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THE ACICA REVIEW

December 2015

ACICA
Australian Centre for International Commercial Arbitration

Leader in international dispute resolution

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ACICA
Australian Centre for International Commercial Arbitration

CONTENTS

The ACICA Review December 2015

INFORMATION PAGE

CASE NOTES

OTHER ARTICLES

Alex Baykitch ACICA President

President's Welcome

Welcome to the fifth edition of the ACICA Review, and to our new members since the last edition.

New Board Members

I would like to acknowledge Ian Davidson SC who recently joined the ACICA Board.

ACICA is privileged to have Ian on the ACICA Board.

Conferences

On 19 November, ACICA held a conference in Perth which was well attended. I would like to thank Professor Gabriël Moens for his efforts.

On 24 November, in conjunction with the BLS and CIArb, the Sydney Arbitration Week was held which was very successful. We look forward to working with the BLS next year.

ACICA is also going to arrange a series of master classes on arbitration and presentations from local and international experts in the field of international arbitration in 2016 for our members.

ICCA 2018

Preparations are going well for the ICCA Congress in 2018. We have confirmed the Sydney Opera House and the Australian Symphony Orchestra for our opening ceremony.

I wish all members and their family and loved ones the very best for the festive season and a happy new year.

Alex Baykitch
President

Deborah Tomkinson
ACICA Secretary General

Secretary General's Report

Launch of New ACICA Rules

Following an extensive review and consultation process, the new ACICA Arbitration Rules and Expedited Arbitration Rules were formally launched at the Australian Disputes Centre (ADC) on 26 November 2015 during Sydney Arbitration Week. The new Rules will come into effect on 1 January 2016.

ACICA has revised its Rules to reflect developments in international arbitration. The new Rules build on ACICA's established practice of providing an effective, efficient and fair arbitral process.

Developments of note include provisions on consolidation and joinder and the conduct of legal representatives, along with the introduction of an expedited procedure for lower value or urgent matters commenced under the Arbitration Rules.

ACICA Rules Launch: *Deborah Tomkinson, Malcolm Holmes QC, Professor Luke Nottage and Alex Baykitch*

The amendments improve the existing Rules and strengthen ACICA's position as a leading provider of international arbitration services in the Asia Pacific region.

ACICA expresses it gratitude to all who assisted with the review process, in particular to all members of the ACICA Rules Committee who have been so dedicated to this initiative.

Malcolm Holmes QC, Alex Baykitch, Deborah Tomkinson, John Wakefield, Professor Luke Nottage

A copy of the new Rules Booklet can be downloaded from the ACICA website: http://www.acica.org.au.

Sydney Arbitration Week 2015

Another very successful and action-packed Sydney Arbitration Week was held from 23 to 27 November 2015.

In celebration of its Centenary year, the **Chartered Institute of Arbitrators** (Australia branch) held a number of events throughout the week, including a Centenary Moot Competition and a Welcome Reception cruise around Sydney Harbour, both held on Monday 23 November. The Third International Arbitration Conference, hosted in conjunction with the Business Law Section of the **Law Council of Australia** and **ACICA**, and the Centenary Gala Dinner, followed on Tuesday 24 November. The celebrations provided a superb opportunity to listen to eminent speakers discuss a variety of current topics (from *Emerging Trends in International Arbitration* to *Opportunities and challenges presented by Australia's new free trade agreements)* and to catch up with colleagues from around the globe.

On Thursday evening, AMTAC and Holman Fenwick Willan together hosted the **AMTAC Seminar**. Speakers Ben Olbourne, Angus Stewart SC and Stephen Thompson explored recent maritime cases, presenting *Hot Issues for Maritime Arbitration Practitioners*. The speakers' presentations are available on the AMTAC website (www.amtac.org.au).

Other events during the week included the **ADC Australian-Indonesian Business Leaders Forum** - an experienced panel comprising Campbell Bridge SC, Associate Professor Simon Butt, Antony Crockett and Andrea Martignoni discussed risk management and options for dispute resolution for Australian and Indonesian parties wishing to do business together, a lunchtime seminar run by **AMPLA / ACICA** exploring *Key International Arbitration Issues in the Energy and Resources sector* and a seminar by **Resolution Institute** on trends in international arbitration. A mock case was run by the **ICC** demonstrating *Emergency Arbitration under the ICC Rules* and a seminar hosted by **CIArb Australia** considered the *Enforcement of foreign awards in China* with speaker Dr Fan Yang (including a book launch of Dr Yang's new text "Foreign-Related Arbitration in China").

Andrea Martignoni, Campbell Bridge SC and Associate Professor Simon Butt

Associate Professor Simon Butt and Antony Crockett

The panel for the ADC Australian Indonesian Business Leaders Forum

Those attending the 2015 International Arbitration Lecture, hosted by Clayton Utz and the University of Sydney on 25 November, heard Hilary Heilbron QC speak illuminatingly on "*Dynamics, discretion and diversity - A recipe for unpredictability in international arbitration?*". The **43rd AFIA Symposium** was held at the ADC on 26 November with the support of the University of Sydney, and the **Young ICCA Workshop,** hosted by Young ICCA in conjunction with ICDR Young & International, focused young minds on issues surrounding *Dealing with Experts in International Arbitration* on Friday 27 November.

Young ICCA Workshop – held at Allens, Sydney

Young ICCA Workshop Faulty members: Karen Wenham, Driver Trett, Sydney (far left) & Matthew Secomb, White & Case, Singapore (far right)

Young ICCA Workshop Faculty members: Ruth Stackpool-Moore, Harbour Litigation Funding, Hong Kong (third from left), Martin Cairns, Sapere Forensic, Sydney (second from right), & James Morrison, Consultant, Morrison Law, Sydney (far right)

Young ICCA Workshop Faculty members: Smitha Menon, Wong Partnership, Singapore (left) & Karen Wenham (middle)

Other Events

ACICA Arbitration Conference: Perth

The ACICA Conference was held successfully in Perth on 19 November 2015, bringing together arbitration practitioners and thought leaders from the dispute resolution sector to discuss the latest challenges and developments in *The Amazing World of Arbitration: Australian Perspectives*. As keynote speaker, the Honourable Kevin Lindgren opened the conference, speaking on the Arbitration Scene in Australia. The conference was notable for its diversity of topics - from Investor-State Arbitration: Case from the Region to Doing Business in China: Dispute Management Aspects. The conference was followed by a reception hosted by Banco Chambers and a book launch of *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective* (Gabriël A Moens and Philip Evans, eds.) by the Hon. Christian Porter MP. For a review of this conference, turn to page 9.

ACICA President, Alex Baykitch

Keynote speaker: *The Honourable Kevin Lindgren AM QG*

Book Launch (L)-(R): *Professor Gabriël Moens, Hon. Christian Porter, Professor Philip Evans*

Brisbane Conference: Managing Construction Disputes

ACICA supported the inaugural Managing Construction Disputes in the Mining and Petroleum Industries conference held on 10 and 11 November in Brisbane. The conference covered a great mix of technical and legal topics and was very well received.

Seminar with Alan Alderson and Donna Ross

On 27 October 2015, ACICA joined with the Chartered Institute of Arbitrators (Australia) to present a seminar on The International Arbitration Landscape in the United States - Implications for Australian Practitioners. Alan and Donna provided an overview of international arbitration in the USA and discussed the statutory framework, key institutions and some noteworthy cases.

Inaugural Joint ADC-MCAMC Event: Chief Justice Allsop AO

On 23 September 2015 the Australian Disputes Centre and the Melbourne Commercial Arbitration and Mediation Centre held an inaugural joint event presented by video-link. The Honourable Chief Justice Allsop spoke in Sydney on The Development and Adoption of an Australian Commercial Law, with a reply from the Honourable Keith Hayne AC in Melbourne and comments on the new London Principles from Lord Peter Goldsmith PC QC.

Hon. Chief Justice Allsop speaking at the ADC

AMTAC Annual Address 2015

The 9th Annual Address was held on 16 September 2015 at the Federal Court of Australia in Perth (and web-cast live). Dr Kate Lewins, Associate Professor, School of Law, Murdoch University delivered the address on A view from the crow's nest: maritime arbitrations, maritime cases and the common law. The Address was followed by an informal drinks reception in Perth. A copy of Dr Lewins' paper may be found on the AMTAC website.

ACICA Seminar with Tim Nelson

Guest speaker Tim Nelson provided his insights, with commentary from Malcolm Holmes QC, on the importance of Governing Law in International Arbitration, in a seminar hosted by ACICA on 17 August 2015. Tim's presentation addressed some of the practical issues in choosing an appropriate governing law, told from the perspective of a lawyer/advocate who has practiced in both the English and New York legal systems.

ACICA and ADC Volunteer Intern Program

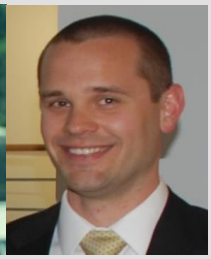
We are fortunate again to have with us a vibrant group of interns at the Centre. Brian So, Eric Van Winssen, Mark Curry, Andrus Must and Shu Zhang have all been working with us one or two days a week this semester.

Brian So

Eric Van Winssen

Mark Curry

Zhu Shang



Andrus Must

We also welcomed Gonzalo Vial from Chile (via Stanford Law School, California) as an international intern in August 2015. Gonzalo was with us for three months, assisting with a number of ACICA and ADC initiatives.

Gonzalo Vial

We thank all our interns for their hard work and dedication.

Ishay Katz

The Amazing World of Arbitration: Australian Perspectives

ACICA Conference, Perth, 19 November 2015

I was delighted to attend the ACICA conference on Thursday afternoon, 19 November 2015 in Perth. It was another summer afternoon in Perth and the invitation to attend this event in an air-conditioned place seemed like a great idea and an attractive proposition. As it happened, I had the privilege to escape to a room full of interesting people from different parts of the country.

The conference was an insightful afternoon with an impressive row of speakers. After I had listened to all the speakers, I understood what Alex Baykitch meant in his opening speech when he talked about how these are interesting times for the development of arbitration in our region.

The first speaker was the Hon. Kevin Lindgren, who talked about the challenges to arbitration in the region. He shared examples of arbitration cases with the audience and he discussed the work undertaken in this area in Singapore. Dr John Selby had very interesting information to share on the future of business law in the internet era. John explained how internet business is conducted and briefly described the Trans-Pacific Partnership (TPP) agreement.

Dr Selby's presentation was followed by Dr Samuel Luttrell's presentation, which appeared to bring together the points discussed by previous speakers. Annelies Moens presented a paper on data privacy, how it evolved over the years and the challenges now and in the future. I learnt that the regulators in Australia and other parts of the world are taking steps to maintain the privacy of data. Annelies also considered the consequences of data breaches.

Professor Philip Evans' presentation dealt with arbitration cases involving workers compensation. Professor Evans won the prize for discussing the "juiciest" arbitration case of the day with a story of how intimate acts may not result in a successful workers' compensation claim.

From Jun Wang's presentation, I learnt about the challenges of arbitration in China, Hong Kong and Singapore. In my opinion, Jun won the prize for having the most attractive presentation slides!

There were two very stimulating panel discussions. The first one dealt with the revised ACICA Arbitration Rules and the second concerned attempts to maintain the attractiveness of arbitration.

The conference was an unqualified success. It was very well organised and the information conveyed was interesting and intellectually stimulating.

Peter McQueen
AMTAC Chair

AMTAC Chair's Report

AMTAC Annual Address 2015 - 16 September 2015

This year's Address was presented from the Federal Court of Australia in Perth on 16 September 2015, following the opening of the Annual Conference of the Maritime Law Association of Australia and New Zealand. The Address was also available by live webcast.

The Address was attended by over 60 people, including Chief Justice Allsop and Justices Rares and McKerracher of the Federal Court of Australia.

Associate Professor Kate Lewins of Murdoch University presented the Address entitled "A view from the crow's nest; maritime arbitrations, maritime cases and the development of the common law", a transcript of which is on the AMTAC website.

Here are two paragraphs from what was an excellent presentation:

> *Keeping a proper lookout - 'the big picture' contribution of maritime law to general common law ....*

It is likely that a law student will strike a commercial maritime case within weeks of starting their studies. Certainly, in contract law, the contribution is prolific. If I had to choose a single most significant case for law students it would probably be the Hong Kong Fir case. In that case a seaworthiness clause led LJ Diplock to identify the existence of the innominate term, and where his Lordship also aligned the test for repudiation and frustration. But there are many more examples. The attempts to circumvent privity have been notable for their maritime flavour; not only in relation to the development of the Himalaya clause (Adler v Dickinson, a new Zealand contribution The Eurymedon, and an Australian contribution, the New York Star), the restrictions on tort claims as an alternative (the Aliakmon) and developing the law regarding bailment: KH Enterprise v Pioneer Container; more recently, the Kos.The law relating to incorporation of and construction to be given to standard terms is also heavily derived from maritime cases, both cargo and passenger claims. Deviation cases derived from maritime law were reimagined into the notion of fundamental breach in Suisse Atlantique although thankfully now no more. As to contractual damages, again there is no shortage of principles derived from maritime cases, such as Albazero, Heron II and the Achilleas. Australia adopted the principles of damages for disappointment and distress in the maritime case of Baltic Shipping v Dillon. In tort, the student will be exposed to cases of Re Polemis, and the Wagonmound (No 2); both cases concerning remoteness and foreseeability of damage. Of great significance in Australia is the Caltex v the dredge 'Willemstad' decision. That case held that pure economic loss was recoverable in tort in narrow circumstances.

Even in criminal law, it is possible to find a maritime case: Crown v Dudley & Stephens.....

Sydney Arbitration Week November 2015 - AMTAC Seminar

AMTAC, as its contribution to the Week, co-hosted with Holman Fenwick Willan at its Sydney office a well-attended seminar, entitled "Hot Topics for Maritime Law Practitioners" on 26 November. The Seminar presentations, which were given by leading practitioners, two of whom are members of the AMTAC Panel of Arbitrators, were on current and controversial decisions given by the English Supreme Court, the English Court of Appeal and the Federal Court of Australia, namely:

A Sale by Any Other Name: OW Bunkers and the English courts

Ben Olbourne, Barrister, 39 Essex Chambers, Singapore & London

The "Sam Hawk": outlier or the new orthodoxy on foreign maritime liens?

Angus Stewart SC, Barrister, New Chambers, Sydney

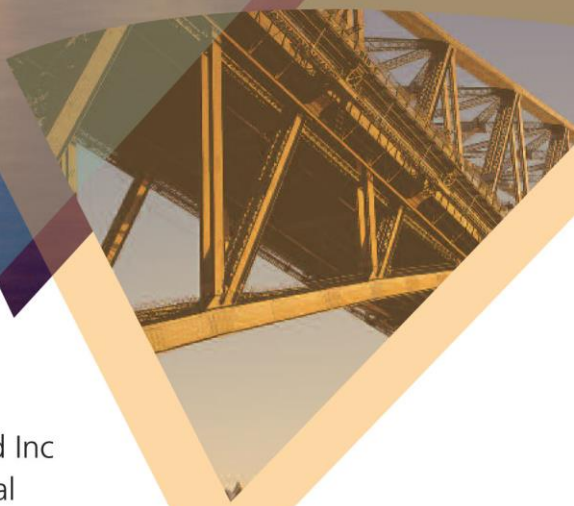
A revisiting of default clauses, given the UK Supreme Court decision in Bunge v Nidera?

Stephen Thomson, Partner, Holman Fenwick Willan, Sydney

Copies of the presentations may be found on the AMTAC website.

SAVE THE DATES

We look forward to seeing you in Sydney & Queenstown in 2018



The Australian Centre for International Commercial Arbitration (ACICA) and The Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) is bringing the International Council for Commercial Arbitration (ICCA) Congress to Sydney in 2018.

We are very proud to be hosting this premier bi-annual international arbitration conference which has never before been staged in Oceania.

The Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) looks forward to hosting you in Queenstown for the add-on event to the 2018 Congress.

Put the dates in your diary now!

SYDNEY 15-18 April 2018

QUEENSTOWN 20 April 2018

ICCA
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ACICA

AMINZ

ICCA2018
Sydney Australia 15-18 April 2018
www.icca2018sydney.com

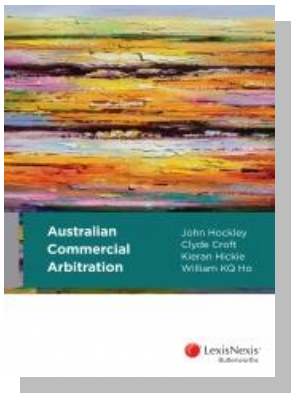
NEWS IN BRIEF

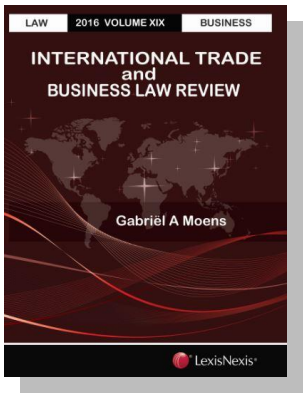
New ACICA Fellows, Associates and Mediation Panel Members

We welcome ACICA Fellows: Derek Johnston (New Zealand), Robert Newlinds SC (NSW), Barry Tozer (NSW), Robert Weber (NSW) and ACICA Associates: Tim Breakspear (NSW), Nicola Nygh (NSW), Cameron Scholes (NSW), Michael Whitten (VIC).

Books published

Dr John Hockley, the Hon Clyde Croft, Kieran Hickie and William KQ Ho recently published their book *Australian Commercial Arbitration* (LexisNexis, 2015). The book is a valuable Annotation of the *Commercial Arbitration Act* 2011 (Vic). Chief Justice Robert French, AC commented in his Foreword that, "Their annotations make extensive reference to extrinsic and comparative materials. They extract and discuss relevant case law in relation to each section of the Act. The authors have spared no effort to make the publication a valuable practical reference for all practitioners in the field, including arbitrators and those who represent parties in the arbitral process." Dr John Hockley is a Fellow of ACICA and the Hon Clyde Croft is a Judge of the Supreme Court of Victoria. William KQ Ho is a Senior Associate, K&L Gates and Kieran Hickie is a Barrister-at-law (Vic).





In 2015, LexisNexis also published the 2nd edition of *The International Arbitration Act 1974: A Commentary*, co-authored by Malcolm Holmes and Chester Brown.

International Trade and Business Law Review

A number of noteworthy arbitration-related articles were published in Volume XIX of *International Trade and Business Law Review,* published by LexisNexis and edited by Professor Gabriël Moens. Dr Sam Luttrell authored an article on *ISDS in the Asia-Pacific: A Regional Snap-Shot* (pp. 20-47). YuXiang Liu, Camilla Andersen and Bruno Zeller published an article on *The Unruly Horse in China: The Enforcement of Foreign Arbitral Awards and Public Policy* (pp. 72-95). Matthew Carmody contributed a topical article on *The UNCITRAL Rules on Transparency: Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency be Applied to International Commercial Arbitration?* (pp. 96-179). Meng Chen has an article on *Empirical Research on Mandatory Rules Theory in International Commercial Arbitration* (pp. 245-268).

Professor Gabriël A Moens, Deputy Secretary General of ACICA, delivered a key-note address in a conference organised by Informa on 9 November 2015 in Brisbane. The conference dealt with Managing Construction Disputes in the Mining and Petroleum Industries. Gabriël's paper was entitled *The Enforcement of Foreign Arbitral Awards*. On 25 November, he also contributed a paper to the Transnational Commercial Law 7th Teachers' Conference (organised by the University of Western Australia) on *The Lure of Arbitration and Alternative Dispute Resolution Education: Its Impact on the Core Law Curriculum*. On 10 December he spoke at the 50th UNCITRAL Anniversary Celebration conference in Perth where he delivered a paper on *The UNCITRAL Model Law on International Commercial Arbitration: Its Influence on Australian Arbitration Law and the ACICA Arbitration Rules*. On 15 December, he also served as a key-note speaker at the 3rd Global Conference on Business and Social Sciences in Kuala Lumpur, Malaysia. His address was entitled *Dispute Resolution in the Asia-Pacific: How to Maintain the Attractiveness of Dispute Management*.

Tim Breakspear
Barrister, Banco Chambers (ACICA Associate)

John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd (No 2) [2015] NSWSC 565

One of the most common applications dealt with by Australian courts in relation to arbitration is an application to refer the parties to arbitration where court proceedings have been commenced which concern a matter the subject of an arbitration clause. A successful party to such an application typically receives a costs order in its favour. Where costs are awarded on the 'ordinary' basis the successful party will usually remain out-of-pocket a material portion of the legal costs it actually incurred. Those unrecovered costs are costs that would not have been incurred but for the commencement of proceedings in breach of the contractual agreement to arbitrate. On such applications should indemnity costs be the ordinary rule? Or can a successful party otherwise recover those costs as losses flowing from the breach of the agreement to arbitrate?

In *A v B* [2007] EWHC 54 Coleman J considered that for the successful party to forgo part of the loss would be "unjust" and decided that the court's power to award indemnity costs should be exercised to enable the successful party to recover all costs reasonably incurred by reason of the breach of the arbitration clause. His Honour reasoned[1]:

> *"The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the English courts or a foreign court. In the ordinary way it can therefore normally be characterised as so serious a departure from "the norm" as to require judicial discouragement by more stringent means than an order for costs on the standard basis. However, although an order for indemnity costs will usually be appropriate in such cases, there may be exceptional cases where such an order should not be made."*

The decision received academic praise in McGregor on Damages, with the result described as one to be commended[2]. Similar support was forthcoming from the Court of Appeal of Singapore, which "heartily endorsed" Coleman J's remarks in Tjong Very Sumito & Ors v Antig Investments Ptd Ltd [2009] 4 SLR 732. A divergence of judicial views has, however, emerged in Australia.

In *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 Chief Justice Martin described the process of reasoning in *A v B* as "impeccable" and held that the principles in that case should be applied in Western Australia[3].

The correctness of the approach in *A v B* had earlier been doubted *in Victoria in Ansett v Malaysian Airline System (No 2)* [2008] VSC 156, and in Queensland in *Mio Art Pty Ltd v Mango Boulevard Pty Ltd and Ors (No 3)* [2013] QSC 95. Martin CJ considered each of those decisions in the course of his judgment in *Pipeline Services*, noting that in each of those cases it was not ultimately necessary to finally determine the issue[4].

In New South Wales, Hammerschlag J recently declined to follow *A v B* in *John Holland Pty Limited v Kellogg Brown & Root Pty Ltd* [No 2] [2015] NSWSC 564. His Honour held that the "A v B approach is not the law in this State. Despite the praise lavished upon it … I consider it to be unsound and insupportable in principle[5]". His Honour referred to the statement of principle by the Victorian Court of Appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303 (a case concerning indemnity costs in the context of a failed challenge to enforcement of an arbitral award) that there was nothing in the arbitration context of the proceedings that warranted costs being awarded on a basis different from that on which they would be awarded against unsuccessful parties to other civil proceedings[6].

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[1] A v B [2007] EWHC 54 at [15].

[2] McGregor on Damages, 18th edition (2009), at [17-037]-[17-038].

[3] Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd [2014] WASC 10 at [18]-[25].

[4] Pipeline Services at [11]-[14].

[5] John Holland Pty Limited v Kellogg Brown & Root Pty Ltd [No 2] [2015] NSWSC 564 at [31].

Consequently, the present position is that in a number of Australian jurisdictions seeking an indemnity costs order is unlikely to provide a means to recovery of all costs incurred by reason of the breach of an arbitration clause.

A possible alternative is for a party to seek to claim those unrecovered costs by way of a cross-claim for breach of contract in the ensuing arbitration proceeding. There are two potential hurdles to that course.

The first is an argument that the cause of action for relief relied upon in the litigation to obtain the order referring the matter to arbitration is the same cause of action for breach of the arbitration clause relied upon in the arbitration proceedings to claim damages. The English rule in *Berry v British Transport Commission*[7] precluded claims for damages in civil proceedings to recover unrecovered costs in prior English civil proceedings. The risk of application of that rule was referred to by each of Coleman J[8] and Martin CJ[9] as a reason to take the course of awarding indemnity costs.

In the current Australian statutory context it is submitted that this first hurdle can be cleared. A party making an application for referral of the matter to arbitration ordinarily relies upon the statutory power of referral in the relevant state or Commonwealth legislation[10]. The statutory text requires only that the party applying for relief establish that there is an arbitration agreement and that the matter before the court is the subject of that clause. It is not necessary for there to be a formal allegation or finding of breach to engage the statutory power. In that statutory context the applicant is not moving on a common law cause of action for breach of contract as the basis for the relief.

The second and more challenging hurdle is proof that the unrecovered costs are a form of loss that is recoverable at law as damages. *In the matter of Ikon Group Ltd (No 3)* [2015] NSWSC 982 Brereton J held[11]:

> *"The Court does not recognise the difference between party/party costs and indemnity costs as damage occasioned to the person liable to pay those costs [University of Western Australia v Gray (No 28) [2010] FCA 586; (2010) 185 FCR 335]. Essentially, the Court values the costs that a party is reasonably caused to incur in proceedings as the party/party costs, taking the view that the difference between party/party costs and the (solicitor/client) costs actually incurred by the party are incurred at that party's own choice, over and above what is necessary for the reasonable defence of the proceedings. In other words, it recognises that while it can be said that the unsuccessful party caused the successful party to incur costs to the extent of party/party costs, in so far as the costs exceed party/party costs, they were incurred not as a necessary and reasonable response to the unsuccessful party's claim, but voluntarily by the successful party such as to, in effect, break the chain of causation or represent a novus actus interveniens.*

Views of practitioners and litigants may differ as to whether that statement of legal principle is reflective of the practical reality of the manner in which costs are incurred in litigation. However, if an arbitrator adopts that foundation principle it creates a considerable evidentiary burden on the party claiming the unrecovered costs to prove the manner in which the unrecovered costs were incurred. The cost of embarking on the forensic task of proving causation in that way is likely to make pursuing the cause of action uneconomical. The party is also likely to incur further unrecoverable costs in the process. Consequently, in the absence of an indemnity costs order the party is likely to remain out of pocket for the unrecovered costs of the initial litigation. That will be the usual result in a majority of Australian jurisdictions.

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7 [1962] 1 QB 306.
8 A v B at [9]-[10].
9 Pipeline Services at [18].
10 For example, s 7 of the International Arbitration Act 1974 (Cth) or s 8 of the Commercial Arbitration Act 2010 (NSW) and equivalent sections in other States that have also adopted the model law.
11 In the matter of Ikon Group Ltd (No 3) [2015] NSWSC

Gitanjali Bajaj
Partner, DLA Piper (ACICA Associate)

Lena Chapple
Solicitor, DLA Piper

Allan Flick
Solicitor, DLA Piper

All's Fair in Love and Award Enforcement: Yukos V Russian Federation

International arbitration has dramatically improved the stability of international commerce over the past 50 years, primarily through the framework for enforcement and recognition of foreign arbitral awards established by the New York Convention[1]. While that framework only provides for a few narrowly defined exceptions to recognition and enforcement of foreign arbitral awards, differing State practices can often lead to complications and practical difficulties in enforcement, particularly in the context of investor-state arbitrations.

This article considers the challenges that can arise in respect of attempts to enforce an award against a foreign State due to the 'public policy' exception under the New York Convention and the operation of the doctrine of 'sovereign immunity' as highlighted by the on-going attempts to enforce the Yukos Awards[2] against assets of the Russian Federation (Russia).

One of the great strengths of international commercial arbitration is the framework for the recognition and enforcement of arbitral awards. Where a party has obtained an arbitration award, that award can be enforced in any of the 156 States that have ratified the New York Convention (member States).

This framework affords parties a relative level of commercial certainty by enabling the recipient of an award to enforce and pursue assets of their counterparty across a vast array of foreign jurisdictions.

However, there are often real complications involved in the enforcement process, particularly in the context of investor-state arbitration, where strategic decisions are required as to where a party should pursue satisfaction of an award. These complications are primarily driven by:

- differing practices between States in relation to the 'public policy' exception under the New York Convention;[3] and
- the operation of the doctrine of 'sovereign immunity'.

We examine below these issues in the context of the recent and ongoing attempts to enforce the Yukos Awards against Russian assets.

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[1] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (**New York Convention**).
[2] *Hulley Enterprises Ltd (Cyprus) v Russian Federation* (Award, Permanent Court of Arbitration, Case No. AA 226, 18 July 2014); *Yukos Universal Ltd (Isle of Man) v Russian Federation* (Award, Permanent Court of Arbitration, Case No. AA 227, 18 July 2014); *Veteran Petroleum Ltd (Cyprus) v Russian Federation* (Award, Permanent Court of Arbitration, Case No. AA 228, 18 July 2014) (**Yukos Awards**).
[3] New York Convention art V(2)(b).

Russian and the Yukos Awards

The Yukos Awards are a trio of awards made in favour of the shareholders of OAO Yukos Oil Company (Yukos Shareholders) against Russia[4]. On 18 July 2014, the Permanent Court of Arbitration in the Hague found that Russia deliberately expropriated OAO Yukos Oil Company and awarded the Yukos Shareholders approximately USD 50.2 billion.

Russia has ratified the New York Convention, as have many of the other States in which Russia has assets. On first glance, the Yukos Shareholders can therefore pursue Russian assets across a wide range of foreign States, which are obliged to enforce the award[5]. Historically, however, Russia has never voluntarily complied with an investment arbitration award,[6] and has in this instance also failed to draw up the payment plan required in respect of the Yukos Awards, making clear its intent not to pay the award. Given Russia's recalcitrant stance, the Yukos Shareholders face several challenges in respect of enforcement of the award against Russian assets, both within Russia and foreign States.

ENFORCEMENT WITHIN RUSSIA

Russia is ostensibly the most logical place to enforce the award, however, the approach of its Courts to the public policy exception and the Russian legislative scheme on sovereign immunity pose a significant barrier to enforcement within Russia.

Russia and the Public Policy Exception

The public policy exception under the New York Convention allows a court in which recognition and enforcement of an arbitral award is sought to refuse to recognise and enforce the award if it finds that: *"the recognition or enforcement of the award would be contrary to the public policy of that country."* [7] The approach to this exception is not entirely uniform amongst States and has in certain cases been broadly interpreted. In Russia's case, the Russian commercial courts have been consistent in their inconsistent application of the public policy exception.[8]

That said, certain recent developments appear to herald a more uniform approach within Russian courts. In 2013, the Presidium of the Supreme Commercial Court of Russia issued guiding instructions on the scope of the public policy exception,[9] favourably citing a decision[10] which held that an award will be contrary to public policy if it violates the fundamental principles of Russian law, is prejudicial to sovereignty or security, or affects interests of large social groups or rights and freedoms of individuals.[11]

While this is not an unusual interpretation amongst member States, and should introduce some level of uniformity of approach within Russia, when it comes to the Yukos Awards, given Russia's legal and political objections to those awards, the most likely outcome is that Russia's Courts will find the award contrary to Russian law or one of the other bases identified above. Undoubtedly, by way of its openness to interpretation, the public policy exception would be a hurdle to enforcement of the Yukos Awards in Russia.

The Sovereign Immunity Doctrine and State Immunity Legislation within Russia

Sovereign immunity, also referred to as State immunity, is a State's immunity from suit and/or enforcement by court action in a foreign State. While the doctrine of sovereign immunity is arguably required to protect comity and the dignity of sovereignty, the doctrine can, problematically, be used to shield illegal State behaviour. The immunity operates at two levels:

- jurisdictional immunity, or immunity from suit; and
- immunity from enforcement of an award, also known as immunity from execution.

Jurisdictional Immunity

Jurisdictional immunity allows a State or a State-owned entity to circumvent the jurisdiction of foreign courts. While jurisdictional immunity is not the focus of this article, it is relevant to note that the defence has become increasingly narrow. A State's actions as a private person, as opposed to its official acts, will now largely fall outside of the defence.

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[4] See above n 2.
[5] New York Convention.
[6] Julien Fouret and Perre Daureu, 'Case Comment: Yukos Universal Limited (Isle of Man) v The Russian Federation - Enforcement of the Yukos Awards: A second Noga Saga or a New Sedelmayer Fight?' (2015) 30(2) *ICSID Review* 336.
[7] New York Convention art V(2)(b).
[8] Peter Pettibone, 'The Scope of the Public Policy Exception to the Recognition and Enforcement of Foreign Arbitral Awards in Russia' (2014) 25 *American Review of International Arbitration* 105, 109.
[9] *Information Letter of the Presidium of the Supreme Commercial Court of the Russian Federation No. 156* (26 February 2013) <http://arbitr.ru/as/pract/vas_info_letter/82122.html>.
[10] Case No. 1, cited in above n 9.
[11] See Pettibone, above n 8; see also above n 9.

This is referred to as the restrictive theory of sovereign immunity,[12] which has gained increasing popularity within the international community.[13]

Immunity from Enforcement

The second aspect of sovereign immunity is immunity from enforcement of an award. This immunity extends to both State entities and private corporations which are either wholly or majority owned by a State. By reason of this immunity, even if a State can be subject to suit, accessing State assets for the satisfaction or enforcement of an award can still be an impossible exercise.

This immunity is not absolute. The International Court of Justice has held that there are certain exceptions to immunity from enforcement, which will allow the recipient of an award to access the assets of a foreign State in the following circumstances:[14]

a) *"the property in question must be in use for an activity not pursuing government non-commercial purposes"; or*
b) *"the State which owns the property has expressly consented to the taking of a measure of constraint"; or*
c) *"the State has allocated the property in question for the satisfaction of a judicial claim."*

These exceptions are often mirrored in domestic law. The first of these exceptions is also mirrored in the United Nations Convention on Jurisdictional Immunities of States and their Property (not yet in force), which provides for an exception to the immunity where "it has been established that the property is specifically in use or intended for use by the state for other than government non-commercial purposes." [15]

Although these exceptions have been generally recognised by member States, there is no consistent international approach to their application and the precise scope of the immunity. These inconsistencies and challenges are highlighted by the on-going issues faced in respect of the enforcement of the *Yukos Awards*.[16]

State Immunity Legislation within Russia

While a sovereign immunity regime within Russia is countenanced and provided for by the Russian Civil Code, there has been no established law on immunity from enforcement, or guidance in the form of rules or regulation, prior to November 2015. This has historically made enforcement of awards within Russia against State assets a blind and impossible task.

On 3 November 2015, President Putin signed Federal Law No. 297 on Jurisdictional Immunities of Foreign States and Property of Foreign States in the Russian Federation. The law apparently adopts the restrictive theory on immunity from enforcement. However, it is uncertain whether this will result in a more favourable regime for enforcement within Russia against Russian assets given the historically protectionist approach adopted by Russia's Courts, which is likely to carry through to its interpretation of the sovereign immunities law.

Impact of a hostile domestic regime for enforcement

In light of the above, many commentators consider that Russia can be "*scratched off the list*" as a forum for enforcement.[17] Accordingly, the most viable solution to secure recovery of the *Yukos Awards* is a global game of hide and seek to locate and access Russian assets in other States. This practicality has clearly been considered by the Yukos Shareholders, who have avoided testing the recovery hurdles within Russia and have instead turned elsewhere for execution of the *Yukos Awards*.

Enforcement in Other States

Selection of a Forum and Identification of Property - the Context

Enforcement of an award against Russian assets in any foreign State will require the Courts to determine whether the property identified for attachment is the subject of immunity from enforcement. This will ultimately come down to a question of whether the property is commercial or non-commercial. Problematically, there are as many answers to this question as there are States, and some States are inevitably more arbitration-friendly than others. Consequently, the decision as to where a party should pursue satisfaction of an award involves both strategic and legal considerations, including:

- the proper identification of assets for attachment; and
- where possible, the identification of arbitration-friendly States for enforcement attempts.

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[12] Hont-Lin Yu, Belen Olmos Giupponi, 'Road to Nowhere?: A Comparative Legal Analysis on the Enforcement of Yukos Awards' (2015) 18(4) *International Arbitration Law Review* 80, 85.
[13] Many States, including Australia, have enacted domestic legislation providing for exceptions to jurisdictional immunity in line with the restrictive theory. See, e.g., the *Foreign States Immunities Act 1985* (Cth).
[14] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) (Judgment)* [2012] ICJ Rep 99, 118.
[15] *United Nations Convention on the Jurisdictional Immunities of States and Their Property*, GA Res 59/38, UN GAOR, 59th sess, Supp No. 49, UN Doc A/59/49 (2 December 2004) art 19(c).
[16] It should be noted that the "sovereign immunity" has created difficulties in other award enforcement attempts against Russia. See, e.g. discussion of the *Noga Saga* in Fouret and Daureu, above n 6, 340.
[17] Fouret and Daureu, above n 6, 343.

Although the approach as to what constitutes commercial property varies between States, there are generally certain types of property that are widely accepted to fall within the scope of immunity from enforcement, for example, embassy premises, cultural centres, information offices, military property, embassy accounts and central bank funds.[18] The Yukos Shareholders may be able to blanket out claims against such types of property. Ultimately, identification of suitable property for enforcement will require an individual analysis of Russian assets in each jurisdiction, according to applicable case law and legislation.

The case of *Franz Sedelmayer v The Russian Federation*[19] (**Sedelmayer**) demonstrates the successful enforcement of an arbitration award against Russian assets in foreign jurisdictions. In that case, a selection of arbitration-friendly jurisdictions, as well as the identification of appropriate property for attachment, resulted in successful and full satisfaction of the award against Russian assets in Sweden and Germany (although satisfaction was initially sought via over 80 proceedings in a multitude of jurisdictions) [20]:

- In Germany, the Federal Supreme Court held that Russian assets held in Germany for the purpose of Russia's diplomatic representation and diplomatic exercises could not be the subject of attachment. However, enforcement against rent payments from commercially used buildings, not used for official purposes, was allowed.[21]
- In Sweden, the Courts did not allow for attachment of property used for Russian State Officials, or for the carrying out of diplomatic functions. However, the Swedish Supreme Court allowed for the withholding of rent payments of a premise which was found to be a commercial (not sovereign) asset.[22]

Yukos Enforcement Attempts to Date

At the time of writing, the Yukos Shareholders have commenced recognition and enforcement proceedings in the United Kingdom, United States, France, Belgium and Germany.[23] Although the Yukos Shareholders have expressed a readiness to pursue enforcement in as many jurisdictions as it takes to achieve satisfaction of the award, Russia has made it clear that it will challenge all enforcement attempts.[24]

One strategy that the Yukos Shareholders are likely to employ is to attempt to prove that Russian State-controlled companies, like Rosneft and Gazprom, are indeed State-owned and controlled. If this can be evidenced, satisfaction of the debt would be far more achievable, although this strategy also presents its own hurdles.[25]

Conclusion

In light of the above, it appears that all is not yet fair in investor-state arbitration. Private investors remain at a disadvantage when enforcing arbitral awards against States, despite increasing State involvement in the commercial market. In its current form, the continued operation of State immunity from enforcement can potentially shield illegal State behaviour.

The Yukos Awards case study demonstrates the practical difficulties in securing enforcement against States who historically resist enforcement of arbitration awards, even if such States have vulnerable commercial assets in arbitration-friendly jurisdictions. In the absence of consistent and coherent international practice, the public policy exception and the immunity from enforcement potentially undermine the utility of investor-state arbitration and create a sovereign risk for international investors.

Overcoming this obstacle requires active consolidation and codification of the various differing State approaches to the public policy exception and immunity from enforcement. In respect of the immunity from enforcement, arguably, to account for the involvement of States in trade and commerce, this consolidation should favour a restrictive application of the immunity. While the United Nations Convention on Jurisdictional Immunities of States and their Property provides a worthwhile framework for consolidation, the draft Convention has gained little traction and is, at the date of writing, still not in force.

In the interim, the enforcement saga of the Yukos Awards will provide a test of the domestic State approach to the immunity question and ultimately a framework for future enforcement attempts.

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[18] August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17(4) European Journal of International Law 803, 825; Cedric Ryngaert, 'Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors' (2013) 26 Leiden Journal of International Law 1, 75.

[19] Franz Sedelmayer v The Russian Federation through the Procurement Department of the Russian Federation (Award, Stockholm Chamber of Commerce, 7 July 1998).

[20] It is worth noting that the award was only for USD2,350,000 and the enforcement process still took approximately 10 years from the date of the award.

[21] The primary decisions concerning Sedelymayer are accessible at italaw at <http://www.italaw.com/cases/982>; see also Fouret and Daureu, above n 6.

[22] Ibid.

[23] Keith Johnson, 'What's Really Happening With the Yukos Case', Foreign Policy (online), 19 June 2015 <http://foreignpolicy.com/2015/06/19/whats-really-happening-with-the-yukos-case-russia-putin-belgium-france/>.

[24] Linda Kinstler, 'Yukos Shareholders Declare War on Russia's Assets', Politico (online), 19 June 2015 <http://www.politico.eu/article/yukos-oil-russia-khodorkovsky-mikhail-putin/>

[25] See, e.g. the decision of the Privy Council in La Générale des Carrières et des Mines v FG Hemisphere Associates LLC [2012] UKPC 27 (17 July 2012), where it was held that the corporate status should be preserved and respected, and that a State and an entity's liabilities should be treated separately.

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Respecting party autonomy and resisting domesticity in international arbitration

The case of Robotunits Pty Ltd v Mennel[1] demonstrates the Victorian Supreme Court's commitment to respecting party autonomy and resisting 'domesticity' in an application to enforce a 'pathological' arbitration agreement.

Background

The proceedings involved an application for a stay of proceedings and referral to arbitration under section 7 of the *International Arbitration Act* 1974 (Cth) (**IAA**). The plaintiff, Robotunits Pty Limited (**Robotunits**), sought the return of certain payments made to its former managing director, Mr Mennel, on the basis that there was no legal or equitable basis for the payments under a shareholders agreement and an employment agreement between the parties. Robotunits also alleged that the payments were made in breach of Mr Mennel's duties as a director under both the general law and under the *Corporations Act* 2001 (Cth) (**Corporations Act**).

Mr Mennel sought a stay of the proceedings relying on an arbitration clause within the shareholders agreement, which provided that:

> "[e]ach party irrevocably and unconditionally submits to arbitration in accordance with the arbitration guidelines of the Law Institute of Victoria".[2]

A pro-arbitration approach

Consistent with his approach in other arbitration matters,[3] Justice Croft took, as his starting point, the policy of minimal judicial intervention in both applications to enforce foreign arbitral awards and in applications, such as this one, to enforce foreign arbitration agreements. In keeping with this approach, His Honour noted the well-established principle in arbitration of respecting party autonomy and sought to give effect to the parties' initial decision to refer disputes to arbitration despite the flaws in the expression of the agreement.

Justice Croft also emphasised the need for courts to resist the temptation of 'domesticity' in interpreting legislation based on the UNICITRAL Model Law on International Commercial Arbitration (**Model Law**) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**). That is, courts should resist interpreting such legislation and in particular, the IAA, through the:

> "prism of principles and doctrines not found in the Model Law or the New York Convention and which may be peculiar to a particular domestic jurisdiction". [4]

Pathological arbitration clause

Neither party disputed that the arbitration clause was, on its face, pathological. There was no evidence that the Law Institute of Victoria ever had any arbitration guidelines. However, Robotunits conceded that the arbitration agreement may be rendered effective with judicial assistance. Given the concession by Robotunits and the strength of the words that each party "irrevocably and unconditionally submits to arbitration", Justice Croft found that the arbitration agreement was operable.[5]

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1 [2015] VSC 268.
2 Robotunits Pty Ltd v Mennel [2015] VSC 268 at [8].
3 See e.g. Cameron Australasia Pty Ltd v AED Oil Ltd [2015] VSC 163.
4 Robotunits Pty Ltd v Mennel [2015] VSC 268 at [14].
5 Robotunits Pty Ltd v Mennel [2015] VSC 268 at [9].

In determining this issue, Justice Croft sought to give effect to the parties' initial decision to submit disputes to arbitration. Indeed, in some jurisdictions courts have taken this approach one step further by giving effect to hybrid arbitration clauses where the parties have agreed to submit disputes to one arbitration institute to be administered under the rules of another institute. In Singapore, the High Court has granted stays to enforce hybrid arbitration clauses,[6] while the Swedish Court of Appeal has enforced an arbitral award made under a hybrid clause.[7]

Interpretation of s 7(2)(b) IAA

The remainder of the case turned on the interpretation of the requirements in section 7(2)(b) of the IAA that must be satisfied before the Court is obliged to stay the proceedings and refer the parties to arbitration, namely:

> "the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration."

In this regard, Justice Croft held that:

- there is no requirement that a 'matter for determination' must be 'sustainable', that is, that it must have reasonable prospects of success;
- the matters which could be referred to arbitration 'in pursuance of the agreement' were matters arising out of or in relation to the shareholders agreement but not to matters arising out of the employment agreement; and
- as a general proposition disputes under the Corporations Act are 'capable of settlement by arbitration'.

The basis for each of these findings is discussed below.

Sustainable dispute

Robotunits argued that a stay can only be granted under section 7(2)(b) of the IAA if the matter for determination is 'sustainable', that is, it must have reasonable prospects of success. However, Justice Croft found that article 8 of the Model Law (which is adopted in section 7 of the IAA) does not impose any sustainability requirement and there is no basis for reading such a requirement into section 7.[8] To find otherwise, His Honour observed:

> "would be to succumb to the temptation of "domesticity"...by allowing the determination of whether to stay proceedings and refer the parties to arbitration to be coloured by the merits of the case."[9]

In coming to these findings, Justice Croft distinguished recent decisions of the New South Wales Supreme Court and Court of Appeal[10] and comments made by Lord Mustill in the *Channel Tunnel Group*[11] litigation.[12] His Honour noted the position that section 7 does not impose a sustainability requirement is supported by comments by McLure P in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*[13] and by judgments of the Singapore Court of Appeal and High Court of Hong Kong interpreting national legislation that adopts the Model Law.[14]

Scope of the arbitration agreement

One of the flaws of the arbitration agreement was that it did not identify which disputes must be submitted to arbitration. Justice Croft rejected Mr Mennel's submission that the agreement should be interpreted as referring all issues between the parties to arbitration. Instead he found that a reasonable person in the position of the parties would have interpreted the arbitration agreement as extending to matters arising out of or in relation to the shareholders agreement but not to matters arising out of the employment agreement.

Whether claims under the Corporations Act are capable of settlement by arbitration

Robotunits argued that the claims for breach of director's duties under the Corporations Act were not capable of settlement by arbitration particularly where those allegations could constitute serious criminal offences and where there was accordingly a strong public interest in having the matter determined in a public forum so that ASIC may be aware of it.

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[6] See Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24; HKL Group Co Ltd v Rizq International Holdings Pte Ltd [2013] SGHCR 5. For a discussion on these cases, see Sean Izor, Insigma Revisited: Singapore High Court Finds Arbitration Clause to be Operable (25 February 2013) Kluwer Arbitration Blog < http://kluwerarbitrationblog.com/blog/2013/02/25/insigma-revisited-singapore-high-court-finds-arbitration-clause-to-be-operable/>.

[7] See Government of The Russian Federation v I M Badprim S.R.L (Judgment dated 23 January 2015 of the Svea Court of Appeal). For a discussion on this case, see Patricia Živković, Hybrid Arbitration Clauses Tested Again: Can the SCC Administer Proceedings under the ICC Rules? (9 June 2015), Kluwer Arbitration Blog <http://kluwerarbitrationblog.com/blog/2015/06/09/hybrid-arbitration-clauses-tested-again-can-the-scc-administer-proceedings-under-the-icc-rules/>.

[8] Robotunits Pty Ltd v Mennel [2015] VSC 268 at [42].

[9] Robotunits Pty Ltd v Mennel [2015] VSC 268 at [42].

[10] Welker v Rinehart (No 2) [2012] NSWCA 95; Hancock v Rinehart (2013) 96 ACSR 76.

[11] Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334.

[12] Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 at [36]-[38].

[13] [2013] 298 ALR 666.

[14] Robotunits Pty Ltd v Mennel [2015] VSC 268 at [39] and [40]-[41].

Justice Croft held that disputes that are not 'capable of settlement by arbitration' within the meaning of the Model Law and New York Convention are limited to those matters where jurisdiction is retained exclusively by national courts for public policy reasons.[15] His Honour approved the comments made by Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd*[16] (ACD Tridon) and held that, as a general proposition, there is not a sufficient element of legitimate public interest in disputes involving the Corporations Act to make it inappropriate to resolve such disputes by arbitration.[17] Moreover, settlement of Robotunits' claims by arbitration would not interfere with ASIC's statutory powers to investigate contraventions of, and prosecute offences under, the Corporations Act.[18]

Justice Croft indicated that the following orders should be made:

- the whole of the proceedings be stayed under section 7(2) of the IAA;
- the parties to be referred to arbitration only in respect of the matter of whether the shareholders agreement provided a legal or equitable basis for the payments in dispute; and
- the parties seek to agree on the arbitral seat and the rules of arbitration on the basis that the parties have liberty to apply to the Court if they are unable to reach agreement.[19]

Conclusion

The decision should send a message to parties, at least in the arbitration list of the Supreme Court of Victoria which is managed by Justice Croft, if not in other Australian Courts, that the Court will try to 'cure' pathological arbitration clauses and give effect to an initial intention to submit disputes to arbitration. This, in turn, should give additional impetus to parties to negotiate to resolve the flaws in their arbitration agreements whether those flaws are references to non-existent rules, a failure to identify the seat of the arbitration or a failure to define the scope of the agreement.

It will be interesting to see whether Australian courts are prepared to take this approach one step further in following authorities in Singapore and Sweden that have enforced hybrid arbitration clauses. This approach introduces new difficulties particularly where the hybrid clause calls for arbitration under the International Court of Arbitration (ICC) Rules to be administered by another arbitral body where the ICC Rules provide that only the ICC can administer arbitrations under the ICC Rules.

A further problem that arose in this matter is the potential bifurcation of the dispute with the Court referring only part of the dispute to arbitration. In these circumstances, if the parties wish to resolve the whole dispute in one forum, they can agree to refer the remainder of the dispute to arbitration. An alternative approach proposed by Justice Austin in ACD Tridon was for the parties to refer the remainder of the dispute to a referee under the Court Rules with the referee to be the same person as the arbitrator.[20] This would, however, result in a more cumbersome procedure for the hearing of a joint arbitration/reference.

While some deficiencies in arbitration clauses can be rectified with the agreement of the parties or with judicial assistance, this will not always be possible. Moreover, parties to flawed arbitration agreements run the risk of time consuming and costly challenges at the jurisdictional and enforcement stages. For these reasons, a well-drafted arbitration agreement, which is applied consistently across related contracts, is a far better option.

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15 Robotunits Pty Ltd v Mennel [2015] VSC 268 at [62].
16 [2002] NSWSC 896.
17 Robotunits Pty Ltd v Mennel [2015] VSC 268 at [69].
18 Robotunits Pty Ltd v Mennel [2015] VSC 268 at [70].
19 Robotunits Pty Ltd v Mennel [2015] VSC 268 at [72]-[73].
20 ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896 at [241].

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Aircraft Support Industries

The recent New South Wales Court of Appeal case of *Aircraft Support Industries Pty Ltd v William Hare UAE LLC*[1] confirmed that courts may partially enforce arbitral awards.

Partial Enforcement of an Award is Possible

If the portion of the award that is void is also capable of severance in that it is clearly separable and divisible from the rest of the award, the residue may be enforced. For a court to decline to enforce an arbitral award on the ground that there was a breach of natural justice in connection with the making of the award, real and practical unfairness and injustice toward the party resisting enforcement must be demonstrated.

Background

This matter involved a dispute arising in relation to the payment of retention monies pursuant to a subcontract between Aircraft Support Industries Pty Ltd (**ASI**) and William Hare AUE LLC (**William Hare**) for construction work at the Abu Dhabi International Airport (**Subcontract**). The governing law of the Subcontract was the law of the United Arab Emirates.

The essence of the dispute referred to arbitration was in relation to the final amount due and the payment of retention monies. It involved an alleged agreement made on 10 May 2011 whereby ASI would release the retention monies to Williams Hare in two instalments: the first instalment of USD797,500 within 30 days of the agreement and the second instalment of USD797,500 500 (**Second Instalment**) on completion of the defects liability period scheduled for 31 January 2012. William Hare agreed to a USD50,000 discount (**Discount**) in consideration for the guaranteed release of the retention monies on the specified dates.

This alleged agreement was documented in a letter signed by both parties on 10 May 2011. The letter was subsequently amended by William Hare to correct an administrative error on the same date, signed by William Hare and provided to ASI.

The first instalment of the retention monies was released on 29 May 2012, well overdue. The Second Instalment was not released.

Arbitral Award

On 24 October 2012, William Hare referred the matter to arbitration pursuant to the arbitration clause in the Subcontract. William Hare claimed the Second Instalment of retention monies as well as payment of the Discount in accordance with the agreement reached in the letter dated 10 May 2011. ASI argued that the agreement reached on 10 May 2011 was part of ongoing negotiations and did not constitute an agreement as to the final amount due under the Subcontract as that could only be done by formal variation of the Subcontract.

(2015) 324 ALR 372.

On 1 May 2014, the arbitral tribunal made an award for both the Second Instalment and the Discount, plus interest and costs, in favour of William Hare. In its award, the tribunal set out the evidence on which it relied, its findings of facts and the legal grounds upon which it made its award.

Supreme Court Proceedings

Following the award, William Hare commenced enforcement proceedings against ASI in the Supreme Court of New South Wales.[2] As the award was made in the United Arab Emirates, which is a party to the New York Convention,[3] the award was enforceable under section 8 of the *International Arbitration Act 1974* (Cth) (the **Act**) (and Article 36, UNCITRAL Model Law).

Justice Darke considered the arguments raised by ASI bearing in mind the principle espoused in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* that "no international award should be set aside unless, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered … in the conduct and disposition of a dispute in an award".[4]

The Discount

ASI argued that the failure by William Hare to make a claim for the Discount in its statement of claim and because neither party made submissions in relation to the Discount, the tribunal should have considered this part of the claim as no longer maintained. ASI submitted that if the tribunal was going to make an award in relation to the Discount, it was obliged as a matter of fairness to notify ASI and allow ASI to be heard on the matter.

Justice Darke found that the absence of a claim for payment of the Discount amount from the statement of claim and the failure of William Hare to raise that the claim was maintained or make any submissions in support of this claim strongly suggested that William Hare had abandoned this part of its claim. He found that it ought to be reasonable for the parties and the tribunal to consider the claim as no longer pressed. If the tribunal considered that part of the claim was still being maintained and was going to make an order in relation to the Discount claim, it should have asked the parties to put forward submissions on that part of the claim. Its failure to do so denied ASI the opportunity to be heard which resulted in a breach of natural justice and real unfairness and real practical injustice to be suffered by ASI. On this basis, Justice Darke declined to enforce that part of the award in so far as it related to the Discount.

The Second Instalment

ASI submitted that the tribunal did not deal with its argument that the 20 May 2011 agreement did not vary the Subcontract. In response to this, Darke J found that the tribunal had dealt with ASI's arguments. The tribunal found that the agreement reached on 20 May 2011 was a settlement of the final amount due, as contended by William Hare and thus ASI's arguments were rejected. As the tribunal had considered ASI's arguments, Justice Darke was unable to find any unfairness or practical injustice in the tribunal's award.

ASI also argued that the tribunal failed to provide reasons for its conclusions in the award. Justice Darke found that the reasons given in the award were adequate and made it clear that, amongst other findings, the tribunal had accepted William Hare's evidence and concluded that the 20 May 2011 was a binding agreement to pay an outstanding amount of money.

Severance

Finally, ASI submitted that the whole of the award should not be enforced because of the tribunal's failure to accord natural justice in relation to the claim for the Discount. ASI argued that the Act restricted circumstances in which part of an award could be enforced. In response to this argument, Darke J noted that the principles of severance had been "applied to arbitral awards for centuries" and other jurisdictions allowed partial enforcement of an award so long as there was no injustice caused by the severance. Justice Darke concluded that no injustice would be caused by severance in this case.

Accordingly, Darke J severed the amount of the Discount and the interest attributable to that sum from the award and enforced that part of the award in relation to the Second Instalment and interest thereon.

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[2] *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* (2014) 290 FLR 233.

[3] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, opened for signature 10 June 1958, 330 UNTS 38 (**New York Convention**).

[4] (2014) 311 ALR 387 at [111].

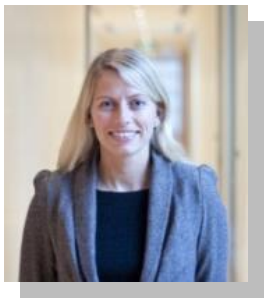
Court of Appeal

ASI appealed against the primary court's decision in relation to the Second Instalment in the Supreme Court of New South Wales Court of Appeal, raising two grounds; (1) that there had been a breach of natural justice so that, even if severance was possible, the whole award should not be enforced regardless; and (2) the award was incapable of severance. The Court of Appeal dealt with these arguments swiftly and unanimously.

In relation to ASI's submission that the arbitrators failed to deal with its arguments regarding the 20 May 2011 agreement, Bathurst CJ (with whom Beazley P and Sackville AJA agreed) considered ASI's pleadings, opening and closing submissions relevant to the validity of the 20 May 2011 agreement and found that these documents raised the issue of whether a binding agreement was needed to amount to a variation of the Subcontract but did not provide any argument in support of the proposition. The Court of Appeal found that ASI's "arguments" were mere assertions and that there was no failure on the part of the tribunal to address assertions, which were unsupported by argument and seemingly abandoned at the close of the case. Accordingly, the Court of Appeal held that the tribunal's reasons were adequate in the circumstances. In addition, ASI made no attempt to demonstrate practical unfairness or injustice.

In relation to ASI's argument that the award was incapable of severance, the Court of Appeal referred to the centuries old power to partially enforce awards where no injustice is caused and that this approach is taken in other New York Convention jurisdictions. Chief Justice Bathurst found nothing in the Act that either impliedly or expressly prohibited severance in the circumstances. The appeal was dismissed.

This is yet another decision of an Australia court which demonstrates the pro-arbitration approach of Australian courts and their willingness to enforce international arbitral awards.



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ISDS in ChAFTA – where's the beef?

A guide to ISDS in the China-Australia Free Trade Agreement: a hollow promise or an answer to ISDS' critics?

The China-Australia Free Trade Agreement (**ChAFTA**) is here. The landmark agreement was signed between the governments of Australia and China on 17 June 2015, although it will only take force once it hurdles the necessary ratification processes in both countries.

The agreement will significantly liberalise market access and deepen economic ties between both nations (not to mention the significant exports of beef products the Australian Government and meat producers hope it will encourage). With greater trade and investment, there will inevitably be more disputes. The focus of this article is the Investor State Dispute Settlement (**ISDS**) mechanisms, which form a relatively small part of the agreement, but have courted significant media attention and controversy.

This article examines in detail the drafting and scope of the ISDS clauses in ChAFTA and outlines the authors' views of the potential impact of this regime for the Australian and Chinese governments and their investors.

(1) ISDS – what is it?

By including ISDS provisions in free trade agreements and investment treaties, the governments who are party to these agreements grant investors the right to bring claims against them directly for breaches of the investment protection promises made in those treaties. ISDS gives investors the ability to have their claim determined in a forum where they are judged by rules of international law, and not merely by the domestic legal system. This is important because the government may have enacted domestic legislation permitting the action which is contrary to the investment protections in the treaty or free trade agreement. An example of this would be a domestic law cancelling an investor's license to mine without compensation, which is made lawful by enacting local legislation permitting that action.

Absent ISDS provisions, there is little prospect that a state will be held accountable for breaching its investment protection promises. Accordingly, absent investor-state dispute settlement, the investment chapters of free trade agreements and investment treaties are not worth the paper they are written on.

(2) ISDS – a crisis of confidence

ISDS clauses are routinely included in bilateral investment treaties and are commonplace in free trade agreements (such as ChAFTA and the Trans-Pacific Partnership (**TPP**) currently being negotiated between Pacific-rim countries). However, there is a public crisis of confidence in ISDS.

Public backlash against ISDS has focused on the fact that some ISDS clauses permit investors to bring claims against governments for domestic regulation enacted in the public interest. Additional concerns include the lack of transparency of the dispute process, and concerns that ISDS is conducted in a forum beyond the reach of national judicial systems. ISDS, has been described by prominent US law makers as being a threat to the United States because it will "*undermine U.S. sovereignty*" and result in "*rigged, pseudo-courts*". Similar invective has been invoked by anti-ISDS campaigners in relation to many free trade agreements currently under negotiation by European Union, African and Asian nations.

In Australia, the relationship with ISDS has been similarly fraught. The Australian Government formally discontinued the inclusion of ISDS procedures in trade agreements in 2011 in reaction to concerns over the investor-state arbitration commenced by Philip Morris over Australia's cigarette plain-packaging reforms. Australia's current position is that it will consider ISDS on a "*case-by-case basis*",[2] evidenced by the recent examples of the Japan-Australia free trade agreement not including ISDS, while the Korea-Australia free trade agreement and ChAFTA do.

ISDS may impact the manner in which a government regulates, as it may well encourage governments to regulate consistently with its investment protection obligations in its treaties and free trade agreements. On first glance, this seems sensible and unproblematic. However, where issues of public health and the environment are involved, this can be intensely controversial, as it may result in governments not taking action it otherwise would for a public good, or it may result in the government being required to compensate investors if it does take such action.

In recognition of this, there is a concerted movement toward limiting and modernising the drafting of ISDS clauses in investment treaties to address these concerns.

(3) ISDS in ChAFTA – narrow investor protection

ChAFTA contains a thoroughly considered ISDS regime which reflects both China and Australia's desire to limit investor protections. The ISDS clauses in ChAFTA are drafted extremely narrowly. The usual substantive protections contained in most investment treaties[3] are completely absent from ChAFTA.

This is no accident. The drafting of ChAFTA occurred over a period during which ISDS was under significant criticism and this section of the agreement was subject to particular scrutiny and specific ministerial approval. As will be seen from our analysis, the governments of both countries have been at pains to limit, rather than expand, the substantive protections available to investors in ChAFTA.

Limited substantive rights

There is only one substantive right for investors of either country to bring any claim under ChAFTA: where the host government of the investment has failed to treat the investor's investment in the same way as local investors' investments (the so called "*National Treatment*" standard under Article 9.3).

National Treatment clauses are designed to guarantee foreign investors no less favourable treatment than domestic investors. So, if an Australian investor comes into China (or vice versa) and wants to operate a business, that business must be treated no less favourably than local businesses. The classic example of a breach of this clause would be either State levying a tax which applies to foreign investors or investments but not to their domestic equivalents.

Strikingly, Australian investors in China have more limited protection than Chinese investors in Australia. For Chinese investors in Australia, the obligation applies to all stages of investment, including the pre-establishment stage where an investor is seeking to make an investment.[4] However for Australian investors in China, the obligation only applies to the post-establishment stage.[5] The intention behind the difference in obligation is to allow the Chinese Government to continue to regulate sectors where establishment of foreign investment is either restricted or prohibited, without facing a potential ISDS claim.

The imbalance of this protection reflects the negotiating power of the parties, but also the differences in market liberalisation in both countries. Nevertheless, China has agreed that the scope of this protection for Australian investors in China will be discussed in the ongoing refinements to the treaty which we discuss further in section 3 of this article.

Protections for legitimate discrimination

Although ChAFTA only offers this very limited form of investment protection, the two nations have been careful to ensure they retain carve-outs for regulating on public interest grounds in a manner that may nevertheless result in discrimination against the foreign investment.

Both states are entitled to enact measures which result in discrimination against foreign investors if to do so is: (i) necessary to protect human, animal or plant life or health; (ii) necessary to ensure compliance with laws and regulations that are consistent with ChAFTA; (iii) for the protection of national treasures; or (iv) relating to the conservation of exhaustible natural resources (including environmental measures). The safeguard for investors in this respect is that the government must not regulate in an arbitrary or discriminatory manner, or in a manner that is, in truth, restriction on international trade and investment disguised as regulation.

As a result, the ISDS provisions in ChAFTA do not prevent either Australia or China from changing their policies or legitimately regulating in the public interest. The flipside of this is that the protections provided to investors are leaner, and it is crucial that investors understand the relevant regulatory environment in both countries before they commit to making an investment.

Most-Favoured Nation

Another key aspect of the treaty is Article 9.4, the Most Favoured Nation (**MFN**) clause. The MFN clause ensures that both countries will continue to receive treatment no less favourable than any other nation, including nations that either country in future enters into new trade agreements with.

It should be noted that these are substantive obligations that Australia and China have between themselves and are not, as has sometimes been suggested, a separate basis for investors to bring an ISDS claim.

Transparency

Finally, in line with a trend towards transparency in investor-state arbitrations, the ISDS provisions in ChAFTA incorporate a high degree of transparency to the arbitration process. The request for consultations, notice of arbitration and orders and awards of the arbitral tribunal must all be disclosed to the public.[6] The provisions stop short of full transparency, however, in that hearings will only be open to the public with the consent of the state against whom the dispute is being brought. Submissions by interested third parties, so-called *amicus curiae* submissions, may also be made where the tribunal considers that they will assist in the determination of issues.

(3) ChAFTA and the Australia-China BIT – a work in progress

A final, unique and crucial element of the ISDS clauses in ChAFTA is the "Future Work Program".

The program, which is set out in Article 9.9, creates a status quo review by Australia and China of the investment legal framework within three years after the date of entry into force of ChAFTA. For that purpose, a future committee will be set up to negotiate various elements of the treaty, which include but are not limited to the addition of further substantive investment protections, including the protection against expropriation without compensation, which at present is a glaring omission.

The existing Australia-China BIT contains some of these additional investor protections and the status of the Australia-China BIT and its relationship with ChAFTA will be also be reviewed as part of the Future Work Program. The net effect of this is that the Future Work Program will clarify, both through the treaty itself and through its planned interaction with the existing Australia-China BIT, what the framework for ISDS between the two nations should be. It will therefore be essential that such a review be conducted as soon as possible after the entry into force of ChAFTA and that such a review be conducted with sufficient transparency.

(4) ISDS in ChAFTA – what are the real benefits for both countries and their investors?

The lion's share of capital flows between Australia and China, and which will be impacted by the ChAFTA, are in trade rather than investment. The ISDS provisions will not help either Chinese or Australian companies trading in the other's territories. This is not unusual, such protections are never to be found in treaties, but must be bargained for between parties through commercial contracting processes.

The relevance of the ISDS provisions however is that they provide a measure of political risk protection to Chinese investors in Australia and Australian investors in China. If their investments are not treated in the same way as local investors' investments, then the infringing government may be required to compensate the investor, if their actions cannot be justified on the public interest grounds provided for in the ISDS carve-outs. Crucially, ISDS protections and the investment liberalisation they protect play a function in encouraging good governance and generating state behaviour conducive with foreign investment.

Finally, the Future Work Program and the clarifications we expect it will bring to the scope of ISDS protections for investors and the interactions between ChAFTA and the China-Australia BIT should be welcomed by investors.

Practically speaking, whilst ISDS disputes are a burgeoning area of jurisprudence, China and Australia's involvement in this area is limited. To date no successful claims have been made against either Australia or China under any of their various investment treaties.[7]

(5) Conclusion

In every case, the goal of states in negotiating free trade agreements and investment treaties is to balance the interests of providing sufficient protection to investors such that the main purpose of the treaty is upheld – the encouragement of reciprocal trade and investment into each country's territory by investors of the other state, while limiting its potential exposure to future claims and upholding its sovereign right to regulate in the public interest.

The Australian and Chinese governments have carefully crafted the scope of the substantive protections offered in the investment chapter of ChAFTA to limit their potential exposure to investor claims. At the same time, they have given teeth to those investor protections offered through providing for ISDS. Investors can take a real degree of security from these protections, as they provide an avenue of redress in the event of discriminatory treatment for Australian investors in China and Chinese investors in Australia. Equally, critics of ISDS will find the regime in this treaty progressive, providing for greater transparency and increased legitimacy in the dispute resolution process.

The ISDS clauses in ChAFTA are expected to serve as a model for states wanting to offer narrower investor protections.

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[1] The countries currently negotiating the treaty include: Brunei, Chile, New Zealand, Singapore, the United States, Australia, Peru, Vietnam, Mexico, Canada and Japan. Other countries have also announced interest in joining the treaty.

[2] "Investor State Dispute Settlement", Trade and Investment Topics, Department of Foreign Affairs and Trade, (http://dfat.gov.au/trade/topics/Pages/isds.aspx) (accessed: 11 September 2015).

[3] These include: no expropriation without compensation, fair and equitable treatment, full protection and security, and no discrimination. It should be noted that some of these protections are provided for under the 1998 Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments (Australia-China BIT).

[4] Article 9.3.1 of ChAFTA.

[5] Article 9.3.2 of ChAFTA.

[6] Further, under Article 9.17.2 the pleadings, memorials and briefs, and minutes or transcripts of hearings of the tribunal may also be made available if the state against whom proceedings are being brought agrees.

[7] Ekran Berhad v PRC (ICSID No.ARB/11/15) was commenced against China under its BIT with Malaysia but on 22 July 2011, the proceeding was suspended pursuant to the parties' agreement. A recent November 2014 claim has also been brought by a South Korean property developer against China under its BIT with South Korea in Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25. So far, Australia has only been a party to one ISDS claim: the Philip Morris Case (Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12), brought by Philip Morris against Australia under its BIT with Hong Kong. The case is still pending.

Ian Govey AM
ACICA Vice President and Fellow

Vice President, Ian Govey, spoke about the role of ACICA at a Workshop on International Regulatory Cooperation at the Third APEC Senior Officials' Meeting in Cebu, the Philippines on 31 August.

The workshop, entitled International Regulatory Cooperation – Cooperation in Action, focussed on international regulatory cooperation (grounded in the trans-Tasman experience and OECD work) and cooperation in action in different regions (ASEAN, North and Latin America, North Asia and Trans-Tasman).

Ian's talk was the keynote address to the Workshop which was attended by around 50 participants representing most of the 21 APEC economies.

The following extract from the paper Ian delivered deals with the role of international commercial arbitration and ACICA:

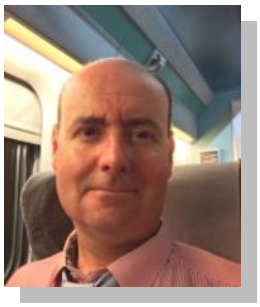
The increased prominence of international commercial arbitration as a means of resolving international commercial disputes is a prominent example of the benefits that greater international regulatory cooperation can bring.

In this regard I want to highlight the role played by various international arbitration bodes – the Australian Centre for International Commercial Arbitration (ACICA) in Australia and others in the region, in particular, the centres in Singapore and Hong Kong.

I am a Vice President (and Director) of ACICA and so I can say a few words about its work in facilitating the resolution of international disputes, especially in the Asia Pacific region.

ACICA is a not for profit organisation established in 1985. Its operations were revitalised in the mid-2000s and it established an office at the newly opened Australian Disputes Centre (ADC), which provides a venue for arbitrations and mediations, in 2010. The opening of the ADC occurred with the assistance of funding from the Federal and New South Wales Governments. ADC is now largely self-funded. ACICA is self-sufficient, with funding for its operations provided through membership payments and fees paid by parties to arbitrations administered by it. ACICA's international arbitration work has increased over the last 5 years in light of the excellent premises and secretariat support, the advantages of its Sydney location and the availability of a strong and experienced pool of arbitrators (both from Australia and elsewhere).

The supportive legal framework governing arbitration in Australia (incorporating UNCITRAL's model arbitration law) and use of ACICA Arbitration rules or other rules chosen by the parties provide a strong foundation for the continued development of arbitration in Australia.



Steve White
White SW Computer Law (ACICA Fellow)

Getting to Yes Sooner – some footnotes from the trenches

In 1991, as part of a "how to sell course" whilst working for IBM I was supplied with a copy of the seminal text "Getting to Yes" by Roger Fischer and William Ury (1981). At the time I had not yet completed my law degree. After now having participated in and conducted hundreds of mediations, I decided to revisit the book in light of some recent observations that I have made as mediator about how the mediation process with some variations can be used to resolve disputes faster.

Typically the format for mediations is to hold a preliminary conference (by telephone), the exchange of papers and a face to face meeting where the parties respectively put their positions and then break in caucus to put offers (if none were made when the parties put their initial position). Typically, a well advised party does not put its best offer first up.

The above technique is used consistently by judicial registrars to resolve disputes with some heavy costs penalties or procedural orders handed down for parties who do not appear to be co-operative. The Registrar normally does not have position papers but instead relies on the pleadings. The pleadings are a good start but those documents rarely set out concisely the real dispute between the parties with clarity (and which dispute if so included is highly likely to be struck out as scandalous, embarrassing and or an abuse of process if it was so pleaded).

The problem with this approach is that by the time the parties have set out position papers, their positions have started to become somewhat fixed and asking them to reduce it further to writing does little to assist.

Further, if this is the first time the parties have prepared a position paper (or simply because some parties like to perceive themselves as hard negotiators) some parties seem to take it upon themselves to, shall I say, put the other party's credibility into question and press arguments which inflame rather than achieve the desired objective whilst nonetheless being very valid arguments at law.

Fischer and Wry suggest that any method of negotiation should be assessed by three criteria. It should produce a wise agreement if agreement is possible; it should be efficient; and it should improve or at least not damage the relationship between the parties. It is difficult to see how the above approach achieves these objectives.

What is the alternative? Recently I have been calling a preliminary phone conference and then immediately having private conferences with the parties before the position papers are due to be exchanged to ostensibly "assist the parties" prepare their position papers and discuss how the mediation process works.

It is useful to agree to the dates for an exchange of position papers at the conference as it provides some pressure for the parties to resolve the dispute before the expenses and inconvenience of preparing such papers are incurred. Those dates can readily be adjusted (by agreement) if the negotiations are proceeding in the direction the mediator would like to take those discussions.

Once in these pre-paper meetings a few things became very obvious to me. The first was meeting the parties in their workplace indicated a lot about who they were, whether or not they were in a position of power and their negotiation style.

The second was that the parties disclose all sorts of things about why their relationship has gone wrong, surprisingly most of which has very little to do with the extant dispute to be mediated. Perhaps, meeting the parties in their own premises assists with this frank approach.

Frequently, parties say they are unhappy with the goods/service/relationship more generally and are seeking to terminate same.

Thirdly, they also tell you what they perceive to be their strong and weak points. The interesting thing is that, after meeting with the other party, you often notice whilst the parties can generally agree that there is a problem it is rare for what they respectively perceive to be their strong point to be accepted by the other party as a strong point and indeed in some instances, this strong point may be the very inflammatory position which has caused the problem to date.

Fourthly, what one party perceives as a weak argument may be one which the other side expresses to you as having significant merit for which they should make some concessions.

The preliminary meeting therefore becomes a valuable opportunity to identify all the claims/arguments that a party has, to examine what the best alternative to a negotiated outcome is (BATNA) and to determine what they require to resolve the dispute.

Identifying the claims also has another useful purpose in that, I am anyway, identifying opportunities to split off discrete questions for determination as an arbitration and or a binding or non-binding opinion.

This is important as the parties are often concerned that the mediation process, when properly understood, will not result in resolution without the agreement of the parties. I appreciate that this med-arb approach has for many years "been on the nose" notwithstanding its original recognition as valuable in the mediation process (or at least in the form of a non-binding opinion on identified issues).

What it does do, is to put options to the parties to resolve their dispute. Fisher and Ury properly identified that to move away from positional bargaining to one focused on interest, options and standards was very important, particularly when faced with a stronger, larger opponent.

By way of example, a proposal I often put at these conferences is: if I could give you a binding decision on that issue for a fixed price does that solve your problem?

Interestingly, when I have put such a proposal to the parties the party that I least expect to agree to same often readily agrees to such an approach whereas the party to whom I thought that such an option would be attractive does not.

That said, it is rare for a party to agree to arbitrate any dispute which is being mediated and all my mediations appear to promptly settle well before trial or such determination.

In any event, it does not matter. What does matter is that the parties have identified the issue (which may not have been as clear before), can do some sums and work out that even with some fixed pricing determination offers (or alternatively litigation) they now have more in their budget to negotiate an agreed and controlled resolution than was the case before.

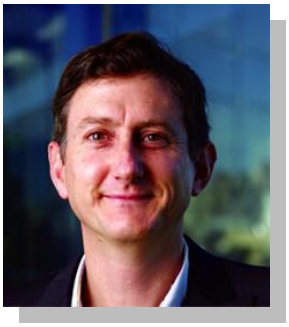
Ultimately what you are able to ascertain from these meetings is a figure/outcome that one party expresses may resolve the dispute and what they perceive to be their weak point.

This newly acquired information gives the mediator a unique opportunity to consider how to best put and receive offers.

Ideally, in many of my mediations the parties agree to a figure by telephone exchange using the mediator and nothing else is said and they continue to trade together. Often, a mediator may suggest that from a range of arguments available to a party to put with an offer, the party should focus on a particular argument which they have previously identified, but which the party receiving the offer perceives as its key weakness. Strong and inflammatory arguments can thus be avoided and the desired outcome achieved.

Often a party may also say whilst I would have been prepared to accept a certain sum I cannot afford now to show any sign of weakness and am prepared to fight harder than before. This "I cannot afford any loss of face" is well known to many cultures. Again this produces another opportunity for the mediator to work out an offer which permits face to be retained.

As this article is intended to be short I will finish up here hoping that I have given you some ideas for your mediations. That said it is interesting to note that about 70% of mediations I have conducted this year as a mediator have not proceeded past these preliminary private meetings with the parties enjoying the benefit of getting to yes sooner. Finally, those parties that did proceed to a full mediation gave me positive feedback on the pre-meeting process as a worthwhile process.



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The TPP Investment Chapter: Mostly More of the Same

Clearly, community concerns persist about ISDS and investment treaties or FTAs more generally, and these issues are not going to go away.

On 5 October the Trans-Pacific Partnership (TPP) FTA was substantially agreed among 12 Asia-Pacific countries (including Japan, the US and Australia), and the lengthy text was released publicly on 5 November 2015. Commentators are now speculating on its prospects for ratification,[2] as well as pressure already for countries like China and Korea to join and/or accelerate negotiations for their Regional Comprehensive Partnership (ASEAN+6) FTA in the region.[3] There has also been considerable (and typically quite polarised) media commentary on the TPP's investment chapter, especially investor-state dispute settlement (ISDS). The *Sydney Morning Herald*, for example, highlighted a remark by my colleague and intellectual property (IP) rights expert, A/Prof Kimberlee Weatherall, that Australia "could get sued for billions for some change to mining law or fracking law or God knows what else".[4] Other preliminary responses have been more measured, including some by myself (in *The Australian* on 6 November)[5] or Professor Tania Voon[6] within Australia, and other general commentary from abroad.[7]

Based partly on an ongoing ARC joint research project on international investment dispute management, with a particular focus on Australia and the Asia-Pacific,[8] I briefly introduce the scope of ISDS-backed substantive protections for foreign investors in the TPP, compared especially to the recently-agreed bilateral FTAs with Korea and China.[9] My separate online analysis briefly compares the ISDS provisions themselves.[10] Since publishing this assessment, the Australian government has also released a helpful 7-page summary of the entire Investment chapter.[11]

Overall, the risks of ISDS claims appear similar to those under Australia's FTAs (and significantly less than some of its earlier generation of standalone investment treaties). However, some specific novelties and omissions are highlighted below, and issues remain that need to be debated more broadly such as the interaction between the investment and IP chapters (as indeed

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http://dfat.gov.au/trade/agreements/tpp/pages/trans-pacific-partnership-agreement-tpp.aspx

[2] http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_whats_next.html, with a shorter version at http://theconversation.com/as-asia-embraces-the-trans-pacific-partnership-isds-opposition-fluctuates-50979

[3] http://www.eastasiaforum.org/2015/10/29/the-tpp-isnt-a-done-deal-yet/

[4] http://www.smh.com.au/federal-politics/political-news/australia-could-be-sued-for-billions-by-foreign-companies-for-new-laws-under-tpp-20151106-gksbjx.html

[5] http://www.theaustralian.com.au/national-affairs/foreign-affairs/experts-test-andrew-robb-tpp-safeguard-claims/story-fn59nm2j-1227598099647?sv=e0536f8755bcf0b6f8b0482164737065&memtype=anonymous

[6] http://www.sbs.com.au/news/article/2015/11/06/calls-trans-pacific-partnership-be-independently-assesed

[7] https://www.iareporter.com/articles/a-first-glance-at-the-investment-chapter-of-the-tpp-agreement-a-familar-us-style-structure-with-a-few-novel-twists/; Amokura Kawharu, "TPPA: Chapter 9 on Investment", presented at the AFIA/USydney forum on 26 November 2015 and downloadable via http://sydney.edu.au/law/caplus/events.shtml.

[8] http://ssrn.com/abstract=2362122

[9] Armstrong, Shiro Patrick and Kurtz, Jürgen and Nottage, Luke R. and Trakman, Leon, The Fundamental Importance of Foreign Direct Investment to Australia in the 21st Century: Reforming Treaty and Dispute Resolution Practice (December 1, 2013) Australian Centre for International Commercial Arbitration (ACICA) Review, Vol. 2, No. 2, pp. 22-35, 2014; http://dfat.gov.au/trade/agreements/Pages/trade-agreements.aspx

[10] http://blogs.usyd.edu.au/japaneselaw/2015/11/tpp_investment_isds.html

[11] Available (with other chapter summaries) via http://dfat.gov.au/trade/agreements/tpp/summaries/Pages/summaries.aspx

raised by both A/Prof Weatherall and myself in last year's Senate inquiry into the "Anti-ISDS Bill").[12] The wording of the TPP's investment chapter derives primarily from US investment treaty and FTA practice, which has influenced many other Asia-Pacific countries (including Australia) in their own international negotiations. Yet the European Union is now developing some interesting further innovations to recalibrate ISDS-based investment commitments. These include a standing investment court with a review mechanism to correct substantive errors of law, developed especially for its ongoing (TTIP) FTA negotiations with the US, but reportedly just accepted in the EU's FTA with Vietnam (which interestingly had agreed to a more traditional ISDS procedure in the TPP).[13]

The TPP's investment chapter's substantive commitments by host states to foreign investors, aimed at encouraging more (but also potentially higher-quality) foreign investment, include for example:

(1) **non-discrimination** compared to local investors (ie national treatment "in like circumstances": Art 9.4) as well as third - country investors (most – favoured - nation treatment "in like circumstances": Art 9.5), both before and after establishment or admission of the investment, but with some listed exceptions;
(2) **fair and equitable treatment**, tied to the evolving customary international law standard (elaborated in Annex 9-A), including a specific reference to denial of justice through local adjudicatory proceedings (contrary to "the principle of due process embodied in the principal legal systems of the world": Art 9.6);
(3) **compensation for direct and indirect expropriation** (Art 9.7).

By contrast, the Australia-China FTA signed on 17 June 2015 (and now expected to be ratified soon, after a change of heart by the main opposition Labor Party),[14] had more limited non-discrimination commitments from China.[15] It also lacked a commitment to FET, although some protection remains available (not enforceable through ISDS) under the 1988 bilateral investment treaty, which will be reconsidered along with the new FTA's investment chapter during a work program after it comes into force.[16]

The TPP's main substantive commitments try to build in public welfare considerations, for arbitral tribunals to assess if or when foreign investors allege violations, eg by further elaborating what constitutes "in like circumstances" as well as the now-familiar Annex (9-B, derived from US domestic law and then treaty practice) on what constitutes indirect expropriation. Article 9.15 adds that a host state may use measures "that it considers appropriate to ensure that investment … is undertaken in a manner sensitive to environmental, health or other regulatory objectives", but only if "consistent with this Chapter" (ie non-discriminatory etc). The TPP's Preamble also acknowledges the member states' "inherent right to regulate".

By contrast, investment chapters in Australia's FTAs with Korea (signed in 2014), China and even ASEAN-NZ (signed in 2009) included a general exception, based on GATT Art XX for trade in goods, allowing host states to introduce measures necessary to protect public health etc provided these were not applied in a discriminatory manner or as a disguised restriction on investment. An advantage of this approach is the extensive jurisprudence from WTO panels applying the GATT exception. Disadvantages include some obvious as well as subtle differences between trade and investment law,[17] as well as a potentially higher evidentiary burden on the state seeking to justify its measures.

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[12] Nottage, Luke R., The 'Anti-ISDS Bill' Before the Senate: What Future for Investor-State Arbitration in Australia? (August 20, 2014) International Trade and Business Law Review, Vol. XVIII, pp. 245-293, 2015; http://ssrn.com/abstract=2483610

[13] http://trade.ec.europa.eu/doclib/press/index.cfm?id=140

[14] Nottage, Luke R., The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia (November 3, 2015) Sydney Law School Research Paper No. 15/97; http://ssrn.com/abstract=2685941. Labour voted with the Government in the Senate to pass the necessary tariff reduction legislation on 9 November 2015: http://trademinister.gov.au/releases/Pages/2015/ar_mr_151109.aspx.

[15] http://lexbridgelawyers.com/wp-content/uploads/2015/06/Lexbridge_ChAFTA-Investment.pdf

[16] http://blogs.usyd.edu.au/japaneselaw/2015/06/compromised_isds_china.html

[17] See generally the book forthcoming soon by my ARC project co-researcher Prof Jurgen Kurtz: http://www.cambridge.org/us/academic/subjects/law/international-trade-law/wto-and-international-investment-law-converging-systems

Anyway, the TPP limits the scope of protection available to investors in specified areas raising strong public interest concerns, such as public debt claims (Annex 9-G) and tobacco control measures. Claims over the latter can be completely precluded in advance by member states, under the General Exceptions chapter (Art 29.5). This is clearly in response to arbitration claims brought by Philip Morris against Australia (and earlier Uruguay),[18] although such a sector-specific exclusion had earlier been resisted by the US as setting a dangerous precedent for future treaty negotiations. The TPP Investment chapter also contains the usual "denial of benefits" provision (Art 9.14) to limit scope for forum-shopping, as alleged in the Philip Morris case under Australia's old BIT with Hong Kong.

Finally, despite such provisions aimed at limiting host state liability exposure to ISDS (and indeed inter-state arbitration) claims, one Australian journalist refers to a US lawyer's opinion in asserting that the MFN provision allows "foreign corporations from TPP states to make a claim against Australia based on the ISDS provisions in *any other trade deal* Australia has signed".[19] This is incorrect in that they overlook the Schedule of Australia for the overarching TPP "Annex II – Investment and Cross-border Trade in Services", which expressly excludes past treaties from the scope of MFN treatment.[20] Such (still uncorrected) media coverage illustrates the difficulties that the Australian government now faces in ensuring passage of TPP-related legislation through the Senate in order to be able to ratify this major regional agreement.

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[18] https://www.ag.gov.au/tobaccoplainpackaging

[19] http://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer?CMP=share_btn_tw (original emphasis).

[20] **http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/annex-ii-schedule-australia.pdf**

Eric Van Winssen
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Commercial Courts: An alternative mechanism for the settlement of international commercial disputes

Over a decade later, in January of 2015, the SICC was established as a division of the Singapore High Court.

I. Introduction

Over the past decade a number of commercial courts have been established to provide an alternative vehicle to arbitration for settling international commercial disputes. This development has occurred in confluence with the growing demand in the commercial sphere for mechanisms to resolve such disputes.

First, this paper will summarise the establishment and jurisdiction of two international commercial courts: the Dubai International Finance Centre ("DIFC") Courts and the Singapore International Commercial Court ("SICC"). Secondly, it will highlight some of the advantages of referring a dispute to commercial courts, rather than to arbitration. Thirdly, this paper will illustrate areas where international commercial courts are unable to replicate the offerings of arbitration institutions. Finally, it will canvas the existing and potential interaction between the two forms of dispute resolution.

II. Establishment & Jurisdiction

In 2004 the DIFC was created as a financial free zone in Dubai's business district.[1]

With the deliberate aim of attracting foreign businesses and establishing itself as a hub for global commerce, the DIFC also adopted courts governed by common law principles.[2] Michael Hwang, the Non-Resident Chief Justice of DIFC Courts, has described the Courts as "a common law island in a civil law ocean."[3] The DIFC Courts endeavoured to ease concerns for international investors, providing a familiar and assured form of legal recourse. Well versed in common law, specifically English law principles, the Courts are equipped to handle complicated disputes arising from numerous types of commercial contracts, such as financing, insurance, shipping, energy and construction agreements.[4] Much like the already existing arbitration institutions, however, the court's jurisdiction over international disputes is largely predicated on contractual clauses that refer disputes arising under the agreements to the DIFC Courts.[5]

Over a decade later, in January of 2015, the SICC was established as a division of the Singapore High Court.[6] In the same ilk, the SICC can decide on claims of both an international and a commercial nature that have been referred to the SICC's jurisdiction under contractual agreement. Further, the aegis of the Singaporean judiciary allows the Singapore High Court to refer claims to the SICC.[7]

The details of its establishment can be found on the DIFC Courts website, <http://difccourts.ae/legal-framework>.

[2] Jitheesh Thilak, 'Extension of Jurisdiction of DIFC Courts and its Impact on Arbitration in the Middle East' (2012) 8 *Asian International Arbitration Journal* 161, 161.

[3] Michael Hwang, 'Commercial courts and international arbitration—competitors or partners?' (2015) 31 *Arbitration International* 193, 201.

[4] Thilak, above n 2, 170.

[5] Ibid, 169

[6] The details of its establishment can be found on the SICC website <http://www.sicc.gov.sg/About.aspx?id=21>.

[7] *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) ss 18D, 18J.

Both the DIFC Courts and the SICC are endorsed as vehicles for the settlement of transnational commercial disputes, a mandate which seemingly echoes that of their arbitral counterparts.[8] Consequently, the establishment of the DIFC Courts and the SICC has invited questions regarding the necessity of such institutions and the resulting impact on existing arbitral bodies.

III. Distinguishing Features of Commercial Courts

While arbitration has long been the preferred dispute resolution mechanism of global commerce, it has inherent limitations.[9] Some issues fall outside the capacity of arbitration, such as insolvency, real and intellectual property issues involving registration and right in rem.[10] Beyond these industry specific confines, there are further, more general hurdles for arbitrators**.** It is in that vein that commercial courts have been established as an alternative.

3.1 Multi-Party Disputes

One of the most prevalent shortcomings of arbitration has been the inability of its institutions to consolidate disputes, thus enabling third parties' ability to commence parallel proceedings.[11] This issue is often prevalent when a dispute arises from a relationship created by a web of connected contracts.[12] Third parties can only be joined into arbitrations when they are both a party to the arbitration agreement and they provide express consent to the joinder.[13] The arbitral bodies are then consequently reliant on public authorities and domestic courts,[14] which envelopes uncertainty in its process and undermines its efficiency.

On the contrary, the SICC is able to join third parties to its proceedings, with or without their consent.[15] In the context of multi-party and multi-contract disputes, this power to order consolidation may prove a determinative feature of the commercial courts, as cost efficiency will always be a foremost concern of the parties.

3.2 Transparency & Accountability

A further criticism of commercial arbitration is that it lacks accountability to the public and, therefore, legitimacy.[16] Chief Justice of Singapore and former Attorney General, Sundaresh Menon, has referred to both the transparency inherent in the SICC's open nature of proceedings as well as the fixed panel of judges that may hear a dispute as means of alleviating the perception of bias inherent in arbitration.[17] Chief Justice Menon argues that such measures establish the commercial courts as a more accountable avenue for recourse, effectively endorsing them as an alternative to arbitration.

For some, these observations may fail to resonate, as confidentiality and the specialization of arbitrators are often lauded as two of the most resolute features of international arbitration. Nevertheless, confidentiality is not exclusive to arbitration as both the DIFC Courts and the SICC allow for privacy to be determined by the parties.[18] Furthermore, both courts are comprised of judges from many different areas of the world and with a range of different specialties.[19]

3.3 Appellate Mechanisms

Finally, Chief Justice Menon has also pointed to parties' ability to appeal decisions as a feature that may attract parties to the SICC and DIFC Courts.[20] Such a mechanism will facilitate the development of jurisprudence to be used a guide for both the courts as well as the parties. With a greater sense of certainty, parties may readily make more informed decisions and, consequently, will likely have greater satisfaction in the process.

While protracted legal disputes, characterized by multiple appeals, may be the deterring factor that caused parties to avail themselves to arbitration in the first place, Chief Justice Menon argues that the costs associated with arbitration have escalated significantly and that parties deploy significant resources to ensure success in the singular proceedings.[21] Commercial courts have conversely endeavoured to limit costs, regularly issuing summary judgments and providing incentives for the parties to execute the terms of their contracts.[22]

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[8] See: Singapore International Arbitration Centre's vision <http://www.siac.org.sg/2014-11-03-13-33-43/why-siac/our-vision-mission-core-values>.
[9] Justice Quentin Loh, 'The Limits of Arbitration' (2014) 1 *McGill Journal of Dispute Resolution* 66, 80.
[10] Hwang, above n 3, 195.
[11] See: *Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corporation and another* [1982] 2 Lloyd's Rep 425.
[12] Hwang, above n 3, 195.
[13] Singapore International Arbitration Centre, *Arbitration Rules of the Singapore International Arbitration Centre* (1 April 2013) Rule 24(b).
[14] Jan Paulsson 'Arbitration in Three Dimensions' (LSE Legal Studies Working Paper No 2, 2010) 2.
[15] Singapore International Commercial Court Committee, *Report of the Singapore International Commercial Court Committee* (Singapore), November 2013, 15.
[16] David A.R. Williams QC, 'Defining the Role of the Court in Modern International Commercial Arbitration' (2014) 10 *Asian International Arbitration Journal* 137, 140.
[17] Alec Emmerson, Sapna Jhangiani and John Lewis, *Why international courts may be the way forward* (16 February 2015) Global Arbitration Review <http://globalarbitrationreview.com/news/article/33364/>.
[18] *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18K.
[19] Jayanth K. Krishnan and Priya Purohit, 'A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution' (2015) *The American Review of International Arbitration* 1, 24.
[20] Emmerson, Jhangiani and Lewis, above n 17.
[21] Ibid.
[22] Krishnan & Purohit, above n 19, 23-24.

3.4 Conclusion

While Chief Justice Menon's arguments highlight the ability of the DIFC Courts and the SICC to address the inherent limitations of international arbitration, they do more to establish such commercial courts as an alternative to arbitration, rather than a replacement. The courts have not seamlessly replicated the salient features that have attracted global businesses to international arbitration, such as its expediency, cost efficiency and level of specialization. Furthermore, the DIFC Courts and SICC face additional hurdles that do not affect arbitral bodies. Any impact that the courts are able to effect, especially the recently established SICC, will not be immediate. It may take years for the SICC to establish its reputation in the international commercial community, and even once clauses are written to refer disputes to the SICC, it may take years still before any legal issues actually arise.[23]

IV. The Enforceability Obstacle

The fundamental advantage that international arbitration can offer is the enforceability of its awards. With 156 state parties, the New York Convention[24] has been a catalyst for the popularity of arbitration as a dispute resolution mechanism. Without the benefit of a similar convention, the DIFC Courts and SICC remain significantly limited.

4.1 Enforceability of DIFC Court Judgments

In order for DIFC Court judgments to be enforced within the UAE, an execution letter and legal translation of the judgment must be sent to the local Dubai courts, which are then obligated to enforce the award.[25] Once a local Dubai court enforces the ruling, it is then enforceable in any Emirate. While this process was enacted with the intention that DIFC Court decisions would be "final and executory," practical obstacles still exist, as often the local courts will lack a nuanced understanding of the specific order and the common law in general.[26]

The more pertinent concern, however, is the enforceability of DIFC Court judgments internationally. Involved parties must first understand whether the UAE has a treaty in place with the relevant enforcing state. Agreements such as the *Gulf Co-operation Council Convention*,[27] *Riyadh Convention on Judicial Co-operation*,[28] and *The Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial Matters*[29] indicate that the judgments will be enforceable across many countries in the Middle East.

The parties will have greater cause for concern where no relevant agreement exists. The DIFC, as with the SICC, have 'memoranda of understanding' ("MOUs") with foreign courts, such as England's Commercial Court,[30] the Federal Court of Australia and the Supreme Court of New South Wales.[31] These MOUs, however, lack binding legal effect and place the order at the discretion and scrutiny of the local courts. Some states, such as Russia, Denmark and Finland, have gone so far as to refuse to enforce foreign judgments altogether.[32]

4.2 Enforceability of SICC Judgments

The SICC's decisions carry much the same weight as that of the DIFC Courts. Designated as a division of the Singapore High Court, SICC judgments carry the same effect as those issued by the paramount domestic authority.[33] Consequently, there is little question as to the enforceability of its decisions in Singapore.

Given that the SICC covets an international client base, its success will be defined by recognition of its judgments abroad. Similar to the DIFC Courts, the SICC will be reliant on foreign courts to enforce its decisions. Singapore is already party to treaties with the United States and United Kingdom,[34] both of which recognize the enforcement of foreign awards, and Singapore will likely endeavour to expand such recognition.

According to the Chief Justice Menon, the SICC will also use the DIFC Courts' MOUs as a model for the wider recognition of its decisions.[35] The support that the Singaporean government has given the SICC should provide credence and be a clear signal of legitimacy to foreign courts; yet, without legal certainty, parties may still be deterred.

4.3 Conversion

Mr. Hwang has also discussed the trial of an additional process whereby DIFC Court judgments would be converted into arbitral awards, conditional upon parties' inclusion of a contractual referral clause.[36]

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[23] Hwang, above n 3, 197.
[24] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).
[25] *Law No. (16) of 2011* (Dubai) s 7.
[26] Krishnan & Purohit, above n 19, 9-10.
[27] *Gulf Co-operation Council Convention* (entered into force 25 May 1981).
[28] *Riyadh Convention on Judicial Co-operation* (entered into force 6 April 1983).
[29] *The Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial Matters,* opened for signature 1 February 1971, 1144 UNTS 249 (entered into force 20 August 1979).
[30] Krishnan & Purohit, above n 19, 14.
[31] Emmerson, Jhangiani and Lewis, above n 17.
[32] Philip R Weems, 'Guidelines for Enforcing Money Judgments Abroad', 21 (11) *International Business Lawyer*, 509.
[33] *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18A.
[34] Emmerson, Jhangiani and Lewis, above n 17.
[35] Ibid.
[36] Hwang, above n 3, 205.

Consequently, the judgments would have the benefit of enforcement under the *New York Convention*. On the contrary, there is still significant doubt that such a mechanism will prove a viable alternative, given the numerous hurdles that need to be cleared. National courts may prove reluctant to enforce such awards, arguing that the ad hoc proceedings would not settle a genuine dispute,[37] as required under the convention.

Furthermore, arbitrators may also feel the reference allows them to re-consider the merits of the dispute.[38] While this process offers an innovative approach to the enforcement issue, its universal acceptance and application is yet to appear on the horizon.

4.4 Hague Choice of Court Convention

Thus, the DIFC Courts and the SICC have continued on the quest for a pervasive enforcement mechanism. One potential vehicle is the *Hague Choice of Court Convention*,[39] an imitation of the *New York Convention* for the enforcement of court judgments.

The convention came into force in October of 2015 and has already been ratified by the European Union and Mexico, with the United States and Singapore also as signatories.[40] Ratification by the other two signatories would certainly provide a boost to the SICC, though it may still take many years before it reaches the same level of acceptance as the *New York Convention.*

4.5 Conclusion

The issue of enforceability is undoubtedly the paramount obstacle that the DIFC Courts and the SICC must overcome to generate widespread interest from the global commercial sphere. While it should be noted that 95 percent of cases that come before the DIFC Courts are settled before reaching final judgment,[41] the certainty offered to parties under the *New York Convention* render arbitration a more appealing alternative in all but a few limited circumstances. Until the DIFC Courts and the SICC are able to offer a guarantee of widespread international enforcement they will fail to present a tangible challenge to arbitration institutions.

V. Cohesion Between Commercial Courts and Arbitral Institutions

Chief Justice Menon's perspective is nevertheless that an international commercial court operating in parallel with a leading international arbitration institution should not be a zero-sum game.[42] Rather, the SICC may be regarded as means of addressing the limitations of arbitration as a disputes resolution mechanism.[43]

Foremost, the creation of commercial courts in Dubai and Singapore under the aegis of their respective domestic judiciaries serves not just as an endorsement of the commercial courts, but also of the locations as hubs for dispute resolution. It sends a clear signal to commercial entities that the government and judiciary are committed to facilitating the efficient settlement of disputes, rendering arbitration more attractive.

Mr. Hwang also argues that the commercial courts largely target disputes that would otherwise be resolved by national courts, rather than by way of arbitration,[44] providing a suite of options for parties to resolve their disputes. Mr. Hwang points to London as an example of the cohesion that can be achieved between commercial courts and arbitration.[45] Beyond the Courts, the DIFC also comprises of an agreement with the London Court of International Arbitration, whereby the DIFC receives the benefits of the LCIA but retains the seat of arbitration in the emirate.[46] So far, the DIFC Courts have shown great deference to the arbitral awards.[47]

Further, the commercial courts may provide curial review in support of the arbitral proceedings. Often times arbitration proceedings will require court action, such as for challenging awards or staying proceedings in favour of arbitration. Commencing such proceedings in commercial courts mitigates the risk of domestic courts' parochialism.[48] The DIFC Courts' bench is largely composed of practicing arbitrators.[49] The international nature of the courts and the developed understanding its judges have of international law complement the arbitration proceedings and could be used to entrench both Dubai and Singapore as dispute resolution hubs.

VI. Conclusion

Inevitably, international commercial courts will cannibalise some business that would otherwise resort to arbitration. This is unavoidable given the similarities in the target clientele. Nevertheless, this should not weigh heavily on the minds of arbitrators. Firstly, it may take years for the courts, specifically the SICC, to develop a reputation in the international business community that can rival established institutions such as the Singapore International Arbitration Centre ("SIAC"). Secondly, as noted by Mr. Hwang, the commercial courts offer services most attractive to parties with needs that are unmet by arbitration and would likely turn to national courts as a primary alternative. Finally, and most importantly, the development of the courts will be best served in parallel to leading arbitration institutions, providing a means of support and ensconcing regions like Singapore and Dubai as international hubs for dispute resolution, to the benefit of both the commercial courts and the arbitration institutions. In sum, these international commercial courts are unlikely to challenge and replace arbitration, but rather offer an alternative within a suite of dispute resolution mechanisms.

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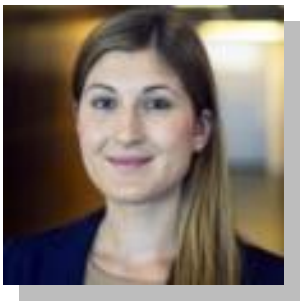
[37] Hwang, above n 3, 206.
[38] Ibid, 205-211.
[39] *Convention on Choice of Court Agreements*, opened for signature 30 June 2005 (entered into force 1 October 2015).
[40] Ibid.
[41] Krishnan & Purohit, above n 19, 26
[42] Emmerson, Jhangiani and Lewis, above n 17.
[43] Loh, above n 9, 82.
[44] Hwang, above n 3, 196-197.
[45] Ibid, 197.
[46] Krishnan & Purohit, above n 19, 16.
[47] Ibid, 17.
[48] See: *Re BG Group plc v. Republic of Argentina* 572 U.S. (2014).
[49] Hwang, above n 3, 195.



Aleks Sladojevic
King & Wood Mallesons

The International Arbitration Act 1974 – summarising recent legislative amendments

On 15 September 2015 the Australian Parliament passed the *Civil Law and Justice (Omnibus Amendments) Act* 2015 (Cth) (CLJOA) which has introduced a number of overdue refinements to the International Arbitration Act 1974 (Cth) (IAA or Act). These latest changes, whilst not extensive, will have consequences for the confidentiality of arbitral proceedings, enforcement of arbitral awards and the application of the IAA to arbitral proceedings.

Confidentiality provisions

The CLJOA has amended the default application of the confidentiality provisions set out in sections 23C to 23G of the Act. These provisions govern the disclosure of confidential information by parties to international arbitral proceedings (as well as disclosure by arbitral tribunals) and, as a result of amendments to sections 22(2) and 22(3) of the Act, they will now apply on an "opt out" rather than "opt in" basis to arbitrations commenced on or after 14 October 2015.

Broadly speaking, the shift to an "opt out" position aligns with the market expectations that arbitral proceedings are confidential unless the parties agree otherwise. While some commentators may contend that this shift in position is contrary to a growing public push for greater transparency in arbitral proceedings, arguably, the demand for transparency is concentrated in the context of investor-state disputes and less so with international commercial disputes involving private actors.

Importantly, there have been no changes to the substance of the confidentiality provisions. It therefore remains the case that parties to an arbitral proceeding must not disclose certain confidential information in respect of that proceeding, except in certain circumstances – for instance, where parties consent to the information being disclosed, where disclosure is required to provide a party with "full opportunity to present [its] case", and where disclosure is required under a court-issued subpoena.

Broader scope for enforcement of arbitral awards

The CLJOA has also broadened the scope of arbitral awards that are recognised and enforceable under the IAA. Before the amendments, section 8(4) of the Act prevented the enforcement of foreign awards made in countries that were not party to the New York Convention (Convention), unless the party seeking enforcement was "domiciled or ordinarily resident" in Australia or a state party to the Convention.

The repeal of section 8(4) broadens the scope of arbitral awards that may be enforced by Australian courts. In other words, it is no longer necessary for awards to be made in one of the 156 states party to the Convention in order to be enforceable, as Australian courts can now recognise an award made in any state.

Resisting enforcement

In addition to broadening the scope of arbitral awards capable of enforcement, the CLJOA has also broadened the basis on which a party can resist the enforcement of an award under the IAA. This comes by way of amendment to section 8(5) of the IAA which, as a result of the CLJOA, now enables a party to an arbitration agreement to resist enforcement of an arbitral award on the basis that *any* party to the agreement was "under some incapacity at the time when the agreement was made".

In its previous form, section 8(5) required the party resisting enforcement to demonstrate that it was subject to a legal incapacity at the time of entering into the arbitration agreement.

Clarifying the Application of the Act

The repeal of section 30 of the Act has sought to clarify its application to international commercial arbitration, and to remove some unnecessary confusion.

Prior to its repeal, section 30 stated that the relevant provisions of the IAA:

> *...[did] not apply in relation to an international commercial arbitration between parties to an arbitration agreement that was concluded before the commencement of [the Act] unless the parties...otherwise agreed.*

The application of this section was complicated, however, with the commencement of section 21(1) of the Act on 6 July 2010. Section 21(1) provides that, "If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration".

The tension between sections 30 and 21 came to a head in the 2012 Federal Court case of *Castel Electronics Pty Ltd v TCL Airconditioner (Zhongshan) Company Ltd* [2012] FCA 21. In that case, the defendant (who sought to resist the enforcement of an arbitral award against it) argued that section 21 had a prospective application only and could not apply to an arbitration agreement entered into before 6 July 2010. The defendant relied on section 30 of the Act as evincing an intention for section 21 to apply prospectively and not retrospectively. The Court, however, rejected this argument finding that it was not in line with Parliament's intention and that, if accepted, it would lead to a "strange result".

Fortunately, the inclusion of a new section 21(2) into the IAA this year has clarified the application of section 21(1), making it clear that the provision applies to any arbitration proceedings commenced after 6 July 2010, regardless of the date on which the relevant arbitration agreement was entered into. The repeal of section 30, therefore, simply removes unnecessary complexity and confusion in determining the application of the Act.

Conclusion

Given that the last sweep of reforms to the IAA took place in 2010, the recent suite of amendments are well overdue. In particular, the change to confidentiality provisions such as they now apply on an "opt out" basis brings the Act in line with general market expectations as to the confidentiality of arbitral proceedings. The broadening of scope in arbitral awards capable of enforcement is also a positive outcome for future arbitration parties. Though far from extensive, the recent amendments to the IAA have introduced a number of much needed refinements to the legislative framework.

Erika Williams
Baker & McKenzie

2015 New South Wales Young Lawyers International Arbitration Moot

The New South Wales Young Lawyers International Arbitration Moot is an annual competition organised by the NSW Young Lawyers International Law Committee. As Erika Williams reports, it is a wonderful opportunity for young lawyers (under the age of 35) and law students to experience the real world of arbitration and network with some of the pre-eminent professionals in the field.

The NSW Young Lawyers International Arbitration Moot was first held in 2009 and has been held every year since, growing in success each year. I participated in the moot in 2012 and found the experience to be extremely beneficial for a number of reasons.

Firstly, I had studied International Commercial Arbitration as a subject at university and the moot provided me with the opportunity to take the legal principles I had learned and apply them in what was like a real life situation, as if I was Counsel preparing the case for a client.

Secondly, having to prepare written submissions for the parties and then present those submissions in the oral hearing gave me the confidence to prepare position papers and submissions in my role as an Associate in the Dispute Resolution group at global firm, Baker & McKenzie.

The other reason I found that participating in the moot has helped with my career is the networking opportunities. Students are paired with lawyers and meet peers who can give them guidance about a career in arbitration. I know that I met some great people who were fellow participants in the moot and I see them regularly at various arbitration related functions. Volunteer arbitrators are made up of Senior Counsel, In-House Counsel, partners and associates from prominent law firms and past participants in the moot who work in the field of arbitration.

The opportunity to present your oral arguments and even just to mingle with these experienced international arbitrators is invaluable.

I found the moot to be of such a great benefit that I have now been responsible for organising it from 2013 to 2015. This year, the moot attracted participants from a variety of backgrounds and there was a record attendance for the finals. This broad participation demonstrates the appeal of arbitration amongst young lawyers and law students and has cemented the moot's place as a progressive and high quality competition.

On Saturday 29 August 2015, 14 young lawyers and law students competed in three rounds of mooting in front of arbitral panels which each consisted of three experienced arbitration practitioners, followed by the semi-final. All teams have the opportunity to represent both the claimant and respondent in a problem question that incorporates the common issues that arise in international arbitration. At the end of the day-long proceedings, two teams emerged as finalists.

This year, those teams were Team 1 consisting of John Karantonis (Lawyer, Clayton Utz, Sydney) and Madeleine Harkin (Student, UNSW) and Team 9 consisting of Lena Chapple (Solicitor, DLA Piper) and Harry Stratton (Student, The University of Sydney).

On Tuesday 1 September 2015, these teams made their oral submissions in front of an arbitral panel which was presided over by the Hon Justice David Hammerschlag, Commercial Arbitration List Judge of the Supreme Court of New South Wales along with Jo Delaney, Special Counsel at Baker & McKenzie, myself as Immediate Past Chair of the NSW Young Lawyers International Law Committee and International Arbitration Moot Manager.

The Moot Final was held before a packed audience which included moot participants, lawyers, academics and sponsors. For the first time this year, Justice Hammerschlag entertained the finalists and audience with an amusing ex tempore arbitral award.

On reflection I can see that participation in the moot has cemented my path as an international arbitration practitioner. I was awarded the prize for Best Oralist in 2012 which earned me a place on the Chartered Institute of Arbitrators Diploma in International Commercial Arbitration Course which I completed in March 2014. Being responsible for the organisation of the moot and on the panel of judges for the final exemplifies the respect I now have from colleagues in the arbitration sphere as a qualified practitioner in international arbitration.

Results

Spirit of the Moot
Alexander Ferguson (Student, Australian National University)

Best Written Submissions
Team 1 – John Karantonis (Lawyer, Clayton Utz, Sydney) and Madeleine Harkin (Student, University of NSW)

Winning Team
Team 9 – Lena Chapple (Lawyer, DLA Piper) and Harry Stratton (Student, The University of Sydney)

Best Oralist
John Karantonis (Lawyer, Clayton Utz, Sydney)

Testimonials

The ACICA International Arbitration Moot was an excellent learning experience. Being the first arbitration moot that I have participated in, I learnt a great deal about the private international legal system and how the arbitration and associated dispute resolution processes work. Furthermore, the process of creating a written submission over several weeks taught me a lot about effective collaboration and teamwork over a sustained period of time. Whilst the oral submissions were challenging (and somewhat nerve-wracking!) at times, they were also an excellent learning experience. Overall, I would recommend this competition for anyone interested in mooting or acting as an advocate in their legal career.
-*Vivek Shah*

The NSWYL International Arbitration Moot was a very enriching experience - both personally and professionally. I was attracted to the Moot because it is a well-run competition and the calibre of competitors is consistently high. I was fortunate enough throughout the competition to come up against a variety of 'counsel' with whom I still keep in touch. A highlight for me was being judged in the grand final of the Moot by the Honourable Justice Hammerschlag of the New South Wales Supreme Court, who certainly put me (and my arguments) to the test. I would strongly encourage anyone with an interest in international arbitration to apply to compete in next year's Moot.
- *John Karantonis*

The NSW Young Lawyers International Arbitration Moot was a fantastic way to meet other young legal minds with a shared interest in private international law. I really enjoyed working with and mooting against people I'd never met before, as well as seeing a few familiar faces from my mooting days at university. We were very grateful to have so many practitioners give up their Saturday morning and afternoon to judge us and give us feedback on our performances. It was exciting to face up against some very talented colleagues and I'm grateful to have had the opportunity to participate in the event.
- *Ashna Taneja*

What happens when an international construction project goes wrong? I think I am a little bit more qualified to answer that after participating in the NSW Young Lawyers International Arbitration Moot. At least that's what I tell my friends at law school. Aside from learning about new areas of law, the moot was an exciting practical environment to learn from other mooters about the best approaches to orally presenting an argument, with expert guidance from distinguished arbitrators. It was an inspiring program, that has encouraged me to pursue a legal career. Thanks to Erika Williams and the team for putting on the great event!
- *Alex Ferguson*

The NSW Young Lawyers International Arbitration Moot proved to be a very illuminating introduction into one of the fastest growing contemporary modes of dispute resolution. It was a very well-organised competition that provided an opportunity to adapt and develop my mooting skills to and in an unfamiliar context and the 'Introduction to Arbitration' seminar offered in the lead-up to the moot was very helpful to that end. I enjoyed the chance to work on a complex contractual problem and be questioned by a range of professionals during oral submissions. Finally, a big thank you goes to Erika for convening the entire Moot so smoothly. It was certainly an experience that has left me more knowledgeable and interested in the field of arbitration and I am sure the Moot will continue to play that role for many aspiring students and practitioners in the future.
- *Eric Shi*

John Karantonis
Clayton Utz*

Opportunities and challenges for dispute resolution in the next century: the 3rd annual International Arbitration Conference in Sydney puts international arbitration practice under the microscope

This conference brought together a diverse collection of eminent speakers from Australia and internationally who shared freely their views and experiences from their respective practices and jurisdictions.

The third instalment of the annual International Arbitration Conference, held in Sydney as one of the centrepieces of the Sydney Arbitration Week each year, took place on Tuesday, 24 November 2015 at the Sofitel Sydney Wentworth in the heart of Sydney's central business district. This year's conference was also aligned with the Sydney celebrations for the centenary of the Chartered Institute of Arbitrators.

Attended by both active and established international arbitration practitioners as well as aspiring lawyers looking to kick-start their careers in international arbitration, the International Arbitration Conference provides the ideal forum for open discussion of all things impacting the practice of international arbitration in Australia, the Asia-Pacific region, and beyond.

The topic of this year's conference, "*Opportunities and challenges for dispute resolution in the next century*", brought together a diverse collection of eminent speakers from Australia and internationally who shared freely their views and experiences from their respective practices and jurisdictions. The conference adopted a multifaceted structure, with some sessions being held as a panel-style discussion and others in a more traditional lecture format, keeping the audience engaged throughout. Importantly, the conference was not simply an opportunity to trumpet the triumphs of international arbitration as a successful means of international dispute resolution. Discussion was instead focussed on innovative ways of dealing with complex issues which frequently arise in the practice of international arbitration and which have the potential to threaten the integrity of the process.

After welcoming remarks from Albert Monichino QC, the conference opening address was delivered by the Chief Justice of the Federal Court of Australia, The Hon Justice James Allsop AO. His Honour's address, titled "The nature of the arbitral legal order and aspects of the place of the courts", commenced with a discussion of the role of commerce and comity in international legal relationships as the backbone of the continued success of international arbitration globally. An in-depth textual analysis of the various instruments facilitating this commerce and comity - being the Geneva Convention of 1927, the New York

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* *John Karantonis was the recipient of the ACICA/ BLS LCA Best Orator prize in the seventh annual New South Wales Young Lawyers International Law Committee International Arbitration Moot and was awarded a ticket to the International Arbitration Conference in Sydney and the CIArb Centenary Dinner as part of his prize.*

Convention of 1958, and the more recent UNCITRAL Model Law - was then given, with a particular focus on the impact that each has had on the recognition and enforcement of international arbitral awards and the interrelationship between the seat of an arbitration and the idea of a resulting award's independent international autonomy.

His Honour concluded that international arbitration has an important role to play in building an integrated international justice system, the structure and shape of which would be subject to a number of variables, including the relationship among national courts, arbitral institutions and activity, and party autonomy.

The first session of the conference was a panel discussion between Dr Christopher Boog, Mr Andrea Carlevaris, Professor Doug Jones AO and Dr Sam Luttrell on the topic "Emerging trends in international arbitration" chaired by Mr Jim Delkousis. The session addressed a number of key matters relevant to modern international arbitration practice, including new techniques for the management of time and costs, how to deal with challenges to arbitrators, the appropriate use of arbitral secretaries (a very topical issue in light of the recent challenge to the award in the Yukos proceedings by the Russian Federation), how the ethics of party representatives should be regulated, and how multi-party arbitrations should be handled.

The second session, which was chaired by Caroline Kenny QC and which consisted of presentations by Liz Cheung, Dr Chen Fuyong and Datuk Professor Sundra Rajoo, discussed the emergence of international arbitration jurisprudence and the establishment of common judicial approaches to international arbitration in the Asia Pacific region. In particular, the topics for discussion included the overcoming of the common law and civil law divide and the likely future complexion of commercial disputes in the Asia Pacific region.

Session three for the day addressed the very topical issue of Australia's new free trade agreements and the opportunities and challenges they presented for Australia. Albert Monichino QC chaired a keynote address from Lord Peter Goldsmith PC, QC on the topic, which was then followed by commentary from Max Bonnell. The ISDS debate featured heavily in the discussion, with objective analysis provided both in respect of the advantages ISDS mechanisms bring to states parties to international trade agreements and the key criticisms of their use. Of the key advantages discussed, Lord Goldsmith and Mr Bonnell noted that ISDS mechanisms have served to de-politicise and de-militarise investment disputes and the protection of foreign investments.

Conversely, the continuing issue of lack of transparency in ISDS cases, inconsistency of decisions and the perception of a 'secret court system' was chief amongst the criticisms of ISDS mechanisms discussed. Importantly, it was acknowledged that lawyers are inherently conflicted in the debate of whether ISDS mechanisms are desirable or not; lawyers clearly want such mechanisms to exist as they provide sources of fascinating work and considerable income but the appropriate questions that need to be answered, namely whether ISDS mechanisms promote security and predictability, are answerable by businesses and governments only and not by lawyers. The European proposal for a permanent standing "Investment Court System" under the Transatlantic Trade and Investment Partnership was also flagged as an initiative to be watched closely in future years. The significant advantages of the proposal in enhancing the transparency of proceedings and consistency of decisions were recognised by the panel, as was the need for continued scrutiny and improvement of the existing ISDS model if it is to have enduring relevance in the future.

Session four dealt with the opportunities and challenges associated with international arbitration seats in Australia and New Zealand. David Fairlie chaired a panel on the topic consisting of Hilary Heilbron QC, David Kreider and Khory McCormick. Key issues such as how the 'tyranny of distance' suffered by Australia and New Zealand can be dealt with and the emergence of particular types of international disputes that are ripe for international arbitrations seated in Australasia were addressed by the panel members, each of whom practices primarily out of different international jurisdictions (Ms Heilbron QC out of the United Kingdom, Mr Kreider out of New Zealand, but previously out of the United States of America, and Mr McCormick out of Australia). This allowed the panel members to give their views on how international arbitration practitioners from different jurisdictions perceive the issues arising out of having arbitral seats in Australia and New Zealand.

The panel members agreed that Australia and New Zealand as 'brands' of arbitral seats meet all the best practice criteria for arbitral seats and present high quality options for disputing parties. Supportive judiciaries, outstanding legal practitioners and successful legislative reform were said to be the key reasons for the great potential Australian and New Zealand arbitral seats offer. However, to unlock this potential, the panel members concluded that Australian and New Zealand international arbitration practitioners must work to include Australia and New Zealand based arbitration clauses into contracts, promote the number of arbitrations being held in Australia and New Zealand yearly,

and be positive about the maturing landscape for arbitration in Australia and New Zealand. A common consensus was reached that the lack of geographical proximity of the two countries poses more of a "psychological barrier" rather than a practical problem that factors into the selection of a seat by commercial parties. Enforceability is the key concern of contracting parties, the panel concluded, whilst issues such as convenience pale in comparison.

The fifth and final session of the conference addressed the recent Hague Choice of Court Convention and the establishment of regional international commercial courts. A panel discussion between Professor Richard Garnett, Malcolm Holmes QC, Daniel Kalderimis and Lord Peter Goldsmith PC, QC was chaired by Ian Nosworthy and focussed on the question of whether the Hague Convention, which has increased substantially the enforceability of domestic court decisions internationally, and the increased dispute resolution options made available by international commercial courts would have an adverse effect on the practice of international arbitration.

The panel considered whether the Hague Convention serves to diminish the monopoly held by international arbitration as a forum for international commercial dispute resolution by replicating the enforcement infrastructure of the New York Convention. As a result, international litigation might not only be seen as a viable alternative, but perhaps as a superior process in light of the coercive powers of courts which are beyond the capabilities of arbitral tribunals. Indeed, the panel agreed that the 'fight-back' by international litigation as a form of international commercial dispute resolution is well under way. The Singapore Commercial Court and its practices, which have been steadily gaining traction in recent years, were used as examples of international litigation's recent successes.

The conclusion at which the panel arrived was that for international arbitration to successfully 'defend' itself against the increased 'threat' posed by international litigation, international arbitration practitioners and institutions would need to focus on the advantages of international arbitration outside of enforcement, consider options to increase the consistency of results in international arbitrations, and encourage collaboration, harmonisation and the use of 'soft law', which assist users of international arbitration to know what they can expect out of the process before they elect to use it.

Following the last session of the day was a closing address delivered by the Chief Justice of the Supreme Court of New South Wales, The Hon Justice Tom Bathurst AC. His Honour addressed the importance of the support the courts in Australia have for international arbitration and emphasised that international arbitration is not a process that courts should consider as a threat and as a limitation of their powers, for there are now procedures in the Supreme Court of New South Wales and in the Federal Court of Australia to assist the arbitration process. In this connection, His Honour observed that it is not only enforcement which underpins the practice of international arbitration, but also the fact that the parties to international arbitrations have agreed contractually to the process, and this is a legally binding agreement which must be upheld by the courts.

His Honour concluded his address with his recognition of the value in conferences such as the annual International Arbitration Conference in Sydney in bringing together esteemed international arbitration practitioners to tackle complex problems with a view to improving the practice of international arbitration.

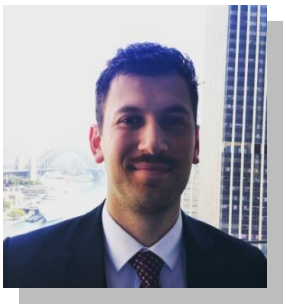
Concluding remarks were then given by Professor Doug Jones AO before the conference was formally closed and delegates of the conference together with other guests were welcomed to the CIArb Centenary Dinner to celebrate the one hundredth birthday of the Chartered Institute of Arbitrators.

Held in the illustrious Harbourside Room of the Museum of Contemporary Art in Sydney's historic The Rocks precinct, the CIArb Centenary Dinner was a celebration of the achievements and developments of the Institute in the one hundred years since its inception. Stunning views of Sydney Harbour and a delectable three course meal were enjoyed by all.

The prophecy of the 'rule of three' was realised when attendees of the dinner were addressed by the Chief Justice of the High Court of Australia, The Hon Justice Robert French AC, on the development of the Institute, its many successes, and its ongoing and increased relevance in a world of heightened international arbitration activity.

It is a rare opportunity to have the privilege of the teachings of three Chief Justices, in addition to those of a number of respected international arbitration practitioners from around the world, in the space of just one day. The third annual International Arbitration Conference in Sydney and the CIArb Centenary Dinner provided such an opportunity.

The international arbitration community in Australia looks forward to the continued success of the annual International Arbitration Conference in Sydney and, indeed, the Chartered Institute of Arbitrators worldwide.



William Stefanidis
Paralegal at Clayton Utz

Legal Prediction: A Challenge in International Arbitration

At the beginning of her lecture, the distinguished speaker opened with the question of "whether this is a price parties are nonetheless prepared to pay in order to obtain a bespoke method of dispute resolution".

The challenge of predicting legal outcomes is particularly difficult in international arbitration according to Hilary Heilbron QC, Deputy High Court Judge, international arbitrator and advocate of Brick Court Chambers who presented at the 2015 annual International Arbitration Lecture. The lecture hosted by Clayton Utz in conjunction with the University of Sydney was attended by eminent members of the legal profession and judiciary, including The Honourable Chief Justice Allsop of the Federal Court and The Honourable Justice Beazley President of the NSW Court of Appeal.

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Predictability factors into parties' choice of forum for the resolution of commercial disputes. The need for predictability arises as a matter of commercial reality for corporations, she said. It falls to legal advisers to advise their clients within reasonable parameters of their chances of success or failure and the array of possible legal outcomes, outcomes which are to an extent influenced by the identity of the tribunal members. To illustrate this point, Ms Heilbron cited US attorney Roy Cohn who once said “I don’t want to know what the law is, I want to know who the judge is”.

According to Ms Heilbron, the lawyer's task is exceptionally difficult in international arbitral proceedings because arbitral tribunals are constituted from an infinitely broader pool of candidates from a diversity of professional, cultural, legal and behavioural backgrounds when compared to the pools of members of the judiciary who preside in curial courts around the world.

The selection of the members of a tribunal is a "fundamental" feature of international arbitration and a key criterion in parties' choice to adopt arbitration as a preferred method of dispute resolution, according to Ms Heilbron who cited statistics from the recent survey by the international law firm White & Case and the Queen Mary College, University of London. The importance of carefully selecting the tribunal members is magnified by the finality of arbitral awards, she added.

However, the speaker warned that the procedure adopted in the majority of arbitration clauses for the appointment of the third member of the tribunal (the tribunal "Chair") does not sufficiently allow for the input of the parties, contrary to what is sometimes perceived to be the case.

"By so nominating its arbitrator a party may feel it has some input into the tribunal’s composition, but the extent to which this can determine the outcome is probably illusory. At best it will ensure that it has one decision maker of a certain quality and experience whom it believes may be sympathetic to its case. But one out of three is not great odds for prediction", she said.

The distinguished Queen's Counsel discussed the potential further dilution of the parties' control over legal outcomes that results from the disproportionately large influence of the Chair over the course of proceedings. She noted that the Chair often exercises a substantial degree of control over both procedural and substantive decision-making, an imbalance which is amplified in cases where the two co-arbitrators are comparably "less industrious" or less experienced.

The dynamics of decision making and cognitive biases, and their impact on the predictability of international arbitral proceedings formed the next part of Ms Heilbron's analysis. The pervasive effect of cultural bias in decision-making was stated in the following terms by the internationally renowned speaker:

"Individuals with different backgrounds and life experiences will interpret the same issues or evidence differently based on different systems of beliefs which in turn can affect outcomes. Thus where there are balancing acts to be made, different arbitrators will attach different weight to different matters. It is difficult to eradicate totally the norms in one's own legal system."

Having made a strong case that unpredictability poses a distinct threat to international arbitration and serves as a disincentive to parties considering arbitration as a dispute resolution method, Ms Heilbron proceeded to discuss potential avenues for reform to address the underlying issues to this predicament.

Ms Heilbron signalled her strong support for improving the method of appointing tribunal Chairs to allow the parties great input into the ultimate selection.

"It should be common practice for co-arbitrators, whoever initiates the list, to consult with the party or parties who appointed them as to a chair or presiding arbitrator, save in exceptional circumstances e.g. where there is extreme urgency to constitute a tribunal. A chair whom both parties buy into may not necessarily produce a more cohesive tribunal, nor guarantee to improve the certainty of outcomes, but given the chair's pivotal role, it will at least remove some elements of uncertainty from the process and enable parties to have a more equal hand in the ultimate composition of the tribunal", she proposed.

Ms Heilbron's suggested simple fix to the problem is to amend arbitration clauses to make the power of the co-arbitrators to appoint a Chair "subject to prior consultation with the parties". Ms Heilbron pointed to existing guidelines by the International Bar Association and the rules of the London Court of International Arbitration which permit such consultations with the parties, but noted the lack of a uniform approach to the issue among the international community. In this light, she called for co-operation to develop a uniform approach to satisfy this lacuna.

"Open-minded tribunals of experienced and knowledgeable arbitrators who deliberate conscientiously are the aspiration; mixed cultures are inevitable and to be welcomed; sub-conscious beliefs will still pervade decisions and counsel will try to attune their arguments to the tribunal they have", she said in a final piece of advice.

Despite these challenges, the future outlook for international arbitration is markedly positive, according to Ms Heilbron. The rapid uptake of international arbitration by commercial parties across the globe is a testament to this. In her closing remarks, she returned to the question she posed at the start of the lecture on the cost of unpredictability to contracting parties. *"It is a price they are prepared to pay"*.

Professor Chester Brown, Associate Dean of the University of Sydney; Professor Doug Jones AO, International Arbitration Group Consultant - Clayton Utz; The Honourable Chief Justice Allsop AO, Chief Justice of the Federal Court of Australia; Hilary Heilbron QC, International Arbitrator, Advocate and Mediator - Brick Court Chambers, London; John Rowland QC, Head of International Arbitration Group - Clayton Utz

Speaker & Audience

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Australian Centre for International Commercial Arbitration

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

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welcome and may be sent to secretariat@acica.org.au or gmoens@acica.org.au