

# International Dispute Resolution in the Global Financial Crisis

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## Introduction

The considerable growth in the use and popularity of alternative dispute resolution (ADR) as a means of resolving a vast array of commercial disputes is a tribute to a growing recognition amongst the business community that it provides a flexible and effective alternative to costly and time-consuming litigation. ADR refers to the range of binding and non binding dispute resolution techniques available outside national courts. Of these, mediation and arbitration dominate. This paper focuses on arbitration. In addition to ADR (in particular arbitration) being a useful tool for the resolution of domestic disputes, it is also the method of choice for resolving commercial disputes of an international nature.

However, arbitration is not without its complications. The decision to include an arbitration clause in a contract, or to rely on arbitration in the case of a dispute involving an investment, should be an informed commercial choice. Due consideration should be given to the nature of the transaction, the nationality of the assets of last resort, the place(s) where resort may be had to the courts, and the process of arbitration being considered for adoption.

The global financial crisis has provoked a change in the arbitration (and litigation) landscape. This paper will discuss the effects of the credit crunch on dispute resolution by analysing empirical evidence and discussing the increased trend towards arbitration at an international level. Following this, possible reasons for this change in landscape will be discussed. The changes in the amount of investor-state disputes and how they have been affected by the state of the global economy will also be explored.

ADR must respond to the changing market. Sections 4 and 5 of this paper will emphasise that in order to take advantage of the changing market, arbitration practitioners must give users what they want. These sections will expound on necessary areas of reform to the arbitral process and how the issues and challenges in arbitration should be addressed in the future in order to make the most of this changing environment.

It will be concluded that the changing markets will present an array of opportunities to those involved with ADR. However, in order to capitalise on these opportunities it is important that all participants in the arbitration process recognise that improvements need to be made.

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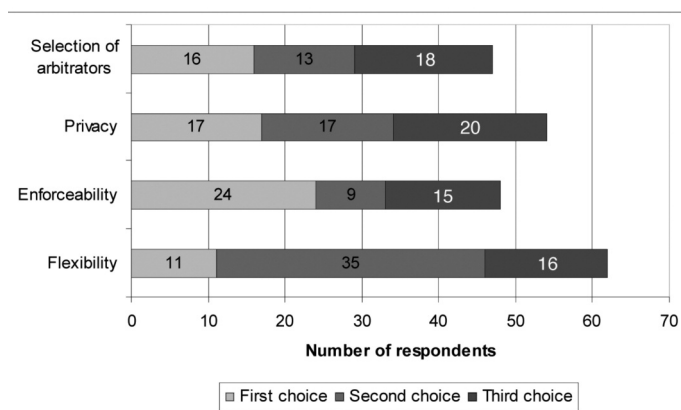
1 Professor Doug Jones AM RFD is an international infrastructure and dispute resolution lawyer, and a Sydney-based partner in the Australian law firm of Clayton Utz, where he heads the International Arbitration and Major Projects Groups. He is a Chartered Arbitrator and door tenant at Atkin Chambers, London. Doug practices in both contentious and transactional matters within Australasia and internationally. He also teaches international arbitration and construction being a Professorial Fellow at Melbourne University and an Adjunct Professor at Notre Dame and Murdoch Universities, Australia. His expertise in International Arbitration and Construction has been regularly recognised by Chambers Global, Asia Pacific 500, Who's Who Legal (2008 - one of 9 most highly regarded construction lawyers worldwide), and PLC Which Lawyer. Amongst positions held Doug is Co-Chair of the International Projects Committee of the International Bar Association, President of the Australian Centre for International Commercial Arbitration, and President Elect for 2011 of the Chartered Institute of Arbitrators. In 1999, Doug was made a Member of the Order of Australia for services to Construction Law and Dispute Resolution, recognising thirty years contribution in those areas.

## Recent Trends in ADR

In recent years, there have been significant fluctuations in the number of cases filed by parties to international transactions. Empirical evidence highlights this growth within both litigation and ADR. This section contemplates the possible reasons for this change and analyses the impact of the changing economic landscape on ADR before providing likely explanations for this impact. It will become clear throughout this paper that the two main reasons for the increase in ADR are both the major reforms to procedure (especially in arbitration) and the indirect consequences of the credit crunch.

The advantages of ADR are increasingly recognised on a global scale. In recent years, ADR has become perceived as the primary dispute resolution tool and the first port of call should a dispute arise. In fact, recent studies have reiterated ADR's growing popularity and have attempted to clarify the reasons for this increase.<sup>2</sup> In 2008, PricewaterhouseCoopers sponsored an international arbitration survey, gauging how 'users' of arbitration perceive the quality of its processes. The 2008 survey shows that there are two primary reasons why individuals favour arbitration to other forms of dispute resolution. The first is that arbitration provides a means to successfully preserve business relationships. The second is the enforceability of an arbitral award. The following graph illustrates this.

### Perceived advantages of international arbitration



Source: PricewaterhouseCoopers, 'International arbitration: Corporate attitudes and practices' (2006)<sup>3</sup>

The perceived advantages of international arbitration encourage commercial parties to avoid transnational litigation in favour of its more flexible alternative. Bjorn Gehle, Special Counsel for Clayton Utz, discusses the primary reasons behind this move towards relying on international arbitration in his article "*Making Arbitration More Efficient*". Gehle argues that the main concerns of litigants are

<sup>2</sup> See PricewaterhouseCoopers, 'International arbitration: Corporate attitudes and practices' (2008).

<sup>3</sup> Cited in Bjorn Gehle, "Making Arbitration More Efficient", paper presented at Australian Centre for International Commercial Arbitration, International Commercial Arbitration: Making it Work for Business, November 2008.

excessive time and costs, the lack of familiarity with foreign court procedures, language barriers, a lack of confidentiality and a fear that some countries may lack an impartial judiciary. These reasons, alongside the fact that it may be difficult to enforce foreign judgements, have sparked a movement away from transnational litigation towards more practical international ADR methods.<sup>4</sup>

The statistics released by the world's largest international arbitration bodies illustrate the growing use of arbitration as a dispute resolution mechanism. Some of the most notable increases include a 38% growth in international arbitration cases filed in the International Centre for Dispute Resolution (ICDR) in the USA since 2000 and an 81% increase in the United Kingdom in the London Court of International Arbitration (LCIA) during the same time-frame. In China, the number of arbitration cases filed in the Hong Kong International Arbitration Centre (HKIAC) has doubled since 2000 and the China International Economic and Trade Arbitration Commission (CIETAC) has experienced growth of 28% increase since 2007. Filings of international arbitration cases in the International Chamber of Commerce (ICC) have also increased by 22% since 2000. These figures emphasise the rapid growth occurring within the international arbitration arena.

The influx of filings over recent years is perhaps attributed to the growing awareness and acceptance of the benefits of ADR. Nevertheless, the extent to which the credit crunch has impacted the number of international cases filed is unknown. It is worth considering whether the sudden increase in filings, since 2008, is related to the recent changes in the global economy.

The table below indicates the percentage increase in the larger arbitral institutions globally. It is evident from this data that there have been significant increases in the number of international arbitrations filed in these institutions over the past 12 months, notwithstanding the effects of the credit crunch. One can reasonably infer from this information that the credit crunch has impacted positively on the use of international arbitration, and the ADR scene at large.

Arbitral Institution	Cases filed - Yr 2007	Cases filed - Yr 2008	% Change (2007-08)	cf. Ave. % change p.a. (2000-07)
HKIAC (China)	448	602	34.38%	10.39%
CIETAC (China)	429	548	27.74%	0.89%
AAA-ICDR (USA)	621	703	13.20%	4.58%
ICC	599	663	10.68%	2.79%
LCIA (UK)	137	158	15.33%	9.26%
SCC (Sweden)	81	85	4.94%	7.38%
SIAC (Singapore)	70	71	1.43%	8.78%
BIAC (China)	37	59	59.46%	30.92%

*Comparison of the major arbitration institutions*

*(% increase of number of international arbitration cases filed from 2007-2008)<sup>5</sup>*

4 Bjorn Gehle, "Making Arbitration More Efficient", paper presented at Australian Centre for International Commercial Arbitration, International Commercial Arbitration: Making it Work for Business, November 2008, 5.

5 Singapore International Arbitration Centre, *Facts and Figures: Statistics* (2008) < <http://www.siac.org.sg/facts-statistics.htm> > at 26 February 2009.

There are several hypotheses explaining why the credit crunch may have caused an increase in the use of ADR. These include:

- (a) The rise in investor state disputes.

Broadly speaking, the credit crunch has caused governments to take action in order to stimulate their respective economies. Some actions may be in breach of international investment treaties. Breaches of treaty obligations may give foreign investors grounds to seek recourse. This area will be discussed in further detail in Part 3, below.

- (b) Demand for legal disputes has traditionally been counter-cyclical.

Generally speaking, boom times have seen failed deals put to one side and accepted as the cost of doing business. However, when the economy contracts, companies are more likely to attempt to recoup their losses. The logic behind this is that deals become more scarce and companies are more inclined to take action to recover any losses that they may have incurred.

- (c) Incomplete contractual agreements or termination of contracts due to an inability to cover costs.

In times of economic uncertainty it is often difficult to obtain funding for major projects. This can significantly impact a contractor's and sub-contractor's ability to meet their commitments. It is probable (and in fact practitioners are starting to see) that this will lead to cutting back costs within projects, delayed payments and eventually terminations. The natural flow-on effect is such to explain the increase in construction and major projects-related arbitrations being heard over the past 6 months.

- (d) Increased number of insolvency disputes.

Many companies have become insolvent as a consequence of the credit crunch. In Australia, the Australian Securities & Investment Commission (ASIC) released statistics showing a 30.16% increase in insolvency appointments from the first half of 2008 to the second half of the year.<sup>6</sup> The UK government also released data from the fourth quarter of 2008 indicating an increase of 51.6% in compulsory liquidations on the same period a year ago.<sup>7</sup>

Historically, in times of recession the number of insolvent companies has grown, in turn triggering more litigations. However in recent years, during troubling economic times, the number of arbitrations commenced has also increased. Accordingly, given the current economic climate, parties to agreements to arbitrate are likely to find themselves dealing with insolvent companies or individuals.

- (e) Arbitration as a preference over litigation in times of economic uncertainty.

Given the state of the current economic climate, corporations are increasingly looking to arbitration in order to avoid the perceived uncertainty of litigation in a foreign court system. Not only are the length and cost of litigation in a foreign state considered uncertain but also the impartiality and quality of the judiciary are, at times, questionable. Accordingly, there is a notable increase in the amount of commercial contracts that contain an arbitration clause as investors foresee this process as more 'certain'.<sup>8</sup>

6 Australian Securities & Investment Commission, *2008 Insolvency Statistics (2008)* <<http://www.asic.gov.au/asic/asic.nsf/byheadline/2008+insolvency+statistics?openDocument>> at 26 February 2009.

7 The Insolvency Service, *Policy Directorate: Statistics (2008)* <<http://www.insolvency.gov.uk/otherinformation/statistics/200902/index.htm>> at 26 February 2009.

8 See Annexures A and B, on pages 26 and 27, for a full illustration of the increase in the number of international arbitrations filed over the past decade. This graph and table highlight the significant growth in the number of cases filed in recent years.

## A rise in Investor-State disputes?

During the past year, governments around the world have enacted policies to stimulate their economies to counter the effects of the global financial crisis. Some of these stimulatory actions may not be entirely consistent with international investment treaty obligations entered into between nation states. This section will explore the nexus between a state's right to enact stimulatory policies and its legal obligations arising out of international investment treaties.

Most governments around the world are party to several investment treaties. These can either be bilateral (BIT), multilateral (MIT) or be contained within a free trade agreement (FTA). An investment treaty is a legal agreement between two or more countries that establishes reciprocal arrangements to encourage foreign investment between the countries. They afford protection to foreign investors from one country (the home country) investing in another country (the host country). The host country is obliged to protect foreign investors by upholding several standards of protection contained in the treaty, such as requiring the host country to treat foreign investors no less favourably than it treats domestic investors

BITs are the most popular type of investment treaty. There are thousands of BITs that have been entered into around the world. Australia is party to 21. The protection afforded to investors in BITs vary in scope, depending on the individual treaty. However, there are several common standards of protections negotiated into most treaties. These are:

- (f) *National treatment clauses*, which require the host State to treat foreign investors no less favourably than domestic investors.
- (g) *Most favoured nation clauses*, which ensure that the host State treats investors from one country no less favourably than the treatment they provide investors under other treaties.
- (h) *Fair and equitable treatment clauses*, which require the host State to avoid subjecting the investor to arbitrary or fraudulent treatment. There may also be a requirement to maintain a stable business environment which is consistent with reasonable investor expectations.<sup>9</sup>
- (i) *Expropriation (nationalisation) clauses*, which prevent the host country from arbitrarily taking an investor's investment without prompt payment of adequate compensation. Expropriation is not limited to the seizing of assets. It may also include changes in law or policy that substantially detract from the value of an investment.
- (j) *Umbrella clauses*, which provide additional protection to investors by elevating any breaches by the host country of its contractual obligations to the status of a breach of the investment treaty. This allows the investor to pursue relief for breach of contract by a state entity, through the favourable dispute resolution provisions contained in the treaty. This motivates host countries to avoid breaching their contractual obligations.

A key feature of investment treaties are the dispute resolution mechanisms. Most BITs allow an investor to pursue legal action directly against a state where it is alleged that the state has breached one or more treaty obligations. The most popular method to resolve these kinds of disputes is through investor-state arbitration. The International Centre for Settlement of Investment Disputes (ICSID) is an international institution whose sole purpose is to administer investor-state arbitrations and conciliations.

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9 See for example *LG&E v Argentina*, ICSID Award 2003; *Tecmen v Mexico*, ICSID AF Award, 2003, para 154.

In good times, investor-state disputes arising from investment treaties are hardly frequent. It still remains to be seen whether investor-state disputes will increase as a result of the actions taken by governments to protect their domestic industries to soften the effects of the global financial crisis. If history is anything to go by, the rise in investor-state disputes that stemmed from government action taken during the Asian Financial Crisis in 1997/98<sup>10</sup> as well as the numerous petro-dollar project disputes that arose from the Oil Crises of the 1970s,<sup>11</sup> may suggest that an increase in investor disputes—as a result of the global financial crisis—is foreseeable.

Two of the most significant policies that have been introduced by the Australian Government since the global financial crisis which may impact upon Australia's investment treaty obligations are:

(a) **Guaranteeing deposits in domestic banks**

This occurred in both the United States of America and Australia. In late 2008, Australian Prime Minister Kevin Rudd announced that the Government will guarantee all deposits in Australian banks, building societies and credit unions for the next three years. This policy aimed to guarantee all money that was borrowed by Australian banks. This policy was later amended to guarantee deposits at *all* banks (whether domestic or international). Similar, yet more extreme, “bail-out” packages were also offered by the US Government to their domestic financial institutions.<sup>12</sup>

(b) **Rescue packages for domestic manufacturers**

Many governments have provided grants and implemented trade barriers in an attempt to ‘rescue’ domestic industries. For example, the Australian Government issued a \$6.2 billion investment plan for domestic car manufacturers. This government initiative invests public funds into a “Green Car Innovation Fund” to assist Australian car manufacturers to become more internationally competitive.

In making significant policy decisions such as the above, the Government must take caution so as to not indirectly breach any of its treaty obligations.

To claim protection under an investment treaty, a party must satisfy two criteria to classify itself as a foreign “investor”. First, an investor may be either a foreign natural person or a foreign corporation. The party must show that it bears the nationality of one of the countries which is party to the treaty. Secondly, the commercial activity undertaken within the host country must be an “investment”. Most BITs define an investment as “any kind of asset”. Thus, a company cannot merely export products to Australia and claim to be an investor. Foreign investors that satisfy these two criteria may be eligible for protection under international treaties.

A clear-cut example of where a state would be in breach of its obligations is where it has directly breached an expropriation clause by taking control of a foreign investor's assets. Most investment treaties entered into by Australia only permit expropriation when it is for a public purpose, under due process of law, non-discriminatory and accompanied by the prompt payment of adequate compensation.

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10 For example the case of *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 313 F.3d 70 (2d Cir. 2002). This case was considered a ‘super dispute’ and arose because of the Indonesian Government's nationalisation of its energy providers.

11 See for example *Kuwait v. American Independent Oil Co. (Aminoil)* 21 I.L.M. 976 (1982).

12 An interesting point to note is that *most* BITs with the United States of America effectively exclude banks from the agreements. This grants the US Government the right to make changes to its policies with respect to it banks (notwithstanding the possible impact on foreign investors) without fear of breaching its treaty obligations.

However, contention arises where a government action may have an indirect impact on the value of a foreign investors assets. “National treatment clauses” and “fair and equitable treatment clauses” impose obligations on governments to treat foreign investors equally and no less favourably than domestic investors. Contention arises where governments favour domestic investors to stimulate economic growth in times of economic crisis. This appears *prima facie*, to be a direct breach of treaty obligations. Whether the host state is in breach of its international obligations will depend largely on the nature and scope of the treaty itself. However, it is interesting to examine whether governments may be exempt from these treaty obligations in times of economic instability.

There are often emergency clauses in international treaties that allow governments to take certain measures for the maintenance of public order, the maintenance or restoration of international peace or security, or the protection of its own essential security interests. Furthermore, arbitral tribunals have held that international investment treaties do not wholly curtail a state’s power to regulate, where doing so is in the public interest. It has been argued that the “State has the right to adopt measures having a social or general welfare purpose.”<sup>13</sup> However, it should be noted that arbitral tribunals have recognised that the state can go too far by completely dismantling the very legal framework constructed to attract investors.

Therefore, evidence of a severe economic crisis could justify necessity as a defence under customary international law and the relevant BIT emergency clause. In fact, there is arguably a requirement to maintain a stable business environment for investors which may at times involve measures to stimulate the economy.

One could logically infer that stimulatory activities undertaken by governments around the world may cause concern to foreign investors, which may in turn encourage them to pursue an action against that country. The statistics released by the ICSID illustrate the increase in the number of investor-state disputes throughout 2008.

The sustained growth in ICSID’s caseload continued in the course of the 2008 Fiscal Year (FY). ICSID recorded its highest yearly number of cases ever administered in a one year period with its number of pending cases rising by 12% year-on-year and reaching 145 cases.<sup>14</sup> Another record, 48 proceedings were instituted throughout the year.<sup>15</sup> 28 proceedings were concluded during FY2008 and a record 17 awards were rendered.<sup>16</sup> These unprecedented statistics illustrate that investors are growing increasingly concerned with international commercial agreements and are accordingly taking action to recoup any losses.<sup>17</sup>

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13 *LG&E v Argentina*, para. 195.

14 International Centre for Settlement of Investment Disputes, *Annual Report (2008)* < <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports#> > at 26 February 2009.

15 These included the registration of 31 new requests for arbitration and one new request for conciliation, bringing the total number of cases registered since ICSID’s establishment to 268.

16 Nine upheld the claims in full or in part, six dismissed all claims on the merits or on jurisdictional grounds, and two embodied the parties’ settlement agreements.

17 ICSID, above n 14.

**Number of international arbitration cases filed with ICSID (2006-2008)<sup>18</sup>**

Year	2006	2007	2008
Cases administered	118	130	145
% increase	15%	10%	12%

The government's obligations under foreign investment treaties as well as the remedies available to foreign investors in circumstances where they are discriminated against indicate that caution must be taken when implementing economic policy. It is prudent that the government consider the impact of any measures under investment treaties before such measures are implemented. On the flipside, it is also worthwhile for investors to consider the additional remedies available against governments that may arise due to investment treaties.

Investor-state arbitration has become a major growth area in dispute resolution. The question is whether its proliferation will lead to its demise, because of the unexpected effect on governments and public concern about transparency, accountability and consistency. Therefore, one can legitimately ask: will states retreat to the days of state protection of investors or is the genie out of the bottle? The answer appears to be that it is unlikely that promotion of trade and the increase in the efficiency of economies will be serviced by a retreat to the past. This is not to say, however, that there should not be attempts to quickly address the justified criticisms of investor-state arbitration. It is a question of tailoring procedures to be more effective in the context of investor-state arbitration, through addressing concerns about transparency and consistency. Moreover, awareness by investor and state communities about relevant processes needs to be enhanced.

Further, the fact that there has been very little uptake of alternative dispute resolution, apart from arbitration, in investor-state matters indicates it is an area where substantial reform is possible. To be successful, such methods must address the same concerns that face the use of arbitration to resolve investment disputes. Alternative dispute resolution mechanisms will probably only be effective if agreements actually provide for them, otherwise, the voluntary participation of states in this procedure is unlikely given the accountability problems with resolving these disputes by negotiation behind closed doors.

Historically (and also recently), in times of economic uncertainty, governments have been forced to nationalise assets and industries, especially in developing countries. Issues may arise where foreign investors are treated unequally to domestic investors because of the emergency nationalisation process.

This may cause investors to look to BITs, FTAs and MITs for protection.

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18 ICSID, above n 14. See also 2006 and 2007 annual reports.



## Reform of the International Arbitration Processes

Given the increasing utilisation of arbitration and constant developments in technology, inefficiencies in the arbitral process are becoming increasingly evident. With these developments in mind, reform of international arbitration processes is critical to its success. In a recent presentation at the Clayton Utz annual International Arbitration Lecture, Jean-Claude Najjar<sup>19</sup> discussed an array of contemporary issues in international arbitration from a user's perspective. He explained that although it is widely used,

*"[a]rbitration is no longer fulfilling the basic need of business customers for early and efficient resolution of disputes. We are increasingly turning elsewhere, to mediation and other forms of ADR."*<sup>20</sup>

This reflects a general consensus that there are areas within the international arbitration framework that need to be improved. Recent developments and increasing trends with respect to international arbitration have necessitated reform to the global framework, such that it can run more efficiently.

This section will discuss areas which require attention with respect to international arbitration processes. The first four issues are being canvassed as part of the reform of the IBA Rules of Evidence. The five areas of concern in international arbitration addressed in this paper are:

- management of the process;
- document disclosure;
- use of Experts and Witnesses;
- innovative procedures eg. witness conferencing; and
- award delays.

These issues, together with possible solutions, are discussed below.

### Management of the process

The arbitration landscape is changing as are users' expectations of the arbitral process. A fundamental part of meeting the expectations of users is to ensure that a framework is in place to ensure that the arbitration process is adequately managed.

In his address at the Clayton Utz International Commercial Arbitration Lecture, Najjar spoke on this issue and stated that:

*"[a]rbitral institutions should develop processes for measuring themselves and their arbitrators in the area of case management just as many courts do. There is a greater need for transparency and information flow."*<sup>21</sup>

There are a number of ways in which the arbitration process can be improved on a broad level. They include increasing the transparency in international arbitration generally, improving efficiency and

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19 Jean-Claude Najjar is the founder and current Chairman of the Corporate Counsel International Arbitration Group (CCIAG), a former Vice-President of the LCIA Court, and the immediate past Senior Chair of the IBA's Corporate Counsel Forum.

20 Jean-Claude Najjar, 'User's View on International Arbitration' (Speech delivered at Clayton Utz and the University of Sydney International Commercial Arbitration Lecture, Sydney, 6 November 2008).

21 Ibid.

case management mechanisms and ensuring flexibility of the process to cater for the needs of different jurisdictions.

Efficiency is probably the most recognised issue with respect to international arbitration. Many of the major arbitral institutions have developed accelerated or 'fast track' arbitration procedures, which may, for instance, apply time limits and condense proceedings to a sole arbitrator. However, given that accelerated arbitration relies on party cooperation, it would take a rare commercial relationship to ensure the process did not encounter some form of delay. Notwithstanding this, expedited arbitration rules, such as those implemented by ACICA, are a step in the right direction for international arbitration. They mark the move away from strict 'adversarial', litigation-like procedures and the move back towards the roots of arbitration, where efficiency is a priority.

The following sections will address specific ways in which efficiency within the arbitration process can be improved.

### **Document disclosure**

The issue of document disclosure has been at the forefront of debate in recent times. This has largely been due to technological developments and the growth of electronically stored information. The reason that this issue is contentious is because the growing amount of information increases the burden and strain on resources in terms of document discovery. In short, large amounts of electronically stored information may lead to a long and drawn out discovery stage and, as such, the length of the arbitral proceedings may increase. The continual development of technology forces us to find an answer to the question: what is the appropriate process for document disclosure when dealing with electronically stored information?

Most international arbitration rules and conventions require the parties to be treated equally and fairly and empower arbitral tribunals to order the production of evidence. For example, Article V (1)(b) and (d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and Article 18 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration (Model Law) both require that each party must be presented with equal opportunity to present its case. Electronically stored information quite often falls within the ambit of "evidence" for the purposes of these conventions, however, there are no guidelines that regulate how the procedure surrounding such information should be regulated.

Both the New York Convention and the Model Law are silent as to the issues of electronic information. This is because it is a relatively new development. The IBA Rules on the Taking of Evidence in International Commercial Arbitration<sup>22</sup> deal with this issue. In fact, the definition of "document" in the IBA Rules makes it clear that it applies to both hard copy and electronic information. Under Article 3 of these Rules, parties are expected to disclose to the tribunal and the opposing party any information that they rely on in their case. Further, if a party wishes to seek documents from the opposing parties, they are required to submit a "Request to Produce".

The IBA Rules of Evidence are certainly a step in the right direction. However, guidelines in this area still need to be improved so as to allow parties to avoid the potential increased cost and delay of international arbitration proceedings whilst still allowing parties to present their case fairly. While the disclosure of electronic documents is a relatively new issue and seemingly unresolved, it is manageable and "should not threaten to overwhelm or undermine arbitration".<sup>23</sup>

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<sup>22</sup> Hereinafter the *IBA Rules on Evidence*.

<sup>23</sup> Troy L Harris, 'Disclosure of Electronic Documents: The Issues and Guidelines in International Construction Arbitration' (2009) 1 *International Construction Law Journal*, 161, 162.

The Chartered Institute of Arbitrators has made a contribution here by the publication of its Protocol for E-Disclosure in Arbitration.<sup>24</sup>

### Use of Experts and Witnesses

The use of party-appointed expert witnesses in international arbitration is increasingly being re-examined in light of the sea change occurring in litigation in many common law jurisdictions. These changes are in response to concerns about the high costs and delay involved in litigation, and aim to minimise the way expert evidence contributes to these problems.

The methods of enhancing and preserving the independence of expert witnesses in litigious proceedings can be applied with success to international arbitration proceedings.

Indeed, the IBA Rules which were adopted in 1999 already provide for this to a certain extent. Article 6.2 of the Rules, for example, requires all tribunal-appointed experts to submit a statement of independence to both the tribunal and the parties before accepting an appointment in the proceedings. The independence of the expert is further assured by the timing of this statement: by submitting it before looking at the issues, the expert's mind is focussed upon his paramount duty to the court before he has a chance to identify with the case of either party. In addition, the statement serves as a powerful reminder to the parties of the role of the expert as an impartial assistant to the court.

Notably however, there is no like provision in the Rules with respect to party-appointed experts. As there is just as great a likelihood of bias on the part of party-appointed experts in arbitration proceedings as there is in court proceedings, it would be useful for international arbitration to draw upon the practices of the courts in this respect by safeguarding the impartiality of party-appointed experts in the same manner as tribunal-appointed experts. Indeed, it is probably more important to ensure the independence of the former by means of guidelines, as the fact of being appointed by a particular party is more likely to give the expert the impression that his evidence must advance that party's case.

Perhaps it is time to revisit these rules in the light of developments since their introduction. One possible means of improving the use of expert witnesses in international arbitration is to adopt a model that permits only single and court appointed experts.

The replacement of multiple, opposing, party appointed experts with a single, neutral expert was first advocated in the Woolf report. Lord Woolf argued that a single witness, appointed by the parties jointly or by the court, would enhance the objectivity of expert evidence and save time and money by significantly reducing the duration of proceedings. Accordingly, his Lordship recommended that a single expert should be preferred to multiple experts wherever possible.

This recommendation is embodied in Rule 423 (Chapter 11, Part 5, Division 1) of the *Uniform Civil Procedure Rules* 1999 of the Supreme Court of Queensland. Subparagraph (b) states that one of the main purposes of the Part is to ensure that expert evidence be given by a single expert wherever practicable, provided that it does not compromise the interests of justice. Subparagraph (d) confirms this, providing that more than one expert should be permitted to give evidence on a particular issue "if necessary to ensure a fair trial". Further, Rule 429H (in Division 3 of the same Part) stipulates that, where an expert is appointed jointly by the parties after proceedings have commenced, that expert is to be the only expert permitted to give evidence on that particular issue, unless the court otherwise orders.

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24 See generally, Chartered Institute of Arbitrators, "Protocol for E-Disclosure in Arbitration" available at <<http://www.ciarb.org/information-and-resources/E-Disclosure%20in%20Arbitration.pdf>>.

Interestingly, the Supreme Court of Queensland *Practice Direction 2 of 2005 (Expert Evidence)* emphasises that cost sanctions may apply under Rule 429D to parties who are found to have needlessly retained multiple experts on a particular issue, although the Direction gives no guidance as to how this is to be assessed.

Certainly the use of a single expert would remove the risk of that expert seeing himself or herself as the “hired gun” of a particular party and, from a practical perspective, it would also save time. However, the original motivation set out in the Woolf report for enhancing time and cost savings should be borne in mind - access to justice. It is by no means certain that the appointment of a single expert enables parties to access a just result more easily than the appointment of multiple, opposing ones.

Moreover it is telling that most Australian jurisdictions have failed to follow the lead of the Queensland Supreme Court. On the contrary, the measure has been met by significant opposition.

Those opposed to single experts argue that differing views on a particular question will not always be the result of bias, but may instead be validly held and reflective of a genuine divergence of opinion within the expert’s field. Hence, the argument goes that the adversarial treatment of opposing experts is necessary to ensure that all views are presented on the matter in question, enabling the court or arbitral tribunal to come to a more informed opinion.

A further argument against single experts is that it may actually *add* to, not reduce, the time and cost of proceedings, as parties may appoint “shadow experts” where they do not agree with the opinion of the official expert, or where they wish to determine what they should tell the single expert.<sup>25</sup> Thus, rather than having two experts under the original system, under a “single expert” system it is possible there will in fact be three.

Where the single expert has been appointed by the court or tribunal, and not by the parties, a further risk is that the court or tribunal will be more inclined to accept the evidence of the expert which it appointed.<sup>26</sup>

Clearly a key difficulty with regard to the independence of expert witnesses is balancing the need for the full range of opinions to be made available against concerns of time, cost and efficiency. It is arguable that other methods such as joint conferences and hot tubbing are sufficient.

Again this is an area where the Chartered Institute of Arbitrators has had a significant contribution by the issuance of its Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.<sup>27</sup>

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25 See generally, S Drummond, “Firing the hired guns”, 11 March 2005; available at <[www.lawyersweekly.com.au/articles](http://www.lawyersweekly.com.au/articles)>.

26 Ibid.

27 See generally, Chartered Institute of Arbitrators, “Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration” available at <<http://www.ciarb.org/information-and-resources/The%20use%20of%20party-appointed%20experts.pdf>>. This Protocol is discussed at length by the author in his paper, “Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last” (2008) 24(1) *Arbitration International* 137.

### **Innovative Procedures: Witness Conferencing**

Court ordered conferences before trial between the opposing experts of the parties are another way of limiting the differences of expert opinion on a given question. The NSW Supreme Court *Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses)* states that the objectives of joint conferences include:<sup>28</sup>

- the just, quick and cost effective disposal of proceedings;
- the identification and narrowing of issues in the proceedings at the preparation and discussion stages of the conference;
- a shortened trial and greater prospects of settlement;
- informing the court of the issues to be determined;
- binding experts to the position they take during the conference, increasing the certainty of the trial process and the issues raised therein (as the joint report may be called as evidence of agreement where the expert tries to assert an opinion other than that to which he agreed to be bound); and
- avoidance or reduction of the need for experts to attend court to give evidence.

Joint conferences are able to achieve these objectives by bringing together experts in a non-adversarial context to discuss their views in their capacity purely as expert. In 2001, Wood J observed that the joint conference experience had been “entirely positive” because:

- the non-confrontational environment made it easier to concede a point than it would be under the pressure of a trial;
- the professional context, in which experts were required to justify their opinions to their fellows, lessened the likelihood of adherence to extreme, unsubstantiated or “junk science” views;
- the meeting (and the subsequent drafting of the report) enabled both the discarding of insignificant peripheral issues and the clarification and identification of major matters of contention; and
- the meeting could lead to a fuller revelation of fact to the expert, which (depending on the facts of the case) might have an impact upon the view held by the expert.<sup>29</sup>

The Woolf Report identified two reservations felt generally within the profession with respect to conferences between experts. To begin with, many expressed the concern that a successful outcome could be undermined by parties or their representatives issuing instructions not to reach agreement or to reach agreement subject to ratification by the instructing lawyer. The view of Lord Woolf was that steps could be taken to remove, or a least mitigate, this problem.

The second reservation related to the perceived expense of holding such meetings. His Lordship was of the opinion that the initial cost incurred in holding the meeting would nevertheless result in savings further down the track.

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28 NSW Supreme Court *Practice Note SC Gen 1*, para 5.

29 Justice J Wood, “Expert Witnesses – The New Era” (Paper presented at the 8th Greek Australian International Legal & Medical Conference, Corfu, 2001).

The view of Australian courts towards joint conferences has been favourable. As recommended by the Woolf report, most Australian courts have overcome the potential for joint conferences to be undermined by expressly prohibiting experts to receive instructions to withhold agreement.<sup>30</sup> Experts are free to disagree of course, but such disagreement must arise from the exercise of their independent expert judgment.

Thus, the Federal Court guidelines aim to enable the court to streamline adversarial expert evidence by providing that it would be improper for experts to be given or to accept instructions to disagree with the experts of the opposing side, where the court has ordered that they meet for the purpose of limiting their differences. Experts' conferences have the potential to play a major role in case management, by focussing upon the genuinely contentious issues and enabling experts to reach agreement as to others. Where experts have been directed to effectively boycott this process, further time and money can be wasted. The guidelines also specify that experts should give reasons where they are unable to reach agreement on a particular matter. This allows the Court to make a more informed judgment with respect to conflicting opinions on a particular issue.

Article 6 of the Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration requires the party appointed experts to meet with a view to identifying the key issues and to seek to reach agreement on those issues before preparing reports which are to be provided to the Tribunal identifying matters of agreement and disagreement, and in the case of the latter, reasons for disagreement. The Protocol also provides for the possibility of the experts giving evidence together.

The prospect of expert and factual witnesses giving evidence together is an exciting one. Such procedures do require a much greater degree of initiative by the Tribunal than is usual in common law proceedings. Although increasingly common with party appointed experts, it is less common with factual witnesses. It does provide an opportunity to substantially shorten factual hearings and to effectively juxtapose, and in some instances reconcile, competing factual recollections.

### **Award Delays**

The design and implementation of ways to ensure the efficient and cost effective disposition of arbitral proceedings needs to be combined with the outcome of the proceedings being available to the parties as soon as possible after their conclusion. Unfortunately this is not always the case.

A combination of busy arbitrators and three member Tribunals can lead to significant and unacceptable delay in the provision of arbitral decisions to the parties after their conclusion.

It is suggested that there are ways of alleviating this problem.

First, parties and arbitrators should be transparent about the anticipated hearing dates and time limits for awards. Although the former are often mentioned, in the author's experience time limits for awards are not. There are of course some arbitral rules which contain provisions for time limits within which proceedings should be concluded, of which the ICC Rules are an example. This six month period applies to the time between commencement and conclusion of the proceedings, and is extended regularly

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30 See, for example *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*; SA Supreme Court *Practice Directions 2006*, direction 5.4.7; NSW Supreme Court *Practice Note SC Gen 11 (Joint Conferences of Expert Witnesses)*.

as a matter of form providing no real contribution to addressing the problem of delayed awards. If the parties required arbitrators to deliver their awards within agreed periods after the conclusion of proceedings there may develop a greater focus by arbitrators on expeditious delivery of awards.

Secondly, a real project management by arbitrators on award preparation and delivery should be possible. Just as case management of proceedings can deliver procedures which are timely and cost effective, project management of the award preparation process can ensure the timely delivery of awards. In the case of three member Tribunals there are predictable stages of award preparation namely deliberation, preparation of a draft by one or more members of a Tribunal, agreement upon the terms of the draft, and the settlement and proofing of the award. Each of these stages takes time which ideally should be planned for and allocated, at least provisionally, from an early stage of the proceedings. Unfortunately this is not often the case, and a Tribunal of three busy arbitrators is often left to find the necessary time after the conclusion of the proceedings in full diaries. Busy arbitrators sometimes object to setting aside time for deliberations and award finalisation at an early stage of proceedings on the basis that if the matter settles they will have declined remunerative work for the period set aside. Assuming however an obligation by arbitrators to deliver awards in a timely fashion, it is suggested that the setting aside of appropriate times to complete awards is just as important as the reservation of dates for hearing which usually can be and are reserved from an early stage of those proceedings.

It is suggested that greater transparency regarding the project management of award delivery would be of assistance to all concerned. It is also possible that transparency regarding arbitrators' track records in timely award delivery would also be of assistance to parties when choosing their arbitrators.

## Challenges and Reform in Australia

Australia has forged strong business relationships with its neighbours, particularly in South-East Asia. With the increasing use of arbitration in Asia following the expansion and opening up of the Asian economies in the mid 1990s, Australia is also developing a strong arbitration culture, both domestically and internationally. As a Western nation in the Asia-Pacific region, Australia is in the unique position of being familiar with law and legal practice in both Asia and Europe.

There has been growth and development of international arbitration for the resolution of commercial disputes involving international trade. This has arisen, at least in part, because of the desire of parties to commit the resolution of their disputes to a neutral forum which will hear the dispute at a place geographically independent of both parties. International commercial arbitration has been a Eurocentric and North American phenomenon for many years but is rapidly developing as an essential part of the resolution of commercial disputes in the South East Asia and Asia Pacific region. Given the trade flows between countries in the Asia Pacific, this is unsurprising. Australia is well placed to provide these neutral venue services to those involved in international trade in the Asia Pacific region. The Attorney General's review of the *International Arbitration Act 1974* (Cth) provides an opportunity to tweak an already effective system for international commercial arbitration in Australia.

## A Co-ordinated Approach

The Australian Centre for International Commercial Arbitration (ACICA) is a strategic vehicle for the development of international arbitration in Australia. ACICA was formed in 1985, has a substantial individual member base and enjoys financial support from many of Australia's largest law firms. The strategy of ACICA is to form part of, and support, a virtuous circle consisting of academic institutions, other arbitral bodies committed to the development of an international arbitration practice in Australia, and those individuals committed to the development of the area.

There is already strong academic support for the study of international arbitration in Australia. Currently a host of the finest academic institutions are offering lawyers, business people and professionals an opportunity to study domestic and international arbitration law under the guidance of some of the world's leading arbitration scholars and practitioners. For international arbitration in Australia to thrive, the development of great arbitrator practitioners and arbitrators is vital. In return, Australians overseas represent the success of international arbitration in Australia.

ACICA enjoys strong support from other ADR bodies including:

- Institute of Arbitrators & Mediators Australia (IAMA) - founded in 1975, membership includes some of Australia's eminent and experienced professionals from a diverse range of sectors including commercial, legal, industry, education and government.
- Chartered Institute of Arbitrators (CIArb) - a professional body dedicated to the promotion of disputes by arbitration, mediation and conciliation. To this end, the Institute provides education and training as well as qualified persons to act as arbitrators, mediators and expert witnesses.
- Australian Commercial Disputes Centre (ACDC) - an independent, not-for-profit organisation, which aims to advance the practice and quality of alternative dispute resolution services, such as arbitration, in Australia.
- Australasian Forum for International Arbitration (AFIA) - founded in 2004 to promote international arbitration amongst "younger practitioners", the AFIA provides a valuable platform for the communication of issues regarding international arbitration.
- Western Australian Institute of Dispute Management (WAIDM) - founded in 2006, it is currently the Western Australian Registry of ACICA. The aim of the institute is to provide a centre of excellence in domestic and international dispute management, research and training together with the provision of arbitration, mediation and negotiation services to the legal and business communities of Western Australia.

It is vital that there is cooperation between these various organisations for Sydney and Australia to succeed as venues for international arbitration. This appears to be occurring at present.

For example, CIArb and ACICA have been active in the establishment and promotion of the Diploma in International Commercial Arbitration in conjunction with the University of New South Wales for the last three years. The intensive course teaches participants the practice of international commercial arbitration, including all major forms of arbitration and related dispute settling mechanisms. Notably the course organisers have recognised the need for specialist teaching with a variety of lectures and expert commentary given by a range of distinguished arbitrators, lawyers, and judges.



### ACICA Initiatives Including the “Expedited Arbitration Rules”

In July 2005, ACICA released its own set of arbitration rules.<sup>31</sup> These rules provide an advanced, efficient and flexible framework for the conduct of arbitrations. They are based on the UNCITRAL Arbitration Rules but have been updated and refined, and are heavily influenced by the new Swiss Rules of International Arbitration.<sup>32</sup> They thus provide a simple and user-friendly system for the conduct of international arbitrations founded on well-tested arbitration rules that have worldwide currency and usage.

Notable features of the ACICA Rules include the following:

(a) **Appointment of Arbitrators**

Absent agreement between the parties, ACICA will determine the number of arbitrators - either one or three, depending on the circumstances of the dispute.<sup>33</sup> This flexibility can help minimise costs, particularly where the size and complexity of the dispute are not known at the time the arbitration agreement is drafted.

(b) **Multi-party Disputes**

Where there are multiple parties (either multiple claimants or multiple respondents) they must act jointly when appointing arbitrators.<sup>34</sup>

(c) **Interim Measures**

There are detailed provisions in Article 28 governing interim measures, which draw on recent UNCITRAL Working Group deliberations. They provide for, *inter alia*:

- an expanded definition of “interim measures”;
- criteria which must be established before an interim measure can be ordered; and
- provisions for the modification, suspension and termination of an interim measure.

(d) **Confidentiality**

In *Esso v Plowman*<sup>35</sup> the High Court of Australia held that arbitration proceedings are private, but not confidential, unless the parties expressly agree otherwise. In response, Article 18 of the ACICA Rules makes all arbitration private and confidential. The parties, the arbitral tribunal and ACICA are required to treat as confidential all matters relating to the arbitration (including the existence of the arbitration), the Award, materials created for the purpose of the arbitration and documents produced by another party in the proceedings and not in the public domain. There are exceptions for:

- applications made to competent courts, including for enforcement;
- disclosure of information or documents pursuant to the order of a court of competent jurisdiction;
- obligations under any mandatory laws considered applicable by the arbitral tribunal; and
- compliance with regulatory bodies (such as a stock exchange).

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31 Available at <[http://www.acica.org.au/arbitration\\_rules.html](http://www.acica.org.au/arbitration_rules.html)>.

32 Enacted by the Swiss Chambers of Commerce and Industry on 1 January 2004, and available at <<http://www.swissarbitration.ch/rules.php>>.

33 Australian Centre for International Commercial Arbitration Rules, Article 8.

34 Australian Centre for International Commercial Arbitration Rules, Article 11.

35 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

(e) **Evidence**

Procedural rules usually provide little guidance regarding the rules of evidence to be applied by the arbitral tribunal. Under Article 27.2 of the ACICA Rules, subject to contrary agreement of the parties, the tribunal must have regard to, but is not bound to apply, the International Bar Association's specialised *Rules on the Taking of Evidence in International Commercial Arbitration*.

(f) **Preservation of Model Law**

A number of jurisdictions that have enacted the Model Law allow parties to "opt-out" of the Model Law regime. In *Australian Granites Ltd v Eissenwerk Hensel Bayreuth & Dipl-Ing Burkhardt GmbH*<sup>36</sup> the Queensland Court of Appeal held that by agreeing to arbitration in accordance with the ICC Rules of Arbitration, the parties intended to exclude the Model Law. This was subsequently followed in Singapore but has since been overturned by legislation in that state. Article 2.3 of the ACICA Rules clarifies the position by providing that the selection of procedural rules does not amount to opting-out of the Model Law.

(g) **Arbitrators' Fees**

Under Article 40, the parties and arbitrators are encouraged to agree on an hourly rate for the arbitrators' remuneration; where they cannot, ACICA will determine an hourly rate, taking into account the nature of the dispute and the amount in dispute (insofar as it is aware of them) and the standing and experience of the arbitrator.

(h) **ACICA's Fees**

ACICA's fees, stipulated in Appendix A of the rules, compare favourably with those of national and international arbitration institutions.

Despite already having a set of arbitration rules which provide an advanced, efficient and flexible framework for arbitration, ACICA have not rested on their laurels. Recently, in a response to the market need for an accelerated arbitration process, ACICA has created the "Expedited Arbitration Rules". These changes further encourage the use of ACICA Rules and arbitration clauses.

### **Reform of the International Arbitration Act**

In November 2008, the Federal Attorney-General, the Honourable Robert McClelland MP presented at the ACICA Conference and spoke about the Government's intentions to facilitate reform of arbitration legislation in Australia. He mentioned that the number of requests for arbitration has trebled since 1992 and that the landscape of international arbitration has vastly changed over recent decades. He reinforced that the development of a modern, clear and fair international arbitration framework in Australia is essential to business in this country. This illustrates the government's intention to ensure that a comprehensive framework is developed in Australia.

McClelland announced eight issues that were to be addressed in a discussion paper and that were to be at the forefront of these reforms. Each of these issues will be briefly outlined below and this section of the paper will consider whether each of the proposed reforms are favourable in Australia's arbitration environment. Submissions to the Attorney-General were made up until January 2009 and the Government is currently considering whether such reforms should be implemented.

The major issues with the *International Arbitration Act 1974* (Cth) (the IAA) are as follows:

- (a) Amendment of the meaning of the 'writing' requirement in Part II of the International Arbitration Act.

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36 [2001] Qld Rep 461 (*Eissenwerk*).

Part II of the IAA provides that the requirement that an arbitration agreement be in writing and the term “agreement in writing” have the same meaning as in Article II (2) of the New York Convention. Generally, the requirement for writing in the New York Convention has been subject to a range of different interpretations in foreign jurisdictions. In Australia, the interpretation of what constitutes as “agreement in writing” has been broad. For example, the Attorney General’s discussion paper gives the example of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*<sup>37</sup> where the Court held that the writing requirement may be satisfied by “clear mutual documentary exchange as to the terms of, and assent to, the arbitration agreement.”<sup>38</sup> The Attorney General also notes that this broad interpretation of the New York Convention is consistent with international best-practice as indicated in the 2006 UNCITRAL Recommendation on interpreting the writing requirement.

In order to make the common law position clearer, the Attorney General has asked if the meaning of the writing requirement for an arbitration agreement in Part II of the IAA<sup>39</sup> should be amended? Furthermore, the paper asks whether elements of the Model Law should be used in the amended definition.

Despite the writing requirement not being the subject of as much controversy in Australia as in other jurisdictions, the IAA should be amended. By adopting the international trend, Australia will be part of a common international approach to this issue.

- (b) Grounds on which a court may refuse to enforce a foreign arbitral award.

Section 8 of the International Arbitration Act provides that a court may refuse to enforce a foreign arbitral award if one of the grounds listed at section 8 is satisfied.<sup>40</sup> Controversially, this has been interpreted broadly, with the Court in *Resort Condominiums International Inc v Bolwell and Another*<sup>41</sup> stating that a court retains a general discretion to refuse to enforce a foreign arbitral award, even if none of the grounds listed in section 8 are made out. For the sake of clarity, the IAA should be amended as suggested to expressly provide that a court may refuse to enforce an arbitral award only if at least one of the grounds listed in section 8 is made out.

- (c) Should the IAA exclusively govern international commercial arbitration to which the Model Law applies?

It is noted that this would exclude any potential application of the State and Territory commercial arbitration Acts to international commercial arbitrations, subject to the Model Law.

Such an amendment would be advantageous. As indicated by the Attorney General, this approach would help ensure that the laws governing international arbitration in Australia are simple and consistent. These are vital elements if Australia is to become an effective forum for international arbitration.

- (d) The adoption of arbitral rules and the “opting out” of the Model Law.

In Australia, parties can agree that a dispute between them is to be settled otherwise than in accordance with the Model Law.<sup>42</sup> The application of this provision was considered in the case of *Eisenwerk*. In this case, the Court found that by agreeing to settle their dispute in accordance with

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37 [2006] FCAFC 192.

38 at 152.

39 at s 3(1).

40 at ss8(5), (7), and (8).

41 [1995] 1 Qd R 406.

42 s 21, International Arbitration Act.

the ICC Rules, the parties had opted out of the UNCITRAL Model Law. This decision was followed by a Singaporean decision concerning a similar provision in the *Singaporean International Arbitration Act 1995* (. While the effect of the Singaporean decision was the same as in *Eisenwerk*, it was subsequently reversed by an amendment to the *Singapore International Arbitration Act 1995*. The Attorney General therefore asks whether the Singaporean approach should be followed and the IAA amended to reverse the *Eisenwerk* decision?

- (e) Drafting inconsistencies in Division 3 of Part III of the IAA.

It is noted in the discussion paper that there are drafting inconsistencies in Division 3 of Part III of the Act. Section 22 provides that sections 25-27 apply on an opt-in basis, however, section 25-27 are stated to apply on an opt-out basis. The Attorney General therefore asks whether these inconsistencies should be remedied and if so should it be amended such that sections 25-27 apply on an opt-out basis?

As stated in the speech by the Attorney General, the IAA must provide a clear and comprehensive framework for international arbitration in Australia. Through this, arbitration proceedings can be both efficient and effective. To this end, such inconsistencies should be remedied with sections 25-27 applying only on an opt-out basis.

- (f) 2006 amendments to the Model Law.

A range of amendments were made to the Model Law in 2006, these included:

- amendments aimed at promoting uniform interpretation of the Model Law;
- altering the definition of an “arbitration agreement” such that when adopting the revised article, states must choose between either a requirement that an arbitration agreement be in writing, albeit broadly interpreted, or removing the writing requirement all together; and
- adoption of more extensive provisions in a new chapter IVA on interim measures and preliminary orders.

The most controversial aspect of the amendments was that of Article 17 which provided for *ex parte* interim measures of protection (i.e., measures obtained by one party from the Tribunal, in the absence of the other party), which the ACICA Rules do not, and probably should not, pick up. The government is to be applauded for not intending to implement amendments allowing for *ex parte* preliminary orders.

The Attorney General asks whether the IAA should be amended to reflect these recent changes to the Model Law?

It is suggested that the IAA should be amended to reflect these recent changes to the Model Law, obviously with the exception of *ex parte* interim measures of protection in Article 17. This would bring Australia up to date with current practice and learning in the area.

- (g) Should a court or other authority perform the functions under the Model Law?

Article 6 of the Model Law provides that certain functions, such as appointing arbitrators and hearing challenges to arbitrators, may be performed by a court or other authority designed for that purpose. In Australia, all such functions are performed by designated courts. However, in other jurisdictions, including Singapore and Hong Kong, certain functions have been conferred on a national arbitration centre (Singapore International Arbitration Centre and Hong Kong International Arbitration Centre respectively). In line with the need to promote Australia as an attractive venue for international arbitration, the Attorney General therefore asks whether the IAA should be amended to follow Singapore and Hong Kong and allow an arbitral institution to appoint arbitrators.

Furthermore, it is queried whether it be appropriate for other functions referred to in Article 6, such as hearing challenges to arbitrators, to also be performed by an arbitral institution similarly designated under the IAA.

The current situation represents a real competitive disadvantage for Australia. The IAA should be amended to nominate the functions of appointing arbitrators and hearing challenges to arbitrators to an arbitral institution. ACICA is ideally suited to perform this. The function of appointing arbitrators is performed by the SIAC and the HKIAC. This is a step necessary to recognise the reality that arbitral centres such as ACICA, SIAC and HKIAC have panels of international arbitrators and a knowledge of the ability and availability of such arbitrators beyond that of parties or the courts. One has to look no further than the UNCITRAL Rules for the Conduct of Commercial Arbitration (UNCITRAL Rules) to see the international recognition that is accorded to institutions in the context of both appointment of arbitrators and the hearing of challenges to arbitrators. Parties adopting the UNCITRAL Rules, without a designation of an appointing authority are directed to the Secretary General of the Permanent Court of Arbitration in The Hague whose function it is to designate an authority to appoint arbitrators. A similar role is provided in relation to challenges to arbitrators. An appropriate course for amendment would be to designate ACICA for the purposes of both appointment of arbitrators and the initial hearing of challenges.

It is interesting to note that in both Singapore and Hong Kong there are vibrant domestic arbitration institutions whose responsibility it is to develop and promote arbitration and other forms of ADR domestically. These co-exist with, and supplement the efforts of the HKIAC and the SIAC who are responsible for it is to promote international arbitration and other forms of international ADR. A similar situation exists here in Australia with a vibrant Institute of Arbitrators & Mediators Australia co-existing with the Australian Centre for International Commercial Arbitration.

(h) Jurisdiction under the International Arbitration Act.

Currently, both the Federal Court of Australia and the State and Territory Supreme Courts have jurisdiction for matters arising under the IAA.

When releasing the discussion paper, the Attorney General announced that he would be shortly introducing a bill to the Commonwealth Parliament to give the Federal Court jurisdiction under Parts III and IV of the International Arbitration Act. This will have the effect of the Federal Court then having concurrent jurisdiction with the State and Territory Supreme Courts for all matters arising under the IAA. The issue of whether this jurisdiction should be conferred exclusively on the Federal Court has been raised by the Attorney General. He saw one advantage of such a move to be the development of a more uniform body of jurisprudence in applying the International Arbitration Act. This is an interesting proposal deserving of detailed consideration.

### **The Future in Australia**

It is critical that the Attorney General bring this reform process to a speedy conclusion to enable the Australian international arbitration profile, already enhanced by his initiatives, to be further consolidated.

Notwithstanding the unprecedented increase in arbitration and other ADR mechanisms over the past year, it would be foolish not to recognise and accept that the Australian international arbitration community face significant challenges.

The success of SIAC and HKIAC as international arbitral centres in our region is clear. While these institutions are a formidable opponent, the flow of international trade within our region suggests that this is an expanding market and we can identify and build upon the niche that Australia offers to participants in these trade flows. This will of course be dependent on the bargaining power of the parties to the various contracts containing the arbitration clauses, but it will also be dependent on other factors which lead parties to choose the seat of an arbitration.

The tyranny of distance is also a significant issue. This has undoubtedly delayed the development of Australian centres for international arbitration. However, all of the potential venues for international arbitration in Australia are attractive both geographically, and from a logistic and cost perspective. The development of a clear arbitration framework is a key issue. Furthermore, Australia is a stable democracy with a well established common law system whose predictability and longevity is not open to question.

Training and practice in the field is essential in order to develop planned awareness and credibility. The development of a local expert arbitrator base is also critical.

All of the initiatives which have been identified above are designed to meet these challenges. This is a medium-term objective.

## Conclusion

The landscape in which arbitration operates is changing. In order to keep up with the pace of the changing economic climate and to grasp the growing opportunities of arbitration, the arbitration landscape needs to adapt to this change. This paper has highlighted the increase in arbitral cases heard over the past 12 months. Given that these numbers are likely to continue to increase around the world, arbitral procedures must improve to suit the changing needs of its users.

Notwithstanding the hype and pessimism surrounding the global financial crisis generally, the changing economy presents a unique opportunity to arbitration practitioners. The booming arbitration world is not merely showing us that there is an increased demand of ADR but it is also highlighting that there are potential 'gaps' in the arbitral system that may appear in future years.

For years we have extolled the virtues of arbitration. However, we must work hard to ensure that these advantages remain strong. Arbitration should remain efficient and cost effective and we must take care not to head down the road of 'international litigation'.

Participants in international arbitration need to be forward thinking - how can we improve arbitration processes? In the short-term, the current framework will manage the increasing caseload. However, in the longer term reform is necessary. Proper procedures must be put in place to manage the process and improve the efficiency of arbitration.

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**Annexure A**

Comparison of international arbitration institutions  
(number of international arbitration cases filed from 2000-08)

Arbitral Institution/YEAR	2000	2001	2002	2003	2004	2005	2006	2007	2008
AAA-ICDR (USA)*	510	649	672	646	614	580	586	621	703
ICC	541	566	593	580	561	521	593	599	663
CIETAC (China)	543	562	468	422	461	427	442	429	548
LCIA (UK)	87	71	88	104	87	118	133	137	158
SCC (Sweden)	66	68	50	77	45	53	64	81	74
SIAC (Singapore)	41	44	38	35	48	45	65	70	71
KCAB (South Korea)	40	65	47	38	46	53	47	59	47
BAC (China)	11	20	19	33	30	53	53	37	59
VIAC (Vietnam)	23	16	19	16	32	22	23	21	#
JCAA (Japan)	8	16	8	14	15	9	11	15	12
BCICAC (Canada)	3	4	4	4	4	2	5	3	#
KLRC (Malaysia)	20	3	3	5	3	7	1	2	5
PDRC (Philippines)	0	1	2	0	0	0	1	1	#
HKIAC (China)^	298	307	320	287	280	281	394	448	602

Source: Singapore International Arbitration Centre, Facts and Figures: Statistics (2008) < <http://www.siac.org.sg/facts-statistics.htm> > at 26 February 2009.

\* These figures are for international disputes through the ICDR (not including American disputes through the AAA)

^ HKIAC does not distinguish cases administered by them and those that they only provide physical services for.

# Figures are not available.

