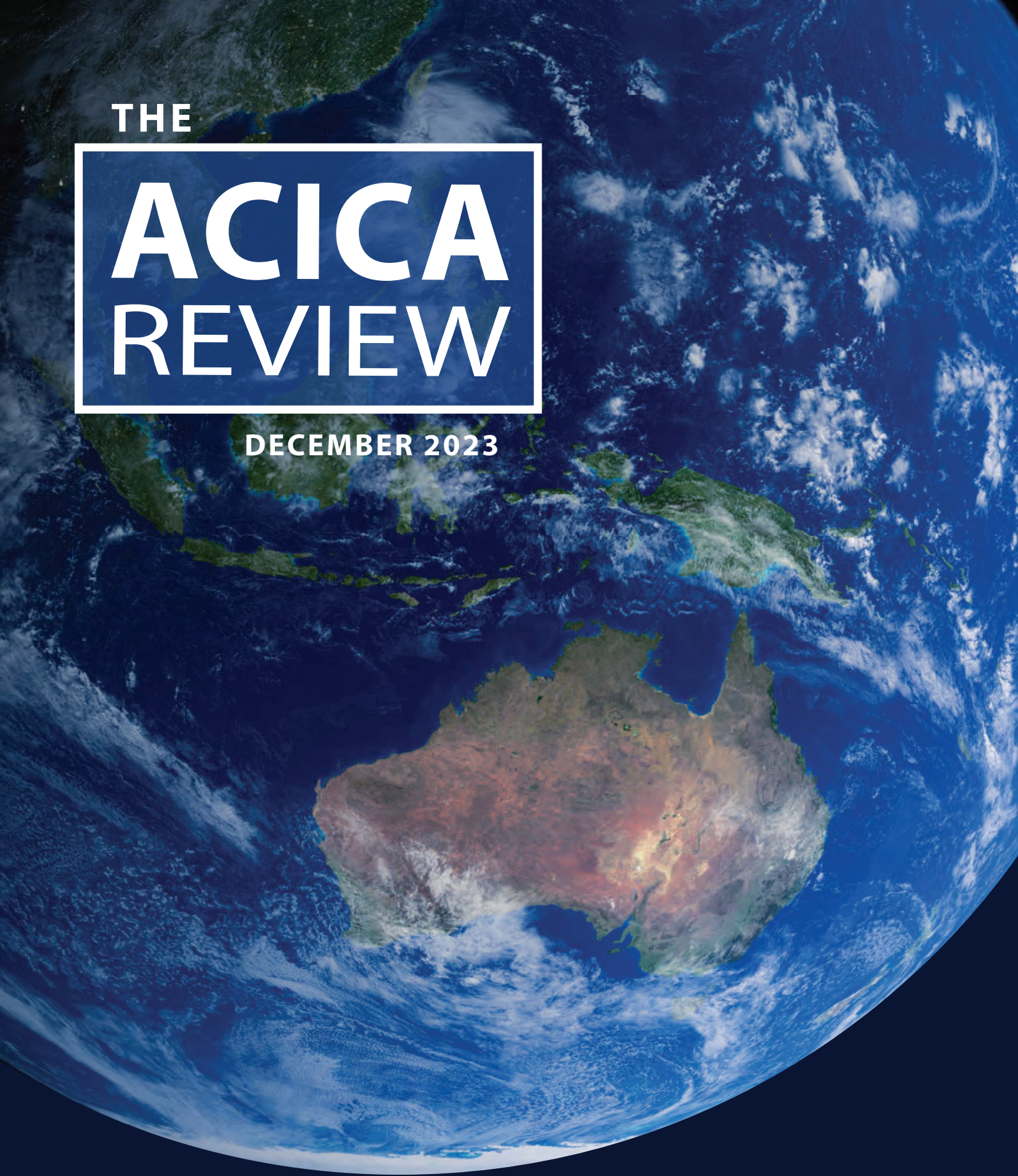

THE ACICA REVIEW

DECEMBER 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

DEC 2023 | Vol 11 | No 2

ISSN 1837 8994

Contents

THE ACICA REVIEW

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President's Welcome

Georgia Quick
ACICA President

Welcome to the December 2023 edition of the ACCIA Review.

We thank all the authors for their submissions and valuable insights. As the year draws to a close, we reflect on the some of the achievements and large initiatives throughout 2023. We can confidently say that 2023 has been another big successful and productive year for ACICA promoting the use of arbitration, administering cases, and promoting Australian cities as a seat for arbitrations. Some of the highlights are described below.

Friends of ACICA – Lisbon, Singapore and New Delhi

ACICA has continued to expand its global outreach through the Friends of ACICA network and events. This year we were delighted to bring together arbitration practitioners and business leaders to network and talk about ACICA and the benefits of having arbitrations with ACICA and in Australia. Across the year we have had events in Lisbon, Singapore, and New Delhi. We are grateful to our generous hosts of these events DLA Piper, Khaitan & Co and White & Case. We look forward to continuing to expand our international engagement through the Friends of ACICA initiative.

Australian Arbitration Week 2023 – Perth, Western Australia

We were delighted to be back in Perth for Australian Arbitration Week (**AAW**) 2023! This is the first time we have been back to Perth since 2018. We have again had a record year for Australian Arbitration Week. The 2023 ACICA/Ciarb International Arbitration Conference has surpassed last year's conference attendees, which at the time was the largest conference ACICA has held. We have had a diverse range of attendees coming from interstate in Australia, Canada, China, France, Hong Kong, India, Ghana, Kenya, Malaysia, New Zealand, Singapore, South Korea, Sweden, Switzerland, United Kingdom, and the United States. We are also pleased to see that 56% of the speakers for the conference were women. Certainly this is a testament to the continuing growth of Australian Arbitration Week locally and internationally!

AAW also featured a further 40 events throughout the week, it was a jam-packed week for the arbitration community. Thank you to all our supporting organisations and partners who have supported Australian Arbitration Week and the ACICA/Ciarb International Arbitration Conferences.

We hope to see you in Brisbane for Australian Arbitration Week 2024! So get in your diaries 13-18 October 2024 for the next AAW.

ACICA/FTI Consulting 2023 Evidence in International Arbitration Report

ACICA with the support of FTI Consulting launched the second 2023 Evidence in International Arbitration Report reflecting the views of international arbitration practitioners in Australia and Internationally. There are many important findings in the report, especially areas for improvement in the international arbitration

community. The empirical data gathered will be used to better understand evidence in international arbitration and inform the arbitral community on what works and what can be improved. ACICA has been travelling around Australia as part of a roadshow on the report to discuss the findings and how we can make improvements in the use of evidence and experts.

We thank all who have given their time to provide their feedback to the survey, the editorial authors, and team, including Deborah Tomkinson, Stephen Rae, Caroline Swartz-Zern, Victor Ageev and Brenda Horrigan.

ACICA Review Editorial Board

We would like to thank the ACICA Review Editorial Board comprising of Associate Professor Benjamin Hayward (Monash University) as General Editor, Board Members, 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), and Editorial Assistant Dr Christian Santos (ACICA Managing Associate) 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.

On behalf of ACICA I would like to wish you all a happy holiday season and a happy new year! ACICA looks forward to bringing another stellar year full of initiatives, events, and leadership in international arbitration in Australia and internationally.

A Growing ACICA, A Stronger ACICA

This year has been another year of tremendous growth for ACICA from the increase in arbitrations filed; the expansion of the Secretariat with the appointment of Kiran Sanghera as Deputy Secretary-General; the most well attended Australian Arbitration Week (AAW) to date; and the introduction of many new initiatives. We take a look back at some of those key moments.

As the holiday season is upon us and end of year approaches, ACICA would like to wish you all a peaceful and prosperous holiday season, and the very best for

2024. We at ACICA are looking forward to continued engagement with you in the new year as the institution continues to grow!

The Secretariat Team Expands

This year we welcomed Kiran Sanghera to ACICA, who was appointed to the role of Deputy Secretary-General. Kiran brings with her over a decade of institutional experience, adding greater depth to the Secretariat. Prior to joining ACICA, Kiran was with the Hong Kong International Arbitration Centre (HKIAC). Kiran has been supporting the Secretary-General, Deborah Tomkinson, and the ACICA Board with a particular focus on business development as ACICA looks to draw from Kiran's experience to continue its development.

Georgia Quick, ACICA President, said at the time of the appointment that "This announcement represents an exciting opportunity for cross-institutional learning and a renewed focus on engagement across ACICA's various stakeholder groups". On Kiran's appointment, Deborah Tomkinson, ACICA Secretary-General, commented, "She is well placed to assist ACICA in our engagement efforts. We are very fortunate to have her join the Secretariat and are looking forward to working with her".

From next year, we also are thrilled to have our Associate, Madeleine Buffard, continue with ACICA on a full-time basis. Congratulations!

ACICA Institutional Arbitrations

This year ACICA has surpassed the number of arbitrations filed in 2022. The increase in the ACICA caseload in 2023 continues the trend previously noted in our Reflections Report that there has been a marked increase in ACICA arbitrations in the last five years.

The Global Arbitration Review (GAR) included ACICA in its list of institutions worth a closer look in the Asia Pacific region. GAR has noted that ACICA is "a well-supported, professional organisation that's done an excellent job galvanising Australia's growing international arbitration scene" and "has more experience on international cases than many had previously thought".

The growing case load at ACICA confirms the trust users have in our services, the maturity of the institution, and quality of the services offered.

Celebrating 20 Years of Support – Thank you to our Corporate Members!

ACICA hosted a celebration honouring its Corporate Members and the immense support, time and expertise they have provided to the institution over the past 20 years! Hosted at Dexus Place, a hearing venue with which ACICA has a referral relationship in place, guests were able to tour the excellent facilities and view a full arbitration hearing set up courtesy of FTI Consulting Trial and Arbitration Support.

We were privileged to have the Honourable Justice Stewart of the Federal Court of Australia speak on of the role of the courts in relation to commercial arbitration. In his address, His Honour noted: "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 is available on the ACICA website here.

We look forward to continuing to work with all ACICA members and the Australian arbitration community to build upon the progress already made to enhance the global reputation of Australia and its practitioners in the provision of excellence in dispute resolution.

Evidence in International Arbitration Report

In September, ACICA in conjunction with FTI Consulting launched the 2023 Evidence in International Arbitration Report reflecting the views of international arbitration practitioners in Australia and globally. The Report explores the impact of expert, lay and document evidence on case outcomes and critical trends like sustainability and equal representation.

Key findings:

- 96% felt increased tribunal intervention would improve the use of evidence in international arbitration.
- 85% were satisfied with using and giving evidence in arbitration, with 64% preferring evidence in arbitration over litigation.
- Though generally in favour of sustainability, when tested, over 50% of respondents would use less sustainable practices if it were more beneficial for their case.
- Less than 1% engaged female experts more than half of the time.

The Report also featured editorials from the members of the global arbitration and broader legal community:

- Martin Cairns, Sapere Forensic
- Benjamin Hughes, Hughes Arbitration
- Toby Landau KC, Duxton Hill Chambers (Singapore Group Practice)
- The Hon. Wayne Martin AC KC, Francis Burt Chambers
- John Temple-Cole, KordaMentha
- Professor Kimberley Wade, University of Warwick
- Dawna Wright, FTI Consulting
- Dr. Iur. Clarisse von Wunschheim, Altenburger Ltd legal + tax

The topics included the impact different legal, cultural and geographical backgrounds have on the use of evidence; the psychology behind evidence; the ways to maximise the impact of expert evidence as seen from the experts; the problems related to document production and proposed solutions; and the ongoing controversy around the utility of disclosure and witness testimony.

Georgia Quick, ACICA President, said "The 2023 Evidence in International Arbitration Report provides a fascinating insight into the different evidentiary experiences of those practising in international arbitration today. It is a powerful tool for identifying trends, best practices and improvement areas in arbitration, such as the strong appetite for tribunal intervention and the ongoing need to address sustainability and diversity in the arbitration community."

Engaging with the South Pacific

ACICA continues its engagement efforts in the South Pacific region. At the AAW 2023 Welcome Reception, ACICA announced the launch of the ACICA Pacific Island Practitioner Scholarship (Scholarship).

The Scholarship is supported by the ACICA Education Fund (Fund). The Fund established by ACICA comprises of the profits from the International Council for Commercial Arbitration (ICCA) Congress hosted by ACICA in Sydney 2018. ACICA will be offering two biennial Scholarships to legal practitioners who are admitted in South pacific Island jurisdictions. Scholarship recipients will be:

- awarded the opportunity to attend AAW including the ACICA & Ciarb Australia International Arbitration Conference, the lead event of AAW;
- supported by the ACICA Secretariat to obtain an understanding of ACICA's work;
- offered the opportunity to be a part of an ADR practitioner network that ACICA seeks to encourage in the South Pacific; and
- offered the opportunity to learn more about and participate in ICCA activities directed at aspiring arbitration practitioners, such as the Young ICCA mentoring program, the ICCA Inclusion Fund and the Johnny Veeder Fellowship Program provided with information or inclusion in relevant ICCA programs.

Applications will open in 2024, so please watch this space and help spread the word.

Donald Francis Donovan, who served as ICCA President from 2016-2018 and presided over the 2018 Sydney Congress, lauded the effort: "I congratulate ACICA on its decision to build on the spectacular success of the Sydney Congress by establishing the Fund, which will ensure that the Congress's success has a permanent impact on international arbitration practice in the South Pacific. ICCA and ACICA are completely aligned in their goal to build capacity in the region by helping arbitration practitioners from the South Pacific participate in Australian Arbitration Week and thereby gain both the learning and networking opportunities the event offers".

Douglas Jones AO, Chair of the ICCA 2018 Congress Host Committee, had this to say: "I am delighted to

see the vision we had for the Fund come to life through the establishment of this scholarship. The ICCA Congress in Sydney showcased to the world the strength of Australia's contribution to international arbitration. The Scholarship is one of the lasting and meaningful ways Australia's reach can be used to support the development of arbitration in the region".

Thought Leadership & Events

ACICA continued to make great strides in its international outreach and profile. A particular highlight was AAW, which returned to Perth for the first time since 2018. AAW was held from 8-13 October 2023 and was the biggest yet.

At the lead event of AAW, the ACICA and Ciarb Australia International Arbitration Conference, we surpassed last year's record attendance. At the conference we had 234 delegates, featuring 38 speakers of which 56% were women. This is reflective of ACICA's commitment to diversity in international arbitration further supporting the work of the ACICA Diversity Committee, which was announced in June. The delegates came from a diverse range of countries including, Australia, Canada, China, France, Hong Kong, India, Ghana, Kenya, Malaysia, New Zealand, Singapore, South Korea, Sweden, Switzerland, United Kingdom, and the United States.

Delegates enjoyed a full week of learning, engagement and connecting with new and old friends. AAW has grown year on year with AAW 2023 being the most well attended and diverse to date with high quality and globally relevant content showcasing Australia's connection and contribution to the international arbitration community.

ACICA was happy to partner with ADR TV and Andrew Skim for media coverage at AAW 2023. ADR TV is an on-demand video and live streaming service exclusively curated for the global legal community. You can hear directly from AAW participants on ADR TV, where you'll get a sense of the warm welcome participants received and the collegiate atmosphere at AAW! Watch here.

See interview photos for ADR TV on th next page.

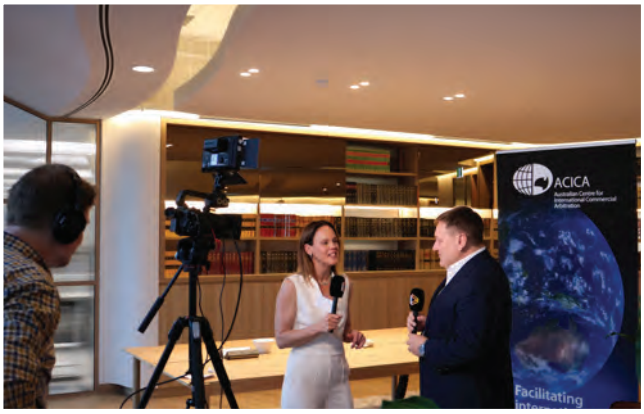
You can also visit the AAW Blog for written summaries of the events here.

We look forward to Australian Arbitration Week 2024 in Brisbane, which is taking place on 13-18 October.

ACICA continues to provide important thought leadership in the development of arbitration. Staying with AAW, ACICA introduced two programmes (i) The AAW Wellbeing Program, which gave AAW participants the opportunity to join social events which encourage outdoor physical activity; and (ii) The ACICA Wing Person Initiative, which aims to build confidence and connections by matching arbitration practitioners who are less familiar or just want a boost with those in the arbitration community who are more confident with their connections to attend events during AAW together.

This year ACICA ran a series of events as part of our roadshow to present and discuss the findings of the ACICA Evidence in International Arbitration Survey Report. ACICA has been organising panel discussions comprising of experts, counsel and arbitrators to not only discuss the findings but also to share tips on improving the use and best practice of evidence and experts in international arbitration.

Finally, ACICA renewed its commitment to sustainability by establishing its Sustainability Taskforce on Zero Emissions Day. The Taskforce comprises industry leaders Daisy Mallett, Independent Arbitrator and Legal Consultant in Sydney; Mark Mangan, Partner at Dechert in Singapore; and Amanda Murphy, Principal, Sustainability & ESG Legal (Disputes & Regulatory) at BHP in Perth. From ACICA, the Taskforce is led by Deborah Tomkinson, ACICA Secretary-General and Caroline Swartz-Zern, ACICA Counsel.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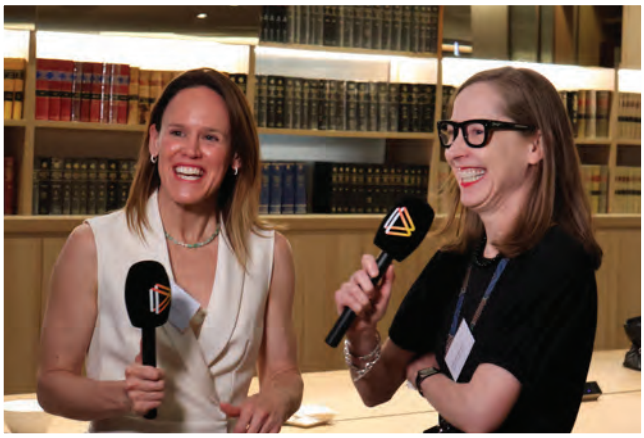

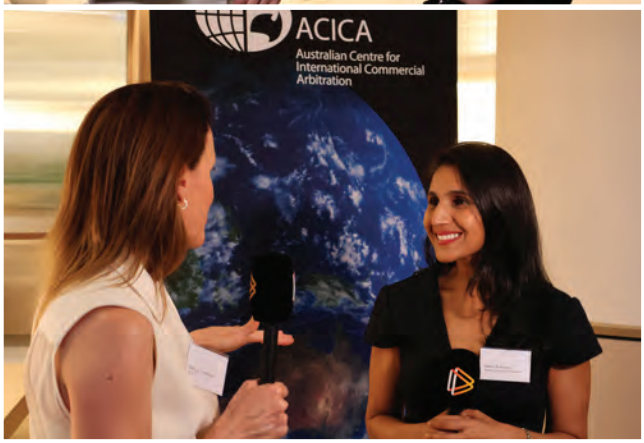
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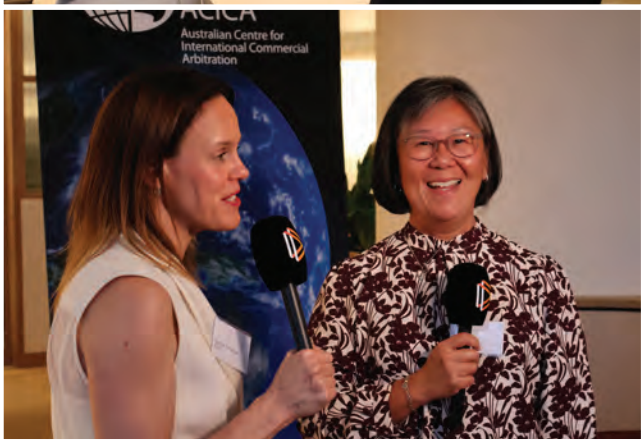

Australian Centre for International Commercial Arbitration


ACICA
Australian Centre for International Commercial Arbitration

Faces of ACICA: Meet Duncan Watson KC

Duncan Watson KC
Partner, Quinn Emanuel Urquhart & Sullivan, and ACICA Fellow

Duncan Watson KC is a partner in Quinn Emanuel's Perth office, having practiced also in London and Sydney with the firm, and is a specialist international arbitration practitioner. Duncan has acted as counsel in both international commercial and international investment arbitrations across the spectrum of global and regional institutions, and represents clients (both multinational corporations and high net work individuals) across a range of industries and jurisdictions.

It was a pleasure to virtually 'catch up' with Duncan recently to gain his insights into a number of issues that we hope will be of interest to readers of The ACICA Review. We hope you enjoy reading what Duncan has to say!

Dr Benjamin Hayward, General Editor, The ACICA Review

Q: Duncan, welcome to The ACICA Review! Would you mind telling us a little about your practice at Quinn Emanuel, and how you found yourself working in the international arbitration field?

Sure! I found my way into international arbitration mostly by accident – certainly not by design. I joined Quinn Emanuel in London back when the firm was a lot smaller than it is now, and it was only just starting to build its international presence. It was a very small office at the time – it only had a handful of partners and associates. That made it a fantastic environment for a junior lawyer – there was no hierarchy to speak of, and everyone was just given the work that they were capable of doing regardless of their post qualification experience or class year. We had all sorts of interesting work, and I put my hand up for everything.

That meant that I was working on all sorts of cases – from English and offshore litigation, to administrative reviews, and international arbitrations. The arbitration work really appealed to me for a couple of reasons. The subject matter was often quite interesting – one of the first cases I worked on was for two senior Russian oligarchs, about a property development in the centre of Moscow, which was very eye-opening! The style of writing suited me – I think that memorial-style pleadings can be incredibly effective, and they much more fun to write and read than more traditional pleadings. That kind of creative, persuasive writing was quite liberating. I had also always found working as a traditional solicitor somewhat frustrating and limiting – as a junior lawyer, it felt like I was missing out on interesting and challenging work for reasons that I didn't quite understand. On the other hand, at Quinn Emanuel we generally don't involve external barristers, which opened up great opportunities that I might not have had elsewhere.

When I moved to Sydney in 2014, Quinn Emanuel had also just opened an office in Hong Kong under the leadership of John Rhie. That office specialises in arbitration, and I fairly quickly began working on a lot of cases with that team. When I was made a partner in 2016, it made a lot of sense for me and the firm for me to relocate to Hong Kong permanently to help drive our regional arbitration practice from there.

My practice now is quite diverse and it's also super-interesting. All of my cases have an Asian element to them – whether it's the client, the counter-party, the seat, the deal, or some combination of all of those. I do a mix of commercial and investor-state cases. I have done a lot of post-M&A cases over the years – breaches of representations and warranties, misrepresentation, busted deals, and that sort of thing. I've done a lot of cases in the energy and resources sector – for instance,

one was about a renewable energy project in the United States, and another involved an expropriated gold mine in West Africa. I'm currently doing a case about a State's wrongful protection of a local business at the expense of a foreign investor – and another about a dishonoured investment in the cryptocurrency sector. So – it's still a real mix!

Q: Our attentive readers might have noticed the 'KC' postnominal in your name. How did you come to be appointed a King's Counsel in England and Wales, and what has this meant for your practice?

In England – unlike some other jurisdictions – anyone can take silk. It is not limited to barristers. Generally, every year, a handful of solicitors are appointed. What matters is whether you meet the criteria, which are mainly geared around excellence in written and oral advocacy.

I have been incredibly fortunate to have done a lot of advocacy from a relatively junior age, in complex cases and in front of very senior arbitrators. I've also had great mentorship, encouragement and support from my colleagues, like Sue Prevezer KC, Stephen Jagusch KC, John Rhie, and Rob Hickmott (who was brave enough to let me try cross-examining for the first time).

In 2019, at the end of a very long and challenging hearing in London, one of the arbitrators took me aside and said that I should apply for silk and that, if I did, he would be a referee for me. That was very flattering – and very surprising – I thought I might apply one day, but had thought that it was probably still years off. But you need to take the opportunities as they come! It's a long and rigorous process. The hardest part, for me, was approaching people to ask if they would act as referees, which felt very presumptuous. I also had to fly to London during the worst of COVID-19 for an interview – and then sit through two weeks of hotel quarantine in Hong Kong on the way back, which I'm sure will be a familiar experience for some of your readers!

The main difference it has made for my practice is that it is easier, now, to explain to clients why we do our own advocacy – and why we don't need external counsel. I could go on at great length about why having a single team run the case all the way through trial is a good model – particularly in international arbitration, which is so different from court litigation – but having those letters after my name helps give people the comfort that it works.

Q: Your work spans both the international commercial and investment arbitration fields. Have you seen any new trends in the types of disputes arising since the onset of COVID-19? And what has been your experience with the continued use (or otherwise) of remote hearings since the world has settled back into the 'new normal'?

A really noticeable trend in my practice has been the increase in cases seated in Singapore, administered by SIAC, or both. In the last year or so, I've noticed cases that in previous years would have been located elsewhere, find their way to Singapore instead.

I think, now, it would be really unusual to have procedural hearings be in person, even where there are important issues being contested. It's hard to justify the cost and inconvenience of doing those sorts of hearing in person. Full merits hearings are definitely back in person, and have been for a while, though there is maybe a bit more latitude being given to hear some witnesses by video.

Q: We hear that you will soon be taking up the role of Managing Partner in what will be Quinn Emanuel's new Singapore office. How do you see your practice changing, having previously worked between Hong Kong and Perth?

I am excited to soon be relocating to Singapore – I have been doing more and more work with a Singapore link over the years, and it has a really vibrant and diverse arbitration community. I am really looking forward to being part of that community and contributing to it, and helping clients work through their problems from a new base. The main contours of my practice won't change very much. I will still be focused on high-stakes international arbitrations with an Asian link, and I will of course continue to spend a lot of time in Hong Kong and Australia.

Q: Quinn Emanuel publishes Law, Disrupted: a podcast touching on a variety of topics that may be of interest to arbitration practitioners including AI, cryptocurrencies, English legal culture, and international arbitration itself. Do you have a favourite podcast, website, blog, or other legal news source that helps you keep up to date with developments in arbitration law or associated fields?

Nothing groundbreaking! GAR and Kluwer are indispensable. Sometimes interesting things pop up on LinkedIn or in law firm email alerts.

Q: Finally, do you have any tips for more junior readers on how to make the most of a career in arbitration?

Lots! The main one, I think, is to make the most of the opportunities you are given – be voracious about work and learning new skills, be proactive about solving problems, and be someone that partners want to work with. Don't be too picky about the cases you work on. All experience is good experience, particularly when it comes to basic skills like issue spotting, drafting, and people-management.

Work overseas if you can. One of the great benefits of arbitration is that it is so transferable – and you will learn so much from working in places like London or Paris or Hong Kong or Singapore. International arbitration is international – so much of it is about being able to see things from the perspective of a client or a witness or an arbitrator who comes from a completely different background to you. Working overseas helps you change your 'lens'. You'll also have a life-broadening experience as well.

Engage with the arbitration community, too. By and large, it is an extraordinary, welcoming, vibrant, and generous group of people. Get involved in organisations like ACICA45, or HK45, or the equivalent wherever you are based. Put your hand up for things like the PWC cross-examination workshop. Reach out to people from other firms who do what you do – even your opponents! – and have coffee. We are lucky to have a professional community like this, so make the most of it.

News in Brief

New Members

We welcome the following new members to ACICA:

Fellows:

Elodie Dulac (Singapore)
Mark Johnston KC (Brisbane)
Jennifer Kirby (Paris)
Eugene St John (Auckland)
Dr Ling Yang (Shanghai)
Dr Yunsoo Shin (South Korea)
Nuala Simpson (Sydney)
Elizabeth Sloane (Hong Kong)
Shady Mikhail (Sydney)
Kristian Maley (Perth)
Jeremy Chenoweth (Brisbane)
The Hon John Alfred Dowsett AM KC (Darwin)
Jacqueline Oyuyp Githinji (Kenya)
Caroline Swartz-Zern (Melbourne)
Val Pin Yeung Chow (Hong Kong)
Roderick Cordara KC (Sydney)
The Hon Patrick Keane AC KC (Queensland)

Associates:

Matt Meakin (Sydney)
Charles Rae (London)
Nicholas Hanrahan (Sydney)
Antonio Azar (Queensland)
Oendri Neogi (Sydney)
Juliana Jorissen (Perth)
Carmel Proudfoot (Singapore)
Zile Yu (Sydney)
Rod Noble (London)

Students:

Isabelle Ficht-Hill (Melbourne)
Natalie Reinboth
Louise Ribiere-Male (Sydney)
Lavanya Goinka (India)
Benji Batten (Melbourne)
Nouman Cheema (Pakistan)
Li Hanyu (Melbourne)
Neha Jasuja (India)
Inma Conde (Sydney)
Muhammad Faisal Hayat (Pakistan)

ACICA Committees

Sustainability Taskforce:

The establishment of the Taskforce represents the next step in ACICA's ongoing commitment to sustainability. The initial focus of the Task force is:

- To consider ways to reduce greenhouse gas emissions throughout the arbitral process;
- To further the efforts of the Campaign for Greener Arbitrations: The Green Pledge by adapting the measures contained in the Campaign's Green Protocols for the broader Australian market and the changing expectations in the sustainability space; and
- To identify ways to educate users on how to accomplish these goals in this rapidly evolving area.

ACICA is pleased to announce the launch of its Sustainability Taskforce (**Taskforce**). The Taskforce members are:

- Daisy Mallett, Independent Arbitrator & Legal Consultant
- Mark Mangan, Partner, Dechert LLP
- Amanda Murphy, Principal, Sustainability & ESG Legal (Disputes & Regulatory), BHP
- Caroline Swartz-Zern, ACICA Counsel
- Deborah Tomkinson, ACICA Secretary-General

Legislative Committee

We thank Danielle Forrester for her contribution to the committee. We recently welcomed two new members:

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

ACICA Events

Recent ACICA Webinar Recordings

Launch of the 2023 Evidence in International Arbitration Report, Melbourne – 6 September 2023

Hosted by Dexus Place

Speakers and Panellists: Victor Ageev, FTI Consulting | Dawna Wright, FTI Consulting | Bruce O'Shea, KordaMentha | Bronwyn Lincoln, Thomson Geer | Robert Heath KC, Young's List

Moderated by Georgia Quick, Ashurst and ACICA President

Watch the launch here.

Recent ACICA Events

ACICA45: Legal Finance – A Practical Guide – 20 July 2023

Host: Katie-Beth Jones, Senior Business Development Consultant, Opus 2

Moderated by Erika Willams, Williams Arbitration | Sanjna Pramod, Norton Rose Fulbright

Speakers: Emily Tillett, Burford Capital | Matthew Lee, Burford Capital Siba Diqer, LCM Finance | Lina Kolomoitseva, LCM Finance

Arbitrator Workshop: Enhancing your ACICA Experience – 26 July 2023 (Sydney)

Host: Guillermo García-Perrote, Herbert Smith Freehills

Facilitated by Deborah Tomkinson, Secretary-General, ACICA and Erika Williams, Counsel, ACICA.

Speakers: Doug Jones AO, Sydney Arbitration Chambers | Robert Tang, Clifford Chance

ACICA45: Clash of Cultures – Exploring the Impact of Culture on Advocacy in International Arbitration – 3 August 2023

Hosted by King & Wood Mallesons

Moderated by Domenico Cucinotta, King & Wood Mallesons

Panellists: The Hon James Allsop AC, Atkin Chambers and Sydney Arbitration Chambers | Edwina Kwan, King & Wood Mallesons | Amanda Lees, King & Wood Mallesons | Boxun Yin, Banco Chambers

Friends of ACICA Networking Event: Singapore Convention Week 2023 – 30 August 2023

Hosted by White & Case

Speakers: Dr Matthew Secomb, White & Case | Brenda Horrigan, Independent Arbitrator and ACICA

Australian Arbitration Week Welcome Reception – 8 October 2023

Hosted by Herbert Smith Freehills

Speakers: Elizabeth Macknay, Herbert Smith Freehills and ACICA | Deborah Tomkinson, ACICA

ACICA & Ciarb International Arbitration Conference – 9 October 2023

Venue: The Ritz Carlton, Perth

AAW Wellbeing Program: Walk& Run for Wellbeing Session 1 – 10 October 2023

Facilitators: Matt Lee, Burford Capital | Daisy Mallett, Independent Arbitrator & Legal Consultant | Deborah Tomkinson, ACICA | Judith Levine, ACICA and Independent Arbitrator

AMTAC: Maritime Arbitration Update – 10 October 2023

Hosted by Clifford Chance

Moderated by Gregory Nell SC, New Chambers and Chair, AMTAC

Speakers: The Hon James Allsop AC, Sydney Arbitration Chamber and former Chief Justice of the Federal Court of Australia | Ashwin Nair, HFW | Kendall Messer, Hall & Wilcox

AAW Wellbeing Program: Speaking of Balance – Wellbeing in International Arbitration – 10 October 2023

Moderated by Deborah Tomkinson, ACICA

Speakers: Amanda Lee, Independent Arbitrator, Consultant at Costigan King and Founder of ARBalance | Desi Vlahos, Commissioner on the IBA Professional Wellbeing Commission and Senior Lecturer at the Australian College of Applied Professions | Professor Samuel Harvey, Executive Director and Chief Scientist, Black Dog Institute

Watch it on ADR TV here.

ACICA45: Memorials – The Goods, The Bad and The Ugly – 11 October 2023

Hosted by Corrs Chambers Westgarth

Moderated by Cara North, Corrs Chambers Westgarth | Kala Campbell, Corrs Chambers Westgarth

Speakers: Charis Tan, Peter & Kim | Katie Mead, Jones Day | Oliver Spackman, Corrs Chambers Westgarth | Andrew Di Pasquale, Aickin Chambers | Nuala Simpson, 7 Wentworth Selbourne Chambers

Arbitrator Roundtable – 11 October 2023

Hosted by DLA Piper

Facilitators: Georgia Quick, Ashurst and ACICA | Matthew Gearing KC, Fountain Court Chambers | Brenda Horrigan, ACICA and Independent Arbitrator | Professor Doug Jones AO, Sydney Arbitration Chambers | Lucy Martinez, Independent Arbitrator | Dr Sam Luttrell, Clifford Chance

AAW Wellbeing Program: Walk & Run for Wellbeing Session 2 – 12 October 2023

Facilitators: Amanda Murphy, BHP | Michael Robbins, DLA Piper | Georgia Quick, Ashurst and ACICA | Erika Williams, ACICA & Independent Arbitration Practitioner

ACICA and ABA: Resolving Disputes on Major Projects – Lessons Learnt from recent Arbitration Proceedings – 12 Ocober 2023

Hosted by Herbert Smith Freehills

Moderated by Brian Miller, Francis Burt Chambers

Speakers: Charis Tan, Peter & Kim | Gavin Denton, Arbitration Chambers | Ben Luscombe, Francis Burt Chambers | Nicolas Crouy, Saipem | Helen McGhan, INPEX | Dawna Wright, FTI Consulting | The Hon Kenneth Martin KC, Francis Burt Chambers

ACICA Practice & Procedures Toolkit: Cutting Edge Tools for Timely, Cost Effective and Fair Arbitral Proceedings – 12 October 2023

Hosted by Clifford Chance

Moderated by Julia Dreosti, Clifford Chance | Kristen Maley, Clifford Chance

Speakers: Jo Delany, HFW | Mark Mangan, Dechert | Caroline Swartz-Zern, ACICA | Bill Smith, Ashurst | Suzanne Spears, Paxus LLP

ACICA Arbitrator Workshop – 13 Ocober 2023

Hosted by HFW

Welcome by Peter Sadler, HFW

Facilitated by Deborah Tomkinson, ACICA, and Erika Williams, Independent Arbitration Practitioner and ACICA and joined by the Hon Rene Le Miere KC, Quayside Chambers, and Amanda Lees, King & Wood Mallesons.

Doing Evidence in Arbitration Better: Presenting the ACICA Evidence in International Arbitration Report (Perth) – 13 October 2023

Hosted by Dexus Place

Moderated by Brenda Horrigan, Independent Arbitrator and ACICA

Speakers: Victor Ageev, FTI Consultant | Martin Cairns, Sapere Forensic | Minoshi De Silva, King & Wood Mallesons | Kanaga Dharmananda SC, Quayside Chambers | Georgia Quick, Ashurst

Doing Evidence in Arbitration Better: Presenting the ACICA Evidence in International Arbitration Report (Sydney) – 29 November 2023

Hosted by Allens

Moderated by Georgia Quick, ACICA and Ashurst

Speakers: Brenda Horrigan, Independent Arbitrator | Andrew Battisson, Linklaters | Daniel Kalderimis, Twenty Essex and Thorndon and Richmond Chambers | Stephen Rae, FTI Consulting | John Temple-Cole, KordaMentha

Unlocking Opportunities & Mitigating Risk: The Australia-India Trade and Investment Relationship – Business Networking Evening with the Australian Centre for International Commercial Arbitration – 1 December 2023

Hosted by Khaitan & Co

Speakers: Tom Overton-Clarke, Australian High Commission | Gitanjali Bajaj, DLA Piper and ACICA | Ajay Bhargava, Khaitan & Co | Vidhi Khabya, Invest India

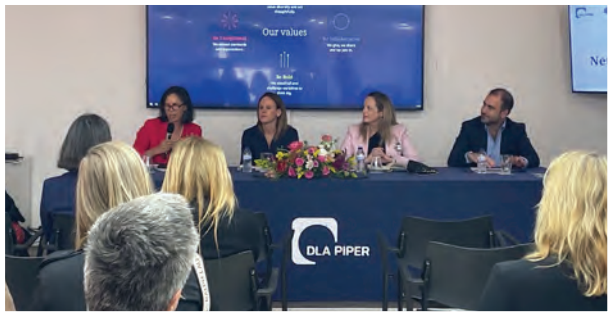
Friends of ACICA Network – Lisbon, Singapore and New Delhi

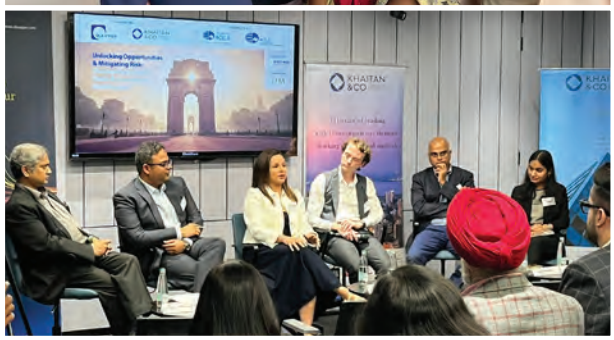
Following the Launch of the Friends of ACICA Network in London in September 2022, ACICA was please to join with DLA Piper ABBC to hold a business networking event focused on trade and investment opportunities between Australia, Portugal and Spain in Lisbon on 12 April 2023, in advance of the International 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.

To coincide with Singapore Convention Week, ACICA held another Friends of ACICA evening on 30 August 2023. Hosted by White & Case, guests were welcomed by Dr Matthew Secomb, Partner and Head of International Arbitration (Asia-Pacific), White & Case Singapore. Brenda Horrigan, Executive Director and Immediate Past President, ACICA, on the latest updates with arbitration activity in Australia, ACICA initiatives and planning.

To end off the year, we headed to New Dehi, India, on 1 December 2023. Investment and trade relations between India and Australia have long been established but are set to grow significantly because of the recently signed Australia-India Economic Cooperation and Trade Agreement. Confidence in the certainty, efficiency and privacy of dispute resolution is essential to profitable trade and investment. Australia offers world-class international dispute resolution services and expertise to promote global trade, safeguard commercial relationships and manage risk in cross-border investment. Hosted by Khaitan & Co, Tom Overton-Clarke, Executive Officer to the High Commissioner and Second Secretary Economic and Trade, Australian High Commission, Gitanjali Bajaj, Partner, DLA Piper and ACICA Vice President, Ajay Bhargava, Partner, Khaitan & Co and Vidhi Khabya, Manager, Invest India, discussed with business leaders and dispute resolution professionals strengthening trade and investment ties between Australia and India, avenues for growth and risk mitigation strategies.

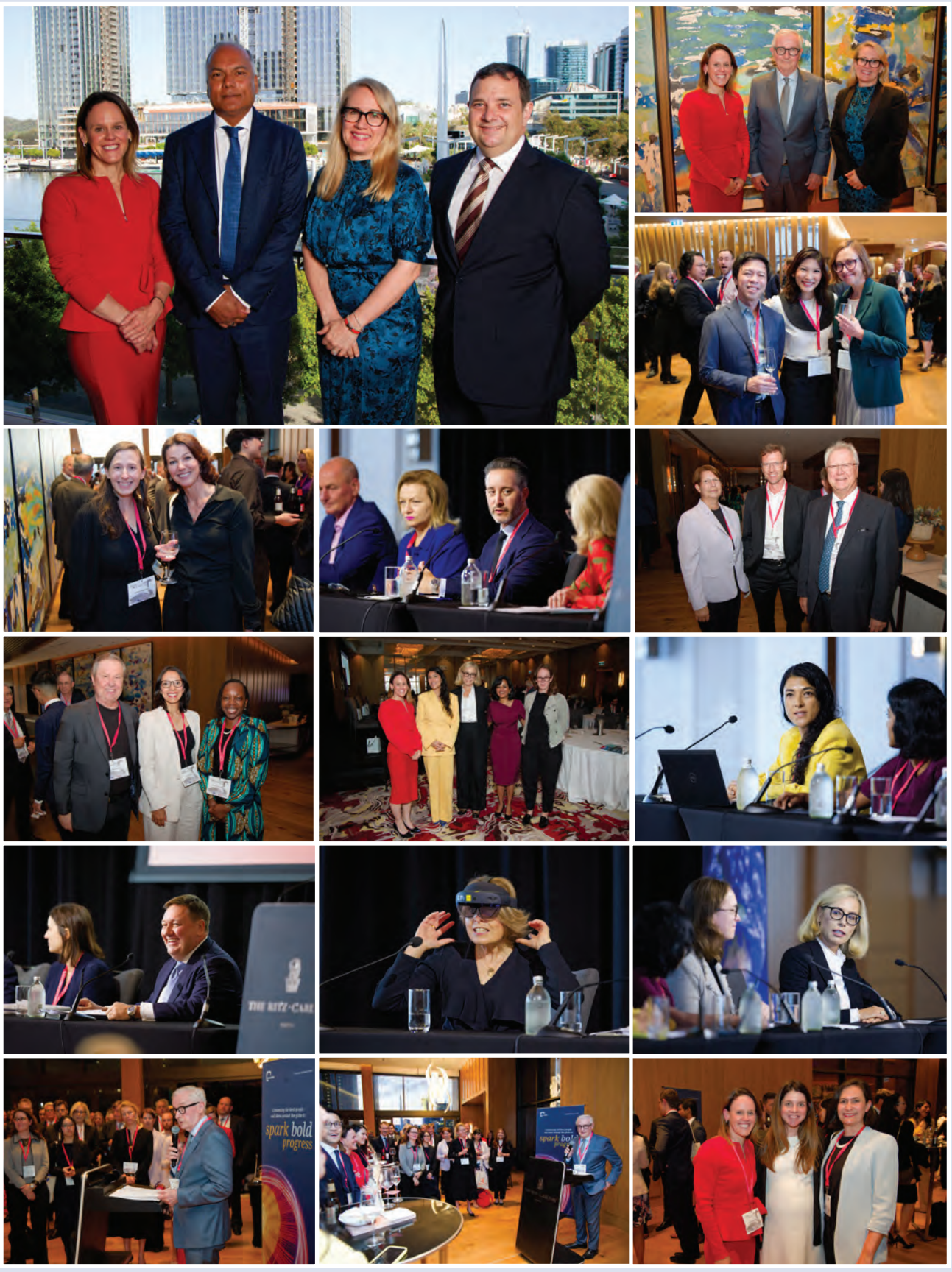
We were excited to see old friends and make some new ones!



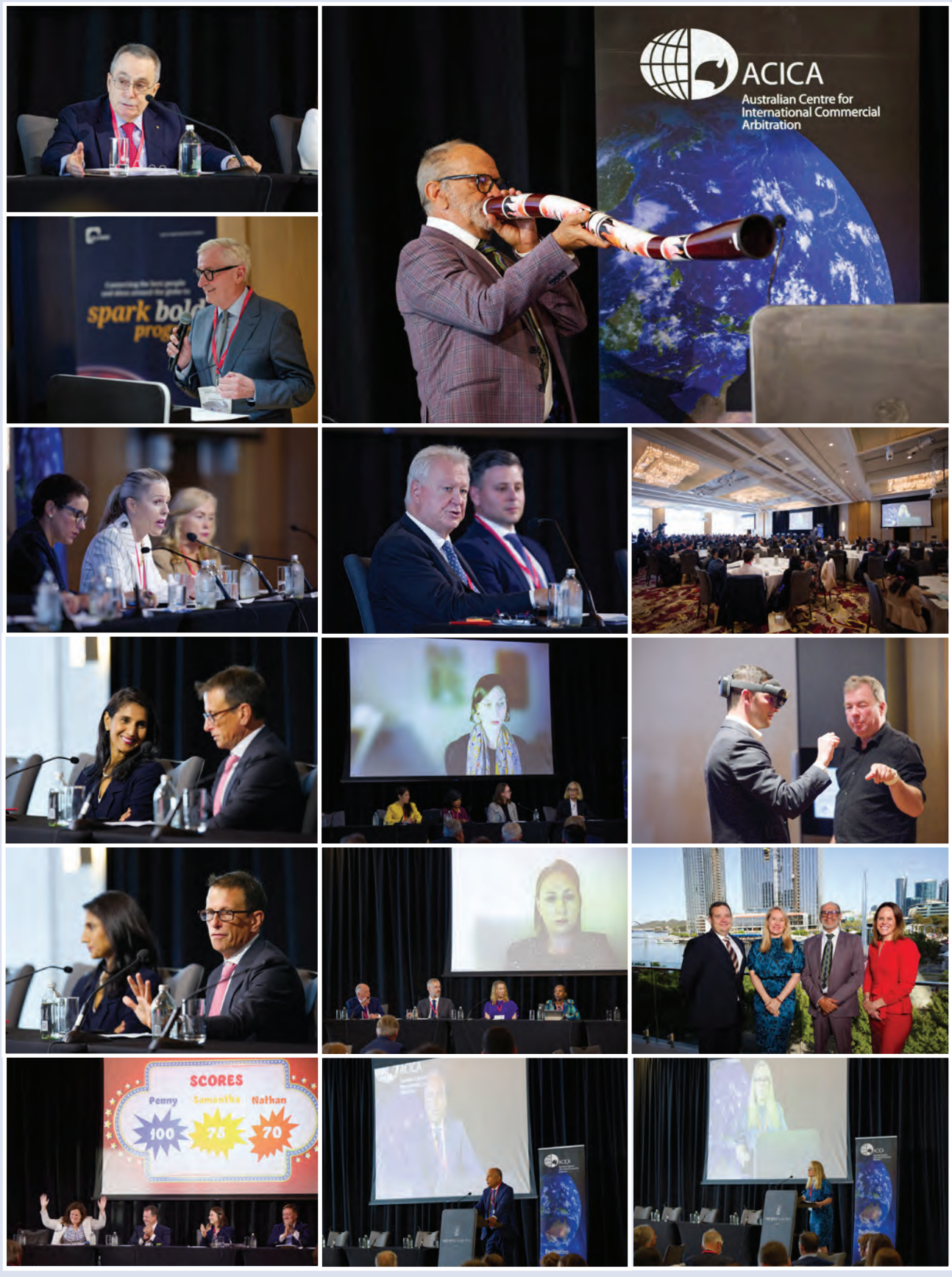


Australian Arbitration Week: Perth 8-13 October 2023

ACICA & Ciarb Australia International Arbitration Conference 2023



ACICA & Ciarb Australia International Arbitration Conference 2023



ACICA AAW 2023 Events: AAW Welcome Reception

ACICA AAW 2023 Events

Recent Spotlights on the Interplay between Arbitration and Insolvency in Australia

Nivedita Venkatraman
Associate, HFW Australia

I INTRODUCTION

In 2023, there were three notable decisions in Australia which considered the overlap between the worlds of arbitration and insolvency. The themes considered in these decisions were the arbitrability of voidable transaction claims, the circumstances where a third party can claim "*through or under*" a party to an arbitration agreement, and the effect of costs and interest awarded in an arbitration against an insolvent entity, where the arbitral award is rendered after the appointment of administrators. This article considers each of these decisions and their key takeaways.

II NON-ARBITRABILITY OF VOIDABLE TRANSACTION CLAIMS

Mansfield (Liquidator) v Fortrust International Pty Ltd, in the matter of Palladium Investments International Pty Ltd (in liq) [2023] FCA 350 concerned an investment management agreement (**Investment Agreement**) that was entered into by Palladium Investments Pty Ltd (in liq) (**Palladium**), Mr Yang and a third-party entity known as GS Asia Investment Co Ltd (**GS**).

Under the Investment Agreement, Palladium transferred $6.95 million to PT Indrogo Institut (Indrogo). Pursuant to the Investment Agreement, the funds were then transferred to GS, which used the funds to purchase various investments for Mr Yang, including acquiring properties.

Palladium, Mr Yang and GS thereafter entered into a Set-Off and Settlement Agreement (**Set-Off Agreement**). Pursuant to the Set-Off Agreement, it was agreed that the properties purchased by GS for Mr Yang under the Investment Agreement would be beneficially owned by GS as part payments towards loans allegedly advanced by GS to Mr Yang.

Palladium was eventually placed into liquidation and Mr Yang also became bankrupt. The liquidator of Palladium was also appointed as the trustee of Mr Yang's bankrupt estate.

The liquidator of Palladium subsequently commenced voidable transactions proceedings (**Proceedings**) against Indrogo seeking to recover the $6.95 million which had been transferred.

During the discovery stage of the Proceedings, it was uncovered that there was no documentary proof of the loans between GS and Palladium or Mr Yang. This suggested that the transfers of the beneficial ownerships of the properties under the Set-Off Agreement were undervalued transactions and/or transfers of property

intended to defeat Mr Yang's creditors, in contravention of ss 120 and 121 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**).

The liquidator filed an interlocutory application in the Proceedings where he sought to join himself, in his capacity as the trustee of Mr Yang's bankrupt estate, as the third plaintiff in the Proceedings. He also sought orders to join GS to the Proceedings and to amend the statement of claim to make claims against GS under the Bankruptcy Act.

The defendants opposed the interlocutory application on the basis that both the Investment Agreement and Set-Off Agreement contained an arbitration clause. The relevant clause provided that "*any dispute, controversy or claim arising out of or relating to*" the Investment Agreement/Set-Off Agreement was to be referred to arbitration under the Singapore International Arbitration Centre (SIAC) Rules. The defendants contended that the liquidator's proposed claim against GS should be referred separately to arbitration in these circumstances.

In granting the interlocutory application, the Federal Court held that although the liquidator could claim "*through or under*" the arbitration agreement to which Palladium was a party, the claims proposed to be brought by the liquidator under the Bankruptcy Act were only actionable by a trustee in bankruptcy. The right to bring these claims did not vest in and could not be exercised by Mr Yang himself. This is because the court believed that none of the elements of ss 120 and 121 are seemingly exercisable by or vested in Mr Yang.

In reaching this conclusion, the Federal Court cited the High Court of Australia's decision in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 342 (*Tanning*), which held the following with respect to when a party can claim "*through or under*" another to exercise a right, or resist enforcement of such right:

"*… an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company;* a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt".

With respect to arbitrability, the Federal Court formed the view that claims pursuant to ss 120 and 121 of the Bankruptcy Act did not fall within the scope of section 7(2) of the *International Arbitration Act 1974* (Cth) (**IA Act**). This was because the relevant claims were not derivative in the sense discussed in *Tanning* and could only be actioned by a trustee in bankruptcy. This was "*even having regard to the extended definition of "party" in subs 7(4)*" to include "*a reference to a person claiming through or under a party*". There was also reasonable doubt as to whether the relevant claims would fall within the scope of the arbitration clause in any event due to the construction of the contract.

III THIRD PARTY CLAIMING "THROUGH OR UNDER" ANOTHER

King River Digital Assets Opportunities SPC v Salerno [2023] NSWSC 510 concerned a claim brought by a company against the sole director and shareholder of an insolvent entity.

In 2022, Trigon Trading Pty Ltd (administrators appointed) (**Trigon**) entered into a Master Purchase Agreement (**Purchase Agreement**) with King River Digital Opportunities SPC (**King River**). Under the Purchase Agreement, Trigon agreed to purchase digital assets for King River, using funds deposited by King River, on an international cryptocurrency exchange known as FTX Trading Limited (**FTX**). The purchased crypto assets would be held by Trigon as custodian for King River.

In November 2022, King River attempted to withdraw funds held by Trigon due to adverse market conditions. However, FTX had suspended its clients from withdrawing any funds and assets. FTX subsequently filed for bankruptcy. At the time, Trigon held US$20.4 million of King River's assets, of which $US9.5 million had been transferred to FTX.

In December 2022, voluntary administrators were appointed to Trigon.

King River thereafter commenced proceedings against the sole director and shareholder of Trigon, Mr Salerno, seeking to recover the funds advanced to Trigon. King

River also sought to pursue an accessorial liability claim against Mr Salerno for misleading or deceptive conduct under the Australian Consumer Law with respect to alleged representations made by Trigon that King River's assets would not be exposed to exchange third party risk.

The Purchase Agreement contained an arbitration clause which provided that "*any dispute, controversy or claim arising out of, relating to or in connection with*" the Purchase Agreement shall be referred to arbitration under the Australian Centre for International Commercial Arbitration (ACICA) Rules.

Mr Salerno eventually filed an interlocutory application pursuant to section 8(1) of the *Commercial Arbitration Act 2010* (NSW) (**CAA**) requesting to stay the court proceedings in favour of arbitration.

The primary question for the Supreme Court of New South Wales was whether Mr Salerno could be considered a party to the arbitration agreement.

The Supreme Court of New South Wales cited *Tanning* (see above) and held that Mr Salerno was a party to the arbitration agreement under section 2 of the CAA. By defending the claim brought by King River, Mr Salerno was effectively denying that Trigon had engaged in misleading or deceptive conduct, which was a position Trigon itself could have taken against King River. In those circumstances, Mr Salerno could claim "*through or under*" Trigon because "the relevant inquiry is into the "subject matter in controversy rather than the formal nature of the proceedings or the precise legal character of the person initiating or defending the proceedings"" (at [32]).

In determining that the subject matter of the dispute was within the scope of the arbitration agreement, the Supreme Court of New South Wales referred to the principle of *kompetenz-kompetenz* and applied a "broad and liberal construction" to the arbitration agreement (at [33] and [35]).

The Supreme Court of New South Wales also considered whether the arbitration agreement was inoperable by reason of abandonment. This was based on King River's argument that, by Mr Salerno applying to transfer the proceedings to the Supreme Court of Queensland, the parties had effectively submitted to the jurisdiction of the courts of Queensland. This argument was dismissed by the Court on the grounds that the steps taken by Mr Salerno to transfer the proceedings were at a time where he was not aware that he was entitled to seek a stay pursuant to the extended definition of "party" in section 2 of the CAA (at [44]). Once Mr Salerno had become aware of this, he took immediate steps to stay the court proceedings in favour of arbitration, in accordance with section 8(1) of the CAA. In the circumstances, Mr Salerno's conduct did not amount to abandonment.

IV ADMITTING INTEREST AND COSTS AWARDED IN AN ARBITRATION

Bumbak v Dalian Huarui Heavy Industry Group International Co Ltd, in the matter of Duro Felguera Australia Pty Limited (Subject to a Deed of Company Arrangement) [2023] FCA 765 considered the approach to dealing with claims for costs and interest arising out of arbitral awards rendered after a company had been placed into administration.

Duro Felguera Australia Pty Limited (Duro) was involved in two arbitrations before it was placed into administration in February 2020.

The first arbitration commenced in 2016 between Duro and Dalian Huarui Heavy Industry Group International Co Ltd (**Dalian**) and was conducted under the UNCITRAL Rules (**First Arbitration**). In December 2019, the arbitral tribunal rendered a partial award and reserved the final award on costs and interest. Following their appointment, the administrators of Duro participated in the arbitration by filing submissions on costs and interest. The final award was published by the arbitral tribunal in August 2020, in which Duro was found liable to Dalian for various amounts of costs and interest. Dalian filed a revised proof of debt in Duro's administration to reflect the principal, costs and interest amounts awarded by the arbitral tribunal.

The second arbitration commenced in 2018 between Duro and Trans Global Projects Pty Ltd (**Trans Global**) and was conducted under the *Commercial Arbitration Act 2012* (WA) (**WA Act**) (**Second Arbitration**). Prior to Duro being placed into administration, the arbitral tribunal confirmed that it was ready to publish its award but would withhold publication until payment of the arbitrators' fees had been made. Once administrators were appointed to Duro, the arbitrators' fees were paid and the award was published. The award ordered that Duro pay a principal amount, costs and interest to Trans

Global, based on which Trans Global filed a revised proof of debt in the administration.

The key question for the Federal Court was whether the proofs of debt filed by Dalian and Trans Global were admissible under Duro's Deed of Company Arrangement (**DOCA**) in circumstances where the relevant costs and interest amounts related to arbitral awards published after the appointment of the administrators.

The Federal Court considered the scope of the DOCA which defined a "Claim" as "*debts or claims which arose on or before the Appointment Date or the circumstances giving rise to which occurred before the Appointment Date*". In considering whether the amounts for costs and interest in the arbitral awards fell within this definition, the Federal Court held that the key consideration was whether there was "*certainty*" that an order for costs and / or interest would be made (at [103]).

With respect to the First Arbitration, the Federal Court noted that the reference to the UNCITRAL Rules in the supply contract between Duro and Dalian meant that Article 40 of the UNCITRAL Rules applied to this arbitration. Article 40 expressly stated that the arbitral tribunal "*shall fix the costs of the arbitration*". If the arbitral tribunal had failed to fix the costs of the arbitration in this instance, the arbitration would not have been conducted in accordance with the terms of the supply contract. These factors meant that as at the "Appointment Date" the parties had a contractual entitlement to arbitration costs. For this reason, the Federal Court held that the claim for costs in the First Arbitration was provable under the DOCA (at [112(b)]).

In contrast, the Federal Court noted that the Second Arbitration was not conducted pursuant to a specific set of arbitration rules. Rather, this arbitration was conducted under the WA Act. Although s 33B(1) of the WA Act provided the arbitral tribunal with the discretion to make an order on the costs of the arbitration, this did not correlate with Trans Global having an entitlement to costs in the Second Arbitration. This meant that there was no "*certainty*" that costs would be awarded by the arbitral tribunal as at the "Appointment Date". For this reason, Trans Global's claim for costs was not a provable claim under the DOCA (at [96]).

The Federal Court also held that the claims for interest in both arbitrations lacked the requisite "*certainty*", given the discretionary nature of any interest amounts awarded by the arbitral tribunals, and the absence of the parties' contracts containing an express term on this matter (at [96] and [113]).

V CONCLUSION

The decisions considered in this article emphasise that it is possible for a third party to claim or defend "through or under" a party to an arbitration agreement, if it can be shown that (a) the claim or defence relates to a matter which is the subject of an arbitration agreement, and (b) the arbitration agreement is not inoperative. However, if the subject matter of the dispute relates to a voidable transaction claim, such claim is unlikely to be arbitrable. Where a party seeks to file a proof of debt in an administration relating to an arbitral award for costs and interest, the likelihood of this proof being admitted in an administration in Australia is increased if the underlying arbitration is conducted under a specific set of arbitration rules, or in the context of a particular contractual arrangement, which expressly provides for the award of costs and / or interest. The reasoning in these decisions makes it apparent that Australian Courts are alive to the nuanced interplay between arbitration and insolvency proceedings.

Evidence in International Arbitration – Defying Gravity

Victor Ageev
Senior Director, FTI Consulting

Background

ACICA, together with FTI Consulting, launched the 2023 Evidence in International Arbitration Report ('EIAR') on 6 September 2023.[1] This article has been adapted from the talk I gave at the launch summarising and commenting on some of the key findings of that report.[2]

The report itself followed previous efforts to reveal the nature of arbitration practice in Australia – first with a focus on Western Australia,[3] and then nationally.[4] The findings in each report depended on the input of respondents to surveys comprising, among others, barristers, solicitors, and experts involved in arbitration. The 2019 WA Arbitration Report and the 2020 Australian Arbitration Report had a quantitative focus – the number and value of disputes, the number of practitioners, and so on. The latest report had a qualitative focus that revealed more about the preferences of respondents. The provenance, methodology, and demography of respondents of the latest report is set out in more detail within the report itself.

Introduction

In this article I focus principally on respondents' preferences revealed in the latest report regarding one topic – tribunal intervention. The forms of intervention specifically considered include tribunal direction regarding expert conferences and joint reports, limitations on document production, concurrent expert testimony, stricter timeframes and word limits, and bifurcation (of merits and quantum, as well as jurisdictional questions).

My commentary is framed by the following data points:

1 80% of respondents agreed that the existing rules around the use of evidence are effective (fewer than 10% disagreed);[5]

1 ACICA, *2023 Evidence in International Arbitration Report (2023) ('EIAR')*.

2 The EIAR is broader in scope than this article and contains some terrific and relevant editorial content – it can be downloaded from <https://acica.org.au/wp-content/uploads/2023/09/Arbitration-Report-2023-FINAL-WEB-compressed.pdf>.

3 WA Arbitration Initiative, 2019 WA Arbitration Report (2019) <https://www.francisburt.com.au/wp-content/uploads/2022/10/WAArbitrationReport2019-2.pdf>.

4 ACICA, 2020 Australian Arbitration Report (2021) <https://acica.org.au/wp-content/uploads/2021/03/ACICA-FTI-Consulting-2020-Australian-Arbitration-Report-9-March-2021.pdf>.

5 EIAR (n 1) 8.

2 Nonetheless, only 30% disagreed that there needs to be reform regarding the use of evidence – that is, the appetite for reform exceeds dissatisfaction with the rules around the use of evidence;[6]

3 Respondents were prompted with ten suggested tribunal interventions.[7] With regard to seven of them, most respondents considered that their use by tribunals should be increased (led by expert conferences and joint reports, which 82% of respondents considered should be encouraged more). 96% of respondents considered that arbitration could be improved by the increased use of at least one suggested intervention;[8]

4 Respondents were overall satisfied (85%) with their experience using/giving evidence in arbitration and most (64%) preferred it to that in litigation;[9] and

5 Finally, from the national report, respondents consider enforceability, confidentiality, and flexibility to be the primary strengths of arbitration, while time, cost, and the similarity to litigation were considered weaknesses.[10]

The data points above combine to suggest the following proposition:[11] while the rules themselves concerning the use of evidence are sufficiently permissive to allow a tribunal to exercise a considerable amount of flexibility, tribunals do not sufficiently take advantage of that flexibility with the result that the arbitration process resembles that of litigation, and further, that in many such cases it is not desirable for this to occur. They also raise the following question – to the extent that time and cost are textbook strengths of international arbitration, but are no longer actually considered to be so by practitioners,[12] is maintaining the greater flexibility of arbitration compared with litigation a similar exercise in defying gravity?

'Judicialisation' and 'proceduralisation'

There are signs that it might be – for example, commentary that the perceived 'judicialisation' or 'proceduralisation' of arbitration is nothing more than a reflection of the growing size and complexity of the disputes dealt with via arbitration,[13] or that such a process was driven by the growing adversarialism of parties,[14] suggest that the trend may by irreversible. Indeed, some argue that international arbitration requires more judicialisation in the form of publishing (some) awards and developing mechanisms of appellate supervision.[15] It has been argued that although publication of awards offends confidentiality, limited publication might have the benefit, from an evidentiary and procedural point of view, of both incentivizing tribunals to be as effective and efficient as possible as well as providing a procedural road-map for future tribunals.[16] Whether such a benefit would be realised is an open question – others consider a risk that generating precedent would reduce the perceived freedom of action of future tribunals.[17]

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6 Ibid.

7 Comprising expert conference and joint reports, limitations on document production, stricter time frames, stricter word limits, bifurcation of jurisdictional questions, concurrent expert testimony, directions as to the form of lay witness evidence, bifurcation of merits and quantum, limitations on the amount of lay witness evidence, and tribunal appointed experts.

8 Ibid.

9 Ibid 9.

10 *2020 Australian Arbitration Report (n 4) 20.*

11 Noting that the sentiments listed were not without (sometimes large) minority views to the contrary.

12 One can find expressions of such sentiments at least as early as 2004 in an Australian context and 1996 in an ICC context. See, eg, Robert Hunt, 'Re-inventing the Wheel: Cost Effective Dispute Management in Arbitration and ADR' [2004] *ANZRIArbMedr 40; Russell Thirgood 'A Critique of ICC Arbitration' [2004] ANZRIArbMedr 26.*

13 Leon E Trakman and Hugh Montgomery 'The "Judicialization" of International Commercial Arbitration: Pitfall or Virtue?' [2017] *UNSWLRS 65, 3.*

14 Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy (Oxford University Press, 2017) 115.*

15 Ibid 218.

16 Doug Jones, 'A new path forward: efficiency through transparency' (Keynote, 8th Asia Pacific ADR Conference, 27th September 2019).

17 *The Evolution of International Arbitration (n 13) 122, 222.*

On the other side of the aisle, the increased use of procedural innovations in domestic courts,[18] together with their use in international commercial courts,[19] suggests a convergence of practices in international arbitration and litigation.[20] In that sense the gap between litigation and arbitration is closing on both ends.

Arbitration does maintain the benefit of a lack of prescriptive rules, which provides space that allows innovation and improvisation. However, that space is also liable to be filled by practitioners with familiar and tested approaches learned in litigation. In that way, the legal and cultural traditions of practitioners find expression within the practice of arbitration,[21] and indeed, can become the dominant forces shaping that practice.[22] The weight of that tradition may result in procedural autopilot that limits the tailoring of procedure on a case-by-case basis.[23]

Due process paranoia

In addition to all of the above is the reluctance of tribunals to be seen to offend due process, or 'due process paranoia'.[24] Benjamin Hughes notes that tribunals 'often find it more expedient (and safer) to simply grant dubious requests.'[25] There is no doubt that such a fear is driven, at least in part, by the conduct of parties and their representatives, and that efficient and cost-effective arbitration requires 'the cooperation of the parties to proceedings'.[26]

How then to alleviate the undue influence of strategies learned in domestic litigation and to escape 'due process paranoia'? Legal and cultural tradition is a ship that turns slowly – how then to embolden tribunals? Well, one way is by the publications of reports such as the EIAR, which demonstrate that there is an appetite for greater tribunal intervention among practitioners. Our results reveal what

18 Robert Hunt, 'Re-inventing the Wheel: Cost Effective Dispute Management in Arbitration and ADR' [2004] *ANZRIArbMedr 40.*

19 Weixia Gu and Jacky Tam, 'The Global Rise of International Commercial Courts: Typology and Power Dynamics' (2021) 22(2) *Chicago Journal of International Law 488.*

20 Georgia Antonopoulou 'The "Arbitralization" of Courts: The Role of International Commercial Arbitration in the Establishment and the Procedural Design of International Commercial Courts' (2023) 14(3) *Journal of International Dispute Settlement 328–349.*

21 Leon Trakman, 'Legal Traditions and International Commercial Arbitration' (University of New South Wales Faculty of Law Research Series No 29, University of New South Wales, 2007).

22 EIAR (n 1) 12.

23 EIAR (n 1) 38.

24 Ibid.

25 EIAR (n 1) 32.

26 Trakman and Montgomery (n 12) 9.

looks like a classic game theory problem among parties – while the optimal outcome might be achieved through some degree of cooperation, if only one party cooperates, they might be put at a disadvantage – thus justifying the need for the tribunal to intervene.[27] Similar logic is at play where respondents essentially indicated that they would provide hard copies of documents or fly witnesses for live hearings if they thought doing so would confer an advantage, despite the obvious environmental incentives not to do so.[28]

Concluding remarks

The nominal solution is for the tribunal itself to take a more active role in shaping the procedures in an arbitration, emboldened by the knowledge that intervention is broadly considered desirable and aided by relevant training and education for arbitrators provided by arbitration institutions (such as ACICA).

A minority of EIAR respondents provided commentary that they wanted to see more prescriptive rules – for example, institutional guidelines or mandates for the use of electronic documents, or rules limiting the production of evidence. The rationale expressed is that more prescriptive rules would empower arbitrators to enforce limitations without a fear that they might offend due process. It's not a dissimilar rationale to that of limited publication of awards containing procedural histories.

The diagnosis and the prognosis are not new and,[29] whatever the strategy, there are no guarantees that international arbitration can continue to defy gravity. But at the very least, the EIAR confirms that practitioners want international arbitration to retain and embrace its unique procedural character.

27 For some general commentary regarding this principle, see: Randal C Picker, 'An Introduction to Game Theory and the Law' (Coase-Sandor Institute for Law & Economics Working Paper No 22, 1994).

28 EIAR (n 1) 15.

29 For a detailed example in relation to construction disputes, see: Doug Jones, 'Innovating Evidence Procedure in International Construction Arbitration' (2019) *Journal of the Canadian College of Construction Lawyers 167*.

The Future of Procedural Order No 1: Scope and Timing

Bronwyn Lincoln
Partner, Thomson Geer and International Arbitrator

Flexibility of the arbitral process is consistently identified as a key factor in the choice of arbitration as a dispute resolution procedure. There is, therefore, some tension between adopting a flexible process which responds to the dispute before the tribunal and the emphasis placed by arbitrators, counsel and arbitral institutions on Procedural Order No 1.

I PROCEDURAL ORDER NO 1

Professor Janet Walker and Professor Doug Jones observe that '[d]espite the historic emphasis on the period at the commencement of the arbitration (and the issues that can usefully be decided at that time), there are now respected sources that recommend procedures that may be adopted at various stages of the process and not merely at the time of Procedural Order No 1'.[1] Examples include the *UNCITRAL Notes on Organising Arbitral Proceedings* which foreshadow the making of decisions on issues of procedure 'in one or more meetings and with or without previous consultations with the parties'[2] and the commentary to the ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders which encourages a flexible approach.[3]

Encouraging arbitrators and tribunals to issue an initial procedural order which not only sets out the procedural timetable, but also makes clear the parties' expectations of the tribunal and sets the parameters for the conduct of the proceedings, also encourages discipline. It does so in circumstances where a tribunal has limited tools available to it to sanction parties for delay or dilatory conduct. It demonstrates to the parties, whose process it is, that there is a system for the resolution of their disputes and that the tribunal has seized control of the process holding the parties and their counsel to account. But how does this align with the objective of a bespoke process, one which adapts to the needs of the dispute?

The International Chamber of Commerce's ('ICC') publication 'Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives'[4] ('Guide') observes, in relation to the ICC Rules, that:

> The open-ended nature of the Rules enables the parties and the arbitral tribunal to tailor-make an effective procedure that suits the needs and particularities of each case. However, when studying the matter, the Commission came to the conclusion that too often the parties and tribunals do not tailor-make the procedure at an early stage, but rather apply boilerplate solutions or simply decide procedural matters piecemeal as the case progresses.

1 Janet Walker and Doug Jones AO, 'Procedural Order No. 1: From Swiss Watch to Arbitrator's Toolkit' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator* (Wolters Kluwer, 2017) ch 37, 393.

2 United Nations Commission on International Trade Law, *UNCITRAL Notes on Organising Arbitral Proceedings*, (New York, 2012) [7], [8].

3 International Council for Commerce Arbitration, *ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders,* (Sourcebook, 2015) *The ICCA Report Series No 2* 10.

4 International Chamber of Commerce, 'Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives' (online, 2018) 4 <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/effective-management-of-arbitration-a-guide-for-in-house-counsel-and-other-party-representatives/>.

> This was found to increase time and cost in many arbitrations.

The issue with adopting a template for Procedural Order No 1 which has been employed in a multitude of earlier arbitral proceedings falls squarely into the first tranche of this conclusion; it does the process of arbitration an injustice. Every dispute is different and every party who has agreed to have their dispute determined by a tribunal (in preference to a judicial determination) is entitled to have the procedure by which the tribunal will arrive at the award, considered and articulated in a way which responds precisely to the issues which are in dispute and fall within the scope of the arbitration agreement.

The Guide continues:

> Tailor-making the procedure so that the arbitration will be faster and cheaper is not inherently difficult to accomplish. The parties can agree upon faster and cheaper procedures and, failing their agreement, the arbitral tribunal has the power to determine such procedures after consultation with the parties. This will normally be done at the first case management conference.[5]

What is significant in this observation is the word 'normally'; there is no mandate on a tribunal conducting arbitration under the ICC Rules to address all procedural matters at the first case management conference. The position is similar under the rules of other leading arbitral institutions, including the ACICA Rules. ACICA's 'Checklist for Preliminary Meeting and Procedural Orders' expressly acknowledges that the checklist is to assist parties and tribunals in preparing for both the first procedural meeting and subsequent procedural meetings.

II REVISITING PROCEDURAL ORDERS

This article is not a call for abandoning Procedural Order No 1. A procedural order which encompasses all aspects of the procedure applicable to an arbitration proceeding remains an important tool in arbitration procedure.

Instead, it is a call for reconsideration of the scope and timing of Procedural Order No 1.

There are two relevant questions. First, whether, in circumstances where the parties are continually calling for cost and time efficiency in the process, Procedural Order No 1 (as we conventionally understand that order) must be made at the first case management conference. Second, whether it is truly efficient and necessary for all procedural orders (through to those which will regulate the evidentiary hearing) to be encompassed in one single document. For some disputes (but not all), the answer to both questions must now be no.

For those disputes, most likely high value disputes involving complex legal and factual issues, there is good reason for tribunals to record bespoke procedures on a number of matters historically covered by Procedural Order No 1 in consecutive orders made as the proceeding progresses (including at key milestones in the procedure such as after exchange of pleadings or memorials, after disclosure requests or after exchange of fact and expert evidence). Experience suggests that procedural orders made in this way can contribute significantly to managing time and cost and facilitating the efficient resolution or determination of the issues in dispute.

III ISSUES TO BE DETERMINED AND RECORDED IN PROCEDURAL ORDER NO 1

Matters concerning the arbitration agreement should not be deferred.

It is essential that the tribunal record in its first procedural order either the parties' agreement or the tribunal's determination on matters such as the seat of the arbitration, the language of the arbitration and the rules under which the arbitration will proceed (including whether the arbitration will proceed under an expedited procedure such as that provided for in the ACICA Rules). Ideally the first procedural order will also record the law governing the arbitration agreement. However, from time to time there is a dispute over governing laws and the tribunal will require submissions in order to make a determination.

The first procedural order should also clearly identify the parties. Whilst this sounds trite, it is not uncommon for an individual or company to be named in a notice of arbitration where that individual or company is not a signatory to the arbitration agreement. Where this occurs, the status of the parties must be clarified. There are

5 Ibid.

circumstances where the arbitration agreement might be (to use a term adopted in the United States) 'extended' to individuals or entities who are not signatories to the arbitration agreement. The inclusion in a notice of arbitration of a party which is not a party to the arbitration agreement is a red flag to any experienced arbitrator. Any controversy must be resolved promptly.

Another issue which ought to be viewed as a preliminary issue is the representation of parties. In some jurisdictions the parties' counsel require a power of attorney. The tribunal should satisfy itself, where appropriate, that the parties' counsel have in place the necessary authorities, and this should be recorded in the first procedural order.

Finally, in the world of artificial intelligence ('AI') and the risk of cyber breaches, there is one further matter which is often overlooked, but should be addressed front and centre by the tribunal and the parties. This is the management and security of data. In the future, we may need to add to this, an agreed protocol on the use of AI (already being used for identification of relevant documents and translation). Used responsibly (with its inherent biases and limitations acknowledged), AI has the potential to be used alongside human endeavour to meet the parties' expectations of efficient dispute resolution.

IV PURELY PROCEDURAL / TIMETABLING ORDERS

Orders which might be described as purely procedural or which relate to the timetable may well be capable of deferment. Tribunals (in consultation with the parties) should consider whether it is in the best interests of the parties to agree to orders for disclosure or evidence (both fact and expert) before the real issues in dispute between the parties have clearly emerged. A decision for example as to whether parties should deliver fact and expert reports at the same time might not be an easy decision at the first procedural hearing. In fact at that time there made be no certainty as to whether expert reports are required (or whether expert testimony should be given by a joint expert or experts retained separately by the parties). A timetable for document requests and production may also be pre-emptive if the parties elect to proceed with memorials (with relevant documents exhibited or annexed when the memorial is delivered).

Walker and Jones endorse these observations, noting:

> Increasingly, though, it is recognised that the Tribunal's and the parties' understanding of the dispute and how best to resolve it emerges later. Even the best efforts to design a satisfactory procedure at the first procedural meeting will fail to take account of the developing character of the dispute in a number of important ways.[6]

V RECENT DEVELOPMENTS AND PROCEDURAL ORDER NO 1

In assessing the scope of Procedural Order No 1, it would be remiss to overlook the lasting impact of Covid. Procedural Order No 1 took on a particular significance when parties attended face to face procedural hearings with lengthy periods in between those hearings. Practices have now changed – tribunals report on impromptu hearings called at short notice and frequent scheduled conferences, all conducted via Zoom or Microsoft Teams. Timetabling orders can be made incrementally. Issues which arise in the course of the proceeding can be dealt with swiftly, fully and in accordance with procedural fairness. Multiple and frequent case management hearings of short duration do not materially add to cost or time; in most cases their effect is to the contrary.

VI FINAL COMMENTS

The observations set out in this article will not be suited to all arbitral proceedings. Smaller value claims where the issues are limited will continue to benefit from a single procedural hearing with the orders for the proceeding and the timeline for steps recorded in the traditional Procedural Order No 1. But we should no longer be wedded to that approach. The future of arbitration rests in part on its inherent flexibility and the willingness of participants (tribunals, counsel and the parties) to choose the process which best suits the dispute. A fresh look at the timing and scope of procedural order no 1 is an essential element of safeguarding the process.

6 Walker and Jones AO (n 1) 397 [§37.05].

The Path to Net Zero is Paved with Disputes

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In committing to reducing emissions by 43% by 2030 and to achieving net zero by the 2050 deadline, the Australian Government has handed industry and business an enormous challenge. The race to meet the targets is sending Australian industries into a protracted period of upheaval similarly experienced during the COVID-19 pandemic, the Banking Royal Commission, and the Global Financial Crisis. Historically, these times of extraordinary change are often the most fertile for disputes. With decades of unprecedented developments now expected on a global scale, organisations need to double down on preparing for the unknown. The time for incremental change is gone. It must be rapid and widespread to meet the targets.

I MODERNISATION: A DOUBLE-EDGED SWORD

To achieve net zero, extensive operational and technological innovation is required, which is a double-edged sword. Improving environmental outcomes will likely introduce risks and uncertainties to previously stable businesses. The trend of businesses touting their environmental credentials or new technologies to win consumer favour also brings into question the validity of these disclosures. As the status quo and expectations shift, it is clear organisations face a future riddled with disputes.

Companies must be resilient if they are to withstand fallout generated by the mandatory task of meeting environmental objectives. High-carbon emitters in particular must change the way they operate. But early research indicates we are far from ready. A 2022 report by Microsoft and the University of London concluded that 34% of Australian companies will fail to meet their net zero goals due to a lack of skills, under-investment in technology, poor government policy and poor leadership.[1]

Such findings are cause for considerable concern. Australian organisations and more specifically, C-suites are on the front line of a rapidly evolving commercial landscape and equally rapid shift in public expectations. This raises greatly the potential for litigation and high-stakes conflict, threatening economic loss and reputational damage.

II ORGANISATIONS MUST BE PREPARED

Transparency is crucial. Regulators are monitoring, investigating, and in some cases, litigating alleged greenwashing, thereby raising the risk of negative headlines that can't be ignored. The Australian Competition and Consumer Commission has been proactive in identifying problem sectors and targeting those companies they believe to be causing the most harm with overstated environmental credentials.[2] The Australian Securities and Investments Commission ('ASIC') has also been investigating listed companies and super

1 James Thomson, 'Why A Third of Firms Will Miss their Net Zero Targets' (online, 22 May 2022) *Australian Financial Review* <https://www.afr.com/chanticleer/why-a-third-of-firms-will-miss-their-net-zero-targets-20220321-p5a6kv#:~:text=It%20estimates%20that%2034%20per,government%20policy%2C%20and%20poor%20leadership.>

2 Ayesha de Kretser and James Eyers, 'ACCC Says It's Ready to Pursue Greenwashers' (online, 15 June 2022) *Australian Financial Review* <https://www.afr.com/companies/financial-services/accc-says-it-s-ready-to-pursue-greenwashers-20220615-p5atv7>.

fund trustees making false or misleading environmental claims. ASIC is intent on continuing vigilance in this area and recently revealed that it had made 35 interventions resulting from greenwashing surveillance between July 2022 and March 2023.[3] These developments are a clear signal to Australian organisations that even potentially misleading disclosures can now result in regulatory action, ranging from a public infringement notice to a scenario of civil penalty proceedings.

The race to hit government targets will see new industries emerge and force others to adapt or fold. Under these circumstances, fulfilling long-standing agreements can be threatened. As the rapid increase of these multi-faceted environmental issues continues, managing risk will be critical.

A prime example is unfolding across the forestry industry as state and federal governments move towards native logging bans.[4] Several states have now announced plans for a rapid exit from native logging, and the impacts will be significant. They range from job losses and the resulting population shifts, timber supply and pricing concerns to compensation schemes required for loggers and others affected.[5]

Many manufacturers must also look to where operational change is likely to occur and the impact on their businesses. Emerging technologies can change working environments quickly and fundamentally change the way industries operate and how businesses interact.

Achieving the net zero target relies heavily on new technology. Historically, this type of innovation is another trigger for disputes as expectations shift. While still being tested, upfront estimates of the technology's capabilities or outputs may be based on limited metrics, so can differ substantially from actual results. Organisations' inability to deliver on contractual requirements may expose them to litigation.

III THE CASE FOR ARBITRATION ON THE PATH TO NET ZERO

Such upheaval generates widespread fallout, hampering day-to-day management and initiating disputes. Issues borne from change can drag on for years. We have seen this across the energy and resources sector where major projects are impacted while decade-old disputes remain unresolved and in the courts.

Arbitration has a significant part to play. With project delays in achieving net zero goals and no allowances for prolonged litigation, arbitration presents as a golden opportunity to provide an effective, efficient, and practical way of resolving these disputes.

The confidential nature of arbitration lends itself to a more favourable experience for witnesses[6] and assisting in matters with new technologies and ways of doing business. It means parties are able to protect their competitive advantage and the reputations of key stakeholders and witnesses in proceedings that would otherwise be drawn into the public sphere. The focus on these matters will only increase the closer we get to the net zero deadline.

The requirement for new technology and major infrastructure products will position arbitrations as a key forum to resolve disputes. Historically, the construction, engineering, and infrastructure industry is the largest

3 Australian Securities and Investments Commission, 'Update on ASIC's recent greenwashing actions' (Media Release, 23-121MR, 10 May 2023) [1] <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-121mr-update-on-asic-s-recent-greenwashing-actions/#:~:text=ASIC%20today%20released%20a%20short,2022%20to%2031%20March%202023>.

4 Paul Karp, 'Pressure Grows on Albanese Government to End Native Forest Logging' (online, 1 June 2023) *The Guardian* <https://www.theguardian.com/environment/2023/jun/01/pressure-grows-on-albanese-government-to-end-native-forest-logging>; Peter Hannam and Paul Karp, 'Environment Minister Raises Hopes New Laws Could Include Federal Ban on Native Forest Logging' (online, 25 May 2023) *The Guardian* <https://www.theguardian.com/australia-news/2023/may/25/nationals-and-cfmeu-dig-in-behind-native-logging-in-nsw-despite-government-analysis-supporting-closure>.

5 Angelica Snowden, 'End of Victorian Native Timber Logging: From Essential Workers to Unemployed' (online, 28 May 2023) *The Australian* <https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnation%2Fend-of-victorian-native-timber-logging-from-essential-workers-to-unemployed%2Fnews-story%2Fa16e2ef8fbd809e2ba24eab4a38a75ca&memtype=anonymous&mode=premium&v21=dynamic-high-test-score&V21spcbehaviour=append>; Sophie Johnson, 'Great Southern Sawmill to Close by End of June Ahead of WA Native Logging Ban (online, 4 May 2023) *ABC News* <https://www.abc.net.au/news/rural/2023-05-04/great-southern-sawmill-to-close-june-ahead-of-native-logging-ban/102297442>.

6 Australian Centre for International Commercial Arbitration and FTI Consulting, *2023 Evidence in International Arbitration Report* (Report, 6 September 2023) 4 [3] <https://acica.org.au/wp-content/uploads/2023/09/Arbitration-Report-2023-FINAL-WEB-compressed.pdf>

arbitration user.[7] Vast investment and coordination across these areas will be critical to achieving the net zero goals. The large and varied projects required will inevitably lead to matters involving global parties and investor-state interests. As environmental policy and regulation evolve and geo-political tensions rise, a greater number of these multi-jurisdictional investment and trade disputes will likely take advantage of the flexibility arbitration offers over traditional litigation. Procedural adaptability and proactive arbitral panels will be key.

It is also important to consider how arbitration can reduce its carbon footprint and assist in the road to net zero. Arbitrations by nature usually involve cross-border matters requiring travel and in-person hearings. In a post-COVID world, old travel habits are returning. It is worth considering if face-to-face meetings are required, or if a witness can attend a hearing virtually without disadvantaging either party.[8]

Arbitration has the potential to evolve into a highly effective and well utilised forum to resolve these disputes and work productively with the parties to ensure effective and commercial outcomes are achieved in a timely manner. A focus on arbitrators taking control of the procedural, evidence and witness process during proceedings will ensure they are not only able to adapt to the new waves of disputes and experts required but remove historical inefficiencies of traditional proceedings.

7 Ibid 11 [Figure 9].
8 Ibid 14 [3].

A Short Summary of a Long History of Arbitration and Analogous Processes in Australia[1]

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Many histories of arbitration in Australia - a federation founded in 1901 of former British colonies established in the late 18th and early 19th centuries - begin at the time of colonisation. They often focus on the importation of arbitration along with many other English legal traditions.

To the extent that these histories go further back, they look at arbitration or similar dispute resolution methods on the other side of the world: amongst the Hittites of Ancient Anatolia (in modern day Türkiye), in ancient Greece and in the Roman empire, and between members of English medieval merchant guilds.

But what of disputes within the indigenous population of Australia, a culture going back some 60,000 years – tens of millennia before colonisation, or even the ancient civilisations referred to above?

Pre-colonisation: Indigenous Dispute Resolution Methods akin to Arbitration

One finds examples of traditional methods of dispute resolution amongst Aboriginal and Torres Strait Islander people that bear some resemblance to arbitration.

In their seminal work *The World of the First Australians*,[2] the noted anthropologists Professor Ronald M Berndt and Dr Catherine H Berndt of the University of Western Australia describe such dispute resolution processes used in indigenous communities before colonisation.

They observe that in aboriginal Australia formal gatherings in the nature of courts with judicial functions or special persons vested with authority to pass judgment did not exist. On the other hand, there were gatherings in the nature of tribal councils that did much the same thing, albeit far more informally and less systematically.[3]

A lack of formality by comparison with litigation may be described as a characteristic of arbitration.

In her work *Aboriginal Dispute Resolution*,[4] Larissa Behrendt, Professor of Law and Director of Research at the Junbunna Institute for Indigenous Education and Research at the University of Technology, Sydney, writes that conflict within Aboriginal communities would arise in varying circumstances, including failure to observe sacred law or ceremonies, breach of kin obligations such as not giving portions of hunted food to relatives, accusations of sorcery, and breach of marriage arrangements and elopement.[5]

Such grievances in communities were dealt with in

1 This paper is an expanded version of a speech made at the ICC seminar 'The History and Evolution of Australian Arbitration – Past, Present and Future' in October 2023, during Australian Arbitration Week in Perth, Western Australia.

2 Ronald M Berndt and Catherine H Berndt, *The World of the First Australians* (Aboriginal Studies Press, 1988) ('Berndt').

3 Ibid 348.

4 Larissa Behrendt, *Aboriginal Dispute Resolution – A Step Towards Self-Determination and Community Autonomy* (The Federation Press, 1995) ('Behrendt').

5 Ibid 19.

several ways including, in some tribes, with a council of elders who would not only make decisions for a particular group but also intervene in disputes if they had not been resolved between family members. The meetings to resolve the disputes would take place when the groups met for ceremonies. There could be no fighting at ceremonies. There was a consensual aspect to the process. It was far more informal and less systematic than a court. Women played a prominent role, often by using their influence to prevent violence between the aggrieved and the accused and their kin.[6]

Berndt and Berndt give examples of two such processes witnessed among the Jaraldi and Dangani people of the Lower River Murray. Two clans met to settle a dispute. Their members sat facing each other, and members of other clans were arranged around their *rupulle* (negotiators, or spokespersons for the clan). Along with the clan elders, they presided over the council or court, known as a *tendi*. The *tendi* began with a general discussion, with accusers and defendants, and witnesses were called. In one example no decision appeared to be reached; in the other, judgment was passed and a punishment meted out.[7]

There are plain similarities between such processes and arbitration.

There is also evidence of "tribal council" procedures in eastern Australia: among the Dieri people, in the north-east of present day South Australia, special closed meetings took place attended by heads of local totemic groups, fighting men, native doctors and elders of some standing, dealing with such matters as sorcery, murder, breaches of moral code and disclosure of secrets of the council or initiation rituals to the uninitiated.[8]

In the eastern Kimberley of Western Australia, authority was vested in the headman and the elders, who conducted proceedings centring round ceremonies, during which grievances were thrashed out.[9]

Professor Behrendt notes that a common way of resolving a grievance was to air it publicly by shouting or yelling.[10] (That can happen in arbitration too, albeit not publicly on the whole.)

Minor grievances in Arnhem Land would be dealt with in a process called a *bugalub*. A hole, representing a sacred waterhole, would be dug in the middle of a specially prepared ground around which people would gather. After ritual singing accompanied by clapping sticks and didjeridu, and dancing by the women present, the persons concerned with the grievance would enter the 'waterhole' and would have water poured over them whilst invocations are called to the mythical beings connected with the site of the ground. This ritual washing was said to heal dissension and make for mutual goodwill between the participants.[11]

Admittedly, there are less similarities apparent between the *bugalub* and arbitration, although those involved in mediation might sense a kindred purpose. But the similarities would seem to end there, because the *bugalub* apparently also provided popular entertainment and enjoyment for people not directly concerned with it.[12]

Use of Arbitration at the Time of Colonisation

At colonisation there are known examples of arbitration being used. For example:

- In early 19th century Victoria, the Port Phillip Association was established by settlers with pastoral and investment interests, and its founding agreement provided for arbitration of disputes by a panel of three arbitrators, with each party appointing one, and the third appointed by the two party appointed arbitrators.[13]
- Arbitration was described as the preferred method of dispute resolution for small debt recovery matters in early 19th century New South Wales.[14]

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6 Ibid 19-20.
7 Berndt (n 3) 348, citing G Taplin, *The Narrinyeri* (1873), in JD Woods, *The Native Tribes of South Australia* (Wigg, 1879).
8 Berndt (n 3) 348-9, citing AW Howitt AW, *The Native Tribes of South-East Australia* (Macmillan, 1904).
9 Berndt (n 3) 349, citing PM Kaberry, *Aboriginal Woman, Sacred and Profane* (Routledge, 1939).
10 Behrendt (n 5) 20.
11 Ibid 349-50, citing WL Warner WL, *A Black Civilization* (Harper, 1937).
12 Ibid 350.
13 Doug Jones and Janet Walker, *Commercial Arbitration in Australia* (Thomson Reuters, 3rd ed, 2022) ('Jones and Walker') [1.170], citing HG Turner, *A History of the Colony of Victoria* (1904).
14 Jones and Walker (n 14) [1.170], citing B Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (The

- In the new colony of Western Australia, Captain James Stirling was appointed Lieutenant General in 1828, and received instructions from Sir George Murray, the then Secretary of State for War and the Colonies of the British Government. The instructions on resolving civil disputes were, 'until a more regular form of administering justice can be organised', to try to settle them 'with the consent of the parties concerned'. Specifically, it was suggested to him that he organise a 'court of arbitration for the decision of such questions of civil right as may arise between the early settlers'.[15]

A Brief History of Arbitration in Australia from Colonisation to 2013

The history of arbitration in Australia since colonisation, influenced first by successive English statutes and then by United Nations treaties and model legislation, is better known. In broad summary:

The *Arbitration Act 1889* (UK), or legislation based on it, was adopted in most Australian states.

In 1975, Australia acceded to the New York Convention and gave it local effect by way of the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth).

From 1984 onwards, the Uniform *Commercial Arbitration Acts* came into force in each State and Territory. This was a procedural arbitration law largely modelled on the *Arbitration Act 1979* (UK), which was generally perceived as allowing for too much court intervention.

In 1989, Australia became one of the first countries to implement the *UNCITRAL Model Law on International Commercial Arbitration*, by way of the *International Arbitration Amendment Act 1989* (Cth) which amended the 1974 Act and renamed it the *International Arbitration Act 1974* (Cth) ('*IAA*'). This became the procedural arbitration law for international arbitrations seated in Australia (unless the parties opted out of it under its former section 21), with the uniform State Acts continuing to apply to domestic arbitrations and international arbitrations where the parties had opted out of the *Model Law*.

In 1995, the High Court in *Esso v Plowman* held that there is no implied or inherent confidentiality in arbitration under Australian law.[16] (There is now confidentiality in Australian arbitration pursuant to statute, unless the parties agree to opt out of that default confidentiality regime.)

In 2010, substantial amendments were made to the *IAA*, which included adopting the 2006 amendments to the *Model Law*, and introducing a range of other amendments to improve the international arbitration regime in Australia. Some problematic court decisions were legislated away, and the previous possibility of opting out of the *Model Law* under the old *IAA s 21 was abolished*.

From 2010 onwards, revised uniform *Commercial Arbitration Acts* came into force in each State and Territory, in substance applying the 2006 version of the *Model Law* to domestic arbitrations in Australia, and so aligning international and domestic arbitration in Australia.

In 2013, the High Court confirmed the constitutional validity of the *IAA's* adoption of the *Model Law's* award enforcement regime in *TCL Air Conditioner*.[17]

Developments in Australian arbitration law have continued apace over the last ten years, and have been documented and commented on in several books and journals, including the ACICA Review.

Conclusion

The direct and relatively recent history of arbitration in Australia is well documented; so are its more distant European roots. But in the country with the oldest continuous culture on earth, it is instructive to consider dispute resolution methods used in that culture, and interesting to find evidence of ancient processes, in different indigenous groups thousands of kilometres apart, that bear some noteworthy similarities with arbitration, even in its modern practice.

Federation Press, 1996).

15 Alex C Castles, *An Australian Legal History* (The Law Book Company, 1982) 296, citing Murray to Stirling (30 December 1828).

16 *Esso Resources Australia Ltd v Plowman* (1995) 183 CLR 10.

17 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* (2013) 251 CLR 533.

Decentralised Justice: Arbitration for the Digital World

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Introduction

Arbitration Yesterday, Arbitration Tomorrow

For centuries, arbitration has been a preferred method for settling disputes, rooted in the traditions of ancient Greco-Roman societies. Compared to litigation, arbitration boasts, *inter alia*, the advantages of speed, confidentiality, and expertise, with issues resolved more swiftly than courts and the knowledge and credibility of individual arbitrators laying the foundation for an impartial proceeding.

Today, in our rapidly changing world, concepts such as 'metaverse' and 'non-fungible tokens' (NFTs) have been thrust into the public consciousness. Among this futuristic nomenclature is 'blockchain', a decentralised digital ledger that records transactions in a secure, transparent, and immutable way. The proliferation of blockchain technology has heralded new disputes uncontemplated by the existing arbitration framework. These cases will be referred to as 'novel disputes'.[1]

Novel disputes call for novel solutions. The nascent concept of 'Decentralised Justice' leverages the convergence of blockchain, crowdsourcing and economics to create a system of quasi-legal adjudication.[2] In doing so, Decentralised Justice platforms promise to alleviate many of the bottlenecks of traditional arbitration when applied in the context of novel disputes.

Is traditional arbitration enough in this new world? If not, is Decentralised Justice the next big thing in arbitration? These two questions will be addressed in five parts: Firstly, by examining the characteristics of novel disputes and the challenges that arise therein. Secondly, by introducing Decentralised Justice as a mode of dispute resolution. Thirdly, by identifying the bottlenecks for traditional arbitration in resolving novel disputes. Fourthly, by considering the application of Decentralised Justice in resolving these bottlenecks. And lastly, by examining how existing arbitration structures and rules can broaden to encompass Decentralised Justice. The essay concludes that, with a favourable regulatory environment and investment to overcome key technical challenges, Decentralised Justice may be the next big thing in arbitration.

The Rise of Novel Disputes

Blockchain and NFTs represent a transformative shift in the virtual world. The blockchain's decentralised and transparent nature offers a new paradigm for trust and security in online transactions. NFTs are redefining digital ownership by bestowing tangible value on digital assets and ushering in new avenues for creators and collectors.[3]

However, with these advancements, a host of new legal questions arise. These include defining the scope of

1 Baudin, S. (2023) (14 August 2023) Blockchain 101: A beginner's Guide to Social Impact and risks, Leyton. <https://leyton.com/ca/insights/articles/blockchain-101-a-beginners-guide-to-social-impact-and-risks/>.

2 Aouidef, Y., Ast, F. and Deffains, B. (2021) 'Decentralized justice: A comparative analysis of blockchain online dispute resolution projects', Frontiers in Blockchain, 4. doi:10.3389/fbloc.2021.564551.

3 NFTs are unique digital markers verified using blockchain technology. They act as certificates of authenticity for items in the virtual world.

rights transferred with an NFT sale, disputes over intellectual property rights of real-life replicas, and the possibility of tort claims in virtual environments.

In 2021, for example, the NFT market exceeded USD 40 billion.[4] But deficiencies in the underlying blockchain have led to losses due to NFT theft, with over USD 100 million worth of NFTs stolen in the first half of 2022.[5]

Separately, buyers have been defrauded into purchasing counterfeit artwork or, in some cases, voluntarily purchased NFTs that infringed intellectual property rights. The 'Metabirkins' case, where Hermès objected to the sale of virtual replicas of its iconic Birkin bag, highlights the uncertainty of the law in this area.[6]

Bottlenecks of Traditional Arbitration in Novel Disputes

The scenarios above present new challenges for the speed, numerosity and enforcement of arbitral cases. These three bottlenecks are explored in more detail below.

Speed Bottleneck: time-sensitive determinations

In the blockchain environment, things happen fast. The value of assets in dispute can change rapidly due to the volatility of underlying asset prices. For example, A Bored Ape Yacht Club, one of the most successful commercialisations of NFTs, had a floor price of USD 45,000 in August 2021, rising to USD 200,000 four months later, in December of the same year.[7]

In contrast, the life cycle of a traditional arbitration dispute averages 26 months from initiation to resolution,[8] in which time many alternative crypto assets go from an initial coin offering to being a 'dead coin'. Even specialised blockchain arbitration forums, such as that offered by the Singapore International Arbitration Centre (SIAC), still average around 14 months.[9]

The importance of speedy resolutions is reflected in stakeholder survey responses. Empirical research shows that one in five parties pointed to timeliness as an important factor when choosing arbitration over other dispute resolution processes.[10]

Numerosity Bottleneck: prevalence of small claims

The power of technology to resolve disputes is matched only by its ability to generate disputes. This bottleneck is exacerbated in the virtual world, where physical constraints do not limit the replication of items. While replicating a physical Hermès handbag, for example, may require a warehouse, equipment, machinery and many hours of labour, an equivalent digital replica can be created and multiplied with a few clicks of the mouse, as exemplified by the aforementioned 'Metabirkins' case.

This ease of replication has two consequences. First, it lowers the entry barrier for potential trademark infringers, causing both the volume and type of infringements to increase dramatically.[11] Second, the absence of overhead costs in the replication process will encourage infringement even in the smallest quantities, where the monetary value of potential claims may be insignificant.

The combined effect of these two results results in a 'numerosity' bottleneck for traditional arbitration, with two further implications. First, a large number of claims will overwhelm the legal system, which lacks the capacity to execute justice. Second, given the costs of litigation, leave many small-value infringements unchecked. This issue is exacerbated by a resource differential between

4 Versprille, A. (2022) (14 August 2023) NFT Market Surpassed $40 Billion in 2021, New Estimate Shows, Bloomberg.com. <https://www.bloomberg.com/news/articles/2022-01-06/nft-market-surpassed-40-billion-in-2021-new-estimate-shows>.

5 Hern, L. (2022) (14 August 2023) More than $100m worth of nfts stolen since July 2021, Data Shows, The Guardian. Available at: <https://www.theguardian.com/technology/2022/aug/24/nfts-stolen-non-fungible-tokens-criminals-scam-cryptocurrency>.

6 *Hermes International v Mason Rothschild, 22 CV(JSR) 384 (SDNY, 2023).*

7 Bored ape yacht club nft floor price chart (14 August 2023) CoinGecko. <https://www.coingecko.com/en/nft/bored-ape-yacht-club>.

8 ICC Dispute Resolution Statistics (14 August 2023) NYIAC. <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf>.

9 SIAC releases costs and Duration Study (14 August 2023) SIAC. <https://siac.org.sg/wp-content/uploads/2022/08/SIAC-Releases-Costs-and-Duration-Study_10-Oct-2016.pdf (Accessed: 14 August 2023)>.

10 Eidenmueller, H.G. (2020) 'Competition between State Courts and Private Tribunals', SSRN Electronic Journal [Preprint]. doi:10.2139/ssrn.3534025.

11 For example, replica cars do not exist in the real world due to high entry barriers. Such limits do not exist in the metaverse, where a vehicle is just as easy to design as a handbag.

regulators and private players – where the regulator has insufficient capacity to combat private players that attempt to skirt the law.

Second, the traditional system can be cost-prohibitive, where amounts claimed are increasingly small. For example, a small claims trial in Japan requires filing costs amounting to nearly half the average e-commerce purchase value.[12] Similarly, claimants seeking resolution in foreign courts for cross-border small claims encounter significant time and cost burdens. For small claims, the costs and delays involved are often disproportionate to the eventual remedy.[13]

Enforcement Bottleneck: anonymity and jurisdiction

In the virtual world, enforcing winning outcomes raises the issue of identifying the culprit. The infringer's identity must generally be known to obtain compensation, which may prove difficult in a world where only digital rather than biometric trails exist. No facial recognition or location pinpointing can help. Users can jump between worlds instantly and disguise themselves behind VPNs and encrypted software. The blockchain bears an intrinsically 'pseudonymous' design where cryptographic addresses identify users with no link to real-world identities.

Further, domestic jurisdictions may hinder arbitration enforcement efforts. For example, the Shenzhen Intermediate People's Court set aside an arbitral award ordering the respondent to pay damages in fiat currency for failing to pay Bitcoin, citing Chinese laws prohibiting the exchange of tokens and cryptocurrencies.[14]

Characteristics of Decentralised Justice

Decentralised Justice is a system wherein traditional legal mechanisms are replaced by peer-driven, digital platforms powered by blockchain and smart contracts. Instead of relying on established institutions, these platforms allow community members acting as 'jurors' to review, deliberate, and decide disputes.

These platforms provide a reasonable cost-benefit ratio for disputes that are legally straightforward and low in value, filling a necessary gap in traditional arbitration with the rise of novel disputes.

Before exploring how Decentralised Justice can address the above bottlenecks, it is useful to dissect the essential traits of this new system. Three characteristics make Decentralised Justice unique compared to traditional arbitration methods – it is based on the blockchain, crowdsourced, and applies economic incentives.

Blockchain

Using the blockchain presents numerous advantages for arbitration. Its transparent and immutable nature ensures that all aspects of the arbitration process are indelibly recorded. Integrating smart contracts allows for self-enforcing arbitration outcomes, streamlining the resolution process and minimising disputes over implementation. Moreover, its decentralised nature allows for the integration of crowdsourced opinions and tokenised incentives into a single collective arbitral outcome.[15]

Crowdsourced

Unlike traditional arbitration, crowdsourced dispute resolution enables anonymous users to determine the 'winner' of a dispute. The concept of crowdsourced dispute resolution is not new, with pioneers like eBay India's Community Court involving its users to determine the validity of deleted reviews two decades ago.[16]

Crowdsourcing achieves efficiency by breaking down large and daunting tasks into smaller actions distributed among multiple individuals, allowing them to work collaboratively towards solutions.[17] More important is the concept of 'wisdom of the crowds', where the collective

12 Habuka, H. and Rule, C. (2017) 'The promise and potential of online dispute resolution in Japan', International Journal on Online Dispute Resolution, 4(2), pp. 74–90.

13 Hörnle, J. (2009) 'Cross-border internet dispute resolution', Cambridge University Press.

14 PRC court sets aside cryptocurrency award on Public Interest Grounds (2021) (14 August 2023) Arbitration notes. <https://hsfnotes.com/arbitration/2021/03/05/prc-court-sets-aside-cryptocurrency-award-on-public-interest-grounds/>.

15 Above n 13.

16 Rule, C. and Nagarajan, C. (2011) 'Crowdsourcing dispute resolution over mobile devices', Law, Governance and Technology Series, pp. 93–106.

17 Kolb B. (2013) 'Marketing for Cultural Organisations: New Strategies for Attracting Audiences', NY: Routledge, p.190.

wisdom of jurors can offer unexpected problem-solving capacity and faster solutions compared to individual experts. One classic example of this concept in practice is Sir Francis Galton's observation at a country fair in 1906, where attendees were invited to estimate the weight of an ox on display. Galton analysed the 800 or so guesses he had gathered and found that while individual estimates varied widely, the median guess was extremely close to the ox's actual weight. This discovery demonstrated that the collective wisdom of a diverse group of people, even if many were not experts, could produce accurate aggregated predictions or solutions.[18]

Economic Incentives

The legitimacy of blockchain arbitration differs from traditional arbitration in that relational trust in the nominated arbitrator is replaced by confidence in the blockchain.[19] While conventional arbitration relies on trust in individually selected arbitrators, blockchain arbitration relies on the system's mechanism design. This mechanism is based on game-theory logic, particularly the Schelling Point concept, to encourage coherent voting among jurors. Jurors are incentivised to vote with the majority by offering financial rewards for doing so, while failing to do this results in the loss of staked tokens.[20] The concept suggests that people tend to gravitate towards certain focal points to establish an agreement in the absence of communication and trust.

Economic incentives also apply to *parties* in the arbitration. If a party is dissatisfied with the decision, they can appeal, and the number of jurors involved in the appeal increases with each round. However, appealing incurs higher fees, making multiple appeals impractical.[21]

Kleros

The 'Kleros' platform is a good example of Decentralised Justice in practice. Kleros acts as a court that positions itself as a swift and cost-effective alternative to other online dispute resolution platforms.

The dispute resolution process on Kleros involves presenting the cases to the jurors, who then use their tokens to vote. Importantly, jurors cannot change or reveal their votes before the voting period ends, ensuring the integrity of the voting process. To prevent fraud and maintain fairness, jurors are prohibited from communicating with each other and must justify their votes. Once the voting period closes, the party with the most juror support emerges as the winner of the dispute resolution process.[22] The platform emphasises anonymity and information-based procedures, incorporating built-in mechanisms to address bias and provide transparent decision rationales.[23]

The Kleros platform will be referred to in the following discussion.

Solutions offered by Decentralised Justice

The most significant potential of blockchain arbitration lies in its ability to address traditional dispute resolution methods' procedural and economic limitations.

Speed Solution

There are three reasons why Decentralised Justice can offer faster resolutions than traditional arbitration. First, the platform can identify decision-makers quickly. Decentralised justice platforms often source jurors or participants from around the world. This can expedite the decision-making process as a pool of global participants is always ready to review a case, regardless of time zones. The availability of expert arbitrators is not a constraint. Further, given that legitimacy is placed in the mechanism design rather than an individual, no vetting process for the right arbitrator is required.

Second, the crowdsourced system processes information faster than an individual arbitrator. The opinion poll model allows parties to express their opinions about a dispute without the need for legal jargon.

Third, enforcement mechanisms are self-executing,

18 Rader S. (2017) (14 August 2023) The Power of Crowd-Based Challenges NASA's Practical Toolkit for Open Innovation. <https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20170012345.pdf>.

19 De Filippi, P., Mannan, M. and Reijers, W. (2020) 'Blockchain as a confidence machine: The Problem of Trust and Challenges of Governance', Technology in Society, 62, p. 101284.

20 Werbach, K. (2018) The blockchain and the new architecture of trust [Preprint].

21 Kleros Long Paper (2021) (14 August 2023) Kleros. <https://kleros.io/yellowpaper.pdf>.

22 Bergolla, L., Seif, K. and Eken, C. (2021) 'Kleros: A socio-legal case study of Decentralized Justice & Blockchain Arbitration', SSRN Electronic Journal [Preprint].

23 Above n 21.

reducing the need for security for costs considerations and post-decision resources.

Under the Kleros protocol, disputes can be resolved in weeks, with the Kleros Blockchain Court typically concluding cases within three weeks. The process involves appointing jurors, submitting evidence over three days, voting in two phases spanning twelve days, and deciding on appeals within four days. Other 'specialised courts' within the Kleros system follow similar timelines, making blockchain arbitration comparably faster than conventional arbitration, even when considering potential rounds of appeal.[24]

Numerosity Solution

Thanks to the mechanism design, Decentralised Justice platforms can leverage the knowledge and work of individuals with specific expertise not necessarily recognised by the system of legal skills, thereby removing the constraints on arbitrators' availability. This has two effects – an increase in the number of cases that can be resolved and a reduction in the costs to resolve said cases.

Resolutions at Scale

The Speed Solution discussed above, combined with the removal of the capacity restraint on arbitrators, allows for Decentralised Justice Platforms to provide resolutions at scale. Empirical evidence shows that online crowdsourced dispute resolution platforms can efficiently handle a much larger volume of disputes than traditional arbitration. For example, from 2012 to 2014, the Taobao Dispute Resolution Centre resolved, on average, 2,000 disputes per day, far exceeding the capacity of traditional arbitrators.[25]

The state can delegate oversight of legally straightforward, small-claim disputes to private platforms to address the numerosity bottleneck, creating incentives to self-regulate. Some jurisdictions have already taken a step in this direction. For example, the Hangzhou Internet Court in China recently held that NFT platforms must proactively check copyright ownership of any uploaded currency.

Reduced Cost

Cost savings come in two forms – savings in initiating proceedings and savings in representation. As outlined in its Yellow Paper, the costs of Kleros arbitration are significantly lower than the filing fees charged by conventional arbitral institutions. For example, the SIAC's filing fee is SGD 2,000, with an administration fee charged at a percentage of the sum in dispute.[26] In contrast, the minimum stake required in the Kleros general court as of April 2023 is tokens worth approximately USD 50.[27]

Cost-savings extend to the resolution process, as Decentralised Justice generally does not involve counsel representation. Kleros streamlines the user experience with menus containing prescribed options, making it

24 Ibid.

25 Staff, A. (14 August 2023) How Taobao is crowdsourcing justice in online shopping disputes, Alizila. <https://www.alizila.com/how-taobao-is-crowdsourcing-justice-in-online-shopping-disputes/>.

26 SIAC schedule of fees (14 August 2023) Singapore International Arbitration Centre. <https://siac.org.sg/siac-schedule-of-fees>.

27 Kleros Board (14 August 2023) <https://klerosboard.com>.

easier for disputants and jurors to participate without the need for counsel representation, which traditionally makes up the majority of arbitral expenditures.

Enforcement Solution

Efficiency

Dispute resolution platforms lack coercive power on their own. In traditional dispute resolution processes, external authorities enforce arbitration awards. However, in blockchain dispute resolution, the jury's verdict can be executed through a smart contract without the need for enforcement by a state court. That is, a decision will automatically trigger the transfer of damages to the account of the successful party. Importantly, this mechanism eliminates the need for reliance on third-party authorities or intermediaries which may increase time, costs and enforcement risk.

For instance, on the Kleros platform, a smart contract locks the disputed crypto assets into escrow and transfers them to the winning party upon adjudication, making the process irreversible. As a result, blockchain dispute resolution often serves as the final decision, even when dealing with anonymous parties.

Anonymity

The self-execution of awards is also relevant when dealing with pseudonymous parties, making coercive enforcement by national courts challenging. While the identities of these parties may not be known in the physical world, the crypto assets stored in their wallets can still be determined and used as compensation. As such, the handling of operations and dispute settlements does not require the identity of the parties involved.

Despite the advantages of self-enforceability, certain limitations must be acknowledged. For instance, smart contracts, which enable automated enforcement, must be in place at the start of the transaction. Further, smart contracts are susceptible to bugs and errors, and their coding process requires careful consideration of all possible contingencies to ensure accuracy.

Moreover, self-enforceability in its present state is limited to the execution of predetermined payment obligations and does accommodate other relief, such as injunctions or specific performance. In complex disputes, where legal obligations require in-depth analysis, a self-executed outcome may prove insufficient.

Unresolved Challenges

Complex Cases Still Require Courts

When voting on outcomes, jurors rely more on common sense and logic than the laws of specific countries. Guided by the system's mechanism design, jurors have ample leeway for straightforward disputes with clear solutions in applying adjudication standards. Decentralised Justice is designed to address the segment of cases that are legally straightforward, low in value, and, because of the bottlenecks presented in this essay, are impractical to litigate or arbitrate.

In contrast, disputes that are legally complex and high in value remain in the province of litigation and arbitration. A recent string of disputes includes *Hermes v Rothschild* on the application of intellectual property laws to virtual goods,[28] *Andersen v Stability AI Ltd* on the use of copyright when training AI image generators,[29] and *CLM v CLN* on whether cryptocurrencies can be the subject of proprietary injunctions.[30]

Despite the bottlenecks of traditional litigation and arbitration, the complexity and value of these cases outweigh the need for speed, cost and automatic enforcement. However, once case precedence becomes more numerous, with well-defined principles for adjudication, the benefits of Decentralised Justice become more attractive.

Adapting to the Legal Framework

Where remedies beyond monetary compensation are sought or where domestic laws explicitly prohibit aspects of Decentralised Justice, the platform's compliance with existing rules must be addressed. On the one hand, platforms should create policies to promote compliance with existing rules. On the other hand, rules should be broadened to encompass the platforms.

As it stands today, Decentralised Justice platforms fail to comply with the requirements of the New York

28 *Hermes International v Mason Rothschild, 22 CV(JSR) 384 (SDNY, 2023).*
29 U.S. District Court for the Northern District of California, No. 3:23-cv-00201.
30 *CLM v. CLN [2022] SGHC 46, [32] (Sing.).*

Convention (NYC).[31] For example, the crowdsourced nature of the decision-making process means that there is a lack of detailed reasons given. While most jurisdictions require awards to state the reasons on which they are based, the level of reasoning may vary. This lack of detailed reasoning might be subject to challenge under the Model Law. Additionally, the potential breach of natural justice, lack of due process, or procedural unfairness in Decentralised Justice awards could lead to enforcement challenges.

To mitigate potential challenges, platforms can enforce more detailed reasoning by jurors and create stringent policies on juror selection that conforms with recognised due process principles. Further, parties and arbitration service providers could consider incorporating waivers of the right to challenge the award in their dispute resolution clause.

Broadening the Legal Framework

Many novel disputes have no direct relationship between the state, infringer, and victim. In these cases, violators must be deemed 'hostis humani generis' – a term historically ascribed to pirates held to be beyond legal protection and therefore subject to the jurisdiction of any nation, even one that had not been attacked.[32] Similarly, novel disputes may not fall neatly within any single jurisdiction, making the ability for Decentralised Justice to decide and enforce as an independent body all the more pronounced. No single authority will have the authority to reverse the execution of awards once a decision is made.

With this power, however, comes great responsibility. Regulators should set international peremptory norms from which no derogation is permitted. Such norms can then be incorporated into user agreements that form the social contract of the blockchain.[33] In establishing the content of these norms, the existing piecemeal approach to blockchain governance falls far short of the complexities and intricacies that novel disputes will present. As such, nations, guided not just by international organisations such as the SIAC but also by technology firms, consumer representatives and other stakeholders, should work toward creating a global framework for Decentralised Justice. Where all jurisdictions encompass the same framework, with the same thresholds for proof and penalties for infringement, territorial risk becomes a far lesser threat.

The interaction between Decentralised Justice awards, the NYC, and national arbitration laws remains untested.

Conclusion

The rise of novel disputes calls for a novel solution. Decentralised Justice offers a solution addressing the bottlenecks faced by the traditional arbitration system. In this system, disputes that are legally straightforward and low in claim value encounter dilatoriness, cost-prohibitiveness and non-enforcement risk. Decentralised Justice addresses these issues through the blockchain by offering greater speed of resolutions, lower costs, and self-enforcement.

In the long run, blockchain-based dispute resolution will naturally complement traditional arbitration in a system where complex and high-value cases set precedents through arbitration, and Decentralised Justice applies these precedents to adjudicate low-value disputes at scale.

To achieve this dynamic, platforms must create policies that align with the existing legal framework, while policymakers should broaden that framework to encompass decentralised systems. Of all people, it is lawmakers who bear the greatest responsibility for understanding the virtual world. Industry expert Richard Susskind said that 'the legal industry will change more in the coming 20 years than in the previous 200'. That shift has already begun. The coming disruption requires the resources, willpower, and adaptiveness from regulators to match.

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31 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, entered into force 7 June 1959.*

32 *Hostis Humani Generis (26 April 2023) Wikipedia <https://en.wikipedia.org/wiki/Hostis_humani_generis>.*

33 Cooper, James, *Why We Need 'meta Jurisdiction' for the metaverse (2 December 2021) The Hill <https://thehill.com/opinion/technology/583529-why-we-need-meta-jurisdiction-for-the-metaverse/>.*

Australian Centre for International Commercial Arbitration

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