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THE ACICA REVIEW

June 2014

ACICA
Australian Centre for International Commercial Arbitration

Leader in international dispute resolution

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ACICA
Australian Centre for International Commercial Arbitration

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The ACICA Review June 2014

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Alex Baykitch ACICA President

President's Welcome

Dear Members,

Welcome to the second edition of the ACICA Review. This is my first President's welcome to our members and I hope you enjoy reading it.

APRAG Conference

On 27 and 28 March 2014, ACICA held the APRAG 10th Anniversary Conference in Melbourne which welcomed speakers and guests from around the world. The Conference was a great success with close to 200 attendees.

ACICA Appointments

At our AGM on 31 March 2014, the Board nominated Ian Govey, Khory McCormick and Jim Delkousis as Vice Presidents with Tony Samuel as Treasurer. I would like to thank the Vice President and Treasurer for their support.

ICCA Congress 2018

On 6 April 2014, ACICA together with the support of AMINZ, won a bid to host the ICCA Congress for 2018 in Sydney with a side conference to be held in Queenstown. I would like to thank Doug Jones AO for making the presentation to the ICCA Counsel. We look forward to seeing you at the Congress in 2018.

Finally, the Board would like to thank Doug Jones AO for his time and dedication to ACICA over the last 8 years. ACICA has certainly grown during his tenure and I look forward to continuing his foresight for ACICA.

Alex Baykitch
President

Deborah Tomkinson ACICA Secretary General

Secretary General's Update

We welcome Alex Baykitch to the ACICA Presidency and Jim Delkousis as a new Vice President. I express my thanks to all members of the Executive for their continued commitment to ACICA.

New Executive Team

Following the ACICA AGM in March, we welcome new members to the Executive team. We thank Doug Jones AO, as he steps down as ACICA President, for his ongoing support and dedication to ACICA and we look forward to continuing to work with him on the ACICA Board.

We welcome Alex Baykitch to the ACICA Presidency and Jim Delkousis as a new Vice President. I express my thanks to all members of the Executive for their continued commitment to ACICA.

Events

As noted in the President's Welcome, ACICA has enjoyed a busy start to 2014. In March, ACICA hosted the successful APRAG Tenth Anniversary Conference in Melbourne. The conference attracted a large number of delegates from the Asia Pacific and focused on key issues for arbitration in the region. The conference is further detailed on page 10.

At the ICCA Conference in Miami in April, ACICA and the Arbitrators and Mediators Institute of New Zealand (AMINZ) presented, and won, a joint bid to bring the 2018 ICCA Conference to Sydney, with an add-on event to be held in Queenstown.

Stuart Veitch receiving the 2013 ACICA Prize

In March, the ICC launched its new Mediation Rules, which came into force on 1 January 2014, in Sydney (and in Melbourne in April). The Sydney launch, held at Sydney Business Chamber on 31 March, featured amongst others, ACICA members Angela Bowne SC and James Morrison. A delegation from the ICC also visited the Centre during their time in Sydney.

On 9 April, the University of Canberra held its annual Prize Giving Ceremony. We congratulate Stuart Veitch on winning the 2013 ACICA Prize for best achieving student in International Commercial Arbitration.

On 14 May, an ADR industry forum was held at the Centre. Representatives from various ADR industry organisations Australia-wide, including ACICA, met to explore strategies aimed at developing an industry voice to present ADR issues to and lobby Government and to increase the uptake of ADR in the community, business and government. An opening address was given by Jeremy Gormly SC (most recent chair of NADRAC).

The AIDC Aboriginal and Torres Strait Islander Mediation Training Scholarships Program was launched at a luncheon event at the Centre on 21 May. With this exciting new initiative the AIDC aims to deepen the understanding of

From Left: *The Hon Fred Chaney AO (Senior Australian of the Year 2014) and Stephen Wright (Registrar, Office of the Registrar, Aboriginal Land Rights Act 1983 (NSW))*

ADR in Australia and reach out to the indigenous community. The keynote address at the event was given by the Honourable Fred Chaney AO, Senior Australian of the Year.

AIDC

The 2014 mediation and professional development training program at the AIDC, run through the Australian Commercial Disputes Centre, commenced in February with its flagship mediator training as well as a number of tailored professional development courses run for clients including the NSW Supreme Court Registrars. A busy schedule of courses, including Advanced Mediation training, will run throughout the year. Further information with respect to upcoming courses can be found on the AIDC website (http://www.disputescentre.com.au).

The AIDC's modern and private hearing rooms in Sydney provide an ideal venue for arbitrations, mediations and other ADR procedures, as well as seminars and meetings. The AIDC website provides all booking information.

ICCA Conference in Miami in April 2014

From left to right are: Richard Yore (Business Events Sydney - Americas office), Samantha Wakefield, Janet Walker (Arbitration Place), Doug Jones, John Walton, Bankside Chambers (NZ), Deborah Hart (Arbitrators' and Mediators' Institute of New Zealand), and Alex Baykitch, President.

ICC delegation visit to AIDC

From left to right are: Lynne Richards (AIDC Training Manager), Delcy Lagones de Anglim (ADR Practitioner), Deborah Lockhart (AIDC's Chief Executive Officer), Hannah Tuempel (Manager of the ICC Centre for ADR) and Bryan Clark (Secretary General ICC Australia).

NEWS IN BRIEF

New ACICA Fellows, Associates and Mediation Panel Members

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ACICA Fellows

Helena Chen (Beijing), Philip C Loots (WA), Angus Stewart (NSW), Paul Hayes (VIC), Piotr Nowaczyk (Poland), Monique Carroll (NSW).

Alan M. Anderson, a fellow of the ACICA, has been awarded the Master of Laws (LL.M.) degree, with distinction in international dispute resolution, from the University of London, England. In addition, he recently was appointed to a three-year term as an arbitrator with the Kuala Lumpur Regional Centre for Arbitration (KLRCA). Mr. Anderson is based in the United States, where he specialises in international arbitration and commercial disputes resolution.

ACICA Mediation Panel Members

Stephen Lancken (NSW), Anthony Lo Surdo (NSW), Philip C Loots (WA)

ACICA Associates

John Arthur (VIC), Timothy Holmes (NSW), William Kinh Quoc Ho (VIC), Hiroyuki Tanaka (Tokyo), Amy Foo Chen Wern (Singapore) and Michael Weatherley (Singapore), Andrew Jeffries (NSW).

New AMTAC Panel Members

We also welcome AMTAC Panel members, Angus Stewart (NSW) and James Drake (UK).

Professor Gabriël A Moens, Dr John Trone and Professor Philip Evans have co-authored an Annotation to the Commercial Arbitration Act 2012 (WA). The Annotation can be found at www.acica.org.au/resources/papers. This is a useful Annotation which will facilitate the study of the uniform Commercial Arbitration Act.

Peter McQueen AMTAC Chair

AMTAC Chair's Report

AMTAC has circulated information sheets relating to negotiating governing law, jurisdiction and arbitration clauses in charterparties for both export and import of Australian cargo shipments, including the Norden decision.

Cooperation Agreements between AMTAC and Asia Pacific maritime arbitration commissions

AMTAC is currently negotiating Cooperation Agreements with the Chinese Maritime Arbitration Commission (CMAC), the Hong Kong International Arbitration Commission (HKIAC) and the Singapore Chamber of Maritime Arbitration (SCMA). By implementation of these Agreements, AMTAC seeks to develop practical and effective cooperation and collaboration with each of these commissions in the promotion of seats of arbitration, and thereby the conduct of maritime arbitration, in the Asia Pacific region.

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

AMTAC has circulated information sheets (which can be found on the AMTAC website http://www.amtac.org.au) relating to negotiating governing law, jurisdiction and arbitration clauses in charterparties for both export and import Australian cargo shipments, including the Norden decision.

AMTAC is also approaching the Federal Government, requesting a review of Section 11 of COGSA. That Section contains mandatory provisions relating to governing law, jurisdiction and arbitration clauses in contracts of carriage by sea. Clarification is required as to which contracts of carriage by sea it applies to, and as to the resolution of disputes arising under such contracts by arbitration conducted at Australian seats of arbitration.

AMTAC Panel of Arbitrators

Over the last 6 months, following a call for applications to this Panel, a number of appointments have been made from both current and newly appointed ACICA Fellows. Further applications are invited and details of the application procedure can be found on the AMTAC website.

Forthcoming events

Members of AMTAC will be participating in various capacities in the following events, further details of which can be found on the websites referred to below:

- **15th International Maritime Law Arbitration Moot (IMLAM 2014) university mooting competition, Hong Kong, 5-8 July 2014 -** www.murdoch.edu.au
  This international competition is organised by Murdoch University in conjunction with the host, University of Hong Kong, and provides an opportunity for law students to prepare written submissions and present oral arguments in respect of a maritime law problem in a realistic arbitration environment. Twenty-four university teams from 11 different countries have registered to compete.
  AMTAC is sponsoring the Spirit of the Moot Award.
  Those wishing to participate as arbitrators are invited to contact the Moot Director, Associate Professor Kate Lewins (k.lewins@murdoch.edu.au)
- **Maritime Law Association of Australia and New Zealand Annual Conference, Queenstown, New Zealand, 10-12 September 2014 -** www.mlaanz.org.au
- **International Congress of Maritime Arbitrators (ICMA), Shanghai, 10-15 May 2015 -** www.icma2015shanghai.com
  ICMA, which is an academic exchange forum in the field of international maritime arbitration, is known as the Olympics for maritime arbitration. Since 1972, 18 conferences have been held and the 19th ICMA will be organised by the China Maritime Arbitration Commission. This will be the first time that ICMA has been held in mainland China.
  Those wishing to present papers at the Congress should submit a summary of no more than 250 words by 15 November 2014 via the secure portal for summaries and papers, which appears at the Submission of Papers link on the above ICMA website. Email enquiries may be directed to Chair of the Topics and Agenda Committee, Philip Yang, at philipyang@biznavigator.com or to Committee Member, Peter McQueen at mpmcqueen@amtac.org.au.

Deborah Tomkinson
ACICA Secretary General

APRAG Ten Year Anniversary Conference 2014

The Tenth Anniversary Conference of the Asia Pacific Regional Arbitration Group (APRAG), hosted by ACICA, was held in Melbourne at the Sofitel from 26 to 28 March 2014 with great success. The programme featured a range of speakers from some 13 Asia Pacific jurisdictions as well as the United Kingdom and the Netherlands. Topics focused on regional arbitral trends and examined what might be in store for arbitration in the Asia Pacific, and for APRAG, in the ten years ahead.

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Doug Jones AO reflected on the unique diversity of the 180 delegates and how few regions garner the kind of support from specialist judges that was evident at the conference.

The conference commenced with a welcome reception, hosted by Her Honour Chief Justice Warren AC of the Supreme Court of Victoria, held at the Supreme Court library. Her Honour also attended the next day to open the conference, following an introduction by Doug Jones AO, President of ACICA (now immediate Past President).

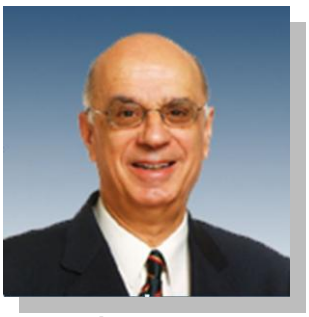
To kick start the discussions, all the previous APRAG presidents and the current president, Yu Jianlong, provided a "Ten Year Report Card" for the organisation under the astute chairmanship of ACICA Fellow, Neil Kaplan CBE QC SBS (Hong Kong). Another ACICA Fellow, Rashda Rana (President of the Chartered Institute of Arbitrators Australian Branch) then led a wide-ranging and thought-provoking session on the Role of the Institutions in the Region, involving representatives of a number of Asia-Pacific and world arbitration institutions.

Bernard Salt (KPMG, Melbourne) thoroughly entertained delegates with his lunchtime address looking at the Expected Economic Growth in the Asia-Pacific and the Consequences for Arbitrators. After lunch, the two afternoon sessions, chaired by ACICA Fellow Beth Cubitt (Clyde & Co, Perth) and Robert Dick SC and ACICA Fellow Jonathan Redwood (both of Banco Chambers, Sydney) respectively, turned to more specific topical issues, delving into Recent Trends in the Enforcement of Awards in the Region, with a focus on developing economies, and examining Regional Idiosyncrasies to the Public Policy Exception to Enforceability. The day concluded with a conference dinner held at Myer Mural Hall, at which His Honour Chief Justice Martin of the Supreme Court of Western Australia treated delegates to an enjoyable address.

The final day of the conference began over breakfast, with a fascinating address from Tony Nolan SC (Victorian Bar) and ACICA Fellow Malcolm Holmes QC (NSW) on the Court of Arbitration for Sport and Doping Allegations, facilitated by Paul Horvath (Victoria). The first session of the day, chaired by the Honourable James Allsop AO (Chief Justice, Federal Court of Australia) featured a unique selection of specialist higher court judges from the Asia Pacific speaking to the strong levels of Judicial Support of Arbitration in the region.

An experienced panel consisting of regional practitioners and academics explored the Role of the Arbitrator/Mediator in Med-Arb in the next session chaired by Richard Leder (Corrs Chambers Westgarth, Melbourne). This was followed by a lively discussion between prominent panelists from leading regional law firms and academia on the Future of Investment Arbitration in the Region, chaired by Michael Hwang SC (Singapore). A networking lunch preceeded the final session of the conference, which focused on the Next Ten Years for APRAG and Arbitration in the Region, in a discussion led by Yu Jianlong (Vice Chairman and Secretary General of CIETAC and President of APRAG).

In his remarks at the close of the conference, Doug Jones AO reflected on the unique diversity of the 180 delegates and how few regions garner the kind of support from specialist judges that was evident at the conference. These observations are symbolic of the persistent strength of arbitration in the Asia Pacific region. ACICA extends its thanks to all speakers and delegates of the conference for their attendance and valued participation.



Ron Salter
ACICA Director

Melbourne Commercial Arbitration and Mediation Centre Launched

Unique to the new facility is the establishment of the Melbourne Commercial Arbitration and Mediation Hub, which provides an online central information point for arbitration and mediation facilities in the city.

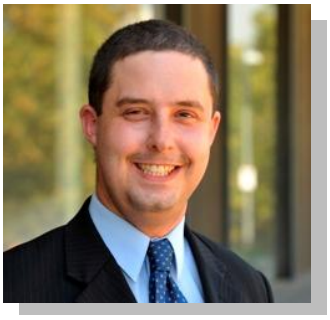
The Melbourne Commercial Arbitration and Mediation Centre, a joint initiative of the Victorian Department of Justice, Court Services Victoria, the Victorian Bar, and the Law Institute of Victoria, and supported by ACICA, CIArb, and IAMA, was officially launched on 17 March 2014 at a reception in the Centre's premises at the William Cooper Justice Centre in the heart of the Melbourne legal precinct.

Jonathan Beach QC, vice-chairman of the Victorian Bar, and Geoff Bowyer, president of the Law Institute of Victoria, both spoke, with the main addresses given by the Honourable Marilyn Warren, Chief Justice of the Supreme Court of Victoria, and the Honourable Robert Clark, Attorney-General. Both the Chief Justice and the Attorney spoke strongly in favour of the development of the Centre, both to enhance the position of Melbourne as an ideal venue for international dispute resolution, and as part of a national grid of centres able to provide choices around the country.

Unique to the new facility is the establishment of the Melbourne Commercial Arbitration and Mediation Hub (www.mcamh.com.au), which provides an online central information point for arbitration and mediation facilities in the city. The website provides venue information and an online booking service, links to directories of arbitrators and mediators, and a wide variety of other information about dispute resolution.

The linked facilities are the Centre itself, the Dispute Settlement Centre of Victoria, the McPhee Mediation Centre, the Law Institute of Victoria Mediation Rooms, the Victorian Bar Mediation Centre, and the Specialist Arbitration Venue within the County Court.

The Centre will be managed by a company limited by guarantee, which is in the process of being established. The first chairman of the company will be the Honourable Stephen Charles QC, retired judge of the Victorian Court of Appeal.



Benjamin Hayward
Willem C. Vis International Commercial Arbitration Moot and Vis (East) Moot Coach

Deakin Law School Honoured as Tribunal Rules its Students Best in the World

Deakin University has a long-standing association with both the Vis Moot in Vienna, and the Vis (East) Moot in Hong Kong – participating in each event since their inception. As the recipient of the 2014 Frédéric Eisemann Award as the Prevailing Team in Vienna – of 290 teams from over 60 jurisdictions – the Deakin Law School has once again demonstrated the worldclass capability of its students.

Deakin's results in both events would not have been possible without the generous support of our Vis Moot Alumni, who each and every year donate their time and facilities to judge in our two-month-long practice moot program.

Eleven students represented Deakin Law School in the events – their preparation starting in early November 2013 and on this occasion, extending through to the final day of the Vienna oral rounds. After spending the better part of three months working on their Claimant and Respondent Memoranda, all eleven team members participated in an intensive, month-long practice moot program. At this time, Mr. Alex Garfinkel and Mr. Stephen Dyason were selected to represent the team in Hong Kong, with Ms. Tess Blackie and Mr. Sam Hall selected to argue in Vienna. For the Deakin oralists, a further month of intensive mooting followed, before our eventual departure.

Our results in Hong Kong were excellent, with Deakin University progressing to the second round (the Round of 16) in the elimination finals and with Mr. Dyason receiving an Honourable Mention for his performance in the general rounds. Proceeding to Vienna, after again qualifying for the elimination rounds, the Deakin Law School met (successively) the University of Mainz (Germany), Cornell University (USA), University Paris Ouest Nanterre la Defense – Paris X (France), the University of Auckland (New Zealand) and Duke University (USA). Reaching the Final Argument, Ms. Blackie and Mr. Hall then met the National Law School of India before Professor Johan Erauw of CEPANI, Professor Ingeborg Schwenzer of the University of Basel, and Mr. Christopher Lau SC. After a tense final argument, and then having the pleasure of sharing our time at the Awards Banquet with our wonderful National Law School colleagues, Deakin University was declared the prevailing team – with Mr. Sam Hall also receiving an Honourable Mention for his performance in the general rounds.

From left: *Ms. Tess Blackie, Mr. Sam Hall, Mr. Stephen Dyason, Mr. Alex Garfinkel*

Deakin's results in both events would not have been possible without the generous support of our Vis Moot Alumni, who each and every year donate their time and facilities to judge in our two-month-long practice moot program. We also extend our thanks and appreciation to the other Australian teams participating in both Hong Kong and Vienna, amongst whom there is always a great sense of collegiality. On behalf of the Deakin Law School, I am pleased to sincerely congratulate our team, all eleven members having truly seized upon the great educational experience and opportunity that the Vis Moot provides.

John K. Arthur *
ACICA Associate

Australia - Hub for International Arbitration

Australia is an attractive venue for international commercial arbitration. It is a Model Law country and has been a party to the New York Convention for many years.

The commonwealth and state parliaments have recently legislated to improve the laws that govern commercial arbitration both internationally and domestically which has served to enhance Australia as an arbitration friendly venue.

International commercial arbitration is a consensual dispute resolution process for transnational commercial disputes.[1] As an important aspect of international commerce, it has in recent decades proved spectacularly successful and is recognised as the preferred method for resolving such disputes.[2] Its proliferation has led to the development of an "internationally recognised harmonised procedural jurisprudence", which combines the best practices of both the civil and common law systems, taking into account diffuse cultural and legal backgrounds and philosophies. The new jurisprudence is establishing a generally accepted procedure for dispute resolution which is of benefit to

1. This article was published in the April, 2014 AIDC E-newsletter, go to: http://www.disputescentre.com.au/Newsletters/april-2014-edition-7-volume-1. In its original version the article appeared in the November, 2013 edition of the Victorian Law Institute Journal (November 2013 87 (11) LIJ, p.40). It is an abridged and revised version of a paper delivered at the Law Institute of Victoria, Essentials Skills, CPD program, 14 March 2013, entitled *'An Introduction to International Commercial Arbitration'* available at www.gordonandjackson.com.au/online-library (posted 25.03.13)("Arthur"). See *The International Arbitration Act 1974: A Commentary*, M. Holmes, and C. Brown, Lexis Nexis, 2011; and generally, *Redfern and Hunter on International Arbitration, Student Edition*, by Redfern, Hunter, Blackaby and Partasides, 5th Ed., Oxford Uni. Press, 2009; *International Arbitration: A Handbook*, by Phillip Capper, 3rd Ed., LLP, 2004; *Court Forms Precedents and Pleadings – Victoria, Arbitration* title by D. Byrne, updated by D. Bailey, Lexis Nexis; Doug Jones, *International Commercial Arbitration and Australia*, 2-3 March 2007 available at: www.claytonutz.com/area_of_law/international_arbitration/docs/International_commercial_arbitration_and_Australia.PDF ("Doug Jones")
2. *TCL Air Conditioner (Zhongshan) Co Ltd v. The Judges of the Federal Court of Australia and Anor* (2013) 295 ALR 596; (2013) 87 ALJR 410; [2013] HCA 5 at [10]("TCL case"); The Hon. P. A. Keane, Justice of the High Court, (2013) 79 *Arbitration* 195-207; 2013 International Arbitration Survey, PWC and Queen Mary, University of London, School of International Arbitration. Available at: www.arbitrationonline.org/docs/pwc-international-arbitration-study2013.pdf and past years' surveys.

international arbitration, as well as modern jurisprudence generally.[3]

Arbitration (international and domestic) is readily distinguishable from other forms of ADR and has been described as "litigation in the private sector".[4] It is seen to offer many advantages over litigation including neutrality, confidentiality, expedition, party autonomy, flexibility in procedure, relative informality, the ability to choose the "judge", and transnational enforceability of awards. These perceived advantages are integral to its success.

The commonwealth and state parliaments have recently legislated to improve the laws that govern commercial arbitration both internationally and domestically which has served to enhance Australia as an arbitration friendly venue.[5] Superior courts have established specialist arbitration lists to facilitate the resolution of disputes by arbitration. The Australian International Disputes Centre (AIDC) has been established in Sydney as Australia's leading dispute resolution venue. Recently the Melbourne Commercial Arbitration and Mediation Centre (MCAMC) was launched as part of a national arbitration grid of excellence.[5] The recent High Court decision in the TCL case, confirming in emphatic terms the constitutional validity and juridical basis of the *International Arbitration Act* 1974 (Cth),[7] has significantly assisted in this process.

Arbitration agreement – the foundation of the arbitral process

The foundation of the arbitral process is the agreement by which the parties refer their disputes to arbitration. Once a binding arbitration agreement is entered into, the parties will be subject to it, so that if a dispute arises which falls within its scope, the dispute must be resolved by arbitration (if a party requires it). Unless settled by agreement, the arbitral process will culminate in an award capable of enforcement with curial assistance. The arbitration agreement's terms will bind the parties, as well as the arbitrator appointed pursuant to it.[8]

An essential quality of the arbitration agreement is that it is considered to be a contract independent of the contract in which it is contained. On this basis, the arbitral tribunal can rule on its own jurisdiction even if the underlying contract has been terminated or is set aside.[9]

An arbitration agreement will commonly deal with such matters as the types of disputes which fall within its terms, the seat of the arbitration (which will determine the *lex arbitri*), the law according to which the dispute will be determined (*the lex causa*), a set of procedural rules, the number of arbitrators and their appointment, and the language of the arbitration. Parties may decide to incorporate the rules of a recognised arbitration institution and adopt the institution as the appointing authority, or to proceed *ad hoc*.

3. Rt Hon. Sir Michael Kerr, *Concord and Conflict in International Arbitration,* (1997) 13 *Arbitration International* 122 at 125-6.
4. Sir John Donaldson in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd & Anor* [1984] 2 All E.R. 175 at 189 cited in, Doug Jones at p2
5. *International Arbitration Amendment Act* 2010 (Cth) and the new Commercial Arbitration Acts in the states which substantially enact the Model Law domestically; see, R. Kovacs "Putting Australia on the arbitration map", (2012) 86 LIJ 36.
6. For example, Arbitration List G of the Supreme Court of Victoria, and see "Arbitration law reform and the Arbitration List G of the Supreme Court of Victoria", by Hon Justice Croft, available on Supreme Court of Victoria website; in NSW, Commercial Arbitration List and see Practice Note No. SC Eq 9; in the Federal Court, see Practice Note ARB 1 - Proceedings under the *International Arbitration Act* 1974, and see "The Federal Court of Australia's International Arbitration List" by Hon. Justice Rares available on Federal Court website; The AIDC, established in 2010 with the assistance of the federal and NSW governments, houses leading ADR providers including the Australian Centre for International Commercial Arbitration, the Chartered Institute of Arbitrators (Australia) Limited, the Australian Maritime and Transport Arbitration Commission and the Australian Commercial Disputes Centre. See **www.disputescentre.com.au/.** The MCAMC is a joint initiative of the Department of Justice, Court Services Victoria, the Victorian Bar and the Law Institute of Victoria. See **www.mcamh.com.au/**
7. TCL case, see note 2 at [11], [12], [17], [29], [45], [81], [101]
8. See note 14; *Rizhao Steel Holding Group Co Ltd* (2012) 43 WAR 91; (2012) 287 ALR 315; 262 FLR 1; [2012] WASCA 50 at [165]–[166]
9. See note 14; *Rizhao Steel*

In Australia it is possible to use both international and local arbitral institutions. The major arbitration institutions, such as the ICC, LCIA; regionally, the SIAC, HKIAC, KLRCA, and CIETAC, and in Australia, the ACICA and ACDC, have recommended arbitration clauses, or the parties can devise their own.[10]

Scope of agreement

An issue that often arises concerns the *scope* of an arbitration clause – whether a particular dispute falls within its terms. If it does (in the face of opposition), the matter (or part) cannot be litigated in the courts. This issue will often arise when a court is asked to stay a court proceeding on the ground that the issues fall within the terms of an arbitration agreement.[11]

Arbitrability

A similar issue is the question of *arbitrability* which involves determining which types of dispute may be resolved by arbitration and which must go to court. This determination will be made initially by the arbitral tribunal, but may ultimately be made by courts of particular states applying national laws. Despite the principle of party autonomy, there are disputes which by their very nature must be determined by the courts, for example, insolvency, criminal proceedings, divorce, or registration of land or patents.[12]

International arbitration dependent on local laws

For international commercial arbitration to operate and be effective, the process must be supported by at least two bodies of national, or local, laws: first, the *lex arbitri*, which will give legal force and effect to the process of the arbitration; and second, national laws which enact or legislate for the enforcement mechanisms of the New York Convention (NYC).[13]

The NYC is the single most important factor explaining the success of international commercial arbitration. So far 148 countries have acceded to it. The Convention is primarily concerned with two matters:

- the recognition of, and giving effect to, arbitration agreements; and
- the recognition, and enforcement, of international (non-domestic) arbitral awards.

It achieves the first by requiring a court of a contracting state to refer a dispute which has come before it, and which falls within the scope of an arbitration agreement, to arbitration; and the second by enabling the successful party to an arbitration award to easily and simply enforce the award in any country which is a party to the convention in accordance with that country's arbitration laws.[14]

Model Law – a template arbitration law

The next most influential international legal instrument in the present context is the United Nations Commission on International Trade Law Model Law (UNCITRAL) on International Commercial Arbitration, commonly known as the *Model Law*. The Model Law is not legally effective on its own, but is simply a template for legislation for an arbitration law (a *lex arbitri*) which may be enacted by individual states.[15]

In Australia, the *lex arbitri* is the *International Arbitration Act* 1974 (Cth)(IAA). Its stated objects are, inter alia, to give effect to Australia's obligations under the NYC, as well as to give effect to the Model Law and the ICSID Convention. The IAA gives the Model Law force of law in Australia and cannot be excluded by the parties. The two principal matters addressed by the NYC are dealt with by the IAA.[16]

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10. International Chamber of Commerce, London Court of International Arbitration, Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, Kuala Lumpur Regional Centre for Arbitration, China International Economic and Trade Arbitration Commission, Australian Centre for International Commercial Arbitration, Australian Commercial Disputes Centre. Arbitration clauses which are inexpertly drawn may be flawed and inefficacious – so called "pathological" clauses.
11. under s.7(2)(b) IAA
12. Redfern and Hunter at [2.111]; [2.114].
13. Capper at p. 11ff. Five systems of law may apply to international commercial arbitration: Redfern & Hunter, at p. 165, cited in *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666; [2013] WASCA 66 [36]
14. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York on 10 June 1958 known as the *New York Convention;* Redfern & Hunter at p. 72; the 148 countries which have acceded to the NYC are the vast majority of countries in the world. On 16 April 2013 Myanmar also acceded to the NYC: www.newyorkconvention.org/new-york-convention-countries/contracting-states; Articles II and IV NYC
15. The 1985 Model Law was revised in 2006, available at **www.uncitral.org**.
16. First, the enforcement of foreign arbitration agreements; and secondly, the recognition, and enforcement, of foreign awards by s.8 and 9 IAA.

The jurisdiction to set aside an arbitral award is pursuant to Article 34(2) of the Model Law. Jurisdiction for enforcement, recognition and setting aside of awards is exercisable by the Federal Court, or if the place of arbitration is in a state or territory, the Supreme Court thereof.[17]

Procedure and evidence – how determined

If the parties to an international commercial contract have inserted an arbitration clause into their contract, which incorporates a set of arbitration rules, then these rules will govern issues of procedure and evidence, subject to the particular *lex arbitri* having mandatory provisions which govern procedural issues and which cannot be overridden by the parties or the arbitrator. Subject to this, the parties and the arbitrator will be able to adapt the chosen rules to suit the particular circumstances of a dispute.

Interim relief

Arbitration rules, such as the UNCITRAL Arbitration Rules, and applicable national laws (*lex arbitri*), such as those based on the Model Law, give the arbitral tribunal, and sometimes local courts, power to make interim orders in aid of the final award (which relief may be enforced in local courts).[18]

What remedies are available

While in general terms in international arbitrations, arbitrators can give the sorts of remedies and relief that national courts can, what an arbitral tribunal can give in a particular arbitration will depend on the arbitration agreement, including any arbitration rules the parties have agreed to, the *lex causa* and the *lex arbitri.* Awards that may be made include payment of a sum of money, declarations, specific performance, injunction, rectification, costs and interest.[19]

Awards, setting aside, enforcement and challenges

The making of a binding and enforceable award by the arbitral tribunal is the object and purpose – indeed, the culmination – of the arbitration process. For both the arbitrator and the parties (or at least the successful party), it is critical that this be achieved. For the award to be enforceable it must, inter alia, be reasoned, deal with all the issues – but only those issues – referred to arbitration, effectively determine the issues in dispute, be unambiguous, be intelligible, correctly identify the parties and comply with all essential formalities.[20]

17. S.18 IAA. For applications to enforce a foreign award, or set aside an award, see *Civil Procedure Victoria,* Lexis Nexis, at [II 9.04.05] ff. See also *Altain Khuder LLC v IMC Mining Inc* (2011) 276 ALR 733; (2011) 246 FLR 47; [2011] VSC 1; reversed on appeal in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717; (2011) 253 FLR 9; [2011] VSCA 248.
18. For example, freezing orders: Art 17(2)(c). Under the IAA. local courts provide assistance to the arbitration process in a variety of ways, including a request to refer a matter to arbitration (s 8). As to enforcement of interim measures in courts, see Art 17H.
19. Capper at pp 113-117; s to interest see ss. 25 and 26 IAA
20. Redfern & Hunter at p. 553ff; ibid, Capper at p. 118. Eg. Art 31 Model Law

The particular *lex arbitri* engaged will set requirements which an award must contain. The precise requirements for an award will principally be determined by the arbitration agreement (incorporating any arbitration rules) as modified by the *lex arbitri.*[21]

If the arbitral process is subject to some irregularity in procedure (and in a limited range of other circumstances), the award is liable to be set aside, or refused recognition or enforcement. As noted, the circumstances by which an award may be set aside are set out in Article 34 of the Model Law, and those on the basis of which it may be refused enforcement or recognition are contained in Article 36. The circumstances under Articles 34 and 36 are virtually identical.

The domestic situation – the uniform *Model Law* Commercial Arbitration Acts

The Standing Committee of Attorneys-General (SCAG) meeting on 7 May 2010 agreed to implement the model *Commercial Arbitration Bill* 2010 based on the Model Law as uniform domestic arbitration legislation. The previous legislative regime of uniform Acts in force in Australian states and territories had several marked differences to the Model Law. New South Wales was the first state or territory to enact the *Commercial Arbitration Act* 2010. The Victorian legislation, the *Commercial Arbitration Act 2011*, came into operation on 17 November 2011. Most other states and territories have now followed suit.[22]

Conclusion

International commercial arbitration has proved spectacularly successful in the postwar era and will no doubt continue to be so. Australia offers many attractions as a venue and seat for international commercial arbitration, including an adherence to the rule of law, an expert legal profession, a stable political system and courts that have "an excellent record for enforcing foreign arbitral awards".[23] Both internationally and domestically it is a Model Law country and has been a party to the NYC for many years. With the greater opportunities for trade and commerce on the international stage brought about by globalisation, and notably the rise of Asia, Australia is well positioned to be an important hub for international commercial arbitration.[24]

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21. Redfern & Hunter at para 9.114; ibid, Capper at p. 117ff
22. See, generally in relation to the new uniform domestic arbitration legislation, *Commercial Arbitration in Australia*, Doug Jones, 2nd Ed., Thomson Reuters, 2012.
23. Doug Jones, pp. 9, 18-19.
24. Doug Jones, see notes 22 and 23; and see note 2, The Hon. P. A. Keane.

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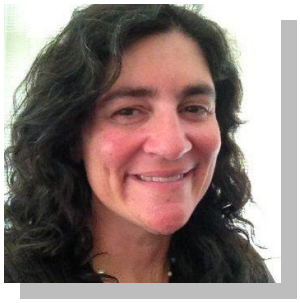

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Recovering Arbitration Costs Awards

One of the advantages of arbitration over litigation is the relative ease by which a party can seek to enforce a foreign arbitral award. This was demonstrated in the matter of *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited* [2014] FCA 130.

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The arbitral award gave effect to the payment agreement and arose from an arbitration that took place in London.

Section 8(2) and (3) of the *International Arbitration Act 1974* (Cth) enables enforcement in Australian State, Territory and Federal Courts, as if the award were a judgment or an order of the relevant Court, of foreign arbitration awards made:

- in countries that are signatories to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*; or
- in non-Convention countries at a time when the person seeking to enforce the award was domiciled or ordinarily resident in Australia or in a Convention country.

The applicant ("Coeclerici") is a Singaporean corporation and the first respondent ("GNC") is an Indian corporation. The second respondent ("Mr Jagatramka"), Chairman and Managing Director of GNC had guaranteed an obligation of GNC to pay an agreed sum to Coeclerici under a payment agreement.

The arbitral award gave effect to the payment agreement and arose from an arbitration that took place in London. GNC, and Mr Jagatramka ('the Respondents") sought to set aside the award but were unsuccessful before the English High Court, see *Gujarat NRE Coke Limited and Anor v Coeclerici Asia (Pte) Ltd* [2013] EWHC 1987 (Comm).

The Respondents each held shares in Australian corporations which owned or controlled two coal mines in Australia and were unsuccessful in their opposition to Coeclerici's application to the Australian Federal Court to enforce the award and an order was made to appoint receivers over the shares, see *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited* [2013] FCA 882.

The Respondents filed a notice of appeal challenging:

- findings that the Respondents had not been denied procedural fairness by the arbitrators;
- findings that the judgment of the English High Court gave rise to an issue estoppel, which precluded the Respondents from arguing in the enforcement proceeding that they had been denied a reasonable opportunity to present their case before the tribunal; and
- order appointing receivers.

and sought a stay of the enforcement of all the primary judge's orders.

A temporary stay was granted in relation to the appointment of receivers pending final determination of the appeal, which was conditional upon payment into court of the judgment debt, see *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCA 918

The appeal was dismissed with costs, see *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109, and the court subsequently made a lump sum costs order for the costs of the enforcement proceedings and ordered the appointed receivers to sell sufficient shares in order to discharge the judgment amounts, post-judgment interest and any costs orders made in the enforcement proceedings and subsequent appeal, see *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Limited* [2014] FCA 130.

This matter shows the effectiveness of the procedure provided under the *International Arbitration Act 1974* (Cth) where a foreign litigant has sought to enforce a foreign arbitral award in Australia against two other foreign litigants.

This matter concerned the enforcement of a judgment in the sum of US$8,804,336.42 (comprising US$8,500,000 Award principal and US$304,336.42 pre-judgment interest) and GBP12,232.85 (comprising GBP11,810.00 Award amount in respect of arbitration costs awarded and GBP422.85 pre-judgment interest on that amount) against parties who resisted every stage of the enforcement procedure.

Despite the large sums involved and the fact that an appeal in the enforcement proceedings had to be heard by the Full Federal Court, the final orders were made in under twelve months after the first application for interlocutory relief was heard in the enforcement proceedings in Australia and just over twelve months after the final arbitral award.

A similarly successful high-speed complex arbitration occurred in the leading domestic arbitration under the new UNCITRAL regime, *Larkden Pty Limited v Lloyd Energy Systems Pty Limited* [2011] NSWSC 268, [2011] NSWSC 1305, [2011] NSWSC 1331, [2011] NSWSC 1567 in which the parties arbitrated their dispute to hearing, costs awards and enforcement in approximately twelve months including four jurisdictional and enforcement decisions before the Supreme Court of New South Wales (in each of which decisions the arbitral decision was upheld by the Court). One of the authors was the arbitrator in that matter.

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Arbitration clauses and VCAT

The recent matter of *Subway Systems Australia Pty Ltd v Ireland* [2013] VSC 550 is an interesting decision. It was an appeal from orders made by the Victorian Civil and Administrative Tribunal whereby Senior Member Riegler found that VCAT is not a "court" for the purposes of s8(1) of the *Commercial Arbitration Act* 2011 ("CAA") and was not bound to refer the dispute to arbitration pursuant to s8 of the CAA and that VCAT had jurisdiction to determine the dispute.

The Parliament chose not to refer to VCAT in ss2(1), 6 and 8 of the CAA and as the Supreme Court noted, it is not open to the parties to agree that the functions provided for in s6 of the CAA could be performed by VCAT.

The Supreme Court granted leave to appeal, as required under s148(1) of the VCAT Act, on the basis that, amongst other reasons, the question regarding whether VCAT is a "court" for the purposes of s8(1) of the CAA was an important issue, confined to a question of law and not a fact-finding exercise which the legislature has deliberately entrusted to a specialist tribunal.

The CAA defines "the Court" to mean the Supreme Court (s2(1) CAA) and allows the parties to incorporate into an arbitration agreement a provision for the County Court or the Magistrates Court to have jurisdiction under the CAA for certain defined functions of arbitration assistance and supervision (s6(2) CAA).

Section 8(1) CAA obliges a "court" to refer the parties to arbitration when an action is brought in a matter which is the subject of an arbitration agreement, unless the agreement is null and void, inoperative or incapable of being performed.

Subway Systems Australia Pty Ltd ("SSA") submitted that due to the non-capitalisation of the word "court" in s8(1) CAA, the definition of "court" should not be limited to the Supreme, County and Magistrates' Courts as in s6 CAA, and should be construed to include VCAT.

SSA sought to rely on cases in which the reference to a "court" has been construed to include VCAT, but conceded that there were other cases in which the term had not been construed in that way.

The Irelands submitted that one must use the dominant legislative intention or "purposive" approach to determine whether VCAT should qualify as a "court".

In addition to the relevant authorities, the Supreme Court examined the international origin of most of the provisions of the CAA, the *Model Law on International Commercial Arbitration* ("Model Law") together with the relevant legislative extrinsic materials (documents of UNCITRAL and its working groups for the preparation of the Model Law), in addition to looking at the *International Arbitration Act* 1974 (Cth) and the *Interpretation of Legislation Act* 1984 to determine how the term "court" should be construed.

The Model Law uses the word "court" uncapitalised throughout its text, which the Supreme Court noted as being unsurprising as the Model Law is intended to be used in many countries with varying judicial systems. It was held that the provisions of the Model Law and the extrinsic materials sought to embrace the diversities in the judicial systems of the various States applying the Model Law rather than dictating which entities should be treated as a "court" and that it was the CAA which properly determines this issue.

The Parliament chose not to refer to VCAT in ss2(1), 6 and 8 of the CAA and as the Supreme Court noted, it is not open to the parties to agree that the functions provided for in s6 of the CAA could be performed by VCAT.

The Supreme Court held that the non-capitalisation of "court" in s8 of the CAA was necessary due to the specific definition given to "Court" in s2(1) and that "court" was used in s8 so as to include all the courts mentioned in s6, namely the Supreme, County and Magistrates' Courts but not VCAT.

The Supreme Court also considered the nature and functions of VCAT, which is to be "*a forum for speedy and inexpensive resolution of specific kinds of disputes"* (*Director of Housing v Sudi* [2011] VSCA 266 at [19]) and held that this supports the view that Parliament intended VCAT's jurisdiction to be exercised "*untrammelled by any mandatory provisions in favour of arbitration"*.

As the Supreme Court noted, parties may elect to commence proceedings in VCAT to take advantage of VCAT being a *"speedy and inexpensive forum"*, despite there being an arbitration agreement. A party who does not wish to have their dispute heard by VCAT is able to seek an order under s77 of the VCAT Act, to have the matter referred to an arbitral tribunal, as a more appropriate forum. Such an order may also be made by VCAT on its own initiative.

Accordingly, practitioners need to carefully consider the risk of VCAT becoming involved in disputes which may have been agreed to be determined by arbitration.

This article is a guide only and should not be used as a substitute for legal advice, readers should make their own enquiries and seek appropriate legal advice.

Sydney Arbitration Week

Following the success of the events last December of what became known as Sydney Arbitration Week, it will be held again this year in the week commencing 10 November 2014.

The ACICA / Business Law Section of the Law Council of Australia International Arbitration Conference (supported by all the arbitral institutions in the region) will be held on 13 November 2014 and GAR Live on 12 November. There will be a variety of other events held during the week.

Thursday 13 November 2014 – Sheraton on the Park, Sydney

Co-presented by ACICA and the Business Law Section of the Law Council of Australia, this Conference will form part of the Sydney Arbitration Week 2014.

Contact: carol.osullivan@lawcouncil.asn.au

Burning Issues in International Arbitration – An Asia-Pacific perspective

1. **Procedure**
   Are "best practices" an excuse for avoiding reform? What about best practices for:
   - exchanges of case;
   - disclosure;
   - factual and expert evidence.
2. **Interim relief – effectiveness and enforceability**
   The debate on interim relief has been overtaken by the debate on emergency arbitrators. Has interim relief proved ineffective? Are interim relief orders enforceable? What about interim relief in:
   - regional arbitration laws;
   - the rules of arbitral institutions;
   - the inter-relationship between court and arbitrator-ordered interim relief.
3. **Training and education of arbitration practitioners and arbitrators**
   What relationship should there be between education, training, and accrediation in:
   - universities and colleges;
   - arbitral institutions;
   - the CIArb.
4. **Alternative dispute resolution arbitration – is arb-med an option in the region?**
   Should mediation be a separate process?
   - arb-med and institutional rules;
   - what are the options, short of full-scale arb-med, for a pro-active tribunal;
   - regional developments in mediation.
5. **Investor state dispute resolution – the looking glass view**
   - Where will it be in 10 years?
   - What are the immediate challenges for countries in the region?

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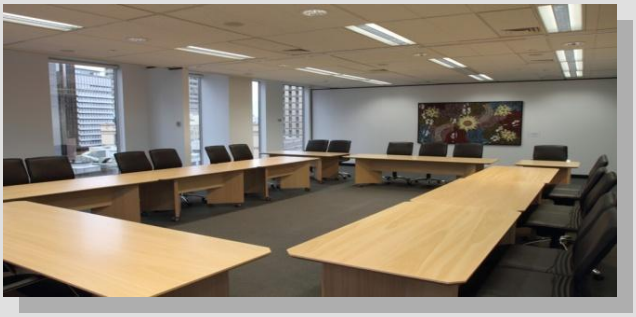

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ACICA

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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