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THE ACICA REVIEW

June 2015

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 2015

Alex Baykitch ACICA President

President's Welcome

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

New Board Members

I would like to congratulate Georgia Quick on her election as one of our three Vice Presidents and Khory McCormick and Ian Govey AM on their re-election as the other Vice Presidents. Ian was also the recipient of a Member of the Order of Australia for his services to the Law, well done Ian! Congratulations also to Tony Samuel on his re-election as Treasurer and to Doug Jones AO and David Fairlie on their re-appointment to the Executive.

I would like to acknowledge Frank Bannon of Clayton Utz and Andrew Stephenson of Corrs Chambers Westgarth who recently joined the ACICA Board.

ACICA is privileged to have the above individuals serve on the ACICA Executive and Board, all of whom are strongly committed to raising the profile of ACICA and Australia internationally.

ICCA 2018

Preparations are under way with committees being constituted, sponsorship packages being worked up and venues for social events being considered. ICCA 2018 promises to be an exciting event: stay tuned for further developments and news.

ACICA 30th Anniversary

On 5 May 2015, ACICA celebrated its 30 year anniversary. ACICA celebrated this milestone on 19 May 2015 with a speech by Chief Justice French AC of the High Court of Australia on the importance of ACICA. I would like to thank the former Presidents of ACICA for navigating the organisation over the past 30 years. Their dedication and hard work has been instrumental in raising ACICA's profile at home and globally.

Meeting with Attorney-General's Department

I recently met with the new Secretary of the Attorney-General's Department, Chris Moraitis PSM and other senior members of the department. I am pleased to report the new Secretary is very supportive of International Arbitration and is looking forward to working with ACICA in the years ahead. A special thank you to Ian Govey AM for facilitating this meeting.

Road Shows

ACICA has undertaken a number of road shows to date with a number planned for this year in the region and USA. If you would like to be involved please let Deborah Tomkinson or Samantha Wakefield know. We would be delighted to have you involved.

Alex Baykitch
President

Deborah Tomkinson ACICA Secretary General

Secretary General's Report

ACICA turns 30!

A succession of high profile Presidents and an active Board has seen ACICA achieve much in its 30 years to promote the practice of international arbitration in Australia and position the country as a viable seat for international commercial dispute resolution.

In May 2015 ACICA celebrated its 30th Anniversary. ACICA was established in 1985 as a not-for-profit organisation dedicated to the promotion and development of ADR in the Asia-Pacific and to advancing Australia's profile as one of the region's premier seats for resolving cross-border disputes. ACICA's first Board consisted of members of the Institute of Arbitrators Australia (now LEADR & IAMA), the Law Council of Victoria, the Australian Bar Association and the Commonwealth Attorney-General's Department.

A succession of high profile Presidents and an active Board has seen ACICA achieve much in its 30 years to promote the practice of international arbitration in Australia and position the country as a viable seat for international commercial dispute resolution. ACICA's first President, Mr Ron Fitch, was the then President of the Institute of Arbitrators Australia. He was followed by well-known arbitrator Mr AA (Toni) de Fina, who led ACICA for 18 years before passing the baton to his Vice President and international arbitrator, Dr Michael Pryles in 2004. Under Dr Pryles' leadership, ACICA released its first set of Arbitration Rules for administered arbitration in 2005 and launched the Australian Maritime and Transport Arbitration Commission (AMTAC) in 2007. Professor Doug Jones AO assumed the Presidency in 2008, spearheading ACICA's legislative reform agenda to assist the government with its reforms to the *International Arbitration Act 1974* (Cth). His Presidency also saw the opening of the Australian Disputes Centre in 2010, an update to the ACICA Arbitration Rules in 2011 and the confirmation by the government of ACICA as the default appointing authority under the amended *International Arbitration Act 1974* (Cth) in the same year.

ACICA now looks towards 2018, when it will host the International Council for Commercial Arbitration (ICCA) Congress in Sydney along with its New Zealand partner, the Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) who will host an add-on event in Queenstown following the conference.

At a cocktail event held to honour ACICA's anniversary, guest speaker the Honourable Chief Justice French of the High Court of Australia, congratulated ACICA on its achievements of the last 30 years, noting that the organisation is in a position to look forward with a considerable degree of optimism to enhancing Australia's participation as an important international service provider. Current ACICA President, Alex Baykitch, thanked His Honour for his words and raised a toast to past Presidents of the organszation and to the next 100 years of ACICA.

Chief Justice French speaking at the ACICA 30th Anniversary Cocktail function on 19 May 2015

Khory McCormick, Georgia Quick, Ian Nosworthy, the Honourable Justice Steven Rares, the Honourable Chief Justice James Allsop AO, Alex Baykitch, James Spigelman AC QC, the Honourable Justice Michael Ball, the Honourable Chief Justice Tom Bathurst AC, the Honourable Justice Lindsay Foster, John Wakefield, Michael Talbot, Ian Govey AM

Justin Rassi, Daisy Mallet, Jason Clapham, Jo Delaney, Peter McQueen

Frank Bannon, Ian Nosworthy, the Honourable Justice Lindsay Foster

Andrea Martignoni, the Honourable Justice Michael Ball

Georgia Quick, James Spigelman AC QC

Michael Talbot, Khory McCormick, Michelle Sindler

Alex Baykitch, Jason Clapham, Justin Rassi

Georgia Quick, Deborah Lockhart, Daisy Mallet, Jo Delaney, Julie Soars, Michelle Sindler, Deborah Tomkinson

Welcome Georgia Quick

Following the ACICA AGM in March, we welcome Georgia Quick as a new Vice President on the Executive team. Georgia has been involved with ACICA for many years as a Director and will be the first female member of the ACICA Executive. Our thanks go to Jim Delkousis for his support on the Executive team over the course of the last year and we look forward to continuing to work with him on the ACICA Board. As always we are grateful to all members of the Executive for their energetic commitment to ACICA.

ACICA Roadshows

ACICA had a busy start to 2015 with ***Roadshows*** run in the United States, India and United Arab Emirates.

On 3 February President Alex Baykitch led a road show in New York, hosted by Clifford Chance and supported by the International Centre for Dispute Resolution, the International Chamber of Commerce, the United Nations Commission on International Trade Law and the Australian Disputes Centre.

New York Roadshow

Two separate events were held in New Delhi and Hyderabad, India on 14 and 17 February, led by Vice President Khory McCormick. These events were run in cooperation with the International Centre for Alternative Dispute Resolution, India and the Australian Disputes Centre. Following the New Delhi event, ACICA and ***ICADR*** entered into a ***Cooperation Agreement*** aimed at the joint promotion of alternative dispute resolution procedures for the settlement of international commercial disputes.

India Roadshows

On 28 April, Prof. Doug Jones AO, ACICA Executive, led a successful roadshow in Dubai at the Dubai International Financial Centre.

Dubai Roadshow

ACICA Cooperation Agreements

In addition to the signing of an agreement with ICADR in India, ACICA also entered into a ***Cooperation Agreement with the Belgian Centre for Arbitration and Mediation (CEPANI)*** in May and a ***Memorandum of Cooperation with the Arbitrators' and Mediators' Institute of New Zealand (AMINZ)***, ACICA's host partner for ICCA 2018.

ACICA Prizes

On 30 March 2015, at the University of Canberra's Prize Ceremony, Ms Brooke West was awarded the ACICA prize for best achieving student in International Commercial Arbitration for 2014. Congratulations to Brooke on this fantastic achievement.

Sydney University held its annual Prize Giving Ceremony on 23 April 2015. ACICA congratulates Ms Arunima Lal on winning the 2014 ACICA Keith Steele Memorial Prize for the highest mark achieved in the postgraduate unit of study in International Commercial Arbitration.

ACICA at the APPEA Conference

In May ACICA attended the Australian Petroleum Production & Exploration Association (APPEA) Oil & Gas Conference and Exhibition in Melbourne. APPEA is the peak national body representing Australia's oil and gas exploration and production industry. Its annual conference highlights and defines the issues and challenges for the industry on a national and international level and offers an opportunity for information exchange and business development. This year's conference included keynote presentations, case studies, technical updates and panel discussions. Close to 200 exhibitors attended the conference, providing a great opportunity for ACICA to speak with industry about its current use of ADR and arbitration.

ACICA Partner Organisation: Introducing the Australian Disputes Centre

In May 2015 the Australian International Disputes Centre amalgamated its two brands (AIDC and the Australian Commercial Disputes Centre, (ACDC)) into one brand: the Australian Disputes Centre (ADC). One brand allows ADC to more efficiently and powerfully deliver on its vision of a world where businesses, government entities and communities in dispute have the knowledge, skills, resources and the commitment to utilise ADR processes appropriate to the nature of their dispute.

ADC to more efficiently and powerfully deliver on its vision of a world where businesses, government entities and communities in dispute have the knowledge, skills, resources and the commitment to utilise ADR processes appropriate to the nature of their dispute. ADC remains Australia's ADR collaborative hub providing a world-class venue and secretariat for ACICA, AMTAC and the Chartered Institute of Arbitrators (Australia) Branch (CIArb).

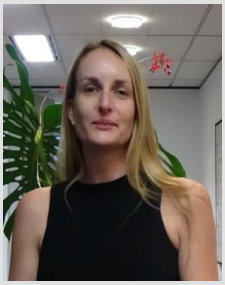
ADC is retaining the same web address: www.disputescentre.com.au and there is no change to its email addresses, phone or fax numbers or ABN. ADC continues to accommodate arbitrations, mediations and other ADR procedures as well as seminars and meetings in its modern and private hearing rooms at the Centre. Booking information can be found on the ADC website. In the first half of 2015 ADC has run its flagship mediator training course in both Fiji and in Canberra for the first time with great success. The training course program for the rest of the year can be accessed on the ADC website.

ACICA and ADC Volunteer Intern Program

We currently have a number of dedicated student interns working at the Centre from the University of NSW and Macquarie University. Nicholas Wilson, Matthew Mok and Christal Hewitt have each volunteered their time to experience alternative dispute resolution in practice.

Nicholas Wilson

Matthew Mok



Christal Hewitt

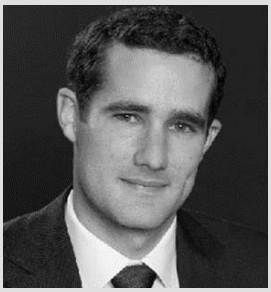
We welcomed Margaux Barhoum from France and Tina Park from Korea as international interns in January 2015. Tina was with us for three weeks, and Margaux for three months, assisting with a variety of initiatives. We thank all our interns for the fantastic contribution they make to the Centre.

Margaux Barhoum

Katlyn Kraus

Katlyn Kraus, who formerly interned with us, recently joined the ADC team as Case Manager. We are excited to have Katlyn on board.

Member Moves



Anthony Crockett

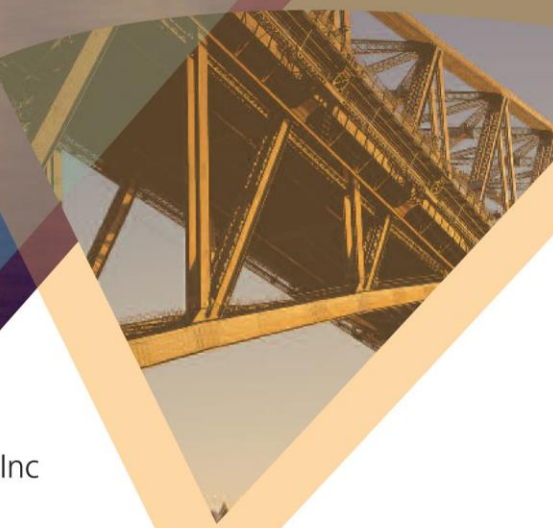
Anthony Crockett, AICA Associate has recently relocated from the Hong Kong office of Herbert Smith Freehills to Hiswara Bunjamin & Tandjung in Jakarta as International Counsel (on secondment from Herbert Smith Freehills). Anthony's focus in Indonesia is on international arbitration.

CIArb Diploma Course

The Australia branch of the Chartered Institute of Arbitrators held its Diploma in International Commercial Arbitration from 18-26 April 2015. The 9-day pre-eminent tertiary international course, which offers a prestigious globally recognised qualification, was well attended with close to 30 participants. A number of ACICA Board Members and Fellows presented sessions at the course.

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
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

ACICA

AMINZ

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

New ACICA Fellows, Associates and Mediation Panel Members

We welcome **ACICA Fellows**: Justin Hogan-Doran (NSW), John Sharkey (VIC), Barry Stimpson (Singapore), Jun Wang (Hong Kong), **ACICA Mediation Panel member** Jeffrey Sewell (NSW) and **ACICA Associates** Ramzy Mansour (NSW), Sara Rayment (NSW), Robert Heath (VIC).

A Sad Event

ACICA and its members were saddened to hear of the passing of Professor Priyatna Abdurassyid, Chairman of Badan Arbitrase Nasional Indonesia (BANI) Arbitration Center (Indonesia) on 22 May 2015. Our deepest condolences and thoughts are with Professor Priyatna's family, colleagues and friends at this sad time.

For those who had the pleasure to meet Professor Priyatna it was an honour to meet an Indonesian of such justified national prominence and personal and professional standing. Professor Priyatna had a personal record of significant national responsibility and contribution going back to the days of Indonesian independence and beyond. He was in many respects a national hero. He was often heard to commend Australia for being one of the countries which was quick to recognise an independent Indonesia. Professor Priyatna apart from his standing in the dispute resolution community was internationally and nationally recognised in many areas of legal learning and practice but particularly aerospace law for which he had a formidable reputation and long term passion. The room in which he regularly met dignitaries and friends at the BANI Arbitration Center was bedecked with photos and memorabilia reflecting his friendships and acquaintances with leading global figures across politics, law and the broader community. His death creates a great loss for not only Indonesia but in broader regional public and dispute resolution communities.

Khory McCormick
Vice President, ACICA

Global Legal Insights chapter on Australian International Arbitration published

ACICA Corporate Member Norton Rose Fulbright has contributed the Australia chapter for Global Legal Insights' publication on International Arbitration. A link to the Australia chapter can be found here: http://www.globallegalinsights.com/practice-areas/international-arbitration-/global-legal-insights---international-arbitration-1/australia. Provided with the kind permission of Global Legal Group.

Book Published

Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective has been published by Springer. The book, which is based on the successful Perth Conference held in May 2013 is edited by Professor Gabriël A Moens and Professor Philip Evans. The book, which costs 84,79 Euros, will be launched on 19 November 2015 during the Second Perth Arbitration Conference by the Hon. Christian Porter, Parliamentary Secretary to the Prime Minister. Information on this Conference is included in this issue of the ACICA Review.

Peter McQueen AMTAC Chair

AMTAC Chair's Report

19th International Congress of Maritime Arbitrators (ICMA) 2015 held in Hong Kong attracted 300 delegates from over 20 countries.

19th International Congress of Maritime Arbitrators (ICMA) 2015 Hong Kong, 10 to 15 May 2015

This Congress, which attracted 300 delegates from over 20 countries, was held in Hong Kong over 4 days with some 22 sessions each consisting of 5 speakers. Keynote speakers were Lord Phillips of Worth Matravers, the former President of the Supreme Court of the United Kingdom, the Hon. Sir Bernard Eder from the United Kingdom and Chief Justice Allsop of the Federal Court of Australia.

Peter McQueen, who was a member of the Topics and Agenda Committee, represented AMTAC at the Congress and was a moderator of a session. Doug Jones, Immediate Past President of ACICA, presented a paper on the maritime construction industry.

AMTAC Annual Address 2015-16 September 2015

This year's Address will be presented from Federal Court of Australia in Perth on 16 September 2015 and will be videocast around Australia immediately following the opening of the Annual Conference of the Maritime Law Association of Australia and New Zealand, which will take place in Perth between 16 and 18 September 2015.

The title of the Address, which will be presented by Associate Professor Kate Lewins of Murdoch University, is "A view from the crow's nest; maritime cases and the development of common law'.

Sydney Arbitration Week 23 to 27 November 2015 - AMTAC Seminar

As one of the Week's events AMTAC will convene a seminar entitled "Hot Topics for Maritime Practitioners", the date and time of which during that Week is to be confirmed.

Katherine Deves
Student

Enforcement of a foreign arbitral award – proper notice – dispute over termination of employment contract

Due to the Ladu's failure to comply with the Award within the stipulated period, IRD sought to enforce the arbitration award in the Australian federal court.

FACTS

The applicant, International Relief and Development (IRD) is a non-profit, non-governmental agency headquartered in Virginia, USA, providing humanitarian aid to communities in crisis, recovery and development. The respondent, Ladu, a dual resident of Australia and Southern Sudan, was employed under an Employment Agreement by the applicant to be the community project manager in Juba, South Sudan, for their programme and operations in the area. The Commonwealth of Virginia held jurisdiction over the Employment Agreement, notably any employment disputes were to be resolved via arbitration in Virginia at IRD's discretion.

Ladu reported directly to the South Sudan Country Director, Mr. Gueye, who discovered anomalies in the procurement of seeds from a local supplier, which fell under the scope of the respondent's purview. Gueye reported this to US headquarters in an email, instigating an internal review process that did not involve Ladu. The review revealed allegations of mismanagement of the programme and fraudulent appropriation of funds, and resulted in the termination of the respondent's employment.

On the day of his termination, Ladu returned to the IRD office with a representative of the South Sudan Relief and Rehabilitation Commission (SSRRC), a local governmental agency regulating the operation of NGOs within South Sudan. Subsequent to this meeting, SSRRC provided IRD with material containing information of Ladu's involvement in a commercial company, contradicting the terms of his Employment Agreement.

The resulting termination of Ladu's employment in April 2011 caused a dispute, and he immediately commenced court proceedings in the Juba local court in South Sudan against his employer for unfair dismissal. These proceedings resulted in a dismissal in July 2011, as the Juba Court had no jurisdiction over the Employment Agreement.

Concurrently, IRD began Arbitration Proceedings in Virginia US as per clause 14 of the Employment Agreement. Multiple attempts by various means were made by both IRD and the appointed arbitrator to contact the respondent and his local Juba legal representative, Dr. Mulla, regarding both the arbitration and the reinstatement of ill-gotten gains, costs and damages incurred. Neither Ladu nor Mulla responded to any communiqués regarding the arrangements, and subsequently did not participate in the Arbitration.

The result of the Arbitration was an award ex-parte in favour of IRD, registered as a judgment in the US District Court. In response, Ladu unsuccessfully and belatedly attempted to challenge the award. The decision was affirmed by US Fourth Circuit of Appeal, which then denied him a petition for rehearing.

Due to the Ladu's failure to comply with the Award within the stipulated period, IRD sought to enforce the arbitration award in the Australian federal court.

JUDGMENT

Kenny J held that the Federal Court of Australia under s 8(3) of the *International Arbitration Act 1974* (Cth) (IAA) court has the power to enforce a foreign arbitral Award. The right to refuse the Award is reserved if circumstances s 8(5) or s 8(7) of the IAA are determined to exist on the balance of probabilities to the satisfaction of the Court.

Points for Consideration

1. Was Ladu given proper notice of arbitrator and Arbitration Proceedings pursuant to s8 (5)(c)?
2. Was Ladu able to present his case in the proceedings: s8 (5)(c)?
3. Were the rules for natural justice breached in the enforcement of the arbitral award therefore contravening public policy: s8(7)(b) & (7A)(b)?

Case for Plaintiff

IRD submitted evidence that multiple attempts were made to contact the respondent and his legal representative, Mulla, via communications to various email addresses, documents hand-delivered to Mulla's office and documents furnished to local Juba court.

IRD counsel claimed that even if Ladu had failed to be given notice, an enforcement order for the Award was still within the discretion of the court. A variety of credible evidence was furnished to the court to prove that the defendant did breach the terms of his employment by participating in a commercial enterprise, and therefore the defendant did not have a defence concerning the matters arbitrated.

Witnesses for the plaintiff were found to be consistent, reliable and truthful; most of the evidence was determined to be credible being corroboratedby contemporaneous documented events and verifiable documentary records.

Case for Respondent

The respondent's case for opposing the award in the Australian Federal Court bore the burden of proof on the balance of probabilities.

The respondent, Ladu, claimed he did not receive proper notice of appointment of the arbitrator or of the proceedings in Virginia as per s 8(5) of the IAA, and asserted a breach of natural justice due to being denied the opportunity to present his case at arbitration, contravening s 8(7) of the IAA.

Ladu relied on submitted affidavits, his own testimony at trial, and evidence given via videoconference by Dr. Mulla and another witness, to prove he was not provided with sufficient notice. Kenny J considered Ladu's claim that he did not receive any of the following notifications via any of the below methods:

- A company email address where his involvement with the organisation at the time included Chairman, Managing Director, shareholder and main contact;
- Emails and personally delivered letters to his local Juba legal representative, Mulla (who Ladu claimed was not his authorised representative for the purposes of the arbitration)
- Documents filed with the local Juba court regarding the prior matter of unlawful dismissal.

Upon consideration, the court rejected the evidence provided, finding Ladu to be a dishonest and unreliable witness. Evidence submitted was determined to have been fabricated for the current court proceedings, with documents attempting to support his claim showing significant discrepancies that were explicated with improbable, disingenuous or non-credible justifications.

Under cross-examination, both of Ladu's witnesses were deemed to be unreliable, notwithstanding the limitations of testimony provided by videoconference. The first witness, an employee of the commercial enterprise Ladu was involved with, attempted to be truthful but it appeared he had been coached and contradicted statements put forward by the respondent. Evidence provided by second witness, Mulla, was rejected by the court due to a lack of candour and implausible explanations.

Decision

Therefore, based on the evidence, the Court:

- Rejected any claims by Ladu that he did not receive any communication regarding the appointment of the arbitrator or notice of the arbitration in the US from IRD or the arbitrator as required by s 8(5)(c) or s 8(7) of the IAA; but in fact it was most probable that the attempts to communicate with him had been successful;
- Determined it was implausible that IRD was unreasonable in contacting Mulla as a legal representative for Ladu in an attempt to communicate with him; and

- Noted that the respondent neither made allegations nor submitted evidence to establish that the making of the Award was induced by fraud or corruption (s 8(7A)(a)), which is contrary to public policy;
- Decided, based on Ladu failing to establish to the satisfaction of the court that he was not given proper notice, that therefore there was no breach of natural justice (within the meaning of s 8(7A)(b) of the IAA), but rather that it was a case of Ladu being notified and invited to participate in the arbitration but electing not to respond or participate;
- Decided that it was immaterial to the case currently before the court whether the plaintiff had a defence to the allegation in the arbitration proceeding, despite Ladu's claim that being unable to state his case was a breach of natural justice and contrary to public policy, because he had the opportunity to do so in the Virginia arbitration but elected not to participate.

Determination of the meaning "Proper Notice"

- Pragmatically, for the purposes of this case, Kenny J noted that the Court did not seek to determine "proper notice" under s 8(5); actual notice was sufficient, and acknowledgement of proper notice by the respondent was not required to be demonstrated by the plaintiff. This upholds decisions in previous cases that have come before the Australian courts, such as *Ugandan Telecom Ltd v Hi-Tech Telecom Pty Ltd No. 2* [2011] FCA 206.
- The principles of statutory interpretation for Australian statutes are applicable in determining the meaning of "proper notice". In this instance, by having regard to the objects of the IAA, with emphasis on the enforcement of arbitral awards as explicated in s 39 which states that international treaties should have a consistent interpretation, and determined in cases such as in *TCL Air Conditioner (Zhongshan)*; *Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83 at [75].
- Otherwise it would be an excessively technical application of Australian legal practice and procedure, repugnant to ordinary statutory interpretation methodology, and would contravene s 2D and s 39 of the IAA, as determined by Foster J in *Traxys Europe SA v Balaji Coke Industry Pty Ltd (No 2)* (2012) 201 FCR 535 at 551 [63].

IMPLICATIONS

Effect given to the New York Convention in Australia

The Ladu decision can once again give confidence to the international commercial community that Australia is willing to meet its obligations to enforce foreign arbitration awards under the New York Convention (Australia being empowered to do so under clause 8(3) of the IAA), as it has previously done in the cases of *Coeclericic Asia v Gujarat NRE Coke* [2013] FCA 882 and *Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited* [2014] FCA 636.

Benefits of Arbitration in Resolving Commercial Disputes

The decision establishes that arbitration is *"an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and the fact that awards are intended to provide certainty and finality",* as per the 2010 amendments to the IAA.

Consistency with Interpretation of Statute

Overly legalistic and technical interpretation by a court contravenes s 39 of the IAA. The court should take a pragmatic view of interpretation and should interpret a statute of an international agreement to be consistent with the meaning within the international treaty, unless stated otherwise.

Leon Chung
Partner, Herbert Smith Freehills (ACICA Board Member)

Edwina Kwan
Senior Associate, Herbert Smith Freehills

Australian courts take a uniform approach to the interpretation of the Model Law

In Cameron Australasia Pty Ltd v AED Oil Limited,[1] the Supreme Court of Victoria refused to set aside a domestic arbitral award on the basis that the applicant was unable to present its case and was denied procedural fairness. The full judgment can be found here. In this decision, the Court relied on international jurisprudence on the interpretation and operation of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**), most notably decisions from the courts of Singapore and Hong Kong. In doing so, this decision reaffirms the Australian courts' willingness to adopt an international best practice approach to the practice of commercial arbitration in Australia and in particular, to creating a unified approach to domestic and international commercial arbitration.

Background

In accordance with the terms of the Dispute Resolution Deed between Cameron Australasia Pty Ltd (**Cameron**) and AED Oil Limited (**AED**), an arbitration hearing was held in June 2014 in Melbourne, Victoria in accordance with the rules of the Institute of Arbitrators and Mediators Australia (**IAMA**).

The Tribunal published its reasons on liability and quantum in a Partial Final Award dated 17 December 2014 and a Final Award on 9 March 2015 finding that Cameron had breached its duty of care to AED.

The application to set aside

On 17 March 2015, Cameron applied to the Supreme Court of Victoria to have the awards set aside under subsections 34(2) of the *Commercial Arbitration Act 2011* (Vic) (**the Act**). Section 34(2) of the Act mirrors Article 34 of the Model Law and provides limited grounds upon which an arbitral award may be set aside by a court. Cameron's application to set aside the awards focused on two procedural rulings made by the Tribunal:

(i) Cameron sought to re-open the hearing 6 months after the hearing had concluded and amend its defence to dispute the existence of a duty of care it owed to AED. Cameron had previously voluntarily admitted the duty of care prior to the hearing. The Tribunal refused to re-open the hearing to allow Cameron to amend its defence and present submissions that it did not owe a duty of care to AED.

(ii) The Tribunal did not allow Cameron to rely upon the expert report of Mr Terrell in circumstances where he was not to be called as a witness by Cameron and would therefore not be available to give oral evidence or be cross-examined by AED.

1. [2015] VSC 163.

Relevant principles on applications to set aside awards

In determining the set aside application, the Court had regard to the international provenance of the Act, in particular section 2A which expressly states that the application of the Act is to promote practicable uniformity between the application of the Model Law to domestic commercial arbitrations and its application to international arbitrations.

Particular reference was made to the decisions of the courts of Singapore and Hong Kong, including the Hong Kong Court of Appeal's decision in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No1)*[2] where Tang V-P considered circumstances in which a Hong Kong Court would set aside an award under Article 34 of the Model Law. In that case, Tang V-P stated that "the Court will not address itself to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law."[3]

The principles governing the setting aside of arbitral awards set out in the Singapore Court of Appeal decision AKN v ALC[4] were also taken into account by the Court who referred to Menon CJ's comments that "just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere with the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases."[5]

In acknowledging that there are very limited grounds for curial intervention in setting aside an arbitral award, the Court relied on *Sauber Motorsport AG v Giedo van der Garde BV*[6] where the Victorian Court of Appeal confirmed that "courts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator 'dressed up as a complaint about natural justice'. Errors of fact or law are not legitimate bases for curial intervention."[7]

Affirming the approach taken by the Singaporean courts, Justice Croft stated that a setting aside application is "not to be abused by a party who, with the benefit of hindsight, wishes he had pleaded or presented his case in a different way before the arbitrator."[8] The Court noted that even if one of the grounds for setting aside an award is made out, the Court retains a discretion to decide whether the award should be upheld

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1. [2012] 4 HKLRD 1.
2. [2012] 4 HKLRD 1.
3. *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* (in liq) (No1) [2012] 4 HKLRD 1 at 7 [7].
4. [2015] SGCA 18.
5. *AKN v ALC* [2015] SGCA 18, [37] - [39].
6. [2015] VSCA 37 (12 March 2015).
7. *Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37 (12 March 2015), [8].
8. *Triulzi Cesare SRL v Xingyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at 134-5 [67*] citing BLC v BLB* [2014] 4 SLR 79.

or set aside, but consistent with the approach of the Federal Court of Australia in *TCL Air Conditioner (ZhongShan) Co Ltd v Castel Electronics Pty Ltd*, no award should be set aside unless real unfairness and real practical injustice has been shown to have been suffered by a commercial party in the conduct and disposition of a dispute in an award.[9]

Set aside application

'Unable to present its case' ground

The first ground relied upon by Cameron in the set aside application was that the Tribunal did not permit it to present part of its case. Specifically, that Cameron was not able to present its case that it did not owe AED a duty of care in tort to take reasonable care.

The basis for this argument was that prior to the arbitration hearing in reliance on the decision of the New South Wales Court of Appeal in *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd*[10] (**Brookfield**), the Cameron legal team advised Cameron to admit the existence of a duty of care that it owed to AED. In the Brookfield decision, the Court of Appeal found that a duty of care existed between a builder of strata title apartments and the Owners Corporation. Cameron's legal team considered that the facts were analogous to the dispute between Cameron and AED and advised Cameron that they would have no persuasive answer to the asserted duty of care by reason of the law as stated in Brookfield.

As a result of Cameron's admission of the duty, AED expressly abandoned its contract claim on the first day of the hearing.

On 8 October 2014, before the Tribunal delivered the award, the High Court of Australia delivered judgment in the appeal from the Court of Appeal decision in Brookfield. In the High Court decision, *Brookfield Multiplex Ltd v Owners – Strata Plan No 61288*[11] (**Brookfield Multiplex**) the High Court rejected the statement of law with respect to when a duty of care will exist in a claim for pure economic loss and held that the builder did not owe a duty of care to the Owners Corporation.

Following the High Court's decision in Brookfield Multiplex, Cameron sought to re-open its case on the limited issue of whether Cameron owed AED a duty of care. In response, AED submitted that Cameron was able to, and did, present its case that it did not breach the duty of care in tort during the hearing and it was no part of Cameron's case that it did not owe a duty of care in tort to AED. This was because prior to its express admission of the duty, Cameron had pleaded no more than a non-admission. The Court agreed with this position and noted that Cameron adopted this position knowing that at the time of making the concession, that the High Court had granted special leave to appeal in the Brookfield case.

In rejecting this ground to set aside the awards, the Court noted that Cameron's application challenging the Tribunal's ruling was in fact of the nature of a merits appeal, an appeal on a question of law. Moreover, the Court found that there was no basis for suggesting that Cameron was denied a reasonable opportunity of presenting its case to the Tribunal in seeking to re-open the hearing, or that there had been some failure to accord Cameron procedural fairness or natural justice.[12]

Procedural decision to refuse to allow reliance on the report of Terrell

The second ground relied on by Cameron to set aside the awards was that the Tribunal breached the terms of the agreed arbitral procedure in refusing to permit Cameron to put Terrell's expert report into evidence which resulted in prejudice to Cameron.

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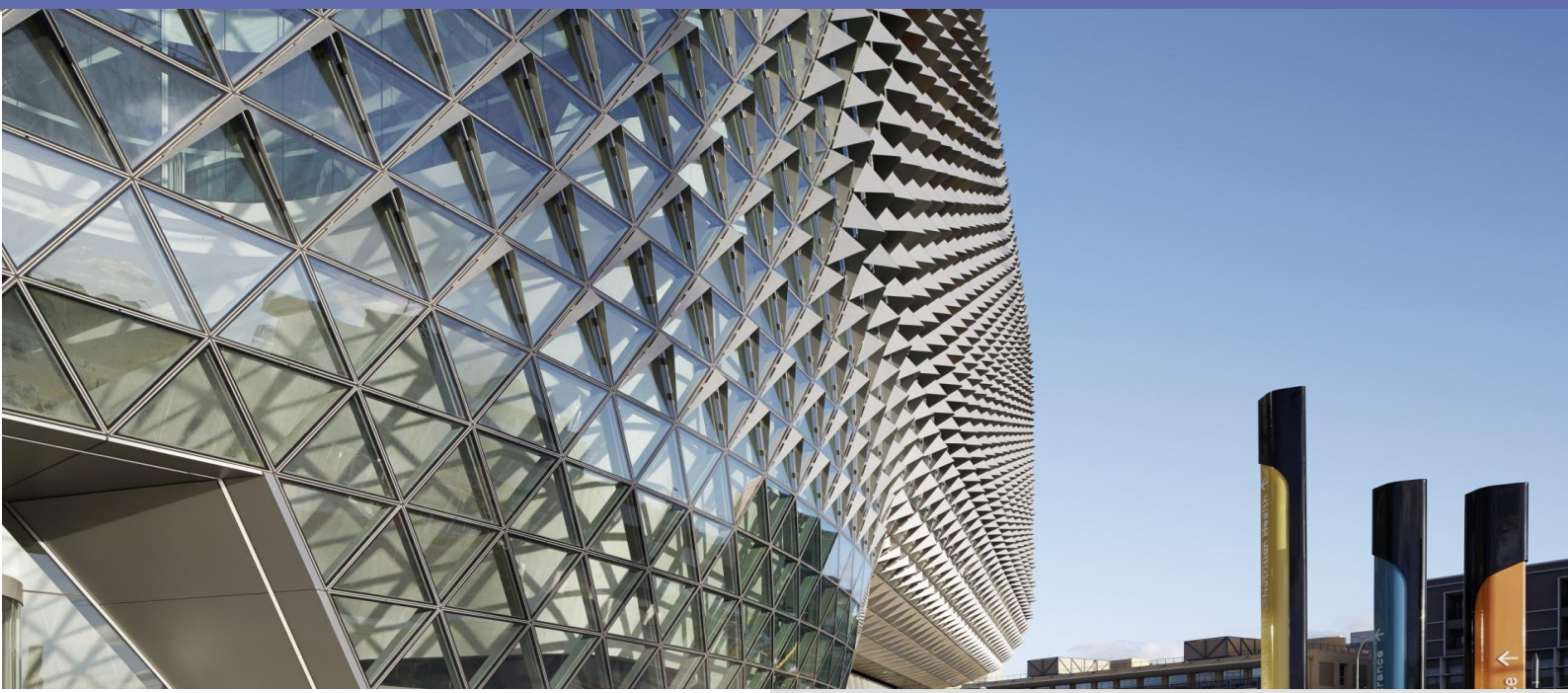
9. *TCL Air Conditioner (ZhongShan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387 at 415 [111].
10. (2013) 85 NSWLR 479.
11. (2014) 88 ALJR 911.
12. [2015] VSC 163 at [49].



In determining this issue, the Court noted that the terms of the arbitration procedure gave the Tribunal wide discretion to conduct the arbitration in such a manner as it considered appropriate and that minor breaches of any procedure would not result in an award being set aside.[13] The Court affirmed the approach in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq)*[14] that provided that a person seeking to set aside an award will either need to show that he or she has been prejudiced, or is reasonably likely to have been prejudiced by the arbitrator's conduct.

Justice Croft rejected this second ground of challenge stating that it was, in substance, "an appeal against a ruling of the Tribunal 'dressed up' as a breach of the agreed arbitration procedure" seeking to attract the operation of the provisions of section 34 of the Act.[15]

Comments

This decision confirms the Australian courts' intention to interpret the Model Law with "a degree of international harmony and concordance of approach to international commercial arbitration… by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand"[16]. Moreover, the decision endorses the uniformity of approach between the domestic and international arbitration regimes in Australia and demonstrates that the Australian courts will have regard to the application of the Model Law to domestic arbitrations in line with its application to international arbitrations.

13. [2015] VSC 163 at [53].
14. [2012] 4 HKLRD I at 38 [105].
15. [2015] VSC 163 at [59].
16. TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 311 ALR 387 at 405 [75].

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Racing through Arbitration and Court Enforcement Processes

The case of *Sauber Motorsport AG v Giedo Van Der Garde BV* demonstrates the benefit of an accelerated arbitration process as well as the efficiency of the Australian courts to enforce an arbitral award in urgent circumstances.

Arbitral Proceedings

In 2014, a dispute arose between Giedo van der Garde BV (**GVDG BV**), an entity established to manage the interests of race driver Giedo van der Garde, and Sauber Motorsport AG (**Sauber**). In June 2014, Sauber had agreed that the Dutch driver would drive for Sauber in 2015. In early November 2014, Sauber reneged on that agreement, signing Marcus Ericsson and Felipe Nasr (the **Other Drivers**) instead.

The dispute was referred to arbitration under the Swiss Rules of International Arbitration in accordance with the arbitration agreement between GVDG BV and Sauber. The seat of the arbitration was Geneva. The agreement was governed by English law.

In November 2014, an emergency arbitrator issued an interim injunction restraining Sauber from taking any action that would deprive van der Garde of the opportunity of participating in the 2015 season. The dispute was heard by Mr Todd Wetmore, acting as sole arbitrator. The parties agreed an accelerated timetable with a two day hearing in order for a decision to be rendered before the commencement of the 2015 Formula One season at Albert Park in Melbourne on 15 March 2015. Mr Wetmore issued a partial award (final for the purposes of enforcement proceedings) on 2 March 2015 (**Award**).

The pertinent order in the Award required Sauber to "refrain from taking any action the effect of which would be to deprive Mr van der Garde of his entitlement to participate in the 2015 Formula One season as one of Sauber's two nominated race drivers" (**Order**).

Supreme Court Proceedings

On 5 March 2015, GVGD BV and van der Garde applied to the Victorian Supreme Court to enforce the Award as if the Award was a judgment or order of that court pursuant to the *International Arbitration Act 1974* (Cth) (**IAA**). Sauber challenged enforcement of the award, arguing that enforcement should be refused because:

(a) the Award dealt with matters not contemplated by, or not falling within the terms of, the submission to arbitration, and further or alternatively, it decided matters beyond the scope of the submission to arbitration, because the arbitrator proceeded on the basis that van der Garde (as opposed to GVDG BV) had a personal contractual right enforceable against Sauber (s 8(5)(d) of the IAA);

(b) enforcement of the Award would be contrary to public policy because (s 8(7)(b)):

i. if Sauber complied with the orders and allowed van der Garde to drive, that conduct could involve compromising safety, training, insurance and other such requirements (one factor was that van der Garde did not have a "super-licence" required for F1 drivers to race);

ii. there was a breach of the rules of natural justice (s 8(7A)(b)) because the arbitrator considered a contractual relationship between van der Garde and Sauber, which had not been argued by either party, and because the Other Drivers were not given the opportunity to be heard at the arbitration;

iii. the Order is vague and uncertain as Sauber contends it cannot ascertain precisely what action it must do or refrain from doing; and/or

iv. enforcement of the Order in the form sought would be futile as it does not oblige Sauber to take any positive action and, in any event, because Sauber is not able to arrange a car for van der Garde to drive in time for the Australian Grand Prix (scheduled less than a week after the court hearing);

(c) the Other Drivers submitted that the matter was not capable of settlement by arbitration because they were not joined as parties or otherwise involved in the arbitration (s 8(7)(a)).

Justice Croft issued his decision on 11 March 2015, two days after the hearing. He enforced the award, rejecting all of Sauber and the Other Drivers' arguments.

Award beyond the scope - s 8(5)(d) of the IAA

Emphasising that a challenge to enforcement is not a review of the merits of the award, Justice Croft considered that the dispute was submitted to arbitration on the assumption that the agreements between GVDG BV and Sauber was for the purpose of facilitating van der Garde's role as a driver for Sauber. Accordingly, the arbitrator's finding in relation to van der Garde's personal contractual interest was not beyond the contemplation of the parties or the scope of the submission to arbitration.

Contrary to public policy - s 8(7)(b) of the IAA

With respect to the legality and safety argument, Justice Croft held that the Court would not contemplate that compliance with the orders would involve compromising safety, training, insurance and other like requirements. If there were practical issues in complying with the Order, Sauber could apply to the Court for assistance. The Court also noted that the Order affected the whole of the 2015 Formula One Season, not just the Australian Grand Prix occurring in the next few days.

The argument that there had been a breach of natural justice failed because the rules of natural justice in the context of the IAA are confined to the parties to the arbitration agreement. There could be no breach of natural justice brought about by the non-involvement of non-parties to the arbitration agreement.

The assertion that the Order was vague or uncertain did not gain traction as Justice Croft remarked that the Court is always available to assist where Orders give rise to any doubt or difficulty at the request of either party.

As to whether the Order is futile, Justice Croft noted that the utility of the Orders sought in the arbitral proceedings was clearly in the minds of the parties and the arbitrator. It is therefore not an issue for the enforcing court to assess. Doing so would be a review of the merits of the Award which is not permitted under the IAA.

Non-arbitrability - s 8(7)(a) of the IAA

The Other Drivers argued that the dispute was not capable of settlement by arbitration because of their non-involvement despite the potential for their interests to be prejudiced. Justice Croft emphasised that the concept of non-arbitrability is not concerned with whether or not non-parties are provided with an opportunity to be heard. Rather, it applies to specific matters where the courts have exclusive jurisdiction for reasons of public policy (such as certain intellectual property, competition and insolvency matters).

For these reasons, Justice Croft concluded that an order in the same terms of the Order in the Award should be made to enforce the Award.

Court of Appeal Proceedings

The day after Justice Croft handed down his decision, Sauber sought leave to appeal to the Victorian Court of Appeal making a number of submissions that the judge erred in his findings and in law.

Initially Sauber sought leave to appeal with any appeal to be held after the Australian Grand Prix. The Court of Appeal did not consider that approach to be in the interests of justice and directed that if leave be granted, the appeal was to be argued in full on the same day, which is what happened.

The Court found that the trial judge did not err in making the orders and dismissed the appeal.

A noteworthy observation in the appeal judgment is that for an award to be contrary to public policy because of a breach of natural justice, real unfairness and real practical injustice must be demonstrated. Further, the Court noted that courts should not involve themselves in any consideration of the merits of the arbitral award that is "dressed up as a complaint about natural justice" (referring to the decision of the Full Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387).

Although the Order was upheld, Sauber indicated that it did not intend to comply. Accordingly, on 13 March 2015, GVDG BV filed contempt of court proceedings against Sauber. This stoush was to be heard before a special sitting of the Victorian Supreme Court on Saturday 14 March 2015. However, the matter did not proceed on Saturday as the parties reached a settlement pursuant to which van der Garde agreed not to race in the Australian Grand Prix on 15 March 2015. Negotiations continue in relation to his participation in the remainder of the 2015 Formula One season.

Despite van der Garde not participating in this track race, this case is an example how an application to enforce an arbitral award can race through the Australian legal system in a timely manner.

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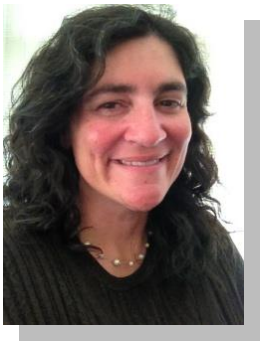

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The Enforceability of Mediation Settlement Agreements

The Court's analysis of the relevant authorities lead to the conclusion that there are at least three categories of accords: mere accord executory, accord and satisfaction and accord and conditional satisfaction.

In a unanimous decision of Meagher JA, Leeming JA and Sackville AJA in the Court of Appeal Supreme Court New South Wales the decision of *Jingalong Pty Limited v Todd* [2015] NSWCA 7 examined whether a Heads of Agreement, drafted as a mediation settlement agreement, constitutes a binding and enforceable contract.

Jingalong sought to rely on the settlement agreement to defeat claims made by Todd (and a second Respondent Pernice) that Todd held an interest in certain real property for which Jingalong was the registered proprietor.

At first instance (*Todd v Jingalong Pty Ltd* [2014] NSWSC 362 at [82]), Kunc J held that the settlement agreement was an accord executory which was unenforceable, "giving rise to no new rights and obligations pending performance".

Kunc J found there had been no performance as Todd had not complied with the terms of the settlement agreement and that the settlement agreement did not prevent Todd or Purnice from pursuing their pre-existing causes of action against Jingalong with respect to the real property, which were ultimately upheld by Kunc J.

The unanimous decision of the Court of Appeal was in accord with Jingalong's argument that the settlement agreement was binding and enforceable and operated to satisfy the claims of Todd and Pernice against Jingalong.

The settlement agreement was signed by Todd, Pernice and William Cameron, on his own behalf and on behalf of Jingalong at the conclusion of the mediation. However, Todd subsequently decided that he did not want to comply with the settlement agreement and failed to attend the completion of the settlement agreement.

Jingalong subsequently served a notice to complete and failing Todd's failure to comply with the notice, entered judgment in favour of Jingalong against Todd in accordance with the terms of the settlement agreement.

In an amended defence, Jingalong pleaded, amongst other issues, that Todd was barred from continuing the proceedings in light of his failure to comply with the settlement agreement.

The Court's analysis of the relevant authorities lead to the conclusion that there are at least three categories of accords: mere accord executory, accord and satisfaction and accord and conditional satisfaction.

The Court held that due to the availability of a number of alternative forms of accords, an analysis of the construction of an agreement should not be based on pre-determined categories of accords. The agreement should construed in accordance with accepted principles of construction, focusing on what the parties have agreed, rather than categorising the agreement as an accord and satisfaction, an accord executory or some other kind of accord.

The Court concluded that the settlement agreement did satisfy any cause of action available to Todd or Pernice against Jingalong and Pernice's cause of action against Todd and therefore allowed the appeal, with costs of the appeal ordered in favour of Jingalong.

As Jingalong had not formulated a claim for specific performance, in order to comply with the requirement to completely and finally determine all matters in controversy between the parties, the matter was referred back to the Equity Division for further hearing of Jingalong's claim for consequential relief, with the costs of the proceedings in the Equity Division to be determined in light of the final orders made.

It is important to note that the Court highlighted the importance of construing the settlement agreement and any drafting anomalies having regard to the fact that it would have been prepared after a period of intensive negotiation, under urgent time pressures and without the parties necessarily having the opportunity to consider successive drafts.

Parties entering into mediation settlement agreements must ensure that they are satisfied with the terms. It cannot be assumed that even though the mediation itself is non-binding, any settlement agreement entered into, following a mediation, will be unenforceable.

TIPS

- Practitioners need to carefully consider the terms of any executed settlement at mediation
- Short time frames and pressure points at mediation need to be carefully managed
- Proposed settlement terms should be prepared, considered and possibly distributed before the mediation

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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.

Bronwyn Lincoln
Partner, Herbert Smith Freehills (ACICA Fellow)

The enhancement of Australia's jurisprudence in arbitration law – a brief look at the Supreme Court of Victoria's recent approach to subpoenas

A number of developments over the past five years have, in a practical sense, contributed to the promotion of Australia, and more specifically, Victoria, as a place for international arbitration

The move began with the 2010 amendments to the *International Arbitration Act 1974* (Cth) (**IAA**) which brought Australia into line with best practice around the world. This built on the re-launch of the Australian Centre for International Commercial Arbitration (**ACICA**) some years earlier, including the publication of up to date arbitration rules and the creation of a panel of arbitrators with wide reaching expertise in international commercial arbitration.

In March 2014, a joint initiative of the Victorian Department of Justice, Court Services Victoria, the Victorian Bar and the Law Institute of Victoria, saw the opening of the Melbourne Commercial Arbitration and Mediation Centre in the court precinct in Melbourne CBD.

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The Arbitration List of the Supreme Court of Victoria commenced operation on 1 January 2010 managed by Justice Croft. In December 2014, the Supreme Court (Chapter II Arbitration Amendment) Rules 2014 (**Rules**) came into operation, providing practitioners with a clear and comprehensive guide to the court's support and assistance to commercial arbitration, both domestic and international.

This article looks at two recent decisions of the Victorian Supreme Court under the Rules in relation to the issue of subpoenas and the contribution they make to the developing jurisprudence in this jurisdiction.

Chief Executive Office of the Australian Sports Anti-Doping Authority v 34 Players and One Support Person [2014] VSC 635

Within days of the coming into effect of the Rules in Victoria, application was made to the Supreme Court of Victoria for the issue of a subpoena requiring attendance for examination before the AFL Anti-Doping Tribunal (**tribunal**) and the production of documents for the tribunal proceedings. The application, made pursuant to s 27A of the Commercial Arbitration Act 2011 (Vic) (**CCA**), was heard by Croft J over four days. The

Key question before the Court was whether s 27A of the CAA had application in relation to the tribunal, specifically, whether in fact the tribunal was an *arbitral tribunal* and whether the proceedings before it were a *domestic arbitration.*

There was evidence before the Court by way of affidavit, that the tribunal had given permission to both the Chief Executive Office of the Australian Sports Anti-Doping Authority and the Australian Football League to make application to the Court for subpoenas. However, this permission was given pursuant to s 27A of the CAA, and, as Croft J noted:

> *A fundamental prerequisite to invocation of powers such as those conferred by s 27A is, patently, that there must be an arbitration, an arbitral tribunal, in support of which any subpoena is issued under these provisions.*

Justice Croft delivered judgment *ex tempore* at the conclusion of the hearing. His Honour found that the proceedings before the tribunal were not arbitration proceedings and that even if they were so, they are not to be characterised as *commercial arbitration proceedings* to which the CCA applies. His Honour found further that there were no proceedings provided for in any other legislation which might be properly characterised as commercial arbitration proceedings attracting the operation of the CCA. The application for the subpoenas was therefore dismissed with a finding that *the provisions of s 27A cannot be invoked by the applicants.*

The published reasons provide a comprehensive analysis of the jurisdiction of the court, the scope of the CCA and the characteristics and hallmarks of arbitration and 'commercial arbitration'. His Honour also examines the provenance of provisions of the CCA which are based on the UNCITRAL Model Law on International Commercial Arbitration.

It is beyond the scope of this article to provide a full analysis of his Honour's reasoning, however it is interesting to note the extent to which an application seeking the assistance and support of the Court for the obtaining of evidence for tribunal proceedings can provide an opportunity for the Court to clarify the scope and application of the domestic arbitration regime (drawing upon principles long established in global international arbitration).

Esposito Holdings Pty Ltd v UDP Holdings Pty Ltd [2015] VSC 183

A second case involving an application under the IAA for issue of subpoenas for the purpose of an international commercial arbitration arose earlier this year. The applicant, Esposito Holdings Pty Ltd (**Esposito**), sought the issue of subpoenas against four entities; none of the entities were party to the arbitration proceedings. The application was made following a grant of leave by the tribunal in accordance with s 23 of the IAA which provides, inter alia, that a party may only apply to a Court for a subpoena in support of arbitration commenced pursuant to an arbitration agreement *with the permission of the arbitral tribunal conducting the arbitral proceedings*.

In determining the approach of the Court to the application before it, Croft J, noting that the corresponding provisions of the domestic legislation were derived from the international legislation, cited with support his Honour's observations and findings in *ASADA*, stating, inter alia, that:

> *… it is, in my view, clearly inappropriate for the Court, in an application under s 27A of the … [Commercial Arbitration Act 2011] by a party to obtain subpoenas, to embark upon a process which would, in effect, "second guess" the arbitral tribunal which has already given permission for the application to obtain a subpoena under these provisions. It is quite clear from the provenance of this legislation, internationally and domestically, that the emphasis sought to be achieved by the legislature is court assistance and support for arbitral processes and not "heavy handed" intervention or, in effect, duplication of the functions of the arbitral tribunal.*

His Honour also referred to the observations of Beech J of the Federal Court of Australia in *Alinta Sales Pty Ltd v Woodside Energy Ltd* [2008] WASC 304, observations cited by the arbitral tribunal in considering whether to grant permission for the application to the Court for the issue of the subpoenas. In that case, Beech J, in considering an application for leave to issue a subpoena under the *Commercial Arbitration Act 1985 (WA),* set out the legal principles requisite for the grant of leave drawn from a number of earlier authorities, including *Apache Northwest Pty Ltd v Western Power Corporation* (1998) 19 WAR 350, *Stanley v Layne Christensen Co* [2004] WASCA 50 and *Commonwealth of Australia v Albany Port Authority* [2006] WASCA 185.

The key element in an application of this kind is *a legitimate forensic purpose*, meaning that the documents or class of documents sought through the proposed subpoena are *apparently relevant,* but the threshold for *apparent relevance* is low so that it is sufficient to show that the document or class of documents *gives rise to a line of enquiry relevant to the issues before the trier of fact*. Relevance is to be assessed by reference to the issues in the arbitration. Next, it is important to take into account that relevance may be difficult to assess before trial and ultimately it is up to the tribunal to determine whether a document is relevant. Beech J emphasised here that *a narrow view should not be taken as to the legitimate purposes of a subpoena* and that there is no requirement that a party be in possession of evidence before issue of a subpoena to avoid *the stigma of fishing*.

Finally, the subpoena must be in the proper form with sufficient identification of the documents or class of documents sought.

Justice Croft concluded that it was reasonable to issue the subpoenas (noting in the judgment the decision of the applicant for the subpoenas to press its application only against one named entity), and in doing so, endorsed the view expressed by the tribunal that:

> *… the determination of an application for permission is not to be treated as a de facto hearing of the application to the Court for the issue of a subpoena. Parliament has given that role to the Court not to the arbitral tribunal. I see no support in the language of s 23 for any conclusion that the application to the court proceeds in the nature of a merits review of the decision of the tribunal.*

Justice Croft also heard an application for security from the recipient of the proposed subpoena. In considering the application, his Honour noted that there was no evidence before the Court as to the financial capacity of the party seeking the issue of the subpoena. His Honour formed the view, pursuant to R 9.06(4) of the Rules, that security ought to be provided in this case. Whilst his Honour had expressed the view that such security might be provided by a bank guarantee where it was difficult to estimate the compliance costs, an order was ultimately made with the agreement of the parties for the payment of a sum into the bank account of the solicitors acting for the party seeking the subpoena (this sum to be held in accordance with Court orders).

Concluding observations

The legislative framework in place in Australia and in its States and Territories to regulate domestic and international commercial arbitration is consistent with world benchmarks. In Victoria, the Arbitration List operating in the Supreme Court, the publication by the Supreme Court of the Rules in December 2014 and the opening of the Melbourne Commercial Arbitration and Mediation Centre each enhance that jurisdiction as an arbitration hub and a key player in the promotion of Australia as a place for arbitration. But physical premises and an effective regulatory regime will not alone establish Melbourne and Victoria on the national and global map; these elements must be combined with a deep and consistent jurisprudence in the field of arbitration and international dispute resolution. The two cases reviewed above demonstrate both Victoria's progression on that front and the ongoing support of the courts to both domestic and international commercial arbitration as an accepted (and secure) form of dispute resolution in parallel with traditional litigation.

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ILA International Commercial Arbitration Committee Explores Confidentiality and Implied Powers

The Committee's report on Confidentiality surveys current law and practice to test the assumption commonly held by parties that their international arbitration proceedings are confidential.

Can users of international commercial arbitration safely assume the process is confidential? Do international arbitrators possess "inherent powers" beyond what is specified in the arbitral rules? These are two topics recently examined by the International Commercial Arbitration Committee of the International Law Association (ILA), and summarised in this article, the original version of which was published on *ILA Reporter,* the new official blog of the Australian Branch of the ILA.[1]

1. The International Commercial Arbitration Committee

International arbitration has been a subject of interest for the ILA since its founding,[2] passing a resolution on international arbitration as early as 1895.[3] The current International Commercial Arbitration Committee is composed of 53 members from over 30 countries, including professors, judges, arbitrators, private practitioners, and staff of international organizations.[4]

The Committee meets in different locations around the world, approximately three times a year. The Australian Branch has two members (both members of the ACICA Board of Directors) – Hague-based Judith Levine and Sydney-based Damian Sturzaker – and an alternate, Jason Clapham. Having members in both hemispheres helps ensure that an Australian representative is present at each meeting. There are other ways for ILA Australia branch members to participate in the Committee's work. For example, for the recent project on confidentiality, young lawyers from the ILA Victoria Chapter helped compile information and draft a submission on Australian case law and legislation, which was used for the Committee's final report.[5]

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1. *See* www.ilareporter.org.au. The *ILA Reporter* provides analysis, commentary and discussion on issues in public and private international law which have bearing on Australia and the wider region. One aim of the *ILA Reporter* is to provide updates on the work and progress of the ILA's international committees, a list of which appears at: http://www.ila-hq.org/en/committees/. Neither the views expressed in this article nor the ILA Committee Reports are attributable to the PCA or ACICA.
2. For a discussion of the ILA's early interests, *see* Mark Weston Janis, *America and the Law of Nations*, 1776-1939 (2010) at 135-138.
3. *See* "List of Previous International Law Association Conferences", http://www.ila-hq.org/download.cfm/docid/8E38560D-B8D1-4C48-9633729B7DEB2F1E.
4. *See* "List of Committee Members", International Law Association, http://www.ila-hq.org/en/committees/index.cfm/cid/1034/member/1.
5. International Law Association, The Hague Conference (2010), International Commercial Arbitration, http://www.ila-hq.org/download.cfm/docid/536E81FE-3BC8-4144-A70672729D8A6AA8.

The cumulated reports of the Committee form a valuable body of work and contain recommendations based on experience in national jurisdictions and international practice. Readers are encouraged to look back at reports of the past decade.[6] This article will focus on the two most recent topics examined by the Committee, "Confidentiality in International Commercial Arbitration"[7] and "Inherent and Implied Powers of Arbitral Tribunals".[8]

2. Recent Committee Work: Confidentiality

The Committee's report on Confidentiality surveys current law and practice to test the assumption commonly held by parties that their international arbitration proceedings are confidential.[9] The report identifies problems that may arise as a result of inconsistent confidentiality rules, sets out findings, and offers recommendations, including two model clauses. The Committee decided to limit the scope of its report to international commercial arbitration, consciously excluding discussion of confidentiality as it relates to investor-State arbitration. The investor-State context was seen as giving rise to distinct policy concerns that may warrant different approaches and solutions that have since been the subject of a separate set of rules on transparency promulgated by UNCITRAL.[10]

The Committee found that confidentiality is an important feature of international commercial arbitration but that many users incorrectly assume that their proceeding is inherently confidential. In fact, many national laws and arbitral rules do not currently provide for confidentiality, and those that do vary in their approach and scope. The report notes that arbitration confidentiality obligations bind the parties to the dispute and their agents and representatives, as well as arbitrators, arbitral institutions, and tribunal secretaries, but not others involved in a case (like witnesses). Where a tribunal has jurisdiction over an arbitral confidentiality dispute, it may use a range of powers directed at the parties, such as ordering injunctive or declaratory relief, awarding damages, barring the introduction of evidence procured in breach of confidentiality, or treating the breach as a breach of the underlying contract.

The Committee recommended:

1. The best way safely to ensure confidentiality (or non-confidentiality) across many jurisdictions is to provide for it by express agreement (prior to or during the arbitration).
2. In the absence of contractual provisions on confidentiality, arbitrators should consider drawing the attention of the parties to confidentiality and, if appropriate, addressing the issue in terms of reference or a procedural order at the outset of proceedings.
3. Express agreement to confidentiality should specify the scope, extent, and duration of the confidentiality obligation, as well as the exceptions to it and how it may be enforced.
4. Given that confidentiality provisions do not normally impose obligations on the non-core participants in the arbitral process, it should be incumbent upon the participant in the arbitration who brings the third party into the proceedings to make reasonable efforts to obtain that third party's express agreement to preserve confidentiality.
5. Reasonable exceptions to an obligation of confidentiality may include:
   (a) prosecuting or defending the arbitration or proceedings related to it (e.g., for enforcement/annulment);
   (b) responding to a compulsory order or request for information of a governmental or regulatory body;
   (c) making a disclosure required by law or by the rules of a securities exchange; or
   (d) seeking legal, accounting, or other professional services, or satisfying information requests of potential acquirers, investors, or lenders.

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6. Relevant reports include, e.g., "Public Policy as a Bar to Enforcement of International Arbitral Awards", International Law Association, New Delhi Conference (2002), http://www.ila-hq.org/download.cfm/docid/BD0F9192-2E98-4B17-8D56FFE03B80B3EA; "*Res Judicata* and International Arbitration", International Law Association, Berlin Conference (2004), http://www.ila-hq.org/download.cfm/docid/446043C4-9770-434D-AD7DD42F7E8E81C6; "*Lis Pendens* and Arbitration", International Law Association, Toronto Conference (2006), http://www.ila-hq.org/download.cfm/docid/C5443B2B-406F-4A42-9BE49EE93FB92A4C.
7. "Confidentiality in International Commercial Arbitration", International Law Association, The Hague Conference (2010), http://www.ila-hq.org/download.cfm/docid/536E81FE-3BC8-4144-A70672729D8A6AA8.
8. "Inherent and Implied Powers of Arbitral Tribunals", International Law Association, Washington Conference (2014), http://www.ila-hq.org/download.cfm/docid/C3C11769-36E2-4E93-8FDA357AA1DABB2F.
9. *See* "Confidentiality in International Commercial Arbitration", *supra* note 7.
10. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

3. Pending Committee Work: Implied and Inherent Powers

The topic currently under consideration by the Committee is "Implied and Inherent Powers of Arbitral Tribunals". Unlike the confidentiality project, this topic was not limited to commercial arbitration and in fact many of the examples in the report were drawn from investment treaty disputes. As with the confidentiality project, Australian members actively participated in discussions and contributed research papers and sources that are referenced in the report.

The current report introduces the topic by noting that party agreement is the foundation of every arbitration, and poses the following questions:

> "[A]rbitrators are sometimes confronted with situations that are not addressed by either the parties' arbitration agreement or the applicable curial law and rules. What, if any, powers do the arbitrators have to deal with those situations? What is the source of those powers? What is the limit of them?"[11]

The report reviews the common law origins of inherent and implied powers and discusses various situations where such powers may be relevant to international commercial arbitration, including:

- Powers relating to procedure (e.g., determining the seat, bifurcating proceedings, deciding on evidentiary matters, and permitting non-party participation);
- Powers to issue interim relief (e.g., to seek a stay of court proceedings, to stop criminal proceedings, to stop disclosure of documents, and to take steps to prevent the exacerbation of the dispute or to maintain the integrity of the arbitral proceedings);
- Powers related to decision-making (e.g., to deal with new objections to jurisdiction, to order summary dismissal, and to award interest);
- Powers to safeguard against misconduct and perceived improprieties (e.g., to deal with vexatious claims or bad faith conduct, to allocate costs as a sanction, and to disqualify counsel); and
- Powers of revision (e.g., to modify a decision in light of new evidence).

The Committee conceptually divides the sources of power into three categories:

- Powers implied by textual sources (the parties' agreement, applicable rules, and law governing the arbitration);
- Discretionary powers of procedure (stemming from the right to oversee proceedings); and
- Inherent powers necessary to preserve jurisdiction (stemming from the duty of arbitrators to protect the integrity of proceedings and render an enforceable award).

While implied and discretionary powers remain subordinate to party agreement, inherent powers cannot be so restricted and therefore, according to the Committee, "should be used narrowly, proportionately and only so far as necessary to accomplish the exigencies of the particular situation".

The Committee's recommendations are targeted at:

- Parties, who should understand that tribunals have inherent and implied powers and realise that, within limits, they may by agreement confirm, expand, or constrict arbitral powers.
- Arbitrators, who should always first look at the arbitration agreement, rules governing proceedings, and relevant law to assess the scope of their authority in any given situation, and only if those sources do not adequately resolve the issue, should consider whether to act on the basis of implied, discretionary, or inherent authority (in that order). Before exercising such powers, arbitrators should elicit the parties' views and assistance to fashion the most appropriate solution, taking into account the parties' legal background and the law governing the arbitration. Arbitrators should explain their reasoning for exercising implied, discretionary, or inherent powers, which may help the award to withstand review at enforcement or set aside proceedings.
- Courts, which should appreciate that arbitrators often have some power to act beyond the explicit boundaries set by the laws and rules governing an arbitration.

4. Future Committee Work?

As noted on the ILA website, the Inherent Powers report will be tabled for finalization at the 2016 conference in Johannesburg.[12] Future topics for the committee are being considered and suggestions are welcome to be sent to jlevine@pca-cpa.org.

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11. "Inherent and Implied Powers of Arbitral Tribunals", *supra* note 8, at 2.
12. *See* http://www.ila-hq.org/en/committees/index.cfm/cid/1034.

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The use of Evidence to achieve the best outcome in Alternative Dispute Resolution

In essence, the key function of expert evidence is to guide the parties to best understand their own risks, as well as remind the other side of the potential consequences if resolution is not achieved.

Arbitration, mediation and other forms of alternative dispute resolution ("ADR") have become increasingly popular over recent years and across a broader spectrum of the dispute landscape. Matters which were once exclusively the domain of the courts with their attendant rules and regulations around evidence are now more commonly being managed through ADR.

It is useful to step back and take stock of the developments accompanying this trend, in particular the opportunities within ADR to adopt innovative ways of using expert evidence to achieve better outcomes.

It is no surprise there is increasing reluctance to resolve disputes in court. Clearly, ADR can save significant time and money in many situations. But due to the 'human factor' the best strategies to achieve a good outcome in mediation can be very different to the best strategies to win a case in court or to achieve a favourable arbitration result . Not all participants have fully adjusted to this nuance and many still conduct themselves as they would in formal litigation, missing the opportunities that mediation creates.

There is a distinct difference in the use of expert evidence, including forensic accounting reports, between mediation, arbitration and litigation. When it comes to calculating the financial component of a settlement, the most logical and accurate quantitative analysis, i.e. the "right" answer and the supporting information needed for trial, isn't necessarily what the parties need to make the best decisions in mediation. In arbitration, evidentiary rules are less defined than in Court, differ between jurisdictions, and often the form of evidence is controlled by the arbitrator.

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1. **Andrew Moffat**, of Constructive Accord, is a commercial mediator who draws upon his former life as an investment banker and commercial banker. He is a member of the mediation panels of ACICA and ADC and the farm debt mediation schemes in both NSW and Victoria.
2. **John-Henry Eversgerd**, a Forensic Partner at McGrathNicol, prepares commercial forensic evidence for court, mediation and arbitration. He acts in an independent or consulting basis to help both sides of a disagreement better understand the potential quantum of damages in commercial disputes.

The role of expert evidence differs in each dispute resolution format. In court, the task is to convince the judge. In arbitration, the evidence needs to be similarly convincing, however the expert's report may need to stand on its own even more so than in litigation. Depending on the particular evidentiary rules set by the arbitrator or agreed by the parties, the expert may not necessarily give evidence personally as they would in Court.

Mediation brings additional complexity; a party needs its expert evidence to fulfil four distinct roles:

1. Allowing the party to make an informed assessment of the likely outcome of trial (quantum and likelihood);
2. Creating doubt in the other side so that they are motivated sooner to agree to a favourable settlement;
3. Providing clarity on the underlying situation so the parties each understand their own financial parameters;
4. Articulating the commercial justification for the other side to agree a "fair" settlement

The parties present at a mediation are likely to include business people who are very close to the matter, and emotionally invested in the outcome. Whilst it is necessary to analyse the likely financial outcome should the matter ultimately end up in court, those calculations should be presented quite differently when used for mediation, keeping in mind the audience and their needs and perspectives.

In essence, the key function of expert evidence is to guide the parties to best understand their own risks, as well as remind the other side of the potential consequences if resolution is not achieved.

When using loss quantification evidence in mediation, in contrast to litigation or arbitration, the best strategy may be to not present all of your claim analysis up front. If the quantum is significantly different from what the other party expects or wants, laying it all bare too soon creates the risk of putting the opposition on the defensive early. Strategically consider beforehand what would be most effective in convincing you if you were in their shoes.

One strategy is to focus initially on the independence and expertise of the expert you have engaged to perform the analysis. Before jumping to the numbers, explain what questions the specialist was asked to objectively answer. This will paint a picture of what the outcome might be from a judge or arbitrator. In other words, demonstrate the potential consequences and cost if they don't negotiate in earnest.

The use of evidence in mediation can be more powerful if one doesn't jump to the technicalities right away, unless the conversation naturally goes there. The evidence will be more powerful if it is presented using the following rules:

1. Present the evidence in a summarised, succinct manner;
2. Utilise graphical illustrations of the key findings and a range of possible outcomes;
3. If the evidence is technical in nature, use a consulting expert to assist and hold a dress rehearsal in advance of the mediation with enough time to adjust the presentation.

A few more recommendations when it comes to expert witness evidence in mediation and arbitration:

1. Do a run through of your opening statement with your experts ahead of the mediation;
2. In arbitration, the composition and subject matter expertise of the tribunal can impact your choice of format and level of detail in your evidence;
3. In mediation, hold back on content that will fall on deaf ears, no matter how accurate and convincing it would be in Court.
4. Leverage the private nature of arbitration to improve availability of otherwise confidential evidence to strengthen your case. On the other hand, a risk to consider is that arbitral tribunals lack coercive power to compel document discovery, which may negatively impact your ability to gather and present the most powerful evidence.

Alternative dispute resolution including arbitration and mediation are becoming more commonplace and better understood by litigants and their advisors. We expect to see growing sophistication from experts and those who retain them, in ensuring that the way they use expert witness evidence is optimised for the type of ADR. Those who don't understand and appreciate the differences will fail to make the most effective use of the expertise at their disposal, and will be less likely to achieve a good outcome early.

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International Arbitral Institutions and Substantive Validity of Arbitration Agreements in Mainland China

Upon the PRC Government's resumption of sovereignty over Hong Kong and the establishment of the Hong Kong SAR on 1 July 1997, Mainland China and Hong Kong SAR operate under the famous "one country, two systems".

Recently published judicial decisions in Mainland China and Hong Kong SAR have revisited the long-debated issue as to whether an international arbitral institution such as the ICC International Court of Arbitration could be characterised as an "arbitration commission" ("仲裁委员会" in original Chinese) under the PRC law and therefore pave the way for upholding substantive validity of a Mainland China-seated arbitration agreement providing for administration of the arbitration by an international arbitral institution.

Article 16 of the 1995 Arbitration Law[1] of the PRC ("1995 Arbitration Law") provides: *"An agreement for arbitration shall include an arbitration clause stipulated in a contract or another written agreement for arbitration reached before or after a dispute occurs. An arbitration agreement shall contain the following: (i) the expression of application for arbitration; (ii) matters for arbitration; (iii) a designated arbitration commission."* While this provision has answered the question as to whether *ad hoc* arbitration is allowed in Mainland China in the negative, a long-debated issue by practitioners and commentators which in turn underpinned by inconsistent PRC court decisions over the years[2] is whether the legislation's term "a designated arbitration commission" ("选定的仲裁委员会" in original Chinese) encapsulates not only a PRC-origin "domestic" arbitration commission but also an international or foreign arbitral institution. The issue is critically important because it goes directly to the substantive validity of an arbitration agreement in Mainland China. Recently published court decisions in Mainland China and Hong Kong SAR have revisited the issue.

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1. Arbitration Law of the People's Republic of China (Adopted at the 9th Session of the Standing Committee of the Eigth National People's Congress on August 31, 1994; effective as from 1 September 1995; amended according to the Decision on Amending Certain Laws adopted at the 10th session of the Standing Committee of the Eleventh National People's Congress on August 27, 2009). An English translation can be found on the official website of the People's Republic of China ("PRC") Supreme People's Court at http://en.chinacourt.org/public/detail.php?id=101.
2. See *Züblin International GmbH v Wuxi Woke General Engineering Rubber Co., Ltd* ([2003] Min Si Ta Zi Di 23 Hao.2004) ("Zublin Case") where the PRC Supreme People's Court negated the validity of an arbitration clause providing for ICC arbitration in Shanghai but also see *Duferco S.A. v Ningbo Art & Craft Import & Export Corp.* ([2008] Yong Zhong Jian Zi Di 4 Hao) ("Duferco Case") where, in the course of recognition and enforcement of a Beijing-seated ICC arbitral award, the Ningbo Intermediate People's Court refused to accept the award debtor's argument that an ICC-administered arbitration in Beijing is against the PRC Arbitration Law.

Mainland China: Shenhua Coal Transportation and Sales Co., Ltd v. Marinic Shipping Company

It has been made public in recent times that on 4 February 2013 the PRC Supreme People's Court issued its *Reply of The Supreme People's Court Regarding Questions On The Validity of The Arbitration Clause Arising From Suit For Declaration Action Between Shenhua Coal Transportation And Sales Co., Ltd And Marinic Shipping Company* (《最高人民法院关于神华煤炭运销公司与马瑞尼克船务公司确认之诉仲裁条款问题的请示的复函)[3] ("Shenhua Reply"). In the Shenhua Reply, the PRC Supreme People's Court has hinted its position over the ambit of the term "arbitration commission" within the 1995 Arbitration Law in the course of answering whether Article 13(2) of the 2006 Ianterpretation of The Supreme People's Court Concerning Some Issues On Application of The Arbitration Law of The People's Republic of China[4] ("2006 Interpretation") is applicable to the particular case in question.

The particular case in question concerns chartered party disputes between Athens-based Greek party Marinic Shipping Company and Beijing-based PRC party Shenhua Coal Transportation and Sales Co., Ltd. It involves a not unusual scenario where the PRC party defies a positive decision on jurisdiction made by a London-seated arbitral tribunal by seeking declaratory relief from the PRC party's home judiciary against the existence of a London arbitration agreement. Among the several issues that split the first instance court (Tianjin Maritime Court) and its appellate court (Tianjin Higher People's Court), the PRC Supreme People's Court in Beijing had to deal with, in the Shenhua Reply, whether Article 13 (2) of the 2006 Interpretation[5] is applicable to a foreign-related arbitration. In answering this question, the Shenhua Reply says the following:

> "*依照《中华人民共和国仲裁法》(以下简称仲裁法)第七章的规定，同意你院关于仲裁法及仲裁法司法解释的规定可以适用于涉外仲裁的意见。但是，仲裁法司法解释第十三条系针对仲裁法第二十条作出的司法解释。仲裁法第二十条所指的仲裁委员会系依据仲裁法第十条和第六十六条设立的仲裁委员会，并不包括外国仲裁机构。故仲裁法司法解释第十三条的规定并不适用于外国仲裁机构对仲裁协议效力作出认定的情形。*"

The above Chinese words can be translated into English as follows:

> "*In accordance with Chapter VII of PRC Arbitration Law ("Arbitration Law"), [this Court][6] agrees your court[7]'s view that the Arbitration Law and its interpretation[8] may apply to foreign-related arbitrations. However, Article 13 of Arbitration Law interpretation refers to our judicial interpretation against Article 20 of the Arbitration Law. "Arbitration commission" as referred to under Article 20 of the Arbitration Law is an "arbitration commission" set up pursuant to Article 10 and Article 66 of the Arbitration Law, and does not include a foreign arbitral institution. Therefore Article 13 of Arbitration Law interpretation is not applicable to a foreign arbitral institution's decision on the validity of an arbitration agreement."* (emphasis added)

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3. [2013] Min Si Ta Zi No. 4, dated 4 February 2013.
4. Effective as from 8 September 2006. An English translation can be found at http://www.asianlii.org/cn/legis/cen/laws/iotspccsmoaotalotproc1305/.
5. Article 13 (2) of the 2006 Interpretation provides as follows: "仲裁机构对仲裁协议的效力作出决定后，当事人向人民法院申请确认仲裁协议效力或者申请撤销仲裁机构的决定的，人民法院不予受理。" (English translation acceptable to the author is this: "*In case where a party applies to the people's court for determining the validity of an arbitration agreement or applies for setting aside the arbitration institution's decision after an arbitration institution has made a decision on the validity of an arbitration agreement, the application may not be registered by the people's court*."
6. Referring to the PRC Supreme People's Court in Beijing.
7. Referring to Tianjin Higher People's Court in Tianjin.
8. Referring to the 2006 Interpretation.

Mainland China: Anhui Longlide Packing and Printing Co., Ltd. v. BP Agnati S.R.L

It has been made public since mid 2014 that on 25 March 2013, seven weeks after the Shenhua Reply, the PRC Supreme People's Court issued its *Reply of The Supreme People's Court Regarding The Dispute On The Validity Of An Arbitration Agreement Between Anhui Longlide Packing And Printing Co., Ltd. And BP Agnati S.R.L.*(《最高人民法院关于申请人安徽省龙利得包装印刷有限公司与被申请人BP Agnati S.R.L申请确认仲裁协议效力案的请示的复函》)[9] ("Longlide Reply"). In the Longlide Reply, the PRC Supreme People's Court has upheld the substantive validity of an ICC Shanghai arbitration clause. The Longlide Reply has quickly become an "eye-catching" matter in the global arbitration community. It even earned for itself and Mainland China a position - on a worldwide basis - as a shortlisted GAR Awards 2015 nominee in the categories of "*most important published decision of 2014 for jurisprudential or other reasons" and "jurisdiction that has made great progress improving its arbitration regime in the past year*" [10]. The suggestion seems to be that the Longlide Reply "signals the jurisdiction is opening up to foreign arbitration providers"[11].

The arbitration clause in the case is worded as such: "*Any dispute arising from or in connection with this contract shall be submitted to arbitration by the International Chamber of Commerce ('ICC') Court of Arbitration [sic] according to its arbitration rules, by one or more arbitrators. The place of jurisdiction shall be Shanghai, China. The arbitration shall be conducted in English*". The PRC party Anhui Longlide Packing and Printing Co., Ltd argued that: (i) the ICC Court of International Arbitration was not an institution that was set up under the 1995 Arbitration Law; (ii) ICC's administration of the arbitration in Mainland China would infringe public interest and may also impair judicial sovereignty; and (iii) even if an award were to be made by a tribunal under the ICC Rules in Mainland China based on such an arbitration clause, the award should be deemed a "domestic award" under the 1995 Arbitration Law and therefore not enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The PRC Supreme People's Court did not specifically respond to any of the aforementioned arguments raised by the PRC party. Instead, the Longlide Reply says the following as its reasoning (if any):

> *"《中华人民共和国仲裁法》第十六条规定，仲裁协议应当具有下列内容：(一)请求仲裁的意思表示；(二)仲裁事项；(三)选定的仲裁委员。涉案仲裁协议有请求仲裁的意思表示，约定了仲裁事项，并选定了明确具体的仲裁机构，应认定有效。"*

The above Chinese words can be translated into English as follows:

> *"Article 16 of the PRC Arbitration Law provides that an arbitration agreement shall contain the following: (i) the expression of application for arbitration: (ii) matters for arbitration; (iii) a designated arbitration commission. The arbitration agreement in question has had expression of application for arbitration, has agreed matters for arbitration and has designated a clear and specific arbitral institution. The arbitration agreement in question is therefore valid".*

Hong Kong SAR: Z v. A and Others

On 30 January 2015, the Court of First Instance of the Hong Kong SAR handed down its decision on the *Z v. A and Others*[12] case ("Z v. A Case") where it dismissed an application to set aside an ICC award in circumstances where the application cited its main ground as the arbitral tribunal's lack of jurisdiction given that the arbitration clauses concerned provide for ICC arbitration "in China".

The party who made the application to the Court of First Instance is from Mainland China while its counterparts in the original disputes are based in Egypt. The PRC party and the Egyptian parties entered into two separate contracts for the manufacture, sale and purchase of goods in Mainland China. The respective arbitration clauses in the two contracts are worded as such:

(1) *"In case of breach of any of the Articles of this agreement by either of the parties, both Parties agree to put best efforts to remedy by negotiations. Otherwise, those Parties agree to arbitration as per the International Chamber of Commerce and held in CHINA? ..(sic)" (CKD and Agency Agreement);* and

(2) "*Any dispute, controversy or difference which may arise between the parties out of or in relation to this Agreement or for the breach thereof shall be settled amicably by the parties, but in case of failure, it shall be finally settled in CHINA by arbitration pursuant to the Rules of the International Chamber of Commerce whose award shall bind the parties hereto.*" (Technical Cooperation Agreement)

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9. [2013] Min Si Ta Zi No.13, dated 25 March 2013.
10. See: http://globalarbitrationreview.com/news/article/33584/gar-awards-2015-winners/.
11. bid.
12. *Z v. A and Others* [2015] HKCFI 228; [2015] 2 HKC 272; HCCT 8/2013 (http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=97176&QS=%24%28HCCT%2C8%2F.

What happened in the original disputes was that the Egyptian parties filed their Request for Arbitration with the ICC International Court of Arbitration pursuant to the arbitration clause in the CKD and Agency Agreement, naming the PRC party as the Respondent and saying that Hong Kong SAR shall be the seat of arbitration on the basis that "*Hong Kong SAR is part of and within China, an arbitration award made in Hong Kong by the ICC Court can be enforced in Mainland China, and further, that the arbitration should be governed by the laws of the PRC*". The PRC party disagreed and argued that "*the arbitration shall be held in China and the nationality of this arbitration award shall also be China according to the CKD and Agency Agreement and Technical Cooperation Agreement, there is no need to fix another place of arbitration by ICC International Court of Arbitration.*"

The Secretariat of the ICC International Court of Arbitration subsequently wrote to the parties that the ICC International Court of Arbitration had fixed Hong Kong SAR as the place of arbitration, pursuant to Article 14 (1) of the 1998 ICC Rules. The tribunal, once constituted, issued a partial award confirming its jurisdiction, upholding the ICC's decision to fix Hong Kong as the place of arbitration, and determining that the law applicablea to the arbitration was Hong Kong law. The PRC party therefore applied to the Court of First Instance of the Hong Kong SAR under section 34 of the Hong Kong SAR's Arbitration Ordinance (Cap 609) and Article 18 of the UNCITRAL Model Law for the court's review of the tribunal's jurisdictional decision and to set aside the tribunal's partial award on the basis of its lack of jurisdiction.

The Court of First Instance Judge Mimmie Chan in this case was presented with two conflicting versions of PRC law expert evidences in relation to the central issue of this article. The PRC law expert appointed by the PRC party has opined that "*an arbitration held on the Mainland and administered by ICC is not a domestic award and may not be enforced by the courts on the Mainland, since ICC is not an arbitration institution which is registered with the authorities on the Mainland under the Mainland Civil Procedure Law*". That expert takes the view that "*the arbitration clause, in the Technical Cooperation Agreement at least, is not even valid and enforceable under PRC law: since the clause does not specify the arbitration institution, but only the application of the ICC Rules.*" The PRC law expert appointed by the Egyptian parties, however, did not agree and instead made references to both the Longlide Reply "*in which the Supreme People's Court ruled that an arbitration clause providing for ICC arbitration on the Mainland is valid"* and the Duferco Case where *"a Mainland court enforced an ICC award made on the Mainland under the New York Convention, although such an award was not considered by the court as a domestic award on the Mainland"*.

In rendering her decision, Judge Mimmie Chan held: *"On the face of the expert evidence, there is a risk that an ICC award made in Mainland China may not be enforceable in Mainland China, and that the ICC Arbitration and award might not be supervised by the Mainland court under the Civil Procedure Law or the Arbitration Law. The experts are, on the other hand, in agreement that an ICC award made in arbitration proceedings conducted in Hong Kong would be enforceable in Hong Kong, and on the Mainland, as well as in other countries which are parties to the New York Convention. On such basis, and bearing in mind that the object of an arbitration agreement must be to have the dispute resolved by a process which would result in a final, binding and enforceable award, I would agree with the Arbitrator that the Arbitration between the parties in this case should be conducted in Hong Kong."*(emphasis added)

Comments

Upon the PRC Government's resumption of sovereignty over Hong Kong and the establishment of the Hong Kong SAR on 1 July 1997 Mainland China and Hong Kong SAR operate under the famous "one country, two systems" formula which was mirrored - on the international level - by the "Sino-British Joint Declaration on the Question of Hong Kong", a history-making document executed by Beijing and London three decades ago. Hong Kong SAR is the only common law jurisdiction within the PRC and retains its position as one of the most sophisticated jurisdictions in the world when it comes to arbitration-related matters. Given the closer economic integration of the two jurisdictions and the growing number of cross-border disputes involving Mainland China and Hong Kong SAR in recent years, in practice it is increasingly common for courts in one jurisdiction to look into arbitration-related issues arising from the other jurisdiction.

Regarding Hong Kong SAR, the *Z v. A* Case illustrates how circumspect the Hong Kong SAR's judiciary is when it comes to its approach in dealing with the central issue of this article. The Court of First Instance appears to have deliberately chosen the delicate (and arguably safe) language of "risk" to describe what could (but may not necessarily) happen for an award made in Mainland China on the basis of an arbitration agreement providing for administration of the arbitration by an international arbitral institution at the enforcement stage. Following that characterisation and having correctly mentioned the important role that a supervisory court plays over an arbitration, the Court of First Instance sensibly moved to a much safer zone by pointing to the "object of an arbitration agreement" (where there are few controversies) and therefore decided the case without asserting either a more positive or more negative answer to the central issue of this article, an unresolved (and frankly much more sensitive) issue in Mainland China itself.

Regarding Mainland China, taking no position to side with or against the Longlide Reply and/or the Shenhua Reply, the author wishes to make three comments.

Firstly, the author is curious about reasons (if any) why the PRC Supreme People's Court, in the Longlide Reply, replaced the legislation's term "a designated arbitration commission" ("选定的仲裁委员会" in original Chinese) with its own term " *a clear and specific arbitral institution*" ("明确具体的仲裁机构" in original Chinese). This query could be particularly notable given that precisely the same court just dealt with the ambit of the legislation's term "arbitration commission" within the 1995 Arbitration Law in the Shenhua Reply, albeit in a different context, and found in clear language only seven weeks ago that an "arbitration commission" as referred to under Article 20 of the 1995 Arbitration Law is an "arbitration commission" set up pursuant to Article 10[13] and Article 66[14] of the Arbitration Law, and therefore did not include a foreign arbitral institution. There is nothing in the 1995 Arbitration Law which suggests that an "arbitration commission" as referred to under its Article 20[15] is in any way different from an "arbitration commission" as referred to under Article 16 of the same legislation. In this regard the author believes that, technically speaking, the Shenhua Reply's description about "arbitration commission" is the most accurate one which hits the legislation's plain intent. In other words, the term "arbitration commission" under the 1995 Arbitration Law plainly refers to one that was "set up pursuant to Article 10 and Article 66 of the 1995 Arbitration Law" and does not include a foreign arbitral institution. This tentative conclusion, in turn, continues to make substantive validity of an arbitration agreement with a Mainland China seat coupled with an international arbitral institution's administration serious doubtful as a matter of the 1995 Arbitration Law.

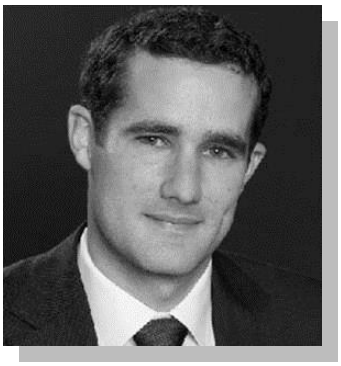
Secondly, the author is unsure whether there is an excessive optimism in the international arbitration community when it comes to a suggestion that the Longlide Reply signals that Mainland China "is opening up to foreign arbitration providers". It is interesting to note that, in the first place, the availability of Longlide Reply was "discovered" (and then reported to the English world) by some English-speaking PRC arbitration practitioners from Chinese-only "Guide on the Trial of Foreign-related Commercial and Maritime Disputes" (Series No. 26), one of many reference books published by the People's Court Press to the general Chinese public year after year. That is very different from a more usual situation in

13. English translation of Article 10 of the 1995 Arbitration Law that is acceptable to the author is as follows: "An arbitration commission may be set up in the domicile of the people's governments of municipalities directly under the Central Government (hereinafter referred to as "municipalities"), provinces and autonomous regions or in other places according to needs. It shall not be set up according to administrative levels. An arbitration commission shall be set up by the relevant departments and chambers of commerce under the coordination of the people's governments of the cities prescribed in the preceding paragraph. The establishment of an arbitration commission shall be registered with the judicial administrative departments of provinces, autonomous regions and municipalities."
14. English translation of Article 66 of the 1995 Arbitration Law that is acceptable to the author is as follows: "Foreign-related arbitration commissions may be formed by the China International Chamber of Commerce. A foreign-related arbitration commission is composed of a chairperson, a number of vice-chairpersons and commissioners.The chairperson, vice-chairperson and commissioners of a foreign-related arbitration commission shall be appointed by the China International Chamber of Commerce."
15. English translation of Article 20 of the 1995 Arbitration Law that is acceptable to the author is as follows: "Whereas parties concerned have doubt on the validity of an agreement for arbitration, a request can be made to the arbitration commission for a decision or to the people's court for a ruling. If one party requests the arbitration commission for a decision while the other party requests the people's court for a ruling, the people's court shall pass a ruling. A doubt to the effectiveness of an arbitration agreement should be raised before the first hearing at the arbitration tribunal."

Mainland China where significant judicial decisions with highly persuasive value are endorsed and published by the "Gazette of the PRC Supreme People's Court", the official and authoritative publication administered and issued by the PRC Supreme People's Court itself to the entire world. In other words, it seems arguable whether the Longlide Reply is "significant" in the eyes of the PRC Supreme People's Court itself[16] at all, given its unusually low profile placement in the judiciary's publication hierarchy. In the author's personal opinion, the PRC Supreme People's Court's approach in placing the Longlide Reply in such a low profile position is understandable. In civil law Mainland China, an *ad hoc* judicial decision over a particular issue arising from a particular case, such as the Longlide Reply (and likewise the Shenhua Reply), does not carry any binding force of law in that jurisdiction. Its absence from the Gazette of the Supreme People's Court downplays its persuasive value even further. Unlike the separation of powers arrangements in countries like Australia, Canada and Singapore,the PRC Supreme People's Court does not possess statutory power to interpret legislations such as the 1995 Arbitration Law under the current PRC legal framework. The statutory power to interpret any provision in the 1995 Arbitration Law is always with the Standing Committee of the National People's Congress[17] who enacted the legislation in the first place and whose interpretation later on (if any) carries the binding force of law[18]. The same can be said for other national-level legislations and their interpretations, say, the 1990 Basic Law of the Hong Kong SAR (Hong Kong's "mini-constitution" after 1 July 1997) which was enacted by the National People's Congress in the first place and the Standing Committee of it retains the ultimate statutory interpretation power.[19] The PRC Supreme People's Court is accountable to the National People's Congress and its Standing Committee.[20] Given the above, the author's suggestion is that one had better look into the Longlide Reply with a high degree of caution without jumping to any conclusion - one way or another - in relation to the suggested "signals that Mainland China is opening up to foreign arbitration providers". It is far too early to say what would happen in the Longlide case itself eventually, let alone safely make a more general proposition at this stage. In any event the materialization of that proposition, no matter how appealing it looks like, depends on various stakeholders and various factors in Mainland China and beyond, not just the PRC Supreme People's Court and its own position.

Thirdly, the author notes and appreciates the kind reminder from the Hong Kong SAR's judiciary in the *Z v. A Case* in relation to the critical importance for parties and their legal advisers to draft arbitration agreements more precisely. This is a particularly pertinent issue for parties from Mainland China and many other developing jurisdictions in Asia, Africa, the Middle East and South America, given that Mainland China has become a net capital exporting jurisdiction since 2014[21] and the fast growing number of south-south trade and investment transactions. For international parties, it is important to remember that in today's world there are three jurisdictions within the territory of the PRC (Mainland China, Hong Kong SAR and Macau SAR) where Chinese, English and Portuguese languages all have their respective places in the territory and both common law and civil law traditions are well represented in different parts of the territory too. In the circumstances, what does "arbitration in China in accordance with Chinese law" mean? Along these lines, if one takes a comparative approach one may well think about whether it is desirable to agree to "arbitration in Britain" (without specifying London or, say, Edinburgh/Belfast) "in accordance with British law" (without specifying the jurisdiction of England and Wales or, say, Scotland/North Ireland).

16. Not in the eyes of some arbitration community members in the English world.
17. See Article 67 (4) of the 1982 PRC Constitution.
18. See Article 47 of the 2000 PRC Law-making Law.
19. See Article 158 of the 1990 Basic Law of the Hong Kong SAR of the PRC (effective as from 1 July 1997). A famous example relates to the case of *Democratic Republic of the Congo and others v. FG Hemisphere Associates LLC* where the Standing Committee of the National's People's Congress has, at the request of the Hong Kong Court of Final Appeal, given its interpretation in respect of Articles 13(1) and 19(1) of the 1990 Basic Law of the Hong Kong SAR of the PRC.
20. See Article 128 of the 1982 PRC Constitution.
21. According to statistics and data analysis conducted by the PRC Ministry of Commerce and the PRC Statement Administration of Foreign Exchange up to January 2015.



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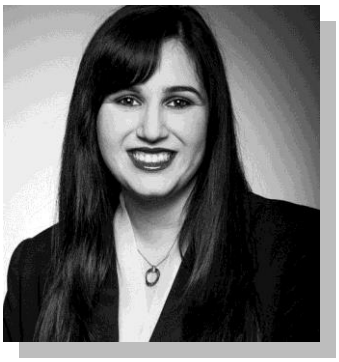

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Indonesia's Bilateral Investment Treaties: To renegotiate or not to renegotiate?

In its 2013 World Investment Report, UNCTAD noted the trend away from bilateral treaties and towards multilateral treaties involving numerous countries (such as the various ASEAN agreements) and which it referred to as "mega-regional agreements".

In March 2014, the Dutch embassy in Jakarta announced that Indonesia had "decided to terminate" its bilateral investment treaty (**BIT**) with the Netherlands and, further, that Indonesia intended to terminate all of its other existing BITs.[2] A representative of the Indonesian government subsequently clarified that Indonesia was not in fact planning to terminate its BITs for good. Instead, Indonesia planned to allow its existing BITs to expire, and subsequently to negotiate new treaties based on a more modern template.[3]

Following the election of President Joko Widodo in October 2014 it was unclear whether the new government would continue to pursue the same policy, until 12 May this year, when the Jakarta Post reported comments from an official of the Indonesian Investment Coordinating Board (BKPM) confirming that the new government would seek to renegotiate Indonesia's BITs.[4]

Indonesia is not alone in seeking to modernize its BITs. UNCTAD's World Investment Report 2014 noted that "at least 40 countries and 4 regional integration organizations are currently or have recently been revising their model IIAs."[5] In many cases, governments have sought to more narrowly define the substantive protections for foreign investors typically contained in these agreements and also to introduce new procedural hurdles to be overcome before an aggrieved investor can refer claims to international arbitration.

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1. Hiswara Bunjamin & Tandjung is associated with Herbert Smith Freehills.
2. Netherlands Embassy in Jakarta, Indonesia, 'Termination Bilateral Investment Treaty' http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html, accessed 25 May 2015.
3. See 'Indonesia Is Letting Its Bilateral Treaties Lapse So As to Renegotiate Better Ones' Financial Times (15 April 2014) http://www.ft.com/cms/s/0/20c6c518-c16c-11e3-97b2-00144feabdc0.html?siteedition=intl#axzz3NvC0EPV0, accessed 25 May 2015.
4. Grace D. Amianti, 'Govt revises investment treaties' Jakarta Post (12 May 2015), http://www.thejakartapost.com/news/2015/05/12/govt-revises-investment-treaties.html , accessed 25 May 2015.
5. United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2014, 115 http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf , accessed 25 May 2015.

According to UNCTAD records, Indonesia has signed a total of 67 BITs.[6] The majority of these (63 of 67) were signed prior to 2004, with a significant number being concluded in the late 1960s and 1970s following Indonesia's ratification of the ICSID Convention in 1968.[7] These BITs have become increasingly outdated.[8]

The Indonesian government has, so far, given few signals as to the changes it would like to make to its BITs.[9] In March 2014, Mahendra Siregar, then chairman of Indonesia's Investment Coordinating Board (BKPM), was quoted in the Financial Times as saying: "[W]e are drafting the new template for the investment treaties so we can introduce it to our counterparts soon, hopefully this year".[10] To date, no template has been published.

One change which has recently been flagged could significantly restrict foreign investors' rights to refer BIT claims to arbitration. According to the Jakarta Post, Azhar Lubis, BKPM Deputy Director for Investment Monitoring and Implementation, suggested that the government will seek to make changes to its BITs in order to limit access to arbitration to cases where the government has given express written consent that disputes with a particular investor may be referred to arbitration.[11]

Indonesia's ability to revise its BITs depends, of course, on the willingness of counterparties to agree to new terms. So far as restricting access to international arbitration is concerned it is at least arguable that Australia might be receptive to the idea.

In 2011, the Gillard government announced that it would not seek to include arbitration clauses in future agreements, explaining that:[12]

> *In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If*

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6. UNCTAD, Investment Policy Hub, 'Indonesia: Bilateral Investment Treaties', http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu, accessed 25 May 2015. The UNCTAD list includes 71 BITs in total, including four earlier treaties that were replaced by new treaties in the case of Finland, Germany, the Netherlands and Singapore.
7. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention). For information on Member States, see https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST65 accessed 25 May 2015.
8. Treaty drafting in the previous decade has been influenced, in particular, by changes to the United States' Model BIT beginning in 2004 and which were based on (at least in part) that country's experience of claims under the investment chapter of the North American Free Trade Agreement. See, Barton Legum, 'Lessons Learned from the NAFTA: The New Generation of US Investment Treaty Arbitration Provisions' (2004) 19(2) *ICSID Rev—FILJ,* 344.
9. Vincent Lingga, 'The week in review: Investor-state dispute' Jakarta Post (17 May 2015), http://www.thejakartapost.com/news/2015/05/17/the-week-review-investor-state-dispute.html#sthash.zPq1rRXm.dpuf , accessed 25 May 2015.
10. Ben Bland and Shawn Donnan, 'Indonesia to Terminate More Than 60 Bilateral Investment Treaties' Financial Times (26 March 2014), http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html?siteedition=uk#axzz3ONi7mg00 accessed 25 May 2015.
11. See Amianti, above n 4. The suggestion that Indonesia may seek to restrict access to international arbitration in this way is not altogether surprising. In the ongoing Churchill mining case, which involves claims under the Australia-Indonesia and UK-Indonesia BITs, the government challenged the tribunal's jurisdiction on various grounds, including that the arbitration clause in the Australia-Indonesia BIT did not establish Indonesia's consent in writing to arbitration for the purposes of Article 25(1) of the ICSID Convention. The government argued that a further positive act was required before Indonesia could be said to have consented to arbitration. See, Churchill Mining and Planet Mining Pty Ltd v Indonesia, ICSID Case No ARB/12/14 and ARB/12/40, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4193_En&caseId=C2723 accessed 25 May 2015.
12. Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, April 2011, p.14, http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx accessed 25 May 2015.

Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.

The Gillard government policy was strongly criticised as liable to disadvantage Australian investors abroad but there nevertheless remains an ongoing debate about whether investor–state dispute resolution clauses should be included in Australia's investment treaties. The position of the current Australian government is that the inclusion of investor-state dispute settlement provisions in any new treaties will be considered on a case-by-case basis.[13] Consistent with the then prevailing Gillard government policy, the Australia-Malaysia Free Trade Agreement,[14] signed in 2012, does not contain an investor-state dispute settlement provision in the investment chapter. Similarly, in early negotiations for the Trans-Pacific Partnership (**TPP**), the Australian government apparently objected to the inclusion of investor-state dispute settlement provisions, at least insofar as they applied to Australia.[15] By contrast, the recently concluded final text of the China–Australia Free Trade Agreement does include an investor state dispute resolution clause allowing investors of one or the other party to submit disputes to arbitration.[16]

The Australia-Indonesia BIT was signed on 17 November 1992 and entered into force on 29 July 1993.[17] Article XV(1) of the agreement provides that it shall be in force for an initial period of 15 years and that it "shall continue in force thereafter for a further period of fifteen years and so forth unless terminated by notice in writing by either Party one year before its expiration". According to this provision, the treaty will remain in force at least until July 2023 unless both parties agreed to its earlier termination, which would be highly unusual.

Early termination of the BIT would also appear to be a relatively pointless gesture given that the ASEAN-Australia-New Zealand Free Trade Agreement (**AANZFTA**), to which Indonesia is a party, includes an investment chapter allowing investors to submit claims to international arbitration.[18]

To the extent that Indonesia does now seek to terminate and/or renegotiate its BITs, it will also need to carefully consider the sunset clauses which most of these treaties contain, pursuant to which investors may continue to be entitled to protection under the treaty (and to refer claims to arbitration) for long periods following termination. While it is possible for the parties to a BIT to agree to truncate sunset periods, in practice this is rare.[19]

Notwithstanding the recent policy announcements, whether Indonesia will in fact renegotiate its BITs (or enter into any new BITs) remains to be seen. While ASEAN member states have signed a large number of BITs in the previous two decades, more recently the number of new agreements being concluded each year has declined dramatically.

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13. Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)', https://www.dfat.gov.au/fta/isds-faq.html, accessed 25 May 2015.
14. Malaysia-Australia Free Trade Agreement (signed 22 May 2012, entered into force 1 January 2013).
15. Jürgen Kurtz, 'The Australian Trade Policy Statement on Investor-State Dispute Settlement', *Insights*, Volume 15, Issue 22 (1 August 2011).
16. See http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/fact-sheet-investment.aspx,accessed 25 May 2015.
17. Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments (signed 17 November 1992, entered into force 29 July 1993).
18. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (signed 27 February 2009, entered into force for all 12 signatories 10 January 2012). Arguably, the substantive provisions of the AANZFTA are not as favourable to foreign investors as the substantive provisions of the Australia–Indonesia BIT. For a more detailed discussion as to how the provisions of Indonesia's BITs compare to the provisions of more modern investment agreements, including AANZFTA, see Antony Crockett, 'Indonesia's Bilateral Investment Treaties: Between Generations? ' (2015) 30(2) *ICSID Rev—FILJ*, 437.
19. For a more detailed discussion on the issues created by sunset clauses see, Tania Voon, Andrew Mitchell and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29(2) *ICSID Rev—FILJ*, 467.

It is possible that this is due, at least in part, to the prioritisation of multilateral FTA negotiations. The ASEAN member states have already concluded investment agreements or FTAs containing investment chapters with Australia and New Zealand (i.e. AANZFTA), China,[20] India,[21] Korea[22] and Japan.[23] As a member state of ASEAN, Indonesia is party to all of these agreements, and also the ASEAN Comprehensive Investment Agreement.[24] ASEAN and its existing FTA partners,[25] are also involved in ongoing negotiations for the so-called Regional Comprehensive Economic Partnership (**RCEP**), which is expected to include an investment chapter.

In its 2013 World Investment Report, UNCTAD noted the trend away from bilateral treaties and towards multilateral treaties involving numerous countries (such as the various ASEAN agreements) and which it referred to as "mega-regional agreements".[26]

Mega-regional agreements pose a significant challenge for Indonesia, both because they involve negotiations with powerful trading partners and because of the risk that they will overlap with older BITs and other investment agreements in problematic ways. Overlapping treaties are likely to increase the complexity of future investor-state disputes and they may also pose challenges for host governments in seeking to exercise regulatory powers consistently with the provisions of multiple agreements. In light of these challenges, whether it is a good idea for Indonesia to expend time and resources renegotiating its network of BITs in the era of "mega-regional agreements" is debatable.

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20. Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations (signed 15 August 2009, entered into force 1 August 2010).
21. Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (signed 12 November 2014, not yet entered into force).
22. Association of Southeast Asian Nations-Republic of Korea Free Trade Agreement (signed 2 June 2009, entered into force 1 September 2009).
23. Agreement between Japan and the Republic of Indonesia for an Economic Partnership (signed 20 August 2007, entered into force 1 July 2008).
24. ASEAN Comprehensive Investment Agreement (signed 26 February 2009, entered into force 29 March 2012).
25. i.e. Australia, China, India, Japan, Korea and New Zealand.
26. UNCTAD, World Investment Report 2013, http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf, [accessed 25 May 2015].

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IAA Reform: Plugging the Black Hole and More

This article discusses the proposed legislative 'fix' currently before the Federal Parliament to the so-called 'black hole' problem. It also raises for consideration further reform of the IAA.

Introduction

In an earlier article in the ACICA News[1] I noted that there was uncertainty surrounding the temporal operation of the new section 21 of the *International Arbitration Act* 1974 (Cth) ('IAA') which may result in a legislative 'black-hole' with respect to certain international arbitrations seated in Australia. Unbeknown to many, a Bill has recently passed the Senate and been introduced into the House of Representatives in an endeavour to fix the problem. This article will discuss the proposed legislative 'fix', as well as raise for consideration some other desirable amendments to the IAA.

Black hole revisited

The centre-piece of the IAA amendments in 2010 was to repeal the old section 21 and replace it with a new section 21, which provided:

> *If the Model Law applies to an arbitration, the law of a state or territory relating to arbitration does not apply to that arbitration.*

In contrast, the old section 21 enabled parties to opt-out of the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') and choose an alternative lex arbitri. As a result of the new section 21, parties to international arbitration agreements entered into after 6 July 2010[2] are not able to opt-out of the Model Law and instead choose a State/Territory arbitration Act (or indeed a foreign arbitral law) as the lex arbitri.

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1. Monichino A, "The Temporal Operation of the New Section 21 - Beware of the Black-hole", ACICA News, December 2012.
2. When the IAA amending Act came into force.

Surprisingly, the IAA did not clarify whether the new section 21 applied retrospectively to international arbitration agreements entered into before the new section 21 came into force. If the new section 21 only applies prospectively, parties' choice to opt-out of the Model Law in international arbitration agreements entered into before 6 July 2010 remains effective. This creates difficulty given that following the amendment of the IAA, the old uniform domestic arbitration Acts have been progressively repealed (upon the enactment of revised domestic arbitration Acts based on the Model Law in each of the States and Territories of Australia, other than the Australian Capital Territory).

A legislative black hole arises when an arbitration is commenced following the enactment of the new uniform Acts, if the following conditions are satisfied:

(a) the new section 21, on its proper interpretation, has prospective effect only;
(b) the arbitration is commenced pursuant to an international arbitration agreement entered into before 6 July 2010; and
(c) the parties have selected an old uniform Act as the arbitral law (and thereby have opted-out of the Model Law, as permitted by the old section 21).

In those circumstances, the arbitral law chosen by the parties does not exist at the date of commencement of the arbitration. Without an arbitral law, there is no nominated court to assist or supervise the arbitration. The problem is real and not merely theoretical, as it can be fairly expected that there are numerous long-term cross-border agreements in operation, entered into before 6 July 2010, which provide for arbitration seated in Australia.

In the past few years, four different judges have expressed three different (obiter) views as to the temporal operation of the new section 21; in particular that:

(a) the new section 21 applies to international arbitration agreements entered into before, as well as after, 6 July 2010. In other words, it has retrospective effect;[3]
(b) the new section 21 has prospective effect only. Entry into the arbitration agreement creates vested rights which the new section 21 does not interfere with;[4] and
(c) the new section 21 may apply retrospectively to pre-6 July 2010 arbitration agreements, provided an arbitration is not commenced pursuant to that agreement prior to 6 July 2010. If, on the other hand, an arbitration is commenced prior to 6 July 2010, vested rights are created which section 21 does not interfere with.[5]

As can be seen, the interpretation of the temporal operation of the new section 21 is not without difficulty.

Professors Nottage and Garnett[6] advocated legislative intervention at both the Federal and State/Territory level to address the "black-hole" problem.[7] In particular, they argued that the IAA should be amended to make clear that section 21 has prospective effect only (i.e. applies only to arbitration agreements entered into after 6 July 2010) and that at the State/Territory level the (repealed) old uniform Acts should be reinstated to the extent necessary to fill the black hole. On the other hand, I argued that amendment should be made only at the federal level to the IAA to provide that the new section 21 has retrospective operation.[8] That is because the prospects of the introduction of amending legislation on a uniform basis across the various States and Territories in Australia in anything resembling a timely manner is very poor (accepting for the moment that ideally the new section 21 should have prospective operation only).

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3. *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209, per Murphy J.
4. *Rizhao Steel Holding Group Company Ltd v Koolan Iron Ore Pty Ltd* [2012] 262 FLR 1 per Martin CJ, with whom Buss JA agreed.
5. *Rizhao* per Murphy JA.
6. Who first identified the black hole problem.
7. Richard Garnett and Luke R. Nottage,"The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?" (2011) 7(1) *Asian International Arbitration Journal* 29 at 49 - 51.
8. See Note 1 above.

Proposed amendment of new section 21

The *Civil Law and Justice Legislation Amendment Bill* 2014 was introduced into the Senate on 29 October 2014. Schedule 2 of the Bill seeks to insert "(1)" before the text of the existing section 21[9] and then to add a new subsection (2) which provides:

> *Subsection (1) applies to an arbitration arising from arbitral proceedings that commence on or after the commencement of this subsection, whether the arbitration agreement giving rise to the arbitration was made before, on or after 6 July 2010.*

The Commonwealth Attorney-General, Senator Brandis QC, in a second reading speech to the Senate on 29 October 2014, pithily explained the purpose of the amendment as follows:

> *The Bill will also amend the International Arbitration Act to clarify its application, providing certainty for private parties who entered into arbitration agreements before the International Arbitration Act was last amended in 2010.*

In February 2015 the Bill was passed by the Senate after consensus was reached on the third reading. It is now before the House of Representatives.

Clearly the government of the day favours the view that section 21 should apply to arbitration agreements entered into before the amendment of the IAA on 6 July 2010. However, the proposed amendment is not without difficulty. That is, the retrospective operation of section 21 is confirmed for arbitrations commenced on or after the commencement of sub-section 21(2) – that is, the commencement of the amendments currently before the Commonwealth Parliament (whenever that might be). The amendments do not, however, address arbitrations already commenced after 6 July 2010 pursuant to pre- 6 July 2010 international arbitration agreements. It is unknown how many cases (if any) fall within this category. The legislature could have provided that section 21(2) has retrospective effect as of 6 July 2010. Such amendment would have avoided the identified difficulty. One is left wondering why it did not. As a result, parties or the courts will be left to sort out any "black-hole" issues that have already arisen in arbitrations commenced after 6 July 2010 pursuant to pre- 6 July 2010 international arbitration agreements.

In summary, the new Bill does not completely eradicate the "black-hole" problem. Having said that, at least the new amendment makes clear the temporal operation of the new section 21 going forward.

Other possible amendments

A question presently facing Australian stakeholders is whether there should be a second round of reform of the IAA, alternatively whether it would be better to allow the law to develop organically without interruption by further legislative amendment? Professor Luke Nottage (of Sydney University) and myself have agitated for further legislative reform in the past. Professor Nottage's reform agenda is more ambitious than mine.[10] It is fair to say that the proposed reforms fall in to two categories. First, addressing legislative difficulties exposed in recent case law (such as the "black hole" problem discussed above). Secondly, potential amendments that could be made to further improve the IAA. I will mention a number of them below.

Competent court for the purposes of Article 35 Model Law

Unfortunately, the IAA does not define 'the competent court' for the purposes of Article 35 of the Model Law, which is concerned with the recognition and enforcement of arbitral awards. Section 18(3) of the IAA identifies the courts taken to have been specified in Article 6 of the Model Law as courts that are competent to perform certain functions referred to in the Model Law (but not Article 35, as Article 6 does not refer to Article 35). The specified courts are the Supreme Courts of the States and Territories of Australia, as well as the Federal Court of Australia.

The IAA should be amended to provide expressly that both the Federal Court and the State and Territory Supreme Courts have jurisdiction to enforce awards under Chapter VIII of the Model Law. This could be done by way of supplementation of the existing Section 18. Likewise, Article 17H of the Model Law, dealing with recognition and enforcement of interim measures, refers to 'the competent court' but nowhere in the IAA is a relevant Australian court identified as such. Again this could be fixed by a simple amendment.

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9. As stated above, section 21 currently reads: *If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.*
10. Professor Luke Nottage,"International Commercial Arbitration in Australia: What's New and What's Next?" (2013) 30(5) *Journal of International Arbitration* 465. Compare, See Monichino A, 'International Arbitration in Australia – 2012/2013 in Review' (2013) 24 *Australasian Dispute Resolution Journal* 208.

Confidentiality

Sections 23C-23G of the IAA provide for confidentiality of international arbitrations seated in Australia. However, those provisions only apply on an opt-in basis. It is not clear why that is so. Indeed, similar provisions contained in the revised uniform Acts apply on an opt-out basis. There is much to be said for the confidentiality provisions to apply on an opt-out basis. If parties do not opt-in to the confidentiality provisions in an international arbitration seated in Australia, the arbitral proceedings are private but not confidential.[11]

Furthermore, the IAA does not address the confidentiality or otherwise of arbitration-related proceedings in court.[12] Arbitration-related proceedings in Singapore and Hong Kong are *prima facie* confidential, thus protecting the confidentiality of the underlying arbitration.[13] There is much to be said for this latter approach. Any confidentiality in the arbitral process may be expunged once the matter is ventilated in open court.

Evidentiary onus

There is currently uncertainty as to the nature of the onus (if any) cast by section 8(1) of the IAA. Section 8 of the IAA is intended to give effect to Article V of the New York Convention ('NYC') while section 9 is intended to give effect to Article IV of the NYC. Section 8(1) states that foreign awards are binding "*on the parties to the arbitration agreement in pursuance of which it was made*".

Specifically, there is conflicting authority on whether by reason of section 8(1), the award creditor has some onus to prove that an award debtor, who is not named in the arbitration agreement, was a party to the arbitration agreement.[14]

By contrast, equivalent legislative provisions in other jurisdictions provide that a foreign award is "*binding upon the persons between whom it was made".*[15] There is no explanation in the Explanatory Memorandum in respect of the IAA as originally enacted[16] for Parliament's choice of language in section 8(1). The section should be brought into line with the equivalent provisions in other jurisdictions.

Negative jurisdictional rulings

Article 16 of the Model Law (which is given the force of law by section 16 of the IAA) only provides for review by the court at the seat of a positive jurisdictional ruling (i.e. a ruling that the arbitral tribunal has jurisdiction). Singapore has recently amended its *International Arbitration Act* to provide for court review of negative jurisdictional rulings (i.e. rulings by the arbitral tribunal declining jurisdiction).[17] A similar amendment could usefully be made to the IAA.

Enforcement of emergency arbitrator awards

Several Asia-Pacific arbitral institutions (including ACICA) have recently introduced rules to provide emergency interim relief prior to the constitution of the arbitral tribunal. The emergency arbitrator is required to render his/her award in a very short space of time (usually 5-15 business days). If not complied with voluntarily, there is an issue as to whether the emergency arbitrator's award is an award capable of enforcement under the relevant arbitration legislation. Both Singapore and Hong Kong have amended their respective arbitration statutes to put the matter beyond doubt by providing for enforcement of emergency arbitrator awards. The IAA could be usefully amended to remove the existing uncertainty.

Court orders for evidence in aid of foreign-seated arbitrations

Article 17J of the revised Model Law (forming Schedule 2 to the IAA) provides that the court may issue an interim measure in relation to arbitration proceedings, irrespective of whether the place of arbitration is in Australia. Section 23 of the IAA permits the court to issue a subpoena requiring a person to attend for examination before, or to produce specified documents to, the arbitral tribunal. The better view is that the power to order subpoenas is limited to arbitrations seated in Australia.

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11. *Esso Australia Resources Ltd v Plowman* (1985) 183 CLR 10.
12. For example, setting aside or enforcement applications.
13. *International Arbitration Act* (Cap) 143A (Singapore), s 22; *Arbitration Ordinance 2010* (Hong Kong), s 16
14. Contrast *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; *Dampskibsselskabet Norden AIS v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161.
15. See for example *Arbitration Act 1996* (UK), s 101(1); *International Arbitration Act* (Cap 143A) (Singapore), s 29(2); *Arbitration Ordinance* (Cap 609) (Hong Kong), s 87(2).
16. Then known as the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth).
17. *International Arbitration Act* (Cap 143A) (Singapore), s 10(3)(b).

Yet there are circumstances where an Australian-based witness might be usefully required to produce evidence (oral or documentary) in a foreign-seated arbitration. At the present time, an Australian court may not directly assist in those circumstances. Section 23(3) of the IAA might usefully be amended to provide that an Australian court may issue a subpoena requiring a person in Australia to attend for examination before, or produce documents to, an arbitral tribunal conducting arbitral proceedings in Australia, irrespective of whether the arbitration is seated in Australia or not.

Arb-Med

The IAA, in contrast with the Singapore and Hong Kong international arbitration Acts,[18] does not contain any provision which expressly recognises an Arb-Med procedure – that is, a procedure whereby the arbitral tribunal assumes the role of a mediator or conciliator in order to facilitate settlement of the dispute referred to arbitration. The revised commercial arbitration Acts include such a provision. Absent a statutory recognition of an Arb-Med process (whether with or without private caucusing) in the IAA, there is a serious risk that enforcement of an international arbitral award made in Australia following a failed Arb-Med procedure will be refused. Such procedures are attractive to Chinese and Japanese parties in particular. In the interests of encouraging a more culturally tolerant approach to the diverse needs of international parties, serious consideration should be given to the inclusion in the IAA of a statutory recognition of an Arb-Med procedure.

Indemnity Costs

Consideration might also be given to introducing a default cost rule in respect of arbitration-related court proceedings such that award debtors who unsuccessfully apply to set aside, or unsuccessfully resist enforcement, of an award should be required to pay costs of the court proceedings on an indemnity basis.[19]

The debate on the indemnity costs issue was revived in a recent address given by Allsop CJ during Sydney Arbitration Week.[20] His Honour argued that public policy considerations arise in the award of costs, that both the United Kingdom and Hong Kong jurisprudence recognises this, and that the approach of the Victorian Court of Appeal in *Altain Khuder*[21] operates on the (mistaken) assumption that enforcement proceedings are substantially the same as other proceedings brought before Australian courts.

Centralisation of Judicial Power

Perhaps the most controversial proposal is the amendment of the IAA to establish the Federal Court as the single intermediate appellate court in international arbitration matters. I proposed this in a paper given at an ICC conference in Melbourne in 2011.[22] The major justification of the proposal is to promote a uniform approach to international arbitration in Australian jurisprudence. The proposal was much more moderate than the proposal raised in the 2008 discussion paper to vest exclusive jurisdiction in international arbitration matters in the Federal Court. Instead, under this more moderate proposal State/Territory and Federal Courts would have concurrent first instance jurisdiction under the IAA, but appeals from single instance decisions would be heard by the Federal Court as the single intermediate appellate court.

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18. See, for example, *International Arbitration Act* (Cap) 143A (Singapore), s17.
19. Monichino A, "When High Risk Strategies Worth a Go?" The ACICA News, June 2013, 23-26.
20. "The Enforcement of International Arbitration Awards and Public Policy, An AMTAC and Holding Redlich Seminar, 10 November 2014, 30-40, PART III: 'Open Policy in the New York Convention and the Model Law" (available at: http://www.amtac.org.au/assets/media/Papers/AMTAC-Seminar-2014/Award-Enforcement-and-Public-Policy-10-November-2014.pdf).
21. See Note 24 above.
22. Monichino A, "International Arbitration in Australia: A Need to Centralise Judicial Power" (2012) 68 ALJ 118.

Immediately prior to his appointment of the High Court of Australia, the then Chief Justice of the Federal Court, Keane CJ, in September 2012 endorsed the proposal as worthy of consideration.[23] In August 2013, the Commonwealth Solicitor-General observed that at a practical and functional level, the establishment of a single intermediate appellate Court to deal with all matters involving international commercial arbitration would be highly desirable in terms of promotion of this area of endeavour.[24]

On the other hand, Bathurst CJ, Chief Justice of the Supreme Court of New South Wales, has recently argued that there are a number of compelling reasons that dispel the idea of centralising jurisdiction for international commercial arbitration.[25] It is beyond the scope of this article to deal with his Honour's criticism of the proposal.

Ultimately, this is a delicate topic but one that must be squarely faced by Australian stakeholders (including the judiciary) going forward.

Application of the Australian Consumer Law

Finally, consideration might be given to clarifying the uncertain application of the Australian Consumer Law ('ACL') provisions relating to misleading or deceptive conduct and statutory unconscionability, to international arbitrations seated in Australia, where the parties have chosen a foreign law or applicable private international law principles leading to a foreign law being applied as the governing substantive law of the arbitration. This uncertainty may be a disincentive to selecting Australia as a seat for international arbitration.

Conclusion

Australia has made substantial progress in the area of international commercial arbitration since the 2010 reforms to the IAA. Australia now has a harmonious regime regulating international and domestic arbitration, underpinned by the 2006 revision of the Model Law. There has been a substantial shift in judicial attitude towards support for arbitration, with Australian judges now displaying an enlightened "light touch" approach in arbitration-related matters. Against that background, the recent legislative "fix" to the "black hole" problem is welcome. However, while the IAA is a respectable *lex arbitri*, there is a strong case for further legislative reform in order to ensure that the IAA reflects international best practice, and that Australia remains "ahead of the curve".

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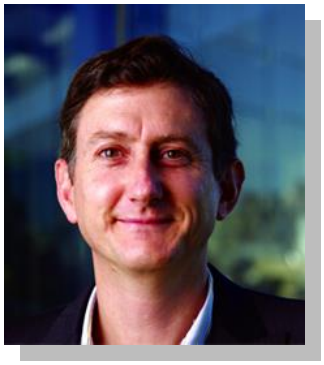
23. Keane P A, 'The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or Our House, Our Rules' (2013) 79(2) Arbitration 195.
24. Justin Gleeson SC, Commentary on Paper by Professor Luke Nottage", in "International Commercial Law and Arbitration: Perspectives" (Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication 14, 2014), at 347.
25. The Honourable A T Bathurst AC, "Judicial Support for Arbitration, A Reprise" International Arbitration Conference Sydney, 13 November 2014, 2. Available at: http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/assets/supremecourt/m670001l771019/bathurst20141113.pdf.



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The 2015 Senate Inquiry into the Commonwealth's Treaty Making Process – and ISDS Policy for Australia

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

Last July, the Senate's Committee on Foreign Affairs Defence and Trade recommended against enactment of *The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (the "Anti-ISDS Bill"), which would have precluded Australia from entering into any future treaties containing any form of Investor-State Dispute Settlement ("ISDS") provisions. Predictably, however, there was a dissent from the Greens Party, which had promoted this Bill, and it may still come to a vote. Further, while opposing the Bill, the Committee's Labor Party members also added comments to the Committee's majority Report from Coalition Senators, emphasising that they were more nervous about ISDS but emphasising that the executive branch's responsibility to negotiate treaties should not be legislatively constrained in this way.

In other inquiries last year by Senate committees and the Joint Standing Committee on Treaties (JSCOT) into the Korea-Australia Free Trade Agreement (FTA), Labor Party parliamentarians also objected initially to the ISDS provisions in that specific agreement, but eventually voted with the Coalition allow legislation to be passed on 1 October 2014 to implement the FTA tariff reductions Australia to ratify that FTA so it came into ef fect from 12 December 2014.[2]

Over this year, another front has developed in this battle against trade and investment treaties generally and ISDS in particular. On 2 December, the Senate asked the same Committee on Foreign Affairs Defence and Trade to report by 18 July 2015 from an Inquiry into:[3]

> "The Commonwealth's treaty-making process, particularly in light of the growing number of bilateral and multilateral trade agreements Australian governments have entered into or are currently negotiating, including:

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1. Professor of Comparative and Transnational Business Law, University of Sydney; ACICA Special Associate; Director, Japanese Law Links Pty Ltd. Research for this Note is supported by an ARC Discovery Project (DP140102526) funded over 2014-2016 jointly with Dr Shiro Armstrong and Professors Jurgen Kurtz and Leon Trakman.
2. Kurtz, Jürgen and Nottage, Luke R., Investment Treaty Arbitration 'Down Under': Policy and Politics in Australia (February 5, 2015) ICSID Review, 2015, 465-80; longer version at http://ssrn.com/abstract=2561147.
3. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Terms_of_Reference (emphasis added).

a. the role of the Parliament and the Executive in negotiating, approving and reviewing treaties;
b. the role of parliamentary committees in reviewing and reporting on proposed treaty action and implementation;
c. the role of other consultative bodies including the Commonwealth-State-Territory Standing Committee on Treaties and the Treaties Council;
d. development of the national interest analysis and related materials currently presented to Parliament;
e. development of the national interest analysis and related materials not currently presented to parliament, such as the inclusion of environmental impact statements;
f. the scope for independent assessment and analysis of treaties before ratification;
g. the scope for government, stakeholder and independent review of treaties after implementation;
h. the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties;
i. a comparison of the consultation procedures and benchmarks included by our trading partners in their trade agreements;
j. *exploration of what an agreement which incorporates fair trade principles would look like, such as the role of environmental and labour standard chapters*; and
k. *related matters*."

A total of 95 Submissions were received,[4] including one (No 44) from myself that appears below in slightly edited form. Many Submissions mentioned ISDS – almost all unfavourably. The following organisations and individuals were invited by the Committee to give evidence over 4-5 May, and most either volunteered opinions on ISDS or were questioned on this particularly by Greens Senator Whish-Wilson from Tasmania, who had proposed the Anti-ISDS Bill last year.[5]

Many of the arguments about ISDS presented to this Senate inquiry go to the substantive pros and cons of ISDS, rather than Australia's treaty-making processes. However, the Committee seems to have to accepted them under a generous construction of items (j) and (k) of its Terms of Reference cited above. For

Organisation or individual giving evidence	Extent of reference to ISDS
* Australian Digital Alliance & Australian Library and Information Association	x
A/Prof Kimberlee Weatherall	-
* AFTINET (AFTINET: Dr Patricia Ranald)	x (partly in response)
* Public Health Association (Dr Deborah Gleeson & Adj Prof Michael Moore)	xx
DFAT	-
* Australian Manufacturing Workers' Union (and other unions bodies)	xxx
Australian Human Rights Commission (Prof Gillian Triggs)	x (referring to "tobacco litigation")
Australian Industry Group	-
Law Council of Australia	x (in response)
* Australian Network of Environmental Defenders Offices	x (in response)
* Choice	xx (discussed further below)
Export Council of Australia	x (in response)
* Dr Hazel Moir	xx
* A/Prof Matthew Rimmer	xxx
Prof Luke Nottage	x (urging a model BIT or provisions: below)

Committee with an April 2015 Open Letter from North American professors of international law responding to public criticisms about ISDS in the Trans-Atlantic Trade and Investment Partnership (TTIP) FTA being negotiated between the United State and the European Union, and the European Commission's May 2015 "Concept Paper" suggesting improvements for TTIP related to ISDS (beyond those already included in the EU's recently concluded FTAs with Canada and Singapore).[6] On 15 June the Senate agreed to extend the Committee's reporting date to 25 June 2015, and it will be interesting to see what it concludes about ISDS as well as Australia's contemporary treaty-making process generally.[7]

4. http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Submissions.
5. Table adapted (footnotes omitted) from my forthcoming report on Australia for a Canadian thinktank's new project on ISDS policy in developed economies: https://www.cigionline.org/articles/investor-state-arbitration. Those asterisked were opposed to ISDS. See Hansard transcript of evidence, via http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Public Hearings. Podcasts are available via http://parlview.aph.gov.au/browse.php?tab=senate.
6. Both available via http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Additional_Documents.
7. An update to this Note will be provided via: http://blogs.usyd.edu.au/japaneselaw/.

Clearly, community concerns persist about ISDS and investment treaties or FTAs more generally, and these issues are not going to go away. The China-Australia FTA agreed in November 2014, and signed on 17 June 2015,[8] includes ISDS and so will no doubt attract extensive parliamentary scrutiny before ratification. Those engaged in international dispute resolution need to keep an eye on what happens in Canberra, if they want to be involved in the ongoing policy and political debate.

***

I welcome this Inquiry and opportunity to make a public Submission on a topic that has been addressed now several times by the Australian Parliament. As an expert in international business law, I have made several Submissions to other inquiries related to Australia's international affairs, including Free Trade Agreements (FTAs) and investment treaties, mostly recently giving evidence to this Senate Committee's Inquiry into the anti-ISDS Bill. In that evidence I remarked that there could be improvements in how Australia approaches FTA negotiations.[9] Due to time and space constraints I make **three specific suggestions** regarding (a) treaty negotiation process and (b) treaty implementation and review, since both stages are encompassed by this Inquiry's Terms of Reference.

1. In its Report in August 2014 recommending against enactment of the Anti-ISDS Bill, this Senate Committee specifically agreed with a point made in my Submission to that Inquiry and in oral evidence, that a better way to address some recent community concerns about the investor-state dispute settlement (especially arbitration) mechanism, now widely agreed in investment treaties world-wide (including mostly by Australia), is for the Australian government instead to develop a Model Investment Treaty (or FTA chapter) or model provisions. This could and should be developed based on extensive public consultation.

2. Subsequently I wrote to the federal Attorney-General and Trade Minister highlighting the Committee's recommendation and volunteering to assist in developing such a Model Treaty or provisions, drawing on a research project on international investment dispute management funded by the Australian Research Council for 2014-6.[10] The Trade Minister replied that this idea would be revisited this year, as officials were currently engaged in concluding major bilateral and regional FTAs.[11] This somewhat puts the cart before the horse, as the benefits of a Model Treaty are lessened if major international agreements can be concluded before it is fully developed, but negotiating such treaties does consume human resources. However, negotiations for Australia's bilateral FTA with China have now been completed, and the regional Trans-Pacific Partnership FTA may well be concluded this year, so the time now seems ripe to embark on this process of developing a Model Treaty or provisions to guide Australia's future treaty negotiations.

3. My **first** broader suggestion for the present Inquiry, however, is that **developing a procedure or even just a practice of public consultation to generate a Model Treaty or provisions** could be a useful compromise mechanism to enhance public understanding and input into subsequent treaty negotiations. This is not a panacea, as it will only be worthwhile if Australia regularly concludes such treaties (as it does eg for international trade and investment), and because such public consultation would not necessarily have any or much Parliamentary scrutiny (compared to a process requiring more structured consultation as through Senate Committee inquiries). But Parliament could issue recommendations to the Executive to initiate a process, with certain parameters and timeframes, to develop a Model Treaty or provisions and then ask for periodic reports on progress. This could therefore become a very useful way of responding to criticisms that the executive branch and current government is too divorced from public opinion when negotiating treaties.

4. A Model Treaty reached through such a public consultation process would not necessarily have to reach agreement on unitary wording for each provision, although this in fact appears to be universal practice for several other major countries that have successfully developed a Model Investment Treaty – both developed countries (eg the USA, first in 2004 and revised in 2012) and developing countries (eg India, presently revising its Model). Instead Australia's model

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8. http://dfat.gov.au/trade/agreements/chafta/Pages/australia-china-fta.aspx.
9. 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, 2015, 245-93; longer version (including transcript of my Evidence) in Sydney Law School Research Paper No. 14/76, http://ssrn.com/abstract=2483610.
10. Armstrong, Shiro, Kurtz, Jürgen, 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) Sydney Law School Research Paper No. 13/90, http://ssrn.com/abstract=2362122; updated in 2(2) ACICA Review 22-35 (2014).
11. I followed by writing to Trade Minister Robb again on 19 March 2015, mentioning the further Senate inquiry this year, but have not yet received a reply.

treaties might list alternatives for controversial provisions, eg one formulation that might be more acceptable to one major political party (such as Labor) and another that might appeal more to another (eg the Liberal Party). This may be the only realistic way forward as issues (such as ISDS) seem to become increasingly polarised in Australia. At least the process of public consultation and the ultimate Model provisions would improve citizens' understanding and engagement in matters subsequently negotiated by their government leaders and officials, and guide the latter as to what may be within the realm of political feasibility as well as acceptable to counterpart states in the treaty negotiations. The alternative is the risk that a government led by one political party may conclude treaty negotiations, including certain provisions (such as ISDS), but not be able to pass implementing legislation to be able to ratify and bring into force the treaty (as almost happened with the Korea-Australia FTA last year, and which may well still happen with the China-Australia FTA after it is signed).

5. My **second suggestion** for this Committee is that **government officials and their political leaders should be incentivised to innovate in treaty negotiations, by putting to their overseas counterparts original ideas suggested by local stakeholders**, even if the reaction from the overseas counterparts may well not be positive.

6. For example, in several Submissions as well as at public presentations I have urged Australian negotiators to propose including in FTAs provisions allowing (or perhaps even requiring) our regulators to share consumer product safety accident sharing with their counterparts in the close trading partner.[12] Such provisions for greater regulatory cooperation would facilitate early detection, minimisation and management of health risks (including incidents such as the recent imported frozen berry problem). Including such provisions in FTAs, rather than ad hoc arrangements, has the advantages of showing citizens concerned about such treaties that they are not simply irresponsible measures for trade liberalisation at all costs, and may also make it easier to adapt local statutory requirements (such as the comparatively strict confidentiality obligations unfortunately added a the last moment in the Australian Consumer Law reforms in 2010.) Yet I believe this idea has never been raised in FTA negotiations, and certainly such provisions are not yet found in any of Australia's recent treaties. Possibly this is because our FTA negotiations are very and increasingly busy, not just juggling many treaty negotiations but also an already growing range of topics; but also because they fear losing overall credibility by raising novel ideas at the negotiating table. Although these are partly valid reasons, the result is that FTAs get "stuck in a rut" and cannot respond to evolving community concerns.

7. How Parliament might then encourage officials and their political leaders to be bolder in such treaty negotiations is an interesting practical question. Again, it may well be sufficient to make a broad recommendation with a request for feedback on achievements (how many innovative proposals were made, even if not accepted by counterparts).

8. My **third suggestion** relates instead to treaty implementation, especially FTAs. My recent research for an ASEAN Secretariat project on consumer protection in Southeast Asia shows that such treaties, including those concluded by Australia, increasingly provide through ongoing regulatory cooperation through Work Programs or such like in specific fields (eg Sanitary and Phytosanitary measures).[13] Yet it is extremely difficult to find out whether and what work has been achieved. Parliament should play a role in **obtaining and publicising progress on such FTA work programs**.

9. A good example is Chapter 6 of the Australia-Singapore FTA. The DFAT website does include a "Sectoral Annex on Food Products", even including respective governmental contacts.[14] But so far I have not been able to find out specifically what has been achieved under this part of the FTA. Other FTAs concluded by Australia also often provide for various work programs, but without even specifying who is supposed to be responsible.

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12. See eg: Australian Government (DFAT), Submission on Country Strategies (Japan, Korea) under 2012 "Australia in the Asian Century" White Paper, 11 May 2013, at http://www.dfat.gov.au/issues/asian-century/; Productivity Commission, joint study Issues Paper, "Strengthening Economic Relations between Australia and New Zealand", Submission dated 22 June 2012, at http://transtasman-review.pc.gov.au/all-submissions; Australian Senate "Inquiry into Australia's trade and investment relationship with Japan", Submission dated 21 July 2011, at http://www.aph.gov.au/house/committee/jfadt/japanandkoreatrade/index.htm.
13. Nottage, Luke R., ASEAN Product Liability and Consumer Product Safety Regulation: Comparing National Laws and Free Trade Agreements (February 7, 2015) Sydney Law School Research Paper No. 15/07, http://ssrn.com/abstract=2562695.
14. http://dfat.gov.au/trade/agreements/safta/Pages/singapore-australia-fta.aspx#documents.

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1.20pm-1.30pm:	The Amazing World of Arbitration: an Introduction Alex Baykitch, ACICA
1.30pm-2.00pm:	The Arbitration Scene in Australia The Hon. Kevin Lindgren, AM, QC
2.00pm-2.30pm:	Resolving Forthcoming Disputes at the Intersection between Internet Governance and International Trade Dr John Selby
2.30pm-3.00pm:	Investor-State Arbitration: Cases from the Region Dr Samuel Luttrell, Clifford Chance
3.00pm-3.30pm:	Afternoon, Tea/Coffee
3.30pm-4.00pm:	Privacy Disputes and Data Breaches: Lessons for Dispute Resolvers Annelies Moens
4.00pm-4.30pm:	Workers' Compensation Arbitration Professor Philip Evans
4.30pm-5.00pm:	Doing Business with China: Dispute Management Aspects Jun Wang
5.00pm-5.45pm:	The Revised ACICA Arbitration Rules Alex Baykitch, Beth Cubitt, Professor Bruno Zeller, Dr John Hockley and Professor Gabriël Moens
5.45pm-6.30pm:	Racing to Revise Institutional Arbitration Rules: How to Maintain the Attractiveness of Arbitration in a Changing World Alex Baykitch, Jun Wang, Matthew Carmody, Professor Bruno Zeller and Professor Gabriël Moens
6.30pm-7.30pm:	Reception and Book Launch of *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective* (Gabriël A Moens and Philip Evans, eds.), Springer, 2015 Launch by the Hon. Christian Porter, Parliamentary Secretary to the Prime Minister

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