggest challenge you see as affecting arbitration in the Asia-Pacific at the current time?

The Asia-Pacific arbitration community is definitely heading in the right direction. However, if I had to pick a challenge, it would be training judges on the application of the New York Convention. There are still too many countries where the New York Convention is applied haphazardly. You get some good decisions, but some horrible ones too.

The whole system of international arbitration is based upon the New York Convention's near-automatic enforcement mechanism, and its super narrow enforcement exceptions. When judges don't follow that approach, it affects the whole system.

Q Finally, do you have any advice for law students and young lawyers who have an interest in pursuing a career in arbitration?

Work hard and hustle. There are jobs in international arbitration, but the supply of young lawyers definitely outstrips demand. To succeed, you need to work really hard and also put yourself out there and take risks. That might be moving overseas or studying further, or taking a two-month unpaid internship after you'd been working for two years: which was my own experience!

Dr Secomb, thanks for taking the time to speak with us today. We hope you have a great holiday season ahead!

News in brief

New Members

We welcome the following new members to ACICA:

Fellows

Surya Gopalan (New York)

Vicky Priskich (Melbourne)

Nathan Landis (Perth)

Dinesh Bishnoi (India)

Associates

Aidan Dierickx (Sydney)

Daryl Teo (Perth)

Oluwakemi Olafuyi (Nigeria)

Vanessa Gore (Adelaide)

Students

Antonio Azar (Queensland)

Laura Schaeublin (Sydney)

Syed Talha Hussaini (India)

Chenyi Yang (Queensland)

Olivia Corney (Sydney)

Nethra Katikaneni (India)

Nandini Hirani

Riya Yadav

ACICA Committees

ACICA has recently established two new committee to assist with the achievement of the institution's objectives and promotion of arbitration in Australia and regionally.

Legislative Committee:

The Legislative Committee has been established as a key part of ACICA's engagement with the Australian Government regarding the legislative framework for arbitration in Australia.

The Legislative Committee consists of Australian practitioners based around the country and in the region, along with the ACICA President, at least one other ACICA executive member and the ACICA Secretary General as an ex officio member. We are pleased to welcome the following members:

- Danielle Forrester, Barrister, Banco Chambers, Sydney
- Mark Johnston KC, Barrister, North Quarter Lane Chambers, Brisbane
- Amanda Lees, Partner, King & Wood Mallesons, Singapore
- Peter Sadler, Special Counsel, HFW, Perth
- Premala Thiagarajan, Barrister, List A Barristers, Melbourne
- Georgia Quick, President of ACICA
- Jonathon Redwood, Vice President of ACICA
- Ian Govey AM, Executive Director of ACICA
- Deborah Tomkinson, Secretary-General of ACICA

Diversity Committee:

ACICA has established a Diversity Committee to assist it achieve its objectives as an inclusive, equitable, culturally competent, and supportive arbitration institution. We are pleased to welcome the following members:

- Chiann Bao, Independent Arbitrator, Arbitration Chambers, Hong Kong as nominee for R.E.A.L.
- Guillermo Garcia-Perrote, Executive Counsel, Herbert Smith Freehills, Sydney
- Gowri Kangeson, Partner, DLA Piper, Melbourne
- Long Pham, Barrister, Quayside Chamber, Perth
- Donna Ross, Arbitrator & Mediator, Donna Ross Dispute Resolution, Melbourne as nominee of ArbitralWomen
- Jay Tseng, Senior Associate, Enyo Lawyers, Brisbane
- Nastasja Suhadolnik, Partner, Corrs Chambers Westgarth, Melbourne
- Georgia Quick, President, ACICA
- Deborah Tomkinson, Secretary-General, ACICA
- Erika Williams, Counsel, ACICA

ACICA Events

Recent ACICA Webinar Recordings

***ACICA45 Panel — Pursuing a Truly International Career in International Arbitration* — 6 September 2022**

Moderator: Ella Wisniewski | Herbert Smith Freehills

Speakers: Samantha Lord Hill | Freshfields Bruckhaus Deringer, Rupert Coldwell | Vinson & Elkins, Bronte Hannah | CMS, Aaron McDonald | Herbert Smith Freehills, Jake Lowther | Magnusson

View the webinar here.

***Conducting Arbitration in the Pacific — Session 1: The State of Play in the South Pacific — When Should Pacific Parties Arbitrate?* – 4 August 2022**

Chair: Jo Delaney | HFW

Speakers: Sam Luttrell | Clifford Chance, Kelly McIntyre | Hemmant's List, Daniel Meltz | 12 Wentworth Selborne, Caroline Swartz-Zern | ACICA

View the webinar here.

***Commencing an Arbitration in the South Pacific — How South Pacific Parties Start to Arbitrate* – 8 November 2022**

Moderator: Dr Matthew Secomb | White & Case, Singapore

Speakers: Derek Wood | Ashurst, Port Moresby; Dr Anna Kirk | Bankside Chambers, Auckland; Jennifer Younan | Shearman & Sterling, Paris; Erika Williams | ACICA, Brisbane

View the webinar here.

Recent ACICA Events

***ACICA Tribunal Secretary Course* – 25-26 June 2022**

Course Directors: Professor Doug Jones AO and Professor Janet Walker CM

Moderated by Erika Williams, Counsel, ACICA

***Sydney: Exploring the ACICA Expedited Arbitration Rules* – 21 July 2022**

Host: Tamlyn Mills, Partner, Norton Rose Fulbright

Moderator: Jo Delaney, Partner, HFW

Panel Members: The Hon. Robert McDougall KC, 12 Wentworth Chambers | Mark Dempsey SC, 7 Wentworth Chambers | Beverley Newbold, Partner, Minter Ellison | Matt Lee, Burford Capital | Caroline Swartz-Zern, Counsel, ACICA

***Conducting Arbitration in the Pacific – Session 1: The State of Play in the South Pacific – When Should Pacific Parties Arbitrate?* – 4 August 2022**

Moderator: Jo Delaney, Partner, HFW

Speakers: Sam Luttrell, Partner, Clifford Chance | Kelly McIntyre, Hemmant's List | Daniel Meltz, 12 Wentworth Selborne | Caroline Swartz-Zern, Counsel, ACICA

***Perth: Exploring the ACICA Expedited Arbitration Rules* – 11 August 2022**

Host: Paul Evans, Partner, HFW

Moderator: David Jenaway, Partner, Allen & Overy

Panellists: The Hon. Neil McKerracher KC | Samantha Nadilo, Fourth Floor Chambers | Long Pham, Quayside Chambers | Ruth Stackpool-Moore, Omni Bridgeway | Caroline Swartz-Zern, ACICA

***Adelaide: Exploring the ACICA Expedited Arbitration Rules* – 30 August 2022**

Host: Andrew Robertson, Piper Alderman

Moderator: Ian Nosworthy AM, Independent Mediator and Arbitrator

Panellists: Nick Floreani, Jeffcott Chambers | Julia Dreosti, Clifford Chance | Ruther Stackpool-Moore, Omni Bridgeway | Robert Williams, Hanson Chambers | Caroline Swartz-Zern, ACICA

***ACICA45: Pursuing a Truly International Career in International Arbitration* – 6 September 2022**

Moderator: Ella Wisniewski, Herbert Smith Freehills

Panellists: Samantha Lord Hill, Freshfields Bruckhaus Deringer | Rupert Coldwell, Vinson & Elkins | Bronte Hannah, MS | Aaron McDonald, Herbert Smith Freehills | Jake Lowther, Magnusson

***Brisbane: Exploring the ACICA Expedited Arbitration Rules* – 8 September 2022**

Host: Carl Hinze | Holding Redlich

Moderator: Lucy Martinez | Martinez Arbitration

Panellists: The Honourable Walter Sofronoff QC | Murray Gleeson Chambers | Erika Williams | Williams Arbitration | Khory McCormick | Holding Redlich | Lina Kolomoitseva | LCM | Caroline Swartz-Zern | ACICA

ACICA45: Managing People in Large and Complex Arbitrations – 29 September 2022

Moderator: Rozelle Macalincag, Thomson Geer

Speakers: Julia Dreosti, Clifford Chance | Kristy Zander, LK | Professor Christopher Kee, Flinders University | Liam McInerney, LK

***ACICA45: Soft Skills in Construction Arbitration* – 6 October 2022**

Speakers: Shanna Svensson, Team Lead, Global Litigation Asia Pacific, Shell | Pip Goldman, Partner, Jones Day | John Temple-Cole, Partner, KordaMentha | Guillermo Garcia-Perrote, Executive Counsel, Herbert Smith Freehills)

***Evening Reception with ACICA and Burford Capital* – 12 October 2022**

Speakers: Christopher Bogart, Chief Executive Officer, Burford Capital | Judith Levine, Independent Arbitrator, ACICA | Justin Hogan-Doran SC, 7 Wentworth Selborne Chambers

***Conducting Arbitration in the Pacific – Session 2: Commencing an Arbitration in the South Pacific – How South Pacific Parties Start to Arbitrate* – 8 November 2022**

Moderator: Dr Matthew Secomb, White & Case, Singapore

Speakers: Derek Wood, Ashurst, Port Moresby | Dr Anna Kirk, Bankside Chambers, Auckland | Jennifer Younan, Shearman & Sterling, Paris | Erika Williams, ACICA, Brisbane

***ACICA45 Workshop: Enforcement in International Arbitration* – 9 November 2022**

Moderators: Imogen Kenny, Herbert Smith Freehills Ashley Chandler, Jones Day

Speakers: Laila Hamzi, List A Barristers, Melbourne | Huw Watkins, Dever's List, Melbourne | Christopher Tahbaz, Debevoise & Plimpton, New York | Sylvia Tee, Ashurst, Hong Kong | Matthew Secomb, White & Case, Singapore | Long Pham, Quayside Chambers, Perth

***Melbourne: Experiencing the ACICA Expedited Arbitrations Rules 2021* – 10 November 2022**

Host: Nick Rudge, Allens

Moderator: Monique Carroll, Cite Legal

Panelists: The Hon Marilyn Warren AC KC | Mark Mangan, Dechert Singapore | Pip Murphy, CASL | Gowri Kangeson, DLA PipervCaroline Swartz-Zern, ACICA

***Arbitrator Workshop: Enhancing your ACICA Experience* – 11 November 2022**

Host: Lee Carroll, Partner, White & Case

Speakers: Deborah Tomkinson, Secretary-General, ACICA | Caroline Swartz-Zern, Counsel, ACICA | Professor John Sharkey AM, Independent Arbitrator

***Neil Kaplan In Conversation with Wayne Martin and David Neuberger* – 7 December 2022**

Welcome: Kate Grimley, Partner, Deloitte Australia

Introductory Remarks: Deborah Tomkinson, Secretary-General, ACICA

Speakers: Neil Kaplan CBE KC SBS, Arbitration Chambers, Hong Kong & Melbourne | The Hon. Wayne martin AC KC, Francis Burt Chambers, Perth | The Rt Hon. Lord David Neuberger of Abbotsbury GBS PC, One Essex Court Chambers, London

***AMTAC Annual Address 2022* – 12 December 2022**

Topic: Anomaly or Bad Policy: Foreign Arbitration Clauses and the Carriage of Goods by Sea Act 1991 (Cth)

Host: Federal Court of Australia, Melbourne

Speaker: Matthew Harvey KC

New Book Launched – So, Now You Are an Arbitrator: The Arbitrator's Toolkit by Neil Kaplan and Chiann Bao

In arbitration, procedure is crucial to ensure acceptance of the process. This book is about the importance of getting the procedure right. It begins with the first-ever request to be an arbitrator and takes the reader through all the stages of an arbitration. It points out some of the pitfalls and contains useful checklists. It gives advice on how to deal with conflicts, conduct hearings, deal with document requests, deal with experts, deal with challenges, agree on fees, draft procedural orders and awards, and how not to take on too much.

Written by two experienced and highly respected international arbitrators, the book provides immeasurably valuable guidance.

Now 30% off using the code 30SNYA22*, when ordering on wolterskluwerLR.com/international

*This offer is valid until 31st December 2022.

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.

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ICCA 2022

Friends of ACICA – London, 15 September 2022

In the lead up to the ICCA Congress in Edinburgh, ACICA held its inaugural *Friends of ACICA* event in London on 15 September 2022 as a pre-ICCA networking event. This newly established outreach initiative by ACICA is to bring together Australian arbitration practitioners and those with Australian connections and interests who practice across the globe together.

Hilary Heilbron KC (Brick Court Chambers), ACICA Fellow & Council Member, gave the welcome to the guests and Georgia Quick, ACICA President, talked about the latest updates with arbitration activity in Australia, ACICA initiatives and planning. With an evening of Australian wine tasting, and guests also met with members of the ACICA Executive team, including Judith Levine and Jonathon Redwood SC (Vice Presidents), Brenda Horrigan and Joshua Paffey (Executive Directors). It was a hugely successful event, and we look forward doing future Friends of ACICA events.

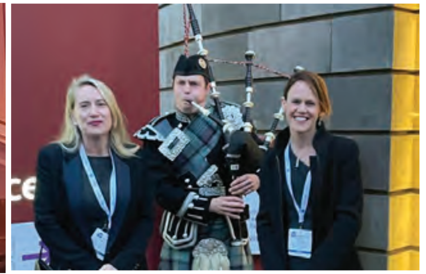
ICCA Congress 2022 – Edinburgh, Scotland, 18-21 September 2022

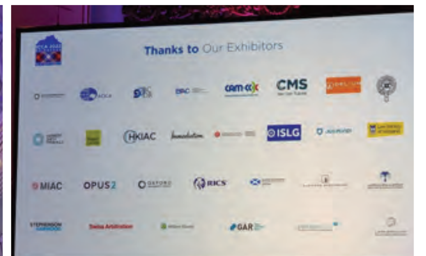
The long anticipated International Council of Commercial Arbitration (ICCA) Congress took place in Edinburgh, Scotland, from 18-21 September 2022 and was hosted by the Scottish Arbitration Centre. The last ICCA Congress was held in Sydney back in 2018 when ACICA hosted the Congress. It was wonderful to reconnect with old friends and make new friends in Edinburgh. We hope to see you all again at the next ICCA Congress in Hong Kong in 2024.

ACICA Exhibiting at ICCA

ACICA was one of the exhibitors during ICCA with our Managing Associate, Christian Santos, at the booth ready to welcome delegates, promote ACICA and arbitration in Australia, answer any questions delegates had about ACICA. We have loved chatting to everyone that came to visit ACICA's booth! Many ACICA Koalas with their handy bookmarks of ACICA resources were taken to many good homes.

ACICA held a raffle at the booth with delegates entering to win an Australian Akubra hat and boomerang. In the photo, our Managing Associate, Christian Santos, (left) is pictured presenting the gifts to the winner Luíza H. C. Kömel, Deputy Secretary-General, (middle) from our friends at the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC). Congratulations!





Drinks Reception at the ACICA Booth

We thank the Scottish Arbitration Centre for allowing ACICA to do a small drinks reception on the afternoon of the first full day of the ICCA Congress on 19 November 2022. Guests were invited to an Australian wine tasting while meeting many of the Australians present at ICCA and the ACICA Executive team, including Georgia Quick (President), Judith Levine, Jonathon Redwood SC (Vice Presidents), Brenda Horrigan, Joshua Paffey (Executive Directors) and Deborah Tomkinson (Secretary-General).

Australian Arbitration Week 2022: Melbourne 7-11 November 2022

After 2 years of remote events, we were so pleased to return to an in-person Australian Arbitration Week 2022 in Melbourne. This year's ACICA & Ciarb Australia International Arbitration Conference on 7 November 2022 was our largest number of conference attendees to date! You can read about some of the key takeaways from the conference sessions from our ACICA interns, Jemima and Linh. We also detail some of the ACICA events from AAW 2022.

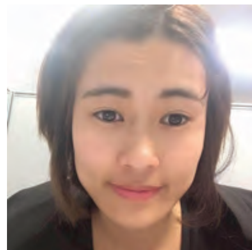
We look forward to seeing you all again for an even bigger AAW 2023 in Perth, Western Australia.

ACICA & Ciarb Australia International Arbitration Conference

ACICA & Ciarb Australia International Arbitration Conference

Report: The ACICA & Ciarb Australia International Arbitration Conference – Melbourne, 7 November 2022

Jemima Moffat
ACICA Intern



Linh Doan
ACICA Intern

The ACICA & Ciarb Australia International Arbitration Conference was the headline event for Australian Arbitration week for 2022. The title of the conference 'future frontiers', intended to spark a broader conversation about contemporary developments in international arbitration. The conference programme begun with a keynote address from the Honourable Susan Kiefel AC, Chief Justice of the High Court of Australia. Her Honor provided a historical overview of international arbitration in Australia and the role of the courts in the creation and enforcement of arbitral awards. Against this backdrop, the conference consisted of eight stimulating sessions covering:

1. Around the World – the Latest Developments and What's to Come
2. Smart contracts, Cryptocurrency & Blockchain Disputes
3. The Evolving ISDS Landscape
4. Key Practical Considerations: Costs, Interests, and Confidentiality
5. The Shift to Renewables
6. Insolvency and Arbitration
7. Arbitration Incubation: Ideas from the Next Generation
8. Resolving Disputes Efficiently – Expedited Arbitration or Expert Determination?

Session 1: Around the World – the Latest Developments and What's to Come

Session 1 was chaired by Justice Quentin Loh, the Chief Justice of the Supreme Court of Singapore. The opening session covered a lot of ground. Loh J was first joined virtually by Aicha Mane, Managing Counsel of Houda Law firm in Senegal, Africa. Mane gave an insightful overview of contemporary developments in international arbitration in Africa. Specifically, relating to the uniform business law in Africa ('Ohada Organisation') and the Uniform Act on Arbitration 1999 ('UAA'). Firstly, Mane discussed role of institutions like the African Common Court of Justice and Arbitration ('CCJA'), established under the UAA. The CCJA is responsible for dispute resolution in the region, including international and regional claims. The CCJA has grown considerably and is increasingly utilized by African businesses to resolve disputes. As a result of the growth, Mane explained that the CCJA is also responsible for answering stakeholder questions relating to transparency and efficiency of process. Secondly, and relatedly, the role of the state, and the Ohada Organisation in reforming international business law and creating an environment for safe and secure international business is particularly important to arbitration in Africa. 15 of the 17 African member states to the Ohada Organisation are also signatories to the New York Convention, giving foreign investors a great deal of confidence in their investments, and the enforceability of arbitral awards. Moreover, state-funded training programs for judges and arbitrators has enhanced the efficacy of those awards. Thirdly and finally, Australian investors in Africa have been and continues to be successful because of the reforms. The

legal framework for Australian companies engaging with African companies is by no means simple, particularly as these relations tend to revolve around extractive industries. In balancing both local and uniform law, development has begun surrounding local arbitration centres with specialization in the law of extractive industries. Practitioners are encouraged to watch this space!

Natasja Suhadolnik, the second speaker of the first session, provided insightful analysis of recent arbitral awards, demonstrating that Australia is undoubtedly an arbitration friendly jurisdiction. She stated that the courts generally view their role as 'limited and supportive' when it comes to arbitral awards. However, some recent decisions suggest a challenge to the current framework is ahead. Suhadolnik gave an overview of the position on stay applications in Australian courts. She opined that Australian courts are increasingly reluctant to rule on matters of arbitral jurisdiction, and increasingly more likely to stay proceedings in favour of arbitration, where a party challenges the scope and operability of an Arbitration agreement. In other words, there is a 'liberal application of competence competence' by Australian courts dealing with the enforcement of arbitral awards. Moreover, the Australian High Court is currently faced with a case between Spain and Luxemborg, where it must determine whether there is a distinction between the 'recognition' and 'enforcement' of an award, and if there is, whether the court's power should extend to both the recognition and enforcement of an award made against a state. It is also before the High Court presently, whether Australia will remain an arbitration friendly jurisdiction in the context of free trade agreements.

The third speaker, Jennifer Younan, also gave an insightful account of the impact of the Ukraine War on international arbitration. She identified two overarching categories of claims which have and are likely to arise. Firstly, investor-state claims, such as those already initiated by foreign investors against Russia. For example, counter-sanctions for the expropriation of individual rights and property. Alternatively, claims by Ukrainian investors who have investments in Russia that are now annexed or controlled by Russia. For example, Ukraine's largest steel maker has signaled a potential arbitration over the destruction of steel plants during the siege of Mariupol. On the other hand, commercial arbitrations are much harder to predict.. Notwithstanding, there are claims with direct proximity to the war, arising from energy price reviews or global supply chain interruptions. Additionally, claims indirectly proximate to the war, such as those arising out of contracts with Russian entities. Furthermore, the direct impact of war is focused on Europe given dependence on Russian Energy, however, will be felt all over the world for a long time to come.

The final speaker of the first session, Gavin Denton, answered the question *'Who are our arbitrators and where will they come from in the future, and what role (if any) do instructions have to play in this process?'* In response, Denton identified that historically, arbitrators have been retired judges and senior practitioners with expertise in certain fields. This was how we ensured we had high quality arbitrators. However, there is a marked lack of diversity in arbitration, which is essential for its development around the world, and within multi-cultural communities. Denton focused on the importance of quality arbitrators and the risks associated with placing quotas on gender, ethnicity, religious affiliation, etc. Inconsistencies relating to arbitrator requirements and obligations across different panels also affects the efficiency and quality of arbitral awards. Ultimately, it is the task of institutions like ACICA to promote arbitrator diversity in the right way, including facilitating training programs.

Session 2: Smart contracts, Cryptocurrency & Blockchain Disputes

The second session addressed an up-and-coming area where development has begun and has the potential to be very significant. The role of block-chain technology was discussed by a panel chaired by esteemed arbitrator and Partner of Gibson & Dunn, Paul Tan. The first speaker Brandon Malone (Scotland) gave a summary of block-chain technology and smart contracts. In summary, Malone identified block-chain technology in this contract as perhaps the most secure way of recording, storing, and exchanging information. A smart contract is a self-executing piece of information, or 'code'. Performance of a smart contract is triggered through the 'oracle' of a smart contract, which is in the simplest sense, the data base upon which the smart contract operates. Therefore, when the database records a certain piece of information, performance of the smart contract is automatic. As explained by second speaker Natasha Blycha, this technology is fundamentally changing the nature of contracts. Contracts are becoming tradeable assets, programmable to make decisions and automate the

performance of obligations. There are several benefits to making arbitration agreements smart contracts, but also several risks which must be managed. The primary risk identified by Blycha is a stark lack of knowledge across the industry, on this area of law. The second risk identified, is the way in which smart contracts will be regulated, and who will be responsible for their regulation. On regulation, the third panelist Adam Percy explained that several leading states are currently attempting to regulate block chain and smart contracts. The Responsible Financial Innovation Act is currently before the US Congress, and a set of uniform laws is before the EU. However, Percy identified his concern that Australia is only attempting to regulate 'pieces of the puzzle', which will lead to stunts in its growth overall.

Furthermore, Blycha and Percy acknowledged this as 'The Responsible Machine Problem'. If we increasingly give over decision making power to an algorithm re. legal positions in contracts, and an algorithm does something wrong, how does the 'long arm of the law' punish an algorithm? Inevitably, there is ownership and responsibility attached to smart contracts, yet how far do each of these extend, and will arbitration be used to resolve these types of claims? Some publications by the panel of the American Arbitration Association seem to suggest this is the case.

Session 3: The Evolving ISDS Landscape

The Evolving ISDS Landscape session was chaired by the Honourable Justice Catherine Button collaborating alongside with four-member panel including Chris Tahbaz (Debevoise & Plimpton), Gonzalo Flores (International Centre for the Settlement of Investment Disputes), Monty Taylor (Arnold & Porter) and Jo Feldman (Norton Rose Fulbright). The panel addressed recent developments that have accelerated a number of significant changes in the Investor-State dispute settlement regime.

Contributing to this emerging topic, Gonzalo Flores was the first panelist responding to several criticisms against the ISDS system regarding the time and cost involved in pursuing a case. He acknowledged that there are two commentary aspects of the amendment in 2016. One is to address an increasing concern about the length and cost of an investment dispute resolution process, the other is about the recognition of the complexity of the investor-state dispute field that may require a longer process. Having two those aspects into consideration, ICSID determined some areas where the time and cost could be reduced and tried to tailor the processes to meet particular needs in each case. Then, in July this year, there were four primary amendments to the ICSID Rules. Firstly, there was an emphasis on the role of technology. All the fillings will be made electronically and potentially, all hearing will be made remotely or in a hybrid format. Secondly, ICSID introduced new time limits as well as extensions for the parties' conduct and tribunal determination. Thirdly, ICSID established specific timeframes for certain motions. One biggest concern in investor-state arbitration is the use of proposals for disqualifications as a tool to derail the proceeding. ICSID raised the bar for the parties to propose as well as tighten the timeframes for the disqualification process. Fourthly, ICSID introduced a specific new rule encouraging expedition with full potential to deal with cases in a timely and cost-effective manner. Overall, the primary purpose of the recent amendments is to make the proceeding more efficient.

Christopher Tahbaz addressed the issues of transparency in the ICSID Rules. He pointed out that by governing the participation of amicus curiae as non-disputing parties in the proceedings which was a big win to the transparency in an arbitration proceeding. There are some specific procedural amendments for the application of a non-disputing party. The tribunal is required to rule on this application within 30 days. Mr. Tahbaz stated amicus curiae has increasingly played an active part in arbitration. According to World Bank's recent statistics on the court's decision on the application of amicus curiae's participation, in the period between 2006 and 2010, there were 10 recorded decisions. Between 2011 and 2016, there were 34 recorded decisions. From 2017 to the present, there were 88 recorded decisions. There is a lot of activity in this area.

Monty Taylor, then, discussed the practical impact of a rapid growth of case law and rulings on the ISDS system. Taylor argued that it certainly affected the way in which counsel argues cases, because instead of the counsel having only treaties and the BCLT at hand, now they have a smattering of past cases. They have a vast array of rulings available to them. Giving how the pleadings tend to look now, councel might need to cite more than 10 cases, if not, their argument will be considered weak and

potentially be removed. From a different perspective, the way the tribunal thinks about the cases also changed over the years. Tribunals are now more likely to support their reasoning by quoting past awards.

Finally, Jo Feldman gave her opinion about the Achmea case and recent withdrawals from key treaties (for example the Energy Charter Treaty) and dealt with questions about the legitimacy of the system. Feldman argued that there are around 3000 treaties containing ISDS. The articles claiming that countries will gradually move away from ISDS seems a little premature. However, there are certainly some moves over the past few years which raised concerns for those who are reliant on ISDS. There is the fact that ISDS has effectively been removed from between the EU member states, and India also does not include ISDS in their recent decision. In conclusion, there are some reasons for developed countries to not include ISDS between themselves anymore. Some consider that ISDS will damage some environmental and public policy. In Australia, in the last decade, ISDS has predominantly been included in many trade treaties. It means that ISDS will be there with the country that has strong trade services, and investment relationship.

Session 4: Key Practical Considerations: Costs, Interests, and Confidentiality

Costs, interest, and confidentiality are key considerations for why parties decide to arbitrate in the first place. This session was chaired by Simon Greenberg to examine each of these features in a practical way. The panel included Jeff Gleeson KC from the Victorian Bar, Melbourne; Dr Anna Kirk from Bankside Chambers, Auckland; Elizabeth Macknay from Herbert Smith Freehills, Perth; and Dr Matthew Secomb from White & Case, Singapore who closely addressed a number of questions: Is Australia leading the way, as it has with third-party funding, in other areas, or are there areas where Australia can improve?

Macknay was first invited to comment on a question: *"How costs have been dealt with in international arbitration in Australia"*. She stated that under the Australia's International Arbitration Act, the starting point will be with party autonomy. It is for the party to decide how the cost should be dealt with. If the parties have not agreed, this matter will go to the tribunal at their discretion. Furthermore, under Article 48 of the ACICA Rules clarify the term "costs of arbitration". That term has a very broad scope which includes the costs of the in-house counsel and the costs of non-independent experts, also the third-party funding costs.

Macknay continued to give clarifications over the issues of third-party funding: *"whether the tribunal costs should be allocated to compensate a funded party for the funding costs when they win the case?"*. Macknay stated that there are no clear provisions under the ACICA Rules in relation to this issue. However, the Queen Mary task force on third-party funding in international arbitration recently prepared very comprehensive report. They concluded that third-party funding really should not make any difference to the decisions made on whether costs should be allocated and how they should be allocated. The successful party should not be denied their costs simply just because they are funded by other third parties. Furthermore, there is a scenario that the party opposing the funded party wins and whether or not they can get a costs order directly against the funder. Macknay, one more time, quoted the conclusion from the Queen Mary task force that the tribunal would not be able to make an adverse order against the funder unless it has an

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expressed power to do so. She suggested that to be able to get this expressed power from the third-party funders, in the early stage of the process, some form of security for cost should be put in place, if the funders are known to getting involved.

Then Dr. Anna Kirk discussed the similarities and differences of the third-party funding regime between Australia and surrounding jurisdictions. Dr. Kirk pointed out that in Australia, the cases on third-party funding are back to 1992, it has been a matter in Australia for a long time. There are some significant contrasts with other jurisdictions in the Asia Pacific. In Hong Kong, international arbitration and mediation allowed the use of third-party funders in 2019. After that, the Hong Kong International Arbitration Centre changed its Rules to bring in some provisions around the disclosure of third-party funding arrangements. In New Zealand, there are few developments on this issue. However, NZ has no particular legislation or major cases on funding per se, although the court is taking a very pragmatic approach to funders.

Dr Matthew Secomb was the next speaker to talk about interests in arbitration. Dr. Secomb pointed out three primary issues making interests one of the subjects that many jurisdictions around the world have struggled with. Firstly, a bad submission usually is made regarding interests. The parties seem to skip over the matter of interests in their submission and at the end of the case, this matter will be brought up and argued vigorously. Secondly, rules and legislation give matters of interests a poor treatment. Thirdly, it is lawyers. They normally do not evaluate correctly the significance of interests. To avoid these issues in practice, making a really good interests' submission would be a huge value for the tribunal. The party should make their statement very clear in their submissions such as what rate the parties are looking for, whether they are asking for compound or simple interests, and the date they want the interests to start on. Moreover, the parties need to also engage with the other party's interests proposal.

Finally, Jeff Gleeson KC addressed the question: *"Is that correct assumption that arbitration is confidential and to what extent?"*. Gleeson expressed that in Australia, it is largely true. However, there are some problems with confidentiality that the witnesses that turn up in an arbitration have no obligation of confidentiality, and a variety of court processes impact on the ability of parties to keep confidentiality. In 1995, in one High Court decision, the High Court ruled that confidentiality is not an essential attribute of arbitration which is very controversial. Twenty years later, the parliament changed the International Arbitration Act with the default position that the material in an arbitration, pleadings, evidence, and the award itself are confidential. However, the reason which Anthony Mason cited to support his proposition that confidentiality is not an essential attribute of arbitration held true.

Session 5: The Shift to Renewables

Renewable energy is a topic increasingly discussed at international conferences like the present one. The chair of session five, Dr Cameron Kelly, identified 'the race to net-zero' as one of the most important challenges of our lifetime, achievable through renewable energy. The panel sought to identify where Australia sits within the shift to renewable energy, and why international arbitration is used to deal with these kinds of disputes. The first panelist Kamar Padisette provided an overview of Australia's current position, which has been the subject of 'phenomenal growth' over the last four years. The reason being, renewable target time periods for 2020 were evaluated and new targets were set for 2030. Additionally, investment has markedly increased in renewables. It is no secret that Australia is rich in resources to create renewable energy and does not generate as much as it uses. Accordingly, to capitalize on its potential, Padisette identified six 'key races which Australia must win': capital, capacity, grid transmission, skill, and resources, changing the narrative around renewables and policy decisions. Whilst it is difficult to say which is most important, in a post pandemic climate skill and resources is proving essential to the industry and market success.

Damien Sturzaker (Speaker 2) thereafter identified the kinds of disputes arising from the renewables sector. There are several similarities with other industries, but also some key differences. Sturzaker identified five types of claims: contract/joint venture agreements, weather, construction, technology, and investor-state disputes. He concluded that international arbitration is ideal for the frequency of cross-border investment in renewables, in addition to the benefits of confidentiality and case-by-case decision making. Gabriela Avila (Speaker 3) spoke on investor-state claims in the sector, focusing on the 'Spanish Arbitration Phenomenon'. Spain is an EU leader

for the transition to a more renewable platform which frequently implemented regulatory reforms from 2007 onwards. Tribunals initially acknowledged the power of government to make regulatory changes, however moved towards protecting existing investments in renewables in light of perceived changed affecting government liability. Tribunals thereafter held that the Spanish government could not regulate in an illegitimate, unreasonable, or disproportionate manner. However, the issue remained, that these three terms were not defined nor standardised. The result being contradictory awards were being rendered in respect of the same regulatory provisions. Bret Adams (Speaker 4) concluded the session by identifying contemporary trends and the way forward for renewables and arbitration. Adams identified community acceptance and landholder engagement as essential to the avoidance of claims. Moreover, a need to move 'from rhetoric to reality' using the three tailwinds of the sector: the physical need for renewable energy (1), the inherent low cost of renewables producible on home soil (2), and increased trajectory of demand for the next period. Furthermore, Adams opined that Australia ought to be the lowest cost producer, however there is debate as to whether the 'tyranny of distance' from large industry players is too much to overcome.

Session 6: Insolvency and Arbitration

The interaction between an international arbitration proceeding and a national insolvency regime has been described as a 'conflict of polar extremes' which can pose unique problems for arbitration practitioners. This session was chaired by Dr. Andrew Hanak KC from Chartered Institute of Arbitrators, Australia to consider the practical issues which arise from this conflict. Our esteemed panel includes Matthew Lee from Burford Capital, Sydney, Courtney Lofti from Jones Day, Frankfurt, Karen Petch from New Chambers, Sydney, and Polly Pope from New Zealand International Arbitration Centre who provided different perspectives to address the following factual scenario.

The factual scenario: Two parties enter a contract for the supply of machinery. The Claimant (a New Zealand company) is the purchaser of the machinery. The respondent (a Swiss company) is the supplier. The Claimant makes a substantial instalment payment under the contract. Final delivery and installation of the machinery is extended several times due to the Claimant's financial difficulties. The Claimant terminates the supply contract and based on an arbitration clause, the Claimant files a request for arbitration seeking a refund. However, the respondent denied the claims and files a counterclaim seeking compensation for all costs incurred.

Starting off the session, Ms. Pope looked into the insolvent claimant's perspective to approach the case. She stated that to understand the motivations of an insolvent company, it is important to understand who is controlling the company and their duties. Under the New Zealand laws, if any legal proceedings against an insolvent company or in relation to its assets will be automatically stayed unless the liquidator or the NZ High Court agrees to continue those processes. Therefore, from the point of their appointment, the liquidator immediately gains the power to commence, continue, discontinue or defend the arbitration. There are two main different scenarios in which a liquidator would wish to take an active part in the arbitration. Firstly, the arbitration is attractive to the liquidator where the arbitration claim is a net asset of the company. Secondly, arbitration provides a prospect for obtaining an enforceable award against the respondent or the liquidator can find a means of funding the arbitration.

Then, Lofti discussed the issues facing the respondent in this hypothetical. She pinpointed that there are three primary issues which are the receipt of the request, the proceedings themself if the parties choose to continue, and lastly the final award, enforcement, and set aside. Firstly, the respondent has two options upon receipt of the request. They can choose to respond to commence further proceedings that will incur costs or be silent which makes the costs of the proceedings much less. Under most rules (for example, Art 49 of ACICA Rules), if the advance on cost is not been paid, the proceeding can be terminated. In this particular case, because of a lack of financial resources for the claimant, the respondent can wait to see if the claimant can pay its portion of the advance on costs. If the claimant can, so it can decide to pay its portion and proceed with the proceedings. Secondly, if the respondent decides to continue with the arbitration. The parties must pay their advance on costs as a precondition for arbitration. Thirdly, in terms of the final award, there are 2 components the respondent might need to look at including recovery and the possibility of an award being set-aside.

Petch next considered this problem from the point of view of the arbitral tribunal. She pointed out that under an arbitrator's perspective, there are three main issues. Firstly, in terms of jurisdiction or arbitrability, as the arbitrator, she looked at the seat of the arbitration and assumed that the law of the seat allows the arbitration to continue even where one of the parties is insolvent. However, some foreign insolvency laws can negate retrospectively the ability of one party to enter into the agreement, therefore, the proceedings might stay because an NZ entity is insolvent except with the consent of the liquidator. Furthermore, it is also possible that the Swiss party could not continue because, under Swiss laws, they might have to litigate this issue in their own courts against one insolvent counterparty. Secondly, if the tribunal is bound to render an enforceable reward, should they exercise jurisdiction at all in this case? The tribunal then will look at the assets of the New Zealand company to consider whether the claimant has the capacity to enforce an award or whether there are any public policy reasons not to continue the arbitration. Finally, to answer the question "what issues can be arbitrated?", Petch stated that all the issues arising under the arbitration agreement can be arbitrated. However, the issues arising in the liquidation or in the insolvency proceedings cannot be arbitrated such as voidable transaction claims, the proof of debt process.

Lastly, Lee addressed it from the perspective of the litigation funder in this hypothetical. Lee acknowledged that there is an injured entity who might need financing. However, legal finance is not just limited to financially distressed companies or entities. In this instance, because of the recoverability and enforceability issues, it is appropriate for funding on both sides. In practice, if the liquidator or the respondent is looking for funding of the claims from the funders, as a first matter, a funder could investigate the proceeding or the potential claims or counterclaims so they could seed funding just for that piece especially in the context of insolvency. The next step is simple payment of legal fees, disbursement and adverse costs over the course of an action. If any of those entities had set of claims, they could pull that together and obtain funding for the whole facility of claims, rather than just dealing with them on a case-by-case basis.

Session 7. Arbitration Incubation: Ideas from the next generation.

The Arbitration Incubation: Ideas from the next generation seminar was chaired by Guillermo Garcia-Perrote from Herbert Smith Freehills and Robert Tang from Clifford Chance. This session was divided into 2 parts in which Mevelyn Ong from Sullivan & Cromwell LLP, New York and Raeesa Rawal from Debevoise & Plimpton, London addressed the questions regarding human rights and environmental issues in arbitration; and then Laurence Terret from Herbert Smith Freehills, Brisbane provided a case study in admissibility issues if a witness tragically dies prior to the hearing. Lastly, Avineet Singh Chawla from Jindal Global Law School rounded out the session by demystifying the enforceability issues of the recent amendments to the Indian Arbitration and Conciliation Act.

At the beginning of the session, Ong discussed the emergence of a pro ESG trend in investor-state arbitration in which the investors might be required to comply with international human rights and environmental obligations. She quoted three key cases during the pre-pandemic era to pinpoint the idea that non-state actors or foreign

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investors now can now be considered subject to international law. First case is the ***Urbaser vs Argentina*** in which the tribunal decided that it is wrong to say that the private parties cannot have obligation under international human rights law. In ***David Aven vs Costa Rica***, the tribunal found that the obligations for concerning the protection of the environment could be imposed on the foreign investors. Ong also related to several development in the post-pandemic era, the governments are ramping up ESG regulations, mandating human rights due diligence. A bombardment of sanctions have been leveled against individuals, financial institutions, and businesses who have been allegedly involved in or facilitating transnational crimes such as money laundering or corruption. However, she pointed out that the issues of joint responsibility for international human rights and the environment are still problematic. Should the joint responsibility be accounted as a question of damages? If not, can we account for it as a question of admissibility instead? As these questions have yet to be addressed, she encouraged international arbitration practitioners to think about them more closely, more focused and more motivated in the context of a post pandemic world.

Then, Rawal addressed what role arbitration can play in navigating the human rights implications of transitioning to renewal energy. She stated that there is a significant increase in the mining of certain critical minerals that are required for cleaner technology and cleaner infrastructure. However, given where these mines are located, we are likely to see a vast variety of human rights issues such as supply chain, child labor, and unstainable mining processes. In the last 2 decades, human rights claims have started to find their way to investor-state arbitration and states are increasingly reaching into the realm of human rights law to defend or to counterclaim against investors' claims. Also, in the context of investor-state arbitration, based on an independent cause of action arising out of the investors' failure to observe its obligations in connection with the main investment, the states shall bring up a claim before arbitration to stop the investor from violating human rights.

Terret next discussed his real-life experience in relation to the death of a witness right before the hearing and the legal issues that arose such as the admissibility and weight of the evidence. He stated that in general, the tribunal has wide discretion to determine the admissibility of the evidence (Article 16.2 of the SIAC Rules). However, in the case, the arbitration rules are silent on the specific questions of witness evidence, a practitioner has to turn to the IBA rules on the taking evidence in international arbitration (Rule 4(7)). According to Rule 4(7), if a witness fails to appear for testimony without a valid reason, the tribunal shall disregard their statement. There are three reasons which are generally accepted as a valid reason. Firstly, there is a serious illness which must be supported by medical evidence. The second is an unexplained disappearance. The third is the death of a witness. Therefore, in the case he dealt with; the evidence is admissible before the tribunal. However, the weight of this evidence might be reduced because of the natural justice principle of procedural fairness.

Lastly, Chawla addressed the 2021 amendment to the Indian arbitration and reconciliation Act in terms of the enforcement of awards. He pointed out that under the Indian Arbitration and Conciliation Act 1986, there is no provision which expressly provide for an "automatic stay" on the execution of the award. Until 1996, in *National Aluminium Co. Ltd vs Pressteel* where the Supreme Court observed that there will be an automatic stay or an unconditional stay on the award when it is in its challenging stage. Then in 2015, there was an amendment to the Act provided that the award will not automatically become an unenforceable award, and the party must file a separate petition for staying the award. Finally, in 2021, there were 2 more grounds added which are the grounds of fraud and corruption. However, because the definition of fraud and corruption is very vague, there are certain questions remaining unanswered which put a lot of pressure on the judicial interpretation system.

Session 8: Resolving disputes efficiently- Expedited Arbitration or Expert Determination?

Expert determination is on the rise in Australia but there are many who think it is a costly, inefficient dispute resolution mechanism and baulk at the thought of using it. Some suggest using expedited arbitration instead. To cover this topic, Erika Williams from Williams Arbitration, Brisbane chaired the session alongside a four-member panel including Mark Mangan from Dechert LLP, Singapore, Jonathan McTigue from Clayton Utz, Melbourne, Nikki O'Leary from Allens, Brisbane, and Bill Smith from Ashurst, Sydney.

Mangan kicked off the session by giving the overview of the expert determination and expedited arbitration. He pinpointed that in terms of the similarities, both processes arise from the party's agreement, and limit or exclude the jurisdiction of the courts. They both result in more or less a binding non-judicial decision which traditionally is cheaper, faster, less formal, and determined by people with specialist knowledge. Besides, there are three primary differences between the two processes. The first is the purpose of the process, the aim of expert determination is a process where someone with specialist knowledge is called upon to make a decision to resolve a technical issue. In contrast, expedited arbitration normally is used principally to resolve legal disputes or broader range issues. The second difference will rest on the legal foundation of both. For expert determination, the parties have to prescribe the terms of reference or the mission for the expert and the procedure. There are no international standards for expert determination. In contrast, arbitration is underpinned by the contract to begin with, however, it includes the entire legal ecosystem that exist to support the process such as supportive legislature, international Conventions, and institutional rules. The third key difference is the way the parties can challenge or enforce a decision resulting from expert determination or expedited arbitration.

Then McTigue made some insightful comments on the topics of the session. He stated that because of the nature of the expert determination process itself, the parties are not in any way constrained that make the expert determination the right process in particular circumstances. Secondly, expert determination has developed over the years in the way that it was reliant on a piece of expert knowledge. Moreover, McTigue focused on the issues of non-binding decision which results from an expert determination process. He expressed that generally, in any expedited process, the parties are not given the opportunity to test evidence by cross-examination which does not give the decision-maker the benefits of being assisted by all the submissions. Those features of the expedited process increase the risk of receiving a poor decision. Therefore, when the process has been looked at through this lens, a non-binding decision is superior. In conclusion, expert determination is capable of being tailored while the expedited arbitration is fairly prescriptive which would be useful for some clients.

The chair next invited Smith to address the question: *"Are these dispute resolution mechanisms even comparable?"* Smith explained that in terms of how the processes operate on a day-to-day basis, if no hearing gets involved in the arbitration, there is very little between those two. In the Australian construction and infrastructure sector, it is common that expert determination is called up as the dispute resolution process either for all disputes or for some various subsets of disputes. Additionally, he articulated that the expert determination is best done on an ad hoc basis. The most value that the parties have in the expert determination is not where it is mandated by the contracts because it is difficult for the parties to foresight the precise expertise that the expert will be used to decide on the matters, or to know who the default appointing body will be for appointing expert if the parties cannot agree to it. On the ad hoc basis, the expert can sit down with the parties to consider what can best address the parties' needs.

Lastly, O'Leary elucidated the question *"How and when the scope of matter can be defined to be referred to arbitration?"* In her view, there is not much difference between expedited arbitration and expert determination. In terms of construction disputes, at the time entering into a contract, the parties do not know what the disputes will be, therefore, it is difficult to foretell what is the appropriate dispute resolution mechanism. Then, once the dispute arises and the parties choose an inappropriate process, a practitioner might need to look for jurisdictional reasons to get out of that clause. There is a primary way to have those mentioned jurisdictional reasons. Under a contract, there is an expert determination clause that capture a large category of dispute. The lawyer will look at a way to try to narrow the scope of that clause. Whether it is technical issues or legal issues, if it is technical issues, it might be sent to an expert determination process, if not, litigation or arbitration might be more suitable.

Dr Andrew Hanak KC acknowledged everyone's contributions and closed the conference.

Commencing Arbitration in the South Pacific – How South Pacific Parties Start to Arbitrate

On Tuesday, 8 November 2022, ACICA, in collaboration with Hemmant's List (Brisbane), held the second event of a five-part series on conducting arbitration in Oceania. This event focussed on the mechanics and best practice on commencing an arbitration with a view to providing capacity building for practitioners of all levels and interests in the region. Following an introduction by Stephen Colditz of Hemmant's List, Dr Matthew Secomb of White & Case Singapore expertly moderated the panel consisting of Derek Wood of Ashurst Port Moresby, Dr Anna Kirk of Bankside Chambers Auckland, Jennifer Younan of Shearman & Sterling Paris and Erika Williams of ACICA, Brisbane. The panellists addressed considerations of what should be done before commencing an arbitration and how to start an arbitration. The audience was told about the many useful resources for starting an arbitration developed by ACICA's Practice & Procedures Board available on its website. The panellists also discussed how to identify a suitable arbitrator and the various factors that should be taken into account. Finally, Derek Wood and Anna Kirk provided insights into the regional arbitration landscape in Papua New Guinea and New Zealand. The event was kindly hosted by Ashurst, with James Clarke of Ashurst providing some closing remarks.

Arbitrator Roundtable

ACICA held an Arbitrator Roundtable with leading arbitrators. This was a candid and in-depth discussion exploring areas of procedural flexibility and innovations in international arbitration practice which can lead to greater efficiencies in the arbitral process.

This roundtable session was a fantastic opportunity for arbitrator to exchange views and experiences on international best practice and challenge the status quo. The aim was to lead to the enhancement of arbitration to Australian corporates and the international competitiveness of Australian arbitrators in their roles in the region.

The spirited discussion among attendees was facilitated by leading international arbitration practitioners Allan Myers AC QC (List A Barristers), Gavin Denton (Arbitration Chambers, Hong Kong & London), Georgia Quick (Partner, Ashurst & ACICA President) and Brenda Horrigan (Independent Arbitrator & ACICA Executive Director) and Hilary Heilbron KC (Brick Court Chambers), and moderated by Deborah Tomkinson (Secretary-General, ACICA). We thank our venue and lunch sponsors DLA Piper and FTI Consulting for their support.

ACICA45 Workshop

On Wednesday, 8 November 2022, ACICA45 held a workshop on the issue of enforcement in international arbitration. The discussion was led by speakers from around the world who shared their insights and facilitated practical exercises among participants. Laila Hamzi, Huw Watkins, Christopher Tahbaz, Sylvia Tee, Matthew Secomb and Long Pham, addressed issues from the arbitration agreement, to the choice of an Arbitral Tribunal and Institution and finishing with the enforcement mechanisms. Participants were given the opportunity to discuss and share their views and took part in practical exercises. The event was hosted by Herbert Smith Freehills and co-moderated by ACICA45 representatives, Imogen Kenny and Ashley Chandler.

Experiencing the ACICA Expedited Rules 2021 – National Roadshow

On Thursday, 10 November 2022, ACICA held the last of its national roadshow events. The roadshow was an interactive enactment of an expedited arbitration proceeding using the ACICA Expedited Rules 2021. The 'actors' included the Hon. Marilyn Warren AC KC as arbitrator, Mark Mangan of Dechert Singapore as counsel for the claimant, Gowri Kangeson of DLA Piper Melbourne as counsel for the respondent, Pip Murphy of CASL Melbourne as the third-party funder and Caroline Swartz-Zern of ACICA, representing ACICA. The event was hosted by Nick Rudge of Allens and moderated by Monique Carroll of Cite Legal Melbourne. The humorous scenario explored the key benefits of ACICA's Expedited Arbitration Rules and the amendments to the rules which reflect developments in international best practice, including improved online practices developed during COVID-19, disclosure of third-party funding arrangements, and many other features which aim to further enhance the arbitration experience for all users. The roadshow has been described by audience members as '*surprisingly gripping*,' and *'the best way to describe changes to Arbitration rules'.*

ACICA Arbitrator Workshop: Enhancing Your ACICA Experience

Fellow members of ACICA in this workshop were given the opportunity to explore the interaction between the ACICA Secretariat and arbitrators operating under the 2021 ACICA Rules. This is intended also as an opportunity for Fellows to get to know ACICA and vice versa. In the workshop, we shared with our Fellows insights 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 also delve into how deposits and costs are managed by the Secretariat to assist with budgeting, prompt payments and to avoid delays to your arbitration.

Thank you to our hosted by Lee Carroll, Partner, White & Case. The workshop was led by Deborah Tomkinson, Secretary-General, ACICA and Caroline Swartz-Zern, Counsel, ACICA. We also thank Professor John Sharkey AM, who shared his first-hand experience of operating under the 2021 ACICA Rules.

Gender Diversity in Arbitration: The Next Step for Experts

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It has been well documented that "*a lack of diversity, including gender diversity, among international arbitrators has been a persistent feature of international arbitration*"[1]. In recent years significant efforts have been made to change this, including through the Equal Representation in Arbitration pledge (**ERA Pledge**). Improving gender diversity in arbitral tribunals is therefore increasingly being brought into sharper focus by the arbitration community, and small but important gains in the number of female arbitrators are being made. However, more needs to be done across the broader arbitration community.

The lack of gender diversity in arbitration is of course not only limited to the representation of women on arbitral tribunals. In response to this, the Equal Representation for Expert Witnesses Pledge (**ERE Pledge**) was launched this year by joint founders and co-chairs, Kathryn Britten and Isabel Santos Kunsman of AlixPartners as a call to action for all parties involved in dispute resolution to improve the visibility and representation of women as expert witnesses. In this article we briefly outline the ERE Pledge and commend it to all arbitration practitioners.

I The State of Play

Anecdotal experience of the under-representation of women in arbitrations is supported by studies:

- A 2020 study by the Queen Mary University of London and PwC revealed that women represented only 11% of experts and 10% of arbitrators in 180 awards between 2014 and 2018.[2]
- A 2020 survey conducted by AlixPartners found that 56% of arbitrators and lawyers had seen no women in expert roles in the last three years, while only 1% had seen four or more women in expert roles in the same period.[3]
- From 2016 – 2020, it is estimated by AlixPartners that women appeared as an expert in only 3% of ICSID arbitrations.[4]
- In the 2022 Who's Who Legal directory for expert witnesses in arbitration, women only represent 16% of the experts that are listed.[5]

1 See for example, ICCA, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings: 2022 Update (The ICCA Reports No. 8, 2022), 4* <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8u2-electronic3.pdf> (**2022 ICCA Report**).

2 PricewaterhouseCoopers and Queen Mary University of London, *Damages awards in international commercial arbitration (December 2020), 5* <https://www.pwc.co.uk/forensic-services/assets/documents/trends-in-international-arbitration-damages-awards.pdf>.

3 Arbitral Women, 'Launch of the Equal Representation for Expert Witnesses (ERE) Pledge' (9 June 2022) <https://www.arbitralwomen.org/launch-of-the-equal-representation-for-expert-witnesses-ere-pledge/>.

4 Ibid.

5 Financial Times, 'Expert witnesses: where are all the women?' (12 October 2022) <https://www.ft.com/content/baff530f-1088-4aac-86bd-e9ebb80e8c89>; Who's Who Legal, Arbitration 2022 - Expert Witnesses - Legal Marketplace Analysis (29 November 2021) <https://whoswholegal.com/analysis/arbitration-2022---expert-witnesses---legal-marketplace-analysis>.

Brenda Horrigan (Left), ACICA Executive Director and Immediate Past President, and Georgia Quick (Right), ACICA President, at the ERE Pledge stall at ICCA 2022 in Edinburgh

II Gender Diversity for Experts Matters

The case for promoting gender diversity in arbitral appointments applies equally to expert appointments. The reasons in support of diversity are well known and were recently set out in the 2022 ICCA Report.[6] It is worth repeating the key reasons:

- It is well evidenced that more gender diversity is likely to improve the arbitral process and lead to better outcomes for all involved.
- Gender diversity has been connected with improved performance and productivity in numerous studies.[7] For example, a 2020 McKinsey & Company report found that, "*[f]or five years our research has shown a positive, statistically significant correlation between company financial outperformance and diversity, on the dimensions of both gender and ethnicity*".[8]
- Diverse groups also have a greater ability to combat cognitive biases and groupthink effectively.[9] This is important for expert witnesses who, in addition to managing their team, must work with other expert witnesses and the arbitral tribunal to produce independent and useful evidence for the resolution of the dispute the subject of the arbitration.
- Increasing gender diversity expands the pool of available talent. Engaging the right expert is important as expert evidence often plays a significant role in arbitral proceedings and in awards. Greater inclusion of women in the pool of expert candidates offers parties the obvious benefit of finding and engaging the most qualified and best-suited person for the job.
- Gender diversity enhances the legitimacy of the arbitral process because it is likely to be perceived to be more accessible and fairer. Studies show that gender diversity has been associated with fairness

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6 2022 ICCA Report (above n 3), 11-22.

7 See 2022 ICCA Report (above n 3), 12-15.

8 See McKinsey & Company, *Diversity Wins: How Inclusion Matters (May 2020), 13* <https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf>.

9 David Rock & Heidi Grant, 'Why Diverse Teams are Smarter' (2016) *Harvard Business Review* <https://hbr.org/2016/11/why-diverse-teams-are-smarter>; *2022 ICCA Report (above n 3), 14.*

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Georgia Quick, Partner at Ashurt and President of ACICA, signing the ERE Pledge

and impartiality,[10] which would have particular importance for the perception of expert evidence, which is required to be provided on an independent and impartial basis.

III Objectives of The ERE Pledge

The purpose of the ERA Pledge is to "address the challenges faced by women who work, or aspire to work, as expert witnesses in all forms of dispute resolution globally".[11]

It aims to do this by:[12]

- increasing, on an equal opportunity basis, the number of women appearing as experts in order to achieve proportional representation and, eventually, full parity;
- supporting hiring, mentoring, and promoting women experts;
- creating a coalition of supporters and advocates in the world of dispute resolution;
- encouraging women to aspire to be expert witnesses in their chosen professions;
- giving women who are, or aspire to be, expert witnesses, better opportunities to achieve their goals; and
- widening the pool of expert witnesses available and enhance the reputation of expert witnesses.

IV Analysis

There are parallels between the ERA Pledge and the ERE Pledge. The ERA Pledge was launched in 2015 in recognition of, and to address, the under-representation of women on international arbitral tribunals. It seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon practically possible, with the ultimate goal of full parity.[13] The ERA Pledge has been a significant initiative with over 5,000 signatories including organisations such as law firms and barristers' chambers, arbitral institutions and corporations.

Since 2015, there has been steady and concrete improvement in gender diversity of appointments to arbitral tribunals. The 2022 ICCA Report found that from 2015 – 2021 the proportion of women appointed as arbitrators more than doubled among institutions participating in the report from 12.6% to 26.1%.[14] A significant factor contributing to this trend is the role of arbitral institutions in making appointments. Since 2015, at least a quarter of all appointments made by arbitral institutions have been women and this proportion has increased each year to reach 37.9% in 2021.

There is still however much to do to overcome the structural and cultural issues that pose a challenge to increasing gender diversity in the arbitration community. Indeed, the influence of unconscious bias may have a

10 Julia Tétrault-Provencher, 'When Equality Can No Longer Wait: From 'Formidable Women' to a Gender-Diverse Pool of Investment Arbitrators' (2020-21) 7 *McGill Journal of Dispute Resolution 70, 74.*

11 Equal Representation for Expert Witnesses, 'About Us' <https://www.expertwitnesspledge.com/about-us/>.

12 Ibid.

13 Equal Representation in Arbitration, 'About the Pledge' <http://www.arbitrationpledge.com/about-the-pledge>.

14 2022 ICCA Report (above n 3), 6 and 26.

particularly acute impact on hindering the progress of gender diversity in the appointment of expert witnesses. Aside from their expertise in an area, experts may potentially be selected for expert witness roles based on characteristics such as "gravitas", "charisma" or "grey hair". These characteristics may be perceived as having a positive effect in persuading a tribunal to trust and accept an expert's opinion when making its award. They have also more traditionally been male characteristics, possibly subconsciously reflecting the characteristics of a typical arbitral tribunal comprised of older men in years gone by. However, it is not clear that this perception is true, and, in any event, it is hoped that gender would not influence how experienced tribunals would assess the credibility and persuasiveness of expert evidence. In this regard, compared to jury verdicts,[15] which may be more susceptible to the historical influence of gender stereotypes, arbitration is well suited as a forum for making advancements in the fair representation of female experts.

V Conclusion

Experience and statistics show that action is needed to improve the representation of female experts in arbitration. The ERE Pledge is a welcome step to improving gender diversity among expert witnesses and it is hoped that it will also effect change in the same way as the ERA Pledge.

Since its launch earlier this year, over 750 signatories have responded to the call for action including major arbitral institutions, law firms and leading consulting and accounting firms. Georgia Quick, partner at Ashurst and President of ACICA says, "*the Equal Representation for Expert Witnesses pledge expands the conversation on diversity in arbitration to include expert witnesses who are an important part of the arbitration process and community. It is an significant step to driving change and commitment to having a truly diverse arbitration community*". ACICA and Ashurst are signatories to the ERE Pledge.

It must also be remembered that the lack of diversity in arbitration goes beyond gender. The benefits of promoting diversity also apply to other aspects of diversity such as nationality, ethnicity, sexuality and age, and there is a need to see progress on increasing the representation of those parts of the arbitration community too. Ultimately, an arbitration community that better reflects the broader community will be a better, stronger and more rewarding community to be a part of, and one that is entrusted to resolve more disputes by arbitration.

15 See for example, Blake M McKimmie et al., 'The impact of Gender-Role Congruence on the Persuasiveness of Expert Testimony' (2019) 28(2) *University of Queensland Law Journal 279, 293.*

New South Wales Supreme Court Allows Call on Bank Guarantee Despite Ongoing Arbitral Proceedings

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In a recent decision, the Supreme Court of New South Wales held that ongoing arbitral proceedings concerning a primary contract did not prevent a party to that contract from calling upon a bank guarantee in relation to the primary contract. This decision continues the legal trend that a guarantee may be called upon whilst parties await the final resolution of their dispute(s), unless a sufficiently strong prima facie case supports the making of an injunction.

I Context

Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd [2022] NSWSC 1125 ('*Daewoo v INPEX*') concerned the issue of whether an interim injunction, which prevented INPEX from calling upon a US$328,510,832 bank guarantee issued by a Korean bank ('Guarantee'), should be extended pending the arbitral tribunal's determination of the parties' rights and obligations in respect of the Guarantee.

In March 2012, Daewoo and INPEX entered into an agreement whereby Daewoo would construct and deliver a floating production storage and offloading facility ('FPSO') to the Ichthys gas field ('Contract'). In June 2019, the parties entered into a Deed of Amendment to the Contract ('Amended Contract').

From May 2021, INPEX issued Daewoo with several warranty claims (all of which were disputed by Daewoo) in respect of alleged delays and defects. The parties were unable to resolve the claims, and on 29 July 2022, in accordance with the dispute resolution process under the Amended Contract, INPEX issued a Request for Arbitration to the Secretariat of the International Court of Arbitration. The compensation sought by INPEX before the tribunal exceeded the amount of the Guarantee.

On 1 August 2022, Daewoo applied to the NSW Supreme Court, on an ex parte basis, seeking urgent interlocutory relief restraining INPEX from calling on the Guarantee, pending the arbitral tribunal's determination of the arguments before it. An interim injunction was granted.

On 5 August 2022, INPEX filed a Cross-Summons, seeking (amongst other things) to restrain Daewoo from pursuing the claim in its summons or otherwise seeking to restrain INPEX from having recourse to the Guarantee.

On 9 August 2022, Daewoo filed a motion, seeking an order pursuant to section 7(2) of the *International Arbitration Act 1974* (Cth) ('Act'), that the Cross-Summons be stayed and the parties be referred to arbitration.

II Applicable Law

Whether or not INPEX was entitled to call upon the Guarantee required analysis of the Act as well as the terms of the Contract and Amended Contract.

A Power to Make Interim Orders

Section 7(2) of the Act generally requires the Court to stay proceedings brought before it and refer the parties to arbitration, where an arbitration agreement exists. However, section 7(3) provides that a court 'may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit'. Consistent with this approach, the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') – which is given the force of law in Australia by section 16 of the Act – provides at articles 9 and 17J respectively, that 'it is not incompatible with an arbitration agreement… for a court to grant [an interim measure of protection]' and that 'a court shall have the same power of issuing an interim measure in relation to arbitration proceedings'.

In *Daewoo v INPEX*, Rees J explained that these provisions declare 'the compatibility between resolving a dispute through arbitration and, at the same time, seeking assistance from the court for interim protection orders'. [1] Thus, the Act recognises the potential need for a court to make interim orders to preserve the parties' rights until a final determination by the arbitration tribunal. In this regard, her Honour noted that the dispute resolution clause itself provided that: 'Neither Party is prevented or restrained by operation of this Article 58 from applying to a court of competent jurisdiction to seek urgent relief (including injunction or conservatory measures)'.[2] Accordingly, the Court had the requisite power to hear interim requests for protection by parties, notwithstanding that the final resolution of the parties' dispute was subject to an arbitration agreement.

B Relevant Principles

In deciding the interlocutory application, Rees J applied the principles regarding interim measures 'in accordance with [the Court's] own procedures,' albeit with

1 *Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd* [2022] NSWSC 1125, [63].
2 Ibid [67].

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consideration given to the 'special features of international arbitration'.[3] Relevantly, where parties have made a choice to submit their dispute to arbitration, the Court should not decide a question solely entrusted to the arbitrators.[4] Rather, the role of the Court is to reinforce the eventual decision of the arbitrators by giving an interim measure that the arbitration tribunal 'cannot [itself] order in time to give necessary protection',[5] and hence, that role should be approached with caution.[6]

Her Honour noted that the existing principles regarding interlocutory applications restricting a call on bank guarantees placed a high burden upon the party seeking such relief as '[the injuncted party] would be prevented from enforcing a substantive right which [they] had contracted for'.[7] Her Honour referred to authoritative cases that emphasised the importance of bank guarantees as 'the life blood of commerce', and as such, noted that they 'fall to be considered in a special category of their own in the context of interlocutory injunctive relief'.[8] This approach does not differ simply because the parties have agreed to arbitrate their dispute.[9]

There were then two key matters for Daewoo to establish in order to successfully extend the injunction restraining INPEX from calling on the bank guarantee:

1. First, that there was a strong prima facie case justifying the Court's interference; and
2. Secondly, that a balance of convenience analysis favoured the granting of the injunction.

III Prima Facie Case

Daewoo needed to establish a strong prima facie case to be successful in its application.[10] There were broadly three issues considered in this regard:

1. Whether the initial Warranty Period was extended by reason of any 'rework;'[11]
2. Whether the Amended Contract had an implied negative covenant restraining INPEX from calling on the Guarantee;[12] and finally
3. Whether article 35.3(b) of the Amended Contract was void to the extent that it purported to prevent Daewoo from seeking an interlocutory injunction restraining a breach of contract, or in aide of a claim for specific performance.[13]

Ultimately, the Court found that although Daewoo's contentions in support of its application were 'arguable', they were not of 'sufficient strength' to warrant the court extending the injunction.[14]

A The Initial Warranty Period

Daewoo argued that no 'rework' (as defined in the Amended Contract) had occurred, but rather, that it had merely supplied replacement materials.[15] This was relevant because the Amended Contract required the provision of rework services for the extension of the initial Warranty Period. On this basis, Daewoo contended that the Warranty Period had expired on 30 June 2021, and as such, INPEX was obliged to release the Guarantee within 30 days of that date.

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3 Ibid [64], quoting Article 17J of the Model Law.
4 Ibid [65], citing *The Lady Muriel* [1995] 2 HKC 320, 325 (Godfrey JA).
5 Ibid [66], quoting *Marnell Corraro Associates Incorporated v Sensation Yachts Ltd* (2000) 15 PRNZ 608, [74] (Wild J).
6 Ibid [66].
7 Ibid [71], quoting *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352, [21]–[22] (Leong JA).
8 Ibid [75], quoting *P Co v R LLC* [2021] HKCU 1199; [2021] HKCFI 691, [32], [42] (Deputy High Court Judge Winnie Tsui).
9 Ibid [72].
10 Ibid [70]-[71].
11 See ibid [88].
12 See ibid [90], [92].
13 See ibid [91].
14 Ibid [98], [111].
15 Ibid [89].

In response, INPEX argued that the definition of rework included the replacement of defective parts or equipment. INPEX further submitted that 'where rework is required but has not been completed, then the initial Warranty Period has been extended and the Warranty Period for the rework has yet to commence'.[16]

Ultimately, the Court did not make a determination on this question, beyond noting that it was 'arguable' and 'hotly contested'.[17] Instead, her Honour based her decision to decline extending the injunction primarily on the notion that the Guarantee was a 'risk allocation device,' noting that the expiry of the Guarantee prior to the resolution of the dispute supported the view that INPEX was intended to hold the money pending an outcome in the eventual arbitration.[18]

B The Alleged Negative Covenant and the Risk Allocation Device Issue

Daewoo argued that it 'was reasonable and equitable to require that, once the time to hold the bank guarantee has expired, it cannot be drawn down',[19] and hence, consistent with the principles of contractual interpretation, a negative covenant being implied 'was necessary to give business efficacy to the contract'.[20]

INPEX contended that the Guarantee was a 'risk allocation device', with the 'purpose of the bank guarantee [being] that INPEX could have recourse to it at any time and without notice to Daewoo'.[21] The intention of the Guarantee, according to INPEX, was that INPEX would benefit from holding the money until the conclusion of any dispute, with the only eventual recourse available to Daewoo (if it turned out that the Guarantee had incorrectly been called upon) being damages. This view was given credence by her Honour, noting the finding in *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd* (No 2) [2017] WASCA 123 that:

> the right to have recourse to the bank guarantee [in this contract] was exercisable 'at any time' and was not expressed to be conditional upon an admission of liability or an arbitral determination, nor was there a requirement for notice to be given to (in this case) Daewoo before exercising this right.[22]

Her Honour stated that to find otherwise would be to provide a significant degree of uncertainty to INPEX during the dispute resolution process, undercutting the 'self-help' nature of the Guarantee.[23] Ultimately, her Honour's view was that '[t]he contractual bargain of the parties is that, while this contest is resolved before an arbitral tribunal, INPEX gets to hold the money'.[24] Therefore, in the absence of an express provision inhibiting INPEX from making the call on the Guarantee, the claimed implied restriction failed and was insufficient to establish Daewoo's prima facie case.[25]

C Article 35.3(b)'s Status in Barring Injunction Applications

Article 35.3(b) of the Amended Contract provided that:

> Other than in case of an application … for an injunction grounded on an allegation of fraudulent attempt … [the] Contractor waives any right that it may have to obtain an injunction or any other remedy or right against any party in respect of Company having recourse to the Bank Guarantee.[26]

Daewoo submitted that this provision was void to the extent that it was an impermissible 'attempt to oust the jurisdiction of the Court to enforce the parties' rights

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16 Ibid [93].
17 Ibid [98], [108].
18 Ibid [104].
19 Ibid [90].
20 Ibid.
21 Ibid [92].
22 Ibid [102].
23 Ibid [107].
24 Ibid [108].
25 Ibid [110].
26 Ibid [29].

which may arise under the contract'.[27] Hence, article 35.3(b) could not prevent Daewoo from seeking an interlocutory injunction preventing a breach of contract. INPEX accepted this point.[28] Her Honour agreed with this construction, but nonetheless found that the provision was still useful in considering the terms of the Amended Contract, as it evidenced the parties' intention that recourse to the Guarantee be allowed by INPEX,[29] and reinforced the previous conclusion as to which party bore the financial burden whilst awaiting the resolution of the dispute.[30]

IV The Balance of Convenience

Having determined that Daewoo had failed to establish a sufficiently strong prima facie case (which was sufficient in itself to dispose of the application), the Court also considered, in the alternative, whether the balance of convenience favoured extending the injunction.[31]

A Daewoo's Position

Daewoo's primary arguments on the balance of convenience test were that:

1. The call on the Guarantee would exacerbate its financial troubles; and
2. Damages would be an inadequate remedy if INPEX was later required to refund the Guarantee by the arbitral tribunal.

On the first point, Daewoo tendered evidence to the effect that the uncertainties caused by the COVID-19 pandemic and sanctions imposed on Russia in 2022 had significantly impacted its ordinary operations. Daewoo pointed out that, as a result of these developments, Daewoo had reported a net loss in the first quarter of 2022.[32]

In this context, Daewoo submitted that any call on the Guarantee (which was the largest that Daweoo had ever been party to) would have a significant financial and reputational impact, as the bank would require the immediate payment of the Guarantee.[33] A failure to pay the Guarantee amount would then result in Daewoo being charged default interest by the bank, as well as default clauses being potentially triggered in its other commercial contracts. Daewoo argued that this may prevent it from meeting any adverse award issued by the tribunal, as INPEX's total claim exceeded the value of the guarantee.

On the second point, Daewoo argued that, should the tribunal award in its favour, damages would be an insufficient remedy, due to the financial or reputational harm Daewoo would have already suffered. Daewoo asserted that the overall impact of a call on the Guarantee would exceed the value of the guarantee itself. Instead, Daewoo offered an undertaking that it would seek to extend the Guarantee, together with the usual undertaking as to damages.

B INPEX's Position

In response, INPEX expressed concerns that Daewoo's financial troubles would inhibit Daewoo's ability to extend the Guarantee or honour its offered undertaking.[34] INPEX further expressed concern over being restrained from calling on the Guarantee, as its value would soon 'step down' to a lower figure under the contract.[35] INPEX asserted that, since Daewoo had demobilised its workforce, INPEX may need to incur additional costs 'to complete the outstanding Work and address the outstanding warranty notices'.[36]

Finally, INPEX highlighted the potential difficulties in enforcing any such undertaking as to damages in South

27 Ibid [91].
28 See ibid [100].
29 Ibid [101].
30 Ibid [101], [106].
31 Ibid [112].
32 Ibid [114].
33 Ibid [121]-[122].
34 Ibid [125].
35 Ibid.
36 Ibid.

Korea, as Daewoo lacked assets in the jurisdiction.[37] Whilst both sides offered expert opinions as to the enforceability of any judgment, it was common ground that enforcement would depend 'on the specific terms of the monetary judgment and the manner in which the judgment [had] been obtained'.[38]

C The Court's Decision

The Court considered that the judgment could be enforced in Korea, but accepted that there would likely be delay in securing this result, during which time Daewoo's financial troubles may impede INPEX's enforcement prospects.[39] By contrast, her Honour found that damages were a sufficient remedy for Daewoo, save for any reputational damage, as the guaranteed money could be easily returned.

Ultimately, whilst sympathising with Daewoo that '[w]hen agreeing to give a bank guarantee a decade ago, Daewoo could not have foreseen a global pandemic, let alone both a pandemic and a war', the Court found that such harsh commercial realities did not 'detract from INPEX's entitlement to be protected by the bank guarantee from Daewoo's troubles in the event of a dispute between them as to Daewoo's performance of the contract'.[40] In those circumstances, the Court found that the balance of convenience also favoured the discharge of the interlocutory injunction and the refusal of a further extension to the process.

V Conclusion

The decision in *Daewoo v INPEX* solidifies the position in Australia that a guarantee can be called, and retained, by the party entitled to call upon it, while the parties await the final resolution of their dispute by an arbitral tribunal: particularly in situations where it can be characterised as a risk allocation device. Any attempt to prevent or injunct the party benefiting from the bank guarantee will be resolved by closely analysing the parties' contractual terms, with a high threshold imposed on the party seeking such relief.

37 Ibid [126].
38 Ibid [127].
39 Ibid [132].
40 Ibid [136].

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Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG [2022] FCAFC 171 ('*The BBC Nile*'): A Statutory Right to an Anti-Suit Injunction?

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I Introduction and Context

Carmichael Rail Network Pty Ltd ('Carmichael') sought protection from a mandatory stay of a Federal Court proceeding pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth), relying on s 11(2) of the *Carriage of Goods by Sea Act 1991* (Cth) ('***COGSA***'). Section 11(2) of *COGSA* has the effect of preserving the jurisdiction of Australian courts in respect of a bill of lading or sea carriage document relating to 'the carriage of goods from any place in [or to] Australia'. On its face, the provision does not permit an arbitration agreement to displace the jurisdiction of the Australian courts, unless the arbitration agreement provides for the arbitration to be conducted in Australia. While English courts have considered the effect of s 11(2),[1] this was the first time an Australian court had considered the legislative position as it applies to interstate sea carriage disputes within Australia.

The Full Court's decision is timely because s 11 of *COGSA* is simultaneously under review by the Australian Government. Submissions to that review, and possible amendment of s 11(2), closed two days after the Full Court's decision was handed down.

II What Happened?

A shipment of 8,669 lengths of hardened steel rails was consigned to Carmichael, evidenced by a bill of lading issued at Whyalla, South Australia, by BBC Chartering Carriers GmbH & Co KG ('**BBC**'). The steel was damaged when a collapse of the stow occurred at sea enroute to Queensland, rendering the cargo unfit for its intended use in railway construction. Carmichael commenced a proceeding in the Federal Court seeking damages in contract and tort. BBC notified Carmichael that it had commenced arbitral proceedings in London to determine the same dispute. The bill of lading that was issued ('BBC bill of lading') provided that any dispute arising out of or in connection with the BBC bill of lading shall be referred to arbitration in London. In response, Carmichael applied for an anti-suit injunction in the Federal Court.

The application for an anti-suit injunction concerned s 10(1)(b)(ii) of *COGSA*, and Carmichael's argument that the relevant choice of law and jurisdiction provisions were contrary to the mandatory law of the forum. Section 8 of *COGSA* gives the amended Hague Rules (at Schedule 1A to *COGSA*) the force of law in Australia.[2] Thus, s 10(1)(b)(ii) of *COGSA* in conjunction with art 3(8) of the amended Hague Rules, which voids and annuls any clause or covenant relieving or lessening the carrier's liability otherwise than as provided by the amended Hague

1 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd* [1990] 1 Lloyd's Rep 236 ('*The Amazonia*').
2 Schedule 1A to the *Carriage of Goods by Sea Act 1991 (Cth) ('COGSA')* was added by the *Carriage of Goods by Sea Regulations 1998* (Cth).

Rules, could operate on the law and jurisdiction clauses in the BBC bill of lading. To arrive at this outcome, Carmichael would need to show how the law and jurisdiction clauses purported (impermissibly) to lessen the liability of BBC for the loss and damage. Carmichael outlined various ways in which conducting a foreign arbitration according to foreign law would do this. In particular, Carmichael argued that if the dispute were to be determined in an English arbitration, the tribunal could well apply an English law interpretation of the amended Hague Rules, not an Australian one. This could arise from substantive differences between English and Australian law and be aggravated by the necessity of proving Australian law through evidence to a tribunal unversed in Australian law.

A third feature of the case, of considerable interest to Australian maritime lawyers, is its short discussion of the popular "FIOST"[3] contractual risk allocation clause. The Full Court's judgment highlights contrasting views from major maritime jurisdictions (and commentary from learned authors) concerning the true nature and legal implications of that convenient commercial arrangement, which is much used in bulk and breakbulk shipping.[4] The contrasting views concern how far FIOST terms relieve an ocean carrier of responsibility for loading and stowage of cargo. This is a question squarely within the ambit of the amended Hague Rules in Australia and is typically both fact-sensitive and contested. Even though English law may in principle answer that question more favourably to the carrier, this was held to be a matter of construction for the tribunal (and based on BBC's undertaking discussed further below, became academic).

III Is There a Lacuna?

Section 11(2) of *COGSA* addresses contracts for the carriage of goods to or from Australia, but is enigmatically silent where the relevant sea carriage is interstate within Australia. Subject to any further appeal, the Full Court has identified a lacuna in s 11(2) of *COGSA*, in circumstances where the governing sea carriage document includes an international arbitration agreement and a claim arises from interstate sea carriage.[5] This arises where s 11 of *COGSA*:

- applies a mandatory presumption that Australian law has been chosen to govern relevant sea carriage documents; and
- voids any agreement that precludes or limits that mandatory presumption, or the jurisdiction of Australian courts, with respect to relevant sea carriage documents; and
- saves arbitration agreements from being so voided only if under the agreement the arbitration must be conducted in Australia; but
- sea carriage documents relating to carriage of goods from a place in Australia to another State or Territory fall outside this scheme.

After careful analysis, the Full Court was unable to discern that legislative consideration had been given to interstate shipments. The Court found that extending the invalidating provisions of s 11(2) to interstate shipments was 'simply not considered'.[6]

The implications of this conclusion include that there is no legislative protection for Australian shippers against carriers contracting out of the jurisdiction of Australia when the sea carriage is interstate. Legislation of any one State or Territory could not cure the omission for constitutional reasons. The court found it impossible to understand why the Parliament has preserved shippers' recourse to arbitration in Australia except when interstate carriage is concerned.[7]

3 *'Free in and out stowed and trimmed'.* The acronym concerns allocation of cost and responsibility for the loading and discharging of cargo.

4 *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* [2022] FCAFC 171, [32]–[40] ('*The BBC Nile*').

5 Precursor legislation of COGSA in 1904 did not catch interstate carriage as far as concerned contractual provisions purporting to oust or lessen the jurisdiction of Australian courts: *The BBC Nile* (n 4) [53]; albeit that precursor legislation of 1904 did concern itself with allocation of liability between cargo and carrier in interstate carriage: at [54]; [58]. Precursor legislation of COGSA in 1924 continued to apply rules on allocation of liability in interstate carriage and also invalidated foreign jurisdiction clauses where the carriage was inward to, and outward from, Australia but there could be no suggestion that the 1924 legislation invalidated such clauses in interstate carriage: at [62]. When *COGSA* replaced the 1924 legislation, once again there could be no suggestion that foreign choice jurisdiction clauses in respect intrastate carriage were invalidated: at [63].

6 *The BBC Nile (n 4) [83]*.

7 Ibid [100].

IV Marine Insurers' Role

Disputes arising out of loss and damage to cargo are generally litigated by insurers. A bill of lading or sea carriage document is also typically a pro forma document in which the 'fine print' covering various matters is non-negotiable. With foreign vessels providing nearly all interstate sea carriage services to Australian enterprises, clauses about law and jurisdiction may not in fact be any part of pre-contractual negotiations between shipper and carrier. Commercial parties tend to focus on practical details such as the ship's schedule and ensuring that the condition and quantity of cargo is correctly stated in pre-contractual and contractual documents. Then, in the event of a claim for loss and damage to cargo, rights of subrogation are exercised. Claim and defence are both conducted by cargo and liability insurers at interest. One or both of these insurers will also typically be non-Australian.

V Why Should Undertakings And Conditions Be Required?

BBC's London arbitration clause was upheld only on the condition that BBC undertakes to admit in the London arbitration that the amended Hague Rules as applied under Australian law apply to the BBC bill of lading, and the Court made a declaration to that effect.[8] The Court further determined that an issue estoppel arose.[9] That such conditions, and undertakings, were required begs questions and confirms that greater clarity is required.

Regular shippers and carriers should not be obliged to undertake costly and time-consuming steps of legal process to secure access to dispute resolution according to Australian law. The undertakings of BBC and the Full Court's declaration concerning conditions of a stay of proceedings were expedients in that particular dispute. The parties by stages, and ultimately the Court, constructed a pathway concerning the future determination of the dispute and this came about because *COGSA* has failed to be clear in an aspect of the Australian marine cargo liability regime.

If the parties in The BBC Nile had agreed on an Australian arbitration, a stay in favour of Australian arbitration would be expected. However, Australian businesses reliant on foreign ships are not well placed to negotiate for disputes to be conducted by arbitration in Australia. *COGSA* should be reformed to eliminate the lacuna identified by the Full Court. If parties are obliged to craft and negotiate undertakings, or to invoke the courts to secure any relevant issue estoppel(s), the outcomes are inefficiency, uncertainty, and delay to substantive adjudication of the dispute.

VI Arbitration Options for Interstate Australian Sea Carriage Disputes

Treating cargo disputes the same whether or not cargo is sent or received from overseas has the merit of consistency, as in simple terms any sea voyage encounters similar perils. A more nuanced approach would, however, take into account that interstate cargo carriage disputes may turn on regulations, practices and arrangements prevailing in Australian ports. Australian circumstances may add important context that is less readily communicated in a foreign tribunal. Further, 'centre of gravity' factors such as the location of witnesses and records may impact an Australian party more negatively where carriage occurs interstate between remote locations within Australia. Disputes about coastal carriage under Australian conditions and between Australian places and businesses could inform the development of useful and distinctive Australian commercial maritime jurisprudence. The latter argument is weakened by the absence of a pathway for limited appeals on points of law from Australian arbitration awards. However, any opportunity is lost if all disputes relating to coastal cargoes are routinely determined in foreign centres.

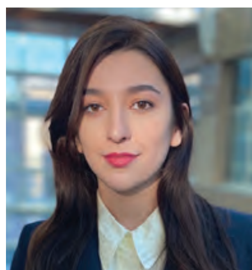
At a time of energy transition, recurring natural disasters and concerns over supply chain reliability, greater reliance will be placed on interstate sea carriage. *COGSA* needs to be 'up to date, equitable and efficient'[10] as much for interstate as for international carriage.

8 Ibid [110] for the reasons explained at [26]–[27].

9 Ibid [27].

10 The object given in s 3(2) of *COGSA*.

Landau v Lamm (2022 ICCA Congress): Towards a South Pacific Solution for Investment Disputes?



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I. Introduction

The ongoing controversy surrounding investor-State dispute settlement (**ISDS**) was recently the subject of lively debate at the 25th Congress of the International Council for Commercial Arbitration (**ICCA**) in Edinburgh. Carolyn Lamm of White & Case in Washington, DC and Toby Landau KC of Duxton Hill Chambers in Singapore, were the debaters for the motion titled "A World Without Investment Arbitration", which centred on the legitimacy and future of ISDS, and whether it had outlived its usefulness.

Toby Landau KC contended that the world without investment arbitration would be better. He argued that there was a "growing exodus from this field", with a significant number of investment treaty terminations, which had exceeded the number of new treaty conclusions every year since 2017. Landau's thesis was that there was no historical or empirical support for the system, with studies showing, contrary to popular belief, that "arbitration does not promote investment flows". Also, according to Landau, arguments that ISDS had a positive impact in terms of depoliticising trade disputes were groundless since "what we have seen is a massive politicisation of issues". He contended that the international legal community should strive to find viable alternatives to replace investor-State arbitration, such as dispute prevention committees, ombudsman or even investment courts.

Carolyn Lamm, in support of preserving the existing ISDS system, argued that recent withdrawals from investment treaties are healthy for the system, especially because those withdrawals have been balanced with many States re-joining or renegotiating treaties and some 3,300 other treaties remaining in place. She contended that, rather than abandoning ISDS entirely, it was important to adopt a philosophy of reform and tackle issues with the current system, focusing in particular on the challenges presented by climate change. Lamm said that the alternatives to investor-State arbitration, such as national courts and diplomacy, have proven to be flawed. In her view, the alternative dispute resolution mechanisms proposed by Landau can work well but together with, and not instead of, the existing ISDS system.

The great debate, between two world-eminent practitioners on international arbitration's centre stage at the ICCA Congress, serves as a timely backdrop to explore how the various arguments for and against the existing ISDS system might play out closer to home in the South Pacific. That is especially so given that there are few investment treaties entered into by host States in the South Pacific. Is our region the perfect "greenfield" for the development of a new system of alternative investment dispute settlement?

II Current investment environment in the South Pacific

The South Pacific has been lagging in economic growth rates, even compared to other developing regions. Comprised mostly of small islands with limited resources, international trade and foreign investments play a

particularly significant role in creating economic prosperity in the South Pacific region.

But even putting aside the broader social and economic benefits of investment and development, the vulnerability of the South Pacific islands to the challenges of climate change perhaps provides a more urgent impetus to promote foreign investment in the region. That is especially so considering that the costs of climate adaptation are high.

For instance, recently, at the COP27 meeting in Egypt in November 2022, there were calls for developed countries to pay for the "loss and damage" poorer countries have suffered (and continue to suffer) because of climate change. It was recommended that this loss and damage should be paid through financing secured by developing countries from foreign investors, developed countries and development banks to the sum of USD 1 trillion a year. This investment would help developing countries recover from some of the future impacts of climate change which are already "locked in" by past emissions generated by developed countries and adapt to cut their emissions for increased resilience.

While foreign investment by developed countries is being urged on such a large scale, the legal framework necessary to attract, foster and secure that foreign investment is, however, currently less than optimal in the South Pacific.

With only 16 states comprising the South Pacific,[1] eight of them have yet to accede to the New York Convention and either have outdated arbitration legislation or none. Also, there is a relatively small number of investment treaties in the region. Apart from the recent Pacific Agreement on Closer Economic Relations Plus (**PACER Plus**) now ratified by 10 South Pacific nations (but which does not include a conventional ISDS mechanism), there are very few other international investment agreements in force in the region, excepting those entered into by Australia, New Zealand and Papua New Guinea.

Remaining largely outside the international investment dispute resolution framework arguably diminishes the confidence of foreign investors conducting business in the South Pacific. This has likely contributed to the poor investment climate in the region. A fact which seems to be confirmed by the ongoing efforts of institutions in the South Pacific, especially the Asian Development Bank, UNCITRAL and the Australian Centre for International Commercial Arbitration, to promote international arbitration reform as a means to boost foreign investment and, in doing so, also build climate-proofing infrastructure.

Whether the traditional ISDS system is actually a necessary tool to promote foreign investment was one of the issues at the heart of the great debate at the 2022 ICCA Congress.

III ISDS in the South Pacific: Replace or Reform?

Against this backdrop, the question is whether the South Pacific should keep its slate relatively clean and avoid traditional ISDS in favour of alternatives (following Landau's position) or, instead, introduce an investor-State arbitration system of dispute settlement to create a more secure foreign investment climate (adopting Lamm's thesis).

Weighing against Lamm's proposal may be the concern that developing countries in the South Pacific region seeking, in particular, to implement policies and regulatory changes to meet climate change challenges, will simply be inviting foreign investor claims against them by entering into investment agreements providing for ISDS.

That concern could be further aggravated by host State apprehension over popular views that investment protections in treaties are seen to incorporate ambiguous language which can lead to arbitral tribunals applying broad and expansive interpretations of loosely defined standards.

It cannot be assisted either by the recent announcement by the Government of Australia, the largest economy and foreign aid donor in the region, that it will not include ISDS provisions in new trade agreements and would attempt to reduce their impact in existing agreements.[2]

While treaties entered into more recently by host States generally seek to strike a more careful balance between investment protection and legitimate public interest actions

1 Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

2 'Trading our way to greater prosperity and security', access via https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security

by host States (including through carve outs and careful drafting around the power to regulate for health and the environment), this does not eliminate the risk of claims being brought by foreign investors. And, for small South Pacific nations, foreign investor claims under ISDS provisions could present a serious threat not only to climate change action but possibly also entire national budgets.

But more fundamentally, will South Pacific nations be convinced that investment treaties with ISDS mechanisms are necessary to incentivise investment inflows? Here the evidence cited by Landau indicating that there is no direct correlation between investment treaties actually resulting in greater foreign investment may carry weight in the South Pacific.

Given the above concerns and the relatively "greenfield" investment environment in the South Pacific, is the region the perfect eco-system to deploy Landau's ideas outside of traditional ISDS and focus on alternative dispute resolution processes?

These alternatives may include, for instance, establishing an investment ombudsman or dispute settlement committee. One or more standing ombuds institution(s) or dispute settlement committee(s) in the South Pacific could serve as pre-emptive mechanisms to scrutinise claims by foreign investors while preserving the autonomy of host States in regulating for legitimate public interests, like climate change. They could do so, with relative time and cost efficiency compared to investor-State arbitration, by making proposals for legislative improvements, administrative intervention and promoting further consultation with foreign investors.

Or would the South Pacific region be well-suited for the innovative step of creating a specific investment court as hypothesised by Landau? Inspiration for such a forum could be drawn from, for instance, the creation of specialised international courts like the Singapore International Commercial Court and the Courts of the Dubai International Financial Centre. A dedicated investment court in the South Pacific might mitigate against some of the concerns around legitimacy of the existing ISDS system, including predictability and consistency in the application of treaty investment protections.

Naturally, many questions remain in terms of the legal, political and practical implementation of Landau's ideas outside the traditional ISDS box.

For instance, by whom and how are appointments to be made to these alternative bodies and their procedural rules drawn-up? Are these alternative bodies to be incorporated in treaties for disputes only within the South Pacific, like the PACER Plus? Or would they be limited to new treaties, including with host States outside the region (and would they be willing to embrace these South Pacific solutions)? Who will fund these alternative investment dispute resolution systems? Or are funding concerns immaterial, considering that the costs of establishing and runn ing these alternative bodies may be eclipsed by the potential costs that can be incurred in investor-State arbitrations?

If ISDS is not a magic pill that the South Pacific must take in order to attract foreign investment, countries in the region may be more attracted to Landau's replacement ISDS arguments (considering the recent PACER Plus treaty does not provide for investor-State arbitration, perhaps the South Pacific is already more predisposed to alternatives). But it may also not be prudent to use developing nations in the South Pacific who are facing a climate emergency as a petri dish for these largely untested alternatives, which might instead speak in favour of Lamm's arguments to reform ISDS.

The "replace or reform" propositions discussed at the debate both have their pros and cons. But if the alternatives to ISDS are capable of settling investment disputes at least as effectively as traditional investor-State arbitration, especially in terms of certainty of result and minimising time and costs, the South Pacific might be prepared to move away from the established ISDS regime and seek to implement Landau's ideas. Indeed, as Lamm espoused, there is no reason that Landau's alternatives cannot be implemented in conjunction with traditional ISDS.

Ultimately, the great debate at the 2022 ICCA Congress was provocative food for thought. Especially when the arguments of Lamm and Landau are viewed through a South Pacific lens, where investment dispute settlement is ripe for innovative development to address the special needs of a region facing a climate crisis.

Demystifying the Metaverse

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We have all heard of the metaverse. But what exactly is it, and why is it relevant to dispute resolution practitioners? In this contribution, I will (i) introduce some features of the metaverse; (ii) address types of disputes that may arise in relation to the metaverse; and (iii) consider what might come next for legal developments in the metaverse.

The Building Blocks of the Metaverse

The metaverse is an immersive virtual world brought to life using augmented reality, virtual reality, and mixed reality technologies.[2] As in video games, users can navigate through the virtual world via an avatar, which can be customised to resemble (or not resemble) the user behind it. There are in fact multiple platforms or 'metaverses' which can be used to access separate virtual worlds. Some of those metaverses are owned and governed by a single operator, whilst others are controlled by 'decentralised autonomous organisations' ('**DAOs**'), where users themselves participate in governing the platform (with no central authority).

When we speak of the 'metaverse' in the sense of the 'universe' of these platforms as whole, it is envisioned to function as:

> a massively scaled and interoperable network of real-time rendered 3D virtual worlds that can be experienced synchronously and persistently by an effectively unlimited number of users with an individual sense of presence, and with continuity of data, such as identity history, entitlements, objects, communications, and payments.[3]

Whilst the metaverse originates in and builds upon gaming platform concepts, it has potentially far-reaching applications, some of which are under development, and others which have barely been conceived of.

Many currently-available platforms aim to gather people in virtual spaces for social and cultural events such as fashion shows, sports, art exhibitions, performances, and DJ sets. They also serve as marketplaces for digital assets, and provide an opportunity for marketing both digital and offline goods and services. For example, in The Sandbox metaverse, rapper Snoop Dogg is creating a replica of his mansion, where he will display his non-fungible token ('**NFT**') collection,[4] perform live concerts, and interact with users.[5] The virtual plot of land adjacent to Snoop Dogg's sold for approximately USD450,000.[6]

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1 This contribution draws on parts of a paper co-authored by Elizabeth Chan and Emily Hay which was presented at the Taipei International Conference on Arbitration and Mediation on 5 October 2022, entitled 'Something Borrowed, Something Blue: The Best of Both Worlds in Metaverse-Related Disputes', published in the *Contemporary Asia Arbitration Journal* Volume 15(2) (2022).

2 Paul P Momtaz, 'Some Very Simple Economics of Web 3 and the Metaverse' (2022) 1(3) FinTech 225, 228.

3 Matthew Ball, *The Metaverse: And How it will Revolutionize Everything* (Liveright, 2022) 28.

4 An NFT is a unique token used to certify ownership or authenticate an item such as a digital asset. See Momtaz (n 2) at 228.

5 The Sandbox, 'The Sandbox Partners with Snoop Dogg to Bring Legendary Rapper Into the Metaverse', *The Sandbox* (Web Page, 23 September 2021) <https://medium.com/sandbox-game/the-sandbox-partners-with-snoop-dogg-to-bring-legendary-rapper-into-the-metaverse-e064e866ed40>.

6 Kate Irwin, 'Someone Paid $450K to Be Snoop Dogg's Metaverse Neighbor', *Decrypt* (Web Page, 4 December 2021) <https://decrypt.co/87524/someone-paid-450k-snoop-dogg-metaverse-neighbor>.

Not only are big brands seeking to establish their presence in the metaverse: a number of law firms have opened virtual offices on platforms such as Decentraland.[7]

Some examples of metaverse platforms with social, cultural and marketplace functions include:

- Meta Horizon Worlds, by Meta;[8]
- AltSpaceVR, owned by Microsoft;[9]
- Decentraland, governed via a DAO;[10]
- Spatial;[11] and
- The Sandbox, a two-dimensional platform governed by a DAO.[12]

Other applications of the metaverse including healthcare, surgery, product design, and engineering are in their very early stages.[13] In the diplomacy field, in October 2022, the embassy of Israel in Korea opened an 'Israel-Korea Metaverse' to promote exchanges between the two countries.[14] Barbados plans a virtual embassy providing e-consular services.[15]

The building blocks of the metaverse include virtual reality technology, cryptocurrency, blockchain technology, smart contracts,[16] and NFTs. Cryptocurrency may be used to buy 'tokens' to exchange for digital assets in the metaverse. Cryptocurrency or tokens may be used to purchase parcels of virtual real estate in a metaverse platform. An NFT certifies the sale. NFTs are likewise used to acquire clothing for avatars, or works of digital art. Transactions and other decisions affecting the platform may be executed by smart contract and recorded on a blockchain.

Regardless of whether legal practitioners are excited about the opportunity to craft their own avatar and spend time traversing virtual worlds,[17] it is necessary to understand the commercial opportunities presented by the metaverse. These are already the basis for significant investments, projects, and transactions. Its value is estimated to grow to the trillions of dollars by the end of this decade.[18] It remains to be seen whether the metaverse fulfils the vision of its believers. However, the level of activity already underway, the potential for disruption of multiple industries, and the likelihood of disputes along the way, merit attention to the legal frameworks that apply and that will likely be developed in relation to the metaverse.

Dispute Resolution and Challenges in the Metaverse

A number of potential areas for disputes can be identified in the metaverse context. Parallels can be drawn with disputes arising in relation to social media platforms, online marketplaces, and other apps: which, like metaverse platforms, require users to accept the platform's terms and conditions upon entry. In this new context, however, it is important to consider the vastly

7 See, eg, ArentFox Schiff, 'ArentFox Schiff Opens First Major Law Office in the Metaverse' (Web Page, 31 October 2022) <https://www.afslaw.com/perspectives/press-releases/arentfox-schiff-opens-first-major-law-office-the-metaverse>.

8 Meta Horizon Worlds: <https://www.oculus.com/horizon-worlds/>.

9 AltSpaceVR: <https://altvr.com/>.

10 Decentraland: <https://decentraland.org/>.

11 Spatial: <https://www.spatial.io/>.

12 The Sandbox: <https://www.sandbox.game/en/>.

13 See, eg, Health Metaverse: <https://health-metaverse.github.io/>; Nokia, 'Six Trailblazing Use Cases for the Metaverse in Business' (Web Page) <https://www.nokia.com/networks/insights/metaverse/six-metaverse-use-cases-for-businesses/>.

14 Kwon Mee-yoo, 'Israeli Embassy Opens in Metaverse', *The Korea Times* (Web Page, 26 September 2022) <https://www.koreatimes.co.kr/www/nation/2022/09/120_336705.html>.

15 Roy Lie Atjam, 'Barbados to Establish the World First Embassy in the Metaverse', *Diplomat Magazine* (Web Page, 30 August 2022) <https://diplomatmagazine.eu/2022/08/30/barbados-to-establish-the-world-first-embassy-in-the-metavesre/#:~:text=The%20Government%20of%20The%20Unitary,world%2Dfirst%20for%20a%20government>.

16 Smart contracts use computer code to self-execute upon the fulfilment of specified conditions. A smart contract may or may not be a legally binding contract. See Law Commission for England and Wales, 'Smart Legal Contracts: Advice to Government', *Smart Contracts Project* (Report, 25 November 2021) vi <http://www.lawcom.gov.uk/project/smart-contracts>.

17 It is fun, even for non-gamers! For those who are interested, MetaverseLegal holds regular meetings in the metaverse to explore different platforms. Please contact the author to receive an invitation.

18 McKinsey & Company, 'Value Creation in the Metaverse' (Web Page, June 2022) 6 <https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/value-creation-in-the-metaverse>.

broader functionality of a 3D immersive world in which users can freely interact and transact. To the extent that the metaverse becomes ubiquitous, such terms and conditions have the potential to become a kind of governing law in themselves.[19]

Disputes with Metaverse Platforms

Disputes may arise with platforms over the value of digital assets (including virtual real estate), user content, user conduct (via avatars), technical security, validity of terms, data protection, and/or other regulatory issues. Such disputes are, in principle, to be dealt with as set out in the relevant platform's terms of use.

In the technology sector, many cryptocurrency platforms and NFT marketplaces already select arbitration for certain categories of disputes.[20] Metaverse platforms such as AltspaceVR,[21] Decentraland,[22] Spatial,[23] and Roblox[24] likewise provide for arbitration as a dispute resolution mechanism. Others such as Meta Horizon Worlds[25] and The Sandbox[26] grant jurisdiction to certain courts.

Potential disputes are not limited to those with users. Non-users may also be implicated, for example in relation to intellectual property, as has been seen in respect of NFTs.[27] Where the non-user has no relationship with a platform, disputes are likely to fall beyond the platform's terms of use (and their contractually-stipulated dispute resolution mechanisms).

Disputes Between Users

Disputes may likewise arise between users themselves, in relation to the sale and purchase of digital assets, licensing, services, or conduct. Some platforms attempt to account for such disputes in their terms of use. For example, Meta provides for a 'default end user license agreement' to apply when a user acquires third party services and is not presented with another end user

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19 Jon M Garon, 'Legal Implications of a Ubiquitous Metaverse and a Web3 Future', *SSRN Research* (3 January 2022) 37 <https://ssrn.com/abstract=4002551>.

20 For example, OpenSea, Binance, Rarible, Nifty Gateway, Bitcoin, Tether.

21 AltSpaceVR provides for arbitration of 'everything except IP' under the *AAA Rules* for residents of the United States, with an option for recourse to a small claims court 'if you meet the court's requirements in your county of residence'. No specific provision is made for disputes falling outside those covered by these clauses. See AltspaceVR, 'Terms of Service, Effective 3 October 2017' (Web Page, 25 March 2022) <https://learn.microsoft.com/en-us/windows/mixed-reality/altspace-vr/community/terms-of-service>.

22 Decentraland provides for ICC arbitration with its legal seat in the City of Panama, with the exceptions of intellectual property claims and relief before small claims courts: Decentraland, 'Terms of Use' (Web Page) cll 18.2-3, 18.6 <https://decentraland.org/terms/>.

23 Spatial specifies JAMS arbitration in New York under the *Streamlined Arbitration Rules*: Spatial, 'Terms of Use – License to Spatial Software, Version Effective 28 September 2022' (Web Page) cl 20 <https://www.spatial.io/terms>.

24 Roblox provides for arbitration seated in San Mateo County, California, under the *AAA Rules* for disputes with users who are United States residents. A number of carve-outs apply, including for intellectual property, data protection remedies, and small claims courts. See Roblox, 'Terms of Use, last updated 13 September 2022' (Web Page) cl 16 <https://en.help.roblox.com/hc/en-us/articles/115004647846-Roblox-Terms-of-Use#user-dispute>.

25 Meta Horizon Worlds provides for jurisdiction of the US District Court for the Northern District of California, or a state court in San Mateo County, California, unless you are a consumer, in which case claims may be resolved in any competent court with jurisdiction: Meta, 'Supplemental Meta Platforms Technologies Terms of Service, Effective 23 August 2022' (Web Page) cl 5.6 <https://www.meta.com/au/legal/quest/terms-of-service/?utm_source=www.google.com&utm_medium=oculusredirect>.

26 The Sandbox provides for exclusive jurisdiction of the courts of Hong Kong: Sanxbox, 'Terms of Use, Updated 24 August 2022' (Web Page) <https://www.sandbox.game/en/terms-of-use/>.

27 For example: (i) Hermès' US lawsuit against over an individual artist's creation of NFTs based on Hermès' line of fashion bags (see Blake Brittain, 'Hermes Lawsuit Over "MetaBirkins" NFTs Can Move Ahead, Judge Rules', *Reuters* (Web Page, 6 May 2022) <https://www.reuters.com/legal/litigation/hermes-lawsuit-over-metabirkins-nfts-can-move-ahead-judge-rules-2022-05-05)/>; (ii) Nike's US lawsuit against StockX for creating NFTs based on Nike's physical shoes (see Mark Wilson, 'Nike is Suing StockX for Allegedly Selling Counterfeit Shoes. What Happens Next?', *Fast Company* (Web Page, 16 May 2022) <https://www.fastcompany.com/90752144/nike-is-suing-stockx-for-allegedly-selling-counterfeit-shoes-what-happens-next>; (iii) Shenzhen Qice Diechu Cultural Creativity Co Ltd's copyright claim in the Chinese courts relating to an NFT digital work against the operator of an NFT marketplace called Bigverse (see Allen & Overy, 'The First NFT Copyright Infringement Decision Handed Down in China' (Web Page, 12 May 2022) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-first-nft-copyright-infringement-decision-handed-down-in-china>; and (iv) Miramax LLC's US lawsuit against Quentin Tarantino after the filmmaker announced his plan to sell NFTs based on his original handwritten script for the 1994 film *Pulp Fiction* (see Latessa Gray, 'Lights, Camera, Legal Action: Quentin Tarantino in Litigation with Miramax Over NFT rights', *World Trademark Review* (Web Page, 14 April 2022) <https://www.worldtrademarkreview.com/article/lights-camera-legal-action-quentin-tarantino-in-litigation-miramax-over-nft-rights)>.

license agreement.[28] The terms of use for Roblox contain a separate section on 'disputes between users and creators or between creators', which include an option for Roblox to intervene in such disputes and potentially reallocate digital assets which decision 'is final and Creator and User will accept that decision'.[29] Many legal questions arise in relation to these provisions, including the interpretation of such terms, and how issues of jurisdiction and applicable law will be resolved by courts or tribunals to which disputes are brought.

For greater certainty, individuals and commercial parties operating in the metaverse may, of course, choose to enter into separate contractual agreements specifying their own governing law and dispute resolution mechanism. This may be appropriate, in particular, for commercial ventures, investments, collaborations, and contractual arrangements involving technical and industry expertise.

Regulatory Issues

Government regulation will be highly relevant in the metaverse and for potential disputes, in terms of risks to commercial parties. While regulatory attention has already turned to digital assets,[30] the metaverse may also bring separate regulatory attention to the fields of data and consumer protection compliance, taxation, financial regulation, anti-money laundering compliance, competition laws, gambling regulation, and criminal laws.[31] Of particular relevance to dispute resolution, consumer protection laws may grant rights to users who are classed as consumers in relation to unfair terms and the ability to seek relief in court.[32]

To the extent that governments become involved in ensuring interoperability between metaverse platforms, another field of regulatory activity can be foreseen in relation to standard-setting and the determination of FRAND (fair, reasonable and non-discriminatory) terms for the licensing of standard-essential patents.[33]

What's Next?

As opportunities in the metaverse grow, it remains to be seen how dispute risks and legal challenges will be managed. These include the vast scope of potential activities in the metaverse, the artificiality of applying existing legal concepts to some of those activities, the anonymity or pseudonymity of users, and the enforcement of decisions relating to digital assets. These challenges are not insurmountable, but may require legal adaptation. Legal initiatives worldwide are already grappling with application of the law to new technology, for example the UK's Jurisdiction Taskforce[34] and the UNIDROIT Digital Assets and Private Law Project,[35] as well as the currently-ongoing Law Commission for England

28 Meta (n 25) cl 4.2(b).

29 Roblox (n 24) cl 7(b).

30 See, eg, European Parliament, 'Crypto Assets: New Rules to Stop Illicit Flows in the EU' (Press Release, 31 March 2022) <https://www.europarl.europa.eu/news/pt/press-room/20220324IPR26164/crypto-assets-new-rules-to-stop-illicit-flows-in-the-eu>; United States Executive Office of the President, Executive Order on Ensuring Responsible Development of Digital Assets, Exec. Order 14,067, 87 Fed Reg 14143 (9 March 2022) <https://www.federalregister.gov/documents/2022/03/14/2022-05471/ensuring-responsible-development-of-digital-assets>; Orna Rabinovich-Einy and Ethan Katsch, 'Blockchain and the Inevitability of Disputes: The Role for Online Dispute Resolution' [2019] (2) *Journal of Dispute Resolution* 47, 72.

31 Garon (n 19) 1.

32 Niuscha Bassiri and Emily Hay, 'Consumer Protection' in José Rafael Mata Dona and Nikos Lavranos (eds), *International Arbitration and EU Law* (Edward Elgar, 2021), at 112. See, eg, *Amir Soleymani v Nifty Gateway LLC and The Competition and Markets Authority* [2022] EWCA Civ 1297, where the English Court of Appeal found that due to the consumer context, a dispute over whether an arbitration agreement in the terms and conditions of an NFT trading platform was null and void, inoperative or incapable of being performed should proceed to a full trial in the English Courts rather than being decided by an arbitrator.

33 See Jacques De Werra, 'The Expanding Significance of Arbitration for Patent Licensing Disputes: From Post-Termination Disputes to Pre-Licensing FRAND Disputes' (2014) 32(4) ASA Bulletin 692, at 697-698, 700.

34 UK Jurisdiction Taskforce of LawTech UK, 'Legal Statement on Cryptoassets and Smart Contracts' (Report, November 2019) <https://lawtechuk.io/explore/cryptoasset-and-smart-contract-statement>; *UKJT Digital Dispute Resolution Rules & Guidance 2021* <https://lawtechuk.io/explore/ukjt-digital-disputes-rules>.

35 UNIDROIT, 'Digital Assets and Private Law', *Study LXXXII : Digital Assets and Private Law Project* (Web Page, 2021) <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/>.

and Wales call for evidence regarding DAOs.[36] Courts are already addressing questions of whether 'air drop' of an NFT may constitute valid service,[37] and whether a Twitter handle is sufficient identification of a counterparty.[38] Dispute resolution in general, and international arbitration in particular, will not be immune from these pressures to adapt, with new dispute resolution tools using blockchain technology and automatic enforcement mechanisms offering new prospects for efficiency and being particularly appealing to this sector. With its procedural flexibility, emphasis on party autonomy, and ability to offer practitioners and decision-makers with particular industry and technical expertise, international arbitration is well-placed to meet these challenges and to be a dispute resolution tool of choice in the metaverse.

To learn more about legal issues related to the metaverse, follow MetaverseLegal on LinkedIn.

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36 Law Commission for England and Wales, 'Decentralised Autonomous Organisations (DAOs)', *Project Details* (Web Page) <https://www.lawcom.gov.uk/project/decentralised-autonomous-organisations-daos/>.

37 *LCX AG v John Doe, No 1-25* (Dkt No 154644/2022) (NY Supreme Ct, NY County), Order to Show Cause and Temporary Restraining Order, 2 June 2022.

38 *Janesh s/o Rajkumar v Unknown Person ("chefpierre")* [2022] SGHC 264, [38].

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Interpreting Arbitration Clauses: A Tale of Two Cases

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Introduction

Australian courts have reached a consensus about the principles that apply to the interpretation of arbitration clauses. But courts have differed in the application of those principles, producing predictable outcomes and others less so. In the last twelve months, the issue of predictability arising from different applications of the principles is demonstrated in the Courts of Appeal in Queensland and in Victoria. This arose both between each primary judge's decision and the relevant Court of Appeal and also between the decisions of the two Courts of Appeal.

It is my respectful suggestion that greater certainty of outcome would be achieved, if courts interpreted arbitration clauses with greater adherence to the guiding principles, which favour a beneficent reading of these clauses, rather than adopting a narrow, literalistic approach.

Principles

Arbitration clauses, pursuant to the doctrine of separability, constitute agreements, requiring the application of the rules of contractual interpretation. The great battles of the last fifty years concerning the interpretation of these clauses have, by and large, been resolved in favour of arbitration clauses being construed in favour of the arbitration of disputes. The guiding principles of contractual construction can be summarised as:

- the meaning to be given to a commercial contract's terms is determined by reference to what a reasonable business person would have understood those terms to mean;[1]
- a commercial contract should be construed by reference to the language used, the surrounding circumstances, and the purpose and objects to be secured by the contract;[2] and
- a court is entitled to approach the task of construction on the basis that the parties intended to produce a commercial result, one which makes commercial sense.[3]

For the interpretation of arbitration clauses, those general principles have been expressed as:

- where parties to a commercial contract agree, before any disputes have arisen, to refer their disputes to arbitration, their agreement should not be construed narrowly;[4] and
- in construing an arbitration clause, parties may be presumed not to have intended that their different disputes will be resolved by different tribunals.[5]

1 *Ecosse Property Holding Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544, 551 [16].*
2 *Rinehart v Hancock Prospecting Pty Ltd (2019) 267 CLR 524, 534 [44].*
3 *Ecosse (2017) 261 CLR 544, 551, [17].*
4 *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160, 165 (per Gleeson CJ) and Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102, [41], [42], and [53] (per Allsop J).*
5 *Ibid.*

The principles relating specifically to arbitration clauses do not imply some legal rule outside the orthodox process of contractual construction, nor do they deny the need to interpret the particular words the parties have chosen to use in their contract.[6]

While this understanding of the specific principles cannot be doubted, the general principles of construction must operate with the specific principles as to arbitration clauses; they should not be engaged so as to obviate the efficacy of the specific principles. After all, the specific principles are no more than an expression of the general principles in the context of interpreting arbitration clauses.

The Two Cases

The two cases considered in this article concern pathological arbitration clauses.[7] In each case, the defendant made an application to stay the proceeding in court and to refer some or all of the disputes to arbitration.

The tension between these cases involves the application of the principles set out in the foregoing part of this article. The differences between the decisions fundamentally arise from whether the Courts applied a narrow interpretation or a more beneficent interpretation of the arbitration clause.

Lee v Lin:[8] Primary Judge

By written contract made in 2014, the defendant agreed to provide migration agent services to the plaintiff. Clause 11 set out several sub-clauses for the resolution of disputes. Sub-clauses (a) and (b) provided for the discussion of disputes between the parties. The clause then provided:

> (c) *If the parties cannot reach an agreement within 21 days, the parties agree to refer the dispute to the Australian Commercial Disputes Centre (ACDC) for final settlement by a single arbitrator appointed in accordance with the Rules of the ACDC, or by another dispute resolution process suggested by the ACDC and accepted by the parties* . . .
>
> (d) *If the parties have been unable to resolve dispute through ACDC, either party may commence Court proceedings but not before the expiry of 28 days from the date of referral to ACDC. (Emphasis added.)*

In September 2021, the plaintiffs commenced a proceeding against the defendant alleging breach of contract and negligence. The defendant made an application, relying on sub-clause 11(c), to refer the parties to arbitration pursuant to s 8(1) of the *Commercial Arbitration Act 2013 (Qld)* and staying the proceeding pursuant to the Court's rules.

The primary judge rejected the application for four reasons:

- sub-clause 11(c) did not require the parties to submit to an arbitration;
- the sub-clause did not require that the "single arbitrator" engage in an arbitration;
- the sub-clause contemplated other dispute settlement methods being agreed upon by the parties; and
- sub-clause 11(d) contemplated the possibility that the parties would be unable to resolve their differences through the ACDC.[9]

In the primary judge's view, a generous reading of sub-clause 11(c) might lead to the conclusion that arbitration was an option available, but the clause went no further.[10] His Honour relied on *Jemena Gas Networks (NSW) Ltd and AGL Energy Ltd*[11] for the proposition that a clause which merely contemplated the possibility of arbitration was not enforceable for the purpose of staying a proceeding.[12]

In the primary judge's opinion, sub-clause 11(c) contemplated the possibility of arbitration but there was

6 *Hancock Prospecting Pty Ltd v Rinehart (2017) 257 FCR 442, 489 [166] (per Allsop CJ, Besanko and O'Callaghan JJ).*

7 The expression "pathological clause" describes a clause which contains defects likely to disrupt the arbitration process. It was first coined in 1974 by Frédéric Eisemann, who was Secretary General of the ICC Court of Arbitration.

8 [2022] QCA 140.

9 [2021] QSC 336, [20].

10 [2021] QSC 336, [21].

11 [2017] NSWCA 266.

12 [2021] QSC 336, [22].

no express agreement to submit the dispute to arbitration.[13]

Lee v Lim: Court of Appeal

The Court of Appeal disagreed with the primary judge, holding that sub-clause 11(c) was an enforceable arbitration agreement. It construed the words "for final settlement" to mean "finally determine or end the dispute between the parties". Emphasis was placed upon the principle that commercial contracts must be construed in a business-like way. Reliance was also placed upon the general principle that, in the interpretation of arbitration clauses, the making of subtle verbal distinctions is not to be encouraged. Additionally, the Court of Appeal relied upon the paramount object of the *Commercial Arbitration Act* to "facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense".[14]

Although sub-clause 11(c) contemplated the possibility of a further agreement, in the Court of Appeal's view, this did not detract from the fact that, unless and until such an agreement was made, the parties had agreed to refer their disputes to arbitration before the ACDC.[15]

As to clause 11(d), the Court of Appeal accepted that, at first glance, its provisions seemed to contradict the idea that the parties were obliged to have an arbitrator make a final award to resolve their disputes. However, it construed sub-clause (d) to mean that, if there were a subsequent agreement between the parties to abandon the arbitration, it left them free to commence court proceedings.[16]

Finally, as to *Jemena Gas Networks*, the Court of Appeal pointed out that the arbitration clause in that case was quite different. That clause provided for discussions between the parties. If those discussions failed, then:

> *… each party [agreed] to endeavour to settle the Dispute by mediation administered by the [ACDC] before having recourse to arbitration or litigation.*

The Court of Appeal pointed out that the clause in that case created an obligation to mediate, not an obligation either to arbitrate or litigate. The clause merely recognised that arbitration and litigation were options available if mediation failed.[17]

Comments

On a strictly literal basis, the primary judge's decision is justifiable but not entirely so. The reference to an arbitrator, but not to arbitration, seems to be a distinction without a difference. What is a person appointed an arbitrator required to do? The answer is clear – arbitrate the parties' dispute.

The Court of Appeal's approach gives a wider interpretation to the words in the clause; its interpretation is also more consistent with giving the clause a practical and business-like interpretation.

Great Union Pty Ltd v Sportsgirl Pty Ltd:[18] Primary Judge

Under a Deed of Renewal of Lease, Great Union leased premises to Sportsgirl for seven years, commencing in 2017 and expiring in 2024. Clause 37.3 dealt with abatement of rental payments. Sub-clause (a) provided:

> *[t]he Tenant may reduce its payment of [rent] … for the period from and including the date the damage or interference with access occurs to and including the date of this lease is terminated or to but excluding the date the Premises are made fully accessible to and wholly fit for the Tenant's use. Any reduction must be proportionate to the loss of amenity caused by the damage or interference with access.*

Sub-clause (b) provided:

> *If the parties do not agree on the reduction to apply under the previous clause, within seven days after the damage or interference with access occurs, then the proportion must be decided under the Commercial Arbitration Act 1984.*

Following COVID lockdowns in Victoria, the lessee paid reduced rent, presumably on the basis that the

13 [2021] QSC 336, [23].
14 [2022] QCA 140, [4].
15 [2022] QCA 140, [5].
16 [2022] QCA 140, [9].
17 [2022] QCA 140, [7].
18 [2021] VSCA 299.

lockdowns interfered with access to the premises. The landlord commenced a proceeding in the Supreme Court of Victoria for unpaid rent. The lessee counterclaimed that it was entitled to an abatement of rent under cl 37. It also sought a stay of the proceeding, pending the determination of its rent abatement claim by arbitration.

The primary judge accepted the tenant's submission that the "matter" the subject of the arbitration agreement included both the proportion of the rent to be abated ("quantification issue") and whether the tenant was entitled to rental abatement on the basis that the premises were damaged or access was interfered with ("entitlement issue"). The tenant contended that the arbitration clause extended to both matters,[19] while the landlord contended that it did not relate to the entitlement issue.[20]

The primary judge accepted that:

> *a court is entitled to assume "that the parties intend to produce a commercial result", that will avoid a construction that renders it "commercial nonsense or working commercial inconvenience".*[21]

His Honour accepted that, although it did not rise to the level of a legal presumption, arbitration clauses should be read against the sensible presumption that the parties do not intend the inconvenience of having possible disputes being heard in two places.[22]

The primary judge concluded that the arbitration clause extended to both the quantification issue and the entitlement issue for the following reasons:

- It was inherently unlikely that the parties to the lease would have intended for the resolution of disputes to be bifurcated, namely that a Court would determine the entitlement issue and then an arbitrator would determine the quantification issue. Such fragmentation, his Honour stated, would cause significant delays and additional costs to the resolution of disputes.[23]
- A reasonable businessperson would understand the expression "if the parties do not agree on the reduction" to include disputes where the landlord contended that there should be no abatement because there was no relevant damage or interference with access.[24]
- On the landlord's narrow construction, a court would have to determine the entitlement issue and then the arbitrator, considering the same evidence, would have to determine the quantification issue. It was unlikely that the parties would have intended the inconvenience associated with this narrow construction.[25]

Great Union v Sportsgirl: Court of Appeal

The Court of Appeal rejected the primary judge's interpretation of the arbitration clause, preferring the landlord's interpretation that it applied only to the quantification issue.

The Court of Appeal pointed out that it was necessary to focus particular attention on the meaning of clause 37.3(b), which is the only clause that makes provision for an arbitration.[26]

Secondly, it said that, as to clause 37.3(b), the threshold requirements for a reference to arbitration are premised on the fact that the relevant damage or interference to access had already occurred. Thus, it said, the expression "if the parties do not agree on the reduction to apply under the previous clause" assumes an entitlement to a reduction and does not carry with it an agreement that the arbitrator determine the entitlement issue. It said that that a reduction will only have arisen under clause 37.3(a) where the relevant damage or interference has already occurred.[27]

19 [2021] VSC 277, [7].
20 [2021] VSC 277, [10].
21 [2021] VSC 277, [13].
22 [2021] VSC 277, [11] – [13].
23 [2021] VSC 277, [16(a)].
24 [2021] VSC 277, [16(b)].
25 [2021] VSC 277, [16(c)].
26 [2021] VSCA 299, [37].
27 [2021] VSCA 299, [38].

Thirdly, the Court of Appeal was of the view that a reasonable business person would consider the word "proportion" would not raise the issue of entitlement. It said that the parties would have used very different language, if they intended "proportion" to include the entitlement issue, particularly since lawyers had been involved in drafting the lease.[28]

Fourthly, it disagreed with the primary judge's view that the landlord's interpretation was unworkable because the entitlement issue should be uncontroversial.[29]

Thus, it concluded that the proper construction of cl 37.3(b) was that the arbitrator was to decide only the quantification issue.[30]

Comments

An abatement under cl 37.3 involves three questions:

1. whether, as a matter of fact, there is damage or interference with access to the leased premises;
2. whether the tenant is entitled to an abatement; and
3. what proportion of the rent is to be abated.

In my view, questions 1 and 2 are separate. There must be an affirmative answer to 1, before proceeding to 2. But an affirmative answer to 1 does not necessarily mean an affirmative answer to 2. Thus, if the damage or interference is *de minimis* or if the tenant caused the damage or interference, then there would be a negative answer to 2. It is entirely possible that the question of entitlement will be controversial.

The primary judge's solution was to bundle the question of entitlement with the question of proportion; therefore, placing both before the arbitrator. It may readily be accepted that the question of proportion implicitly includes the question of entitlement. The Court of Appeal's point that, if the parties intended this, they would have said it, lacks persuasiveness, particularly given that arbitration clauses are sometimes insufficiently thought through or poorly drafted.

The Court of Appeal's solution was to bundle the factual question of damage or interference with the question of entitlement; therefore, leaving only the question of proportion before the arbitrator. Thus, the question of entitlement must be resolved in a court and the question of proportion must be resolved before an arbitrator.

In my respectful opinion, clause 37 is sufficiently ambiguous to admit both constructions; however, the primary judge's construction is more business-like and practical. For this reason, his Honour's decision is, with respect, to be preferred.

Conclusion

Contractual construction can create divisions among judges of the highest courts when applying orthodox principles. The two cases considered in this article illustrate this point.

While adherence to the orthodox principles of contractual construction goes without saying, it is suggested that those principles, as manifested in the context of interpreting arbitration clauses, should not be minimised. Thus, where different constructions of an arbitration clause are genuinely competing, a construction in favour of arbitration (or arbitration of wider disputes) is preferable. I suggest this for three reasons. First, arbitration has many advantages over curial proceedings in the resolution of commercial disputes. Secondly, a construction beneficent to arbitration is often closer to a business-like interpretation of the arbitration clause. Thirdly, this approach is productive of more predictable outcomes.

28 [2021] VSCA 299, [39].
29 [2021] VSCA 299, [42].
30 [2021] VSCA 299, [43].

Revisiting Referrals

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The term 'referral powers' describes many different powers and obligations of courts to refer disputes to arbitrators or referees. Depending on the nature of the referral power or obligation, questions of fact, law, or both might be referred. Generally, a referral will take the form of a written document, and the terms of the referral determine what the arbitrator or referee is to decide and whether the decision will be binding or non-binding on the parties. Referral powers have recently featured in high-profile disputes across the construction,[1] large corporate,[2] and technology sectors.[3] Given there are substantial consequences where a dispute is referred, it is important that practitioners are aware of the different types of referral powers and their implications for dispute resolution. This article embarks on a brief taxonomy of referral powers, provides practitioners with a list of issues to consider when examining any particular referral regime, and highlights opportunities such powers create for efficient, timely, and effective dispute resolution.

History and taxonomy

Current referral powers in Australian jurisdictions can be traced back to two key ancestors.

First, English courts have long referred matters of detail or account to referees, even without the consent of the parties, as 'an early form of active case management'.[4] Given that courts could refer matters without the consent of the parties, referees were almost invariably appointed officers of the court.[5] The Court of Chancery had long referred disputed fact issues for determination by a report of a Master or a Chief Clerk.[6] These practices were continued in the *Judicature Act 1873 (UK)*.[7] Later procedural innovations allowed the referral of entire matters rather than particular issues.[8]

This type of referral has been described in Australia by Justice Stephen as a 'mode of trial ... distinct from conventional arbitration' with 'none of the quite special qualities which give to the award of an arbitrator in an arbitration founded upon an out of court submission its

1 *Santos Ltd v Fluor Australia Pty Ltd [2020] QSC 373.*

2 *Rinehart v Hancock Prospecting Pty Ltd (2019) 267 CLR 514.*

3 *Epic Games Inc v Google LLC (2022) 399 ALR 119.*

4 *CPB Contractors Pty Ltd v Celsus Pty Ltd (2018) 364 ALR 129, 137.*

5 Ibid *137-8.*

6 The common law courts also had the power under section 7 of the *Common Law Procedure Act 1854 (UK) to refer matters of account to arbitrators or court officers, although such references were regarded as akin to references by agreement. See Buckley v Bennell Design & Constructions Pty Ltd (1978) 140 CLR 1, 16.*

7 *Judicature Act 1873 (UK) ss 56-7.*

8 *Judicature Act 1884 (UK) s 9.*

own uniquely conclusive character', being 'no more than part of the machinery of the court for the trial'.[9] His Honour reasoned that such referrals are necessarily distinct from arbitration, where the awards produced attract immunity from judicial review because of the fundamentally consensual nature of arbitration agreements.[10] Thus, the products of such referrals were not final and binding, but rather susceptible to judicial review, and courts had a discretion to adopt, vary or reject findings of fact made by the decision maker in the referred proceeding: unlike their limited review role (not extending to the merits) with respect to arbitral awards.

Second, and distinct from the above type of referral, parties are free to agree to arbitration. The courts of countries party to the New York Convention and the UNCITRAL Model Law (including Australian courts) are obliged to refer matters the subject of an arbitration agreement to arbitration.[11] Such arbitration agreements are severable contracts. They can be agreed before or during proceedings. If one party attempts to resile from the arbitration agreement by initiating or continuing proceedings in a court, the other party can hold the recalcitrant party to the arbitration agreement by proving the arbitration agreement and applying for an order to stay the court proceeding and refer the matter to arbitration. Such a referral is made in support of the parties' arbitration agreement and thus the referral to arbitration remains fundamentally grounded in consent. This consent underpins the final and binding nature of arbitral awards and the limited avenues for challenging arbitral awards.

The distinction between the two types of referrals is therefore fundamentally one of consent to referral, and the consequential reviewability of the decision produced. In the former, the referral is part of the court's ability to self-regulate for the efficient exercise its judicial functions, and the outcome is subject to judicial review. In the latter, the referral is the court's support of the parties' agreement that an arbitral tribunal determine their competing claims and adjudicate upon their rights in a final and binding fashion, and courts respect that outcome as final and binding as between the parties.[12] The former is fundamentally a case management tool. The latter arbitral process is fundamentally based upon consent.

The distinction is one of substance rather than mere form, and there are two semantic assumptions that practitioners should avoid.

First, the term 'referral to arbitration' does not necessarily connote referral of a dispute to an arbitrator for final and binding determination. For example, s 66 of the *Supreme Court Act 1935* (SA) allows the court to refer a civil proceeding or any issues within it to an 'arbitrator' without the consent of the parties. The appointed arbitrator becomes an officer of the court and the court retains a residual discretion to not adopt the 'award' of the arbitrator as its judgment on the action or issue referred. As a matter of substance, s 66 is distinct from a conventional arbitration by agreement and is fundamentally a 'case management' referral power.[13]

Second, practitioners should note that some referral powers under Acts establishing superior courts use the IAA or CAAs as the mechanism of referral. For example, r 50.08 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) empowers the Court to order a proceeding or a question in a proceeding be referred to arbitration with the consent of both parties, and requires that such an order specify that either the CAA or the IAA apply to the referred arbitration. Powers such as these may raise complex questions as to how the relevant CAA or the IAA applies in combination with the relevant court rules.

9 *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1, 15, 18.

10 Ibid 21.

11 Any Australian court hearing a matter the subject to an arbitration agreement must stay proceedings and refer the parties to those proceedings to arbitration under either the *International Arbitration Act 1974* ('IAA') (for international commercial arbitrations) or the Uniform Commercial Arbitration Acts ('CAAs') (for domestic arbitrations) respectively. It should be noted that these referral regimes are mutually exclusive as between one another, however they are both based upon the UNCITRAL Model Law.

12 See the limited grounds of challenge to an arbitral award in s 8, and sch 2 Arts 34(2)of the IAA and the equivalent ss 34, 36 of the CAAs.

13 *Leighton Contractors (SA) Pty Ltd v Hazama Corp Ltd* (1991) 56 SASR 47, 53-57 (Debelle J). Note that there is another misleadingly labelled 'arbitration' referral power in s 38(2) of the *Civil Procedure Act 2005* (NSW), but it is not exercised in respect of large, complicated disputes: NSW Judicial Commission, *Civil Trials Bench Book*, 4 June 2021, [2-0585]-[2-0590].

Key aspects of current referral powers

Referral powers are idiosyncratic between jurisdictions, and practitioners should consider the following issues when examining a referral power that is potentially applicable to a given dispute.

Whether consent is a prerequisite to referral

Generally, most of the referral powers that are part of a court's ability to manage its caseload do not require the consent of the parties for a matter to be referred,[14] or do not require consent where the proceeding requires a prolonged examination of documents.[15] By contrast, where there is an existing arbitration agreement, referrals under the IAA or CAAs are necessarily premised on the pre-existing consent to that agreement. Where there is not an existing arbitration agreement, none of the referral powers that require consent for referral specify the form of consent that must be provided. Presumably a draft form of order by consent would suffice. However, despite the substantive distinction between arbitration and referrals as part of the court case management process, parties should be careful to ensure that in attempting to consent to referral under one of the 'case management' regimes, they do not inadvertently risk creating an argument that they have agreed to arbitrate under the IAA or one of the CAAs. Arbitration under the IAA or one of the CAAs may be desirable in any given case: the key point here is that practitioners should be aware that two different pathways exist.

The types of matters to be referred

Most referral powers allow for the referral of questions of fact or law, being some or all of the questions in a proceeding.[16] Often, the matters capable of referral are not limited to those identified by the pleadings or other agreement.[17]

Most referral powers do not restrict the types of disputes which may be referred.[18] However, disputes with large volumes of evidence, disputes that are factually complicated, or disputes that require expertise (including expertise in running large trials) are ripe for referral.[19] The trial of such disputes drains public resources and occupies valuable time on civil and commercial court lists.[20] Referral of such proceedings achieves the objectives of just, quick, efficient and inexpensive resolution of disputes according to law.[21] At least in Queensland, the tribunal need not be better equipped than a judge to hear a particular matter if referral would facilitate just resolution at minimal expense.[22]

One outlier to this trend is New South Wales, where the Civil Trial Bench Book suggests referral of matters that do not involve complicated issues of law and fact and where the hearing time is three hours or less.[23] We suggest that complicated disputes are precisely those most suitable for referral because referral allows the resolution of these matters in an efficient manner that promotes the public interest in the efficient use of publicly funded court time.[24] For such matters, courts must consider whether

14 See eg, referrals to 'arbitration' in the *Civil Procedure Act 2005* (NSW) s 38 and the *Supreme Court Act 1935* (SA) s 66(1); and referrals to referees in the *Federal Court Act 1976* (Cth) ss 54A(1), 53A(1A); *Uniform Civil Procedure Rules 2005* (NSW) r 20.14(1); *Uniform Civil Procedure Rules 1999* (Qld) r 501; *Supreme Court Act 1935* (SA) s 67; *Supreme Court Act 1935* (WA) s 50 (for questions being referred); *Supreme Court Rules 2000* (Tas) r 574. Consent is required under the *Civil Procedure Act 2010* (Vic) s 66(2) and the *Supreme Court Act 1935* (WA) s 51 (for trials or questions being referred).

15 *Supreme Court Act 1979* (NT) s 26.

16 *Uniform Civil Procedure Rules 1999* (Qld) r 501(4)(a); *Uniform Civil Procedure Rules 2005* (NSW) r 20.13; *Federal Court of Australia Act 1976* (Cth) s54A; *Federal Court Rules 2011* (Cth) r 28.61(1)(b).

17 *Uniform Civil Procedure Rules 1999* (Qld) r 501(4)(b); *Uniform Civil Procedure Rules 2005* (NSW) r 20.13; *Federal Court Rules 2011* (Cth) r 28.61(1)(b).

18 There may be some restrictions on allegations of fraud being referred. See *Civil Procedure Act 2005* (NSW) s 38(3); *Uniform Civil Procedure Rules 2005* (NSW) r 20.8.

19 *Santos Ltd v Fluor Australia Pty Ltd* [2020] QSC 373, [23], [67] (Bradley J).

20 This issue has long been recognised. See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 October 1891, 2354 (George Reid): 'the ordinary legal business of the country is often blocked for weeks by cases which take up time for jurymen and judges at great expense to the public, which can only satisfactorily be settled by arbitration out of court.'

21 See, eg, *Federal Court of Australia Act* 1976 (Cth) s 37M; *Civil Procedure Act 2010* (Vic) ss 9(1), 9(2)(g); *Uniform Civil Procedure Rules 1999* (Qld) r 5.

22 *Santos Ltd v Fluor Australia Pty Ltd* (No 2) [2020] QSC 373, [66].

23 Judicial Commission of New South Wales, *Civil Trials Bench Book* (2022, online) [2-0585]. In relation to the statutory history of the current s 38 of the *Civil Procedure Act 2005* (NSW), see Explanatory Note, Civil Procedure Bill 2005 (NSW) 1.

24 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 182.

the controversy (or part of it) is better suited to a forum separate to litigation.[25]

Court supervision of the referred proceeding

If interlocutory questions arise in a proceeding referred under a 'case management' referral power, the court can assist because the proceeding remains within the court.[26] In addition to providing the original framework of which matters should be referred and how the reference should be carried out, the terms of such a reference may further allow for the court to oversee the referred proceedings by scheduling intermittent directions hearings or by any other mechanism the court sees fit. Alternatively, if the court wishes for the referee to have the same powers as the court with respect to discovery, interrogatories or compelling evidence by subpoena, or hearing matters relating to pleadings or privilege,[27] it may give directions to that effect.[28] After the referral has occurred, questions might arise that require construing the scope of the powers conferred on the tribunal, arbitrator or referee. Whether the court is able to hear an application regarding a question of construction of the scope of the referral will depend on whether the specific provision under which the reference was made allows for such an application to be heard.[29] If the provision does not allow for the application to be heard by the court, the inference is that it will be for the referee or tribunal to construe the bounds of the reference. For this reason, particular care needs to be taken when drafting the orders containing the terms of the reference.

Courts have a more limited ability to supervise arbitrations under the IAA or CAAs. Those Acts grant courts power to assist arbitral tribunals in gathering evidence[30] and to make orders regarding confidentiality,[31] but not powers to make directions as to the conduct of the arbitration more broadly. Rather, those matters are within the sole purview of the arbitral tribunal.

Whether the product of the referral is final and binding

Disputes referred to arbitration under the IAA or CAAs, or under powers in other legislation that use the IAA or CAAs as the mechanism of referral, will produce an award

25 *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd (No 2)* [2014] QSC 216, [62].
26 See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 50.01–50.04; *Uniform Civil Procedure Rules 1999* (Qld) r 505. See also *Civil Procedure Act 2005* (NSW) s 38(4).
27 See, eg, *Santos Limited v Fluor Australia Pty Ltd & Anor* [2021] QSC 181.
28 See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 50.02; Uniform Civil Procedure Rules 1999 (Qld) r 505(2).
29 See, eg, *Santos Limited v Fluor Australia Pty Ltd & Anor (No 2)* [2021] QSC 189, [30]-[31].
30 IAA ss 23(1), 23(3), 23A.
31 IAA ss 23F-23G.

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that is final, binding and enforceable on the parties subject to the narrow exceptions in Article 5 of the New York Convention,[32] Article 36 of the Model Law (for awards produced by foreign-seated arbitrations), and Article 34 of the Model Law (for awards produced by Australian-seated arbitrations).

By contrast, most of the powers to refer disputes to referees or 'arbitration' which are better described as case management powers produce reports that are not binding in the same way as arbitral awards. Rather, most give the referring court a residual discretion to adopt, vary or reject the report.[33] The exact nature of the courts' discretion to adopt, vary or reject these reports varies with different powers. One authority suggests that, generally, the reports of referees are not to be treated as 'some kind of warm-up for the real contest'.[34] However, the degree of deference, if any, is not akin to the final and binding nature of arbitral awards caught within the framework of the IAA or the CAAs.

Enforcement

The product of any given referral will be enforceable in one of two ways, depending on the terms of the referral power. First, if the referral produces a report that can be adopted at the court's discretion as a judgment of the court and the court exercises its discretion to adopt the report, the report is enforced as a judgment of the court.[35] For example, this method of enforcement would be used where the matter is referred under a case management referral power that does not require the parties' consent for referral.[36] Second, if the referral produces an arbitral award to which either the IAA or CAAs are applicable, those regimes set out a separate enforcement procedure. Where the matter is referred because of a pre-existing arbitration agreement between the parties, the second method will apply. Both methods of enforcement achieve the same result for judgment debtors within the jurisdiction of Australian courts because awards can be enforced as if they were judgments of the court granting them recognition pursuant to the IAA or CAAs.[37] However, if a prospective award/judgment debtor has substantial assets outside the jurisdiction of the Australian courts, there is a clear advantage to entering into an arbitration agreement under either the IAA or CAAs, as the resulting award will be enforced (subject to narrow exceptions) in all of 171 Contracting States to the New York Convention. By contrast, even if a court adopts the report produced by a non-IAA/CAA referral in a judgment, that judgment can only be enforced easily in jurisdictions with which Australia has a reciprocal agreement, which are significantly fewer.[38]

Opportunities created by referral powers

Together, 'case management' and IAA/CAA referral powers create opportunities for efficient and flexible commercial dispute resolution that stands to benefit all stakeholders in such disputes.

Courts can use 'case management' referral powers as a primary method of extracting facts from evidence. These 'case management' referral powers have four key benefits. First, the referral of disputes allows judges to focus their efforts on truly contentious issues of fact and law which arise out of the report of the referee. Second, referral (or

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32 Replicated in s 8 of the IAA.

33 See, eg, *Federal Court of Australia Act 1976* (Cth) s 54A(3); *Federal Court Rules 2011* (Cth) r 28.67(1); *Uniform Civil Procedure Rules 2005* (NSW) r 20.24; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 50.04; *Uniform Civil Procedure Rules 1999* (Qld) r 505D(1); *Supreme Court Act 1935* (SA) s 67(3); Supreme Court Rules 2000 (Tas) r 574(1).

34 *Wenco Industrial Pty Ltd v W W Industries Pty Ltd* (2009) 25 VR 119, 126.

35 See, eg, *Supreme Court Act 1935* (WA) s 50(2); *Supreme Court Rules 2000* (Tas) r 575(3).

36 However, where the matter is referred under a case management referral power that requires the parties' consent to referral, a more complex question arises as to which enforcement regime applies. In a proceeding that has been referred, the 'award' of the arbitrator or the report of the referee is not analogous to the award of an arbitrator appointed by agreement; rather it is equivalent to a form of judgment or verdict: *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1, 15. This distinction arises from the longstanding distinction between court ordered arbitration and arbitration by submission: Quintin Hogg, *The Law of Arbitration* (Butterworth, 1936) 184, cited in *Buckley v Bennell Design & Constructions Pty Ltd* (1978) 140 CLR 1, 18. This distinction suggests that generally any potential conflict between the enforcement provisions of the IAA or a CAA and the rules of the court under which the the referral was made should be resolved by determining that a court referred arbitration should not engage the IAA or CA unless the rules of the referring court provide for that to occur, such as under the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 50.08. Of course, this is subject to the specific terms of the reference.

37 IAA s 8; CAAs s 35(1); *Federal Court of Australia Act 1976* (Cth) s 54(1).

38 See the *Foreign Judgments Act 1991* (Cth) pt 2; *Foreign Judgments Regulations 1992* (Cth) sch.

the mere possibility of referral) avoids substantial periods of time being blocked out of court calendars for lengthy trials which may have a significant prospect of settling. Third, the threat of referral (and the additional costs to the parties associated with referral) creates an economic incentive for parties to seek agreement on procedures to maximise the efficiency of evidence presentation. Fourth, many referral powers allow courts to retain close supervision and control of referred proceedings by directions.

The combination of both 'case management' and IAA/CAA referral powers give parties unprecedented levels of procedural flexibility, if they are used wisely.

First, parties may obtain a number of benefits from having the freedom (via referral powers) to easily move the bulk of fact-finding out of court calendars without needing a pre-existing arbitration agreement. For example, parties may benefit from beginning proceedings in court and using the court's powers, specialised court lists and the case management experience of a trial judge to narrow the issues in a proceeding and identify particular disputes of fact suitable for referral under the IAA/CAAs before drafting an appropriate arbitration agreement. Furthermore, parties engaged in multiple disputes raising similar questions of law or fact might benefit from litigating a preliminary question before a court rather than referring multiple disputes to separate arbitrations which may encourage contested consolidation applications. This course of action might benefit the parties by providing a binding legal precedent.

Second, parties to matters referred under either the IAA/CAAs or 'case management' referral powers will benefit from increased procedural flexibility. Arbitrators and referees can be hand-picked to provide subject-matter or case management expertise. Arbitrators of disputes referred under the IAA or CAAs may also provide flexible document disclosure protocols and an ability to hear international witnesses at hours more convenient than referees to whom disputes are referred under 'case management' referral powers or trial judges.

The major drawback of the current plethora of referral powers is a serious lack of uniformity in 'case management' referral powers between different state and federal courts, especially regarding the topics addressed above. The lack of uniformity between jurisdictions increases the potential for interlocutory disputes as to jurisdiction. As long as 'case management' referral powers remain idiosyncratic between jurisdictions, parties will continue litigating and resisting referral, or instead opting for arbitration agreements under the uniform IAA and CAAs in the pursuit of procedural certainty.

ACICA Rules 2021

In March 2021 ACICA released a new edition of its Arbitration Rules and Expedited Arbitration Rules. The new Rules came into effect on 1 April 2021. Copies of the new ACICA Rules Booklet can be downloaded from the website: www.acica.org.au

International Arbitration as the New Frontier for Reconceptualizing the International Legal Personality and Responsibility of Foreign Investors in the Post Pandemic World

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I. Introduction

Since the introduction of the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles for Business and Human Rights, the notion that non-state actors, specifically foreign investors, may have responsibility for human rights and the environment has manifested in a number of ways.[1] For example, in the post-pandemic era, we have seen an avalanche of ESG regulations worldwide mandating human rights due diligence reporting across global supply chain networks, the proliferation of sanctions levelled against businesses and financial institutions involved in or facilitating transnational crime such as modern slavery or money laundering, the intensified policy initiatives promoting transitions to greener economies, and also, the promulgation of new-generation treaties expressly imposing sustainable development obligations on foreign investors.[2]

Against this backdrop, the question being increasingly asked is not of what rights a state owes to a foreign investor, but rather, what obligations a foreign investor owes instead. It becomes worthwhile then to take a step back and consider whether the international arbitration

1 Parallel to this reconceptualization of the legal personality and responsibility of the foreign investor under international law, there is a similar reconceptualization of the legal personality of the state and of its corresponding rights, immunities and obligations: see further, M. Ong, "The Interplay of Sovereignty, Personality and Consent in the Execution of Arbitral Award Debts against Non-Party State-Owned Enterprises," *McGill Journal of Dispute Resolution* (2018) Volume 4, <https://mjdr-rrdm.ca/articles/v4/the-interplay-of-sovereignty-personality-and-consent-in-the-execution-of-arbitral-award-debts-against-non-party-state-owned-enterprises/>.

2 For example, the Dutch Model Treaty (2019) includes a provision where the contracting parties "express their commitment to the international framework on Business and Human Rights, such as the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, and commit to strengthen this framework." *See further,* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download. Another example is the Singapore-EU FTA, wherein contracting parties expressly commit to and have regard to the "principles articulated in the Universal Declaration of Human Rights." *See further,* https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreement_en. The Morocco-Nigeria BIT (2016) is similarly driven by ESG-focused concerns, including stipulating that investment projects be assessed for environmental and social impacts, and that investors comply not just with host state laws on environmental protection, labour law and human rights, but also with international standards. *See further*, https://edit.wti.org/app.php/document/show/bde2bcf4-e20b-4d05-a3f1-5b9eb86d3b3b.

forum is prepared for this new post-pandemic era more focused on advancing sustainable development. In re-examining the status quo, three pre-pandemic arbitral cases stand out for their particular prescience and together exemplify how international arbitration is becoming the new frontier through which foreign investors may be recognized as subjects under international law, and consequently have responsibilities, if not obligations, for international human rights, the environment, and good governance.

II. Recognizing foreign investors as subjects under international law

The first case of note is *Urbaser* v. Argentina,[3] where the tribunal recognized that because "international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce," "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law."[4] The tribunal considered that whereas "positive" international law obligations "to perform" could only bind states,[5] "negative" obligations – *i.e.* directions to respect a particular right, and not "engage in activity aimed at destroying"[6] such rights – could be of "immediate application, not only upon States, but *equally* to individuals and other private parties."[7]

Second, in *Bear Creek* v. *Peru*,[8] the tribunal there did not adopt *Urbaser*'s distinction between "positive" or "negative" international law obligations. Instead, the tribunal was divided on whether a particular international instrument – there, the International Labour Organization's Indigenous and Tribal Peoples Convention (ILO Convention 169) – imposed "direct" obligations on non-state actors. Whereas the majority decided that the Convention imposed "direct obligations on states only,"[9] the dissenting arbitrator opined that "does *not*…mean that [the Convention] is without significance or legal *effects*"[10] for a foreign investor. In recognizing that "indigenous and tribal peoples also have rights under international law and these are *not* lesser rights" subordinated to an investor's rights,[11] the dissenting arbitrator found that an investor's international law "responsibilities are no less than those of the government."[12] In the dissenter's view, a "significant and material" failure to comply with such responsibilities led to damages being halved.[13]

In the third case of note, in *David Aven* v. *Costa Rica*,[14] the tribunal went further than both *Urbaser* and *Bear Creek*, finding that international law obligations that could be characterized as "obligations *erga omnes*" – such as those concerning the "protection of the environment" – could be imposed on foreign investors because in falling within the "concern of all states," states would have a "legal interest in their *protection*."[15] *David Aven* thus opened the door to the possibility of foreign investors being not only obliged to *respect* certain international law rights (*i.e.* *Urbaser*'s so-called "negative" obligations), but being additionally obliged to proactively *protect* such rights (*i.e.* "positive" obligations).

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3 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v. *The Argentine Republic* (ICSID Case No. ARB/07/26), Final Award, dated 8 December 2016, ("*Urbaser* v. *Argentina*"), <https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf>.

4 *Urbaser* v. *Argentina*, at para 1195.

5 *Urbaser* v. *Argentina*, at para 1208-1210.

6 *Urbaser* v. *Argentina*, at para 1199, 1210.

7 *Urbaser* v. *Argentina*, at para 1210 (emphasis added).

8 *Bear Creek Mining Corporation* v. *Republic of Peru* (ICSID Case No. ARB/14/21), Final Award, dated 30 November 2017, ("*Bear Creek Final Award*"), <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf>.

9 *Bear Creek Final Award*, at para 241, 408, 664.

10 *Bear Creek Mining Corporation* v. *Republic of Peru* (ICSID Case No. ARB/14/21), Partial Dissenting Opinion, dated 12 September 2017, ("*Bear Creek Dissenting Opinion*"), <https://www.italaw.com/sites/default/files/case-documents/italaw10107.pdf>, at para 9-10 (emphasis added).

11 *Bear Creek Dissenting Opinion*, at para 36 (emphasis added).

12 *Bear Creek Dissenting Opinion*, at para 39.

13 *Bear Creek Dissenting Opinion*, at para 39. See also, at para 37.

14 *David Aven et al.* v. *Republic of Costa Rica* (Case No. UNCT/15/3), Final Award, dated 18 September 2018, ("*David Aven* v. *Costa Rica*"), <https://www.italaw.com/sites/default/files/case-documents/italaw9955_0.pdf>.

15 *David Aven* v. *Costa Rica*, at para 738 (citing the *Barcelona Traction Case*, ICJ Judgment of 5 February 1970, at para 33, noting that with respect to "obligations of a State towards the international community as a whole," "all States can be held to have a legal interest in their protection, they are obligations *erga omnes* [*ie.* towards everyone]"), and also para 699.

When viewed together, the *Urbaser*, *Bear Creek* and *David Aven* trio reflect changing understandings of the international legal personality of foreign investors. Concerns as to whether such a conceptual evolution is contentious can be addressed by recalling that investment treaties governing the relationship between state and foreign investor are typically interpreted pursuant to the *Vienna Convention on the Law of Treaties*, and accordingly, ought to be interpreted in light of the treaty's object and purpose, and keeping in mind any relevant rules or principles of international law such as (but not limited to) "respect for, and observance of, human rights."[16] Recognizing that foreign investors can be subjects under international law and have associated responsibilities, if not obligations, under international law thus becomes not so much an exercise of mental gymnastics, but rather an exercise of purposive and contextual interpretation, one that recognizes that investment law and international arbitration should not operate in a silo carved out from the broader auspices of international law and international law developments.[17]

III. The international law responsibility of foreign investors

Intertwined with the emerging recognition of the foreign investor as subjects of international law is the idea that responsibility for respecting and protecting human rights, preserving the environment, and not undermining good governance, is and should be a joint responsibility for *both* state and investor. Perhaps the more critical, and controversial, issue then is how the international responsibility of the foreign investor can be accounted for.

In *Bear Creek* – the only case of the trio of cases discussed herein that endeavoured to give force to this idea[18] – the tribunal accounted for the joint responsibility of the state and the investor as a question of damages. For the majority of the tribunal, joint responsibility was accounted for by quantifying the impact of the state's action on the economic viability of the underlying investment, and considering the investor's non-compliance with international law only to the extent that such non-compliance had an economic impact on the investment's future profitability. Not only did this focus leave the impact of non-compliance on the local indigenous community out of the calculation (and therefore unremediated), but it turned a blind eye to the counterfactual impact of what would have happened to the broader human rights or environmental landscape had there been no state action taken, *i.e.* the non-economic impacts.[19] The *Bear Creek* dissenter's alternative focus of quantifying the investor's "contribution to the events"[20] that led to the state's action was equally problematic to the notion of joint responsibility, albeit for a different reason – such an approach runs the risk that

16 *See* Vienna Convention on the Law of Treaties, Preamble and Art. 31, among others.

17 *See e.g., Urbaser* v. *Argentina*, at para 1189 and 1200 (noting that construing an investment treaty as an "isolated set of rules of international law…is not correct for more than one reason" and instead should be "construed in harmony with other rules of international law of which it forms part, including those relating to human rights."). See generally, F. G. Santacroce, "The Applicability of Human Rights Law in International Investment Disputes," *ICSID Review Foreign Investment Law Journal* (2019) Vol. 34, < https://academic.oup.com/icsidreview/article-abstract/34/1/136/5573016?redirectedFrom=fulltext>.

18 This is likely because in both *Urbaser* and *David Aven*, the invocation of the international law obligation was defeated (or perhaps more precisely, left unresolved as obiter statements) at the merits stage of the proceedings, and that being so, the tribunal in both *Urbaser* and *David Aven* did not have the opportunity to consider how to account for the joint responsibility of the state and investor. Both tribunals similarly considered that the international law obligations respectively invoked by the respondent states in their counterclaims were not "based on international law" per se, but rather as arising in relation to the underlying investment treaty. *See, Urbaser* v. *Argentina*, at para 1206-1209; *David Aven* v. *Costa Rica*, at para 739-743. This dichotomy seems odd, considering that in order to succeed in raising the counterclaim in the first instance (an endeavour in which they did succeed, as both tribunals accepted jurisdiction), the respondent states needed to establish a sufficient nexus to the investor's claim which arose from the underlying investment treaty. By contrast, in *Bear Creek*, the international law obligation invoked – being, whether the claimant investor had obtained a "social license" in accordance with ILO 69 – was a crucial issue accounted for at the damages assessment point instead; *Bear Creek Final Award*, at para 408.

19 *See further e.g.,* F. El-Hosseny and P. Devine, "Contributory Fault Under International Law: A Gateway for Human Rights in ISDS?" *ICSID Review Foreign Investment Law Journal* (2020) Vol. 35, <https://academic.oup.com/icsidreview/article-abstract/35/1-2/105/5891897>; P. Muchlinski, "Can International Investment Law Punish Investor's Human Rights Violations? Coopper Mesa, Contributory Fault and its Alternatives," *ICSID Review Foreign Investment Law Journal* (2022) Vol. 37, <https://academic.oup.com/icsidreview/article-abstract/37/1-2/359/6555484?redirectedFrom=fulltext>.

20 *Bear Creek Dissenting Opinion*, at para 38.

an investor can choose to not comply with international human rights or environmental law safe in the knowledge that such non-compliance will merely be considered a form of contributory negligence that will offset or discount part of the damages award, but will not otherwise deprive him of compensation.[21] Neither approach to accounting for the joint responsibility of the state and the investor for international human rights and the environment seems satisfactory. In fact, both approaches seem disconnected and at odds with a rapidly-changing world where the spotlight is increasingly on investors to assess, report and address human rights and environmental impacts in their operations or along their supply chain, and where states have made greater commitments to uphold human rights or taken bolder action to transition to greener economies.[22]

Instead of accounting for the joint responsibility of the state and the investor as a question of damages, perhaps more thought ought to be given to recognizing that responsibility as a question of admissibility or of jurisdiction.[23] There are cases, for example, where tribunals have invoked an international public policy against corruption as a jurisdictional or admissibility bar,[24] or have recognized that investment protection ought not to be granted at the outset for investments "made in violation of the most fundamental rules of protection of human rights."[25] As to whether an international public policy yet exists recognizing corporate social responsibility – specifically, an investor's responsibility (if not obligation) towards international human rights and the environment (as opposed to only vis-à-vis corruption) – it is worth noting that in line with growing movement towards affirming that idea,[26] the tribunal in *Urbaser* v. *Argentina* opined that "international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce."[27] The unanimous adoption by the *Bear Creek* tribunal of the "social license to operate" concept – a term used to "define" the "broader scope"[28] of the responsibility of companies to respect human rights – should also not be overlooked. Although it remains to be seen whether future tribunals will solidify this further, recognizing the existence of such an international public

21 *See above* n. 19.

22 *Id. See also*, UN Guiding Principles for Business and Human Rights, where two of the foundational principles espoused is that business enterprises "should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved," including to have "[p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute;" Principles #11 and #13.

23 *See further e.g.,* B. Choudhury, "Investor Obligations for Human Rights," *ICSID Review Foreign Investment Law Journal* (2020) Vol. 35, <https://academic.oup.com/icsidreview/article-abstract/35/1-2/82/5866671?redirectedFrom=fulltext>.

24 *See e.g., World Duty Free Company Limited* v. *Republic of Kenya* (ICSID Case No. ARB/00/7), Final Award, dated 4 October 2006, at para 141, 157, 172, where the tribunal found that because "bribery is contrary to the international public policy of most, if not all, states," and regardless of whether there was a contradictory local custom "which might render legal locally what would otherwise violate transnational public policy," "claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld." *See also, Metal Tech Ltd.* v. *Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Final Award, dated 4 October 2013; *Inceysa Vallisoletana S.L.* v. *Republic of El Salvador* (ICSID Case No. ARB/03/26), Final Award, dated 2 August 2006; *Littop Enterprises Limited et. Al.* v. *Ukraine* (SCC Case No. V2015/092), Final Award, dated 4 February 2021.

25 *See e.g., Phoenix Action Ltd* v. *Czech Republic* (ICSID Case No. ARB/06/5), Final Award, dated 15 April 2009, <https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf> (noting that "nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.")

26 *See e.g.*, above n. 2, and UN Human Rights Council, "Protect, Respect and Remedy: A Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises," J. Ruggie, UN Doc A/HRC/8/5 (7 April 2008) (repeatedly noting that business enterprises have a "baseline responsibility to respect human rights"); B. Choudhury, "Investor Obligations for Human Rights," *ICSID Review Foreign Investment Law Journal* (2020) Vol. 35, <https://academic.oup.com/icsidreview/article-abstract/35/1-2/82/5866671?redirectedFrom=fulltext> (noting that "[t]he corporate responsibility to respect human rights has therefore evolved into, at best, a global norm, and at least, a global expectation").

27 *Urbaser* v. *Argentina*, at para 1195.

28 *See e.g.,* UN Human Rights Council, "Protect, Respect and Remedy: A Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises," J. Ruggie, UN Doc A/HRC/8/5 (7 April 2008) (noting "the broader scope of the responsibility to respect is defined by social expectations - as part of what is sometimes called a company's social licence to operate").

policy could assist in accounting for the joint responsibility of the state and the investor for international human rights and the environment, while being a less controversial alternative than attempting to identify and inflict specific "hard" international law obligations not otherwise imposed on investors by international law itself.[29]

IV. Looking forward

The *Urbaser*, *Bear Creek* and *David Aven* trio reflect evolving understandings of the international legal personality and responsibility of foreign investors. In the post-pandemic world, the foreign investor will not only have to be cognizant of an increasing array of obligations with an ESG flavour arising under the domestic laws of the countries in which it operates, but also of responsibilities, if not yet obligations, potentially arising under international law as well. Not only will disputes regarding the substance and scope of such international law responsibilities and the consequences of non-compliance be increasingly encountered in the international arbitration arena.

Paper presented at the ACICA & CIArb Australia International Arbitration Conference 2022 on 7 November 2022, subsequently published in the Kluwer Arbitration Blog.

29 *See e.g., Urbaser* v. *Argentina*, at para 1195 (noting "even though several initiatives undertaken at the international scene are seriously targeting corporations human rights conduct, they are not, on their own, sufficient to oblige corporations to put their policies in line with human rights law" (emphasis added)).

Arbitrations – When it Comes to Assessing Damages, How Flexible is Too Flexible?

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One of the key benefits that is often cited for arbitration, compared to litigation, is flexibility. Flexibility in the choice of arbitrator(s), in process and in approach. However, a recent Singapore Court of Appeal decision has highlighted that there are limits to this flexibility, particularly as it relates to the assessment of damages.

Various findings were made leading to the Court of Appeal's decision in *CEF and CEG v CEH* [2022] SGCA 54[1] (***CEF and CEG v CEH***) which set aside the damages aspects of the relevant arbitral award. Whilst there are several aspects which will be of interest to arbitration practitioners, particularly on the issue of natural justice, this article considers the comments made by the Court of Appeal on the quantum of damages. The decision stated that:

> *"In the Award, the Tribunal noted that there were deficiencies in the respondent's evidence as regards proof of its reliance loss, but nonetheless proceeded to award the respondent 25% of each claimed head of reliance loss. We reproduce the relevant excerpts of the Award as follows:*
>
> *Ancillary capital expenditure*
>
> …
>
> *443. The Tribunal notes that the Respondent could have produced various source documents to show its expenditures (e.g., purchase orders and invoices for purchase of equipment). Such production would have been reasonable in light of the [appellants'] objection to the figures stated by the Respondent and would have assisted the Tribunal in ascertaining whether the numerous figures stated in the audited reports are directly relevant to the claim. However, the Respondent failed to submit the relevant source documents.*
>
> *444. Nevertheless, the Tribunal believes that the Respondent had suffered loss by spending significant ancillary capital in relation to the Plant. Accordingly,* ***bearing in mind the deficiencies in the Respondent's evidence, the Tribunal decides to award the Respondent 25% of the ancillary capital expenditure claimed*** *amounting to [R$57,825,000]."* [2] *(emphasis added)*

1 Civil Appeal No 153 of 2020, Originating Summons No 241 of 2020.

2 Paragraph 114, *CEF and CEG v CEH*.

The decision included several similar extracts from the Award for the other heads of reliance loss claimed, each referring to the 'deficiencies with the Respondent's evidence' and each reaching the decision to award the Respondent 25% of the relevant head of loss.

Relevantly, the Court of Appeal decided that the Tribunal had:

> *"…inexplicably proceeded to adopt a "flexible approach" and to award the respondent 25% of each head of reliance loss, without first telling the parties it would be doing so or giving them the opportunity to address the Tribunal on the same. Had the Tribunal indicated beforehand that it would apply this flexible approach, the appellants would have had the opportunity to decide whether to ask the respondent to produce the source documents, or to take a forensic risk by resting their defence only on the burden of proof."* [3]

And further:

> *"The Tribunal explained that it was applying a "flexible approach" to proof of damage as "it is impossible to lay down any definitive rule as to what constitutes sufficient proof of damage"."* [4]

Whilst it may not be possible to lay down definitive rules on what is sufficient proof of damages in all cases, as the Court of Appeal judgment stated, "…*both parties would have expected that the Tribunal would only award the respondent loss that the respondent could prove."* [5] As a result, the Court of Appeal set aside the Damages Order from the Tribunal, whilst allowing the rest of the Award to stand.

Not looking for perfection – "… a court will make the best estimate it can"

Based on the author's experience, the most common form of relief sought in arbitrations is damages. However, the author's experience is that proving those damages is sometimes not given the same degree of rigour or forethought afforded to proving liability issues. Furthermore, the focus often doesn't turn to damages until relatively late in the process. Damages in the arbitration the subject of the *CEF and CEG v CEH* decision appear to have been limited to so-called 'reliance losses' i.e., those costs that were incurred as a result of the contract, which are often referred to as wasted expenditure[6].

Whilst the contract was subject to Singapore law, the author understand that the position is similar to that in Australia, where the need for a degree of estimation in assessing damages can be summarised as follows:

> *"A contracting party who is unable to establish the precise measure of his or her loss is not thereby deprived of his or her right to recover damages. In some cases, a court will make the best estimate it can... In other cases, a court may proceed on the basis that 'a starting-point' for the calculation of loss is the 'expenditure incurred and wasted in reliance on the... promise."* [7] (emphasis added)

Whilst for reliance losses there may need to be some estimation as to whether a cost was, indeed 'wasted in reliance on the promise', the starting point is the actual expenditure incurred, and the burden of proof of such expenditure lies with the claimant. In this respect, the original Tribunal had referenced, and the *CEF and CEG v CEH* decision repeated in full, paragraphs from the Singapore case *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ('Robertson Quay'), which states:

> *"28. The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered.*
>
> …
>
> *30. Accordingly, a court has to adopt a flexible approach with regard to the proof of damage….."*

---

3 Paragraph 110, *CEF and CEG v CEH*.

4 Paragraph 115, *CEF and CEG v CEH*.

5 Paragraph 117, *CEF and CEG v CEH*.

6 Reliance losses may also include future liabilities arising from, say, leases entered into in reliance of a contract, or assets acquired in reliance of a contract. Depending on the circumstances, there may be income received or potential income from the sale of assets, which would need to be netted off the 'wasted expenditure'.

7 *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54, at 19.

However, Robertson Quay (and the Tribunal award and the ***CEF and CEG v CEH*** decision) went on to cite the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 that:

> *"**Where precise evidence is obtainable, the court naturally expects to have it.** Where it is not, the court must do the best it can."*[8] (emphasis added by this author)

The principle that the court should *"do the best it can"* is therefore only relevant where precise evidence is not obtainable. In the author's experience, this is rarely the case for the existence of reliance losses, as it should be relatively straightforward for the claimant to demonstrate, and provide verifiable proof, that such expenditure was incurred. Critical of the 'flexible approach' taken by the Tribunal, the Court of Appeal decision stated:

> *"The Tribunal had expressly stated that there were deficiencies in the respondent's evidence due to the respondent's failure to produce the relevant supporting documents or to explain how the existing documents substantiated its claim."*[9]

Verification of costs

In the author's experience whether expenditure claimed as 'reliance losses' has been incurred (and paid) should be a matter of fact, verifiable through suitable documentation. This is *'precise evidence'*, which should be obtainable, and therefore *'the court naturally expects to have it.'*

Whilst there may need to be some flexibility as to the exact evidence to be adduced, typically, invoices, purchase orders, supply contracts, general ledger records, payment records, bank statements and related documentation can be provided to answer the following questions:

- Was the cost incurred:
  - on the relevant project;
  - during the relevant period; and
  - in an amount proportionate to the work performed, and which is not excessive?
- Has the cost been paid? If so, by the claimant, or some other party?

There may be questions as to, say, whether costs were incurred in the relevant period, or whether such costs may include inter-company uplifts to recover group overheads, however documentary evidence should be available to address these issues of fact.

While invoices and related documents may show that a liability has been incurred, such invoices may subsequently be updated by credit notes such that the actual amount incurred may be lower than the original invoice. Alternatively, a particular amount may have been incurred and paid by a related entity, raising the question of whether the amount was then charged through to the claimant. Therefore, depending on the nature of the expenditure, it may be appropriate to trace the amount on the invoice through to the actual payment and, in some circumstances, to consider subsequent general ledger information for the (relatively rare) situation where a credit note is provided after full payment. Again, these are matters of fact on which precise, documentary evidence should be capable of being adduced.

Wasted expenditure?

It is not sufficient to simply show that a cost was incurred as a result of an act or breach; it is necessary to show that it was "wasted in reliance on the promise". Often, non-accounting evidence is required to help the tribunal assess whether the cost was incurred as a result of the act or

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8 Devlin J in the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422, as quoted at Paragraph 115, *CEF and CEG v CEH*.

9 Paragraph 117, *CEF and CEG v CEH*.

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breach, or if it would have been incurred anyway. However, accounting evidence may be required to help show whether the expenditure gave rise to an asset which may subsequently generate some value for the claimant, either through use or sale.

Reasonably incurred?

Reliance losses are often claimed in situations where there is sufficient uncertainly as to the extent (if any) of profits that would have been earned but for the act or breach. In those circumstances, reliance losses are claimable based on the implicit assumption that a rational claimant would not have incurred costs if it did not have a reasonable expectation of at least recovering those costs. However, there are some cases where the respondent seeks to show that it was not reasonable for the claimant to have incurred a cost, as there was no realistic chance of that money being recouped even absent the act or breach. In these circumstances the burden of proof may shift, such that it is for the respondent to provide sufficient appropriate evidence that such amounts would not have been recouped.

Proof for expectation losses

Whilst the Court of Appeal in *CEF and CEG v CEH* focussed on reliance losses, the burden of proof still lies with the claimant in respect of a claim for expectation losses. Comparatively, the nature (if not the extent) of evidence required to prove expectation losses can often be more complex.

Whilst financial information may be required to show the historical performance of the claimant (whether before or after the alleged act or breach the subject of an arbitration), it is likely that forecasts will need to be made regarding the 'but for' financial performance that would have happened but for the act or breach being complained about. It is, therefore, less likely that expectation losses can be established solely by the sort of information (such as invoices, purchase orders and similar) that are required to establish reliance losses. However, actual budgets or forecasts that were prepared prior to the relevant act or breach may help to give guidance to a tribunal regarding the likely financial performance that may have been experienced in the 'but for' or counterfactual scenario.

For expectation losses, one needs to the counterfactual historical performance, which has a degree of risk associated with the estimation of these figures. There is potentially more estimation risk associated with the actual future performance that may occur and yet more estimation risk when considering the counterfactual future performance. It is in these circumstances that the cases, addressed above, acknowledge the difficulties with estimating loss and refer to the need for doing the 'best one can'.

Conclusion

Parties can sometimes worry that an arbitrator might seek to give a "Judgment of Solomon" by settling on a damages figure that will leave both parties unsatisfied. The relative lack of public arbitral awards (outside of the investor state field, or where challenged in a court) means that the extent to which this fear is justified is hard to quantify. The *CEF and CEG v CEH* judgment highlights the risks for arbitrators if they apply such 'wisdom' without a proper basis, as well as the risk to the claimant if they do not satisfy the basic burden of proof for losses.

In arbitration, as well as litigation, the quantification of damages is not always an exact process; there is often an element of estimation rather than calculation of known amounts. Triers of fact, whether judge(s) or arbitrator(s), need to do the best they can with the evidence provided.

However, a claimant must still put forward sufficient appropriate evidence to support its claim. Whether, when and why a claimed cost was incurred are facts which can normally be verified based on relatively straightforward documentation. The claimant should include documentation to support such costs. They should not rely on the tribunal being 'flexible' in their approach to such proof.

Australian Centre for International Commercial Arbitration

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