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THE ACICA REVIEW

December 2014

ACICA
Australian Centre for International Commercial Arbitration

Leader in international dispute resolution

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ACICA
Australian Centre for International Commercial Arbitration

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Alex Baykitch ACICA President

President's Welcome

Dear Members,

Welcome to the third edition of the ACICA Review, and to our new members since the last edition. Let me take this opportunity to thank you all for your support this year and I look forward to working with you next year to increase awareness of ACICA and its capabilities, both locally and internationally.

New Board Members

I would like to welcome two new board members Leon Chung of Herbert Smith Freehills who replaced Don Robertson and Damien Sturzaker of Marque Lawyers who is a board nominee of the Chartered Institute of Arbitrators.

I would also like to welcome our new corporate members, the Banco Chambers.

I would also like to welcome back our Secretary-General, Deborah Tomkinson who has returned from maternity leave.

Sydney Arbitration Week

Sydney has held its annual Sydney Arbitration Week, with sub-conferences being held around the main event, on 13 November. I would like to thank those that attended the conference and the satellite events during arbitration week.

ACICA Rules (Amended)

An Exposure Draft of the ACICA Arbitration Rules 2015 has been released by the ACICA Rules sub-committee for public comment. Enquiries are welcomed and may be directed to the ACICA Secretariat at secretariat@acica.org.au.

ICCA 2018

Preparation has begun to deliver the best ICCA Conference ever. If you would like to be involved in helping us deliver on our promise in Miami, do get in touch via Samantha Wakefield (email: sam.wakefield@au.kwm.com) or Deborah Tomkinson (email: deborahtomkinson@disputecentre.com.au).

Seasons Greetings from ACICA.

Alex Baykitch
President

Deborah Tomkinson ACICA Secretary General

Secretary General's Report

Sydney Arbitration Week

A dynamic Sydney Arbitration Week came to its conclusion on 14 November, with a full calendar of successful events running during the course of the week.

The centerpiece was the International Arbitration Conference ***Burning Issues in International Arbitration – An Asia-Pacific Perspective*** hosted by the Business Law section of the Law Council of Australia and ACICA on 13 November. A line up of expert speakers guided a series of interesting and thought provoking panel discussions on topics ranging from the vexed issue of reformation in arbitration procedure: "*Are 'best practices' an excuse for avoiding reform?*" to an exploration of the use of arb-med procedures in the Asia-Pacific region, and much in between. The conference was followed by a cocktail function hosted by ACICA Corporate Member Clayton Utz in their offices overlooking Sydney Harbour.

LCA / ACICA Conference: *(L-R) Angela Bowne (Blackstone Chambers, Sydney), Chen Fuyong, (Beijing Arbitration Commission), Justice Dr Clyde Croft (Supreme Court of Victoria, Melbourne), Ruth Stackpool-Moore (Hong Kong International Arbitration Centre, Hong Kong), Prof. Doug Jones AO (Clayton Utz)*

Sydney Arbitration Week kicked off with a seminar on Monday evening hosted by Holding Redlich and AMTAC. A pre-eminent panel, comprised of the Chief Justice of the Federal Court of Australia, The Honourable James Allsop AO, Malcolm Holmes QC and Geoff Farnsworth, provided an in-depth analysis of

LCA/ACICA Conference: *(L-R) Dr John Hockley, Professor Gabriël Moens*

Foreign Award Enforcement and Public Policy in Australia. The speakers have produced a detailed paper on the same topic which is available on the AMTAC website (www.amtac.org.au). ACICA Corporate Member King and Wood Mallesons held a parallel event: ***When Good Investments Go Bad: An International Arbitration Hypothetical*** with a panel discussion led by international experts focusing on issues arising in investment treaty arbitration.

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AMTAC Seminar: *(L-R) Geoff Farnsworth, Prof. Sarah Derrington, His Honour Chief Justice Allsop AO, Malcolm Holmes QC, Peter McQueen*

The second GAR Live Sydney conference was held on Tuesday. The event was chaired by Justin D'Agostino, Herbert Smith Freehills and James Spigelman AC QC. His Honour Chief Justice Allsop AO set the scene for the day with his keynote speech exploring ***International Commercial Arbitration – the Courts and the Rules of Law in the Asia Pacific Region.*** This was followed by energetic panel discussions, GAR Live Symposium and a lively debate on the motion: "*This House believes that international arbitration is not arbitration if there is an appeal*". At the conclusion of the conference, delegates made their way en-mass to the Federal Court of Australia for the Clayton Utz and Sydney University Annual International Arbitration Lecture. This year Michael Hwang SC provided much food for thought in his lecture entitled ***Commercial Courts and International Arbitration – Competitors or Partners?*** in which he explored some of the new initiatives being undertaken in Singapore and Dubai.

On Wednesday Michael Hwang SC presented an entertaining and informative lunchtime paper at 12 Wentworth Selbourne Chambers on ***Dealing with Allegations of Corruption and Illegality in International Arbitration by Arbitrators and Courts.*** An afternoon tea was held by ***Arbitral Women*** and the ICC hosted a seminar on ***Effective Management of Arbitration: A Guide for in-House Counsel and other Party Representatives*** at the Centre. In the evening a panel comprised of Professor Paramjit S. Jaswal (Vice Chancellor, Rajiv Gandhi National University of Law, Punjab), ACICA Fellow Alan Thambiayah, John Cox (Solicitor and President Australian Indian Business Council), ACICA Vice President Khory McCormick and ACICA Associate Jo Delaney led a fascinating discussion on managing risk and options for dispute resolution at the ***AIDC Australian Indian Business Leaders Forum.***

AIDC Australian Indian Business Leaders Forum

The last day of Sydney Arbitration Week was packed with events for younger practitioners. For the second year running Young ICCA, The Chartered Institute of Arbitrators International Arbitration Young Members Forum, Asia-Pacific Forum for International Arbitration (AFIA) and Young ICC joined forces to host a Young ICCA International Arbitration Skills Workshop. The workshop entitled ***Commencing International Arbitrations – Trouble Shooting Pathological Clauses and other Problems*** saw a room full of young practitioners, led by a faculty of young international arbitration specialists, delve energetically into the issues arising from a number of problem scenarios.

AIDC Australian Indian Business Leaders Forum: *(L-R) John Cox, Alan Thambiayah, Professor Paramjit S. Jaswal, Jo Delaney, Khory McCormick, Deborah Lockhart*

A ***Working Brown Bag lunch*** was held at the Centre to consider and discuss the recently released Exposure Draft of the ACICA Arbitration Rules. ACICA Rules Committee Chair, Malcolm Holmes QC, led the discussion on the proposed changes to the ACICA Rules. The week wrapped up with the ***AFIA International Arbitration Symposium*** held at the Centre with the support of Sydney University.

ACICA extends its thanks to all conference delegates and hopes to welcome them all back to Sydney very soon.

Other Recent Events

The Chartered Institute of Arbitrators Young Members International Arbitration Forum held a workshop on The Art of Persuasion on 16 July 2014. Barrister Michael Holmes and ACICA Fellows James Morrison and Daisy Mallet discussed the fine art of persuasion in the context of dispute resolution and acting as an advocate (as a solicitor or barrister) in international arbitration and mediation. The session was moderated by Natalie Puchalka.

The ***AIDC Schools Invitational Debating Program*** was launched on 1 August. This program has been developed to engage school students, university students and young legal practitioners in the exploration of issues arising with regard to conflict and dispute resolution.

The Centre hosted, in conjunction with the University of NSW, a delegation of ***Thai Judges and Court Officials***. ACICA Fellow and AIDC Director, John Wakefield presented a seminar to the delegation on the topic of ADR in Australia.

On 20 August 2014, we welcomed a delegation arranged by the ***South Korean Ministry of Justice*** to the Centre to exchange views on the development of international arbitration in Australia and South Korea.
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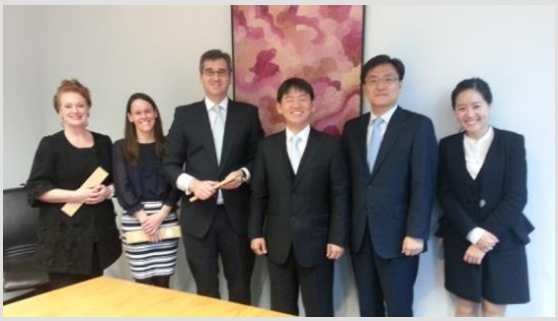

South Korean Ministry of Justice visit

The Centre again hosted the preliminary rounds of this year's ***Chartered Institute of Arbitrators (Australia) / NSW Young Lawyers International Arbitration Moot*** on 27 September 2014. The finals were held on 30 September at Baker & McKenzie, before a panel consisting of the Honourable Justice Foster of the Federal Court of Australia, Albert Monichino, President ClArb Australia and Erika Williams, Chair of the NSW Young Lawyers International Law Committee.

The ***AMTAC Address*** was held on 4 September 2014 at the Federal Court of Australia in Sydney (video-cast around Australia). David Byers, Chief Executive of the Australian Petroleum Production & Exploration Association provided an Australian perspective on "LNG – Driving Gas Globalisation". The Address was followed by an informal drinks reception in Sydney.

A successful ***ACICA Roadshow***, led by Vice-President Khory McCormick and David Fairlie was held in Jakarta, Indonesia on 23 September 2014 in cooperation with the BANI Arbitration Center - Indonesia (formerly known as *Badan Arbitrase Nasional Indonesia*). Following on from a successful Road show in Seoul last year, ACICA returned to the Seoul International Dispute Resolution Centre on 3 October to host a Roadshow led by Immediate Past President Doug Jones.

Indonesia Roadshow

A seminar on ***The Business of Mediation: Making it Happen*** was held at the Centre on 8 October 2014, with ACICA Mediation Panel Member Andrew Moffat speaking on his experience of developing a commercially successful mediation practice.

ACICA signed a ***Cooperation Agreement*** with the Nanjing Arbitration Commission on 22 October 2014. A signing ceremony was held in Nanjing. ACICA looks forward to working closely with the Commission in the future.
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Nanjing Arbitration Commission

AIDC

The AIDC mediation and professional development program, run through the Australian Commercial Disputes Centre (ACDC) has very successfully come to a conclusion for 2014. In October we welcomed Sienna Brown to the training team as the Learning and Professional Development Administration Manager. Sienna was previously the public officer at Sydney Living Museums running the events programs for both the public programs and foundation. ACDC's flagship mediator training course was run, for the first time, in Perth from 28 October to 1 November 2014 with the accreditation day held on 4 November 2014. The training course program for 2015 can be found on the website: www.disputescentre.com.au.

Following entry into a Memorandum of Understanding between the Rajiv Gandhi National University of Law and AIDC in November, a new alliance will see Indian students being trained by ACDC. The first such course is intended to commence in January 2015 in India.

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. Booking information can be found on the AIDC website.

NEWS IN BRIEF

New ACICA Fellows, Associates and Mediation Panel Members

On 3 June 2014, the Hon Chief Justice Wayne Martin, Chief Justice of Western Australia, launched a new LexisNexis online arbitration service, called "Australian Commercial Arbitration". This service has been co-authored by Dr John Hockley, a Fellow of ACICA, the Hon Justice Clyde Croft of the Supreme Court of Victoria, Kieran Hickey of the Victorian Bar and William Ho of K&L Gates

New members

We welcome new ***ACICA Fellows*** John Arthur (VIC), Nicholas Alexander Brown (Hong Kong), the Honorable Kevin Lindgren AM QC (NSW) and Chris Lockwood (VIC), ***ACICA Associates*** Julia Dreosti (SA), Stephen Ipp (NSW), Ian Prudden (VIC), Donna Ross (VIC) and Luke Bradshaw (Singapore), and ***AMTAC Panel Member*** Malcolm Holmes QC (NSW).

ACICA and AIDC Volunteer Intern Program

Natasha Moulton

Jun Won "JW" Lee

We have recently had a number of student interns working at the Centre through the University of NSW program, along with students from Macquarie University and the University of Sydney who have volunteered their time to experience alternative dispute resolution in practice. We have two University of Sydney JD students, Jun Won "JW" Lee and Natasha Moulton currently interning with us, assisting with case management and a number of other ACICA initiatives.

Book Review

Charles O'Neill, *Human Dynamics in Construction Risk and Management - the key to success or failure* (published by: Contract Dynamics Sdn Bhd)

Construction, in all its forms from civil engineering to general building, is one of the world's biggest industries; a major employer, the generator of vast revenues and an economic barometer.

Charles O'Neil, ACICA Fellow

A common factor in construction risk management is human dynamics and this book explores how and why people are the crucial element in every project, not a lack of effective risk management systems, of which there are plenty, with most companies either using a proprietary system or having developed their own in-house versions. Personal behaviours and inputs will either create success or be the cause of failure every time a project is structured, designed and built.

This book is primarily about how people react in certain situations under pressure or for other extraneous reasons. It looks at all levels of personnel from Board members to site managers and delves into a range of human behaviours and why they so often interfere with risk management systems to the detriment of a project. The book then goes on to provide analyses, answers and recommendations to try and overcome the problem.

The book also examines successful projects and shows why they are the direct result of excellence in the different aspects of personal inputs and behaviours, particularly in the areas of communications and relationship management at all levels.

Charles O'Neil and the 12 contributing authors have called on their wealth of experience on a wide range of projects all around the world to analyse the positive and negative human dynamics of construction risk management and from this they provide recommendations and solutions to prevent disasters and create success.

The book contains more than 50 project case studies, 'human' management situations and online links to public information on projects around the world that have run into trouble.

Peter McQueen AMTAC Chair

AMTAC Chair's Report

The 8th Annual Address entitled "LNG-Driving Gas Globalisation: An Australian Advantage" was presented by David Byers, Chief Executive of the Australian Petroleum Production and Exploration Association on 4 September.

Review of Section 11 of the Australian Carriage of Goods by Sea Act (COGSA)

Earlier this year AMTAC contacted the Department of Infrastructure and Regional Development requesting a review of Section 11 of COGSA. That Section contains mandatory provisions relating to governing law, jurisdiction and arbitration clauses in contracts of carriage by sea. AMTAC is of the view that clarification, by way of statutory amendment, is required as to which contracts of carriage by sea it applies, and as to the resolution of disputes arising under such contracts by arbitration conducted at Australian seats of arbitration.

AMTAC has obtained in principle support in respect of this request from the Maritime Law Association of Australia and New Zealand, the Australian Shipowners Association, Shipping Australia Limited and the Australian Peak Shippers Association, all of whom are stakeholders in the Australian marine cargo liability regime which is set out in COGSA.

AMTAC has been informed by the Department that in its opinion a review is not warranted. Consideration is now being given by AMTAC as to the next steps to be taken in light of this response.

AMTAC Annual Address 2014

The 8th Annual Address entitled "LNG- Driving Gas Globalisation: An Australian Advantage" was presented by David Byers, Chief Executive of the Australian Petroleum Production and Exploration Association on 4 September.

The Address, which was video-cast nationally using the facilities of the Federal Court of Australia, attracted an audience of approximately 100 and was followed by a Q&A session. The Address and the slides accompanying it are on the AMTAC website at www.amtac.org.au .

In his Address, Mr Byers offered an Australian perspective on the role that liquefied natural gas (LNG) can play in driving gas globalisation, outlining the current state and future outlook of the global gas market, considering the significance to the national economy of LNG's rapid growth and what Australia must do to further grow its share of the global LNG market.

Fifteenth International Maritime Law Arbitration Moot (IMLAM 2014) university mooting competition, Hong Kong, 5-8 July 2014

This competition, which was organised by Murdoch University in conjunction with the host, University of Hong Kong, provided an opportunity for law students to prepare written submissions and present oral argument in respect of a maritime law problem in a realistic arbitration environment. Twenty university teams from 11 different countries competed.

Universitas Indonesia was the winning team by defeating Maastricht University in the Grand Final, the other semi-finalists being the University of Queensland and National University of India.

The paper which the speakers presented is on the AMTAC website at http://www.amtac.org.au.

Sydney Arbitration Week 10-14 November 2014 – AMTAC Seminar

As one of the events of the Sydney Arbitration Week, AMTAC convened a seminar entitled "Foreign Award Enforcement and Public Policy" on Monday 10 November.

The speakers were Chief Justice Allsop AO, Federal Court of Australia, Malcolm Holmes QC Arbitrator and Geoff Farnsworth, Partner Holding Redlich.

The seminar, which was hosted by Holding Redlich in their Sydney office, attracted 50 attendees, and focused on the notion of public policy as expressly referred to in the award enforcement process under the New York Convention and the Model Law on International Commercial Arbitration.

The paper which the speakers presented is on the AMTAC website at www.amtac.org.au.

Nineteenth International Congress of Maritime Arbitrators (ICMA), Shanghai, 10-15 May 2015 www.icma2015shanghai.com

This is the first time that this Congress, which is being organised by the China Maritime Arbitration Commission, will be held in mainland China.

AMTAC will be represented at the conference by AMTAC Executive Members Peter McQueen and Professor Sarah Derrington.

Julie Soars
Barrister (ACICA Fellow)

ADR: Online Procedural Order.

Julie Soars, barrister, mediator and arbitrator and a fellow of the Australian Centre for International Commercial Arbitration (ACICA) and of CIArb, has recently together with the ACICA Rules Committee, finalised a draft procedural order that can be used (with any necessary amendments or adaptation) if the parties wish to use Online Dispute Resolution (ODR) technologies in an arbitration governed by the standard or expedited Arbitration Rules of ACICA (ACICA Rules) and heard in Australia – see the link on the ACICA website under the resources section available at:http://acica.org.au/resources/draft-procedural-order-for-use-of-online-technologies

The draft procedural order enables arbitrators and parties to take advantage of ODR technologies that have exciting potential, such as video conferencing and the use of commercially available Cisco WebEx Meeting Center online product. It contains suggested draft orders covering the costs and adequacy of these ODR technologies, additional confidentiality protections that may be needed, provisions necessary to deal with applicable Australian law, the necessity to specify the arbitrator as "host" where some ODR technologies are used and so on.

It is likely to be of interest to arbitration practitioners who use, or are thinking of using, ODR technologies in arbitrations.

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The Honourable Michael Ball
Judge of The Supreme Court of New South Wales

The Australian Arbitration Option, Seoul, 2 October 2014

Address by The Honourable Michael Ball, Judge of the Supreme Court of New South Wales, Seoul, 2 October 2014[1].

The procedures followed by the New South Wales Supreme Court are governed by legislation known as the Civil Procedure Act, the Uniform Civil Procedure Rules that are made under that Act and Practice Notes issued by the Chief Justice following consultation with interested parties including legal practitioners who have an interest in the relevant field.

Introduction

In this presentation, I propose to begin by telling you something about the Australian legal system and the procedure followed by the Supreme Court of New South Wales in dealing with disputes concerning international commercial arbitrations. I then propose to say something about several recent Australian cases that demonstrate the current attitude of Australian courts to international commercial arbitration. Finally, I propose to say something about the arbitration "*scene*" in Australia.

The Australian legal system

Australia has a federal system of government, and its legal system comes from the English common law tradition.

At both the Federal and State levels, the legislatures have passed legislation which largely adopts the UNCITRAL Model Law on International Commercial Arbitration and implements the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The federal legislation governs international commercial arbitrations. The amendments which adopt the Model Law came into effect in 2010. There was a challenge to the validity of the amended legislation on constitutional grounds that was heard by the High Court of Australia, Australia's final court of appeal, in 2013[2]. That challenge failed; and there can now be no question of Australia's adoption of the Model Law.

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1. I would like to acknowledge the assistance that my tipstaff, Nicholas Borger, gave me in preparing this paper.
2. TCL v Judges of the Federal Court of Australia [2013] HCA 5; (2013) 295 ALR 596.

State legislation governs domestic arbitrations.

The Federal Court of Australia has jurisdiction to hear matters arising under the federal legislation. State Supreme Courts have jurisdiction to hear matters arising under both the federal legislation and their respective State laws.

Several things follow from this.

The first is that the approach of practitioners and the courts to domestic and international arbitration is largely uniform. This has assisted both judges and practitioners who specialise in dealing with arbitration disputes to build up knowledge and expertise which is relevant to international commercial arbitrations.

Second, as is apparent from what I have said, those who choose to arbitrate international disputes in Australia have a choice of which system of courts to use to resolve any issues concerning their arbitration and to seek to enforce awards made in Australia. During the period 2010 to 2013, 27 cases were determined in the Supreme Court of New South Wales, 24 cases were determined in the Federal Court of Australia and 10 cases were determined in the Supreme Court of Victoria concerning the operation of the federal *International Arbitration Act*. A smaller number of cases concerning the federal International Arbitration Act were decided in other state courts[3].

Third, although there is that choice, the way the court hierarchy and system of precedent operates in Australia means that it is to be expected that the law governing both domestic and international arbitrations will develop in a uniform way throughout Australia.

Procedures in the New South Wales Supreme Court

Against that background, let me say something now about proceedings in the Supreme Court of New South Wales.

The procedures followed by the New South Wales Supreme Court are governed by legislation known as the Civil Procedure Act, the Uniform Civil Procedure Rules that are made under that Act and Practice Notes issued by the Chief Justice following consultation with interested parties including legal practitioners who have an interest in the relevant field.

One of the things the Practice Notes do is establish specialised lists within the court structure for determining particular types of dispute. At the beginning of 2012, a specialist Commercial Arbitration List was established[4]. That list is supervised by the Judge who is also responsible for the Commercial List and the Technology and Construction List, which also operate within the court system. The purpose of the Commercial Arbitration List is to facilitate the prompt resolution of disputes arising in the

3. L Nottage, "international Commercial Arbitration in Australia: What's New and What's Next?", Journal of International Arbitration 465 at 473.
4. See Practice Note SC Eq 9 Commercial Arbitration List.

context of arbitral proceedings in which the Court has jurisdiction, which includes both domestic and international arbitrations. The list operates on the basis that few interlocutory steps should be necessary in order to prepare a dispute concerning an arbitral proceeding for hearing. At the time the proceedings are commenced, the plaintiff must file a document setting out:

(a) a statement of the nature of the dispute;
(b) a succinct statement of the issues of fact the plaintiff contends will arise;
(c) a succinct statement of the issues of law the plaintiff contends will arise;
(d) a statement setting out the interlocutory steps the plaintiff considers necessary to prepare the matter for hearing.

The defendant must file a response dealing with the same issues.

Generally, the onus is on the party who seeks an interlocutory step, such as pre-trial discovery, to convince the Court that that step is necessary for the just and quick disposal of the proceedings. The emphasis of the Practice Note is on fixing a date for the hearing of the dispute as quickly as possible.

Recent case law

Let me turn now to some recent Australian cases concerned with international commercial arbitrations. A brief overview of those cases demonstrates I think that Australian courts take a sensible, commercial approach when dealing with arbitration clauses and arbitral awards.

Even before the 2010 amendments adopting the Model Law, Australian courts had started to take a broad approach to the construction of the scope of an arbitration clause. In 2006, for example, the Full Federal Court of Australia in the decision of *Comandate Marine Corp v Pan Australia Shipping Ltd*[5] held that courts should adopt a liberal approach to the construction of an arbitration clause. The Court said that this liberal approach is "underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places".[6]

There is currently a debate in Australia about the extent to which a court should interpret the scope of an arbitration clause by reference to a presumption that the parties intended to refer all their disputes to arbitration rather than by reference to the ordinary principles that apply to the interpretation of any term in a commercial contract. A recent decision of the New South Wales Court of Appeal[7] suggests that, consistently with the interpretation of any terms in a commercial contract, the interpretation of an arbitration clause must start with the terms used by the parties, rather than a particular presumption or rule of construction irrespective of the plain meaning of the words. On the other hand, the Western Australian Court of Appeal said in *Paharpur Cooling Towers v Paramount (WA) Ltd*[8] that the approach of the English House of Lords in *Fiona Trust & Holding Corporation v Privalow* "was consistent with the approach taken in Australia".[9] The House of Lords in the *Fiona Trust* case suggested that no emphasis should be placed on fine distinctions or shades of meaning in arbitration clauses. Instead, construction of the clause should begin from an "assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered…to be decided by the same tribunal".[10] Interpretation of an arbitration clause should proceed in that way "unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".[11]

5. [2006] FCAFC 192; (2006) 157 FCR 45.
6. Ibid [164].
7. Rinehart v Welker [2012] NSWCA 95, [121]-[122] (Bathurst CJ); [204] (McColl JA); [218] (Young JA).
8. [2008] WASCA 110.
9. Ibid [39].
10. Fiona Trust & Holding Corporation v Privalow [2007] 4 All ER 951, [13] (Lord Hoffman).
11. Ibid.

It seems to me, however, that the debate about which approach is correct is largely an academic one. Both approaches accept that if the meaning of the arbitration clause is clear then that is the meaning the court must give to the clause. If the meaning of the clause is not clear, then, even on the approach of the New South Wales Court of Appeal, it is necessary to construe the clause in the context in which it was agreed. Part of that context is one in which it is to be expected that the parties would want all their disputes determined by one tribunal. The words of the arbitration clause must be interpreted having regard to that context. To adopt a narrow interpretation of an arbitration clause in that context would be to ignore the commercial reality that lies behind the decision of the parties to agree to submit disputes to arbitration. On either approach, then, the court is likely to favour a broad interpretation where the clause is not clear.

If a dispute falls within an arbitration clause, then, generally speaking, an award made by the arbitrator will be valid and enforceable. One exception to this principle, which is recognised in the Model Law and has been adopted by the Australian legislation, is where the subject matter of the dispute is not capable of settlement by arbitration – in other words, it is not arbitrable. This requirement is found in Art 34(2)(b)(i) of the Model Law, which states that an arbitral award may be set aside by a court with competent jurisdiction if the court finds that "the subject matter of the dispute is not capable of settlement by arbitration under the law of [the] State".

Once again, Australian courts take a broad approach to what is arbitrable. In *Comandate*, for example, the arbitration clause used the words "all disputes arising out of this contract shall be arbitrated". The Full Federal Court held that those words were wide enough to encompass a claim for misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth) (now the *Australian Consumer Law*) and that claims for damages for misleading and deceptive conduct made under that legislation were arbitrable, even though the relevant legislative provisions have a public interest component of protecting members of the public from misleading and deceptive conduct by corporations.

Another example of Australian courts taking a broad approach to what is arbitrable is the decision of the New South Wales Supreme Court in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd*[12], where it was held that questions concerning the eligibility of one of the parties to a patent licence agreement to apply for a patent in Australia were arbitrable in accordance with an arbitration clause contained in the agreement.

On separate occasions, Justice Allsop, who is now the Chief Justice of the Federal Court, and Justice Warren, the Chief Justice of Victoria, have each referred to cases such as Comondate to conclude that "it is incumbent upon a party […] to demonstrate why the resolution of the particular dispute by private arbitration would be injurious to the public interest, or impermissibly encroach on the rights of third parties, or otherwise justify curial resolution".[13] In other words, a matter will not be incapable of settlement by arbitration merely because an area of commercial law might have a public interest element. The courts will adopt a liberal approach to the interpretation of the arbitration clause to ensure as many matters as possible will fall within it, and a narrow approach to the notion of public interest to ensure as many matters as possible will be arbitrable. In doing so, the courts seek to give effect to the method of dispute resolution as bargained for by the parties.

The finality and enforceability of arbitral awards is of central importance to the commercial success of any arbitration. Other than non-arbitrability, a further exception to the finality of an arbitral award is provided by Art 34(2)(b)(ii) of the Model Law. That article provides that a party may, by application within three months of the date of the award, apply to a court to set aside an award on the ground that the award is in conflict with the public policy of the relevant jurisdiction. A similar provision is contained in Art 36(1)(b)(ii), which provides that recognition or enforcement of an arbitral award irrespective of the country in which it was made may only be refused on certain specified grounds, including the ground that recognition or enforcement of the award would be contrary to the public policy of the relevant State. These articles have been incorporated into the legislative regime in Australia.

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12. [2011] NSWSC 268
13. Justice James Allsop, 'International Arbitration and the Courts – the Australian Approach' (2012) 17 Quarterly Bulletin of The Chartered Institute of Arbitrators Australia 1, 22 cited by Justice Marilyn Warren AC, 'Australia as a "safe and neutral" arbitration seat', ACICA, 6-7 June 2012, 21.

Sections 8(7A) and 19 of the International Commercial Arbitration Act contain a gloss on the Model Law. They state that for the avoidance of doubt an award and the enforcement of an award would be contrary to public policy if a breach of the rules of natural justice occurred in connection with the making of the award.

Earlier this year, an appeal was heard by the Full Federal Court concerning the scope of the public policy exception contained in Arts 34 and 36 of the Model Law in the case of *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [14] and, in particular, what is meant by the rules of natural justice in ss 8 and 19 of the Act.

In that case, the appellant, TCL, a Chinese company, entered into an agreement with the respondent, Castel, an Australian company, for the distribution in Australia of air conditioning units manufactured by the appellant in China. A dispute arose after an alleged breach by the appellant of that agreement. The parties submitted the dispute to arbitration in Australia. An award was made in the respondent's favour. The appellant sought to set aside the award under Art 34 of the Model Law and also sought to resist its enforcement under Art 36, relying on the public policy exception. It claimed that it had not been accorded procedural fairness by the arbitrator with the result that there had been a breach of the rules of natural justice in connection with the making of the award. The asserted breaches of natural justice arose from the making by the arbitrator of three factual findings, which, it was said, were made in the absence of probative evidence and were matters on which the appellant was not afforded an opportunity to present evidence and argument. The appellant argued that, in considering these questions, the Court should examine afresh the facts of the case to determine whether or not probative material supported the factual conclusions.

The Court unanimously dismissed the appeal. In doing so, it said the following:

> [I]f the rules of natural justice encompass requirements such as the requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitration system will be undermined by judicial review in which the factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly.[15]

For that reason, the Court held that international commercial arbitration awards "will not be set aside or denied recognition or enforcement under Arts 34 and 36 of the Model Law (or under Art V of the New York Convention) unless there is demonstrated real unfairness or real practical injustice in how the [arbitration] was conducted or resolved, by reference to established principles of natural justice or procedural fairness".[16]

The Court also warned against the interpretation of "public policy" in a broad fashion "that might pick up particular national domestic policy manifestations".[17] Instead, it accepted that public policy should be restricted to the state's most basic, fundamental principles of morality and justice to ensure commonality of approach to the question irrespective of the jurisdiction in which the arbitration occurs. The Court also said that, given the international nature of the Model Law and the goal of uniformity and harmony at the heart of it and the New York Convention, it "is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, …the New York Convention and the Model Law".[18]

On the facts of the case before it, the Court ultimately held that the complaints made by the appellant were about evaluation of the factual material. The evidence revealed that the appellant received "a scrupulously fair hearing in a hard fought commercial dispute".[19] As a result, no rule of natural justice was breached.

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14. [2014] FCAFC 83 (Allsop CJ, Middleton and Foster JJ).
15. Ibid [54].
16. Ibid [55].
17. Ibid [64].
18. Ibid [75].
19. Ibid [167].

A final case worthy of mention in this context is a decision in 2011 of the Supreme Court of New South Wales in *teleMates Pty Ltd v Standard SoftTel Solutions Pty Ltd*.[20] In that case, a matter was referred to arbitration pursuant to an arbitration clause in the contract between the parties. The plaintiff claimed that, under the clause, any arbitration had to be the subject of a separate agreement and that it had not consented to the referral to arbitration nor the appointment of the arbitrator. The relevant article of the Model Law was Art 16, which provides that the arbitral tribunal can rule on its own jurisdiction. Art 16(3) provides that, if the arbitral tribunal ruled as a preliminary question that it had jurisdiction, any party could request within 30 days after having received notice of that ruling that a specified court decide that matter. On 18 January 2011, the arbitrator ruled that he had power to rule on his jurisdiction, that he had been properly appointed and that he had jurisdiction to determine the dispute. On 22 February 2011, the plaintiff filed a summons requesting the Court to make declarations regarding the validity of the appointment of the arbitrator.

The Court relied on Art 5 to hold that it could only intervene in accordance with the Model Law. Although Art 16 enabled a court to determine the question of jurisdiction of the arbitrator, a request within the time limit specified by that article was "an essential condition of the plaintiff's right to have the Court decide the matter".[21] Therefore, absent a request within the 30 day period specified in Art 16(3) of the Model Law, no court could intervene to determine the matter of an arbitral tribunal's jurisdiction where the tribunal itself had determined the matter in favour of jurisdiction as a preliminary question.[22] In reaching conclusion, the Court said that its decision "reflects two of the underlying policies of the Act, namely, that disputes which the parties have submitted to arbitration should be speedily resolved and that intervention of the Court should be minimised".[23]

The arbitration scene in Australia

Lastly, I want to say something about the arbitration scene in Australia.

Arbitration, particularly international commercial arbitration, is increasingly taught at both the undergraduate and postgraduate level in Australian law schools. There has also been growth in the number of conferences and seminars on arbitration and other forms of alternative dispute resolution held in Australia. Both of these developments indicate the continuing cultural shift within the Australian business and legal communities, which view arbitration as an essential method of dispute resolution.

The large number of academic publications devoted to the topic of arbitration also demonstrates the active interest on the part of the Australian legal and business communities in that topic. At the local level, Professor Jones has published a second edition of his text, Commercial Arbitration in Australia, which now sits alongside other texts on international arbitration in Australia. This, of course, is in addition to many international publications, such as the Journal of International Arbitration and the Australasian Dispute Resolution Journal. The consumption of this material by Australian practitioners demonstrates their interest in alternative dispute resolution, and the inclusion of articles published by Australian

20. [2011] NSWSC 1365; (2011) 257 FLR 75.
21. Ibid [53].
22. Ibid.
23. Above n 27, [54].

practitioners and academics on the Australian experience is indicative of the international community's interest in Australia as an arbitration jurisdiction.

Also on the subject of the legal profession, Australian lawyers have substantial international experience. It is common for young lawyers in Australia to obtain experience working in other jurisdictions. Traditionally, they most often went to London or New York. Increasingly, however, lawyers from the graduate level through to partnership spend time in regional jurisdictions including Singapore, Hong Kong and China, and increasingly Australian law firms have opened offices in Asia or formed associations with legal firms based in Asia. That international experience is readily translated and applied to commercial arbitrations in Australia and assists in assuring that Australia brings an international and regional perspective to commercial arbitration.

Conclusion

A survey conducted in 2010 found that the most important factor influencing the choice of seat for arbitration was the "formal legal infrastructure" of the seat.[24]

Australia has a well-established legal system committed to the rule of law. In the past, Australian courts, consistently with the attitude of the Common Law to arbitration, adopted a more interventionist approach to arbitrations. However, in recent times there has been a major shift in attitude. That change in attitude started before the adoption in Australia of the Model Law, but has been reinforced since then by both the changes in the legislation and decisions which have applied it. The courts, as demonstrated by the short overview of some recent cases, now adopt an approach of non-interference with arbitral awards through a broad interpretation of arbitration clauses and a restrictive interpretation of the grounds available for setting aside awards or refusing to recognise them. This achieves the purposes of the international instruments (which underpin the Australian legislation). It places Australia in line with other potential seats for commercial arbitrations by harmonising its governance and court supervision of arbitrations with its regional alternatives and makes it, and Sydney in particular, an attractive place to arbitrate.

24. The Queen Mary – 2010 International Arbitration Survey: Choices in International Arbitration 17; see also Justice Clyde Croft, 'Commercial Arbitration in Australia: the Past, the Present and the Future' (paper prepared for the Chartered Institute of Arbitrators, London, 25 May 2011).

Matthew Barry

Enforcing awards following a decision at the seat: the US or the French approach?*

The decision of the Southern District of New York in *Pemex*[1], discussed in Lorraine Brennan's recent post, indicates that US courts are prepared to enforce awards that have been set aside at the seat of arbitration. In this general sense, *Chromalloy*[2] remains 'alive'. However, the Court in Pemex enforced the award 'under the standard announced in *TermoRio'*.[3] This standard requires deference to a setting aside decision at the seat unless the decision 'violates basic notions of justice'. [4]

A strong argument can be made that the decision of the Mexican court in Pemex met this standard, but the TermoRio standard will rarely be met. Indeed, in the more recent case of *Thai-Lao Lignite*[5], the same Court that decided *Pemex* vacated its previous judgment enforcing an arbitral award after the award debtor had the award set aside by the Malaysian High Court. The Court, citing *TermoRio*, stated that an arbitral award set aside at the seat cannot be enforced except in 'extraordinary circumstances not present in this case'.[6] Together, *Pemex* and *Thai-Lao Lignite* indicate that US courts have become considerably more deferential to the seat since *Chromalloy*.

The deferential approach of the US courts is a far cry from the approach of the French courts. The French Courts have routinely enforced awards that have been set aside or suspended by the courts at the seat of arbitration. [7] They have enforced such awards by applying the 'more favourable rights' provision in Article VII of the New York Convention in combination with Article 1502 of the New Code of Civil Procedure, which does not recognise setting aside or suspension of the award at the seat as a ground for refusing enforcement. More significantly, however, French courts make the theoretical claim that an international arbitral award is not 'anchored' or 'integrated' in the seat of arbitration. Accordingly, the views of the seat court on the validity of the award simply have no bearing on whether the award should be enforced in France. In Putrabali, the Cour de Cassation went so far as to say that an international arbitral award is 'an international judicial decision' which is 'not anchored in any national legal order'. On this view, an enforcement court is entitled to form its own view on the validity of the award, irrespective of the views of any other court.

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* BA (Hons)/LLB (Hons) (Usyd). This article is based on an Honours Thesis submitted at the University of Sydney.

1. *Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración y Producción* 962 F Supp 2d 642 (SDNY 2013).
2. *Chromalloy Aeroservices Inc v The Arab Republic of Egypt* 939 F Supp 907 (DC Cir, 1996).
3. *Pemex* F Supp 2d 642 (SDNY 2013) at 657.
4. *TermoRio SAESP and LeaseCo Group LLC v Elecranta* SP 487 F 3d 928 (DC Cir, 2007), 937.
5. *Thai-Lao Lignite Co Ltd v Government of the Lao People's Democratic Republic* WL 476239 (SD NY, 2014).
6. *Thai-Lao Lignite* WL 476239 (SD NY, 2014), 11.
7. See *Polish Ocean Line v Jolasry* (Cour de Cassation, 10 March 1993); *Hilmarton Ltd v Omnium de traitement et de valorization* (OTV) (Cour de Cassation, 23 March 1994), 663; *Direction Générale de l'Aviation Civile de l'Émirat de Dubai v International Bechtel* (Paris Court of Appeal, 29 September 2005); *PT Putrabali Adyamulia v Rena Holding* (Cour de Cassation, 29 June 2007); *Maximov v NLMK* (Tribunal de Grande Instance, Paris, 16 May 2012).

A similar divergence in approach to decisions at the seat is also seen in cases where the award is upheld (rather than set aside) at the seat. On the one hand, courts in Hong Kong and Australia have held that enforcement courts should generally defer to the views of seat courts on the validity of the award. For example, in *Gao Haiyan*,[8] the Chinese seat Court upheld the award despite the award debtor's objections that the arbitral tribunal was biased following a failed attempt at 'Arb-Med'. In enforcement proceedings in Hong Kong, Reyes J at first instance found that the tribunal was biased and refused enforcement, but this was overturned on appeal on the basis that Reyes J 'should have given more weight to the decision of the [Chinese] Court'.[9] Although US courts have not addressed this issue directly, they are highly likely to take a similar approach. In *TermoRio*, the Court stated that the New York Convention does not endorse a regime in which enforcement courts 'routinely second-guess' the judgments of seat courts.[10]

On the other hand, French courts have disregarded decisions at the seat upholding arbitral awards, reasoning again that such decisions simply have no bearing on the enforcement question. In *Unichips*,[11] for example, the Swiss courts at the seat upheld an arbitral award despite the award debtor's objection that it was not given a reasonable opportunity to be heard. When the award debtor sought to resist enforcement of the award in France on the same ground, the French Court held that it was not bound to reach the same conclusion as the Swiss courts. The Court examined the award afresh and independently came to the conclusion that the award debtor had a reasonable opportunity to be heard.

Some commentators (especially Professor Emmanuel Gaillard) favour the French approach of disregarding decisions at the seat because it supports the idea of a truly international arbitral legal order in which no state has ultimate control over the validity of an arbitral award.[12] However, from a policy perspective, the French approach raises some serious problems. First, ignoring decisions at the seat in a world where national arbitration laws are converging is likely to lead to re-litigation of the same or similar issues across jurisdictions. This threatens to undermine the perceived efficiency of international arbitration. Second, in some cases the manifest intention of the parties is for the courts at the seat to have the final say on the validity of the award. If such an intention is found to exist, it should arguably be respected. In *Putrabali*, for example, the parties to an arbitration seated in England reserved their right under the *Arbitration Act 1996* (UK) to appeal the award on a question of law. The award was set aside in England on that basis, yet the French Cour de Cassation ignored the decision of the English courts and enforced the award. This seems contrary to the manifest intention of the parties in Putrabali, which was for the judges of the English courts — applying the unique provisions of English arbitration law — to have the final say on the validity of the award. Third, as has been well documented, the French approach of disregarding decisions at the seat creates the risk of conflicting awards.[13]

In light of these difficulties with the French approach, the deferential approach of the US courts is arguably preferable. Indeed, it appears that Australian courts are likely to follow the US approach and defer to decisions at the seat in all but exceptional circumstances. In the recent case of *Gujarat*,[14] the award debtor unsuccessfully argued before the English courts at the seat that it did not have a reasonable opportunity

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8. *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKLRD 627; *Gao Haiyan v Keeneye Holdings Ltd* [2011] 3 HKC 157.
9. *Gao Haiyan* [2012] 1 HKLRD 627, [68].
10. *TermoRio SP* 487 F 3d 928 (DC Cir, 2007), 937.
11. *Unichips Finanziaraia v Gesnouin* (Paris Court of Appeal, 12 February 1993).
12. See eg, Emmanuel Gaillard, 'International Arbitration as Transnational System of Justice' in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years, ICCA Congress Series Volume 16* (Kluwer Law International, 2012) 66, 70.
13. See Pierre Mayer, 'Conflicting Decisions in International Commercial Arbitration', (2013) 4(2) *Journal of International Dispute Settlement* 407
14. *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468

to present its case. Nevertheless, the award debtor sought to resist enforcement in Australia on substantially the same grounds. The Federal Court of Australia found that the award debtor was given a reasonable opportunity to present its case, but held that, in any event, it would 'generally be inappropriate' for the Court to reach a different conclusion on this question than the English courts. Such a departure from the seat would only be justified in an 'exceptional case' where the seat court acted corruptly or was unable to correct a serious injustice, which was clearly not the case here. Australian courts have therefore taken a similar approach to the US courts, deferring to the decisions of seat courts in all but exceptional cases. Pemex provides a good example of an 'exceptional case' that should serve as a yardstick for determining whether to defer to a decision of a seat court.

English courts have also taken a deferential approach by applying the doctrine of issue estoppel. Significantly, English courts have held that an issue estoppel can arise from a decision of an enforcement court. In the recent case of *Diag Human*,[15] the Austrian Supreme Court refused to enforce an award rendered in the Czech Republic on the basis that the award had 'not yet become binding on the parties'.[16] In subsequent enforcement proceedings in England, the English Courts held that the Austrian decision gave rise to an issue estoppel, which prevented the parties from raising the issue of whether the award was binding in the English proceedings. The English Court therefore deferred to the Austrian decision and refused enforcement. However, the Court emphasised that issue estoppel should be applied with caution, given the challenges of interpreting foreign judgments. Perhaps for this reason, judges have been reluctant to apply issue estoppel, preferring instead to accord deference to the seat as a matter of policy.[17] It remains to be seen whether US and Australian courts will defer to a decision of an enforcement court.

The variety of approaches taken by enforcement courts to decisions at the seat is not ideal. It creates uncertainty for the parties about the effects of a decision at the seat, and undermines the perceived efficiency and effectiveness of international arbitration. In search of a solution to this complex issue, several commentators, including Albert van den Berg, have proposed a 'new' convention that would take the review of arbitral awards out of the hands of national courts.[18] This proposal, loosely based on the ICSID Convention model, would vest an international body with exclusive jurisdiction to review arbitral awards. Once an award received confirmation from this body, it would be automatically enforceable in contracting states. An international consensus in favour of such reform is not guaranteed and would take considerable time to emerge. Meanwhile, enforcement courts should follow the approach of the US courts. A policy of deference to the seat of arbitration, save in exceptional cases, makes the most sense.

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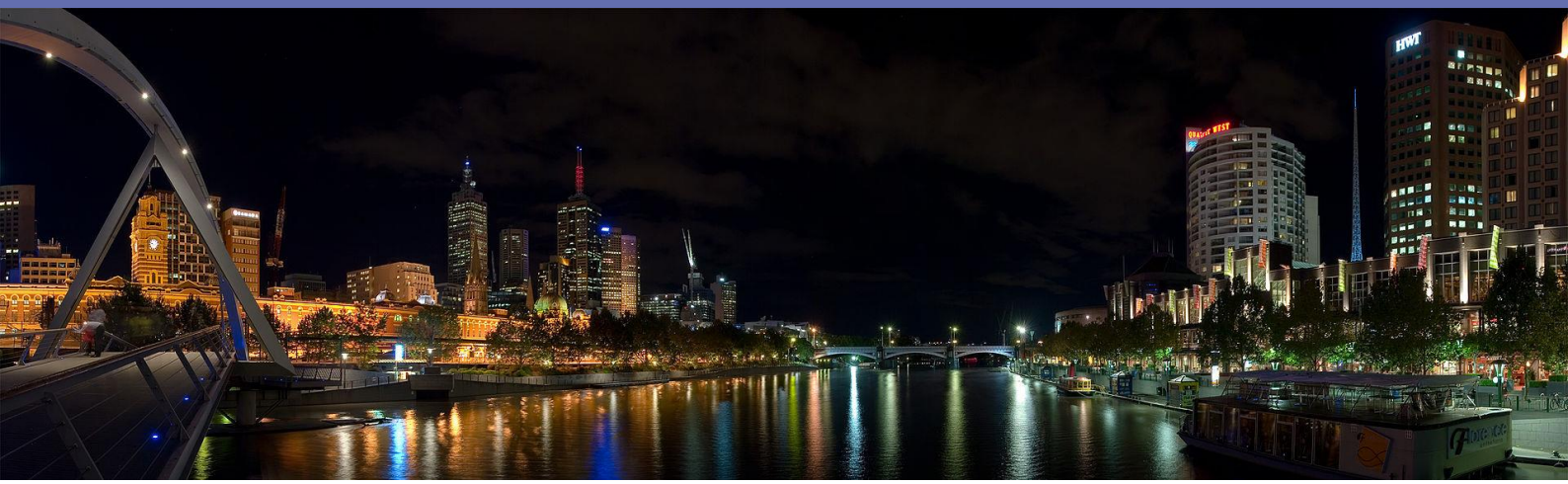
15. *Diag Human v Czech Republic* [2014] EWHC 1639 (Comm).
16. New York Convention art V(1)(e)
17. See, eg, Chief Justice Allsop, 'The Authority of the Arbitrator' (Speech delivered at the Clayton Utz–University of Sydney International Arbitration Lecture, Sydney, 29 October 2013), 3 <http://www.claytonutz.com/ialecture/2013/speech_2013.html>; *Gujarat* (2013) 304 ALR 468 at [64].
18. Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?' (2014) *ICSID Review* 1, 25; Mark Mangan, 'With the globalization of arbitral disputes, is it time for a new Convention?' (2008) 11(4) *International Arbitration Law Review* 133.



Shiro Armstrong[1] **Jürgen Kurtz**[2] **Luke Nottage**[3] **Leon Trakman**[4]

The Fundamental Importance of Foreign Direct Investment to Australia in the 21st Century: Reforming Treaty and Dispute Resolution Practice*

This paper outlines our collaborative research project for 2014-16, aimed at evaluating the economic and legal risks and benefits associated with the Australian Government's recent approach to investor-state dispute settlement (ISDS), and broader implications for Foreign Direct Investment (FDI) and international investment law particularly in the Asian region. The multidisciplinary research will include econometric modelling, empirical research through stakeholder surveys and interviews, as well as critical analysis of case law, treaties and regulatory approaches. The aim of this project is to identify optimal methods of investor-state dispute prevention, avoidance and resolution that efficiently cater to inbound and outbound investors as well as Australia as a whole. The goal is to promote a positive climate for investment inflows and outflows, while maintaining Australia's ability to take sovereign decisions on matters of public policy. The authors welcome feedback from readers, and especially any opportunity for interviews with readers or other individuals and organisations with practical experience of international investment dispute management.

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Introduction: Project Aims and Background

Foreign direct investment (FDI) has become essential to global economic development, with FDI flows exceeding US$1.5 trillion in 2012 (UNCTAD 2012).[5] Australia's treaty-making practice, especially along the lines of the 2011 "Gillard Government Trade Policy Statement" eschewing investor state dispute settlement (ISDS) provisions in future treaties,[6] may be sub-optimal as it is not entirely based on sound cost-benefit analyses data and supporting legal research. The policy of pursuing trade and investment agreements that exclude ISDS puts Australia against the global trend. One important question is whether this impacts Australia's ability to attract FDI.[7]

Our project **aims generally** to develop a key policy framework and devise salient institutional structures and processes that take account of two competing pursuits: the cost-benefit advantages of promoting Australia as an FDI destination; and the need to ensure that these advantages are considered in light of competing policy objectives that are not explicated exclusively on economic grounds. This project is valuable and innovative because it identifies significant gaps in the current Australian policy framework and uses interdisciplinary research to address them. It will also have implications for investment treaties and governance of FDI more broadly.

The overall purpose is to ensure that Australia remains an attractive destination for FDI and does not deter investors in the context of competing policy objectives. As such, the project will evaluate the economic and legal risks and benefits associated with the Australian Government's current policy on ISDS through multidisciplinary research, namely (i) econometric modelling, (ii) empirical research through stakeholder surveys and interviews, as well as (iii) critical analysis of case law, treaties and regulatory approaches. The basic objective is to identify optimal methods of investor-state dispute prevention, avoidance and resolution that efficiently cater to inbound and outbound investors as well as to Australia as a whole. The **specific purposes** therefore are to:

1) investigate policies that underpin Australia's approach to negotiating international investment treaties, with particular emphasis on its policies on avoiding, managing and resolving investment disputes;
2) identify and analyse links between these policies and the investment practices of both inbound and outbound investors; and
3) propose recommendations on alternative approaches to investment policy;

so that, through a carefully framed cost-benefit analysis, Australia can retain appropriate sovereignty over public policy issues (such as public health and the environment) while promoting a positive economic climate for investment inflows and outflows.

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5. For updated data and analysis, see eg http://unctad.org/en/Pages/DIAE/Research%20on%20FDI%20and%20TNCs/Global-Investment-Trends-Monitor.aspx.
6. See "Gillard Government Reforms Australia's Trade Policy" (Media Release, 12 April 2011), http://trademinister.gov.au/releases/2011/ce_mr_110412.html. The hyperlink to the Trade Policy Statement no longer functions, but the Statement can still be accessed at http://pdf.aigroup.asn.au/trade/Gillard%20Trade%20Policy%20Statement.pdf or via http://blogs.usyd.edu.au/japaneselaw/2013/11/arc.html.
7. Abbott's Coalition Government, which took power from the Labour Government in Australia's general election of 7 September 2013, has distanced itself from the Trade Policy Statement released by the (Labour-led) Gillard Government in April 2011, including with respect to treaty-based ISDS. The Statement has been expunged from government websites and, in January 2014, the Abbott Government released "Frequently Answered Questions" on ISDS, explaining that it "will consider ISDS provisions in FTAs [and presumably other investment treaties] on a case-by-case basis" (https://www.dfat.gov.au/fta/isds-faq.html). Australia subsequently did not include ISDS provisions in its FTA with Japan agreed in April and signed in July 2014 (http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/). By contrast, it did so for the FTA concluded with Korea in December 2013 and signed in April 2014 (http://www.eastasiaforum.org/2014/01/01/arbitration-rights-back-for-the-south-korea-australia-fta/), with the Australian Government stating that it "has ensured the inclusion of appropriate carve-outs and safeguards in important areas such as public welfare, health and the environment" (http://www.dfat.gov.au/fta/akfta/fact-sheet-key-outcomes.html). However, Labor Senator Penny Wong (Opposition Leader in the Senate) was reportedly concerned about the impact of "any" proposed ISDS mechanism: Gareth Hutchens, "South Koreans Free to Sue Thanks to New Free Trade Agreement" (6 December 2013) at http://www.smh.com.au/national/south-koreans-free-to-sue-thanks-to-new-free-trade-agreement-20131205-2ytx1.html. In September 2014, Labor members of the parliamentary Joint Standing Committee on Treaties (JSCOT) issued a dissenting Report, recommending against ratification of KAFTA partly because of concerns over its ISDS provisions, which jeopardises the capacity of the Abbott Government to ratify the treaty because it lacks a majority in the Senate. However, in August 2014, Labor members of the Senate's Foreign Affairs, Defence and Trade Legislation Committee agreed with the Coalition members' recommendation that a Greens Party private member's *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, which would have precluded Australia from entering into any future investment treaty containing ISDS provisions, should not be enacted (see http://kluwerarbitrationblog.com/blog/2014/08/27/the-anti-isds-bill-before-the-australian-senate/). Compared to the Coalition members' report, those Labor Party Senators's additional comments identified greater risks associated with ISDS, but also the executive's constitutional authority and responsibility to negotiate treaties. (For an analysis based on submissions and evidence at those Senate Committee hearings, see Nottage 2015.) Accordingly, there is ongoing political controversy over ISDS, including significant media interest (see eg http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/5734490, 14 September 2014), generating interesting contrasts and parallels with some other countries including within the Asia-Pacific region. Our project therefore remains important because it will: (a) guide the negotiation and drafting of ISDS provisions in future Australian treaties, (b) realistically assess alternatives and reforms to the ISDS system, (c) influence the approach of other states (or indeed future Australian Governments) towards treaty-based ISDS.

By way of **general background**, FDI flows involve cross-border investment and inevitably result in some cross-border disputes, becoming especially problematic when such disputes are with the 'host' state (the state where the investment has been made). Domestic, regional and international investment markets are becoming increasingly integrated and interdependent. A corollary is that a healthy flow of FDI into and out of investment markets directly impacts on a variety of economic sectors (Trakman & Ranieri 2013, chs 1–2). FDI is a key ingredient to sustainable economic growth (Sun 2002). In particular, an increase in FDI share leads to 'higher additional growth in financially developed economies' (Alfaro et al 2010). The significance of FDI is even greater since the Global Financial Crisis of 2008 (GFC) and advanced economy slowdown.[8] Competition is now growing among states to attract cross-border investment, notably relating to capital and support infrastructure investments which are directed at providing financial stability and sustaining liquidity in investments. Australia has been able to develop a competitive, economically efficient and technological advanced resources sector and become a major global supplier of raw materials due to FDI.

Investor-state arbitration (ISA) provisions are now commonly included in investment treaties around the world (Nottage & Weeramantry 2011). [9] Essentially, ISA is perceived to act as a risk-minimisation strategy for investors by allowing them the facility to institute claims against host states directly when states allegedly breach their international law obligations. The knowledge that there are robust processes to resolve disputes can attract investment into the host state. ISA is also perceived as avoiding the social and political cost associated with domestic litigation, including the publicity of open hearings. It enforces substantive protections agreed among states under public international law, and ISA is seen as being efficient in not requiring investors to mobilise their 'home' states to initiate inter-state claims on their behalf (under customary international law in limited circumstances, or the World Trade Organization (WTO) with respect to investments in some services sectors, or other trade-related investment treaties). Critically, ISA provisions are viewed as obviating the need to seek domestic law remedies through the local courts of the host state, which may be seen as being less impartial and specialized in comparison to international arbitral tribunals. [10] The justification for ISA may reasonably depend on the quality of host country institutions such as the independence of domestic courts, the rule of law and the development of the judicial system.

The pros and cons of ISA are debatable (Waibel ed, 2012). [11] Especially for a state like Australia, ISA mechanisms involve a balancing exercise between two competing pursuits – each of which has social, economic and legal costs and benefits. The first relates to providing foreign investors with a robust formal procedure through which they can enforce their substantive protections efficiently and free from state incursion, thereby offering them reduced risk incentives to invest in Australia. Treaties containing ISA are inferentially even more valuable for Australian outbound investors, as these investors feel comforted that host states will be less likely to subject them to discriminatory or corrupt practices.

The **second** and competing objective is to ensure that Australia retains appropriate sovereignty to legislate on public policy issues, such as health and the environment. Arguably, giving foreign investors the ready ability to institute international ISA claims against Australia potentially compromises the Australian Government's ability to devise effective measures around these public policy issues, leading to a state of 'regulatory chill' (Tienhaara 2012). The issue of public health has been recently canvassed in Australia through the plain packaging legislation and the disputes surrounding it (Nottage 2013). The issue of the environment is likewise significant in a resource-rich country that invites investment in mining, oil and gas (UNCTAD 2012).

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8. Relatedly, investment treaties acted as an important bulwark against the temptation of states to practice damaging economic protectionism in the immediate aftermath of the GFC: see Kurtz and van Aaken (2009).
9. Over 1800 "Bilateral Investment Treaties" (BITs, including 21 in force for Australia) can be freely searched and downloaded via http://www.unctadxi.org/templates/DocSearch.aspx?id=779. In addition, all of Australia's Free Trade Agreements (FTAs) include ISDS, except for those with three developed countries (the US, New Zealand and Japan): see texts available via http://www.dfat.gov.au/fta/. For an overview of key features of Australia's BITs and ISA mechanisms found in its FTAs, see Mangan (2010). For investment treaty practice and drafting of other major economies, see (Brown ed, 2013).
10. For a concise summary of these perceived benefits and ways to manage potential adverse effects, from the European Commission, see "Factsheet on Investor-State Dispute Settlement" (3 October 2013) at http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf; and its discussion paper for a Public Consultation on ISDS in the EU-USA FTA presently under negotiation (until July 2014, at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179; cf also Nottage, 2015).
11. See also now Eberhardt et al (2012); UNCTAD (2013); Campbell et al (2013) at http://ssrn.com/abstract=2280182; Nottage (2014).

In the important but controversial Trade Policy Statement released in April 2011 by the former Gillard Government, Australia changed its longstanding investment treaty practice regarding ISA, noting that it 'does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses'. The then Government stated that it would not 'support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses.' As a result, the Gillard Government announced that it would 'discontinue' the practice of including ISDS procedures (including ISA provisions) in trade and investment agreements. [12] Yet, other than a few states in Latin America (Ecuador, Bolivia and Venezuela) that reject ISA, a few countries that do not provide for it (notably Brazil) and recent intimations by South Africa to reject it as well, [13] most countries – including now in Asia – include ISA provisions to decide disputes based on treaty and customary international law – largely 'delocalized' from domestic legal systems (Trakman 2012b).[14]

In issuing its Policy at odds with the treaty practice of the overwhelming number of states in the international community, the Australian Government relied on a report produced in 2010 by the Australian Productivity Commission (PC).[15] However, the data and analysis were potentially incomplete or even flawed (as outlined in Part 2 below). Our project therefore adopts an interdisciplinary approach to explore the economic, political and legal risks engendered by Australia's new Policy. Based on our findings, we will then make recommendations, in consultation with government, business and other stakeholder groups, on effectively redressing those risks.

Project Outline

Our project can be summarised in three key propositions:

(a) There is presently insufficient data and analysis of the links between FDI and Australia's treaty making practice, especially its position on ISDS, in order to justify or negate its current policy standpoint;
(b) Economic and legal research is necessary in order to supply this data so that Australia can avoid deterring FDI and remain an attractive FDI destination while ensuring that it is able to take sovereign decisions on issues of public policy; and
(c) This project can deliver the data and analysis necessary in order to formulate efficient policies in this area, based on sound multidisciplinary research.

We will do this by analysing key socio-economic and political risks associated with Australia's Policy in light of two issues. First, what, if any, broader issues, including risks and costs, surrounding **treaty practice** arise from Australia's policy shift? Second, what are the potential costs and benefits of its new policy on **FDI flows**, both inbound and outbound? By investigating these questions, we will be able to identify the links between Australia's investment treaty making practice and its ability to cultivate FDI, while preserving its ability to take sovereign decisions on public policy grounds that are socially and economically desirable.

Treaty Practice

Risks investigated:

Australia is currently negotiating or has recently concluded important Bilateral Investment Treaties (BITs) and especially Free Trade Agreements (FTAs) with countries including China, Japan and Korea – each of which has agreed to extensive ISA protections in almost all their recent

12. Australia's FTA with Malaysia, concluded in 2012, consequently omitted ISDS (instead only including an inter-state arbitration process to resolve investment claims against the host state). But Australia's outbound investors into Malaysia retain significant protections anyway under the 2009 ASEAN-Australia-NZ FTA: see eg Bath and Nottage (2014) at http://ssrn.com/abstract=2331714. The Gillard Government, curiously, did not attempt to renegotiate any past investment treaties that had included ISDS (even in more rudimentary forms).
13. Carim (2013). See also http://www.bdlive.co.za/business/2013/10/31/bill-to-limit-arbitration-for-foreign-investors (31 October 2013).
14. Indeed, the European Commission has recently affirmed that ISA must form part of any high-quality investment treaty entered into by the European Union (albeit accompanied by substantive and procedural delimitations to safeguard key regulatory autonomy) (EC 2013). By contrast, Indonesia has recently informed the Netherlands that it did not wish to renew its bilateral BIT (and indeed indicated that it would review all of Indonesia's BITs as they came up for renewal): http://indonesia.nlembassy.org/news/2014/03/bilateral-investment-treaty%5B2%5D.html (13 March 2014); http://kluwerarbitrationblog.com/blog/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/.
15. Available via http://www.pc.gov.au/projects/study/trade-agreements/report.

investment treaties (Eliasson 2011; Hamamoto & Nottage 2011; Bath & Nottage 2011; Trakman 2013a). It is arguable that, if Australia persists with the 2011 Trade Policy approach to ISDS, particularly in light of these three countries' strong interest in securing better access to Australia's resources sector, including through capital investment, Australia risks delaying or even derailing negotiations to expand its FTA partners.[16] The same risk potentially arises in respect of Australia's participation in the Trans-Pacific Partnership Agreement (TPPA), dominated by the US (Trakman 2013b);[17] and in the Regional Comprehensive Economic Partnership (or 'ASEAN+6' FTA: including China, Japan, Korea, India, Australia and New Zealand) under negotiation since November 2012 (Trakman & Sharma 2014).

An Australian policy against any forms of ISA in all future treaties may have a trail of social-political and economic costs. It can destabilize Australia's treaty-making capabilities, extending well beyond the actual availability of ISA. It can impact on the content of investment agreements generally, including the costs and benefits arising from substantive protections and remedies to which Australia agrees. It can affect which states are willing to enter into negotiations with Australia, as well the costs arising from demands they may make in return for agreeing to Australia's position on ISA (thereby potentially limiting valuable gains of strategic interest to Australia). Without proper analysis of the costs and benefits of investment treaty design, there is potential to distort investment flows, adversely influence public policy and even impact political relations between Australia and other countries.

In order to address these risks, this project will consider the following issues:

Treaty Making and Interpretation

1. The crucial economic, political and social significance of Australia's investment treaties.
2. Should Australia adopt its own Model Investment Treaty? What are the economic, social and political benefits of it doing so?

Key Provisions in Investment Treaties and Their Interpretation

1. How should the scope and operation of investment treaties be delineated through, for instance, the definition of protected 'investment', 'investor' and 'expropriation'?
2. What position should Australia adopt on relative and absolute standards of treatment to be conferred on foreign investors?
3. How should Australia work to secure its domestic interests and issues of public policy, including health and the environment?

Effects on FDI and Investor Practice

Risks investigated:

Australia's position with respect to ISA can directly affect investment practices. As a resource-rich country, Australia can benefit significantly from expanded inbound investment. Simultaneously, Australian businesses can benefit from investing in foreign jurisdictions (UNCTAD 2012).

On the negative side, Australia's Trade Policy carries distinct risks. It can engender the perception that Australia is not hospitable to **inbound** foreign capital investors. Inbound investors in local markets may withdraw, or fail to commit, capital investments in Australia by assuming that their investments will become subject to domestic public policy requirements enforced by domestic judges in accordance with domestic laws and procedures that may be contrary to business interests without a public policy justification. They may value the benefit of expert international tribunals that apply international investment law in ISA proceedings. The perceived negative consequence of Australia's policy against ISA is therefore economic and political: in potentially

16. See generally Armstrong 2011; Kurtz 2012; Nottage 2011; Burch, Nottage & Williams 2012; Trakman 2013b; Trakman and Sharma 2014. Another possibility is that Australia "gives up" some more important benefit from future FTAs in order to "opt-out" of ISDS protections. Some media commentary on these points over 2012-2013 is available via http://blogs.usyd.edu.au/japaneselaw/2013/10/isa2013.html and http://blogs.usyd.edu.au/japaneselaw/2012/12/negotiating_and_applying_inves.html.
17. Australia's Trade Minister under Abbott's Coalition Government, Andrew Robb, has reportedly said that despite agreeing to ISDS in the FTA concluded with Korea on 5 December 2013, he still intended to hold out against ISDS in the TPP "until he received a good price" in return.
"If there is a substantial market access offering, and if we can also succeed in getting exclusions and protections to safeguard certain public policy measures then we will be prepared to put it on the table, but it is not on the table yet."
Asked whether that meant Australia needed something in return, Mr Robb said: "That's right."
The gains would need to provide extra market access to the US, Japan, Canada, or any of the other eight nations. Questions of intellectual property and access to medicines were "red-line issues".
"We will not do anything to increase the cost of the Pharmaceutical Benefits Scheme," Mr Robb said.
See Peter Martin, "Robb to Tackle Trans Pacific Partnership" (6 December 2013) at http://www.smh.com.au/business/robb-to-tackle-trans-pacific-partnership-20131205-2yttu.html.

marginalizing foreign capital and financial interests in favour of domestic public policy (Trakman 2012a; 2014a).

Outbound Australian investors, in turn, may envisage the risk of their capital investments eroding, or being confiscated by foreign governments in litigation before the domestic courts of host states. Under the new Policy, Australian outbound investors may need to assess the cost of managing capital and related financial risks associated with foreign investment. The Policy explicitly states that '[i]f Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.'

A clear risk is that this Policy may alienate peak business groups, such as the Australian Chamber of Commerce and Industry (ACCI). [18] They may envisage significant political and financial risks to outbound Australian investors in having to rely on courts in partner countries that lack a sustained 'rule of law' tradition or have high 'corruption' indices recorded by such organizations as the World Bank. The issue is how efficiently and reliably outbound investors can assess the capital and other financial risks of investing in foreign markets, in deciding if, how and to what extent to commit in target countries, and in securing protection against financial risks associated with those investments over the life of the capital investment (Kurtz 2012; Nottage 2013; Trakman 2014).

Whether or not Australia is truly unfriendly to foreign investors, an economic and political risk is that Australia's position on ISA may generate the *perception* that its policy carries real financial risks and costs to inbound and outbound investors. Given the vulnerability of international markets to investor perception, this shift in policy, therefore, can have a very real macro-financial impact on capital markets that depend on infrastructure and related capital investments from inbound and outbound Australian investments (Trakman & Ranieri 2013, chs 2-3).

In response to these threats, we will study key risk management issues faced by Australia as a whole, as well as inbound and outbound investors:

Key Issues in Risk Management for Inbound and Outbound Investors as well as for the Australian Government

1. How should inbound and outbound investors assess economic and political risks (where can they find out such information and what should they do with it)?
2. How should they measure such risks?
3. How should they gather information on changing risks (where to get it, and how to use it effectively)?
4. How valuable is political risk insurance to such investors (self-insurance, government and private indemnity insurance, and other risk management strategies)?
5. What are the costs of securing the 'right' kind of insurance, at the 'right' price and time (e.g. in advance of risks materializing into a loss)?
6. What role should the Australian government play in such risk management?

Dispute Avoidance Measures in Investor–State Relations

1. What dispute avoidance measures should states and investors adopt in managing such risks?
2. Where and how should they provide for these measures (e.g. by treaty or contract)?
3. What are the costs and benefits of treaties providing for informal negotiation measures?
4. Should investment treaties or contracts provide for the appointment of qualified conciliators and mediators to assist in resolving investor-state conflicts?
5. How viable is diplomatic intervention by an investor's home state to resolve a dispute with the host state?

Dispute Resolution Measures in Investor–State Conflicts

1. Should dispute resolution measures be graduated? For example, should investors be required to first exhaust local remedies before domestic courts before instituting ISA proceedings?
2. Should ISA be retained or renegotiated by treaty or contract?
3. Is a two-tier 'domestic courts–ISA' approach more efficient and fairer?
4. Is a multi-tier approach preferable, commencing with dispute avoidance measures (such as negotiation) and concluding with dispute resolution measures (such as ISA)?
5. What are the optimal methods of preventing, avoiding, and resolving investor-state disputes?

18. See http://acci.asn.au/Research-and-Publications/Media-Centre/Media-Releases-and-Transcripts/Global-Engagement/Australian-Foreign-Investment-Requires-Right-to-Su.aspx (9 August 2012).

Project Methodology

Sustained multidisciplinary research on the social, economic and political impact of Australia's 2011 Trade Policy Statement is currently lacking, despite the importance of the issue. This project will investigate that impact in three stages, each of which is necessary to obtain an integrated view of the current situation, and to propose recommendations on arriving at efficient outcomes (as identified in the 'Background' set out in Part 1 above). It will:

(a) use econometric analysis to identify the strategic economic and political effect of ISA protections upon levels of inbound investment;

(b) use empirical data and case analysis to identify the impact of this policy on outbound investors, such as through the risk and cost of outbound investors being discriminated against by poorly governed host states; and

(c) undertake scholarly and doctrinal analysis of treaties, cases, academic articles and media literature to identify the potential risk of 'regulatory chill' resulting from treaty practice.

(i) Econometric analysis to identify the relationship between ISA protections and levels of inbound investment

The focus of this econometric study is Australia, its actual and potential trade and investment partners, and its inbound and outbound investors. The econometric analysis will serve several purposes: it will assist in building an economic model of FDI, an understanding of the significance of that model in the Australian government negotiating practice with respect to BITs and FTAs, as well as the economic and political impact of FDI for selected regional, country and country-pair characteristics (beyond Australia).

The project will develop an original econometric study to critically assess the economic and political links between inbound FDI and a host state's willingness to offer ISA protections. The literature is not settled on this issue. There are studies that find investment agreements have statistically significant effects on the nature and volume FDI. Berger et al (2010) found a positive impact on FDI, at least from regional investment treaties using appropriate methods to account for endogeneity issues, and having many zero values for the sample's dependent variable. Other studies show very little statistical or economic significance of such agreements for FDI (Bergstrand & Egger 2011).

Our systematic study will start with a theoretical model to ensure consistency in the choice of economic variables. It will extend from a 3-factor, 3-country, 2-good model (Egger & Pfaffermayr 2004; Baltagi et al 2007) to a 4-factor, 3-country, 2-good model. It will add natural resources as a factor in addition to labour, capital and human capital, to account for resource seeking FDI which is significant for a resource-rich country such as Australia (Armstrong 2011).

Our model will explicitly take third-country effects into account on grounds that investments between two countries are affected by characteristics (and changes in those characteristics) of neighbouring countries. Unlike fixed effects estimation and gravity model methods that implicitly take account of third-country, or multilateral, effects, some recent FDI models use inverse distance weighted effects to account for third-country effects. Gravity models of trade are used extensively to explain FDI, as trade and investment are deeply endogenous. However, there is evidence that knowledge-capital models of FDI significantly outperform gravity model-type FDI models, given that knowledge based models are derived from the behaviour of multinational enterprises and exporting firms (Blonigen 2005).

We will use a large global matrix of FDI flows and stocks to model the economic effects of investment treaties and contracts, as global flows and trends are required to estimate a robust counterfactual for understanding local data. A model that estimates only sub-regions or sub-samples can bias the results, with large one-off shocks in the data, especially with FDI data as it is typically 'lumpy'. A model that is based on a global sample requires regional, country-pair and country-specific controls to reach sensible and more precise findings that account for particular characteristics, trends and settings. We will test results against sub-samples for robustness. Our study will also follow Bergstrand & Egger (2011) in adopting careful econometric specifications that take account of, and exercise control over, the fact that investment agreements and FDI are determined internally, such as by state parties to BITs (Aisbett 2009). We will include up-to-date data, given that BITs have proliferated; FDI has continued to grow rapidly following the GFC; and ISA provisions in investment treaties have evolved.

The content of investment agreements varies with different ISA provisions, while varying generations of BITs have drastically diverse effects on investing firms. Many studies measure the effect of inward and outward investment agreements on FDI without accounting for these differences (Peinhardt & Allee 2011). Those studies that have taken account of different types of ISA provisions have typically only included two or three types of ISA provisions and have found significant distinctions between the effects of FDI between different generations of BITs. Our study will go further. We will take account of and measure variations in four types of ISA provisions, consistent with trends in the latest generation of investment agreements.

(ii) Empirical data and analysis of cases to identify the impact of this policy shift on outbound investors, such as through discrimination and corruption in host states

In addition, we will undertake original interview- and survey-based research to determine the risk of Australia's outbound investors facing bias or discriminatory attitudes in host states, in the absence of ISA. We will focus particularly on countries that are significant current or prospective investment destinations for Australian outbound investors, especially in the Asia-Pacific region.[19]

We will begin by closely analysing the results and approach of two studies relied on by PC, which strongly influenced the Government's 2011 Trade Policy Statement (PC 2010: 269). We will explore the various caveats expressed in those studies and assess the extent to which they represent a weak empirical foundation to support Australia's shift away from incorporating ISA provisions in future investment treaties.

The PC relied on one econometric study in general, namely, the World Bank's 'World Business Environment Survey (10000 business responses from 80 countries). That survey found that foreign firms enjoyed regulatory advantages not shared by their domestic equivalents, as reported by those firms themselves' (Huang 2005). However, that Survey was carried out back in 1999-2000. In addition, the PC did not mention that that study also found that such relative advantages disappeared when foreign investors were benchmarked against politically-connected domestic firms; there was even evidence that foreign investors were in fact disadvantaged (ibid, at p3). We will assess the significance of these factors in relation to Australia's policy towards ISA.

The PC also cited a related World Bank economic study which compared foreign and domestic investors. It found that the 'foreign privilege' phenomenon was stronger in Eastern Europe and South America compared to East Asia (ibid: 8). The political economic literature also shows that certain categories of FDI (especially resource-seeking versus market- and efficiency-seeking FDI) have less ex post bargaining power and so are more vulnerable to host country tactics (Kobrin 1987). Drawing on the World Bank survey, Desbordes & Vauday (2007) found that foreign investors self-reported that their political influence allowed them to obtain advantages (in influencing the content of proposed host state laws) compared to their domestic counterparts. To further test for economic and political risks faced by Australian (and perhaps other Asia-Pacific) investors in major emerging source destinations for FDI, particularly in Asia, we will create and implement a mail survey. This will include questions similar to those asked in the World Bank's 1999 Survey, such as Australian investors' sense of their political influence on law-making. However, it will ask further questions about their treatment in other dealings with the legal system (including regulators and the courts), in particular, whether and how their local counterparts might obtain relative advantages in these respects.

19. See generally Bath and Nottage (2015), available on request from the authors.

To keep this aspect manageable, the project will focus on Australian firms investing in several Asian countries included in the World Bank's 1999-2000 survey (notably Indonesia[20]) and others of present or anticipated interest to them (especially China and Vietnam). We will also survey organisations and individuals, such as law firms, familiar with investors' dealings in these countries.

Our project will draw on the CIs' extensive contacts with the legal profession and will involve website analysis, for example, of the Law Society's searchable database of solicitors' expertise. Through contacts of CIs' Kurtz and Nottage, we already have in-principle agreement to collaborate with the ACCI (for access to Australian investors), and the Emergency Committee for American Trade, along with CI Trakman's links to the North American Free Trade Agreement (NAFTA) Secretariats in the US, Canada and Mexico (for access to the views of North American businesses both in the US and Canada as a comparator). We will also approach organisations such as AUSTRADE for assistance in surveying their clients invested in or familiar with the five countries, and to pilot a draft questionnaire.

Unlike the World Bank Survey, we will conduct extensive semi-structured follow-up interviews of these Australian investors to clarify our understanding of their responses to questions regarding host state impediments, especially relating to whether and why they perceive that local investors face such impediments to a lesser degree. We envisage that more open-ended survey questions and the follow-up interviews will generate a representative range of case studies, highlighting challenges in the current regulatory environment faced by foreign investors in major Asian economies. We will propose that these challenges might be readdressed through tailored treaty protections. We will also interview business, government and international bodies, as well as NGOs, in Australia, Asia and North America, to obtain a broader perspective on responses from particular investors. We anticipate a total of about 80 interviews; most are expected to be carried out in Australia, but some will be conducted in Asia and North America, with each CI taking major responsibility for particular countries, as elaborated in Part E.1 below.

As part of this empirical study, we will organise two workshops, one with government representatives and the other with investor representatives. Both will take place in Year 2 of the project (2015). The Government Workshop will include the PC, AUSTRADE, Department of Foreign Affairs and Trade (DFAT), and Treasury. This will likely be hosted at the ANU. The Investor Workshop, including importers, exporters, the ACCI, insurers etc, will likely be held at UNSW. The purpose of each workshop will be to elicit comments and advice from workshop attendees, to open the door to ongoing communication, and to indicate an intention to circulate draft findings to them for feedback prior to the conclusion of the study. We believe that such participation will assist in developing the research project, rendering it more directly relevant to current risks and benefits associated with FDI, and assisting government and industry groups in going forward in often contentious and complex cases.

(iii) Scholarly analysis of treaties, cases, academic articles and media literature to identify the potential for regulatory chill resulting from treaty practice

The project will also undertake jurisprudential and case study research into the efficiency of ISA. It will address concerns about sovereignty on issues of public policy and fears of 'regulatory chill' emphasised by the Australian PC in its 2010 report. We will also undertake a comparative analysis of treaty practice in jurisdictions that have policy concerns somewhat analogous to Australia, such as Canada.

We will conduct a detailed analysis of investor-state arbitral cases on key treaty protections (especially guarantees of national treatment, fair and equitable treatment and compensation for direct and indirect expropriation). We will assess whether that jurisprudence has, either in law or fact, chilled or deterred further measures for environmental or other policy protections in that host state or elsewhere. This approach departs significantly from the PC's methodology of engaging in secondary and historical accounts of such jurisprudence.

We will examine all publicly available arbitration or other awards on this subject (cross-referencing databases such as those maintained by International Centre for Settlement of Investment Disputes, the United Nations Conference on Trade and Development, and the *Investment Arbitration*

20. See also now Nottage and Butt (2013) at http://ssrn.com/abstract=2340810 (examining existing and potential treaty claims by Australian investors, especially in the resources sector); Nottage (2014a). The World Bank survey also covered Malaysia and Philippines, but the funding allocated by the ARC for this project prevents a detailed analysis of those countries.

Reporter). Our aim is to identify the outer contours of arbitral jurisprudence on key treaty protections, especially national treatment, fair and equitable treatment, and guarantees against both direct and indirect expropriation. Our objective is to assess the likely risk profile of states regulating for key public purposes and, especially in the case of Australia, to compare those treaty protections against domestic (constitutional) law standards. We will pay particular attention to canonical cases involving environmental and health regulations in countries with domestic and regulatory systems comparable to Australia such as Canada in *SD Myers v Canada* (waste disposal measures), the US in *Methanex v US* (gasoline additive regulation) and Canada in *Chemtura v Canada* (pesticide ban).[21]

We will then supplement this examination of primary source material with a comprehensive review of the secondary literature, and information available from the government sector. We will place particular focus on the manner and extent to which investor reactions to treaty protections have, or are likely to, produce regulatory chill. We will continue to carefully monitor the ongoing investment treaty action by Philip Morris against Australia by evaluating whether its jurisdictional and substantive claims are likely to cause Australia and other countries in the region to adopt defensive action by which to shield themselves from comparable and future investor claims. The project will examine the likely nature of such a regulatory chill, varying from reluctance by states to conclude investment treaties, to not enacting legislation on controversial issues (such as the plain packaging of cigarettes) that may give rise to investor or other claims (Nottage 2013). In identifying and verifying such evidence, the CIs will consult with officials, public interest groups and business sectors involved in foreign investment, particularly in Asia. Consultation will vary from budgeted workshops to informal discussions and interviews – which we expect sometimes to overlap with the follow-up interviews from the survey outlined at (ii) above.

By closely examining these selected ISA awards (together with targeted survey information), we will assess the political and economic factors that lead foreign investors to commence ISA claims. We will weigh the adverse reputational costs of litigating against a state against the costs to investors of resorting to ISA (at least against certain states) that are sometimes ignored by those who assert that ISA gives rise to a regulatory chill. In particular, we will explore the factual matrices of ISA proceedings which demonstrate that foreign investors often first seek to litigate in the domestic courts of the host state and only commence ISA once the underlying relationship with the host state (especially in network industries) has broken down irretrievably. We will examine the extent to which investor recourse to domestic courts weakens the 'regulatory chill' thesis, and conversely, supports the legitimate role of ISA to enable foreign investors to bargain in the shadow of investment treaty protections.

Finally, we will systematically review leading treaty practice to identify techniques and strategies by which states other than Australia have balanced foreign investment protection against core regulatory autonomy. This comparative analysis is intended to extend beyond the analysis adopted by the PC and the Government's Trade Policy Statement (critiqued generally in Kurtz 2011; Nottage 2011; Burch et al 2012, Trakman 2014).[22] Canada, for instance, has successfully included general exemption provisions (modelled on provisions in the WTO) for every investment treaty it has signed since entering into the NAFTA. The US, instead, has carefully delineated the scope of operative obligations. The US's strategy has included linking any guarantee of 'fair and equitable treatment' to protections under customary international law, and grounding the guarantee against indirect expropriation in US constitutional doctrine.[23]

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21. On *Chemtura*, see Nottage (2015), with further references.
22. See also, updating and refocusing Nottage (2011), Nottage (2013a) (in a special issue on the international politics of resources in North Asia); and Nottage (2015), comparing KAFTA with earlier Australian and US treaty practice.
23. The EU is another important site for innovation in investment treaty practice as it is currently finalizing the substantive and procedural (including ISA) components of a model or template EU investment treaty, and recently entering into agreements (eg Canada or Singapore) and negotiating others (notably with the US) against that backdrop. More generally on the implications of intersections between international trade and investment law, see Kurtz (2013; 2014-5).

Significance and Innovations in Research and Concepts

This project is most important for policy-making in a crucial field for the world economy, at national, regional and global levels. The results will also contribute to important debate over whether the WTO or other multilateral bodies[24] should promote a new investment treaty framework and principles that govern pre- and post-establishment FDI.

The project will be significant in offering comprehensive and practical cost-benefit guidelines to both the Australian government and investors (inbound as well as outbound) in managing FDI. Importantly, it will draw attention to issues that Australia must take into account when negotiating treaties to ensure that it achieves an efficient balance between exercising its sovereignty over public policy issues and ensuring healthy participation in international investment markets.

Our research will be particularly significant for Asia-Pacific initiatives, such as the TPPA which is currently being negotiated and which represents the second largest potential trade and investment area after the EU. However, the analysis will impact on established non-treaty measures used to expand investment and trade in the region, notably via ASEAN and the Asia Pacific Economic Cooperation (APEC) forum. We will also add new perspectives and data to a major domestic debate on the merits and risks of the ISA system, especially for a nation like Australia in which investment in the resources sector is essential for the economy to thrive.

Our project will have significant methodological value as a multidisciplinary study by adding insights to various disciplines that have not been exploited in an integrated manner. We will use econometric analysis to formulate legal arguments on how Australia could temper its treaty practices to encourage investment, while maintaining effective control over its socio-economic and social concerns. We will draw on political science studies to further demonstrate the dynamics behind international treaty negotiations (eg Pekkanen 2012) and their impact upon domestic groups interested in or affected by ISA provisions (Nottage 2011). Scholars conducting econometric studies on investment and ISA (eg Berger et al 2010) rarely, if ever, engage in interview-based or other qualitative studies to triangulate their findings. Our project thus takes a novel and comprehensive approach by combining quantitative as well as qualitative methodologies.

The econometric method is particularly innovative. It builds upon and combines streams of literature in carefully measuring the impact of ISA provisions on FDI. The econometric analysis will: account for the different types of ISA provisions (Peinhardt & Allee 2011); include multilateral factors in a knowledge-capital framework for FDI modelling (Carr et al 2001; Markusen 2002); focus on East Asia/Australia-specific factors (including eg a natural resource endowment variable) (Armstrong 2011); and properly control the endogeneity issue arising from FDI and investment agreements being co-determined (Aisbett 2009; Bergstrand & Egger 2011).

Our legal analysis will draw, not only on public international law (the core sub-discipline for investment treaty law, and the overlapping sub-discipline of WTO law), but also on comparative law. The latter is essential to understand key attributes of foreign investment regulation in major Asia-Pacific economies, and related legal risks facing and protections accorded to foreign investors in host states, which may not (yet) be fully covered or implemented by treaty provisions. Our project is also conceptually significant in drawing from discourse in:

i. environmental regulation (to understand and assess 'regulatory chill');
ii. corporate governance (as a backdrop to regulating investor and dispute resolution behaviour and attitudes);
iii. international commercial arbitration (overlapping with treaty-based ISA insofar as a host state may consent to ISA through an investment contract, and some procedural features and jurists involved in ISA overlap with those in commercial arbitration: Nottage and Miles 2009; Trakman 2012); and
iv. international tax treaty law (to consider the costs and benefits of adapting dispute resolution provisions in that field to ISA) (Burch et al 2012).

24. See eg http://www.oecd.org/investment/internationalinvestmentagreements/publicconsultationisds.htm.

Feasibility and Communication of Results

Regarding time lines, we will conduct the econometric study of the impact of ISA provisions on inbound FDI throughout 2014.

We will commence the survey- and interview-based study of Australian outbound investors into major Asian economies in mid-2014 (after securing university Ethics Committee approvals). That will continue through to end-2015 (as follow-up interviews can be time-consuming). CI Nottage has extensive experience in undertaking such empirical work. He is also familiar with issues facing foreign investors in and out of Japan (Hamamoto & Nottage 2010), and in three of the countries targeted for our survey- and interview-based research (Bath & Nottage 2011).

The legal analysis of investment treaty awards and comparative treaty practice will begin in early 2014 and run to mid-2016. This part of the project will be relatively time-consuming (due to the large number of awards) and complicated by the fact that not all key awards are publicly available. Furthermore, treaty practice is deeply in flux as states experiment with different investment models and strategies.

At each stage of this project, we will produce working papers and scholarly articles communicating our analysis, findings and recommendations. We will draw on our proven track records as prolific authors of high-quality work in influential publications.[25] We will also incorporate key findings and recommendations in a co-edited or co-authored research monograph to be completed by the end of 2016.

A part-time Research Associate at UNSW will coordinate research and ensure that it operates efficiently. Four part-time Research Assistant positions, one based at each CI's institution, will be established for most of the project's duration. These RAs will assist in reviewing and disseminating project-related publications and work-in-progress on an ongoing basis, leading to the final monograph. We will maintain ongoing communication with Government and investor organizations. We will provide, and receive feedback on key economic data and on our empirical research and findings. We will build on our existing relationships with Government and Investor groups through a workshop with each group. One workshop will be held at the ANU and the other at UNSW, both in Year 2 (2015). These will be important occasions to communicate our preliminary findings.

The two workshops will provide an important opportunity: to engage in first-hand investigations into Government and investor practices; and to discuss key costs and benefits associated with FDI and ISA. The Government Workshop will include the PC, Treasury, AUSTRADE and DFAT. The Investor Workshop will include investor representatives, as well as importers, exporters, the Business Council of Australia, insurers etc. We will also canvass views of public interest and labour organisations such as the Cancer Council of Victoria (on the tobacco plain packaging dispute with Philip Morris) and the Australian Council of Trade Unions. We will catalogue responses at both workshops in relation to watershed developments, such as arise from the Philip Morris case and other novel investor-state claims.

Regular updates on our findings will be shared through online journals, such as *Transnational Dispute Management*, as well as on blogs (see, for example, CI Nottage's comprehensive blog on Japanese Law and the Asia Pacific).[26] Other communication channels will include the East Asia Forum, East Asian Bureau of Economic Research (EABER) and South Asian Bureau of Economic Research (SABER), with which CI Armstrong is closely affiliated.[27]

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25. Many of our published and forthcoming works are freely available via SSRN.com (including an earlier version of this paper).
26. See http://blogs.usyd.edu.au/japaneselaw/; and also the East Asia Forum blog co-edited by Armstrong, at http://www.eastasiaforum.org/tag/investor-state-dispute-settlement/.
27. See https://crawford.anu.edu.au/research_units/eaber/.

Conclusion: Expected Outcomes and Benefits

We expect the three stages of investigation in our project to establish:

(i) important links between ISA protections and levels of inbound investment, revealed through the econometric analysis;

(ii) viable responses to concerns of outbound investors about the availability of appropriate ISDS processes in host countries, in the absence of ISA; and

(iii) sustainable data demonstrating whether or not a complete renunciation of ISA is required to avoid regulatory chill in key areas of public policy, such as health and the environment.

Such findings will allow us to explore alternative methods of formulating efficient and fair methods of resolving investment disputes, including dispute prevention and avoidance measures. An underlying purpose will be to highlight functional ways in which Australia can present itself as an attractive investment destination, while giving its businesses the confidence to invest in key foreign jurisdictions, and balancing public interest concerns.

These research findings will generate significant **economic and social benefits** nationally, regionally and internationally. The project will demonstrate how dispute resolution measures can be effectively implemented in investment treaties and contracts. It will illustrate the risks and benefits that arise from particular formulations of those measures. On a social level, we will address issues such as 'regulatory chill' relating to measures adopted or considered by host states for environmental and public health protection. On the national level, it will focus on strengthening Australia as a key investment destination, while providing investor interest groups with reliable information on how to invest efficiently in Australia and abroad.

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LCIA Rules 2014: Effective, efficient and fair

The London Court of International Arbitration (LCIA) has adopted new rules that apply to all arbitrations commenced on or after 1 October 2014 (2014 Rules). Focusing on efficiency and fair process, the 2014 Rules include not only new provisions for the appointment of an emergency arbitrator but also, in a novel move, standards of conduct for parties' legal representatives. A summary of the key changes is set out below.

Whether the 2014 Rules achieve a more efficient and fair process is yet to be tested. The bottom line is that where parties fail to act efficiently or fairly, the tribunal now has greater powers to deal with such behaviour from both a procedural and costs perspective.

According to the LCIA, the 2014 Rules have been modernised with a focus on ensuring an effective, efficient and fair process for all parties. The LCIA's new Director General, Dr Jacomijn van Haersolte-van Hof has attributed the balanced set of rules to a 'meticulous and thoughtful drafting process'.

Notable changes in the 2014 Rules include provisions for:

- Procedural changes for increased efficiency;
- Apportionment of costs;
- Emergency arbitrator provisions; and
- Conduct Guidelines for the parties' legal representatives.

Increased Efficiency

Minor procedural changes have been made to increase the efficiency of the process, and 'modernise' the Rules. These measures include the introduction of:

- electronic filing;
- shorter time limits for default procedures, initial contact with the tribunal and rendering of the award;
- London as the default seat in the absence of a choice by the parties;
- English law as the default law of the arbitration agreement in the absence of a choice by the parties;
- declarations from arbitral nominees that they are willing to devote sufficient time, diligence and industry to ensure the expeditious conduct of the arbitration; and
- consolidation provisions

Apportionment of costs

The tribunal has a wide discretion in respect of apportioning costs. While it has been widely accepted that the conduct of the parties may be considered by the tribunal

when assessing the division of costs, this was not expressly set out under the old rules. Article 28.4 now provides that tribunals may consider the conduct of the parties when apportioning costs. The effect of this provision is that parties will risk an adverse cost award where they fail to act efficiently or fail to comply with the new conduct Guidelines.

In relation to agreements for the apportionment of costs, Article 28.5 now provides that such agreements will only be accepted if they were:

- entered into before the dispute arose; and
- confirmed in writing by the parties after the request for arbitration was submitted to the tribunal.

Emergency Arbitrator

Significantly, the LCIA has introduced a mechanism for the appointment of an emergency arbitrator meaning that parties will no longer have to resort to local courts for urgent or interim relief where a tribunal has not yet been appointed. Parties now have the option to make an application for the appointment of a temporary sole arbitrator within 3 days.

The emergency arbitrator provisions have been drafted on and 'opt-in'/'opt-out' basis where:

- parties will need to opt-in for arbitration agreements concluded prior to 1 October 2014; or
- parties will need to opt-out for arbitration agreements concluded after to 1 October 2014.

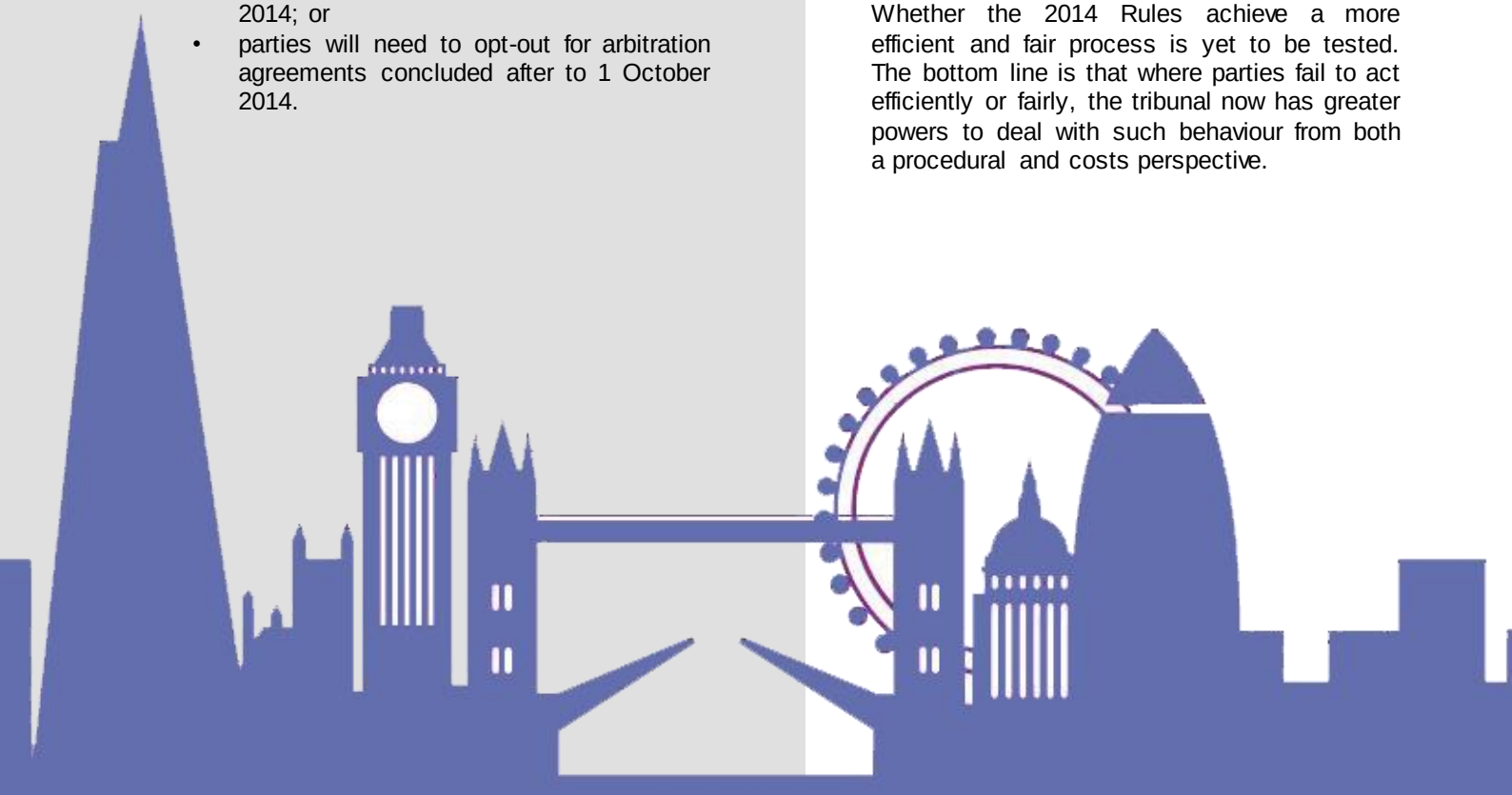
Conduct Guidelines for the Parties' Legal Representatives

In what is potentially the most significant amendment, the LCIA has introduced novel Guidelines for the conduct of the parties' legal representatives appearing by name in the arbitration, which are intended to promote the good and equal conduct. The Guidelines, which are provided in an annexure to the 2014 Rules, expressly prohibit certain conduct, including:

- conduct amounting to an abuse of process such as repeated challenges to an arbitrator's appointment or jurisdiction;
- provision of false statements;
- procurement of false evidence;
- concealment of documents subject to production orders; and
- unilateral communications with the tribunal or member of the LCIA Court making a determination.

The tribunal has also been empowered under Article 18.6 to sanction legal representatives who fail to comply with the Guidelines through a written reprimand or caution as to the future conduct in the arbitration or any other measure necessary to uphold the general duties of the tribunal. It is not clear whether these 'other measures' would include reporting the behaviour to the legal representatives regulatory body although the express power to do so was removed from the final draft of the 2014 Rules.

Whether the 2014 Rules achieve a more efficient and fair process is yet to be tested. The bottom line is that where parties fail to act efficiently or fairly, the tribunal now has greater powers to deal with such behaviour from both a procedural and costs perspective.



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Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited [2014] FCA 636

The recognition of Australia as a pro-arbitration jurisdiction has been reinforced in the recent Federal Court of Australia decision *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636. This decision clarifies that a foreign arbitral award will only be set aside under section 9 of the *International Arbitration Act 1974* (Cth) (**the Act**) in limited circumstances and confirms the Australian courts' pro-enforcement approach to foreign arbitral awards.

This decision is a further example of the pro-arbitration stance of Australian courts and raises a number of significant issues with respect to the enforcement of arbitral awards in Australia.

Background and the Underlying Awards

The dispute arose out of a shipping contract between Armada (Singapore) Pte Ltd (Armada) (a Singaporean shipping company) and Gujarat NRE Coke Limited (Gujarat) (an Indian manufacturer) for the shipment of coking coal.

The arbitration clause in the contract provided for arbitration in London and specified that the three arbitrators to be appointed to the tribunal should be 'commercial men who are members of the Institute of Arbitrators in London'.[1]

Pursuant to the arbitration clause in the contract, Armada commenced arbitration proceedings alleging that Gujarat breached its obligation to nominate laycan periods under the contract. Both parties nominated barristers as their party-appointed arbitrators. The Chairperson of the tribunal nominated by the party-appointed arbitrators was not a lawyer.

1. Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited [2014] FCA 636, [17].

After hearings were held in London, the tribunal made three separate awards in favour of Armada. In the First Award, the tribunal declared that it had substantive jurisdiction to determine the dispute. In the Second Award, the tribunal found that Gujarat was in breach of the contract and set out the manner for assessment of damages. The Third Award determined the quantum of those damages.

Armada subsequently sought to enforce all three arbitral awards in Australia under the Act.

Grounds of Objection

Gujarat resisted the enforcement of all three awards in the Federal Court of Australia relying on the following five grounds:

1. The two barristers appointed were not 'commercial men' as specified in the arbitration clause. As such, Gujarat submitted that Armada had failed to satisfy section 9 of the Act which requires the court to be satisfied that the award was made by a tribunal duly appointed under the arbitration agreement.
2. As two of the arbitrators were not 'commercial men', Gujarat argued that the composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place and therefore the court should refuse enforcement under section 8(5)(e) of the Act.
3. The Second Award was a declaration that Armada would be entitled to damages in respect of future shipments (if any) that Gujarat failed to perform. Gujarat submitted that this purported to bind the parties to pay damages in respect of a future loss at a time when the loss had not yet become 'binding' under section 8(5)(f) of the Act.
4. Similarly, Gujarat argued that as the Second Award was a declaration as to future contractual loss, to enforce this award would be contrary to public policy under section 8(7)(b) of the Act.
5. Finally, Gujarat submitted that the contract between Gujarat and Armada was a 'sea carriage document' within the meaning of section 11 of the *Carriage of Goods by Sea Act 1991* (Cth). As a result, Gujarat argued that the arbitration agreement was of no effect and the tribunal lacked jurisdiction to make the awards that Armada was seeking to enforce.

The Decision

Justice Foster held that as Armada had established that each of the three arbitral awards were 'foreign awards' within the meaning of section 8(1) of the Act, Gujarat bore the onus of proof regarding its enforcement challenge.

After considering the parties' submissions, Justice Foster dismissed each of the five grounds upon which Gujarat relied and enforced all three arbitral awards in favour of Armada.

In respect of Gujarat's five grounds for resisting enforcement of the awards, Justice Foster found:

1. Gujarat had previously raised a jurisdictional objection before the tribunal on the basis that the two party-appointed arbitrators were not 'commercial men' as specified in the arbitration clause. Justice Foster noted that the Federal Court of Australia is not bound to follow or apply the findings of the arbitrators in respect of this issue and confirmed that the Court had the power to determine matters of jurisdiction for itself.[2] However, his Honour noted that the Court should only exercise this power where it was necessary to do so,[3] reflecting a judicial preference to avoid interfering with arbitral findings.

   Justice Foster held that the meaning of the phrase 'commercial men' depended on its context, but emphasised that what was important was the commercial experience of the arbitrator. The mere fact that an arbitrator was also a lawyer would not be enough to disqualify them from satisfying the descriptor 'commercial men'.[4] Therefore, his Honour found that the arbitrators were commercial men and the tribunal had been duly appointed under the arbitration agreement.

2. [50].
3. Ibid.
4. [55].

In rejecting Gujarat's claims, Justice Foster noted that in any event, Gujarat had not objected to the appointment of the arbitrators at an early stage in the proceedings and had therefore waived its rights to object to their appointment, or alternatively were estopped from doing so.[5] Justice Foster also emphasised that Gujarat continued to participate in the arbitration for some time after the arbitrators had dismissed its objections to jurisdiction and only sought to extricate itself from the arbitration after the unfavourable Second Award. [6]

2. Given Justice Foster's finding that the two arbitrators were commercial men, Gujarat's second ground for resisting enforcement of the arbitral awards under section 8(5)(e) of the Act subsequently fell away.

3. In respect of the third ground relied upon by Gujarat, Justice Foster declined to give effect to any declaration made in the Second Award in respect of future shipments. In doing so, his Honour relied on section 8(5)(f) of the Act which grants Australian courts the right to refuse enforcement of foreign arbitral awards that have not yet become 'binding'. Justice Foster held that while he would not enforce the declaration in the Second Award on the basis of section 8(5)(f) of the Act, he would grant Armada liberty to apply to amend its Originating Application to seek enforcement of any additional awards that are made by the tribunal relating to Gujarat's failure to perform subsequent shipments.

4. Justice Foster did not accept Gujarat's submissions that the declaration in the Second Award regarding future contractual loss was contrary to public policy stating:

> *"The mere fact that enforcing such a declaration might not be consistent with principles developed in Australia for the exercise of an Australian court's discretion to make declarations would not, or itself, be sufficient to constitute a reason for refusing to enforce the award on the grounds that to do so would be contrary to public policy."* [7]

These comments provide helpful guidance of the meaning of 'contrary to public policy' in section 8(7) of the Act since the 2010 amendments. In making these conclusions, Justice Foster held that the balance of the Second Award was clearly enforceable.

5. Consistent with the Full Federal Court's decision in *Dampskibsselskabet Nordon A/S v Gladstone Civil Pty Ltd* (2013) 216 FCR 469, Justice Foster rejected Gujarat's argument that the awards were unenforceable on the basis that the contract was a 'sea carriage document' within the meaning of section 11 of the *Carriage of Goods by Sea Act 1991* (Cth).

Justice Foster decision was to substantially enforce the awards and on this basis, he made orders that Gujarat pay Armada's costs in respect of the application.

Comment

This decision is a further example of the pro-arbitration stance of Australian courts[8] and raises a number of significant issues with respect to the enforcement of arbitral awards in Australia.

Firstly, Justice Foster confirmed that although Australian courts have the power to determine matters of jurisdiction themselves, if a court chooses to exercise that power, it should only do so where necessary. These comments demonstrate that Australian courts recognise the jurisdiction of international arbitration tribunals and should only disturb the findings of an arbitration tribunal in limited circumstances.

Secondly, the decision confirms that once a party has established a prima facie case for enforcement, then the burden lies on the Respondent to satisfy the court that grounds for resisting enforcement apply. These findings represent a further pro-enforcement stance.

Thirdly, Justice Foster's findings that the mere fact that an arbitral award is made in terms not in accordance with Australian legal precedent is not enough to support a finding that enforcement of the award is contrary to public policy. This confirms that a party resisting enforcement on public policy grounds will be required to meet a high threshold.

Fourthly, the case highlights the need for a party to object to jurisdiction quickly, or risk a finding that it waived any right to contest the composition of an arbitral tribunal. This is consistent with the reasoning that parties should not be able to resist enforcement of an unfavourable award following arbitration proceedings that that they have freely participated in.

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5. [57].
6. [60].
7. [67].
8. *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* [2014] FCA 414; *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5; *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109; *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131.

Fifthly, this decision raises some interesting questions regarding the meaning of 'binding' awards under section 8(5)(f) of the Act which specifies that an Australian court may refuse enforcement if 'the award has not yet become binding on the parties to the arbitration agreement'. Section 8(5)(f) of the Act is consistent with Article V(1)(e) of the New York Convention that permits, but does not require, non-recognition of an arbitral award if it has not become 'binding'.

The practical meaning of what constitutes a 'binding' award under Article V(1)(e) of the New York Convention has been interpreted in a number of ways. One view is that the availability of appellate review of the merits of an award in the arbitral seat renders an award not 'binding'. An alternative view is that Article V(1)(e) only requires that the award must be binding 'on the parties' in accordance with an arbitration agreement that specifies an award shall be final and binding.

Justice Foster declined to give reasons for his finding that the tribunal's declaration with respect to future contractual losses was not 'binding', nor did his Honour consider the meaning of what constitutes a 'binding' award for the purposes of sections 8(5)(f) of the Act. This decision does however highlight that there remains a degree of uncertainty regarding the circumstances in which a court would refuse to enforce an award on the basis that it is not 'binding'.

Lastly, this decision also raises important practical ramifications for parties in relation to costs. Given the pro-enforcement approach of the Australian courts, any party that challenges the enforcement of a foreign arbitral award in Australia risks significant cost consequences in the event that their application is unsuccessful.

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TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83

Arbitral award may only be set aside for breach of the rules of natural justice where real unfairness or real practical injustice is demonstrated.

Summary

In *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83, TCL Air Conditioner (Zhongshan) Co Ltd (**TCL**) appealed from the dismissal of its application to set aside an international arbitral award under Article 34 of the *UNCITRAL Model Law on International Commercial Arbitration* (**Model Law**). TCL's primary complaint was that the arbitral tribunal had failed to accord it procedural fairness such that there had been a breach of the rules of natural justice in connection with the making of the award, and so, it was asserted, the award was in conflict with, or contrary to, the public policy of Australia, and liable to be set aside pursuant to Article 34(2)(b)(ii) of the Model Law.

The Full Court of the Federal Court of Australia unanimously held that real unfairness or real practical injustice must be demonstrated in how the arbitral hearing was conducted or resolved, by reference to established principles of natural justice or procedural fairness, before an arbitral award is set aside or refused recognition or enforcement. In this case, the Full Court was not persuaded that TCL had been, in essence, denied the opportunity to be heard on an important and material issue as revealed by such a finding made without probative evidence. In other words, real unfairness or real practical injustice was not demonstrated, and the award made against TCL was not set aside.

Facts

TCL (based in the People's Republic of China) and Castel Electronics Pty Ltd (**Castel**) (based in Australia) were parties to an agreement for the distribution of air conditioning units manufactured by TCL. The agreement provided for arbitration in the event of a dispute. Disagreement arose between the parties and the dispute was submitted to arbitration. On 23 December 2010, the arbitral tribunal delivered an award in Castel's favour. On 27 January 2011, a further costs award was delivered.

TCL sought to set aside the awards under Article 34 of the Model Law, which has the force of law in Australia by virtue of subsection 16(1) of the *International Arbitration Act 1974* (Cth) (**IAA**). Castel sought to enforce the awards under Article 35 of the Model Law. TCL sought to resist enforcement under Article 36 of the Model Law. In seeking to set aside and resist enforcement of the award, TCL contended that the arbitral tribunal failed to accord it procedural fairness such that there had been a breach of the rules of natural justice in connection with the making of the award, and so, it was asserted, the award was in conflict with, or contrary to, the public policy of Australia, and liable to be set aside pursuant to Article 34(2)(b)(ii) of the Model Law or refused recognition or enforcement pursuant to Article 36(1)(b)(ii) of the Model Law (see also section 19 of the IAA).

The asserted breaches of natural justice arose from the arbitral tribunal's three central findings of fact, upon which TCL was said to have been denied an opportunity to present evidence and argument and which findings of fact were said to have been made in the absence of probative evidence.

TCL advanced a number of appeal grounds, challenging, inter alia:

- the primary judge's finding that the Model Law required a demonstrated offence to fundamental notions of fairness and justice before the relevant discretion in Articles 34 or 36 of the Model Law could be exercised; and
- the primary judge's reference to the need to balance the efficacy of enforcing arbitral awards and the public policy of Australia, including the importance of uniformity of international jurisprudence dealing with public policy.

(TCL asserted that the primary judge should have held that any breach of the rules of natural justice as understood in Australian domestic law required the award to be set aside or to be refused enforcement).

In confining the scope of public policy in this manner, the Court had regard to the widespread international judicial support and emphasised the importance of attempting to create or maintain, as far as the language in the IAA permits, a degree of international harmony and concordance of approach to international commercial arbitration.

While there is no doubt that, at common law (through the exercise of public power), it is an error of law to make a finding of fact for which there is no probative evidence, the context of international commercial arbitration is the exercise of private power and is one which recognises the autonomy, independence and free will of the contracting parties, wherein errors of fact or law are not legitimate bases for curial intervention: see TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia [2013] HCA 5 at [81]. The Court's strong view was that, if the rules of natural justice (in the context of international commercial arbitration) encompass a requirement of probative evidence for the finding of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which the factual findings of an arbitral tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing has been conducted regularly and fairly. The danger would be even greater if natural justice was reduced in its application to black-letter rules in the sense that this may foster a mindset that the rules of natural justice may be breached in a minor and technical manner.

The Court accepted, without the slightest hesitation, that the making of a factual finding by an arbitral tribunal without probative evidence may reveal a breach of the rules of natural justice in the context of an international commercial arbitration. This, the Court said, would be so when the fact was critical, was never the subject of attention by the parties to the dispute, and where the making of the finding occurred without the parties having an opportunity to deal with it. That is unfairness. It does not follow, however, that any wrong factual conclusion that may be seen to lack probative evidence (and so amount to legal error) should necessarily, and without more, be characterized as a breach of the rules of natural justice in this context.

The Court emphasised that the essence of natural justice is fairness. Unless there is unfairness or true practical injustice, there can be no breach of any rule of natural justice. The required content of fairness in any particular case will depend on all the circumstances of the case. It is not an abstract concept, but essentially practical. Fairness, the Court said, is normative, evaluative, context-specific and relative.

The relevant context being international commercial arbitration, the Court held that no arbitral award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness are breached. The Court remarked that in most if not all cases, real unfairness or real practical injustice should be capable of being demonstrated and expressed tolerably shortly with tolerable clarity and expedition rather than by requiring the court to repeat or re-examine the fact-finding and analysis process in detail (which TCL contended was the proper approach).

Whilst TCL sought to argue exactly that, the Court said that real unfairness or real practical injustice will not be demonstrated as a result of a detailed factual analysis of evidence regularly and fairly advanced involving asserted conclusions of facts different to those reached by the arbitral tribunal. The Court was ultimately not persuaded that TCL had been, in essence, denied the opportunity to be heard on an important and material issue as revealed by such a finding made without probative evidence – no real unfairness or real practical injustice was demonstrated. In the circumstances, the Court dismissed TCL's appeal to have the award set aside.

Authors' note: *A similar version of this case note has been submitted for publication in the Corporate Law Bulletin of the Centre for Corporate Law & Securities Regulation at The University of Melbourne. Permission has been received from the editors of the Corporate Law Bulletin for this case note to be published in The ACICA Review – December 2014.*

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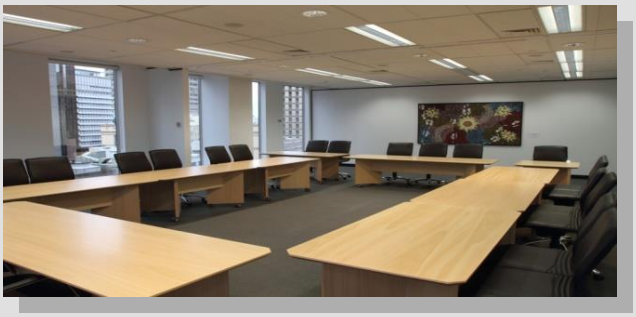

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