

THE

ACICA REVIEW

JUNE 2023



ACICA

Australian Centre for
International Commercial
Arbitration

**GLOBAL
LEADERSHIP
REGIONAL
EXCELLENCE**



ACICA

Australian Centre for
International Commercial
Arbitration

Leader in International Dispute Resolution

THE

**ACICA
REVIEW**

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THE ACICA REVIEW

Editorial Board:

Dr Benjamin Hayward (General Editor), Meghan Keary, Gianluca Rossi, Cara North, Stewart McWilliam and Zhong Guan.

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President's Welcome



Georgia Quick

ACICA President

Welcome to the June 2023 edition of the ACCIA Review.

We thank all the authors for their submissions and valuable insights. Some of the highlights are described below.

ACICA Executive

In May 2023, the ACICA Board of Directors elected the ACICA Executives for 2023-2024. I am pleased to continue as President of ACICA for a third term and to work with a dedicated and experienced Executive team. We continue to strive to be a truly national body and ensure we work together in our efforts to promote international arbitration initiatives in Australia and abroad.

Welcome to Kiran Sanghera as ACICA's new Deputy Secretary-General!

ACICA is very pleased to announce the appointment of Kiran Sanghera as ACICA Deputy Secretary-General from June 2023. Kiran's significant arbitral institution experience adds further depth to ACICA's very experienced and dedicated Secretariat Team. On behalf of the ACICA Executive and Board, we warmly welcome Kiran to the ACICA team!

Friends of ACICA – Lisbon, Portugal

ACICA was pleased to join with DLA Piper ABBC to hold a business networking event focused on trade and investment opportunities between Australia, Portugal and Spain in Lisbon on 12 April, in advance of the

International Bar Association Arbitration Day. Our thanks to all that attended and to Ambassador Indra McCormick and DLA Piper ABBC Country Managing Partner Nuno Azevedo Neves who spoke alongside ACICA Secretary-General Deborah Tomkinson, and to Kate Brown de Vejar and Sofia Ribeiro Mendes for hosting the event in the beautiful Largo de Sao Carlos outside DLA Piper's office.

Check out our News in Brief section for photos of the event. We are looking forward to organising our next Friends of ACICA event.

ACICA Corporate Members Celebrate

This year marks twenty years since the founding firms commenced their support of ACICA. That support from the initial seven founding firms has now grown to 15 Corporate Members (Allens, Ashurst, Clayton Utz, Clifford Chance, Corrs Chambers Westgarth, DLA Piper, Herbert Smith Freehills, HFW, King & Wood Mallesons, MinterEllison, NSW Bar Association, Norton Rose Fulbright, Sapere Forensic, Victorian Bar and White & Case). This support continues to be critical to the existence and success of the institution.

ACICA hosted an intimate drinks reception on 1 May 2023 where I provided a welcome to the event followed by a keynote address from the Honourable Justice Angus Stewart, Our Secretary-General, Deborah Tomkinson, then updated Corporate Members on current ACICA initiatives and key focus areas for ACICA as it continues to expand.

Australian Arbitration Week 2023 – Perth, Western Australia

We are excited to be coming back to Perth, Western Australia, for Australian Arbitration Week from 9-13 October 2023. The week will commence with the ACICA and Ciarb Australia International Arbitration Conference on Monday, 9 October at the Ritz Carlton hotel. With a further 40 events throughout the week, it will be a packed week for the arbitration community. This is one arbitration week you should not miss. We hope to see you in Perth for Australian Arbitration Week 2023!

ACICA Review Editorial Board

We would like to thank the ACICA Review Editorial Board comprising of Dr Benjamin Hayward (Monash University) as General Editor, Cara North (Corrs Chambers Westgarth), Stewart McWilliam (Herbert Smith Freehills) Meghan Keary (Corrs Chambers Westgarth), Gianluca Rossi (Judge's Associate, Supreme Court of Victoria) and Zhong Guan (Quinn Emanuel Urquhart & Sullivan) for their work on this edition of the ACICA Review. Their invaluable contributions have made our bi-annual ACICA Review a fantastic publication for our arbitration community.

Report of the AMTAC Chair



Gregory Nell SC

AMTAC Chair

In September 2022, the Federal Government announced a Review into whether s.11 of the *Carriage of Goods by Sea Act 1991 (Cth)* (**COGSA**) should be amended for the benefit of Australian industries and to increase the use of and trust in Australian arbitration processes.

This Review was initiated after a number of stakeholders – including AMTAC in 2013 and again in 2020 – had raised concerns about the terms of s.11 and whether its operation was impeding Australian industries in settling disputes, including through arbitration. In November 2022, AMTAC lodged a detailed submission in response to this Review, addressing the Concerns raised by the Review and proposing possible amendments to s.11 to overcome those Concerns. A copy of that submission is available on the AMTAC website’s Resources (Publications, Presentations & Papers) Page.

Of the three principal Concerns raised by the Review, the second is whether there is an apparent lacuna in the operation and application of s.11 of COGSA to inter-State shipments, as a result of which the level of protection afforded by s.11 to domestic cargo interests is less than that afforded to Australian importers and exporters, so far as the application of Australian law and access to Australian Courts is concerned. This second concern was discussed in an article by the AMTAC Chair in 2021 and more recently was the subject of AMTAC’s 2022 Annual Address “*Anomaly or Bad Policy: Foreign Arbitration Clauses and the Carriage of Goods by Sea Act 1991 (Cth)*” delivered by Matthew Harvey KC on 12 December 2022. A copy of

both that article and a video of the 2022 Annual Address are also available on the AMTAC website’s Resources Page.

This apparent lacuna arises as follows. Whilst s.11(1) of COGSA provides that the parties to contracts for the carriage of goods by sea from any place in Australia to a place outside Australia are taken to have intended to contract according to the laws in force at the place of shipment, that sub-section does not apply to inter-State carriage of goods by sea. Nor is there within COGSA any equivalent provision for inter-State shipments. Further, although s.11(2)(a) of COGSA provides that any agreement which purports to preclude or limit the operation of s.11(1) is ineffective, that sub-section also has no application to inter-State shipments and will not strike down a foreign choice of law clause in a contract for the carriage of goods by sea inter-State (in the same way it does for a shipment out of Australia). Similarly, whilst s.11(2)(b) and (c) of COGSA render ineffective foreign jurisdiction and arbitration clauses that purport to preclude or limit the jurisdiction of Australian Courts, these provisions only apply to contracts for the carriage of goods by sea into and out of Australia. Neither provision applies to inter-State shipments. Nor does COGSA contain any equivalent provision applicable to inter-State shipments. Consequently, the parties to a contract of carriage of goods by sea inter-State are free (subject only to the possible application of Article 3 rule 8 of the Australian Hague Rules) to agree that any disputes arising under that contract are to be determined by

either a foreign court or in an arbitration overseas. This is despite such a clause in a contract for the carriage of goods by sea into or out of Australia being per se void and unenforceable. Moreover, if a contract for the carriage of goods by sea inter-State contains a foreign arbitration clause, an Australian Court seized of a dispute under that contract must stay the proceedings before it in favour of that foreign arbitration. That is unless that arbitration clause is rendered invalid for some other reason.

The existence of this lacuna was confirmed by the Full Court of the Federal Court of Australia in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co. KG* (2022) 406 ALR 431. Although the High Court of Australia recently granted special leave to appeal from that judgment, that was limited to another aspect of that case. The High Court refused special leave to appeal from the Full Court's findings regarding s.11 and its non-application to inter-State shipments.

The third Concern raised by the Review arises out of the terms of s.11(3) of COGSA and uncertainty as to their scope and application. This sub-section, which was added to COGSA in 1997, provides that an arbitration clause or agreement is not made ineffective by s.11(2) if under the terms of that clause or agreement "*the arbitration must be conducted in Australia*". The purpose of s.11(3) was to make plain that an arbitration in Australia does not offend either the prohibition in s.11(2) or the policy considerations underlying it. Nevertheless there are difficulties with the language of that part of s.11(3) quoted above. The first is as to the requirement that the arbitration "*must*" be conducted in Australia for s.11(3) to apply. The second is as to the meaning of the word "*conducted*" as it is used in s.11(3) and whether this refers to the *seat* or *place* of the arbitration or to the *venue* or *place of hearing* (a distinction explained by the NSW Court of Appeal in *Raguz v Sullivan* (2000) 50 NSWLR 236). Both difficulties are productive of uncertainty which has the potential for arbitration agreements including those

providing for Australian seated arbitration to not fall within s.11(3) and to thereby be rendered ineffective by s.11(2), contrary to the otherwise clear legislative intent of the former. Removing this uncertainty (for example by the amendments to s.11(3) proposed by AMTAC) is likely to enhance the exception that s.11(3) provides to s.11(2) and as such promote and foster arbitration in Australia as a means of resolving disputes under those contracts of carriage of goods by sea that are subject to COGSA. This will include contracts for the carriage of goods by sea inter-State if s.11 is also amended (in the manner proposed by AMTAC) to remove the existing lacuna in its application that is the subject of the Review's second Concern.

AMTAC has welcomed and supports this Review of s.11 of COGSA and the objectives that it seeks to achieve. In particular, AMTAC believes that it is in the Australian national interest for s.11 to be amended to overcome the Concerns identified by the Review and to thereby provide the Australian shipping, import and export industries, including those dealing with inter-State carriage of goods by sea, greater clarity and certainty in the application of s.11 to their contracts of carriage. This includes in the identification of those Australian arbitration clauses that are valid and enforceable under COGSA, which is relevant to the promotion and use of commercial arbitration as a means of alternative dispute resolution in the Australian maritime industry.

In furtherance of that objective, AMTAC continues to be a strong supporter of the International Maritime Law Arbitration Moot (**IMLAM**) Competition which is being hosted this year by the Hillary Rodham Clinton School of Law, Swansea University (UK) from 1 to 6 July 2023. AMTAC will also be holding a lunchtime seminar on Maritime Arbitration Updates as part of Australian Arbitration Week (**AAW**) in Perth on 10 October 2023. Further details of that seminar can be found on the AAW Calendar and will be announced closer to that event.

Editorial: ACICA's Ongoing Diversity Discussion and Why it Matters



Caroline Swartz-Zern
Counsel, ACICA

Diversity is an issue that underlies the ethos of our institution. When we make appointments, when we think about what we can do for our arbitration community, we consider diversity and how we can best communicate information to people of different backgrounds. We know we are, thankfully, not the only organisation to focus on this issue given the importance of the topic, but we feel deeply that diversity helps to define best practice in international arbitration and dispute resolution more generally. That is why we have launched a series of diversity initiatives to formalize our efforts.

A core part of our recent efforts involved establishing the ACICA Diversity Committee. The objectives of the Committee are to address, explore, educate, learn about, and respond to the diversity of the human experience. It was established as a part of ACICA's ongoing efforts to ensure that it operates as an inclusive, equitable, culturally competent, and supportive arbitration institution. The Diversity Committee intentionally comprises members from geographic, cultural, ethnic and gender diverse backgrounds with a focus on the Asia-Pacific region, a growing region with a significant caseload but still often under-represented. See [here](#) for a list of members.

The official launch of the Diversity Committee took place on 20 June 2023 at ACICA's Diversity Panel Discussion on Unconscious Bias and the Effects of Assumption in Arbitration. This event was the first in what we hope is an ongoing series of discussions on diversity at ACICA. This event was a conversation on bias and the effects of those assumptions on practice. President of ACICA, Georgia Quick (Ashurst) moderated. Speakers were Lucy Greenwood (Independent Arbitrator), Anne Secomb (Independent Arbitrator), Guillermo Garcia-Perrote (HSF) and Professor Blake McKimmie (University of Queensland). While the inspiration for the event was the assumption that a woman, or mother, would not be a decision-maker, as shown in a viral tweet by London-based Arbitrator Lucy Greenwood, we also covered other areas of bias. Some of the key points that came out of this discussion were:

- Though 80% of all arbitral awards are written in English (as noted by Anne Secomb), and knowledge of English is important, having an accent when speaking English does not indicate a lack of proficiency in the language.
- Most people have biases, whether conscious or not. The first step is awareness, and then work to improve how we react to them.

- As humans, we are worse at picking out reliability of witnesses than a flip of a coin. We need to assess the information that we consider when accepting evidence, on the basis that we are doing so from a subjective view.
- Having diversity in decision-making may not be the most comfortable solution, but it is likely to produce the best outcome.
- Often, as pointed out in a question from the audience, those who attend these discussions are those who are already engaging with the topic.

This event re-enforced key points for our diversity initiatives. As human decision-makers, we are confronted with information that we need to categorise and assess. By knowing our limits and our expectations, we are better able to do this correctly. Diversity is not a question of merely appointing more female arbitrators, it is a question of appointing arbitrators who have had different experiences and can best assess the information that will be before them, including cultural, linguistic, sector, legal system background. If we do not address diversity in arbitration, we are missing a key benefit of party autonomy.

That is why for International Women's Day 2023, ACICA implemented a three-pronged approach to increase the number of women on the ACICA Arbitral Panel. This push was not simply to increase the number of women but also an effort to include women from different locations and backgrounds.

Firstly, ACICA identified female arbitrators listed on other institution's panels and emailed them directly, inviting them to apply for [Fellow membership with ACICA](#) if they met the criteria. Secondly, ACICA emailed representatives of Australian State Bar Associations asking them to put a notice in their respective newsletters inviting female barristers who considered that they meet Fellow criteria to apply for Fellow membership; and thirdly, ACICA emailed current members with a call to action

emphasising that 'Much More Needs To Be Done'. In this email ACICA outlined a number of steps that could be taken and resources available to members to encourage greater diversity in appointments.

Increasing the diversity of appointments is fundamental. Increasing visibility of a more diverse group in our profession in other ways is also helpful. In 2021, ACICA's Executive team reached gender parity for the first time and achieved greater geographical diversity; at Australian Arbitration Week 2022, the ACICA/Ciarb Australia International Arbitration Conference featured 41 speakers from eight countries around the world and nearly 43% of the speakers were women; and ACICA implemented the Australian Arbitration Week Principles in 2023 which any organisation intending to hold an event during the week must declare that they will comply with. These Principles include a requirement to ensure a fair gender balance, and the inclusion of diverse speakers, including with regard to ethnicity, geography and culture when planning their events.

But diversity is not just at surface level. We acknowledge that making connections can be more difficult when one feels like they do not belong, regardless of background. This has knock-on effects. Being able to create connections can often enable arbitration practitioners to make new opportunities, perhaps a job, a speaking opportunity, a publishing opportunity, or a future appointment. To help with this, the ACICA Diversity Committee is rolling out 'Flight of Friendship', an initiative to connect 'wing people' to 'winged people'. That is, an informal introduction of anyone who feels they might benefit from having someone introduce them around at events over the course of Australian Arbitration Week taking place in Perth from 8 October 2023. More information is available [here](#).

We will continue to engage on diversity. Not because it is the topic of the day, but as Lucy Greenwood noted in our 20 June 2023 event, it is a matter of urgency.

Faces of ACICA: Meet Emily Hay



Emily Hay

Counsel, Hanotiau & van den Berg, ACICA Fellow

Emily Hay is Counsel at Hanotiau & van den Berg, and – having joined the firm in 2014 – she has acted as arbitrator, counsel, and tribunal secretary, and she has also assisted in State court litigation concerning the set-aside and the enforcement of arbitral awards. Closer to home, Emily completed a Bachelor of Arts and Bachelor of Laws (with First Class Honours) at Macquarie University in 2008. She is admitted in New South Wales and registered as a foreign lawyer in Brussels. She currently splits her time between Brussels and Taipei.

Emily will be familiar to readers of *The ACICA Review*, having contributed an excellent and very timely article to our December 2022 issue titled ‘Demystifying the Metaverse’. Recently, I had the chance to virtually ‘sit down’ with Emily over a cup of ‘digital coffee’ and hear about her experiences in arbitration: we hope you enjoy her insights!

Dr Benjamin Hayward, General Editor, *The ACICA Review*

Q Emily, you have professional experience as an arbitrator (both sole arbitrator and co-arbitrator), counsel, and tribunal secretary in arbitral proceedings, and you also assist clients with litigation concerning the enforcement and set-aside of arbitral awards. How did you first get interested in the international arbitration field, and how did you find yourself working across all these various arbitration-related roles?

I was always fascinated by international law, and had encountered international dispute settlement in my studies. Still, I never seriously considered international arbitration as a career path at first. Several human rights internships later, I found myself in private practice in Brussels and came to appreciate the special opportunity that international arbitration offers to work outside your home jurisdiction, with all the complexities of international law, procedural challenges, different cultures, and interesting people. Once I had stumbled into it, I never looked back!

I am lucky to have had the opportunity to work on such a diverse range of cases. At Hanotiau & van den Berg, we act as counsel in commercial arbitration proceedings, and because we have small teams it is very hands-on. Our lawyers are also appointed as arbitrators in some of the most complex and high value matters, which has given me the chance to work as a tribunal secretary. Thanks partly to this valuable experience, I am now building my own practice as arbitrator. I am obviously starting with smaller commercial disputes, but I find that these are often no less complex and interesting than the large cases I otherwise work on. Professor van den Berg is also one of the world’s leading experts on the New York Convention, so we regularly act in set-aside and enforcement matters related to arbitral awards, especially in Belgium and in the Netherlands.

Q You also have experience advising on European privacy and data protection law, including the GDPR. Data protection and privacy have been big issues recently in arbitration: have you seen these laws being considered in the conduct of arbitral proceedings?

Before Hanotiau & van den Berg, I started my career at a Belgian firm where I was primarily advising on data protection matters. When I switched fields, I never anticipated that there would be such strong intersections between the two. The world of international arbitration is now attuned to the reality and importance of data protection, and you can see this in initiatives such as the ICCA-IBA Joint Task Force on Data Protection in International Arbitration: which published a roadmap to assist practitioners to understand this issue. It has become commonplace in my cases for data protection to be addressed at the outset of the proceedings, at the case management conference, and also in Procedural Order No. 1 or in the terms of reference. Whilst there was a period where some template language was circulating that did not do a great job of addressing necessary requirements, practice is now catching up. In some cases, especially where the parties themselves are subject to the GDPR, they put in place a separated data protection protocol just to take care of these matters. I have also seen data protection raised in the context of document production requests, and in disputed redactions to documents that will be published.

Q You have studied in a range of jurisdictions, and you have also acted as an arbitrator in disputes involving different governing laws. How do you keep up with the knowledge required to deal with different legal systems in your arbitration practice?

Well, when you are faced with a practical issue in a case, you have to get to the bottom of it: and that can involve digging through cases and academic literature on a very specific issue of national law, whether that is the law of England and Wales, or Singapore, or Korea, or any other jurisdiction. Working on a publication that requires research is also a great way to become deeply acquainted with different legal systems. Over time, this knowledge naturally accumulates. For me, the sense of purpose for a

specific project or case is important to keep me up to date. It's not that I am picking up Swiss law textbooks instead of a good novel!

Q You also work in Spanish and French, in addition to your native English. How important have you found language competencies to be in your professional life?

Native English-speakers are in a lucky position in that the dominant working language in international arbitration is English. That being said, additional languages are a big asset. Having working knowledge of French and Spanish has enabled me to take on cases where the underlying documents are in another language, even if my primary drafting language remains English. We have a number of ongoing Latin American investment cases, for example, where documents are submitted in either language. These competencies basically expand your options of the types of cases you can work on.

* Your Masters Studies at Leiden University addressed public international law. How important is public international law expertise to your day-to-day work?

Since a good portion of my current caseload involves treaty disputes, I do regularly tackle public international law issues in practice. Just today, in fact, I had to look up something that I had studied at Leiden! That being said, I have learned several other fields of law, including almost everything I know about international arbitration, 'on the job'. Putting theory into practice in relation to real-world cases has been a great way to learn!

Q You regularly publish and speak on arbitration topics. How important are these kinds of activities to your work as a practitioner?

I think there is a kind of symbiosis between the two. I write and speak about topics that I find interesting, and this can shape your expertise and your profile as a practitioner. Writing and speaking roles force you to really look into something rigorously, in a way that is not just casual reading, and that knowledge and perspective can be applied in cases that you work on. Of course, your experience as a practitioner is also crucial to give a practical perspective on the things you write and speak about.

Q You are also developing a particular expertise in the legal implications of the metaverse, via your role as a founding administrator of MetaverseLegal, and also via your recently published article on this topic in The ACICA Review. Where do you see the intersection between the metaverse and arbitration heading in the future?

I think we are some way off from the kind of interconnected, interoperable virtual reality that enthusiasts contemplate. Even if this change happens more slowly than anticipated, though, I think that there is a good chance that virtual and augmented reality tools will lead to new markets and types of commercial transactions, as well as inevitable disputes. Arbitration has some definite advantages as a dispute resolution tool when it comes to new technology, due to its cross-border enforceability, procedural flexibility, party autonomy, and (often) confidentiality. But there are also significant challenges to using arbitration in these new fields. In the metaverse, I see a good chance that

arbitration-inspired tools and innovations will be adopted that are designed for low value claims, for example, using blockchain technology and AI. It's a bit of an open question as to what the implications will be for traditional arbitration as we know it, but that's what makes it so interesting to follow.

Q Finally, do you have any advice for young practitioners interested in working in the international arbitration field?

If you are passionate about working in this field, get involved in some of the many young professional networks out there: it helps to build your knowledge, get to know the market, and most importantly, meet your peers and more experienced practitioners. Internationally, there are now many different ways to enter the international arbitration field outside the more conventional pathways, so I would also say keep your eyes and your options open. Bonus: Australian lawyers have a great reputation abroad!

News in Brief

New Members

We welcome the following new members to ACICA:

Corporate Member

White & Case

Fellows

Nicholas Andreatidis KC (Brisbane)

The Hon. Dennis Cowdroy AO KC (Sydney)

The Hon. Anthony Kelly KC (Melbourne)

The Hon. Peter Riordan KC (Melbourne),

Adam Rollnik (Melbourne)

Anne Secomb (Singapore)

Colin Seow (Singapore)

Toby Shnookal KC (Melbourne)

Nicole Smith (New Zealand)

Swee-Im Tan (Kuala Lumpur),

I-Ching Tseng (Macgregor, Queensland)

Lucas Bastin KC (Sydney)

Adrian Duffy KC (Brisbane)

Athina Fouchard Papaefstratiou (Paris)

The Hon. Andrew Greenwood (Brisbane)

The Hon. Paul Heath KC (Auckland)

Pamela Jack (Sydney),

Lauren Lindsay (Auckland)

Duncan Miller SC (Sydney)

Charis Tan (Singapore)

Julie Wright (Sydney)

Associates

Elisa Holmes (Sydney)

Loretta Houlahan (Canberra)

Manoj Mathur (India)

Heidi van Eeden (Auckland)

Tom Webb (Perth)

Michael Wells (Sydney)

Julian Wyatt (Melbourne)

Andrew Berriman (Sydney)

Christopher Humby (Adelaide)

Jess McGuirk (Sydney)

Ben Petrie (Melbourne)

Students

Layan Al Fatayri (Hungary)

Samuel Davies (Paris)

Ishaan Joshi (India)

Yashu Mishra (India)

ACICA Welcomes the Appointment of Kiran Sanghera as Deputy Secretary-General

ACICA is delighted to announce the appointment of Kiran Sanghera to the role of Deputy Secretary-General of ACICA commencing June 2023.

Kiran will be supporting the Secretary-General, Deborah Tomkinson, and ACICA Board with a particular focus on business development, bringing with her over a decade of institutional experience.

Kiran's most recent tenure with the Hong Kong International Arbitration Centre (HKIAC) includes three and a half years in a business development leadership role, which ACICA looks forward to drawing on as it continues to grow.

Georgia Quick, ACICA President, said "This announcement represents an exciting opportunity for cross-institutional



learning and a renewed focus on engagement across ACICA's various stakeholder groups. Kiran's appointment is part of our investment into the ACICA Secretariat to add greater depth in recognition of our growing caseload, the breath of ACICA's initiatives and outreach, and the maturity of the organization."

[Read the full media release here.](#)



**Australian
Arbitration Week**
ACICA

**Calendar of
Events now
available!**

**Perth
9-13 October 2023**

**LEAD EVENT:
ACICA & Ciarb Australia
International Arbitration
Conference
9 October 2023**

[CLICK HERE »](#)

Australian Arbitration Week 2023 Calendar of Events Released!

The Calendar of Events for Australian Arbitration Week 2023 is now available! In its 11th year and with 40 events currently scheduled, AAW is ramping it up with sessions from global thought leaders, practical tips and tricks for practitioners and arbitrators of all levels, and kick on events to showcase Perth as a leading city for dispute resolution, business and even a bit of fun.

ACICA Congratulates Managing Associate on Doctoral Graduation – Dr Christian Santos

ACICA would like to congratulate our Managing Associate in the Secretariat, Dr Christian Santos, on his recent PhD graduation from the University of Notre Dame Australia in Sydney on 2 May 2023.



**Congratulations
on the appointment
of our first ever
ACICA45 Co-Chairs,
Imogen Kenny and
Liam McInerney**




Liam McInerney
LK Law, Adelaide

Imogen Kenny
Herbert Smith Freehills, Melbourne

**ACICA and the ACICA45
Steering Committee are
thrilled to have you!**




ACICA45 Welcomes its Inaugural Co-Chairs – Imogen Kenny and Liam McInerney

ACICA45 is delighted to announce the appointment of its first ever Co-Chairs: Imogen Kenny and Liam McInerney!

They have begun their terms as Co-Chairs of the ACICA45 Steering Committee and have already been busy organising another year full of events and educational opportunities for emerging practitioners interested in arbitration.

ACICA and the ACICA45 Steering Committee are thrilled to have Imogen and Liam as Co-Chairs. We look forward to the growth of ACICA45 under their leadership.

Liam McInerney

Liam is an Associate at LK Law in Adelaide, South Australia, with focuses on commercial litigation, arbitration and related investigations. He has particular experience with proceedings arising from construction disputes, corporate insolvencies and claims of professional negligence.

Liam holds a Bachelor of Laws from the University of Adelaide and has completed ACICA's Tribunal Secretary Course.

Liam is admitted in Adelaide, South Australia.

Imogen Kenny

Imogen is a Senior Associate at Herbert Smith Freehills, Melbourne, and specialises in international arbitration and complex cross-border litigation. Imogen has a particular focus on disputes in the energy, technology and consumer products sectors.

Imogen was previously an Arbitration Associate to leading international arbitrator, Dr Michael Pryles AO PBM.

Imogen holds a Bachelor of Laws (Hons) and a Bachelor of Business from the Queensland University of Technology. Imogen is admitted in Victoria, Australia.

Launch of ACICA Diversity Committee

ACICA is pleased to announce the official launch of the ACICA Diversity Committee.

The objectives of the Committee are to address, explore, educate, learn about, and respond to the diversity of the human experience. It was established as a part of ACICA's efforts to ensure that it operates as an inclusive, equitable, culturally competent, and supportive arbitration institution.

The Committee has members from geographic, cultural, ethnic and gender diverse backgrounds and bring with them a range of experience. They are (in alphabetical order):

- Cameron Sim of Debevoise & Plimpton, Hong Kong
- Chiann Bao of Arbitration Chambers, Singapore as a nominee of R.E.A.L (Racial Equality for Arbitration Lawyers) initiative
- Donna Ross of Donna Ross Dispute Resolution, Melbourne as nominee of ArbitralWomen

- Gowri Kangeson of DLA Piper, Melbourne
 - Guillermo Garcia-Perrote of Herbert Smith Freehills, Sydney
 - Jay Tseng of Enyo Lawyers, Brisbane
 - Lisa Bingham, Consultant, Belgium
 - Long Pham of Quayside Chambers, Perth
 - Nastasja Suhadolnik of Corrs Chambers Westgarth, Melbourne
 - Swee Im Tan of 39 Essex Chambers, Kuala Lumpur
- Georgia Quick, President of ACICA, Deborah Tomkinson, Secretary-General of ACICA, and Erika Williams, Counsel at ACICA sit alongside the Committee members.

The Committee was established in November 2022. The official launch took place on 20 June 2023 at ACICA's Diversity Panel Discussion on Unconscious Bias and the Effects of Assumption in Arbitration.



Friends of ACICA – Lisbon, Portugal

ACICA was pleased to join with DLA Piper ABBC to hold a business networking event focused on trade and investment opportunities between Australia, Portugal and Spain in Lisbon on 12 April, in advance of the International Bar Association Arbitration Day. Our thanks to all that attended and to Ambassador Indra McCormick and DLA Piper ABBC

Country Managing Partner Nuno Azevedo Neves who spoke alongside ACICA Secretary-General Deborah Tomkinson, and to Kate Brown de Vejar and Sofia Ribeiro Mendes for hosting the event in the beautiful Largo de Sao Carlos outside DLA Piper’s office. We were excited to see old friends and make some new ones!



Celebrating 20 Years with ACICA Corporate Members!

On the evening of Monday, 1 May 2023, ACICA hosted an event in celebration of its Corporate Members and the immense support that those organizations have provided to the institution over many years. The event was held at Dexus Place, a hearing venue with which ACICA has a [referral relationship](#) in place.

The evening's festivities commenced with a welcome from ACICA President, Georgia Quick, followed by a keynote from the Honourable Justice Angus Stewart, Federal Court of Australia. His Honour spoke to the role of the courts in relation to commercial arbitration, noting that:

The attractiveness of arbitrating in Australia has increased in the 21st century following reforms to the International Arbitration Act, the adoption of a uniform regime by States for domestic arbitration based on the Model Law, the continuing development of arbitration expertise at leading law firms and the Bar and among the judiciary, the work of ACICA including the modernisation of the ACICA Rules, and

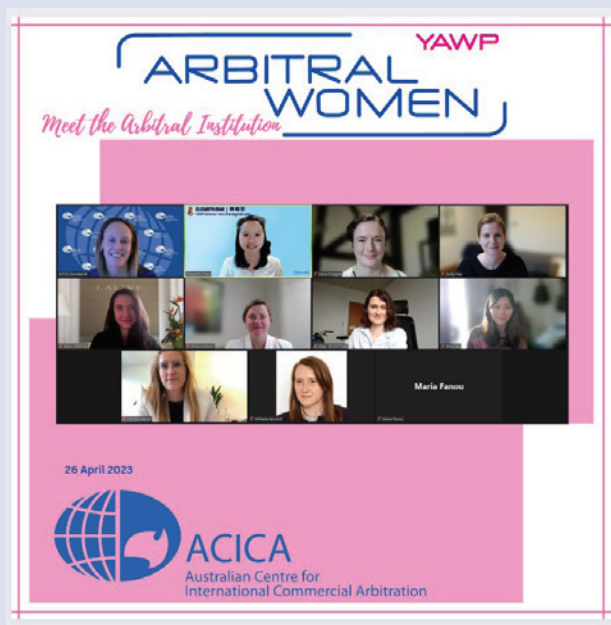
the unambiguous acknowledgement of the “pro-enforcement” bias toward the recognition and enforcement of arbitral awards in Australian arbitration law as found and expressed by Australian judges.

A full copy of His Honour's paper may be [downloaded here](#).

ACICA Secretary-General, Deborah Tomkinson, provided attendees with a brief update on ACICA initiatives, prior to their touring the Dexus Place facilities and viewing an arbitration hearing set up courtesy of FTI Consulting Trial and Arbitration Support.

ACICA expresses its great thanks to all its Corporate Members and their representatives that provide their valuable time and expertise in support of ACICA initiatives. We look forward to continuing to work with them to build upon the progress that has already been made and to continue to enhance the global reputation of Australia and its practitioners in the provision of excellence in dispute resolution.





Young Arbitral Women Practitioners - Meet the Institution Series

On 26 April 2023 ACICA had the pleasure of sharing information about the institution at the Meet the Arbitral Institution Series of Young Arbitral Women Practitioners Group, which has included the representatives of more than 40 arbitral institutions. ACICA Secretary-General, Deborah Tomkinson, shared great insights about the institution and ACICA's focus on increasing diversity in arbitration and promoting emerging practitioners.

Recent ACICA Committee Appointments

ACICA Judicial Liaison Committee:

- The Hon. Justice Craig Colvin, Federal Court of Australia, Chair of the ACICA Judicial Liaison Committee
- The Hon. Justice Angus Stewart, Federal Court of Australia Representative on the ACICA Judicial Liaison Committee
- The Hon. Justice Kevin Lyons, Supreme Court of Victoria Representative on the ACICA Judicial Liaison Committee

Australian Capital Territory ACICA Committee

- Ian Govey AM (Patron) Former Australian Government Solicitor
- Thomas Gaffney (Chair) Senior Associate, Ashurst
- Prue Bindon, Barrister, Key Chambers
- Tom Howe PSM KC Former Chief Counsel, Australian Government Solicitor
- Bridie McAsey
- Arjuna Nadaraka, Department of Foreign Affairs and Trade
- Jenny Priestley, Attorney-General's Department
- Associate Professor Esme Shirlow, Australian National University

NSW State Committee:

- The Hon. Dr Annabelle Bennett AC SC (Patron), 5 Wentworth
- Edwina Kwan, Partner, King & Wood Mallesons

ACICA Users' Council

- Diana Bowman, Senior Legal Counsel, VINCI Energies Asia Pacific
- Diana Kuitkowski, Director Legal, Sydney Metro, Transport for NSW

ACICA45 Steering Committee

- Liam McInerney, LK, ACICA45 Co-Chair
- Imogen Kenny Herbert Smith Freehills, ACICA45 Co-Chair
- Nivvy Venkatraman, HFW, NSW Representative
- Sanjna Pramod, Norton Rose Fulbright, NSW Representative
- Thomas Fearis, Berkeley Research Group, Hong Kong, International Representative
- Eden Jardine, Hogan Lovells, London, International Representative
- William Ahern, Mayer Brown, Paris, International Representative
- Samara Cassar, White & Case, Singapore, International Representative

ACICA Legislative Committee

- Karen Petch, New Chambers
- Boxun Yin, Banco Chambers

ACICA Events

Recent Events

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

Welcome and Host: Kate Grimley, Deloitte

Introductory Remarks: Deborah Tomkinson, ACICA Secretary-General

Speakers:

The Hon. Neil Kaplan CBE KC SBS, Arbitration Chambers, Hong Kong & Melbourne

The Hon. Wayne Martin AC KC, Francis Burt Chambers

The Rt. Hon. Lord David Neuberger of Abbotsbury GBS PC, One Essex Court Chambers, London

AMTAC Annual Address 2022: Anomaly or Bad Policy: Foreign Arbitration Clauses and the Carriage of Goods by Sea Act 1991 (Cth) – Melbourne, 12 December 2022

Host: Federal Court of Australia

Speaker: Matthew Harvey KC, Victorian Bar

ACICA45: The Great Debate: Oral Advocacy in International Arbitration – Barristers or Solicitors? – 30 March 2023

Host: Corrs Chambers Westgarth

Moderators: Cara North, Corrs Chambers Westgarth | Ashley Chandler, Michael Pryles Arbitration and Mediation

Speakers: Caroline Swartz-Zern, ACICA | Jake Lowther, Magnusson | Scott McPherson, Hogan Lovells | Lucian Ilie, Outer Temple Chambers | Liala Hamzi, List A Barristers | Robert Williams, Hanson Chambers/List A Barristers.

Business Networking Evening with the Australian Centre for International Commercial Arbitration – Lisbon, Portugal, 12 April 2023

Host: DLA Piper

Welcome: Kate Bron de Vejar, DLA Piper, IBA Arbitration Committee & ACICA Fellow

Speakers:

Her Excellency Ambassador Indra McCormick, Australian Ambassador to Portugal

Nuno Azevedo Neves, Country Managing Partner, DLA Piper ABBC

Deborah Tomkinson, ACICA Secretary-General

ACICA45 Panel: Technology in International Arbitration: The Nuts and Bots – 4 May 2023

Host: Ashurst

Moderators: Laurence Terret, Ashurst | Zara Shafruddin, Jones Day

Speakers: Simon Bellas, Jones Day | Claire Schneider, Level 27 Chambers | Susannah Wilkinson, Herbert Smith Freehills

Panel: Questions of Sovereign Immunity: Reflections on Kingdom of Spain v Infrastructure Services Luxembourg – 7 June 2023

Co-Hosts: ACICA and International Law Association (Australia Branch)

Moderator: Jo Delaney, HFW

Commentator: Damian Sturzaker, Marque Lawyers

Speakers: Justin Hogan-Doran SC, 7 Wentworth Chambers | Professor Chester Brown, 7 Wentworth Chambers | Dr Christopher Ward SC, 6 St James Hall Chambers | Phillip Santucci, New Chambers

ACICA Diversity Panel - "I was the Judge" - Unconscious Bias and the Effects of Assumptions in Arbitration – 20 June 2023

Host: Ashurst

Moderator: Georgia Quick | Ashurst & ACICA President

Speakers: Lucy Greenwood, Greenwood Arbitration, London | Anne Secomb, Secomb Arbitration, Singapore | Guillermo Garcia-Perrote, Herbert Smith Freehills, Sydney | Professor Blake McKimmie, University of Queensland, Brisbane.

Hallo From...Vienna: A Brief Reflection On The Return Of In-Person Hearings For The 30th Willem C. Vis International Commercial Arbitration Moot



Ben John
Lawyer, Allens



Anuki Suraweera
Law Graduate, Allens



Chester Brown
Professor of International Law and International Arbitration, University of Sydney, Barrister, 7 Wentworth Selborne Chambers

For the first time since 2019, the oral rounds of the Willem C. Vis International Commercial Arbitration Moot took place in person. Over the first week of April, Australian university teams congregated along with 370 other teams from across the world in the historic city centre of Vienna. Besides the excitement that comes with

travelling, Australian teams also felt the relief of not having to compete at midnight through to the early hours of the morning (and over Zoom!), as had been the experience of Australian Vis Moot teams in 2020, 2021 and 2022.

This year's University of Sydney team consisted of Maya



Eswaran (LLB V), Sofia Mendes (LLB IV), Kathy Zhang (LLB V), and Harriet Walker (JD III). The team competed in a number of 'pre-moots' as preparation for the final oral hearings in Vienna. This began with the Chartered Institute of Arbitrators New South Wales Pre-Moot, which was hosted by Clifford Chance's Sydney office. This competition featured teams from the University of Sydney, the University of New South Wales, Notre Dame University and the Australian Catholic University. The University of Sydney team was declared the winner, which provided the team some confidence for the European adventure that lay ahead.

The European leg of the journey began in Stockholm with the 19th Stockholm Pre-Moot, hosted at the offices of Swedish commercial law firm Mannheimer Swartling and co-organised by the University of Stockholm and the Stockholm Chamber of Commerce. After a very close final, the Sydney University team finished as the runner-up to Denmark's Aarhus University.

With little time to rest, the team boarded a plane to Amsterdam that night and arrived in the Netherlands just in time for the 16th Permanent Court of Arbitration (PCA) Hague Vis Pre-Moot. The Pre-Moot, hosted by the PCA and held in the Peace Palace, is no doubt one of the highlight events of the pre-moot calendar. The University of Sydney team emerged victorious in the competition, winning the PCA Hague Pre-Moot for the first time in the University's history (the team is pictured below on the grand staircase).

In Vienna, the University of Sydney team successfully navigated moots in the general rounds of the final oral hearings against the University of Cincinnati, the University of Vienna (who were the eventual winner of the competition), SWPS University (Poland), and the Georgian Institute of Public Affairs School of Law and Politics. After a nervous wait, the team was announced as a finalist and was through to the round of 64. Having flown halfway across the world, the Sydney team was drawn against its neighbour from Australia, the University of New South Wales. In a close moot, the University of Sydney was announced as the winner and progressed to the round of 32.

In an incredibly tight moot against the University of Geneva in the round of 32, which could have gone either way, the tribunal awarded the moot to Geneva, ending



what had otherwise been a dream run. To top off a very successful campaign, the University of Sydney team was awarded the first runner up prize for the Werner Melis Award for Best Memorandum for Respondent—in other words, finishing second out of approximately 380 teams in the respondent memorandum prize category.

It was not just the University of Sydney team that had such an exceptional competition—six Australian teams made it through to the round of 64, with the University of Queensland making it to the quarter-finals. The success of the Australian teams at this year's competition reflects the strength of Australian universities on the world stage. Having the moot back in person also meant that the teams were able to meet students, coaches, lawyers, arbitrators and academics from across the globe. These friendships and connections are invaluable and will no doubt last well into the future.

We want to extend our sincere gratitude to the many people who supported the University of Sydney team over the 2023 Vis campaign. The team's success would not have been possible without a strong network of past mooters, lawyers, barristers, and academics who were so generous with their time.

Until the 31st Vis Moot...Tschüss from Vienna!

The Public Policy Exception to the Enforcement of Awards – The Narrowest of Roads



Jeremy Quan-Sing
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Sam Leeson
Associate, Allens

I OVERVIEW

A fundamental tenet of arbitration is that parties are generally expected to accept and abide by the decision of the tribunal, even if the result disappoints. Although there are circumstances when an award may be set aside or refused enforcement, these are limited and are narrowly applied by the courts. Under the Model Law¹ and the New York Convention,² these grounds generally relate to jurisdiction (such as a tribunal's excess of powers, or the arbitrability of the subject matter); procedure (relating to, for example, the composition of the arbitral tribunal); and substantive matters (including errors of law or fact, and contravening public policy). In this article, we undertake a short review of the 'public policy' ground in Australia, in the context of two recent and noteworthy Australian decisions.

II THE PUBLIC POLICY EXCEPTION

A General Principles

An arbitral award may be set aside or refused enforcement if the award is contrary to the public policy of the relevant state. Naturally, the concept of public policy is broad, and a review of cases internationally indicates that what constitutes 'public policy' varies significantly.³ For example:

...while in the United States, public policy is understood in this context as the 'most basic notions of morality and justice', in Egypt they are the rules aimed at achieving any political, social, or economic public interest, which can be procedural or substantive. ... At the other end of the scale is Saudi Arabia, where an award is contrary to public policy if contrary to Islamic law...and Japan, where courts have found that procedural irregularities – if serious

¹ UNCITRAL Model Law on International Commercial Arbitration.

² United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

³ See Nigel Blackaby, Constantine Partasides and Alan Redfern, *Redfern & Hunter on International Arbitration* (Oxford University Press, 7th ed, 2023) at [10.80]–[10.86] and [11.110]–[11.129].

enough – may amount to violations of public policy.⁴

In most established arbitral jurisdictions, the courts are careful in applying the public policy ground and consider the following principles:

- public policy should be narrowly construed. Awards will only be contrary to public policy if their enforcement would violate a state's fundamental notions of justice, fairness and morality and its interest;
- public policy should be given an international dimension, so that the idiosyncratic public policy of certain states should not be a reason for setting aside or enforcing an award; and
- consideration of public policy grounds must be weighed with 'pro-enforcement' and 'pro-arbitration' biases (which may itself constitute a matter of public policy in certain states).

B Australian Approach

In Australia, international and domestic arbitral awards can be set aside or refused enforcement if it is contrary to public policy. This is reflected in the relevant provisions of legislation governing international and domestic arbitration,⁵ which largely reflect the UNCITRAL Model Law and the New York Convention.⁶ As a pro-arbitration jurisdiction, it is not surprising that a review of Australian jurisprudence (in relation to both domestic and international arbitrations) suggests Australian courts are careful when considering the public policy exception and, consistently with other established arbitration jurisdictions, have confirmed that the exception is reserved for awards which are truly incompatible with the notions of justice and fairness.

The decision of the Full Federal Court of Australia in *TCL*

Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361 (*'TCL'*) represents the touchstone of Australian jurisprudence in this area. In *TCL*, the Court found that the public policy exception is '*limited to the fundamental principles of justice and morality of the state, recognising the international dimension of the context*'.⁷ The Court made clear that the international context in which public policy is discussed in arbitral legislative instruments is '*very different from the review of public power in administrative law*' – a context that practitioners unfamiliar with the arbitral context may otherwise be enticed to adopt. The Court's interpretation of public policy in *TCL* has been adopted on multiple occasions, both in the context of international⁸ and domestic arbitral awards.⁹ The result of this approach is that the public policy exception is to be applied uniformly across model law countries, and does not invite the parties to invoke idiosyncrasies in Australia's national public policy and the rules of natural justice in Australia.¹⁰

The meaning of 'public policy' is the same under the CAAs, notwithstanding the domestic context. Minor textual differences between the IAA and the CAAs do not mean that the concept of public policy differs between the Acts.¹¹ It is also consistent with the Australian courts' approach in domestic arbitration-related court proceedings to draw on jurisprudence considering the IAA, the CAAs, and model law jurisdictions more broadly.¹²

III CASE NOTES

A *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584 (*'Guoao'*)

Stewart J's recent decision in *Guoao* highlights the manner in which the principles discussed above factor into practical considerations for Australian enforcing courts where the public policy ground is invoked. His

4 Ibid at [10.79].

5 See, eg, *International Arbitration Act 1974* (Cth) s 8(7)(b); *Commercial Arbitration Act 2011* (Vic) s 36(1)(b)(ii).

6 UNCITRAL Model Law on International Commercial Arbitration (n 1) art 36(1)(b)(ii); United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*'New York Convention'*) art 5(2)(b).

7 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 [76] (Allsop CJ, Middleton and Foster JJ).

8 See, eg, the decision in *Guoao* [32]–[33] (Stewart J).

9 See, eg, the decision in *Lieschke* [25] (Rees J).

10 *TCL* [73] (Allsop CJ, Middleton and Foster JJ); *Lieschke* [24] (Rees J); *Guoao* [32] (Stewart J).

11 *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 [35].

12 *Tayar v Feldman* [2020] VSC 66 [44] (Lyons J).

Honour considered whether to enforce an award made by the Beijing Arbitration Commission. Guoao Holding Group and Ms Xue were shareholders with some level of control over companies that were owners of a joint venture entity ('Guoao Village') formed under a Cooperative Development Agreement ('CDA') to develop an aged care project in Beijing. Under the CDA, there would be a series of equity transfers and the Guoao Holding Group was to provide shareholder loans to finance the project. The CDA provided that all disputes arising from or in connection with its performance shall be settled through negotiation, but, if no settlement could be reached, 'either party may submit the dispute to Beijing Arbitration Commission for arbitration.'

Disputes arose over the shareholder loans and breaches by both parties of the CDA, which were referred to arbitration. The Beijing Arbitration Commission held, among other things, that Ms Xue had fundamentally breached the CDA by causing Guoao Village to sign a loan agreement, and withdrawing RMB 130 million from Guoao Village pursuant to that agreement. The tribunal ordered dissolution ('*jie chu*') of the CDA and compensation equivalent to about AUD50 million.

Ms Xue and the other award debtors unsuccessfully challenged the award in various Chinese courts, with the Guoao Holding Group successfully enforcing the award in China and recovering about AUD5 million of the award debt. The Guoao Holding Group then applied to enforce the award against Ms Xue in Australia, who resided in Sydney, for the balance of the award debt. Ms Xue resisted enforcement as being contrary to public policy, because the award did not fulfil the notion of '*jie chu*' as contemplated by Chinese law, which requires the parties to be put back in the position that they were in before entering the contract. Ms Xue contended that this required re-conveyance of shares from the Guoao Group, and that this produced real unfairness.

In considering the public policy exception, Stewart J adopted the Australian position set out by the Full Court in *TCL* and

considered that Ms Xue's complaints did not enliven the public policy exception,¹³ because:

- it will generally be inappropriate for the enforcing court to reach a different conclusion to a court at the seat of the arbitration on the same question of asserted defects in the award.¹⁴
- Ms Xue had agreed to the rescission of the CDA during the arbitration, but did not seek re-conveyance of the shares;¹⁵
- Ms Xue could still apply to the Chinese Courts for an order for restitution of the shares. The arbitration did not stop the claimants from pursuing that remedy under Chinese law;¹⁶ and
- the tribunal did not make any obvious error in not ordering reconveyance of the shares, because it would involve Guoao Village's interests, which was not a party to the arbitration.¹⁷

B *Lieschke v Lieschke* [2022] NSWSC 1705 ('*Lieschke*')

In *Lieschke*, Rees J considered an application to set aside a domestic award based on the public policy ground. The arbitration concerned the dissolution of a family farming partnership between a father (Errol), his son (Malcolm) and his daughter-in-law (Michelle). A dispute arose over errors in accounting for the assets and liabilities of, and contributions to, the partnership during its dissolution.

Following the arbitrator making an interim award, Errol changed his legal representation and sought to retain a new expert to provide accounting evidence, which was rejected by the arbitrator. Errol argued before the arbitrator that he was unable to present his case, contrary to s 18 of the CAA (NSW). The arbitrator issued a final

¹³ Ibid [35].

¹⁴ Ibid [36]-[39]. His Honour considered that there was no basis to conclude that the power of the Chinese Courts was so limited that they could not intervene even where an obvious and serious disregard for basic principles of justice by the arbitrators occurred, to bring Ms Xue into the exception in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109.

¹⁵ Ibid [40].

¹⁶ Ibid [41].

¹⁷ Ibid [47].

award in which he rejected Errol's submission as unmeritorious and without substance, and made the orders sought by Malcolm and Michelle.

Errol applied to set aside the final award under s 34(1)(a)(ii) on the basis that he was unable to present his case. He argued that this was also in conflict with the public policy of the State, as he was denied procedural fairness and natural justice by the arbitrator's conduct, and the inadequate reasons for such conduct. Rees J agreed, setting aside the award under s 34(1)(a)(ii) and the public policy exception.

Her Honour considered that by making the interim award, the arbitrator had effectively bifurcated the arbitration. In these circumstances it was 'unremarkable' that Errol had sought to amend his case and adduce new evidence following the interim award, to improve his chances of achieving a measure of success in the final award. Errol's amendments and application to adduce new evidence were made promptly. Her Honour considered that it was 'clear that the arbitrator was determined to complete the arbitral process as it had been defined by directions made before [Errol]'s change of legal representatives, come what may.' Notwithstanding the arbitrator's wide discretion to conduct the arbitration as he saw fit, Rees J ultimately considered that Errol suffered a practical injustice by being unable to present his case, which enlivened public policy exception (s 34(2)(b)(ii)), as well as the specific exception for being unable to present his case (s 34(2)(a)(ii)). In reaching this finding, Rees J noted the following principles from *TCL* and usefully noted that:

... In most, if not all, cases, a party should be able to demonstrate that it has suffered such unfairness or injustice without a detailed re-examination of the

facts, "Unfairness or practical injustice in the conduct of international commercial arbitration should, if it exists, be able to be expressed shortly and, likewise, demonstrated tolerably shortly".¹⁸

This is consistent with the position in *TCL* that there must be compelling reasons for enforcement of a Convention award to be refused on public policy grounds.

IV PRACTICAL CONSIDERATIONS AND TAKEAWAYS

These decisions remind parties to arbitration agreements to consider the international context of their award, and the decision reinforces that the public policy exception is narrow and will not prevent enforcement of an award based on idiosyncrasies of Australian domestic policy. More often than not, it will require a significant contravention of 'public policy' before an award will be set aside or not enforced, such as a failure to afford procedural fairness and natural justice.

The decisions in *Guoao* and *Lieschke* highlight that the public policy exception to enforcement is narrow, and requires the award to offend a fundamental principle or norm of justice, morality or fairness, having regard to an international context. Practically, this means that where parties are not shut out from rectifying the perceived unfairness, the award should be enforced. Parties seeking to challenge enforcement of a foreign award should, therefore, consider the following key matters:

- Enforcement will not be contrary to public policy if the resisting party's 'complaint' could have been dealt with by the tribunal. The decision in *Guoao* indicates that a party's failure to seek its own appropriate orders during the arbitration (e.g., the reconveyance of

18 *Lieschke* [24]–[26] (Rees J) (citations omitted).

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shares)¹⁹ will undermine an argument that enforcing the award would be contrary to public policy.

- Has a 'supervisory' court at the seat of the arbitration ruled on the issue? If the court of the seat of arbitration (the supervisory court) has considered the same issue in dispute before the enforcing court, the enforcing court is unlikely to depart from that decision unless the powers of the supervisory court were so limited that it could not have intervened.
- Have the parties been subject to a practical injustice in the course of the arbitration? The decision in

Lieschke demonstrates that a party who experiences a real practical injustice which prevents them from putting their case may rely upon the public policy exception. The arbitrator's broad discretion to manage the arbitration must not create a real unfairness or injustice affecting the parties' ability to present their best case. The fundamental notion of arbitration that the dispute will be resolved according to the mechanism agreed by the parties is therefore tempered by more fundamental notions of natural justice and fairness.

¹⁹ For another enforcement related case concerning the transferring of shares, see *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724 and *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5, where Justice Croft of the Supreme Court of Victoria found (with the Court of Appeal subsequently agreeing) that the tribunal's award requiring the return of the purchase price of shares did not allow for double recovery (in the sense that the shares could also be kept).

Third-Party Funding Costs in Arbitration - Further Sweetening the (Funding) Deal



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I Introduction

The use of third-party funding in arbitration continues to rise, not just for those parties which have perhaps been left impecunious by the conduct of the counterparty, but also for those which have sufficient resources but may instead wish to deploy those funds in their commercial activities with the hope of generating more return than the cost of the third-party funding. With the increasing use of funding in arbitration, the question of recovery of third-party funding costs (ie awarding of the return paid by the funded party to the funder) is also likely to increase. So, what is the status of the ability to recover the costs of third-party funding?

The English Commercial Court judgment in *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd*¹ set in motion the prospect of recovering the cost of third-party funding with arbitral institutions following suit by way of

updates to arbitral rules and guidance for tribunals to assist with exercising their discretion to award costs.

The current state of play is that whilst an award providing for costs of third-party funding may be permitted under certain institutional rules and supported by the Courts, at least in England and Wales, it is ultimately a question of reasonableness.

II 'Arbitration Costs' Or 'Other Costs': Gateways For Recovery

The ordinary starting point is that arbitral tribunals adopt the principle of 'costs follow the event' or, in layman's terms, 'loser pays'.² However, tribunals may exercise their discretion when apportioning costs,³ which may involve consideration of the conduct of the parties during the course of the arbitration. This discretion can extend to the awarding of third-party funding costs either pursuant to

¹ [2016] EWHC 2361 (Comm) (*Essar*).

² Neil Kaplan, Chiann Bao 'Costs' in Neil Kaplan, Chiann Bao (eds) *So, Now You Are an Arbitrator: The Arbitrator's Toolkit* (Kluwer Law International, 2023) 113, 116.

³ Steven Finizio, Ross Galvin 'Allocation of Costs in International Arbitration: A Comparative Analysis of Approaches in International Commercial Arbitration and Investment Treaty Arbitration' in Sherlin Tung, Fabricio Fortese, Crina Baltag (eds), *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy* (Kluwer Law International, 2019) 115, 116 and 123-4.

such costs being expressly provided for as ‘costs for arbitration’ or, ;other costs’.

At present, the rules of just two arbitral institutions expressly provide for the recovery of third-party funding costs as costs of arbitration. Article 48 of the Australian Centre for International Commercial Arbitration (‘ACICA’) Rules 2021 is one of those instances (emphasis added):

48 Costs of Arbitration

The term “costs of arbitration” includes: ...

- (d) the parties’ legal and other costs, including, but not limited to, in-house costs, such as in-house counsel and other non-independent experts, and *third-party funding costs*, directly incurred by any party in conducting the arbitration, if such costs were claimed during the arbitration proceedings and only to the extent that the Arbitral Tribunal determines that such costs are reasonable.

This express reference to third-party funding costs similarly arises in article 34.4 of the 2018 Hong Kong International Arbitration Centre (‘HKIAC’) Administered Arbitration Rules: ‘The arbitral tribunal may take into account any third party funding arrangement in determining all or part of the costs of the arbitration referred to in Article 34.1’.

For those institutional rules which do not expressly refer to third-party funding costs as ‘costs of arbitration’, parties have, in several instances, successfully sought to be awarded such costs under the capture all heading of ‘other costs’. Several major arbitral institution rules contain this discretion for tribunals to award ‘other costs’.⁴ For example, article 38(1) of the 2021 International Chamber of Commerce (‘ICC’) Rules of Arbitration provides that (emphasis added):

Article 38 – Decision as to the Costs of the Arbitration

- 1) The costs of the arbitration shall include the fees

and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the *reasonable legal and other costs incurred by the parties for the arbitration*.

III Disclosure of Third-Party Funding

In recognition of the availability of tribunals to award recovery of third-party funding costs, users and institutions alike have sought to mitigate the surprise for unsuccessful parties discovering the existence of funding arrangements only *after* the award. For example, article 54 of the ACICA Rules 2021 provides that (emphasis added):

Article 54 – Third Party Funding

54.2 *A party and/or its representative shall, on its own initiative, disclose the existence of third party funding and the identity of the funder to the Arbitral Tribunal and ACICA, and the other parties, upon that party submitting a Notice of Arbitration or Answer to Notice of Arbitration or Answer to the Request for Joinder, or as soon as practicable after third-party funding is provided or after entering into an arrangement for third-party funding, whichever is earlier. Each party shall have a continuing obligation to disclose any changes to the information referred to in this Article occurring after the initial disclosure, including termination of the third-party funding.*

54.3 The Arbitral Tribunal may, at any time during the arbitration proceedings, *order a party to the arbitration proceedings to disclose: (a) the existence of third-party funding; and/or (b) the identity of any such third-party funder.*

⁴ Asian International Arbitration Centre, *AIAC Rules* (adopted 1 August 2021) art 40(2)(e); International Centre for Settlement of Investment Disputes, *ICSID Arbitration Rules* (adopted 1 July 2022) r 50(a); International Centre of Dispute Resolution, *ICDR Rules* (adopted March 1 2021) art 37(d); London Court of International Arbitration, *LCIA Rules 2020* (adopted 1 October 2020) art 28.3; Singapore International Arbitration Centre Rules, *SIAC Rules* (adopted 1 August 2016) art 37; United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* (adopted 9 December 2021) art 40(2)(e); Vienna International Arbitration Centre, *VIAC Rules of Arbitration and Mediation* (adopted 1 July 2021) art 38(2).

Similar disclosure provisions are contained in the HKIAC Rules,⁵ ICC Rules,⁶ ICSID Rules,⁷ and SIAC Investment Rules.⁸ The Stockholm Chamber of Commerce has also adopted a policy encouraging disclosure.⁹

A funded party's disclosure is important because it places the tribunal and counterparty on notice of funding.¹⁰ Having awareness of a claimant that is backed by a funder generally encourages the other party to settle the claim early as the presumption is that funders are only interested in claims with good prospects of success, and, as raised above, the counterparty may be liable for the funder's success fee.

Additionally, the disclosure of third-party funding helps promote best practice in reducing conflicts of interests that may arise between arbitrators and third-party funders and, in turn, reduces the risk of a challenge arising due to justifiable doubts as to an arbitrator's impartiality or independence.¹¹

IV Applicable Principles – When Will Third-Party Funding Costs Be Awarded?

The English Commercial Court in *Essar* rejected a challenge of an ICC sole arbitrator's award requiring Essar to pay Norscot's costs of engaging a third-party funder. The third-party funder advanced £647,000, and Essar sought £1,940,000 as the sum owed under the funding agreement. The arbitrator held that they were entitled to order the payment of £1,940,000 as 'other costs' under the ICC Rules and the *lex arbitri*, being s 59(1)(c) of the *Arbitration Act 1996* of England and Wales.

The English Commercial Court agreed that the arbitrator was entitled to interpret 'other costs' to include third-party funding, noting that the ICC Commission Report of 2015 highlighted that the central question is whether the cost incurred was reasonable.¹² The ICC Commission Report provided that reasonableness can be gauged by whether: (a) there needed to be protection against unfair

5 Hong Kong International Arbitration Centre, *HKIAC Rules* (adopted 1 November 2018) art 44 ('*HKIAC Rules*').

6 International Chamber of Commerce, *ICC Rules* (adopted 1 January 2021) art 11(7) ('*ICC Rules*').

7 International Centre for Settlement of Investment Disputes, *ICSID Arbitration Rules* (adopted 1 July 2022) r 14(1) ('*ICSID Rules*').

8 Singapore International Arbitration Centre, *SIAC Investment Rules* (adopted 1 July 2017) r 24(l) ('*SIAC Investment Rules*').

9 Stockholm Chamber of Commerce, *Disclosure of any third parties with an interest in the outcome of the dispute* (adopted 11 September 2019)

10 *Muhammet Cap & Sehil Insaat Endustry ve Ticaret Sti v Turkmenistan (Procedural Order No.3)* (International Centre for the Settlement of investment Disputes, Case No ARB/12/6, 12 June 2015) at [9]; *Astrid Benita Carrizosa v Colombia (Procedural Order No. 1)* (International Centre for the Settlement of Investment Disputes, Case No ARB/18/5, 19 February 2019) at [10.4].

11 International Bar Association, 'IBA Guidelines on Conflicts of Interest' (adopted 23 October 2014) General Standard 2.

12 *Essar* (n 1) at [61]-[65] citing ICC Commission, 'Decisions on Costs in International Arbitration' (2015) *ICC Dispute Resolution Bulletin* (2), [87]-[93].

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or unequal treatment of the parties in respect of costs; and/or (b) the success fee resulted in an improper windfall to third-party funders.¹³

Here, Essar had intentionally sought to financially cripple Norscot by refusing to make payment under their contract,¹⁴ with the tribunal concluding that the purpose of this was to practically remove Norscot's ability to initiate arbitral proceedings.¹⁵ The Court agreed with the arbitrator's decision that Norscot had no choice but to enter into a funding agreement.¹⁶ Even though it is unclear whether Norscot disclosed during the arbitration that it had obtained funding, the Court agreed with the arbitrator's observation that Essar was 'undoubtedly aware that Norscot's costs could not be financed from its own resources'.¹⁷ Additionally, the Court agreed with the tribunal that the decision to award the costs of the third-party funding (being a 300% return of the advanced sum) was reasonable because it reflected the standard market rate for funding agreements.¹⁸

Since the 2016 judgment in *Essar*, costs for third-party funding have been extended beyond the circumstances of *Essar* with such costs being awarded even where the funded party had the necessary funds to pursue arbitration. In 2020, a Singapore-seated tribunal, under the rules of the Singapore International Arbitration Centre Arbitration Rules, held that the 'other costs' reference was 'extremely broad', and that costs of third-party funding need only be incurred in connection with arbitration.¹⁹ One year later, the English Commercial Court in *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* ('*Tenke*') similarly concluded that third-party funding costs are recoverable if the tribunal is

satisfied that: (a) the cost itself is reasonable and (b) the circumstances calling for it are reasonable. The Court agreed with the tribunal's decision that third-party funding costs were recoverable even if the claimant was purportedly responsible for its own financial difficulties.²⁰

V Recovery of Third-Party Funding Costs in Investor-State Arbitration

The position on recovery of third-party funding costs in investor-state arbitration is similar but less clear. In *Kardassopoulos and Fuchs v Georgia*,²¹ an International Centre for Settlement of Investment Disputes ('ICSID') tribunal held that the claimant investor could recover its reasonable legal costs but did not comment on whether third-party funding formed part of those costs.²² The tribunal stated that it did not know of any principle that required third-party funding arrangements to be taken into consideration when determining the claimant's recovery of its legal costs.²³

Similarly, in *Mohamed Abdel Raouf Bahgat v Egypt*, a Permanent Court of Arbitration tribunal did not exercise its discretion under the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules (2021) to award third-party funding.²⁴ While the claimant relied on *Essar* in its submissions as to why it should be awarded third-party funding costs, the tribunal did not comment on that argument.²⁵ Instead, it based its decision on the 'particularities' of the case. The tribunal did not specifically outline these particularities, however, from the award it can be gleaned that there were three reasons. First, it was unclear how money could be owed to the initial funder, who went bankrupt.²⁶ Secondly, it

13 ICC Commission, 'Decisions on Costs in International Arbitration' (2015) *ICC Dispute Resolution Bulletin* (2) at [87]-[93].

14 *Essar* (n 1) [21]-[22].

15 *Ibid* [24].

16 *Ibid*.

17 *Ibid* [23].

18 *Ibid* [25].

19 *Blair James Speers & Graham Paul Johnson v Makemytrip Limited & Hotel Travel Limited (Final Award)* (Singapore International Arbitration Centre, Case No ARB169/16/AB, 9 June 2020) at [159].

20 *Ibid* [74]-[78].

21 *Ioannis Kardassopoulos and Ron Fuchs v the Republic of Georgia (Final Award)* (International Centre for Settlement of Investment Disputes, Case No ARB/05/18 and ARB/07/15, 3 March 2010).

22 *Ibid* [687]-[691].

23 *Ibid* [691].

24 *Mohamed Abdel Raouf Bahgat and The Arab Republic of Egypt (Final Award)* (Permanent Court of Arbitration, Case No. 2012-07, 23 December 2019) [591].

25 *Ibid*.

26 *Ibid* [581].

had awarded the claimant's legal representatives' a success fee.²⁷ Thirdly, the claimant agreed to aggressive and irresponsible funding terms, which possibly required a success fee payment of USD 80 million, including an interest rate of 16%.²⁸

In *Dominion Minerals v Panama*, an ICSID tribunal found that the third-party funding fee was not reasonable as the claimant reportedly sought to recover USD 32.4 million, which was three times higher than its costs of legal representation.²⁹ As this award has not been published, it is unclear whether the claimant relied on *Essar or Tenke*.³⁰ Even though the outcome was different, it nevertheless follows the overarching principle of reasonableness set out in *Essar and Tenke*.

VI Practical Take-Aways

The ability to recover third-party funding costs has been made clearer in England and Wales as well as by the express inclusion of such costs as arbitration costs in the ACICA and HKIAC rules. However, the door remains ajar for other jurisdictions and tribunals constituted under other rules to approach the question under the banner of 'other costs', exercising their discretion as to costs generally having regard to the reasonableness of the third-party funding costs.

27 Ibid [588].

28 Ibid [578]-[581].

29 *Dominion Minerals v Republic of Panama (Final Award)* (International Centre for Settlement of Investment Disputes, Case No ARB/16/13, 5 November 2020).

30 Lisa Bohmer, Analysis: Arbitrators in *Dominion Minerals v Panama* Unanimously Dismiss Denial of Benefits Related to Shareholder's Dual Nationality, But Disagree on Merits and Damages, *IA Reporter* (16 November 2020).



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Bifurcation Of Arbitration Proceedings: A Cautionary Tale In CBI Constructors v Chevron



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I Introduction

In *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* (*Chevron*)¹ the Western Australia Court of Appeal (**WACOA**) upheld the decision of the Western Australia Supreme Court (**WASC**) to set aside an interim award on the basis that the tribunal lacked jurisdiction because it was *functus officio*. At first instance Martin J² held that an arbitral tribunal can exhaust its jurisdiction on certain issues by operation of the *functus officio* doctrine,³ if the tribunal has already decided those issues in an interim award.

This case offers key lessons for parties involved in arbitration where the proceedings have bifurcated certain issues such as quantum and liability. Once issues relating to liability have been decided, the tribunal does not have jurisdiction to revisit those issues, even if there are overlapping questions yet to be decided.

The judgment is also a timely reminder of the supportive and supervisory role of the courts in relation to arbitration proceedings. In particular, courts will not act

as an appellate jurisdiction when it comes to admissibility of claims brought before an arbitration tribunal. However, a tribunal's decision on its own jurisdiction remains a matter subject to independent review by the courts.⁴

II Contractual Dispute

Chevron Australia Pty Ltd engaged the joint venturer contractors CBI Constructors Pty Ltd, and Kent Projects Pty Ltd (**CKJV**) for the provision of construction and related services for its Gorgon offshore oil and gas project located off the north-west coast of Western Australia. A contract was signed in 2011 (**Contract**) with a provision that Chevron would reimburse CKJV for their employment of labour carrying out works at the project sites in Barrow Island, Henderson, Perth, and at various yards in South Korea, China and Indonesia.

The parties were in dispute as to CKJV's entitlement to reimbursement for certain labour costs. In 2016, a Letter of Agreement (**LOA**) was entered into between the parties to settle various disputes.

1 [2023] WASCA 1 (*Chevron*); on appeal from *Chevron v CBI Constructors* [2021] WASC 323.

2 *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323. See also Jo Delaney et al, *Arbitration Law in Australia 2021: A Year in Review*, Holman Fenwick Willan (Report, February 2022) 6 <[003747-HFW-Arbitration-law-in-Australia-2021-Year-in-review.pdf](#)>.

3 *Functus officio* is Latin for having performed his office.

4 *Chevron* (n 2) [66].

The Contract included a multi-tiered dispute resolution clause enabling either party to commence arbitration if negotiations and mediation failed.⁵

At the heart of the dispute was the question of what labour costs were recoverable by CKJV. The Contract contained a detailed pricing schedule for ‘Staff’ and ‘Craft Labour’ by reference to contractual ‘Costs’ and ‘Rates’. A Pricing Schedule attached to the contract provided that the parties ‘may mutually agree to convert Cost items into Rate items’.⁶ There was also a reference in the contract that ‘Costs (which may or may not be a Direct Cost) means an *actual cost* to [CKJV] which, if reimbursement is sought, must be supported by documentary evidence. [CKJV] and [Chevron] may mutually agree to convert Costs items into Rate items...’⁷ The term ‘actual cost’ was not defined.

lii Arbitration Proceeding

CKJV filed a notice of arbitration claiming Chevron was in breach of the Contract and the LOA for underpayment of the labour costs. Chevron counterclaimed that it had been overcharged by CKJV. A tribunal of three arbitrators was constituted.

Following an application by CKJV, the Tribunal made procedural orders to split the arbitration into issues of liability and quantum.⁸ The Tribunal firstly considered whether the costs of CKJV’s labour and staff was to be calculated on a cost-reimbursable basis or a rates basis. The answer to this question would have a substantial impact on the quantum dispute and could potentially reduce the time and costs involved in the arbitration.

The Tribunal issued an interim award (‘First Interim Award’) where it unanimously found, among other things, that ‘*the LOA did not evidence or contain any agreement between the parties to convert the Price for Staff and Supervision from Cost items to Rate items*’.⁹ The First Interim Award was meant to settle all issues of liability.

During the quantum phase, CKJV sought to argue that,

on the proper construction of the Contract, the term ‘actual costs’ (for which it was to be reimbursed) should be construed to include amounts accrued as part of Staff’s employment entitlements, and which may have not been actually paid, but would nevertheless increase CKJV’s labour costs (‘Contract Criteria Case’). This issue had not been argued during the liability phase.

Chevron objected to CKJV’s arguments contending that CKJV was re-agitating a liability issue that had already been decided during the liability phase. Chevron argued that CKJV was prevented from pleading the Contract Criteria Case by reason of *res judicata* or issue estoppel or Anshun estoppel, and/or because the Tribunal was *functus officio* in relation to all issues of liability and did not have jurisdiction or authority to determine the Contract Criteria Case.

The Tribunal addressed this issue in a second interim award (‘**Second Interim Award**’). The majority dismissed Chevron’s jurisdiction objections, finding that CKJV was permitted to raise these arguments as part of its quantum submissions. The majority found that these items related to the quantification of CKJV’s claims, which had not been considered during the liability phase. The Tribunal also determined that there was no *res judicata*, issue estoppel or Anshun estoppel. The dissenting arbitrator upheld Chevron’s argument that the Contract Criteria Case was an issue of liability and the Tribunal was *functus officio* with respect to all issues of liability.

Iv Challenge to the Tribunal’s Second Interim Award

Chevron applied to the WASC to set aside the Second Interim Award under section 34(2)(a)(iii) of the *Commercial Arbitration Act 2012* (WA) (‘Act’). Chevron argued that the Tribunal lacked jurisdiction to decide issues relating to liability in the Second Interim Award as it was *functus officio*. These issues of liability had already been determined in the First Interim Award.

5 Ibid [14].

6 Ibid [10].

7 Ibid [28].

8 Procedural Order 14 stated that ‘[t]he First Hearing will concern all issues of liability only. All issues in relation to the quantum and quantification of [the parties’ claims] shall not be heard at the first hearing’: at [21].

9 [2021] WASC 323 [125].

Martin J set aside the Second Interim Award. His Honour considered three issues:

1. whether the argument of *functus officio* came within the grounds for setting aside an award under section 34(2)(a)(iii) of the Act;
2. if so, whether Chevron had established that the Tribunal was *functus officio*; and
3. whether the WASC should use its discretion to grant relief under section 34(2) of the Act.

Section 34(2)(a)(iii) of the Act provides that an award may be set aside where it 'deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration'. Martin J found that the issue of *functus officio* did come within this ground for setting aside an award.¹⁰

As the Act was engaged, Martin J undertook a detailed review of the arbitration proceedings, including the Tribunal's procedural orders leading to the interim awards. His Honour found that the Contract Criteria Case concerned issues of liability and that CKJV's opportunity to raise this claim expired upon the publication of the First Interim Award.¹¹ Having accepted Chevron's case, his Honour found that in a case like this, the WASC's discretion under section 34(2) 'should be "virtually automatic"'.¹²

V Appeal and Judgment

CKJV appealed the decision to the WACOA raising four grounds of appeal.¹³ CKJV argued that the primary judge erred:

1. in finding that the doctrine of *functus officio* could apply to the Tribunal in absence of a *res judicata*, issue estoppel or Anshun estoppel;
2. in failing to hold that the Tribunal's findings to the effect that there was no *res judicata*, issue estoppel or Anshun estoppel, if erroneous, were mere errors of

law which did not impact the Tribunal's jurisdiction;

3. further, or in the alternative, in failing to find that the *functus officio* principle could only apply if the Tribunal failed in its construction of the phrase 'all issues of liability' or in its characterisation of the Contract Criteria Case as not being a liability issue when, if an error were made, it was merely an error of law with no impact on the Tribunal's jurisdiction;

in finding that CKJV's Contract Criteria Case was an issue of liability as described in the procedural orders, and in setting aside the Second Interim Award on the basis that the Tribunal was *functus officio*.

The WACOA first conducted a review of the jurisprudence of estoppel and *functus officio* before addressing CKJV's submission that the primary judge effectively had engaged in a review of the merits of the Tribunal's decision.

A key issue on appeal was the extent to which the Court could review the Tribunal's findings in the context of a set aside application under section 34(2) of the Act.

The Court considered the basis for a tribunal's jurisdiction, stating that:

By submitting their claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them ... [t]he general rule is that an award made by an arbitrator pursuant to such authority is final and conclusive. The former rights of the parties are discharged by an accord and satisfaction. The accord is the agreement to submit disputes to arbitration; the satisfaction is the making of an award and fulfilment of the agreement to arbitrate.¹⁴

The Court noted that one reason why an award is considered final and binding is that it gives rise to a *res judicata* or issue estoppel. The Court considered the common law doctrines of *res judicata* and issue estoppel noting that these principles 'operate upon the parties to

¹⁰ *Chevron* (n 2) [35].

¹¹ *Ibid* [36].

¹² *Ibid* [44].

¹³ *Ibid* [46].

¹⁴ *Ibid* [72-3], [78], quoting *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 [12].

preclude further litigation by the parties or their privies.¹⁵ The Court described these doctrines:

1. *Res judicata* (also known as cause of action estoppel) 'operates to preclude an assertion in a subsequent proceeding of a claim to a right or obligation which was asserted in the proceeding and which was determined by the judgment'.¹⁶
2. Issue estoppel operates to preclude an assertion, alleging or denying a state of fact or law for the purpose of some other claim or cause of action, where it has been the matter of a previous judgment: 'A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies'.¹⁷

The Court acknowledged that estoppel applies to litigation and arbitration alike, noting, with respect to the role estoppels play on the jurisdiction of an arbitral tribunal, that:

[w]hilst preclusionary estoppels operate on the parties (and their privies) to preclude the assertion of a right or obligation or the raising of an issue of fact or law, and must, generally speaking, be pleaded, the consequences of finality also directly impinge upon the authority or jurisdiction of the arbitrator.¹⁸

However, 'the creation of an issue estoppel and the exhaustion of the arbitrator's authority (as *functus officio*) are separate and distinct'.¹⁹ In other words, '[o]ne affects the rights of the parties; the other affects the jurisdiction of the arbitrator'.²⁰ On this basis, the Court held that preclusionary estoppels go to the admissibility of claims before an arbitration tribunal and the courts cannot review these decisions.

In contrast, a challenge under the doctrine of *functus officio* goes to the very jurisdiction of the tribunal. A tribunal is considered *functus officio* after issuing an award. Having determined the specific factual or legal

issues in the award, the tribunal no longer has authority with respect to those issues. The same applies to the issues within an interim award.

The Court acknowledged that whilst a tribunal has authority to rule on its own jurisdiction under section 16(1) of the Act, that authority is not conclusive. The court's power to review the question of jurisdiction is enlivened if an application is made under section 34(2)(a)(iii) of the Act.

The court stated:

The review is a *de novo* review, it is not an appellate review, the question is not whether error has been established, and the court applies a 'correctness' standard of intervention. The court is neither bound nor restricted by the Tribunal's own view of its jurisdiction, although it will examine 'carefully and with interest' the reasoning and conclusion of the arbitral tribunal on the topic of jurisdiction and may be assisted by it to the extent that it is cogent.²¹

In essence, the Court was of the view that even if the Tribunal was wrong in its findings regarding preclusionary estoppels, these were matters well within the Tribunal's mandate and the courts would not impinge the Tribunal's findings.

However, as it was a set aside application under section 34(2)(a)(ii), the question before the court was whether the Tribunal had jurisdiction to consider the Contract Criteria Case. The Court upheld the decision of the primary judge that the Tribunal did not have jurisdiction as it was *functus officio*. The Tribunal had made a decision with respect to 'all issues of liability' in the First Interim Award. As the Contract Criteria Case was properly characterised as an issue of liability and not quantum, the Contract Criteria Case was outside the scope of the Tribunal's jurisdiction when the Second Interim Award was issued, rendering the Second Interim Award susceptible to challenge pursuant to section 34(2)(a)(iii) of the Act.

15 Ibid [75].

16 Ibid [76] quoting *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28 [22].

17 Ibid [77] quoting *Bair v Curran* (1939) 62 CLR 464, 531–33.

18 Ibid [85].

19 Ibid [89].

20 Ibid.

21 Ibid [119].

The Court dismissed the appeal holding that, without a reservation of authority, the Tribunal plainly lacked jurisdiction to hear any aspects of liability after the First Interim Award was issued.

VI Key Takeaways

This decision provides some practical guidance for parties involved in arbitration proceedings, and their legal representatives.

First, the decision highlights the potential risks of bifurcating issues in arbitration, or indeed, litigation proceedings. Whilst there may be sound strategic reasons for splitting issues of liability and quantum (including factors like time and costs), this case stresses the

importance of giving due consideration to all potential arguments that may be raised during the liability phase. The failure to do so may preclude a party from later raising such issues during the quantum phase. The same caution applies to other forms of bifurcation.

Second, the decision also accentuates the discreet role of the courts in supporting and supervising arbitrations. This judgment confirms the position that the courts will not act as an appellate jurisdiction on issues of admissibility of claims in arbitration proceedings, such as issues of res judicata and estoppel. However, as a tribunal's decision with respect to its own jurisdiction is not conclusive, it remains a matter subject to independent review by the courts.

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Kicking the “Issues” Down the Road and Judicial Interventions – a Yes or a No?



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Background

In the recent decision of *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd*,² the Western Australian Court of Appeal considered several issues that are of interest and practical relevance to the arbitration community. This case concerned an application to set aside an interim arbitral award and principally considered the following issues:

- (i) how the “preclusionary estoppels”³ apply and operate (as opposed to “functus officio”) to prevent parties (and their privies) from re-visiting an issue of law or fact, which was previously determined in a judgment or in an award; and
- (ii) in the context of a hearing split into liability and quantum phases, the effect of an interim “liability” award rendering the arbitral tribunal “functus officio” on all liability issues, including those raised after the delivery of that first interim award.

Functus Officio and Preclusionary Estoppels - How do they Operate?

The principle of *functus officio* generally refers to the completion or exhaustion of a tribunal’s authority to determine issues,⁴ in essence operating as a check on jurisdiction. In effect, the arbitrator’s power comes to an end (to borrow the Court’s words, it is “*completed or exhausted*”) by reason of having delivered an award.⁵ In comparison, preclusionary estoppel operates as a bar on parties asserting a right or obligation or raising an issue that has been (or should have been) previously determined.⁶

As distinguished by the Court of Appeal, preclusionary estoppels are separate and distinct from the principle of *functus officio*: as preclusionary estoppel “*affects the rights of the parties; [whereas] the other affects the jurisdiction of the arbitrator*”.⁷ From this emerges the importance of distinguishing between what potentially affects the

1 With many thanks for contributions to Kristian Maley.

2 [2023] WASCA 1 (“CBI v Chevron”).

3 The Court of Appeal also briefly touched on other related issues such as issue estoppel, *res judicata*, and Anshun estoppel.

4 See, further discussion at *CBI v Chevron* (n 1) [85]-[91].

5 See, eg, discussion at *ibid* [91], [96].

6 See, eg, *ibid* [85], referring to *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507.

7 *CBI v Chevron* (n 1) [89].

parties' rights on one hand and what potentially goes to the issue of the jurisdiction of the arbitrators on the other hand, although there might be a practical overlap in effect. This distinction is important and should be borne in mind by parties, for the reasons described below.

Interim versus Final Award - Should they be Treated Differently?

A question arises here - should the principle of *functus officio* operate differently in the context of interim awards and final awards? This can become a fertile ground for argument between parties, perhaps over what issues have or have not been dealt with, and what might therefore fall within the ambit of the *functus officio* principle. Hence, the key question becomes – what, if any, authority does the tribunal retain after issuing an interim award?

In the context of arbitration, the consequence of the doctrine of *functus officio* (resulting in the arbitrator's mandate, and hence their authority and legal competence having come to an end) is that the arbitral tribunal generally can no longer re-examine a decision or exercise powers with respect to the issues already dealt with in an award. In the context of an interim award, this refers to a particular matter (the subject of that interim award) over which power has been exercised and exhausted. However, matters which are not the subject of an interim award may still be within the ambit of a tribunal's remaining power. In the Court of Appeal's words, "[w]here a valid award is an interim award, the arbitrator is only *functus*

officio with respect to the issues dealt with in that interim award, and retains the authority to deal with the matters left over."⁸ The reason given for this was because the tribunal's "authority is not completed or exhausted in respect of the matters left over."⁹

The Court of Appeal also emphasised the principle of finality of the points decided, having regard to the parties' agreement to solve their dispute,¹⁰ and to the award being final and conclusive in respect of the issues it determines. The principle of finality applies both to final and interim awards (on the points decided, respectively).

"All Issues of Liability" - Is there a Limit?

By way of context, a procedural order in *CBI v Chevron* referred to "all issues of liability", with a contested question later addressing what fell within this phrase.¹¹ An important consideration in this context then is the ambit of what is encompassed by "all issues of liability". Accordingly, a question that arises here is – does that mean all issues as then pleaded, or does it extend to any as-yet-unpleaded issues of liability? In this respect, regard must be had to the procedural orders.

For this reason, precision is key when formulating the procedural orders (ie. it should be made clear what is and what is not to be decided in any interim award). This is because the wording of a procedural order can become paramount in terms of what has been potentially decided by that interim award, and may go a long way towards avoiding or precipitating potential future disputes amongst the parties.¹² At the very least, careful

⁸ Ibid [91].

⁹ Ibid.

¹⁰ Ibid [85]-[86], [97].

¹¹ See *ibid* [21], [48], [101]-[114].

¹² See, eg, *ibid* [101]-[114].



wording may assist in helping to resolve disputes as to the meaning and reach of a potential interim award (or for that matter, any other award or procedural order).

Judicial Interventions and Setting Aside of Awards

From recent decisions such as the High Court's judgement in *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l.*,¹³ it is clear that Australia remains a pro-enforcement jurisdiction. However, at least on the domestic plane under the *Commercial Arbitration Acts* (such as in the *CBI v Chevron* case), this is balanced with the need for judicial supervision of arbitral tribunals and the proper exercise of jurisdiction. The power for judicial intervention to set aside an arbitral award in Western Australia exists under the *Commercial Arbitration Act 2012* (WA) s 34 (for domestic commercial arbitrations) and by the *Model Law* art 34¹⁴ (for international commercial arbitrations). For example, having regard to the *Commercial Arbitration Act 2012* (WA), the Court of Appeal in *CBI v Chevron* identified that this enables for review by a competent court, on a *de novo* basis, of whether an arbitral tribunal has exceeded its jurisdiction.¹⁵

As regards a court's potential involvement in the setting aside of awards, a point to note here is that "[a]n arbitral tribunal has authority to rule on its own jurisdiction under s 16(1) of the [Commercial Arbitration Act, in question]. However, it has no conclusive authority to determine its jurisdiction".¹⁶ Once jurisdiction is established by a tribunal, the courts will then decide that issue again on the basis of a *de novo* review (ie. the court reconsiders the issue(s)). Although the court may be assisted by the arbitral tribunal's own reasoning and conclusions on its jurisdiction, the court is not bound by the tribunal's opinion.¹⁷ Hence, the court may diverge from the arbitral tribunal's reasoning and conclusions, leading to an outcome potentially opposed to the initial decision that a party may wish to rely upon for future enforcement.

A key point emerges here that judicial intervention is available and can occur where a tribunal has acted *functus officio*.¹⁸ This appears to strike a balance between ensuring the enforceability of awards, whilst also maintaining a degree of oversight by way of judicial intervention where called upon. In short, this provides avenues and access to review for parties amongst the parties' options as part of the arbitration toolkit provided by Australian (and international) arbitration laws.

Concluding Remarks and Practical Insights

Building on the Court of Appeal's decision, a number of practical learnings emerge out of this cautionary tale, being a reminder of certain issues that bear upon a party's decision to seek a bifurcated hearing:

- (i) Parties should ensure that, as far as possible, all issues that they may ultimately seek to raise are clearly articulated in the memorials or pleadings. This ought to be considered prior to an application for bifurcation (if any), so that the issues to be dealt with in each phase of a bifurcated hearing are known, understood, and uncontentious. This will also assist with assessing the potential consequences of bifurcation, including the risk of adverse consequences, and adopting strategies to mitigate such outcomes. This is especially so because, by virtue of preclusionary estoppel, a party may be estopped from raising a potentially meritorious issue at a later stage. How issues are stated can thus have potential ramifications for the tribunal's jurisdiction (including as a result of the operation of the *functus officio* principle);
- (ii) *When deciding whether to apply to bifurcate proceedings (that is, split the proceedings into liability and quantum phases), alternatives should also be considered. This includes options such as whether to seek determination of identified questions of law, or whether to proceed on the basis of a case stated. An*

13 *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l* [2023] HCA 11.

14 Given effect by the *International Arbitration Act 1974 (Cth)* s 16(1).

15 *CBI v Chevron (n 1)* [119]-[120].

16 *Ibid* [92], [119].

17 *Ibid* [120].

18 See, here further, reasoning at *ibid* [119].

assessment of the benefits and downsides of each of these potential options also ought to be undertaken;

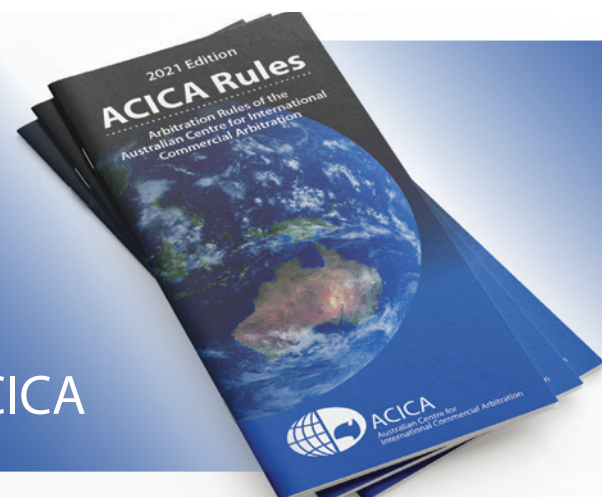
(iii) When considering how bifurcation should occur, attention should be given to whether parties can (or should) expressly provide for a reservation of rights to raise additional specified issues after a first interim award, and the tribunal's jurisdiction to hear and determine such issues (including consideration of the potential impact of such a reservation);¹⁹ and

(iv) Parties should ensure that interlocutory and procedural orders are drafted in unambiguous terms, that are self-explanatory and self-contained (if possible), so as to help minimise the risk of any orders being interpreted in a way that might be adverse to a party's case or have consequences that were previously not contemplated by the parties.

¹⁹ For example, looking at *CBI v Chevron* (n 1) [127] of the case and [66] of the Appendix, Procedural Order 17 referred to an express reservation to adduce a specific report at the second hearing (being the quantum phase).

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



The Timing Paradox in Investment Arbitration: May a Legitimate Expectation Arise in the Midst of an Ongoing Investment?



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Introduction

The doctrine of legitimate expectations in international investment arbitration, according to the *Thunderbird v Mexico* ('*Thunderbird*') tribunal, addresses 'a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act on reliance on said conduct, such that a failure by the [State] to honour those expectations could cause the investor (or the investment) to suffer damages.'¹

Beyond arbitral precedent, the doctrine finds its original from in various domestic administrative law systems (including the German, Dutch, Argentinian, and English systems: within the context of administrative law, all protect certain kinds of expectations that the respective States may give rise by way of their conduct).²

Recently, the doctrine has been the subject of much debate. Many have argued that the protection afforded by legitimate expectations has been extended too far. Whilst addressing some of the criticisms raised, this paper will primarily analyse whether or not a legitimate expectation may arise amidst an ongoing investment.

What are Legitimate Expectations and Why are they Protected?

Legitimate expectations are closely related to the investment protection standard of fair and equitable treatment ('FET'), which is contained in most bilateral investment treaties ('BITs') and is statistically the most frequently protection invoked in investment arbitration.³ Although referred first in the aforementioned *Thunderbird* case, reference to the doctrine within the context of the FET standard plainly appeared first in the *Tecmed v Mexico* ('*Tecmed*') case.⁴

1 *International Thunderbird Gaming Corporation v The United Mexican States* (UNCITRAL Case), Arbitral Award, 26 January 2006, [147].

2 U. Kriebbaum and C.H. Schreuer, 'At What Time Must Legitimate Expectations Exist?' (2012) 9(1) *Transnational Dispute Management* 265, 266. See also Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28(1) *ICSID Review* 88, 102.

3 S Bianchi, 'The Role of Investor-State Tribunals in Determining the Scope and Content of the Fair and Equitable Treatment Standard – Legitimate Expectations and Proportionality' (LLM Thesis, Columbia University, 2022) 1, 5 <https://scholarship.law.columbia.edu/llm_essays_theses/5>.

4 *Técnicas Medioambientales Tecmed, SA v The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, [88]. However, the standard itself can be traced back to the general principles of law contained in local State legal systems: see, eg, *Gold Reserve Inc v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014, [576].

In *Tecmed*,⁵ the tribunal understood that a breach of the FET standard could occur when a state fails to afford treatment matching the basic expectations that were considered by the investor when deciding to invest.

The major innovation of *Tecmed* is to have clearly recognised the concept of legitimate expectations as a protection encapsulated by the FET standard.⁶ Following *Tecmed*, scholars stress that (on a case-by-case basis) tribunals 'should evaluate whether the host State acted (i) consistently, (ii) with a lack of ambiguity, and (iii) transparently in its dealings with the investor'⁷ (both in their actions and in the underlying purposes of those actions).

Case law supports the concept,⁸ and reinforces the obligation of host States to maintain stable and predictable business and legal environments, with unreasonable changes violating the FET standard. In this sense, legitimate expectations may derive from specific commitments to an investor such as a stabilization clause or from the legal framework on which the investor relied upon when making its investment.⁹

In general, tribunals assess whether or not there was a breach of a legitimate expectation if the State acted in a manifestly unfair or inequitable manner, such as when it acts inconsistently with specific material representations previously made to attract an investment. For example, case law has held that a legitimate expectation was created for an investor to increase toll rates based on a concession agreement entered with the investor along with repeated year-to-year promises; failure to increase the rates and instead reducing them constituted a

violation of a legitimate expectation.¹⁰ Some tribunals, moreover, have identified transparency as an obligation also falling under the FET standard.¹¹

Not So Fast: Main Criticisms of the Legitimate Expectations Doctrine

Several tribunals, in addressing allegations of a breach of legitimate expectations, have pointed out that States have a right to regulate in favor of the public interest. For example, in *Saluka Investments BV v Czech Republic* ('*Saluka*'), the tribunal noted that no investor can reasonably expect that the circumstances prevailing at the time the investment was made will remain unchanged. For the *Saluka* tribunal, the determination of whether a frustration of expectations was justified and reasonable must consider the host state's right to regulate domestic affairs considering the public interest.¹²

In other cases, it was questioned whether a legitimate expectation can depend upon what the investor subjectively expected,¹³ and it has been reaffirmed that a State is entitled to some reasonable degree of regulatory flexibility to respond to the needs of the public interest.¹⁴

In addition, case law reinforces that the political, social, and economic background of the host State is relevant in assessing whether investor expectations are legitimate. Other cases highlight the 'narrow expectations' generated by 'general legislative statements', stating that to assess whether a legitimate expectation exists, "relevant factors include: [...] ii) general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk

5 *Técnicas Medioambientales Tecmed, SA v The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003, [154]. Allegedly, one of the most cited cases of arbitral jurisprudence: see R Dolzer, 'Fair and Equitable Treatment: Today's Contours' (2013) 12(1) *Santa Clara Journal of International Law* 10, 14.

6 See, eg, *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011, [348].

7 Lucy F. Reed and Simon Consedine, 'Fair and Equitable Treatment: Legitimate Expectations and Transparency' in M Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 284, 288.

8 See, eg, *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic* (ICSID Case No. ARB/03/19) Decision on Liability, 30 July 2010, [189]; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic* (ICSID Case No. ARB/01/3) Award, 22 May 2007, [262]; *National Grid PLC v Argentine Republic* (UNCITRAL Case) Award, 3 November 2008, [170]; *Sempra Energy International v The Argentine Republic* (ICSID Case No. ARB/02/16) Award, 28 September 2007, [300].

9 *Glamis Gold, Ltd v United States* (UNCITRAL Case (NAFTA)) Award, 8 June 2009, [627].

10 *Walter Bau AG (in liq) v Kingdom of Thailand* (UNCITRAL Case) Award, 1 July 2009, [12.2].

11 *Metalclad Corporation v The United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2000, [76].

12 *Saluka Investments BV v Czech Republic* (UNCITRAL Case) Partial Award, 17 March 2006, [305].

13 *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (ICSID Case. No. ARB/01/7) Decision on Annulment, 21 March 2007, [67].

14 *Electrabel SA v. The Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, [7.75].

is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*.¹⁵

The jurisprudence also recalls the ‘undeniable’ right and privilege of the State to exercise its sovereign legislative power, which includes enacting, amending or annulling laws, unless a stabilization clause or related covenants exist. This is coupled with the duty of due diligence to be exercised by investors.¹⁶

In short, the scenario regarding the validity and content of legitimate expectations has never been free of debate, and there are still many unknowns to be resolved or, at least, to be answered in a coherent and in an unambiguous manner that can provide legal certainty to investors and states.

When can a Legitimate Expectation Arise?

Tribunals have consistently held that protected expectations are the ones existent at the time of an investment, and that investors make their decision to invest based upon the law and representations existing at the time of the investment.¹⁷ One of the unknowns, referred to above, is the extent to which this is still true.

This position became nuanced in *Frontier v Czech Republic* (*Frontier*). The *Frontier* tribunal found that ‘where investments are made through several steps, spread over a period of time, legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganization of the investment.’¹⁸

Setting a cut-off date for when a legitimate expectation can effectively induce an investor to establish or expand an investment could prove troublesome. Investments are not static, and rarely occur in clearly defined stages. It could be the case that an expectation did not in fact induce an investor to expand or establish an investment, but did induce an investor to maintain a particular asset.

This was precisely what happened in *Tethyan v Pakistan* (*Tethyan*). There, the tribunal understood that the claimant, which owned a mining operation, maintained, and expanded its investment due to encouragement by the State. The tribunal found that since the ‘major part’ of the claimant’s expenditures came after the host State’s representation, a legitimate expectation did exist, even though it was constituted after the establishment of the initial investment.¹⁹

Another possible and factually-probable situation is one in which an investor, after initially establishing an investment, takes a business decision in reliance on policy set after the investment’s initial implementation. Although the decision might have not been business-critical, it would be difficult and arguably unreasonable to suggest that the legitimate expectation in question here should not in fact be afforded protection.

For example, if a foreign investor’s company which produces wheat decides to produce barley specifically because of tax incentives introduced by the host State, which were promised to last for a certain amount of time, and those incentives are then taken away before the allotted time, it would be reasonable for the company to seek for damages: regardless of whether the expectation in question did or did not damage the underlying business, or whether or not the expectation was made after the initial establishment of the investment. It would also be hard to argue that the decision to expand the production of the company to another crop was not a key step in the implementation of the investment.

In this sense, the key question for deciding whether or not an investor’s expectation is in fact legitimate (and thus worthy of protection under the FET standard) is not timing (ie. when it was created), but whether or not there was a formal or informal representation or legal framework that the investor relied upon throughout the conduct of its business.

15 *Continental Casualty Company v Argentine Republic* (ICSID Case No. ARB/03/9) Award, 5 September 2008, [261].

16 *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case No. ARB/05/8) Award, 11 September 2007, [333].

17 *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award, 20 May 1992, [82]. See also *Dredging International NV v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award, 6 November 2008, [265].

18 *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL Case (PCA)), Final Award, 12 November 2010, [287]. See also *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, [340].

19 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), Decision on Jurisdiction and Liability, 10 November 2017, [901].

Even if one were to assume the position that an expectation may only be protected if it is made in the context of a critical step in the implementation of the investment, it would be hard to argue that any major business decision that went awry and later became the basis for an investment arbitration was not in fact a critical step in the advancement of said investment. Thus, the exclusion of legitimate expectations based solely upon timing considerations becomes even more troublesome: and, perhaps, unreasonable, especially given the complex nature of investments, which are rarely able to be separated into neatly discernable steps.

Therefore, the proposition that legitimate expectations are only legitimate when certain timing rules are satisfied is arguably largely moot: since most major business decisions can be regarded as a significant step in the implementation of an investment, and since it is also difficult to clearly identify when one step ends, and when another one begins.

Concluding Remarks

In recent years, there has been much discussion addressing whether or not the concept of legitimate expectations has been 'spiraling out of control',²⁰ since in principle, the doctrine can be used to afford a wide range of protections to investors, at any time during their investment, to the detriment of the host States' capacity to make and give effect to public policy.

The wide range of situations which could give rise to legitimate expectations have led many States into modifying the language of FET clauses, in order to specifically deny the protection of legitimate expectations.

This trend can already be seen in the more recently negotiated Australian BITs. For example, in the 2019²¹ BIT signed between Hong Kong and Australia, which replaced the more broadly worded 1993²² BIT signed between the two jurisdictions, the Fair and Equitable

Treatment clause was changed to expressly exclude the protection of legitimate expectations. The same exclusion was present in the BIT signed with Uruguay, but is not seen in older treaties, such as the BITs signed with the Czech Republic, Argentina, and Egypt.²³

The recent tendency of modern Australian BITs to specifically exclude the application of legitimate expectations reflects a broader trend in investment treaty practice to limit the situations which could give rise to a breach in the FET standard.

In this sense, it is important for States, when signing BITs, to keep in mind what the concept of legitimate expectations under the FET standard can entail: ideally, those States would specifically set out whether legitimate expectations will in fact be protected, or at least define the time at which said expectations may arise. Otherwise, there is a risk that the legitimate expectations doctrine might lose its meaning and purpose, and generate arbitrary results which undermine the concept and the legitimacy of its application.

Therefore, to limit the potential circumstances in which a legitimate expectation may arise (in order to secure a host nation's flexibility in making public policy), it would be advisable for treaties to limit the possibility of legitimate expectations arising to the time from which the investment effectively commences its operation, or to clarify whether it extends further into an investment's lifespan. An express disposition would be helpful for investors and host States alike, and would secure certainty and clarity as to when the BIT limits the concept's application.

20 Augusto García Sanjur and Dilara Khamitova, 'Is the concept of Legitimate Expectations Spiraling Out of Control?', *British Institute of International and Comparative Law* (Web Page, 9 November 2022) 1, 2 <<https://www.biicl.org/blog/49/is-the-concept-of-legitimate-expectations-spiraling-out-of-control?>>.

21 *Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China* (2019), art 8.

22 *Australia and Hong Kong (under an Entrustment of Authority from the Government of the United Kingdom) Agreement for the Promotion and Protection of Investments* (1993), art 2.

23 *Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments* (2002), art 3.

Transparency in International Arbitration: Balancing the Need for Openness with the Need for Confidentiality



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Introduction

International arbitration is often presented as an efficient and appropriate alternative to domestic court systems for resolving conflicts. For international arbitration to be effective, it is essential that the procedure adopted be open and accountable. This article will discuss the significance of openness in international arbitration and how it may promote justice, foster trust, and avoid corruption and misbehaviour.

The Importance of Transparency

Transparency is an essential component of international arbitration. It is integral to ensuring the fairness and integrity of the arbitral process by minimising opportunities for corruption and misconduct. For instance, disclosing arbitrators' names and potential

conflicts of interest can prevent bias and corruption. In *Chartered Institute of Arbitrators v B* (*Chartered Institute of Arbitrators*),³ the England and Wales High Court (Commercial Court) recognised the importance of transparency by allowing the disclosure of confidential arbitration documents to prove an arbitrator's bias. Such disclosures can help to prevent disputes or challenges to the outcome of the arbitration.

Transparency helps build trust and confidence in the arbitration process among the parties involved and the general public. Trust promotes the use of arbitration in resolving disputes and as a reasonable and effective alternative to domestic judicial systems. Ensuring the public's trust in arbitration proceedings was linked to the general public interest in the *Chartered Institute of Arbitrators* case. In that case, the Court allowed the disclosure of arbitral documents in relation to allegations of bias. In doing so, the Court settled the general public's interest as an exception to the principle that arbitrations are confidential.

Trust is especially crucial for international investment arbitration, where one of the parties involved is a state. Since one of the parties is a state, the outcome of such arbitrations affects state policies. For instance, *Biwater Gauff (Tanzania) v United Republic of Tanzania*⁴ involved adjudication on the privatisation of water resources. In that case, the tribunal allowed non-governmental organisation representation since it was required to

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3 *Chartered Institute of Arbitrators v B* (2019) EWHC 460 (Comm) (*Chartered Institute of Arbitrators*).

4 *Biwater Gauff (Tanzania) v United Republic of Tanzania (Procedural Order No. 3 of 29 September 2006)* (2006) ICSID Case No. ARB/05/22.

adjudicate a matter of public interest. Following suit, the United Nations recognised the importance of transparency in state arbitrations when, in 2014, it produced the *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules* ('UNCITRAL Rules on Transparency').⁵

Lastly, transparency can facilitate open and fair resolution of disputes in international arbitration. Suppose the rules and procedures of arbitration like the manner of taking evidence and basis of appointing arbitrators can be made public. In that case, parties involved in the arbitration can be clear about what is expected of them, which can help prevent misunderstandings or disputes about the process. The ICC's 2021 Rules offer a detailed list of rules and procedures used in its arbitration, including provisions for the appointment and removal of arbitrators, applicable rules of law and the time limit for arbitration, among other things. This can help prevent disputes on procedural considerations like composition of the Tribunal.

Challenges and Risks

The issue of transparency in international arbitration proceedings is complex and contentious. Transparency is an essential aspect of international arbitration. An English Court of Appeal in *Dolling-Baker v Merrett*⁶ held that confidentiality is embedded in the nature of the arbitration. The Court held that parties have an implied obligation not to disclose to third parties the documents disclosed, produced or prepared in the arbitration. At the same time, there are also challenges and risks associated with transparency in this context. One of the critical challenges is the need to balance transparency with confidentiality. The UNCITRAL attempted such balancing by incorporating various transparency provisions in the UNCITRAL Rules on Transparency.⁷

International arbitration is often used to resolve disputes between private parties. Maintaining the confidentiality

of those disputes is crucial to protect the interests of the parties involved. For example, trade secrets or other confidential information may be at stake in arbitration. Publicising this information could harm the parties involved. The England and Wales High Court recognises an implied term of confidentiality in arbitration proceedings as a matter of business efficacy, as recognised in *Hassneh Insurance Co of Israel v Stuart J Mew*.⁸

On the other hand, in international investment disputes, one of the parties is the state. Decisions in such arbitrations invariably affect public policies and the general public interest. Thus, investment arbitrations may justify the imposition of higher obligations of transparency. For instance, in *Metalclad Corporation v. The United Mexican States*,⁹ the Mexican government was held liable for damages for denying a United States corporation the permission to operate a toxic waste landfill in Mexico. This case gained widespread media coverage for its procedural deficiencies, affecting a change in United States policy on transparency in international investment arbitrations. Different approaches must be preferred to tackle both situations.

Another concern is the possibility that openness may be utilised to undermine the arbitration procedure. In rare instances, participants in arbitration may attempt to gain an unfair advantage by exploiting publicly available information to influence the outcome. Such behaviour may impede arbitration and undermine the system's fairness and credibility.

Thus, it is crucial for arbitration tribunals and other parties to strike a just balance between the need for openness and the need for confidentiality. To guarantee that the arbitration process is fair, effective, and respected by all parties, the challenges and risks of transparency in international arbitration must be thoroughly explored and appropriately handled.

⁵ *United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules*, GA Res 68/109, UN Doc A/68/462 (adopted 16 December 2013) ('Rules on Transparency').

⁶ *Dolling-Baker v Merrett* (1990) 1 WLR 1205.

⁷ *Rules on Transparency* (n 3).

⁸ *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243.

⁹ *Metalclad Corporation v The United Mexican States (Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information of 27 October 1997)* (1997) ICSID Case No. ARB(AF)/97/1.

Dealing with the Challenges and Risks of Transparency

Given the significance of transparency in international arbitration and the attendant challenges and risks, it is vital to investigate how to address these concerns. One method is establishing explicit standards and procedures for openness in international arbitration and ensuring that they are regularly followed. For instance, arbitration tribunals may be compelled to publicise the arbitration's rules and processes and any findings and awards. This may guarantee that the parties to the arbitration are informed of the decision-making process and criteria. It may avert disagreements and misunderstandings.

The Rules on Transparency opt for such transparency provisions in investment arbitrations.¹⁰ The rules provide for public disclosure of information and documents used in arbitral proceedings, subject to given safeguards. Right from initiating proceedings, the parties' names, the economic sector involved, and the applicable treaty would be disclosed. All notices, submissions, exhibits and transcripts of the proceedings would be available to the public. Additionally, the tribunal may publish expert reports and witness statements upon request. These provisions are subject to safeguards to prevent the disclosure of confidential information, undue burdens or delays to the arbitral process.

The Vienna International Arbitral Centre ('VIAC') follows the same principle. According to Article 41 of the VIAC's Rules of Arbitration and Mediation,¹¹ the institution can publish an anonymised summary or extracts of its awards unless parties raise an objection. In practice, too, it routinely publishes such edited extracts of awards.

In addition, arbitration tribunals can be required to publish the names of arbitrators involved and any potential conflicts of interest that they may have. This helps to ensure that the arbitrators are impartial and independent to minimise concerns about bias or

corruption. The International Chamber of Commerce has sought to achieve such transparency. Article 5 of Appendix II of the ICC's Rules of Arbitration allows the court to give reasons for its decisions on an arbitrator's appointment, removal or replacement.¹² The ICC has published the names of arbitrators adjudicating its cases since 2016.

Another approach is to provide adequate safeguards for confidentiality in international arbitration. Parties and institutions can establish clear rules for what can be made public and what must be kept confidential. The ICSID's approach in *Burlington Resources Inc. v. Republic of Ecuador*¹³ is illustrative. There, the publishing of investment arbitration proceedings was subjected to a three-fold requirement of identification of (i) necessary excerpts, (ii) purpose and (iii) necessitating reasons.

Singapore's Arbitration Act offers another model for balancing confidentiality with transparency.¹⁴ Section 57(3) of that legislation allows disclosure of confidential information subject to the consent of concerned parties. Additionally, the court may reveal confidential information, but only if it would not reveal the identity of any party or any matter that the party wishes to remain confidential.

Institutions can also establish procedures for protecting confidential information during the arbitration process. This can take the form of a requirement for parties to submit confidential information to the arbitration tribunal in a sealed envelope or a provision allowing the arbitration tribunal to redact confidential information from any public documents, amongst other things. Article 7 of the UNCITRAL Rules on Transparency provides for prompt designation and redaction of confidential information. Any information a state considers must remain confidential to protect 'essential security interests' would be exempt from disclosure.

Overall, dealing with the challenges and risks of

¹⁰ *Rules on Transparency* (n 3).

¹¹ Vienna International Arbitral Centre, '*Rules of Arbitration and Mediation*' (adopted 1 July 2021).

¹² International Chamber of Commerce, '*Rules of Arbitration*' (adopted 1 January 2021) r 11.

¹³ *Burlington Resources Inc. v. Republic of Ecuador, (Decision on Counterclaims of 7 February 2017)* (2017) ICSID Case No. ARB/08/5.

¹⁴ *Arbitration Act* (Singapore. cap 10, 2002 rev ed).

transparency in international arbitration requires a careful balance between the need for transparency and the need for confidentiality. Establishing clear guidelines and rules and providing adequate safeguards for confidentiality can foster just settlement of disputes by arbitration.

Conclusion

In conclusion, transparency is an essential component of international arbitration. It promotes fairness and impartiality, increasing public confidence in the process. However, transparency also poses challenges and risks in international arbitration, lest it is used to undermine the process. For effective redressal, transparency needs to be balanced carefully with confidentiality.

A proper balance of transparency and confidentiality may be found by establishing clear guidelines and rules for transparency and providing adequate safeguards for confidentiality. The appropriate level of transparency in international arbitration proceedings will depend on each case's specific circumstances and the parties' varying needs. By promoting fairness and accountability, building trust and confidence, and minimising corruption and misconduct, transparency is essential for ensuring that the arbitration process is fair, effective, and respected by all parties.

Arbitration v Litigation - The Comparative Cost Debate (Continued)



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Introduction

The ubiquitous debate whether arbitration or litigation is more expensive than the other shows no sign of fading in the immediate future. Perhaps the most common economic arguments for each are the absence, ordinarily, of any merits appeals, in the case of commercial arbitration,¹ and the generally lesser tribunal fees and expenses, in the case of curial determination.

A further distinction between the arbitral and curial options, and one that is suggested weigh in favour of arbitration from an economic perspective, arises from the occasional necessity or desirability for a trial judge or for an intermediate court of appeal to determine factual questions arising from the evidence, even if those questions are not necessary to answer due to conclusions reached on other issues. As was said by Basten JA, (with whom Ipp JA and Sackville AJA agreed), in *Rebenta Pty Ltd v Wise*²:

9 It is often desirable in the case of a trial judge, who has heard evidence on a matter, to determine factual questions arising from the evidence, even if they are not necessary on conclusions which have been reached on other issues. That is because some account must always be taken of the possibility of a successful appeal, requiring the further evidence to be assessed, or in all likelihood repeated on a rehearing. The costs which are likely to flow to the parties in such an event will rarely be justified by the savings in judicial time. Further, such an event is more likely where there is a full appeal by way of rehearing, than where there is a more limited right of appeal.

10 With respect to an intermediate court of appeal, there is no further right of appeal, absent a grant of special leave to appeal to the High Court. While it seems undesirable in many cases to assess the likelihood of a grant of special leave and if granted, the likelihood of success on an appeal, in some cases such consideration may be appropriate: cf *Health World Ltd v Shin-Sun Australia Pty Ltd* [2009] FCAFC 14; 174 FCR 218 at [47] (Perram J, Emmett and Besanko JJ agreeing). Nevertheless, it will usually be open to the intermediate appellate court to work on the basis that a successful appeal is, in a run-of-the-mill case, a possibility, but not a probability.

It is the possibility of an appeal that underpins the necessity or desirability of a trial judge deciding issues that are strictly superfluous to the determinative issue in

1 *AKN v ALC* [2015] 3 SLR 488 [37]-[39]; *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163 [21]-[22]; *Spaseski v Mladenovski* [2019] WASC 65 [55], [60]. Excluded, for present purposes, are cases of parties agreeing to an appeal, as where, for example, s.34A of the domestic *Commercial Arbitration Acts* is engaged.

2 [2009] NSWCA 212.

any case. That possibility is not present in a commercial arbitration, generally speaking, subject to just what it is that the parties and the arbitrator have agreed that the tribunal is to determine, it is submitted that it is not necessary, and perhaps undesirable, for an arbitrator to go beyond the determinative issue or issues. Further, and importantly, the comparative cost to the parties will be less if the arbitrator declines to proceed beyond the determinative points.

Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd [2022] QCA 266

The foregoing reflections are prompted by the recent decision of the Queensland Court of Appeal in *Built Qld Pty Ltd v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd*³. The case concerned claims made by a contractor against a principal arising out of the parties' contract for the refurbishment of a Queensland hotel. Before the Supreme Court of Queensland, the contractor claimed that a defects notice of 11 August 2016 given by the contract superintendent to the contractor amounted to a direction to vary the contract giving the contractor an entitlement to (1) the price of the varied work, (2) an extension of time (EOT), and (3) delay damages.

The trial judge held that the contractor was not entitled to any EOT for carrying out the work it was directed to perform by the defects notice. However, the judge did not make any finding as to the EOT due to the appellant upon the alternative conclusion that the contractor was so entitled.

On appeal, the court found the contractor was entitled to succeed on its claim for an EOT.⁴ It accordingly became necessary to assess the delay to completion caused by the 11 August 2016 notice - a task that had not been undertaken at first instance given the judge's decision not to allow the claimed EOT. Of that the Court of Appeal said: "Although the primary judge did not find that the appellant was entitled to an EOT, she should have gone on to assess the EOT which ought to have been granted, if her conclusion was wrong"⁵ It thus fell to the Court of Appeal to undertake the task.⁶ It concluded that the contractor was entitled to an EOT of 83 days.⁷

Conclusion

It is submitted that, had the judgment at first instance in *Built* been an award of an arbitrator in the same terms, the arbitrator would not have been subject to the same criticism as was the trial judge. It was the possibility of an appeal in *Built* that rendered it desirable or necessary that the judge address the counterfactual and that possibility would not ordinarily be present in arbitral proceedings.

Conversely, criticism of an arbitrator in similar circumstances to those in *Built* might be seen where the tribunal determined questions it was not strictly necessary to answer given the tribunal's primary findings. In such a case the parties might not be entirely without justification in saying that they were put to needless cost.

³ [2022] QCA 266 ('Built'). On 13 April 2023 the High Court dismissed an application by the principal (respondent) for special leave to appeal from the decision of the Court of Appeal: [2023] HCASL 43.

⁴ *Built* [99].

⁵ *Ibid* [101], citing *Elliott v Lawrence* [1966] Qd R 440, 444-445 and *Stockland Property Management Pty Ltd v Cairns City Council* [2011] 1 Qd R 77, 99 [55], per Keane JA.

⁶ *Built* [105].

⁷ *Ibid* [144].

Australia's (Dis)Engagement with Investor-State Arbitration: A Sequel



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A seminar held on 10 November 2022 during the Australian Arbitration Week, organised by the UNCITRAL National Coordination Committee for Australia ('UNCCA') and hosted by Allens in Melbourne, discussed 'Australia's engagement in the ISDS [investor-state dispute settlement] reform process'.¹ My presentation divided successive governments' approach into three significant eras over the last decade or so: anti-ISDS (2011-13), case-by-case ISDS (2014-21), and uncertainty (2022-present).

Some of the uncertainty in this current third era has dissipated since the seminar: Australia has now reverted to opposing investor-state dispute settlement ('ISDS') arbitration. On 14 November Australia's current Trade Minister Dan Farrell declared that the new Labor

Government 'will not include ISDS in any new trade agreements'² and would attempt to reduce their impact in existing agreements. On the latter point, he stated that 'when opportunities arise, we will actively engage in processes to reform existing ISDS mechanisms to enhance transparency, consistency and ensure adequate scope to allow the Government to regulate in the public interest'. The announcement promptly generated concern from commentators from the Business Council of Australia³ and legal practice, including Dr Sam Luttrell (who also presented at the UNCCA seminar).

The announcement provided little detail on this anti-ISDS policy shift, so we need to go back in history. But it is also conceivable that the announcement was made in anticipation of the second-ever ISDS arbitration claim being filed against Australia,⁴ by Zeph registered in Singapore and controlled by Clive Palmer, commenced in late March 2023 under the ASEAN-Australia-New Zealand Free Trade Agreement ('FTA'). Below I locate the Trade Minister's announcement in context and sketch some implications, drawing partly on my 2021 book of selected essays on investor-state and commercial arbitration, focusing on Australia and Japan⁵ in regional and global contexts.

1. Anti-ISDS (2011-13)

Before this sequel, in the first era beginning in 2011, the centre-left (Labor/Greens) Gillard Government had

1 UNCITRAL National Coordination Committee for Australia (UNCCA), *Australia's engagement in the ISDS reform process* (2023) <https://www.uncca.org/event-details/australias-engagement-in-the-isds-reform-process>.

2 Senator the Hon Don Farrell, 'Trading our way to greater prosperity and security' (Albanese Government Trade and Investment Agenda, The Australian APEC Study Centre, 14 November 2022).

3 Andrew Tillett and Ronald Mizen, 'Business warns investors could be spooked over trade agreement changes', *Australian Financial Review* (online, 14 November 2022) <https://www.afr.com/politics/federal/business-warns-investors-could-be-spooked-over-trade-agreement-changes-20221114-p5by1r>.

4 David Weber and Nicholas Perpetch, 'Clive Palmer to sue Australia for \$300 billion over iron ore project in WA's Pilbara region', *ABC News* (online, 30 March 2023) <https://www.abc.net.au/news/2023-03-30/clive-palmer-to-sue-australia-for-300b-over-iron-ore-project/102166246>.

5 Luke Nottage, *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts* (Elgar, 2021), with introductory chapter and other related material available via <https://japaneselaw.sydneym.edu.au/2020/08/book-in-press-with-elgar/>.

declared that Australia would no longer agree to any form of ISDS in future bilateral investment treaties ('BITs') or FTA investment chapters. That stance derived partly from the Productivity Commission's recommendation (by majority) in its 2010 report into international trade policy more generally, which favoured more unilateral liberalisation measures and was skeptical about proliferating FTAs from a more laissez faire perspective. On ISDS provisions, the draft and then final reports asserted that there was no good evidence that offering them led to more FDI flows, Australian investors did not invoke investor-state arbitration, and ISDS could lead to 'regulatory chill'. Additionally, the Gillard Government anti-ISDS policy from 2011 was driven by concerns from the political left about investment and trade liberalisation generally. It was probably also influenced by Philip Morris Asia initiating the first-ever ISDS dispute against Australia around this time, challenging Australia's tobacco plain packaging legislation under the (then) BIT with Hong Kong. The anti-ISDS policy delayed conclusion of major FTAs with China, Korea and Japan, large exporters of capital to Australia which pressed for such provisions.

2. Case-by-Case ISDS (2014-2021)

However, after the centre-right Coalition government won the election in late 2013, it reverted to the pre-2011 approach of agreeing to ISDS provisions on a case-by-case assessment. FTAs were soon concluded with China and Korea, including ISDS. The FTA concluded with Japan did omit ISDS, but probably because it did not offer Australia sufficient extra export market access or other benefits, at a time when the Coalition Government had difficulties passing legislation through the upper house of Parliament. Japan's longer positive experience of investing in Australia also meant it could play the long game and seek ISDS-backed protections through other treaties, which it eventually achieved in fact through both

countries ratifying the Comprehensive and Progressive Agreement for Trans-Pacific Partnership mega-regional FTA ('CPTPP', in force for both states from 2019). The Labor Opposition voted with the Government to pass tariff-reduction legislation needed to ratify these ISDS-backed treaties, unlike the Greens, declaring the Labor Party's continued opposition to ISDS but assessing the FTAs as overall in the national interest.

Additionally, over this second era, the Coalition Government omitted ISDS in the Pacific Agreement on Closer Economic Relations (PACER) Plus FTA with Pacific Island micro-states, given their limited inbound investment prospects and capacity as host states to defend ISDS claims. It also agreed to omit ISDS in the Regional Comprehensive Economic Partnership ('RCEP') or ASEAN+5 FTA, probably because almost all pairs of its 15 member states have at least one ISDS-backed treaty among themselves anyway.⁶ The Coalition Government also renegotiated a few early FTAs and BITs (eg with Singapore, Uruguay and Hong Kong), replacing them with CPTPP-like provisions to add more detail to investor rights or indeed to rebalance them in a somewhat more pro-host-state manner in light of emerging investment treaty case law. It also solicited public submissions to inform a review of older treaties,⁷ although the Government did not then publish a report (let alone any Model BIT) formalising its evolving negotiating preferences. Australia further [ratified the Mauritius Convention](#) in 2020 to help retrofit transparency provisions on older treaties, although this will bite primarily only if other states also ratify the Convention and so far few have done so.⁸

Australia's renewed nuanced approach towards ISDS over 2014-21 may have been influenced by some (but not very strong) evidence, in Asia⁹ and more widely,¹⁰ that ISDS provisions do in fact have significant positive

6 Luke Nottage and Bruno Jetin, 'Introduction' in Luke Nottage et al (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Kluwer Law International, 2021) 1-38.

7 Australian Government Department of Foreign Affairs and Trade, *Australia's bilateral investment treaties (2023)* <https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties>.

8 Luke Nottage and Ana Ubilava, 'Novel and Noteworthy Aspects of Australia's Recent Investment Agreements and ISDS' in Luke Nottage et al (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Kluwer Law International, 2021) 115-40.

9 Luke Nottage, 'Rebalancing Investment Treaties and Arbitration in the Asian Region' in Mahdev Mohan and Chester Brown (eds), *The Asian Turn in International Investment* (Cambridge University Press, 2021) 379-398.

10 Shiro Armstrong and Luke Nottage, 'Mixing Methodologies in Empirically Investigating Investor-State Arbitration' in Ole Kristian Fauchald and Malcolm Langford Daniel Behn (ed), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, 2015) 315-364.

impacts on FDI flows. Also, ratifying investment treaties globally certainly impacted FDI, meaning that a minority of states increasingly holding out against all ISDS would have instead reduced ratifications and therefore FDI flows. Other empirical research, highlighted by Dr Sam Luttrell at the recent UNCCA seminar, adds that ISDS-backed treaties reduce the cost of syndicated loan finance for cross-border investors.¹¹

Luttrell's presentation further reinforced how Australian investors (particularly in long-term resources projects) not only take into account ISDS protections but also started commencing outbound investor-state arbitrations under Australian treaties¹² (or contracts) alleging host states have violated their substantive commitments. This is especially so since the successful *White Industries v India* award¹³ in 2010, which the Productivity Commission seems to have been unaware of. Concerns about 'regulatory chill' also seem to have declined as Australia defeated Philip Morris Asia on jurisdiction in 2015 (and Uruguay later defeated the parent company on the merits regarding its own tobacco packaging measures), and as no further inbound ISDS arbitrations were commenced against Australia. Nonetheless, perhaps because ISDS remained a live issue in parliamentary treaty ratification hearings and successive Coalition Governments did not control the upper House, Australia does not seem to have been particularly vocal in multilateral ISDS reform discussions in UNCITRAL or ICSID, although it has participated.¹⁴

3. Uncertainty then Anti-ISDS Again (2022-present)

After Labor won the general election in May 2022, the new Government had not publicly declared its policy approach towards ISDS, until the Trade Minister's announcement on 14 November 2022. At the UNCCA seminar the week before, I noted that the foreign ministry's website still stated that Australia assesses ISDS on a case-by-case assessment. However, setting policy going into the election, the Labor Party's 2021 National Platform¹⁵ had reiterated that 'Labor will not enter into agreements that include ISDS provisions'.¹⁶ In addition, it stated:

Labor in government will review ISDS provisions in existing trade and investment agreements and seek to work with Australia's trading partners to remove these provisions. While this process is underway, Labor will work with the international community to reform ISDS tribunals so they remove perceived conflicts of interest by temporary appointed judges, adhere to precedents and include appeal mechanisms.

Labor will set up a full time negotiating team within the Department of Foreign Affairs and Trade whose sole job will be to negotiate the removal of ISDS clauses ...¹⁷

Until 14 November 2022, there had been no public announcement about any such initiatives. Nonetheless,

11 Veljko Fotak, Haekwon Lee and William Megginson, 'A BIT of Investor Protection: How Bilateral Investment Treaties Impact the Terms of Syndicated Loans' (2019) 102 *Journal of Banking and Finance* 138, 155.

12 United Nations Conference on Trade and Development, *Investment Dispute Settlement Navigator* (2023) <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/11/australia>.

13 James Claxton, Luke Nottage and Ana Ubilava, 'Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: New Developments and Implications for India and Australia' (2021) 13 *Indian Journal of International Economic Law* 209, 217.

14 Anthea Roberts and Taylor St John, *UNCITRAL and ISDS Reform (Hybrid): Season 5 – Watching the Grass Grow* (Blog of the European Journal of International Law, 24 November 2021) <https://www.ejiltalk.org/uncitral-and-isds-reform-hybrid-season-5-watching-the-grass-grow/>.

15 ALP, *ALP National Platform* (ALP Special Platform Conference, March 2021).

16 *Ibid* 9 [45].

17 *Ibid* 94 [33]-[34].

at the UNCCA seminar, I pointed out some possible implications of a renewed anti-ISDS policy for Australia's major ongoing FTA negotiations involving investment.¹⁸ namely with India (with a provisional agreement reached only on trade related matters) and the European Union.

4. Implications for Australia's Main FTA Negotiations

India unilaterally terminated its BIT with Australia in 2017, as part of its broader policy of winding back protections for foreign investors since the White Industries award and successive claims against India under other older treaties. Although India's new Model BIT from 2016 retains ISDS, it provides a narrow window and its substantive protections are heavily circumscribed, and India has been able to only conclude a few new investment treaties¹⁹ from this negotiating position. Even maintaining the second era's case-by-case assessment policy, I therefore considered it quite possible that Australia and India could end up agreeing on a parallel investment treaty that leaves only inter-state arbitration, especially if India offered significant preferential market access to Australian investors.

Omitting ISDS is now the only possibility, under the newly announced Labor Government stance, but India now may not offer as much market access or other benefits to Australia. A better compromise, given problems encountered by foreign investors in India as well as Jawaharlal Nehru University Prof Jaivir Singh's empirical evidence²⁰ that ISDS-backed treaties cumulatively have had a positive impact on FDI inflows

for India, could have been a CPTPP-like investment treaty with some further innovations. Those might include a [mandatory mediation step before arbitration](#),²¹ as Australia agreed upon (unusually) with Indonesia in 2019 but not with Hong Kong.²²

Australia is also still negotiating an FTA with the EU, seemingly getting close to agreement as of June 2023. Since 2015, as a partly political compromise internally, the EU offers only an 'investment court' alternative to traditional ISDS, on a take it or leave it basis. Singapore took this option, for example, but Japan did not (preferring to stick with pre-existing BIT with EU member states with traditional ISDS and watching longer term multilateral reform discussions). In my opinion, Australia should probably take the investment court option, to secure an overall better FTA deal, as I have argued (with Prof Amokura Kawharu) also for New Zealand²³ after it too from 2018 mimicked Australia's first anti-ISDS policy. Arguably, this option is not 'ISDS' so it would not conflict with the Labor Party's 2021 platform and now the 14 November 2022 Labor Government's anti-ISDS position. Although the EU's investment court model allows foreign investors the right to directly commence arbitration, they cannot nominate arbitrators; they instead are pre-selected only by the home and host states, and then randomly assigned to hear the claim (and any appeal). If Australia adopts this interpretation of its stance eschewing ISDS, to conclude a deal with the EU, this would also signal to other regional players and UNCITRAL delegates that there is scope to be flexible in investment treaty negotiations.²⁴

18 Australian Government Department of Foreign Affairs and Trade, *FTAs under negotiation (2023)* <https://www.dfat.gov.au/trade/agreements/negotiations/ftas-under-negotiation>.

19 Ashutosh Kumar and Anjali Anchayil, Keeping a Distance: India's Approach towards Investment Treaties (Kluwer Arbitration Blog, 20 October 2022) <https://arbitrationblog.kluwerarbitration.com/2022/10/20/keeping-a-distance-indias-approach-towards-investment-treaties/>.

20 Jaivir Singh, Vatsala Shreet and Parnil Urdhwarshre, 'The Impact of Bilateral Investment Treaties on FDI Inflows Into India: Some Empirical Results' (2021) 57(3) *Foreign Trade Review* 231, 233.

21 James Claxton, Luke Nottage and Ana Ubilava, 'Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: New Developments and Implications for India and Australia' (2021) 13 *Indian Journal of International Economic Law* 209, 217.

22 James Claxton, Luke Nottage and Ana Ubilava, *Pioneering Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: IA-CEPA and HK-UAE BIT* (Kluwer Arbitration Blog, 5 September 2020) <https://arbitrationblog.kluwerarbitration.com/2020/09/05/pioneering-mandatory-investor-state-conciliation-before-arbitration-in-asia-pacific-treaties-ia-cepa-and-hk-uae-bit/>.

23 Amokura Kawharu and Luke Nottage, 'Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu' (2018) 18/03 *Sydney Law School Research Paper* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116526.

24 Amokura Kawharu and Luke Nottage, 'Models for Investment Treaties in the Asian Region: An Underview' (2017) 34(3) *Arizona Journal of International and Comparative Law* 462-528.

Meanwhile, the United Kingdom reached agreement in March 2023 to accede to the Comprehensive and Progressive Agreement on Trans-Pacific Partnership ('CPTPP'), although unions were [reportedly](#) condemning 'clauses in the deal that will allow large companies to sue the UK government behind closed doors if they believe their profits have suffered from changes to laws or regulations'.²⁵ Another [commentary](#) indicates that 'in light of the UK's "investment relationship" with Australia and New Zealand, the CPTPP's ISDS provisions will not apply between the UK and these two countries'.²⁶ This also surely reflects the anti-ISDS policy of Australia (renewed from November 2022) and New Zealand (from late 2017, which then acceded to the CPTPP after negotiating bilateral side letters excluding ISDS vis-a-vis some member states).

5. Impact from ISDS Arbitrations?

Arguably, an additional factor behind the recent policy shift by Australia has been that firms linked to right-wing politician and mining magnate Clive Palmer escalated complaints in 2020²⁷ by formally seeking consultations with the federal Government and then on 14 October 2020 notifying a dispute through his Singaporean company Zeph, after unsuccessful constitutional and

other [domestic law challenges](#).²⁸ This Notice of Dispute²⁹ alleged discrimination (including, via a most-favoured nation treatment provision, violation of an umbrella clause for example in Australia's BIT with Papua New Guinea), breach of fair and equitable treatment (including presumably denial of justice and disappointed legitimate expectations) [and possibly expropriation](#)³⁰ related to Western Australian state legislation impacting on iron ore rights and related past domestic arbitration awards. Given his high public profile, and rights originally held by his Australian company being transferred to Zeph in Singapore, the potential for a protracted ISDS arbitration under one of Singapore's multiple treaties with Australia, risks creating another Philip Morris Asia moment. The Notice of Arbitration filed at the end of March 2023 (not yet publicly available), claiming around A\$300 billion (including 'moral damages') plus interest and costs, certainly rekindled (mostly very negative) [media and political interest](#) in ISDS,³¹ which had peaked in Australia over 2010-16.³²

In addition, already in late 2022, concerns were reportedly being raised about potential ISDS claims brought by Asian and other investors and in Australian gas resources³³ under the Labor Government's plans to deal with the global energy crisis. Announcing now a

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- 25 Vladislav Djanic, 'UK Strikes Deal to Join CPTPP; ISDS is Included, But With Some Exceptions' *Investment Arbitration Reporter* (online, 31 March 2023) <https://www.iareporter.com/articles/uk-strikes-deal-to-join-cptpp-isds-is-included-but-with-some-exceptions/>.
- 26 Phillip Inman, 'UK joins Asia-Pacific CPTPP trade bloc that includes Japan and Australia', *The Guardian* (online, 31 March 2023) <https://www.theguardian.com/business/2023/mar/31/uk-joins-asia-pacific-cptpp-trade-bloc-that-includes-japan-and-australia>.
- 27 Luke Nottage, 'Clive Palmer versus (Western) Australia. He could survive a High Court loss if his company is found to be "foreign"', *The Conversation* (online, 10 September 2020) <https://theconversation.com/clive-palmer-versus-western-australia-he-could-survive-a-high-court-loss-if-his-company-is-found-to-be-foreign-145334>.
- 28 Donna Ross, *Up In Smoke: Will Clive Palmer's Singapore Company Be Denied Standing In Its ISDS Arbitration Against Australia?* (2021) 6(4) *Australian Dispute Resolution Bulletin* 54, also at <https://www.donnarossdisputeresolution.com/2021/07/08/up-in-smoke-will-clive-palmers-singapore-company-be-denied-standing-in-its-isds-arbitration-against-australia/>.
- 29 The Notice based on the Singapore-Australia FTA, lodged with the then Minister of Foreign Affairs through Volterra Fietta, is outlined by and downloadable via Jarrod Hepburn, 'Notice of dispute emerges in potential treaty claim against Australia' *Investment Arbitration Reporter* (online, 11 November 2021) <https://www.iareporter.com/articles/notice-of-dispute-surfaces-in-potential-treaty-claim-against-australia-following-domestic-court-loss-for-claimants-owner/>.
- 30 Jonathan Bonnitcha, *Can Clive Palmer use Investor-State Dispute Settlement to get what the High Court wouldn't give him?*, *Australian Public Law* (Blog Post, 1 December 2021) <https://www.auspublaw.org/blog/2021/12/can-clive-palmer-use-investor-state-dispute-settlement-to-get-what-the-high-court-wouldnt-give-him>.
- 31 Paul Karp, 'Clive Palmer hires Christian Porter for \$300bn lawsuit against Australian government', *The Guardian* (online, 30 March 2023) <https://www.theguardian.com/australia-news/2023/mar/30/clive-palmer-christian-porter-300bn-lawsuit-against-australian-government>.
- 32 Luke Nottage, 'International Arbitration and Society at Large' in Stefan Kroell et al (eds) *Cambridge Compendium of International Commercial and Investment Arbitration: Volume I* (Cambridge University Press, 2023) 389-423, with earlier manuscript also at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116528.
- 33 Ronald Mizen, 'Huge lawsuits loom over gas market intervention', *Australian Financial Review* (online, 10 November 2022) <https://www.afr.com/politics/federal/massive-lawsuits-loom-over-gas-market-intervention-20221106-p5bvwf>.

renewed anti-ISDS policy may help pre-empt public criticisms in this respect as well. However, any such claims would be preserved under existing treaties, while substantive commitments made under Australia's treaties (especially FTAs) anyway give the host state considerable scope to introduce emergency measures.³⁴

6. Conclusions

Whatever the impact of these potential claims on its policy-makers, Australia's renewed anti-ISDS posture will make it even more [difficult for RCEP to add ISDS protections](#),³⁵ unless the Labor Government backtracks or loses the next elections in 2025. ISDS must be discussed again among member states within two years of RCEP coming into force, with a decision then on whether and how to add ISDS to be reached within another three years (Art 10.18). Any implications for Australia's recently concluded review of its FTA with New Zealand and Australia³⁶ have yet to be spelled out as well.

In addition, the new Labor Government policy will probably have further ripple-on effects particularly across the Asia-Pacific region. It could also potentially impact on wider multilateral discussions about ISDS in UNCITRAL, and even on the 'modernisation' of or withdrawal from the ISDS-backed Energy Charter Treaty³⁷ (which Australia signed in 1994 but never ratified), especially if the Australian government can articulate more specifically the arguments and evidence for adopting this renewed anti-ISDS position.

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34 Andrew Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Elgar, 2017).

35 Henry Gao, 'The Investment Chapter in the Regional Comprehensive Economic Partnership: Enhanced Rules without Enforcement Mechanism' (ERIA Discussion Paper Series, Economic Research Institute for ASEAN and East Asia, 14 September 2022).

36 Senator the Hon Don Farrell, 'Australia strengthens trade agreement with ASEAN and New Zealand' (Joint Media Release with Anthony Albanese MP and Senator Tim Ayres, 13 November 2022).

37 Johannes Tropper, *Withdrawing from the Energy Charter Treaty: The End is (not) Near* (Kluwer Arbitration Blog, 4 November 2022) <https://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/>.

Calendar of Events

Please note that all event times noted are in Australian Western Standard Time (UTC +8)

TIME	EVENT	HOST
MONDAY 9 OCTOBER 2023		
08:30 - 18:00 followed by cocktails to 19:30	2023 International Arbitration Conference	ACICA and CI Arb Australia
19:30 onwards	AAW Kick-On Cocktails and Canapés with Peter & Kim and Omni Bridgeway	Peter & Kim and Omni Bridgeway
TUESDAY 10 OCTOBER 2023		
8:00 - 9:00	ArbitralWomen Breakfast	ArbitralWomen
8:30 - 9:30	Harnessing Generative AI: Large Language Models as Catalysts for Innovation in Arbitration	Ashurst
9:00 for 9:30-10:30	Government Intervention and Australia's LNG market: Deep Dive into the Export Control Regime	White & Case
9:30 - 10:30	The next new variant? Arbitration in the healthcare and life sciences sector	Corrs Chambers Westgarth
11:00 - 12:00	Overlapping Claim Areas and the Rise and Proliferation of Maritime Boundary and Related Hydrocarbon Disputes	DLA Piper
11:00 - 12:30	International Arbitration in the Asia-Pacific: what is hot and what is not? Key trends and developments in the region	King & Wood Mallesons
12:30 - 13:30	Climate issues at the intersection of law and politics	Twenty Essex
12:30 - 14:00	Maritime Arbitration Update	AMTAC
14:30 - 15:30	Disrupting Disputes: The benefits of arbitration in Technology	Corrs Chambers Westgarth
15:00 - 16:00	Critical errors and strategic missteps to avoid in International Arbitrations	Jones Day & Quayside Chambers
16:00 - 17:00	Immunity and justiciability in international arbitration: the limits of inquiry into State conduct	Twenty Essex
17:00 for 17:30-18:30	Ciarb Australia Annual Lecture	Ciarb Australia
17:30 for 18:00-19:00	War Stories from the Front Lines of Investment Arbitration: An Evening of Conversation	Norton Rose Fullbright
19:00 - 22:00	Quiz Night, Trivia for a Cause	Francis Burt Chambers & Opus2

For more information, see aaw.acica.org.au/aawcalendar

CONTINUES OVER:

CONFERENCE PARTNERS

Alpens << Linklaters

Francis Burt
FRANCIS BURT CHAMBERS

KordaMentha

driver trett

OPUS2

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Accuracy

MAXWELL CHAMBERS

Secretariat

Calendar of Events

Please note that all event times noted are in Australian Western Standard Time (UTC +8)

TIME	EVENT	HOST
WEDNESDAY 11 OCTOBER 2023		
7:15 for 7:30–8:30	Waking up to arbitration – trends and developments in commercial arbitration	Norton Rose Fullbright
9:00 - 11:00	Memorials – The Good, the Bad and the Ugly	ACICA45
9:00 - 10:00	The History and Evolution of Australian Arbitration – Past, Present and Future	ICC Australia
10:30 - 11:30	Kill the Technical Dispute	Resolution Institute
12:30 - 14:00	Blood, Sweat and T...ribunals	Clifford Chance
9:00 - 14:00	Arbitrator Roundtable	ACICA
14:30 - 15:30	Competence-Competence or Incompetence-Incompetence? Court intervention in tribunal jurisdiction	King & Wood Mallesons
14:30 - 15:30	Recent developments and future directions for investor-State dispute settlement reform in Australia and abroad	UNCCA
16:00 - 17:00	Arbitrating the energy life cycle: insights for construction, gas pricing, and transition disputes	Three Crowns
16:00 - 17:00	Jumpstart Your Career In International Arbitration: A Guide For Newcomers	ICC YAF
17:00 for 17:15–19:00	Ciarb YMG: From Down Under to Up Above	Ciarb Australia
17:30 - 19:00	Clayton Utz / University of Sydney Annual International Arbitration Lecture	Clayton Utz
19:00 - 22:00	Sunset Soiree	HF&W & LCM
THURSDAY 12 OCTOBER 2023		
8:30 - 9:30	Protecting foreign investments in times of unprecedented disruption	Ashurst
9:00 - 11:00	Resolving Disputes on Major Projects – Lessons Learnt from Recent Arbitration Proceedings	ABA & ACICA
11:30 - 12:30	The role of commercial and investment treaty arbitration in promoting de-carbonisation	Corrs Chambers Westgarth
11:30 - 12:30	Mitigating Sovereign Risk in International Construction Projects	Clifford Chance
12:45 - 14:45	ACICA Practice & Procedures toolkit session	ACICA
15:00 - 16:30	ICCA Hong Kong 2024 – Australian Roadshow	HKIAC
15:00 - 18:00	What's Next? A Panel Discussion of: Hot tubbing witnesses of fact & Cost of arbitration - Drive for greater efficiency	Lighthouse Club Australia
17:00 - 18:00	Expert evidence in arbitration – Separating case winners from case losers	Level 27 Chambers
18:00 for 18:30–20:00	The Great Debate – Arbitration: The Saviour or Saboteur? Exploring the promise of efficiency in arbitration	Corrs Chambers Westgarth
18:00 - 20:00	Sundowners with Sandgropers: War Stories from the Middle East and South East Asia – experiences arbitrating abroad	Asia-Pacific Forum for International Arbitration
FRIDAY 13 OCTOBER 2023		
9:00 - 10:30	ACICA Arbitrator Workshop	ACICA
11:00 - 12:30	Doing Evidence in Arbitration Better	ACICA

For more information, see aaw.acica.org.au/aawcalendar

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The Australian Centre for International Commercial Arbitration (ACICA) is Australia's only international arbitral institution. A signatory of co-operation agreements with over 50 global bodies including the Permanent Court of Arbitration (The Hague), it seeks to promote Australia as an international seat of arbitration. Established in 1985 as a not-for-profit public company, its membership includes world leading practitioners and academics expert in the field of international and domestic dispute resolution. ACICA has played a leadership role in the Australian Government's review of the *International Arbitration Act 1974* (Cth) and on 2 March 2011 the Australian Government confirmed ACICA as the sole default appointing authority competent to perform the arbitrator appointment functions under the Act. ACICA's suite of rules and clauses provide an advanced, efficient and flexible framework for the conduct of international arbitrations and mediations.

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