# GLOBAL LEADERSHIP
## REGIONAL EXCELLENCE

# THE ACICA REVIEW
DECEMBER 2013

ACICA
Australian Centre for International Commercial Arbitration

# Leader in international dispute resolution

**THE ACICA REVIEW** December 2013 | Vol 1 | No 1 | ISSN 1837 8994

ACICA
Australian Centre for International Commercial Arbitration

# CONTENTS

## The ACICA Review December 2013

**ARTICLE** **PAGE**

# President's Welcome

**Doug Jones AO** ACICA President

Dear Members,

Welcome to the new ACICA Review. I hope you enjoy reading it.

## Sydney Arbitration Week

On 5 December, the joint IBA/LCA/ACICA Conference was held in Sydney which proved to be a stimulating conference with delegates and speakers from around the world meeting to discuss International Arbitration in the Asia-Pacific. The conference created the initial focus for Sydney Arbitration Week, which saw a number of international arbitration events come to Sydney and provided the opportunity for debate and discussion in relation to key issues facing arbitration in the Asia Pacific. A review of the events held during Sydney Arbitration Week can be found on page 40. ACICA is pleased to announce that Sydney Arbitration Week will be held again in 2014 and we look forward to welcoming our friends and colleagues back to Sydney at that time.

## APRAG Conference 2014

2014 sees the APRAG 10th Anniversary Conference being held in Melbourne which I hope will reflect APRAG's outstanding contribution over the last 10 years. I would like to thank Ron Salter and the Organising Committee for their outstanding efforts in putting this conference together to date. As a foundation member of APRAG and the Australian Government's sole default appointing authority, ACICA is proud to host what will be the largest gathering of its kind in Australia. The growth of APRAG's members from 17 to over 40 institutions in the last 10 years is a reflection of the growing importance of international arbitration in the Asia Pacific.

## ACICA Board Appointments

On behalf of ACICA, I would like to welcome our new representative to the Board for ACICA Corporate Member DLA Piper,partner Jim Delkousis, who replaces Ron Salter on his retirement from the firm. We are grateful that Ron has agreed to continue on the Board in his individual capacity as a general member and for his ongoing contribution to ACICA. I would like to thank Laurie Glanfield, who resigned from the ACICA Board earlier this year, for his considerable service to ACICA and arbitration over the course of many years. In recognition of his service, Laurie has been made a Life Fellow of ACICA.

## Road Shows

2013 has been an exciting year of Road Shows for ACICA with events having been held in the United States (Houston and San Francisco) and Seoul, Korea. Further Road Shows, including to Japan and a return to the United States are being planned for 2014.

## Farewell Michelle Sindler and Gianna Totaro

Finally, the Board and myself would like to thank Michelle Sindler, Secretary-General who will be leaving us after 3 years at ACICA. Michelle has been with us since we opened our doors at our new premises on Castlereagh Street and has been a valued member of ACICA. I also thank Gianna Totaro, who since 2009 has served ACICA as its Media and Marketing Advisor and immediate past Editor of the ACICA News. We wish Michelle and Gianna the best in their future endeavours.

**Doug Jones AO**
President

**Deborah Tomkinson** ACICA Secretary General

# Secretary General's Update

The last six months have been an exciting time for ACICA, with a rising number of new cases filed and preparations underway for significant arbitration events being held both at the AIDC and more widely in Australia in the later part of 2013.

Current ACICA cases are demonstrating an increasing trend toward the use of the ACICA Arbitration Rules and Australian seats for arbitration by international parties, particularly in the Asia Pacific region and this expansion is expected to continue.

## Farewell to Michelle Sindler

After more than three years at the helm of ACICA and the AIDC we farewell past ACICA Secretary General and AIDC CEO, Michelle Sindler. Michelle has been the driving force of the ACICA Secretariat during this time and instrumental in the push to encourage greater and more efficient use of arbitration in Australia. She has also been a mentor to the many, including myself, who have had the opportunity to work with her over the years. We wish her all the best in her future endeavours and hope that she continues her association with the Centre in other capacities.

## Events

As noted in the President's Welcome, ACICA is honoured to be the official conference host and organiser of the **10th Anniversary APRAG Conference** to be held on 26-28 March 2014 in Melbourne, Australia. ACICA welcomes friends and colleagues to join us in celebrating APRAG's (Asia Pacific Regional Arbitration Group) achievements and exploring opportunities and challenges for the next decade. For more information about the Conference, please visit www.apragmelbourne2014.org.

ACICA had significant involvement in a number of the events held during the recent **Sydney Arbitration Week**, further detailed on page 40. Along with the International Bar Association Arbitration Committee and the Law Council of Australia, ACICA presented a Conference on ***Key Issues in International Arbitration in the Asia Pacific Region*** in Sydney on 5 December 2013. ACICA also supported the **Young ICCA International Arbitration Workshop** that was held on 6 December 2013.

A successful **ACICA Roadshow** was held in Seoul, Korea on 18 November 2013 at the Seoul International Dispute Resolution Centre. Led by Vice-President Khory McCormick and chaired by ACICA Fellow Ben Hughes, the roadshow showcased the benefits and opportunities for Korean entities considering Australia as a neutral seat for arbitration.

ACICA was a supporting organisation for the **Hong Kong International Arbitration Centre's annual ADR in Asia Conference**, held as a part of the Hong Kong Arbitration Week in October 2013. This year's conference focused on "*International Arbitration in Asia: A Behind the Scenes Review*" and was held on 23 October 2013.

On 8 October, we hosted a delegation of Judicial and Legal officers from **Cambodia** and **Japan** at the Centre, presenting to them on recent initiatives to grow ADR in Australia and the roles that ACICA and the AIDC play. The visit formed a part of a six-week capacity building program run through the University of Sydney.

*Judicial delegation from Cambodia and Japan with Deborah Tomkinson and Mark Sheldon, Case Manager Intern.*

A delegation of Chinese judges and judicial officers from the city of Tianjin visited the Centre on 20 September 2013 which is the second time we have hosted a judicial delegation from Tianjin. The delegation received a presentation on the AIDC, its facilities and ADR in Australia, with an introduction to ACICA and the ACICA Arbitration Rules.

*Judicial delegation from Tianjin with Deborah Tomkinson and Mark Sheldon.*

**The Chartered Institute of Arbitrators Young Members International Arbitration Forum** held a debate at the AIDC on 19 September 2013 on advocacy in international arbitration. The two teams of young lawyers, Anne Hoffmann and Peter Anagnostou, and young barristers, Michael Holmes and Catherine Gleeson, debated the question of "Who Makes the Better Advocate?", looking at the pros and cons of briefing counsel or doing your own advocacy in arbitration. The Forum was chaired by ACICA Fellow, James Morrison.

The **AMTAC Address**, held on 18 September 2013, was a great success with President of the Comité Maritime International, Stuart Hetherington, providing an informative and comprehensive presentation that was videocast around Australia courtesy of the Federal Court of Australia facilities and followed by an informal reception supported by the Federal Court and the Maritime Law Association of Australia and New Zealand. Further information on the Address can be found in the AMTAC Chairman's Report on page 8.

The Centre hosted the preliminary rounds of the **Chartered Institute of Arbitrators (Australia)/NSW Young Lawyers International Arbitration Moot** on 31 August 2013. The finals were held on 3 September 2013 at Baker & McKenzie. A full report by Erika Hansen, NSW Young Lawyers, may be found on page 20.

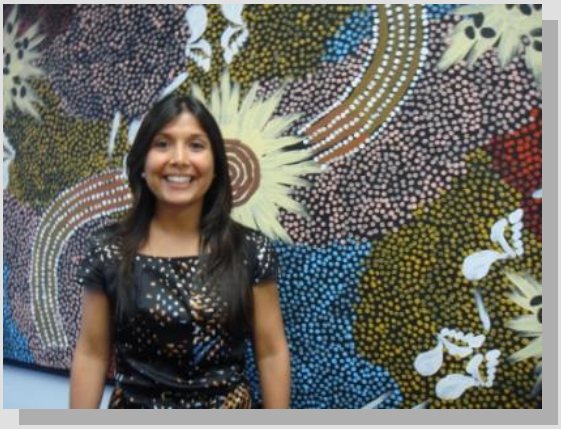
Representatives of the Jerusalem Arbitration Center (**JAC**), a joint initiative of the International Chamber of Commerce (**ICC**) Israel and ICC Palestine, visited Sydney on 30 July 2013 at an event supported by AIDC and ACICA and held at ACICA Corporate Member, Clayton Utz's, offices in Sydney. The JAC will launch in East Jerusalem in November 2013 to hear commercial disputes between Palestinian and Israeli businesses.

## ACICA and AIDC Volunteer Intern Program

Our new case manager intern, Mark Sheldon, from Corporate Member Corrs Chambers Westgarth, commenced with us in September 2013 and is assisting with case management and various other activities at the Centre for two half days a week.

*Mark Sheldon, Corrs Chambers Westgarth*

For three months commencing September 2013, Juliana Camacho, a lawyer from Colombia joined the team interning two days a week. Juliana has a Masters in Arbitration and International Commerce from Versailles University in France and is assisting with a number of current ACICA initiatives.



*Juliana Camacho*

Early in the summer break, we had Ashley Wickremasinghe from the University of NSW interning with us for a month.

*Ashley Wickremasinghe*

## AIDC

The mediation training and professional development courses offered at the AIDC through ACDC continue to be very popular. The last mediator training course for 2013 ran from 25-29 November 2013, with the next course set for 24-28 February 2014. Information with respect to all upcoming courses can be found on the AIDC website (http://www.disputescentre.com.au/).

Remember that your arbitration, mediation and other ADR procedures as well as seminars and meetings, can be comfortably accommodated in Sydney in the modern and private hearing rooms at the AIDC.

We wish to thank ACICA Corporate Member Corrs Chambers Westgarth, on behalf of both the AIDC and ACICA for the recent generous donation to the Centre of a number of computers, screens and keyboards to replace some of the less current office facilities. The donation is much appreciated.

We also mention the sad passing of Henry Jolson OAM QC on 13 October 2013 after a long illness. Mr Jolson was a prior ACICA Mediation Panel member and on the Australian Commercial Disputes Centre's panel of mediators. In 2012 Mr Jolson was awarded the Medal of the Order of Australia for service to the law, notably in the area of alternative dispute resolution. Mr Jolson will be remembered for his service to the legal profession and his contribution to mediation and the development of ADR in Australia, amongst his many other pursuits. We extend condolences to his family.

# NEWS IN BRIEF

## New ACICA Associates and Fellows

We welcome new ACICA **Fellows**: Julie Soars (NSW), Jim Morrison (NSW), Daniel Meltz (NSW), John Hockley (WA), Rob Palmer (Singapore), Cameron Ford (Singapore), Scott Ellis (WA) and Russell Thirgood (QLD), and ACICA **Associates**: Dov Silberman (VIC), Chris Kintis (NSW), Thomas Pambris (NSW), Glen Warwick (WA), Gitanjali Bajaj (NSW), John Kelly (VIC) and Kateena O'Gorman (VIC).

## New AMTAC Panel Members

AMTAC has instituted a **new Panel Membership Application Procedure** for the AMTAC Panel of Arbitrators, which may be found on the AMTAC website. We welcome new **AMTAC Panel** members: Ben Olbourne (Singapore), Alan Thambiayah (WA), Terry Mehigan (NSW), Madan Assomull (Singapore) and Jaya Prakash (Singapore).

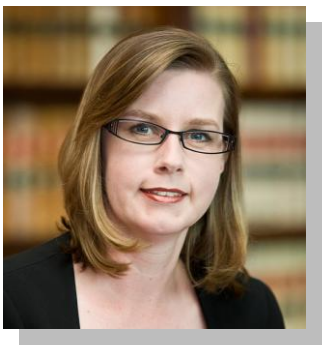
## Other News

The Commercial Arbitration Act 2012 (WA) was proclaimed in the Government Gazette on Tuesday, 6 August 2013. The Act came into operation the day after the date of publication, on Wednesday, 7 August 2013.

Professor Sarah Derrington, AMTAC Vice Chair has been appointed the first female Dean of Law, T C Beirne School of Law, The University of Queensland.

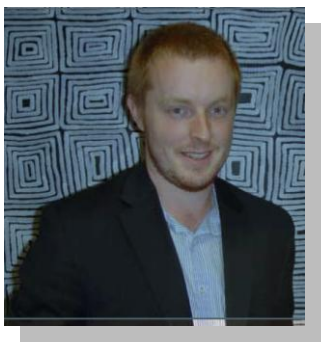
Professor Gabriël A Moens gave a lecture on *Interim Measures of Protection: A Comparative Perspective* on Wednesday, 18 September at IAMA, Perth. His lecture was based, in part, on his paper (co-authored with Professor Philip J Evans), entitled "A New Commercial Arbitration Act for Western Australia", published in June 2013 Arbitration & Mediation (IAMA Journal), 2013, 41-67.

Rupert Robey was the ACICA Keith Steele Memorial Prize winner at the University of Sydney in 2013. His paper entitled *Compared to other jurisdictions, especially in the Asia-Pacific regions, Australia's legislative regime for confidentiality in ICA represents a good compromise* may be accessed at https://docs.google.com/file/d/0B0STc5uyVOutNDlJblEzeXBGaUE/edit?usp=sharing



*Professor Sarrah Derrington*

*Professor Gabriël A Moens*



*Rupert Robey*

**Peter McQueen** AMTAC Chair

# AMTAC Chair's Report

## IMLAM 2013 - Southampton 8-12 July 2013

The 14th Annual International Maritime Law Arbitration Moot Competition had a record 24 university teams from 10 countries, including two from Australia (University of Queensland and Murdoch University) competing.

The University of Queensland and the National University of Singapore faced one another in the Grand Final before an arbitration tribunal of His Lordship Lord Phillips of Worth Matravers KG, former President of the Supreme Court; Charles Debattista, Maritime Arbitrator of Stone Chambers; and Jane Andrewartha, Partner of Clyde & Co. The University of Queensland team came out victorious for the second year running. Congratulations to the team and to their coach, Sarah Derrington. The AMTAC 'Spirit of the Moot' Prize, which was presented by Peter McQueen who participated in the competition as an arbitrator, was awarded jointly to the University of Southampton and Sri Lanka Law College. The 2014 IMLAM Competition will be hosted by the University of Hong Kong in July 2014.

## SCMA Annual Conference - Singapore 4 September 2013

Peter McQueen presented at this Conference on the topic "*Promoting Maritime Arbitration in Asia Pacific – The Way Forward*", in which he highlighted the benefits of Asia Pacific maritime arbitration commissions working in cooperation and collaboration with each other to promote the nomination of seats of arbitration, and thereby the conduct of maritime arbitration. To this end AMTAC will be negotiating in the Asia Pacific region Cooperation Agreements with the SCMA in Singapore, the HKIAC in Hong Kong and the CMAC in China.

## AMTAC Annual Address 2013 – "The Elusive Panacea of Uniformity; Is It Worth Pursuing?" - National videocast from the Federal Court Sydney 18 September 2013

This year's Address was presented by Stuart Hetherington, President of the Comité Maritime International (CMI), which is the international organisation representing national maritime associations, and which has as its major objective the promotion of the unification of maritime law.

The Address, which was given in the Federal Ceremonial Court, Sydney, in the presence of the Chief Justice James Allsop AO and Justice Steven Rares of the Federal Court, was broadcast by videocast to the Federal Courts in Brisbane, Canberra, Melbourne, Adelaide and Perth to an audience of over 80 persons.

A transcript of the paper which formed the Address is on the AMTAC website at www.amtac.org.au under Papers. Its Abstract states:

> *This paper refers to the history of the Comité Maritime International (CMI), its raison d'être being to seek to bring uniformity to maritime law internationally; the long history of attempts to achieve uniformity; and the reasons identified by others as to what has stood in the path of greater uniformity in the past. It examines the history of the carriage of goods liability regimes over the last 120 years, makes a recommendation as to how commercial parties could achieve greater uniformity and move the reform agenda more speedily in relation to the carriage liability regime, describes the current work of the CMI, looks at CMI's limited role in relation to arbitration and recent disparate cases in the law on recognition of international arbitration awards; commits the CMI to continue its role of seeking to achieve uniformity, whatever obstacles it encounters.*

*Peter McQueen, Stuart Hetherington, Chief Justice James Allsop AO and Justice Steven Rares at the AMTAC Address 2013, 18 September 2013.*

## Enforcement of foreign maritime arbitral awards in Australia - latest jurisprudence

The Full Court of Appeal of the Federal Court in *Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd* [2013] FCAFC 107 (**18 September 2013**) has held that a voyage charterparty is not a "sea carriage document" in the context of section 11 of the Carriage of Goods by Sea Act 1991(**COGSA**), thereby allowing the foreign maritime arbitral award in question, which related to a dispute arising under a voyage charterparty for the carriage of goods out of Australia, to be enforceable in Australia.

This decision, which is reviewed in this Review at page 13, overturned the first instance decision in the Federal Court and is in line with the ruling of the Supreme Court of South Australia in *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* (2011) 112 SASR 297.

AMTAC is circulating an information sheet relating to the implications of this decision to those negotiating arbitration and governing law clauses in charterparties, which relate to shipments of cargo both out of and into Australia, in addition to giving consideration to the need for amendment to section 11 of COGSA.

The Full Court of Appeal of the Federal Court in *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 (**30 September 2013**), in upholding the first instance decision in the Federal Court, enforced a foreign maritime award, having held, as had the English High Court of Justice previously held, that the judgment debtors had not been denied procedural fairness by the arbitral tribunal which had not breached the rules of natural justice and which had given those parties a reasonable opportunity to present their case.

This decision, which is reviewed in this Review at page 10 is noteworthy as it reflects a pro-enforcement attitude to foreign arbitral awards and further the inappropriateness in general of an enforcement court of a New York Convention country to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of the arbitration, here the English High Court of Justice.

## AMTAC Panel of Arbitrators – applications invited

AMTAC recently released a new Panel Membership Application Procedure for the AMTAC Panel of Arbitrators. A copy of the new procedure and further information in relation to the Panel can be found on the AMTAC website (www.amtac.org.au). All applications should be sent to the ACICA Secretariat at secretariat@acica.org.au.

**Andrea Martignoni**
Partner

**James Morrison**
Senior Associate

**Theodore Souris**
Lawyer

# Federal Court Confirms Pro-Enforcement Approach to Foreign Arbitration Awards

The Full Court of the Federal Court has dismissed an appeal from a decision of Justice Foster of the Federal Court of Australia to enforce an award rendered in London. The award debtors had already applied, unsuccessfully, to the English High Court of Justice to have the award set aside on the basis that they were not provided a reasonable opportunity to put their case to the arbitral tribunal. Justice Foster agreed with the decision of the English High Court and further held that because the issue had already been determined by the English High Court at the seat of the arbitration, it would generally be inappropriate for an enforcement court applying the New York Convention to reach a different conclusion on the same question.

The award debtors had already applied, unsuccessfully, to the English High Court of Justice to have the award set aside on the basis that they were not provided a reasonable opportunity to put their case to the arbitral tribunal.

.

## How does it affect you?

- The decision is a reminder of the weight that is to be given to the decision of a court at the seat of the arbitration, which may affect the choice of the seat of arbitration when drafting an arbitration clause.

- When resisting enforcement of an award, parties should be careful to consider the extent to which any ground has already been relied upon in an unsuccessful application to set aside an award at the seat of the arbitration or may give rise to issues of public policy in the enforcement country.

## Background

Coeclerici Asia (Pte) Ltd had commenced arbitration proceedings against the respondents, Gujarat NRE Coke Limited and Mr Jagatramka, to recover prepayments made under a contract for the sale of metallurgical coke. The contract was governed by English law and provided for arbitration in London under the auspices of the London Maritime Arbitrators Association. Before the hearing in the arbitration was held, the parties reached a settlement that provided that Coeclerici would be entitled to an immediate consent award, without the need for any pleadings or hearings, if the respondents failed to make any of the settlement payments.

Gujarat Coke and Mr Jagatramka failed to make the required payments and, on 4 February 2013, Coeclerici requested that the arbitral tribunal immediately make an award in its favour. The arbitral tribunal sent an email to the respondents' solicitor requesting that the respondents provide, by the

following day, any reason why the tribunal should not make the award. The respondents' solicitor replied that they did not yet have instructions and, in the following days, argued that the respondents had not been given a reasonable opportunity to present their opposition.

The tribunal made an award on 14 February 2013 in favour of Coeclerici.

The respondents then applied to the English High Court of Justice to have the award set aside, arguing that they were not provided with a reasonable opportunity to be heard and that there had been a serious irregularity. The respondents' application was dismissed[1].

## Application to the Federal Court of Australia

Coeclerici applied to the Federal Court of Australia to enforce the award under section 8(3) of *the International Arbitration Act 1974* (Cth) (the IAA). The respondents resisted enforcement, arguing:

- again that they were not provided with a reasonable opportunity by the tribunal to present their case in the arbitration (s8(5)(c) of the IAA); and
- that there was a breach of the rules of natural justice, such that enforcement would be contrary to public policy (s8(7)(b) and 8(7A)(b) of the IAA).

Justice Foster allowed the application for enforcement of the award and, among other things, ordered payment to Coeclerici of the outstanding amounts and appointed receivers over certain shares that Gujarat Coke and Mr Jagatramka owned in Australia[2]. In his reasons, his Honour held that the respondents 'had ample opportunity and more than a reasonable opportunity in which to put their case before the arbitrators'. He found that even if the respondents could not instruct their solicitors in the first few days, there was still ample time for their solicitors to take instructions and put forward detailed submissions before 14 February 2013.

Noting the similarity of the submissions and evidence in the English High Court setting aside proceedings, Justice Foster also held that there was an issue estoppel regarding the 'reasonable opportunity' question because it had already been determined by the English High Court. His Honour held that the matter was probably also *res judicata*. He found that, even if there were no issue estoppel or *res judicata*, it would generally be inappropriate for an enforcement court of a New York Convention[3] country to reach a different conclusion on the same question as a court at the seat of the arbitration.

## Appeal in the Full Court of the Federal Court

The respondents unsuccessfully appealed to the Full Court of the Federal Court[4]. In a unanimous judgment, Chief Justice Allsop, Justices Besanko and Middleton agreed with Justice Foster's conclusion that Gujarat Coke and Mr Jagatramka had been given a reasonable opportunity to be heard. The Full Court also agreed with Justice Foster that it will generally be inappropriate for an enforcement court of a New York Convention country to reach a different conclusion on the same question of asserted procedural defects as that reached by a court at the seat of the arbitration.

The Full Court noted that, despite the difference in the relevant arbitration legislation in England and Australia, and the difference in the basic exercise before the English High Court in setting aside proceedings and Justice Foster in enforcement proceedings, Justice Foster's decision that the English court had already decided the same issue was correct.

The Full Court also found that it was not necessary to resolve the issue of whether issue estoppel operates in circumstances where an Australian court is considering whether to refuse enforcement of a foreign award for public policy reasons or because a party is unable to present its case. However, the Full Court endorsed Justice Colman's

1. See Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Limited [2013] EWHC 1987 (Comm).
2. See Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited [2013] FCA 882 (Justice Foster)
3. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.
4. See *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 (Chief Justice Allsop, Justices Besanko and Middleton).


observations in *Minmetals Germany GmbH v Ferco Steel Ltd*,[5] which emphasised the limited circumstances in which a court may be able to do so.

## Comment

Justice Foster found that, in rare cases, an enforcing court in a New York Convention country could reach a different conclusion on the same question as a court at the seat of the arbitration. This would suggest that an Australian enforcement court applying the New York Convention could still consider, for example, whether enforcement would be contrary to public policy, although the Full Court's judgment suggests that power would also be limited.

The effect of a decision by a court at the seat of the arbitration refusing to set aside an award has been considered by other enforcement courts applying the New York Convention, including as follows:

- in Singapore, the High Court has held a party should not be given 'two bites at the cherry' by resisting enforcement on similar grounds to those relied upon on an application to set aside the award[6];
- in Hong Kong, while expressing reservations as to whether questions of enforcement under the New York Convention may be resolved by reference to principles of issue estoppel said to arise from setting aside proceedings, the Court of Final Appeal held that failure to raise public policy grounds in proceedings to set aside the award may not preclude a party from raising an objection to enforcement on public policy grounds[7]; and
- the Paris Court of Appeal held that, in enforcement proceedings under the New York Convention, it was not bound by a decision of the Swiss Federal Court refusing to set aside an award on the basis that the arbitral tribunal purportedly violated a party's right to be heard and failed to comply with the procedure agreed by the parties[8].

The decisions of the Federal Court confirm a continuing pro-enforcement approach to foreign arbitration awards that gives considerable weight to the decisions of courts at the seat of arbitration.

5. [1999] 1 All ER (Comm) 315.
6. Newspeed International Ltd v Citus Trading Pte Ltd, 4 June 2001, OS No 600044 of 2001 (Singapore High Court).
7. Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111.
8. Societe Unichips Finanziaria v Gesnouin, 12 February 1993 (Cour d'Appel, Paris).

**Julie Soars**
Barrister, Seven Wentworth, ACICA Fellow

# Case Note: Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd [2013] FCFCA 107

***Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd* [2013] FCFCA 107, 18 September 2013, Full Court, Federal Court of Australia: Mansfield, Rares and Buchanan JJ**

1. For those interested in arbitration, particularly maritime arbitration, the *Norden* case at first instance and on appeal, is important. It squarely considers the application of Australian mandatory law as a basis for resisting enforcement of an award under the New York Convention in Australia.

**The argument that mandatory Australian law rendered the award unenforceable**

2. The award in question was made in a London arbitration of a dispute involving a claim for demurrage (liquidated damages for delay) payable under a voyage charterparty. The voyage charterparty had been entered into between Norden (as ship owner) and an Australian based charterer, Beach Building (re-named Gladstone Civil by the time of the appeal). The voyage charterparty was governed by English law and provided for London arbitration of disputes.

3. The Australian "mandatory law" in issue was the effect of s11(2) of the *Carriage of Goods by Sea Act* 1991 (C'th) (**COGSA**). This section strikes down and renders of "no effect" any clause that purports to provide for resolution in foreign courts or by foreign arbitration of disputes in any "*sea carriage document relating to the carriage of goods from any place in Australia to any place outside of Australia*" (outbound shipments) and any "*sea carriage document relating to the carriage of goods from any place outside of Australia to any place in Australia*" (inbound shipments). A dispute resolution clause in respect of such disputes is only valid under mandatory Australian law if it provides for the resolution of those disputes in Australian courts or by arbitration to be conducted in Australia.

4. The key issue in the case was whether the dispute between the parties under the voyage charterparty was a dispute arising under a "*sea carriage document relating to the carriage of goods*" for the purposes of s11(2). The London arbitrator had rejected a jurisdictional challenge by Beach Building based on s11 COGSA on the basis of a finding that the voyage charterparty was not such a sea carriage document.

5. The trial judge Justice Foster after referring to the legislative history of the section, had given the relevant phrase "*a meaning reflective of ordinary English usage*" and held that the voyage charterparty contained or evidenced a "contract of carriage of goods by sea" and was therefore a "sea carriage document". Foster J had noted that S2C of the *International Arbitration Act* 1975 (C'th) (**IAA**) expressly provided that nothing in the IAA affected the operation of s11 COGSA. Hence the London arbitration clause was found to be of no effect and the award was unenforceable, on grounds which were not expressly stated by the trial judge.

6. Foster J's decision was contrary to the approach taken in an unhelpfully short "ruling" of Anderson J of the Supreme Court of South Australia in *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd* [2012] SASC 50 which had led to the conflict between state and federal court decisions on the point.

7. There had been fairly widespread criticism of Foster J's decision by commentators, particularly those who represent ship owning interests and whose clients prefer London arbitration of such disputes. The critics said that the mischief that s11 sought to remedy was that of small Australian marine cargo interests (such as holders under a bill of lading for a single container being carried on a ship that carries thousands of containers) being forced to litigate or arbitrate their disputes in foreign jurisdictions. It could not have been intended to apply to disputes by parties to voyage charterparty agreements which were complicated commercial agreements often for the charter of an entire ship between commercially sophisticated parties.

8. On appeal, the majority in the Full Federal Court (Mansfield and Rares JJ) effectively agreed with the critics and concluded that a voyage charterparty was **not** a *sea carriage document* within the meaning of s11 COGSA, having regard to: (a) the legislative history of s11; and (b) the context in which s11 appeared within COGSA. That context included a distinction found in the amended Hague Rules between a *sea carriage document* (being a document or contract to which the amended Rules applied) and a charterparty (being a document or contract of carriage to which the amended Rules did not apply directly or by their express terms). The majority held this distinction should be carried through to the interpretation of s11 COGSA (a view that Foster J had rejected at first instance, as did the dissenting judge, Buchanan J).

9. Rares J of the majority held that the purpose of s11 COGSA was to protect, as part of a regime of marine cargo liability under bills of lading and similar contracts of carriage, the interests of Australian shippers and consignees from being forced contractually to litigate or arbitrate outside Australia.

10. Mansfield J of the majority also held that while the construction of s11 COGSA found by Foster J was an available one on the language of the section, the better approach was to adopt the alternative construction in which the charterparty was not a "*sea carriage document*" for the purposes of s.11(2)(b) COGSA.

**Conclusion**

11. The Full Court's decision on appeal has been well-received by a number of commentators as being pro-arbitration: it is said that the Full Court by construing s11 COGSA narrowly gave effect to the parties' chosen arbitration agreement which provided for London arbitration, rather than taking a more parochial approach by extending the application of s11 COGSA to charterparties. The contrary view is that the policy basis on which the Full Court acted is flawed: it is a myth that Australian charterers as a general rule in any market are of a sufficient size and have sufficient bargaining power to negotiate with ship owners to vary standard dispute resolution clauses in charterparties. Hence the mischief that s11 COGSA sought to remedy for the holders of bills of lading, applies equally to Australian charterers.

12. As Beach Building (now Gladstone Civil) was under a creditor's arrangement, leave to appeal to the High Court was not sought and it is likely that the law is now settled, at least for the time being.

13. The Full Federal Court's interpretation of s11 COGSA has the effect that in the future it will strike down a more limited class of international arbitration clauses, in particular it will render of "no effect" foreign arbitration clauses in bills of lading or waybills. Where international arbitrations are commenced in respect of bills of lading or waybills in breach of this Australian mandatory law (such as by an arbitration commenced in Singapore), claimants run the risk that anti-suit and even anti-anti suit relief will be obtained from Australian courts (as was the case in a recent case in which I was involved). Respondents are likely to try to prevent the claimant proceeding with the foreign arbitration contrary to Australian mandatory law, rather than wait to challenge the validity of the award at the enforcement stage, which is a higher risk strategy, particularly where the respondent has assets outside of Australia against which any award may be enforced.

**Steve White**
Principal, White SW Computer Law, ACICA Fellow

**Sarah Pike**
Senior Associate, White SW Computer Law

# Wording of Alternative Dispute Resolution Clauses for Project Agreements

When an agreement is drafted to include multiple dispute resolution procedures, which are often interdependent, care must be taken when drafting other clauses within the agreement that seek to fast track particular types of dispute to a single specified method of dispute resolution.

There were two classes of disputes which could be referred for determination by the Accelerated Dispute Resolution Procedures. One class consists of disputes expressly referred for determination by an Independent Expert or by Accelerated Dispute Resolution.

Importantly, it should be made clear whether one party has the ability to unilaterally oblige other parties to undergo such a fast track dispute resolution mechanism and the interaction of such a fast track option within the broader framework provided by the general dispute resolution clauses should to be clearly outlined.

The Court of Appeal, Victorian Supreme Court handed down a decision[1] in an appeal from a judgment of Croft J[2] involving the interpretation of the dispute resolution provisions of a Project Agreement, pursuant to which Plenary Research Pty Ltd ("the Appellant") had agreed to design, construct and operate a biosciences research facility at a campus of La Trobe University.

The Appellant had submitted three claims for extension of time, which claims were rejected by Biosciences Research Centre Pty Ltd ("the Respondent"). The Appellant then proceeded to serve a Notice of Dispute and submissions on the Respondent disputing the rejection of its extension of time claims.

The Respondent sought to exercise its right to refer the dispute for resolution under the Accelerated Dispute Resolution Procedures provided for in the Project Agreement.

The Appellant disputed that referral and said that the Notice of Dispute must proceed to arbitration.

At first instance, Croft J held in favour of the Respondent that the Project Agreement required that the dispute between the parties be resolved by an Independent Expert, in accordance with the Accelerated Dispute Resolution Procedures provided for in the Project Agreement.

The Project Agreement provided three dispute resolution procedures:

---

1. *Plenary Research Pty Ltd v Biosciences Research Centre Pty Ltd* [2013] VSCA 217
2. *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249

- Senior Negotiations;
- Accelerated Dispute Resolution Procedures; and
- Arbitration.

The principal issue in the appeal was to determine which set of procedures applied.

There were two classes of disputes which could be referred for determination by the Accelerated Dispute Resolution Procedures. One class consists of disputes expressly referred for determination by an Independent Expert or by Accelerated Dispute Resolution. The second class consists of disputes agreed to be referred to an Independent Expert in the event that the Senior Negotiations procedure did not succeed (subject to the amount claimed being equal to or less than $5 million in relation to the Works or $500,000 in relation to Services).

The Project Agreement provided that extension of time dispute ***may*** be referred to an Independent Expert for resolution.

Croft J preferred the Respondent's view that the use of the word "may" gives either party a choice as to whether or not it seeks to refer an extension of time claim to an Independent Expert.

The Appellant submitted that the construction the Project Agreement adopted by Croft J was incorrect. They argued that the consequence of the use of the word "may" does not require that extension of time claims must be determined by an Independent Expert and that where objection is taken by either party to the election of the other party to have an extension of time dispute referred to an Independent Expert, then the election cannot be enforced.

The Appellant's view was that whilst 'may' can mean 'must', that did not mean that one party could proceed unilaterally against the opposition of the other party to impose the Accelerated Dispute Resolution Procedures on the other contracting party.

The Appellant maintained that the fast track referral to an Independent Expert remained possible, on the initiative of one party, but not compulsory in the event that the other party objected, or where the preferred arbitration process had commenced.

The Court, Garde AJA with Maxwell P and Tate JA in agreement, held that the construction of the clause governing extension of time disputed by the trial judge was correct, for reasons including, amongst others:

- The clause governing extension of time claims was expressed to apply to any dispute about an extension of time claim. The use of the word 'any' was held to suggest a comprehensive approach to the class of disputes identified in the provision;
- The right to refer an extension of time dispute to an Independent Expert for resolution was conferred on either party.
- The use of the word "may' gives either party a choice as to whether or not it seeks to invoke the provision.
- Extension of time claims are notorious in building disputes and it is reasonable and sensible for them to be resolved using a 'fast track' process
- It is important for provisions to be reasonably and meaningfully construed so as to give the parties a real opportunity of avoiding prolonged and expensive litigation or arbitration proceedings which they have in their agreement sought to avoid through access to accelerated dispute resolution.

The trial judge noted the High Court's reference to the decision of the Queensland Supreme Court in *Zeke Services Pty Ltd v Traffic Technologies Ltd*[3] in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd*[4] in which it was stated that *the evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical*.

With correctly worded agreements, the parties can make good use of a fast track resolution process involving expert determination for specified areas of dispute, while maintaining an overarching dispute resolution mechanism to govern the agreement as a whole.

---



3. *[2005] 2 Qd R 563, 570 [27] (Chesterman J).*
4. *[2011] 244 CLR 305, 315 [25] (French CJ, Crennan and Kiefel JJ).*

**Ian Govey**
ACICA Fellow

# Darwin Conference on 'Australia in the Asian Century'

The role of ACICA was promoted as an effective resort for dispute resolution in the context of trade and investment with Asia at a Conference in Darwin on 29 August. The Conference, *Australia in the Asian Century*, was attended by senior Commonwealth officials based in the Northern Territory.

Australia and ACICA in particular, played a key role in the establishment of APRAG which was formed to encourage cooperation between the arbitral bodies and joint promotion of international arbitration in the Asia Pacific region.

The promotion of ACICA, as well as Australian arbitrators and the Australian legal framework for dispute resolution, came in a speech by Ian Govey, Vice President of ACICA and CEO of the Australian Government Solicitor.

Other speakers at the Conference were:

- Adam Giles, Chief Minister of the Northern Territory
- Ken Henry, Chair of the Institute of Public Policy at the Australian National University
- Allan Gyngell, Director General, Office of National Assessment
- Paul Henderson, former Chief Minister of the Northern Territory
- Sean Kildare, General Manager of Inpex Corporation
- Donald McGauchie, Chair of AACo and former Member of the Reserve Bank Board
- Sharon Bell, Deputy Vice Chancellor of Charles Darwin University.

Ian's talk which was entitled 'Australia in the Asian Century, Legal Aspects' focused on 4 topics:

1. Australia needs to have an effective domestic commercial law, and where appropriate, an international law framework to facilitate trade and investment with Asia
2. Australia needs to have an effective system for dispute resolution to facilitate this trade and investment
3. Australia needs to have a legal profession which is well-equipped to support Australian business in this trade and investment
4. Australia needs to be active in promoting the rule of law, accessibility of law and the adoption of effective commercial laws and dispute resolution mechanisms in Asia.

An edited (shortened) version of Ian's comments on dispute resolution follows:

"Australia has a long history of reliance on, and promotion of, alternative dispute resolution, in particular in the Asian region.

Where a binding form of dispute resolution is needed, international arbitration is very often preferred to that of any country's court system. It is seen to have advantages of neutrality, party control (in particular, venue, rules, choice of arbitrator, finality and confidentiality), as well as cost and speed – which are potential advantages, albeit not always achieved. Perhaps most importantly, there is an effective international regime for enforcement of arbitration agreements and arbitral awards under the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards to which 149 countries, including Australia, are parties. This can be contrasted with the much more limited international arrangements for enforcement of court decisions which operate on a bilateral basis and which in practice are more limited in their scope.

For Australia, the field of international commercial arbitration is governed by the federal *International Arbitration Act 1974*. In addition to providing for the enforcement of international arbitral awards under the New York Convention, it adopts the internationally recognised UNCITRAL Model Law on International Commercial Arbitration to govern international arbitrations (to the exclusion of State and Territory domestic arbitration laws). The Model Law has been adopted in over 60 countries.

The legal framework governing international arbitration in Australia has been further strengthened following amendments to the International Arbitration Act in 2010. Importantly, the grounds for challenging the enforceability of an arbitral award and an agreement are limited to those provided in the New York Convention and the Model Law, and the Act provides a statutory duty of confidentiality.

Furthermore, Australia has a highly credible organisation to conduct international arbitration, the Australian Centre for International Commercial Arbitration (ACICA). ACICA was established in 1985 to educate, promote and encourage the use of international commercial arbitration as a means of dispute resolution within Australia and the Asia Pacific region. The Centre was reinvigorated in 2010 when the Commonwealth and New South Wales Governments jointly provided funding to help ACICA establish Australia's first dedicated international dispute resolution centre in Sydney.

ACICA's role was reinforced by its appointment under regulations made in 2011 under section 18 of the *International Arbitration Act* 1974 as Australia's sole appointment authority in dispute where the parties have not provided for an arbitrator or another appointment mechanism.

As recent decisions have demonstrated, there is strong support by Australian courts for an effective arbitration process, including in recognising the need to limit judicial intervention in relation to agreements made by parties. At an institutional level there is also close cooperation with Australian courts, reflected in the establishment by ACICA of its Judicial Liaison Committee which is chaired by former High Court Chief Justice, the Hon Murray Gleeson AC. The Committee has judicial members from the Federal Court of Australia and the Supreme Courts of 4 States, the ACT and the Northern Territory. The Committee is designed to promote uniformity in the rules and procedures relating to arbitration in Australia in areas such as enforcement of awards and agreements, the appointment of arbitrators and interim measures in support of arbitration.

The quality and reputation of a select number of Australian arbitrators makes the export of their services noteworthy. Australian lawyers are active in dispute resolution in Asia, both as arbitrators and in representing parties, and this helps to enhance Australia's reputation for expertise in this field.

ACICA has an active program of engagement with Asian countries:

- It has undertaken road shows in Malaysia, China and India recently, and similar events are planned for later this year in Japan and Korea to promote ACICA and international arbitration in Australia
- ACICA is hosting (with the International Bar Association and Business Law Section of the Law Council) a conference on key issues in international arbitration in the Asia-Pacific region in Sydney in December 2013
- ACICA is hosting the Asia Pacific Regional Arbitration Group (APRAG) Conference in Melbourne in March 2014.

Australia and ACICA in particular, played a key role in the establishment of APRAG which was formed to encourage cooperation between the arbitral bodies and joint promotion of international arbitration in the Asia Pacific region. APRAG was launched at a conference hosted by Australia in Sydney in 2004. It now has more than 35 member organisations comprising arbitration centres and associations in the Asia Pacific Region".

**Erika Hansen**
Baker & McKenzie

**Sonya Willis**
Lecturer, The University of Sydney

# ArbitralWomen Dinner to Honour Rashda Rana and Jo Delaney

On 15 August 2013, ArbitralWomen in Sydney gathered for a dinner to celebrate the appointment of Rashda Rana (Treasurer, ArbitralWomen) as the President of the Australian branch of the Chartered Institute of Arbitrators (CIArb) and Jo Delaney as the Chair of the Education Committee of the CIArb (Australia). The Australian branch of the CIArb was established in 1995 and Rashda is the first female president of the Australian branch, which is a win for women everywhere.


***From left:*** *Michelle Sindler, Angela Ha, Louise Dargan, Mili Djurdevic, Frances Isaac, Mary Walker, Jo Delaney, Rashda Rana, Erika Hansen, Eriko Kadota, Anne Hoffman, Daisy Mallett, Bree Farrugia, Gitanjali Bajaj, Sonya Willis and Theresa Dinh*

Jo Delaney is a Special Counsel at the Sydney office of Baker & McKenzie and joined the firm when Sarah Lancaster left to take up her role as Registrar of the LCIA. Jo has practiced in international arbitration for the past 14 years with Clifford Chance in London. Her return to Sydney coincided with Rashda relinquishing her role as the Chair of the Education Committee in order to focus on the presidency.

After congratulating Rashda and Jo on their appointments, each of the women present introduced herself and spoke of how she has come to be involved in dispute resolution, her concerns and ambitions.

We then heard some of the impressive achievements and ongoing struggles of women working, or seeking work, in arbitration. In particular, it was wonderful to hear about the very important work that is being carried out by some of our members who have been pushing the frontiers both here and overseas.

Some of the achievements of those present included lobbying to ensure that arbitration (whether as arbitrator or counsel) is recognised as constituting a proper part of barristers' work, assisting the United Nations to develop legal systems in emerging economies such as Cambodia and training and working with tribunals and in firms to develop arbitration expertise.

Over dinner, we discussed the difficulties women face in trying to promote themselves in the field of arbitration and explored ways in which women could endeavour to overcome these hurdles. We can all learn from and through the experiences of others, including some who were not present but whose efforts were discussed. When discussing how to balance work and life with family, especially children, the importance of a strong support network at home and in the work place was evident. Husbands and partners of the women at the event were praised for their support and these men should also be afforded some recognition.

At the end of the night, we were all pleased that we had come together in a forum that was open and encouraging of each other. It was proposed that we organise an ArbitralWomen breakfast at the next international Sydney event, the IBA/Law Council * on 6 December 2013 when there will be a chance for ArbitralWomen members from outside Australia to join in the discussions.

Whilst we acknowledged that most women face similar challenges, the celebration of two appointments of proactive and inspiring women to positions within the CIArb (Australia) was a positive and promising development for women in arbitration.

**Erika Hansen**
Baker & McKenzie

# CIArb/YL International Arbitration Moot

In 2009, the Chartered Institute of Arbitrators Australia (CIArb), in co-operation with the New South Wales Young Lawyers International Law Committee staged the inaugural CIArb/YL International Arbitration Moot. Now in its fifth year, this competition has attracted participants from Sydney, Melbourne, Canberra, Perth, Brisbane, and for the first time this year the moot had an international participant from Vietnam. This broad participation signifies the appeal of arbitration amongst Young Lawyers and demonstrates that the CIArb/YL International Arbitration Moot has cemented its place as a progressive and high quality competition.

On Saturday, 31 August 2013, 18 young lawyers competed in four rounds of mooting in front of arbitral panels which each consisted of 3 experienced arbitration practitioners. The competition was a resounding success with a very high quality of mooting displayed.

Throughout the competition, each team member was scored individually based on a set of criteria assessing clarity of reasoning, how they dealt with questioning from the tribunal, identification of issues, teamwork and style. These scores were used to determine the prize for best oralist and to determine which teams would compete in the final.

The final was held on Tuesday, 3 September 2013 at Baker & McKenzie. The finalist teams were Team 10 consisting of Nicola Bailey and Alexander McVey, and Team 11 consisting of Antoine Najjarin and Natalie Mendes. These two teams made their oral submissions in front of an esteemed arbitral tribunal consisting of the present president, immediate past president and past president of the Australian branch of the CIArb. The current president, and first female president of the Australian branch is Rashda Rana. Rasha was joined by John Wakefield, immediate past president and Malcolm Holmes QC, past president.

Following some very impressive oral submissions, including responding to some vigorous questioning from the arbitral tribunal, the winning team was announced, awarding Nicola Bailey and Alexander McVey a generous book prize consisting of arbitration books that were kindly donated by Federation Press, Thomson Reuters, Cambridge University Press, ICC Australia and Lexis Nexis.

These publishers also donated a number of books to be awarded to the team with the best written submissions. Team 2 consisting of Tomoyuki Hachigo and Kelvin Tran were honoured with this award.

Each year, one participant is awarded the Spirit of the Moot in recognition of a little something extra that he or she brought to the moot. This year's winner was Peter Craney for his willingness to participate after his team mate fell ill and then teaming up with another participant whose team mate was also unable to participate. The cooperation and enthusiasm demonstrated by Peter was rewarded with a lunch with Doug Jones, partner at Clayton Utz and esteemed International Arbitrator.

***From left:*** *The winning team of Alexander McVey and Nicola Bailey; CIArb Australia President, Rashda Rana; winner of Best Oralist, Blake Primrose, and Winner of Best Written Submissions, Tomoyuki Hachigo.*

Finally, as mentioned above, the mooter awarded the most points based on their individual performance receives the prize for best oralist. The prize for best oralist is a place in the Diploma of International Commercial Arbitration course. This intensive course in International Commercial Arbitration is offered over 9 days by CIArb and UNSW and participants are taught the practice of international commercial arbitration, including all major forms of arbitration and related dispute settling mechanisms such as WIPO and CIETAC. A congratulation goes to Blake Primrose for winning best oralist.

Our gratitude goes to the following arbitrators who gave up their Saturday to judge the four rounds of the moot:

- Peter Anagnostou
- Greg Burton SC
- Louise Dargan
- Dalma Demeter
- Mili Dhjurdevic
- Theresa Dinh
- Angela Ha
- Lorraine Hui
- Frances Isaac
- Thomas John
- Angus MacInnis
- Daisy Mallett
- Paul Menzies QC
- Greg Nell SC
- Michael Sanig
- Julie Soars
- Deborah Tomkinson,

A special thank you must also go out to Rashda Rana, Jo Delaney, Deborah Tomkinson and Natalie Puchalka who were instrumental in the success of the moot.

**Judith Levine**
Senior Legal Counsel, PCA

# Permanent Court of Arbitration Celebrates 100th Anniversary of the Peace Palace

On 11 October 2013, the Permanent Court of Arbitration (PCA) hosted a seminar in The Hague to celebrate the 100th anniversary of the Peace Palace. The seminar was one of many diverse events held throughout the year to mark the centenary of the construction of the landmark "temple of peace" built in 1913.

Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community.

The Peace Palace was built to house the PCA, an intergovernmental organization dedicated to peaceful resolution of international disputes which had been created by treaty in 1899. Today the Peace Palace also hosts the International Court of Justice (the principal judicial organ of the United Nations), the Hague Academy of International Law and the world class Peace Palace Library. Its construction followed an international architecture competition, and was made possible with funding from U.S. steel magnate and philanthropist Andrew Carnegie. The interiors of the Palace are decorated with gifts from member states, including materials, artworks and busts of famous peace activists and international jurists.

## The PCA Peace Palace Centenary Seminar

The PCA's seminar on 11 October was a unique opportunity to bring together arbitrators and counsel participating in cases administered by the PCA, diplomats representing the PCA's 115 member States, dozens of the PCA's "Members of the Court" (individuals nominated by member States to be on a panel of available arbitrators), academics and others involved in international dispute resolution.

The morning session comprised a program of legal staff from the International Bureau of the PCA updating the audience on the PCA's activities. Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community. The PCA's caseload is currently at an all time high, with 83 cases presently being administered by the PCA.

Of these, eight are state-to-state disputes, including disputes under the UN Convention on the Law of the Sea (Philippines v. China, Bangladesh v. India, Argentina v. Ghana, Mauritius v. UK), under special agreements or pursuant to bilateral treaties, such as India and Pakistan, concerning a hydroelectric dam in the Kashmir region, under a 1960 treaty.

The biggest growth in the PCA's caseload has been in "mixed arbitrations", involving combinations of states and non-state parties. Of the current docket, about 20 cases involve confidential contract disputes between private parties and states, state-owned entities or intergovernmental organizations. The PCA also administers 49 investor-state arbitrations pursuant to bilateral and multilateral investment treaties. Some of these cases are public, including a NAFTA case which is being live-streamed on the internet at time of writing, and the Philip Morris Asia Limited v. Australia arbitration, for which the key procedural documents are available on the PCA's website.

Other growth areas include cases involving intergovernmental organizations (such as a recent South Pacific fisheries case), "intra-state" disputes arising from post civil-war scenarios (such as the Abyei arbitration between the Government of Sudan and the Sudanese People's Liberation Movement/Army) and disputes involving the environment.

The morning program also highlighted the PCA's 2012 Rules which have been adapted to deal with the evolving types of players in international disputes, explained how the PCA has dealt with over 500 appointing authority requests under the UNCITRAL Rules, and showcased recent activities of partner organization ICCA (the International Council of Commercial Arbitration) in publications, global outreach and scholarship. Materials from the morning program will be posted on the PCA's website soon (www.pca-cpa.org).

The afternoon program, entitled *Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration*, opened with a keynote address by Professor Jan Paulsson. Judge Peter Tomka, President of the ICJ, then moderated a debate amongst a distinguished panel featuring Australian Professor James Crawford SC (focusing on arbitrator challenges), UK Judge Sir Christopher Greenwood QC, (discussing the Most-Favoured-Nation clause in investment treaties), and French Professor Brigitte Stern (speaking about sovereign regulatory freedom).

## The PCA and the Asia-Pacific Region

As observed during the centenary seminar, disputes involving at least one party from the Asia-Pacific Region make up a substantial portion of the PCA's current caseload, including more than half of the interstate cases, and one third of the "mixed arbitration" cases. The PCA Secretary-General last year received 22 requests to designate or act as an appointing authority in proceedings involving at least one party from the Asia-Pacific.

Approximately one-third of the legal staff at the PCA's International Bureau are nationals from the Asia-Pacific region (including China, Korea, the Philippines, Singapore, Sri Lanka, Australia and New Zealand). The PCA regularly has fellows and interns from the region. There are Australian arbitrators sitting in ten pending PCA cases. PCA staff have also participated in training programs and conferences in the region, including recent events in Vietnam, Malaysia, India, Hong Kong, China, Singapore and Australia hosted by governments, academic institutes, APRAG and the Chartered Institute.

While many PCA proceedings are held at the beautiful Peace Palace headquarters, the PCA has also conducted meetings or hearings in over 35 cities in accordance with the flexibility that arbitration offers parties. In the region, the PCA has concluded Host Country Agreements with Singapore and India, pursuant to which participants in PCA cases (such as arbitrators, counsel and witnesses) are granted privileges and immunities similar to those provided in The Netherlands. Similarly, the PCA has entered into cooperation agreements with various regional arbitral institutions, including ACICA, SIAC and HKIAC. This year the PCA has held hearings in investor-state arbitrations in Hong Kong and Singapore, with more scheduled before year's end, a development that is testament to the rapid growth of the institution's activity in the Asia-Pacific region.

## The Peace Palace

## PCA Peace Palace Centenary Seminar – panel on Investor-State Arbitration

***From Left:*** *Professor Jan Paulsson, Judge Sir Christopher Greenwood QC, President Peter Tomka, Professor Brigitte Stern, Professor James Crawford SC*

## PCA Peace Palace Centenary Seminar – morning program


***From Left:*** *PCA Secretary-General Hugo Siblesz, PCA Legal Counsel Dirk Pulkowski, PCA Senior Legal Counsel Judith Levine, PCA Assistant Legal Counsel Evgeniya Goriatcheva*

## Australian lawyers on PCA staff

***From Left:*** *Judith Levine (Senior Legal Counsel) & Fiona Poon (Legal Counsel)*

## Some of the PCA's legal staff

***From Left:*** *Dirk Pulkowski, Garth Schofield, Fedelma Smith, Sarah Grimmer, Brooks Daly, Judith Levine, Martin Doe, Evgeniya Goriatcheva, Aloysius Llamzon*

**Nicola Nygh**
Special Counsel, Allens

**Steven Pettigrove**
Associate, Linklaters

# Myanmar Accedes to the New York Convention

On 15 July 2013 Myanmar formally acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**").

Myanmar's accession to the New York Convention is the latest development in the process of facilitating foreign investment and economic growth in Myanmar. This process commenced after a new reformist government came into power in March 2011 after five decades of military rule.

## How does it affect you?

- The New York Convention obliges Myanmar's Courts to give effect to contractual provisions which provide for disputes to be resolved by arbitration and to enforce foreign arbitral awards;
- Draft legislation implementing Myanmar's obligations under the New York Convention has been prepared although some uncertainties remain as to the details of the legislation and how it will be applied by the Courts;
- Nevertheless Myanmar's accession represents a significant step by the Myanmar Government in creating a legal environment attractive for foreign investment.

## Background

Myanmar is an emerging market in Asia that is attracting significant interest from foreign investors. It is rich in natural resources, has a large population (approximately 60 million people), and requires substantial investment in key sectors of the economy, including infrastructure, telecommunications, power and financial services. Myanmar's accession to the New York Convention is the latest development in the process of facilitating foreign investment and economic growth in Myanmar. This process commenced after a new reformist government came into power in March 2011 after five decades of military rule.

Since March 2011, the Myanmar Government has engaged in a broad programme of political, economic and legal reform. An important development in terms of domestic policy was the Government's abolition in April 2012 of the country's grossly overvalued official exchange rate in favour of a market-based exchange rate system. The Government has also introduced a new Foreign Investment Law (the "**FIL**"), which came into force in November 2012.

The FIL, along with the Foreign Investment Rules and the notification on restricted economic activities issued by the Myanmar Investment Commission earlier this year, provides the legal framework for foreign investment and identifies the forms of investment allowed, permitted sectors for investment, foreign ownership restrictions, and tax and duty incentives. Further legal reform is expected in a number of areas in the near future.

In recognition of the country's social, political and economic reforms, most major trading powers, including the European Union, the United States, Japan, Australia and Canada have progressively eased economic sanctions that have been in place against Myanmar for over 15 years. In April 2013, the European Union lifted all economic sanctions on Myanmar. The United States has suspended most of its trade and investment sanctions against Myanmar and lifted further restrictions in May 2013. However, most trading powers, including the European Union and the United States, have retained arms embargoes and targeted restrictions against certain individuals and entities accused of human rights abuses.

Each of these developments is an important step towards reducing constraints on Myanmar's growth and attracting foreign capital. Investors have nevertheless expressed concern about the absence of an effective mechanism for resolving commercial and investment disputes relating to Myanmar. Myanmar's accession to the New York Convention represents a significant step in addressing that concern.

## Accession to the New York Convention

On 16 April 2013, Myanmar deposited its instrument of accession to the New York Convention. The accession formally took effect on 15 July 2013, when Myanmar became the 149th party to the Convention (the Democratic Republic of the Congo is expected to become the 150th party to the Convention shortly).

The New York Convention is considered to be one of the most successful international conventions and an essential component in establishing a strong framework for foreign investment. The Convention requires contracting parties to recognise and enforce foreign arbitral awards in their jurisdiction, subject to limited exceptions. The Convention also requires parties to give effect to contractual provisions which provide for the resolution of disputes by arbitration. The Convention therefore enables investors to choose a neutral offshore forum for the resolution of investment disputes in preference to the local courts, if the parties have contractually agreed to arbitration.

While Myanmar is yet to introduce domestic legislation giving effect to its obligations under the New York Convention, its accession adds an important piece to Myanmar's investment framework. The FIL introduced in November 2012 explicitly recognises investors' rights to agree contractually on their dispute resolution mechanism. While the FIL therefore allows foreign investors to agree to refer disputes to offshore arbitration (for example, arbitration seated in a recognised arbitration centre such as Hong Kong or Singapore), to date, there has been no reliable legal mechanism for enforcing foreign arbitral awards through the Myanmar Courts. Myanmar's accession to the New York Convention demonstrates the Government's intention to fill that gap. However, as explained below, a number of uncertainties remain regarding how Myanmar's accession will operate in practice.

In addition, Myanmar is a party to a number of multilateral and bilateral investment treaties with countries in the Asian region, including the ASEAN Comprehensive Investment Agreement (the "ACIA") and the ASEAN-Australia and New Zealand Free Trade Agreement (the "ASEAN-ANZ FTA"). The ACIA and the ASEAN-ANZ FTA grant applicable investors a range of investor protections and establish mechanisms for resolving investment-related disputes.

Many foreign investors will seek to structure their investments in Myanmar to take advantage of the protections afforded by these agreements. Subject to the challenges identified below, Myanmar's accession to the New York Convention will establish a route for applicable foreign investors to enforce the protections granted by the ACIA and the ASEAN-ANZ FTA to investments in Myanmar.

## Challenges remain

Although Myanmar's accession to the New York Convention represents a very significant development, there remain grounds for caution. While we understand Myanmar has not made any reservations to the Convention, the enactment of domestic legislation implementing Myanmar's obligations under the Convention is likely to be a pre-requisite to the successful enforcement of a foreign arbitral award in Myanmar. We understand that a new draft arbitration law, which is based on the UNCITRAL Model Law on International Commercial Arbitration, has been prepared, and will deal with the recognition of contractual provisions for arbitration and the enforcement of foreign arbitral awards. However, a large number of draft laws are currently pending consideration by Myanmar's Parliament and it is not known when the new arbitration law will be enacted.

As a practical matter, the rule of law in Myanmar has been significantly impacted by five decades of military rule. We are not aware of any foreign arbitral award having been enforced in Myanmar previously. Under the New York Convention, domestic courts may refuse to enforce a foreign arbitral award on the basis that it would be contrary to the public policy of that country. This exception has generally been interpreted narrowly. Countries the courts of which adopt an expansive interpretation of "public policy" are generally considered less investor-friendly.

How the Myanmar Courts will interpret this exception, particularly in respect of awards involving the Myanmar state, or state-owned enterprises, remains to be seen. However, we understand that efforts to train judges in Myanmar in dealing with New York Convention awards are already underway.

Corruption within Myanmar also remains a significant concern for foreign investors. In 2012, Myanmar ranked 172 out of 176 countries on Transparency International's Corruption Perception Index. The Myanmar Government has indicated its intent to tackle the problem. In December 2012, Myanmar ratified the United Nations Convention against Corruption. To comply with its obligations under the Convention, the Government has established a committee to combat bribery and corruption in the public sector and is preparing an anti-corruption law.

## Conclusion

Myanmar's accession to the New York Convention represents a significant step in the reform programme initiated by the Myanmar Government. This development demonstrates the Government's intention to establish a friendly environment for foreign investment by enabling foreign investors to resolve commercial and investment-related disputes offshore and enforce foreign arbitral awards within Myanmar. The most urgent task for the Government now is to incorporate the provisions of the New York Convention into Myanmar's domestic laws by enacting new arbitration legislation. The first application to enforce a foreign arbitral award before the Myanmar Courts will also be highly anticipated. While foreign investors will continue to adopt a cautious approach in contemplating investments in Myanmar, Myanmar's accession to the Convention and reports of further anticipated reforms are highly encouraging.

**Guido Carducci**
ACICA Fellow*

# Preventing Parallel Court and Arbitral Proceedings: Is the French "Negative" Effect of Kompetenz-Kompetenz a Model for International Commercial Arbitration?

A frequent and probably "evergreen" dilatory strategy for signatories to an international arbitration agreement who oppose arbitration involves starting parallel court proceedings to challenge the arbitration agreement.

Legislators in other jurisdictions that regard these matters of expediency and parallel court proceedings as important[1] in international arbitration practice may find French international arbitration law of interest.

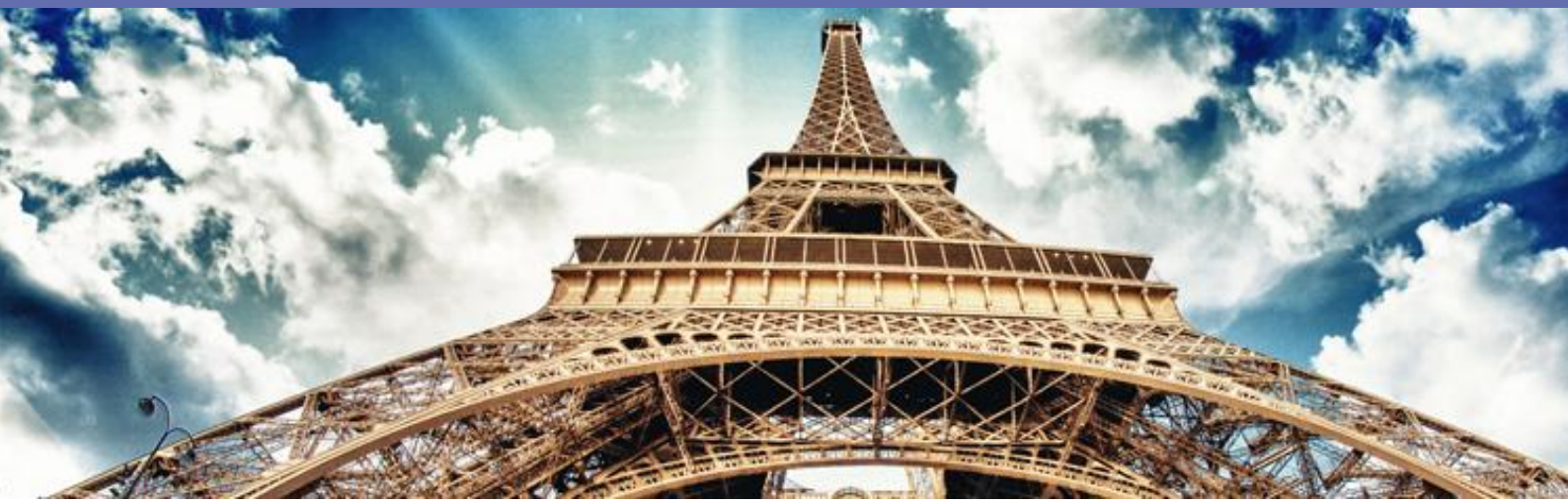
Each legal system faces the need to strike a sound balance between preserving arbitration as the exclusive and freely chosen forum and giving parties access to court proceedings, during or after the arbitration proceedings. French arbitration law[1], as reformed in 2011, reinforces, in both domestic and international arbitration, earlier French case law by granting to the principle of *Kompetenz-Kompetenz* (hereafter "K-K") both a "positive effect", an exclusive jurisdiction to the tribunal to rule on its jurisdiction over the dispute in case it is contested and, more originally in comparative arbitration law, a "negative effect"[2] which excludes the jurisdiction of French courts over claims related to disputes that fall under an arbitration agreement.

Although the parties may opt out of international arbitration and the French court may not raise ex officio its lack of jurisdiction, the "negative effect" prevents effectively the risk of dilatory strategies and artificial parallel court proceedings, beyond what the "positive effect" of K-K can ensure. Legislators in other jurisdictions that regard these matters of expediency and parallel

---

**** Former Chief of the Legal and Treaty Section at UNESCO, Dr. Carducci is an attorney and a law professor teaching in Paris, a Chartered Arbitrator, FCIArb, Arbitrator and Conciliator in ICSID Panels and has an independent practice as arbitrator, legal expert and counsel.***

1. In detail, G.Carducci, *Law and Practice of Arbitration in France. Commentary and Treatise on Commercial and Investment Arbitration*, Oxford University Press 2014.
2. E.Gaillard, *L'effet négatif de la compétence-compétence*, in Etudes de procédure et d'arbitrage en l'honneur de J-F. Poudret, 1999 Lausanne, p.387.



court proceedings as important[3] in international arbitration practice may find French international arbitration law of interest. The exceptions to the "negative effect" of K-K that a legislator would deem necessary are crucial in the balancing of relevant interests.

The exceptions retained in French law, which exclude the "negative effect" of K-K and results in the resumption of court jurisdiction, only apply if an arbitral tribunal has not yet been seized of the dispute and the arbitration agreement is manifestly void or manifestly not applicable.[4] As these two conditions are cumulative and must both be satisfied in order for the exception under French law to apply the "negative effect" of K-K applies and prevents parallel court proceedings in France as soon as the arbitral tribunal has been seized, and even before if the arbitration agreement is not manifestly void or not applicable.

It follows that the "negative effect" of K-K prevents parallel court proceedings in France more frequently than the UNCITRAL Model Law[5], which is applicable in Australian international commercial arbitration[6], or the New York Convention[7] would in Australia by requiring courts to refer the parties to arbitration only when a party so requests and the arbitration agreement is not null and void, inoperative or incapable of being performed, irrespective of whether the arbitral tribunal is already seized or not.[8]

The "negative effect" is no longer operational once the award is made and French courts may annul the award on a few selective grounds, some of which relate to the tribunal's interpretation of the arbitration agreement. The French "negative effect" of K-K represents a significant degree of arbitration-friendliness in jurisdictional perspective. Does it represent the right degree, and the proper balance, with regard to court control, for international commercial arbitration? Future developments in comparative arbitration law and from the perspective of legislators in other jurisdictions will tell.

---

3. They were regarded important also in the EU but not sufficiently to justify a specific mechanism to prevent parallel court and arbitration proceedings in the new EU Regulation 1215/2010, G. Carducci *The* ***new E.U. Regulation 1215/2012 of 12 December 2012 (Brussels I bis) on Jurisdiction and International Arbitration (****With Notes on Parallel Arbitration, Court Proceedings and the EU Commission's Proposal)*, ***Arbitration International* 2013, III, p.467.**
4. Art.1448 cpc
5. Art. 8(1)
6. Sect. 16, *International Arbitration Act* No. 136 of 1974 as amended by the *Statute Law Revision Act* 2011.
7. Art. II (3)
8. Art. 8(2) of the Model Law supports this view (…arbitral proceedings may nevertheless be commenced or continued ...).

**Joachim Delaney**
Special Counsel, Baker & McKenzie

# Investor-State Arbitrations: UNCITRAL Adopts New Transparency Rules

On 11 July 2013, the United Nations Commission on International Trade Law (**UNCITRAL**) adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (**Transparency Rules**). The Transparency Rules are to come into effect as part of the UNCITRAL Rules of Arbitration (**UNCITRAL Arbitration Rules**) on 1 April 2014.[1]

Most importantly, the Transparency Rules do not apply to international commercial arbitrations. The confidentiality and privacy of commercial arbitrations remain unaffected.

## Public interest vs confidentiality and privacy

Transparency in investor-State arbitration has long been a vexed question[2]. Balancing the legitimate and substantial interest of the public in investment arbitration with the traditionally confidential and private nature of international arbitration has been a difficult challenge. Potential delays and increasing costs have also been raised as potential disadvantages of increased transparency.

Steps have been taken by, for example, the International Centre for the Settlement of Investment Disputes (**ICSID**) as well as regional free trade commissions, such as the NAFTA Free Trade Commission between US, Canada and Mexico (**NAFTA Parties**) to increase transparency and permit public participation in investment arbitrations.

In 2006, the ICSID Rules of Procedure for Arbitration Proceedings (**ICSID Rules**) were amended to increase transparency in ICSID arbitrations. For example, Rule 37 was amended to empower the tribunal to permit amicus curiae briefs following consultation with the parties to the arbitration; Rule 32 was amended to empower the tribunal to decide whether or not to open up hearings to third parties; and Rule 48, which permits the publication of awards with the consent of both parties, was amended to facilitate the prompt release of excerpts of an award where consent is withheld.

The NAFTA Parties have sought to increase transparency and public participation through the standardised registration of claims, public access to documents, pleadings and awards and the ability of the other NAFTA Parties as well as amicus curiae to provide input to the tribunal.

As a result, amicus curiae briefs and open hearings have become an increasingly frequent occurrence in ICSID and NAFTA arbitrations.

---

1. The Transparency Rules provide for an amendment to Article 1 of the UNCITRAL Arbitration Rules so that the Transparency Rules are part of the UNCITRAL Arbitration Rules.
2. For a detailed analysis of transparency in investment arbitrations see, J. Delaney and D. B. Magraw, "Procedural Transparency", in P. Muchlinski, F. Ortino and C. Schreuer, *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008.

## Application of the Transparency Rules

The Transparency Rules only apply to investor-State arbitrations that are brought under the UNCITRAL Arbitration Rules pursuant to an investment treaty. They do not apply to ICSID arbitrations nor do they apply to contractual disputes between an investor and a State or State entity that arise out of an investment agreement. They may apply to investor-State arbitrations conducted under other arbitration rules or in ad hoc proceedings if the parties agree to their application.

Most importantly, the Transparency Rules do not apply to international commercial arbitrations. The confidentiality and privacy of commercial arbitrations remain unaffected.

The Transparency Rules will apply on either an "opt-in" or an "opt-out" basis depending upon when the relevant investment treaty came into force:

- The Transparency Rules will **not** apply to claims brought under an investment treaty that is already in force or a treaty concluded before 1 April 2014, unless the parties to the arbitration agree or the State parties to the treaty agree to their application (Article 1(2));
- The Transparency Rules will apply to claims brought under investment treaties that enter into force after 1 April 2014, unless the State parties agree otherwise (Article 1(1)).

## Overview of the Transparency Rules

There are four important ways in which the Transparency Rules will increase public participation in investor-State arbitrations:

- public access to documentation created during the arbitral proceedings;
- public access to hearings;
- participation of other States that are party to the investment treaty; and
- participation of third parties, such as amicus curiae, in the arbitral proceedings.

The Transparency Rules provide for exceptions to protect confidentiality or protected information or to protect the integrity of the arbitral process.

## Public access to documentation

As soon as an investor-State arbitration is commenced, the notice of arbitration will be sent to a repository maintained by UNCITRAL (Article 2). The repository will promptly publish the name of the disputing parties, the economic sector involved and the treaty under which the claim is made. This approach is similar to that adopted by ICSID, which also publishes basic information of pending cases.

The Transparency Rules, however, provide for further publication of documents created during the arbitration proceedings, including the notice of arbitration, the response to the notice of arbitration, the statement of claim and statement of defence, further written statements or submissions, a table of exhibits, transcripts of the hearings and orders, decisions and awards of the tribunal (Article 3). Such documentation is only published in a few, certainly not all, ICSID arbitrations.

Further, any person (not just an interested party) may request the tribunal to make publicly available expert reports, witness statements and potential exhibits (Articles 3(2) and 3(3)).

Whilst confidential and commercially sensitive information may be protected (see the exceptions below), the scope of the documentation that may be disclosed to the public, not just amicus curiae and other interested parties, is potentially much wider than that disclosable in an ICSID or NAFTA arbitration.

## Public access to hearings

The Transparency Rules provide that hearings relating to the merits of the dispute, i.e. not procedural hearings, shall be public (including through the use of video links) (Article 6). The only exception to public hearings is where there is a need to protect confidential information. In those circumstances, only that part of the hearing that involves the confidential information is to be held in private.

## Other State parties

The State of the investor, i.e. the Home State, or other States that are party to the investment treaty, may make submissions if so permitted or invited to do so by the tribunal. For example, such submissions may relate to the interpretation and application of particular terms in the treaty. Tribunals in NAFTA arbitrations will often accept submissions from the two States that are not party to the arbitration.

## Amicus curiae

The Transparency Rules provide for the participation of third parties, such as amicus curiae, in the arbitral proceedings (Article 4). The amicus curiae must first apply to the tribunal, describing its interest in the arbitration as well as any interests or connections it has with the parties to the arbitration, for permission to make written submissions. If permission is granted, the amicus curiae may make written submissions on matters within the scope of the dispute.

The tribunal is to ensure that the parties to the arbitration have a reasonable opportunity to make observations on the submissions. It must also ensure that the amicus curiae submissions do not disrupt or unduly burden the proceedings or unfairly prejudice one of the parties.

## Exceptions to the Transparency Rules

The Transparency Rules provide for certain limited exceptions to protect confidential or protected information or to protect the integrity of the arbitral process.

The publication of any documentation relating to the arbitral proceedings is subject to the protection of confidential or protected information (Article 7). Such information is not to be disclosed. That part of the hearing concerning the confidential information is to be held in private (Articles 6(2) and 7(3)(c)).

Confidential and protected information includes (Article 7(2)):

- confidential business information;
- information protected under the treaty; and
- information protected under the law of the respondent State or under any law or rules determined by the tribunal to apply to the disclosure of the information.

Further, the tribunal may exclude or delay the publication of information where it would jeopardise the integrity of the arbitral process by, for example, hampering the collection or production of evidence, or lead to the intimidation of witnesses, lawyers acting for the parties or the tribunal, or in other comparably exceptional circumstances (Article 7(6) and (7)).

## Effect of the Transparency Rules

Investor-State arbitrations on foot are unaffected by the Transparency Rules unless the parties to the arbitration agree to their application. Likewise, investor-State arbitrations commenced under an existing investment treaty remain unaffected unless the parties agree otherwise. As the Transparency Rules only apply on an opt out basis to treaties concluded after 1 April 2014, it could be some time before the Transparency Rules are applied regularly by investor-State tribunals.

Nonetheless, given the public interest in investor-State arbitration and the increasing pressure on States, investors and tribunals to increase transparency and public participation, it is possible that tribunals and parties to investor-State arbitrations will agree to the application of the Transparency Rules. If so, then the manner in which those arbitral proceedings will be conducted is likely to change substantially.

The procedural burden on the parties is likely to increase significantly - most of that burden will be borne by the investor bringing the claim. For example, it is likely that a tribunal will order the claimant to ensure the necessary documentation is submitted to the repository for publication or to make the necessary arrangements for a public hearing. Parties will also need to address any submissions made by amicus curiae or the States that are parties to the investment treaty.

Increased transparency and public participation in investment arbitrations conducted under the UNCITRAL Rules is a positive development. It is hoped that the development of a convention relating to the application of the Transparency Rules to existing treaties, the next project of the UNCITRAL Working Group II, will maximise the impact of the Transparency Rules.

**Matthew A. Lee***

# IBA Guidelines on Party Representation in International Arbitration: A Cautionary Introductory Note for Clients, Counsel, and Arbitrators

Clients, legal counsel and arbitrators alike should all take note of the recent International Bar Association's Guidelines on Party Representation in International Arbitration (the "Guidelines"). While not binding, the Guidelines are intended as an expression of international arbitration best practice and offer a concise set of standards that seek to enhance certainty and preserve the integrity, transparency and fairness of arbitral proceedings.

The Guidelines are very much like watching a duck crossing the water of a calm pond: we are not exposed to the frantic paddling that occurs beneath the surface, nor do we know whether the duck will remain in the pond if the weather turns bad.

Reference to the Guidelines is likely to become more common in the future and in the event that parties agree to adopt the Guidelines in whole or in part (or arbitrators simply begin to refer to them generally), it will be important for clients, in-house counsel, external counsel, and arbitrators to be familiar with the details of the Guidelines and the remedies that may flow from breach of those Guidelines. This article provides both an overview of the salient provisions of the Guidelines and a summary of the key considerations that should now be assessed in light of these new Guidelines. This article is of particular use for clients and in-house counsel given that the Guidelines are not strictly limited to the actions of party representatives, and the potential remedies directly impact clients and any award and/or recovery of costs.

## An Important Initial Caveat

The Guidelines are very much like watching a duck crossing the water of a calm pond: we are not exposed to the frantic paddling that occurs beneath the surface, nor do we know whether the duck will remain in the pond if the weather turns bad. Read alone, all 27 guidelines are stated concisely with succinct and clear commentary to explain context. The Guidelines offer a tool that arbitrators can use to control and regulate the conduct of parties and their representatives, with the threat of remedies as an obvious, but discretionary, enforcement mechanism. No doubt, clients and arbitrators in many countries will read the Guidelines and see great sense in applying them to govern future disputes. However, beneath the surface, things are far more complex than they appear. First, the Guidelines must be reconciled with the arbitration agreement and other rules that govern the conduct of legal practitioners in different jurisdictions. Second, the apparent brevity and simplicity of the Guidelines does not alter the reality that rules of professional conduct and ethics in various jurisdictions may conflict with these Guidelines, and clients, counsel and arbitrators will all be forced to assess what happens when conflicts occur before, during and after an international arbitration.

---

***Matt Lee** is a dually-qualified lawyer at Quinn Emanuel Urquhart & Sullivan, LLP in New York and a member of the firm's International Arbitration Group. The views expressed in this article are the author's personal views, and do not reflect the opinions of Quinn Emanuel. For more information on this article or Quinn Emanuel's Sydney office please contact matthewlee@quinnemanuel.com.

The point is not to suggest that this conflict is irreconcilable, but rather, to note that clients, counsel and arbitrators should all be extremely cautious of trying to play too quick and loose based on a presumption that the Guidelines can be applied generally without consideration of other rules. The Guidelines *explicitly* note as much, stating "[a]s with the International Principles on Conduct for the Legal Profession … the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. They are also not intended to vest arbitral tribunals with powers otherwise reserved to bars or other professional bodies." Guidelines at 2. It should be noted that this kind of diplomatic approach is the norm for the International Bar Association, and other sets of guidelines and rules have been introduced and enforced after consultation with bar associations across the globe. *See, e.g*. IBA Rules on the Taking of Evidence in International Arbitration (as revised in 2010); IBA Guidelines on Conflicts of Interest in International Arbitration (currently under revision); and IBA Guidelines on Drafting Arbitration Agreements.

As arbitrators become more familiar with the Guidelines, and start referring to them as an expedient and fair way to address party representation and conduct in international arbitration, it is paramount for clients and their counsel to remember that local standards, rules and regulations will continue to apply. Furthermore, unlike in domestic settings where both the judge and counsel are likely familiar with, and subject to, a single set of professional conduct rules, "party representatives in international arbitration may be subject to diverse and potentially conflicting bodies of domestic rules and norms [and the] range of rules and norms applicable to the representation of parties in international arbitration may include those of the party representative's home jurisdiction, the arbitral seat, and the place where hearings physically take place." Guidelines at 1. Thus, clients and counsel would be well served by being aware of both this potential for conflict and the practical reality that an arbitrator might not be familiar with a specific jurisdiction's rules and standards.

## The Guidelines

Guidelines 1-3 concern the application of the Guidelines. Specifically, Guideline 1 notes that the "Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings." *Id*. at 5. Guidelines 2 and 3 then proceed to both address what should happen in the event of a dispute regarding the meaning of the Guidelines, and reiterate that the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, nor are the Guidelines intended to derogate from the arbitration agreement or to "undermine either a Party representative's primary duty of loyalty to the party whom he or she represents or a Party representative's paramount obligation to present such Party's case to the Arbitral Tribunal." *Id*.

It is worth noting that in the domestic litigation context, this kind of language preserving the duty to the client is often balanced against a duty to the court and a duty to the profession, and there are, in many jurisdictions, systems in place to make sure that these duties are complied with. What is notable about Guidelines 1-3 is that, unlike a court or professional regulatory body that enforces the multiple duties owed to the client, court and profession, it is not clear whether an Arbitral Tribunal or arbitrator, has power to unilaterally apply these rules in the absence of consent by the parties. Indeed, on this point the comments section notes that "[t]hese Guidelines do not state whether Arbitral Tribunals have the authority to rule on matters of Party representation and to apply the Guidelines in the absence of an agreement by the Parties to that effect. The Guidelines neither recognise nor exclude the existence of such authority." *Id*. at 5. Despite this lack of certainty, the comments nonetheless note that it "remains for the Tribunal to make a determination as to whether it has the authority to rule on matters of Party representation and to apply the Guidelines." *Id*.

Guidelines 4-6 address party representation. Guideline 5 is particularly important because it directs "[o]nce the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest." *Id*. at 6. This requirement was included in an attempt to address scenarios where new counsel had been brought on after the appointment of an independent tribunal because new counsel had some relationship with an arbitrator. Notwithstanding the fact that this kind of scenario seems to have been addressed by Guideline 5, a cautious reader or client will still want to know (1) what happens if the person accepts representation before the Arbitral Tribunal has been constituted and that representative happens to have a "relationship" with an Arbitrator; and (2) what kind of "relationship" creates a conflict of interest? The only guidance here is provided in the comments to the Guidelines, which note "[i]n assessing whether any such conflict of interest exists, the Arbitral Tribunal may rely on the IBA Guidelines on Conflicts of Interest in International Arbitration." *Id*. It should be noted that under the IBA Guidelines on Conflicts of Interest, the applicable standard is an objective standard of a reasonable observer having justifiable doubts.

Guidelines 7-8 concern communications with arbitrators. Other than by agreement or under some limited exceptions, Ex Parte Communications with an arbitrator concerning the arbitration should *not* be engaged in. Specifically, "[w]hile communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute." *Id*. at 7. No doubt, Guidelines 7 and 8 are an explicit attempt to draw a line between permissible and impermissible Ex Parte Communications between a Party Representative and a prospective Party-Nominated Arbitrator and/or Presiding Arbitrator. On the one hand, a Party Representative can engage in communications that assist in assessing "expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest" that include general descriptions of the dispute. *Id*.

On the other hand, the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute are off limits. This distinction is going to be difficult to monitor and police, especially given that the community of international arbitration counsel and arbitrators (not to mention those who act as both) is very close and most practitioners are well aware of many of the views/positions of their colleagues (even if those views are not readily available via a growing jurisprudence of awards and academic scholarship).

Guidelines 9-11 attempt to regulate submissions to the Arbitral Tribunal by limiting false submissions of fact being made, *knowingly*, by the Party Representative to the Arbitral Tribunal and false submissions being made in witness statements and expert reports. The Guidelines focus on remedial measures that may be taken when a party representative knows, or becomes aware of, a false statement of fact that has been made by a Witness or Expert. Specifically, "[i]n the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, [that] Representative should, subject to the countervailing considerations of confidentiality and privilege, promptly correct such submission." *Id*. at 8-9. Furthermore, in the event that a Party Representative knows, or later becomes aware of, evidence from a Witness or Expert that he or she knows to be false, there are a number of remedial measures that can be taken, including: (1) advising the Witness or Expert to testify truthfully; (2) taking reasonable steps to deter the Witness or Expert from submitting false evidence; (3) urging the Witness or Expert to correct or withdraw the false evidence; (4) correcting or withdrawing false evidence; or (5) withdrawing as Party Representative if the circumstances so warrant. *Id*. at 9. By way of contrast, the Guidelines do not appear to extend to false submissions as to law, with the comments to the Guidelines noting that "[w]ith respect to legal submissions to the Tribunal, a Party Representative may argue any construction of a law, a contract, a treaty or any authority that he or she believes is reasonable." *Id*. at 10.

Guidelines 12-17 concern information exchange and disclosure, and are the provisions that clients will, at first instance, need to pay particular attention to. The comments to the Guidelines note that "Party Representatives are often unsure whether and to what extent their respective domestic standards of professional conduct apply to the process of preserving, collecting and producing documents in international arbitration." *Id*. at 11-12. To that end, the comments also note that the "Guidelines are intended to foster the taking of objectively reasonable steps to preserve, search for and produce Documents that a Party has an obligation to disclose." *Id*. at 12. Guidelines 12-17 specifically concern preservation of documents that are *potentially relevant* to the case, and while a "Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business," a Party Representative "should not make any Request to Produce, or any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay." *Id*. at 10-11. Guidelines 14 and 15 explain the necessity of producing documents that have been ordered to be produced, and the Party Representative should advise and assist the Party in taking reasonable steps to "ensure that: (i) a reasonable search is made for Documents that a Party has undertaken, or been ordered, to produce; and (ii) all non-privileged, responsive Documents are produced." *Id*. at 11. Furthermore, Party Representatives "should not suppress or conceal, or advise a Party to suppress or conceal, Documents that have been requested by another Party or that the Party whom he or she represents has undertaken, or been ordered, to produce." *Id*. Finally, if "during the course of an arbitration, a Party Representative becomes aware of the existence of a Document that should have been produced, such Party Representative should advise the Party whom he or she represents of the necessity of producing the Document and the consequences of failing to do so." *Id*.

It should also be noted here that the IBA addressed the scope of document production in the IBA Rules on the Taking of Evidence in International Arbitration, specifically at Articles 3 (Documents) and 9 (Admissibility and Assessment of Evidence). Furthermore, clients should pay particular attention to the following directions that are provided in the comments to the Guidelines:

> Under Guidelines 12-17, a Party Representative should, under the circumstances, advise the Party whom he or she represents to: (i) identify those persons within the Party's control who might possess Documents potentially relevant to the arbitration, including electronic Documents; (ii) notify such persons of the need to preserve and not destroy any such Documents; and (iii) suspend or otherwise make arrangements to override any Document retention or other policies/practices whereby potentially relevant Documents might be destroyed in the ordinary course of business.

> Under Guidelines 12-17, a Party Representative should, under the given circumstances, advise the Party whom he or she represents to, and assist such Party to: (i) put in place a reasonable and proportionate system for collecting and reviewing Documents within the possession of persons within the Party's control in order to identify Documents that are relevant to the arbitration or that have been requested by another Party; and (ii) ensure that the Party Representative is provided with copies of, or access to, all such Documents.

Guidelines at 12. Following these protocols, which might not necessarily be self-evident for clients located in some jurisdictions, is one precautionary measure that can be taken to ensure that a party can later show that a minimum standard of document retention has been complied with.

Guidelines 18-25 govern how a Party Representative can communicate and interact with witnesses and experts. Specifically, a "Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports" and that "Representative may, consistent with the principle that the evidence given should reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony." *Id*. at 13-14. It is here that the IBA's proclamation of "best international arbitration practise," "transparent and predictable standards of conduct" and "integrity" will likely contradict local mandatory laws and/or professional or disciplinary rules in some jurisdictions with regard to the disclosures that are required concerning communications made, and materials collected/prepared, during the drafting of an expert report or witness statement.

One need only consider the different approaches in Australia, the United Kingdom, and the United States, regarding the role that counsel can play in assisting an expert/witness, and the disclosures required to be made with the filing of an expert report and/or witness statement, to understand the potential for this part of the Guidelines to cause confusion and conflict. The only reference to any higher standard of transparency is in the comments to the Guidelines, which notes "[d]omestic professional conduct norms in some jurisdictions require higher standards with respect to contacts with potential Witnesses who are known to be represented by counsel." While this provision does not address the conflict over expert disclosure standards addressed above, one path towards resolving this conflict might be for local bar associations and/or regulators to permit this standard in the context of international arbitration, but not during litigation. Even that may be a stretch in jurisdictions with entrenched views about how expert reports should be prepared, and what information and disclosures should accompany a final expert report.

Finally, Guidelines 26-27 outline possible remedies for Misconduct. Under the Guidelines, "Misconduct" is defined to mean "a breach of the present Guidelines or any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative." *Id*. at 3. Importantly, an Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, can find that a Party Representative has committed Misconduct, and *may* apply the following remedies:

(a) admonish the Party Representative;

(b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;

(c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs;

(d) (d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.

*Id*. at 16. Guideline 27 then "sets forth a list of factors that is neither exhaustive nor binding, but instead reflects an overarching balancing exercise to be conducted in addressing matters of Misconduct by a Party Representative in order to ensure that the arbitration proceed in a fair and appropriate manner." *Id*. at 17. These factors include:

(1) the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award; (2) the potential impact of a ruling regarding Misconduct on the rights of the Parties; (3) the nature and gravity of the Misconduct, including the extent to which the Misconduct affects the conduct of the proceedings; (4) the good faith of the Party Representative; (5) relevant considerations of privilege and confidentiality; and (6) the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct. *Id*. at 16.

## Clients Beware!

Clients should not let the title to the IBA Guidelines distract them from the fact that while the Guidelines are predominantly focused on the conduct of Party Representatives in International Arbitration, it is the *client* that "may ultimately bear the consequences of the misconduct of [their] Representative." *Id*. at 5. To be sure, an "admonition" by an arbitrator or Arbitral Tribunal may act as the catalyst for subsequent professional sanctions against a Party Representative under local mandatory laws and/or professional or disciplinary rules. While enforcement of these professional sanctions falls beyond the scope of any given international arbitration, the client remains on the hook for the actions of its counsel. Indeed, within the four walls of an international arbitration, it is the client that has most to lose, especially in the short term, from the discretionary remedies that an Arbitral Tribunal can impose. For this reason, it is critical for clients and in-house counsel (and also external counsel and arbitrators) to view the actions of Party Representatives in the context of the Guidelines. Furthermore, with increased reference to, and application of, the Guidelines in the future, clients, counsel and arbitrators will also have to reconcile the simplicity and brevity of the Guidelines with the complexity of various local rules and standards that will remain applicable to any given international arbitration. Failure to reconcile the Guidelines with these other local rules and standards will likely reproduce the same kinds of conflicts that the drafters of the Guidelines were trying to resolve in the first place unless local bar associations and regulators work to promulgate revised rules and standards that mitigate these tensions.


## Sydney Arbitration Week

The inaugural Sydney Arbitration Week was held with great success at the beginning of December 2013. The Week's program was full of stimulating international arbitration events with a keen focus on issues specific to the Asia Pacific region.

The central event of the week was the conference, co-presented by the IBA Arbitration Committee, ACICA and the Business Law Section of the Law Council of Australia, on Key Issues in International Arbitration in the Asia Pacific Region held at the Inter-Continental Hotel on 5 December.

The Week kicked off with GAR Live Sydney, a one day conference hosted by Global Arbitration Review and chaired by Justin D'Agostino of Herbert Smith Freehills and Neil Kaplan CBE QC SBS. The Hon. Murray Gleeson AC QC, former Chief Justice of the High Court of Australia and chair of ACICA's Judicial Liaison Committee explored the challenges of federalism in Australia in his key note speech. A lively panel discussion followed, with well-known arbitration panelists exploring the advantages of Australia as an arbitral seat as well as the challenges still faced by Australia when positioning itself as a leading venue in the Asia Pacific region. The conference continued with the GAR Live Symposium, a lunch address from Professor Jeffrey Waincymer (Monash University), and an intimate and amusing fireside interview of leading Australian arbitrators conducted by Neil Kaplan. The day concluded with an Oxford-style debate, chaired by John Beechey (ICC International Court of Arbitration) on the motion "This House believes that international arbitration would be cheaper, faster and no less just if disclosure of documents were limited to those each party relied upon". ACICA members were strongly represented amongst the panelists and speakers involved with this well-attended conference.

The central event of the week was the conference, co-presented by the IBA Arbitration Committee, ACICA and the Business Law Section of the Law Council of Australia, on Key Issues in International Arbitration in the Asia Pacific Region held at the Inter-Continental Hotel on 5 December. Four panels consisting of high profile speakers from throughout the Asia Pacific region and beyond explored topics ranging from Asia Pacific international arbitration capability to investor state arbitration in the region.

The conference highlighted the significant growth of arbitration in the Asia Pacific region and considered the steps that can be taken to progress current initiatives and develop regional capabilities. The conference was followed by a cocktail function at the law firm of Clayton Utz overlooking the spectacular Sydney Harbour.

*IBA/LCA/ACICA Conference, panel discussion on "Are there particular characteristics of international arbitration in the Asia Pacific Region?". Chair: Doug Jones, AO.* ***Panelists (L-R):*** *Sunil Abraham, Ariel Ye, Yoshimi Ohara and Ben Hughes*

The IBA conference led into the inaugural meeting of the IBA Asia Pacific Arbitration Group. This meeting, held on 6 December, was themed "Pacific Currents – Asia Pacific Arbitration" and focused on the perspectives, concerns and needs of disputing parties in the Asia Pacific region. Potential initiatives aimed at developing international arbitration in the region, and the opportunity for partnership between practitioners, arbitral institutions and arbitrators to develop such initiatives were also discussed.

Sydney Arbitration Week also had a strong focus on the development of younger practitioners in this area. The first Young ICCA International Arbitration skills workshop to be held in Australia was run on 6 December at Allens Linklaters. The half day workshop, hosted by Young ICCA in co-operation with the CIArb Young Members International Arbitration Forum (CIArb YMIAF), the Asia-Pacific Forum for International Arbitration (AFIA) and the International Law Committee of the Young Lawyers NSW, and with the support of ACICA and the Australian International Disputes Centre, was led by a faculty of young international arbitration specialists and focused on the key elements of preparing for arbitration hearings. The roundtable format successfully produced an energetic discussion and it was inspiring to see the next generation of practitioners at work.

The final event of the week was the 36th AFIA International Arbitration Symposium on Asia-Pacific International Arbitration hosted by the University of Sydney Law School. Two preeminent panels traversed a number of interesting topics proposed by members including potential remedies for arbitrator misconduct and the use of prior academic writings or decisions as the basis for challenges to arbitrator impartiality. David Rivkin, as guest speaker, provided his thoughts on "Creative Approaches to Arbitrating Disputes", inspiring further contemplation of the potential mechanisms by which practitioners and arbitrators alike can work to improve the efficacy of arbitration proceedings. It was an enjoyable event that provided a fitting close to a busy and successful week.

ACICA extends its thanks to all the delegates who attended the conferences throughout Sydney Arbitration Week and we look forward to welcoming you back to Sydney next year.


## AIDC Room Hire

Established in 2010 with the assistance of the Australian Government and the New South Wales State Government, Australia's premier dispute resolution venue offers a premier one stop full ADR service.

### Why choose the Australian International Disputes Centre as your dispute resolution venue?

Located at 1 Castlereagh Street, in the heart of Sydney's legal and business districts, the Australian International Disputes Centre offers state of the art technology and soundproofed custom-built rooms that can be configured for arbitrations, mediations, adjudications, deposition-taking, conferences, seminars and meetings. Fully air-conditioned with modern furnishings, the contemporary corporate environment is enhanced by prominent Australian Indigenous artworks on loan from the **Ken Hinds Cultural Heritage Collection**.

All necessary business support services including case management and trust account administration are provided by skilled and professional staff. The AIDC is in close proximity to the Sydney Opera House, the Houses of Parliament and many of the city's prestigious hotels, bars and restaurants.

NSW GOVERNMENT

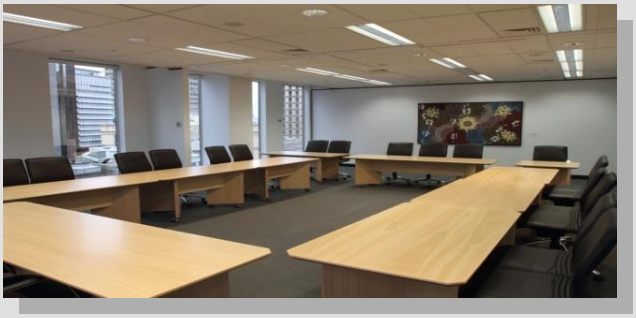
**Australian International Disputes Centre**

A: Level 16, 1 Castlereagh Street Sydney NSW 2000
P: +61 (0) 2 9239-0700
F: +61 (0) 2 9223-7053
E: info@disputescentre.com.au

**Visit and Book Online**
disputescentre.com.au

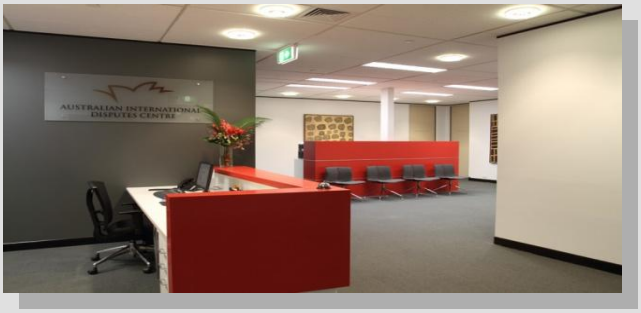
AUSTRALIAN INTERNATIONAL DISPUTES CENTRE

## World Class Dispute Resolution Facilities



Equipped with state of the art technology, the AIDC has 10 custom-built rooms which can be configured for arbitrations, mediations, adjudications, deposition-taking, conferences, seminars and meetings, offering privacy and comfort in a modern environment. Fully air-conditioned, the Centre's expansive picture windows draw in city views and plentiful natural light. Facilities can be tailored to meet specific requirements so you only pay for what you need.

## Premier One Stop Full ADR Services




Our services include the nomination of skilled and experienced dispute resolution experts in all commercial practice and professional disciplines, both domestic and international. The AIDC, through its partner organisations, has available recommended rules and standard contract clauses for facilitating dispute resolution for all types of disputes. In addition, the AIDC offers world's best practice services in case management and trust account administration.

## Cost Savings

Sydney offers significant cost savings, ranked well below cities such as Tokyo, Zürich, Hong Kong and Singapore - *Mercer 2013 Cost of Living Survey*. Favourable foreign exchange rates give Sydney a significant edge in the cost of accommodation, meals, auxiliaries and infrastructure. Hotel rooms range from the budget conscious to 5-star international hotels with spectacular harbour views.

www.acica.org.au

# 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 new act. ACICA's suite of rules and clauses provide an advanced, efficient and flexible framework for the conduct of international arbitrations and mediations. Headquartered at the Australian International Disputes Centre in Sydney (www.disputescentre.com.au) ACICA also has registries in Melbourne and Perth.

## ACICA Corporate Members

---

Allens › ‹ Linklaters

ashurst

CLAYTON UTZ

CLIFFORD CHANCE

CORRS CHAMBERS WESTGARTH lawyers

DLA PIPER

HERBERT SMITH FREEHILLS

holman fenwick willan hfw

KING&WOOD MALLESONS 金杜律师事务所

MinterEllison LAWYERS

The New South Wales Bar Association

NORTON ROSE FULBRIGHT

sapere research group

VICTORIAN BAR MELBOURNE•AUSTRALIA


The ACICA Review is published in June and December. Contributions are
welcome and may be sent to secretariat@acica.org.au or g.moens@acica.org.au