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President's Message

Rowena McNally, National President

Welcome to the last edition of the IAMA Journal for 2013.

This edition of *The Arbitrator and Mediator* contains a number of articles written by some of our leading ADR professionals, academics and prominent members of the ADR community. We are proud to bring this edition to you.

Many contributors to the Journal will be speakers at our next Annual Conference to be held in Canberra, 2 – 4 May 2014 and I recommend to you to reserve these dates in your planner now.

Readers of *The Arbitrator & Mediator* will have observed that since it was launched in 1981, the Journal has developed and maintained its authority as a learned publication. This reflects the talents and diligence of our Editor, Russell Thirgood, and the Journal Committee. I wish to thank them for their sustained commitment to producing an informative peer-reviewed journal that places the Institute of Arbitrators & Mediators Australia at the leading edge of scholarly discussion on ADR in Australia.

The IAMA Arbitration Rules have been under review these last months, and the final consultation period is currently underway. I encourage all members with an interest in arbitration to participate in this consultation which will lead to release of the new Arbitration Rules in early 2014, with an official launch at the IAMA Annual Conference in Canberra.

On behalf of the National Council of IAMA, I also wish to congratulate our 2013 IAMA Fellows. A Fellow of IAMA is someone who has satisfied the Council that they have such wide knowledge and experience of the Law and Practice of arbitration, mediation, adjudication, probity services or other fields of dispute resolution and avoidance to qualify him or her to become a Fellow of The Institute. Congratulations to our 2013 Fellows who received recognition this year for their high standard of knowledge and achievement in ADR:

- The Hon John Dyson Heydon AC QC (NSW)
- Mr Norman A Faifer (VIC)
- Mr Jonathan Smith (QLD)
- Dr Penny Webster (VIC)
- Mr Stephen White (VIC)

Finally, as 2013 draws to a close, I thank our National Councillors, Chapter Chairs, Chapter Committee Members and all of the IAMA staff around Australia and look forward to 2014 as we continue to provide high quality professional dispute resolution services, education and training.

Editor's Commentary

Russell Thirgood,[1] *Editor*

Welcome to the December 2013 edition of *The Arbitrator & Mediator*.

Our first contribution is from the Hon. Justice Clyde Croft. With a particular focus on the Asia-Pacific region, the vital role the courts have to play in supporting the development and success of international and domestic arbitration is discussed in this article. With the recent implementation of legislation in both Australia and New Zealand that reflects international best practice in arbitration, the courts in both countries are well placed within a pro-arbitration environment to enhance their attractiveness as arbitral seats and ensure that enforcement is expeditious. In this context, Justice Croft analyses a number of recent decision in Australia and New Zealand and outlines some procedural and other steps than have been taken in order to ensure that the judiciary in both countries are recognised as being arbitration-friendly.

Professor Doug Jones AO focuses his discussion on the three most lethal attacks on the integrity of an arbitration: arbitrator misconduct, counsel misconduct and parties approaching the arbitration in bad faith. The article addresses the important area of fair and just process in both international and domestic arbitration, the efforts of international arbitrational institutions and legislative regimes to maintain such a process, and the effectiveness of these attempts.

In *Gao Haiyan and another v Keeneye Holdings and another*, the Hong Kong Court of Appeal allowed the enforcement of a mainland Chinese arbitral award, reversing a decision of the Court of First Instance to refuse enforcement on the grounds of public policy. Josh Wilson SC and William EM Lye discuss a number of issues that emerge from this litigation and the divergent views that exist within the judiciary of Hong Kong regarding the arb-med process.

In her article, Sophie East takes a practical look at some of the issues to consider in drafting alternative dispute resolution (**ADR**) clauses. Attention is given to a number of matters that are commonly overlooked by parties, including appropriate definition of the scope of the dispute, the setting of clear processes and boundaries for multi-tier clauses, making key choices regarding place of arbitration and the particular rules to be applicable and addressing ongoing performance obligations.

1 Partner and Head of Arbitration, McCullough Robertson Lawyers; National Councillor, Institute of Arbitrators & Mediators Australia; Director, Australian Centre for International Commercial Arbitration.

Neuroscience offers fascinating insights into the way that we as humans make decisions and respond to conflict. It is set to change the way in which dispute resolution is understood. In their article, Barbara McCulloch, Dr Cathy Stinear and Jeremy Scuse provide the reader with a lesson in basic neurobiology and show how by applying insights provided by this science to dispute resolution, conflict can be resolved more efficiently.

The recognition of arbitration as a preeminent form of dispute resolution has ebbed and flowed throughout history. I trace the history of arbitration from Ancient Greek times, through the medieval period (during which the common law courts of England exhibited a high degree of hostility towards the process), to the implementation of the first arbitration legislation in Australia and ending in an examination of the recently enacted Uniform Commercial Arbitration Acts. This survey of arbitration's rich history leads to the conclusion that, despite arbitration falling out of favour for a period of time, the new Uniform Commercial Arbitration Acts provide a real opportunity for arbitration to reach its full potential.

David Kreider focuses on the pros and cons of the well-accepted practice of the unilateral appointments of co-arbitrators by parties to disputes, or the appointment of sole arbitrators or the chair by mutual agreement by the parties themselves. The practical advice for parties and their lawyers is that it is beneficial to maintain a strong voice in the process of nominating a co-arbitrator (where the tribunal will consist of three arbitrators) and in agreeing with the other side upon the nomination of the presiding arbitrator (sole arbitrator or chair). Parties should engage diligently and proactively with the process, as it may shape the arbitration proceeding itself.

In order to commence investor–state arbitration under a Bilateral Investment Treaty (BIT), several requirements must be met, including the requirement that in order to benefit from the protections provided by BITs, an investor must be a national of a contracting state but not of state in which they have invested. In his article Sergei Gorbylev explores the complexity behind the seemingly-simple concept of nationality and the fact that in an increasingly-globalised world the nationality of individual persons can be difficult to determine.

ADR is an ever-evolving field. A number of creative dispute resolution techniques have been developed by extending, re-engineering and blending existing processes so that something'new' is obtained from the'old' and through the utilisation of new technologies. As Professor Tania Sourdin explains, at present innovation across the ADR sector has a tendency to be ad hoc and may not be shared or understood across the sector – something that must be rectified to ensure that the potential of such innovations and ADR can be realised.

Culture is the essence of communication. John Morhall demonstrates how, within the context of mediated dispute resolution, understanding the impact of culture on communication and negotiation is key to bringing the parties to a resolution that is on mutually-acceptable terms. John provides a useful practical guide for mediators, lawyers and their clients on how to navigate a mediation where parties are from divergent cultures.

The first of our two case notes examines *PT First Media (formerly known as PT Broadband MultiMedia TBK) v Astro Nusantara International BV and others and another appeal*, which has important ramifications for international commercial arbitration. Tamlyn Mills takes us through the key topical and controversial issues discussed in this case, including whether an unsuccessful party can resist the enforcement of an arbitral award on the grounds of an alleged lack of jurisdiction of the arbitral tribunal in circumstances where that party did not raise the issue at an earlier stage and whether a tribunal has the power to join third parties who are strangers to the arbitration agreement under the 2007 SIAC Rules without the consent of all parties.

The key issue in *WTE Co-Generation & Anor v RCR Energy Pty Ltd & Anor* concerned the interpretation of a clause in materially similar terms to clause 42.2 of Australian Standard 4000. The judgment reinforced that courts will continue to construct dispute resolution clauses robustly in order to give them commercial effect, but indicates that, in order to be valid the clause must set out the dispute resolution process or model to be employed in a way which does not leave the process subject to further agreement between the parties.

Thank you to all contributors for their scholarly work. Happy reading.

How the Judiciary can support domestic and international Arbitration[1]

The Hon. Justice Clyde Croft, Supreme Court of Victoria[2]

Introduction

Commercial arbitration continues its global growth – with very significant increases in the number of disputes initiated, as well as in the monetary sums in dispute. This strong trend can be partially attributed to developing and rapidly industrialising economies, particularly those in Asia, and the consequent increase in business opportunities and ensuing disputes. No doubt the impact of long established arbitral jurisdictions, such as New York, London, Paris and other European centres, has also played a part. However, given that international arbitration generally relies on mutual consent, businesses and legal practitioners must have been satisfied at the time of contracting that dispute resolution by arbitration was fair, efficient, and enforceable. Contracting parties must first have had a favourable disposition towards arbitration, and also been able to understand the specific factors and decisions to be made which influence the particular ways in which an arbitration may be conducted. Surveys such as the *Queen Mary 2010 International Arbitration Survey: Choices in International Arbitration*[3] show that parties do consider various factors in choosing a favourable seat or law to govern the contract.[4]

Given the sophistication of the corporations that utilise international arbitration, there is a certain level of competition between arbitral jurisdictions. Potential seats take active measures to promote their approach to arbitration; otherwise they risk marginalisation in the competitive global marketplace. Failing to present attractively may have significantly adverse consequences, particularly in terms of the development of a jurisdiction's international legal expertise, and the involvement of its legal and professionals in international trade and commerce.

Success in this respect is, of course, not only dependent on arbitrators and arbitration practitioners. The whole process must be well supported by arbitral institutions and, importantly, the courts. All concerned must play their part in maintaining the quality of arbitral processes and outcomes, and in reducing delay and expense. Legislatures must do all they can to facilitate laws that create a favourable arbitral environment. Courts, whether they be facilitating or enforcing, are also tasked with understanding and

1 A paper presented at the Arbitrators' and Mediators' Institute of New Zealand Annual Conference, 25 – 27 July 2013 (Auckland). I would like to thank my Associate, Mr William KQ Ho, BA LLB (Hons) (Deakin), Solicitor, for his assistance in the preparation of this paper.

2 B Ec LLM (Monash), PhD (Cambridge), LFACICA, LFIAMA, JFAMINZ, FCIArb – Judge in charge of the Arbitration List for the Commercial Court of the Supreme Court of Victoria.

3 Queen Mary, University of London, School of International Arbitration, *2010 International Arbitration Survey: Choices in International Arbitration*, sponsored by White & Case LLP ('2010 QM Survey') at <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf>

4 Please also note that there has been a further survey and study conducted and released, though it does not touch upon the issue of the choice of seat of arbitration: see Queen Mary, University of London, School of International Arbitration, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process.*

supporting arbitration in all these respects – and they must be impartial, efficient and knowledgeable, and experienced with respect to international and domestic arbitration law and practice. Arbitral institutions are also playing an increasing role, and must maintain a high level of expertise, impartiality and efficiency, to the extent they are involved in both administered disputes, and in exercising any statutory or other functions, such as appointment powers. These duties, shared amongst all actors in the field, are particularly important in an atmosphere of concern, internationally and domestically, at the incidence of delay and expense. Also of fundamental importance is the state of the arbitration law, the legislation regulating both domestic and international arbitration, and its interpretation and application by the courts.

There have, over many years now, been significant efforts made by individuals and organisations, public and private, to encourage and develop arbitration in New Zealand and in Australia. In New Zealand, these include very early adoption and enactment of the Model Law on International Commercial Arbitration ('the Model Law'), both as originally adopted by the United Nations Commission on International Trade Law ('UNCITRAL') on 21 June 1985 and then as amended by UNCITRAL on 7 July 2006. New Zealand was also very prompt in enacting the substance of the Model Law provisions, which were applied to both international and domestic arbitrations, in the *Arbitration Act* 1996 ('the AA'). In fact, with the introduction of the Arbitration Amendment Act 2007, which came into force on 18 October 2007, New Zealand became the first country to adopt the whole of the Model Law as amended, with only a few minor modifications.[5] Australia was a little slower in adopting a similar course, though the Model Law, as amended in 2006, now forms the basis of both the *International Arbitration Act* 1974 (Commonwealth of Australia) ('the IAA'), as amended in 2010, and the State-based domestic commercial arbitration legislation – first enacted as uniform legislation on this basis by New South Wales in the *Commercial Arbitration Act* 2010, in Victoria in 2011 and now in all the other States and Territories (except the Australian Capital Territory) (the domestic legislation is, for convenience, referred to as'the CAA').[6]

These efforts also include those by the courts in creating and utilising specialist arbitration lists and arbitration judges, and the development of new rules, services and education programs by arbitral institutions and centres.

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5 The legislation governs both domestic and international arbitration. The principal part of the legislation contains provisions that are applicable to domestic and international arbitration. The First Schedule adopts the Model Law with minor amendments and applies to both domestic and international arbitration. The Second Schedule contains optional rules applicable to domestic arbitration (unless the parties can opt out) and international arbitration (if the parties opt in). Though one should be wary of opting in as the Second Schedule has been designed for domestic arbitration by allowing appeals on questions of law arising out of an award. The Third Schedule contains reproduction of various treaties including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').

6 Commercial Arbitration Act 2010 (NSW) came into force on 1 October 2010; *Commercial Arbitration Act* 2011 (Vic) came into force on 17 November 2011; *Commercial Arbitration Act* 2011 (SA) came into force 1 January 2012; *Commercial Arbitration (National Uniform Legislation) Act* 2011 (NT) came into force on 1 August 2012. Both the *Commercial Arbitration Act* 2011 (Tas) and *Commercial Arbitration Act* 2012 (WA) have been assented to but are not yet in force. Queensland has the uniform legislation currently passing through its parliament, whilst the Australian Capital Territory is yet to act on the SCAG Model Bill.

The aim of the present arbitration reinvigoration process is to increase the use of both international and domestic commercial arbitration in both New Zealand and Australia. International experience indicates that countries that have been successful in establishing busy international arbitration centres and attracting significant international arbitration work also have significant and active domestic arbitration sectors. The two feed off each other. The vibrant domestic arbitration sector provides significant experience for its arbitrators – and also for its courts. It is all the more so where the domestic arbitration law is based on an international regime, such as the Model Law – as is the position in both New Zealand and Australia.

Reinvigoration of international or domestic arbitration in Australia cannot be achieved by governments or the courts acting alone. Governments have now made a crucial contribution to the process by procuring the enactment of substantially enhanced international arbitration legislation and groundbreaking domestic arbitration legislation. Rather, responsibility for this reinvigoration also falls on the various commercial arbitration stakeholders – commercial parties, lawyers (whether they be corporate, in-house lawyers, barristers or solicitors), arbitrators, and arbitral institutions (particularly as educators and the custodians of ethical standards).[7] I will, however, concentrate on the role of the courts, but it should be observed that the role or roles of each of these stakeholders is or are, naturally, interconnected and so collective, coordinated, action is required.

At times, there has been a perception that the courts have hindered effective commercial arbitration, both by intervening too much in the arbitral process and by interpreting the arbitral law in an interventionist rather than a supportive way.[8] This perception, as well as many other factors, was one of the reasons why Australian commercial arbitration legislation required attention; though the domestic legislation had also become very dated as a result of developments in legislation elsewhere.[9]

Prior to the enactment of the then new, uniform, domestic commercial arbitration legislation in the mid-1980s, Australian commercial arbitration had been constrained very significantly by the case stated procedure which could be used, in effect, to force a retrial of the issues in an arbitration in the reviewing court. Naturally, the cost, expense and delay involved, along with the loss of confidentiality of the dispute, had the effect of making commercial arbitration very unattractive.

In relation this latter aspect, reference should be made to the innovative arrangements developed by the Arbitrators' and Mediators' Institute of New Zealand ('AMINZ') in developing the Arbitration Appeals Tribunal, which is designed, broadly, to provide an expeditious and cost-effective arbitral appeal

7 Including the Arbitrators' and Mediators' Institute of New Zealand ('AMINZ'), the Australian Centre for International Commercial Arbitration ('ACICA'), the Chartered Institute of Arbitrators (Australian Branch) ('CIArb'), the Institute of Arbitrators and Mediators Australia ('IAMA') and the New Zealand Dispute Resolution Centre ('NZDRC').

8 For further discussions of these cases, see below at p 21 and following.

9 The domestic commercial arbitration legislation, prior to the enactment of the *Commercial Arbitration Act* 2010 in New South Wales was uniform (or substantially uniform) legislation which flowed from the work of SCAG in the late 1970s and early 1980s which was based on the then new and innovative legislative developments in England which resulted in the enactment of new legislation in the form of the *Arbitration Act* 1975 (Eng) and, principally, the *Arbitration Act* 1979 (Eng). Victoria was the first State to enact the legislation SCAG had developed, in the form of the *Commercial Arbitration Act* 1984. New South Wales followed shortly afterwards as, in due course, did the other States and the Territories. Apart from in New South Wales, as a result of its enactment of the *Commercial Arbitration Act* 2010 (NSW), this is the domestic commercial arbitration legislation still in force in Australia.

mechanism while at the same time maintaining arbitration confidentiality without the need to rely on judicial discretion being exercised in favour of maintaining confidentiality.[10]

Finally, in setting the scene, the importance of harmonising arbitration laws, both intra-nationally and internationally, and the needs of the international and domestic communities should be emphasised. In this respect, Mr Sundaresh Menon SC, Attorney-General of Singapore (as his Honour the Chief Justice then was),[11] in the Opening Plenary Session of the ICCA Congress 2012 (Singapore) said:[12]

> *6 But, in the second half of the 20th century, as global trade grew, so did the pressure for the development of a workable system of international dispute resolution and with it we saw the growth of efforts to harmonise arbitration laws so as to construct an acceptable international framework. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which was adopted on 21 June 1985,[13] was ground breaking in its efforts to rationalise and propose a uniform legal framework for the conduct of arbitrations that would gradually displace the patchwork of hitherto disparate pieces of domestic legislation. And in providing a model text for States to adapt and adopt, the Model Law also paved the way for a new paradigm of minimal curial intervention by specifying very restrictive and defined circumstances in which the intervention of the courts could be sought*
>
> *7 Recognising that what the business community desires is a fast and ultimately, a conclusive method for resolving commercial disputes, the courts have gradually eased their supervisory control over arbitration in line with the norms reflected in the Model Law and the ubiquitous New York Convention. The impressive statistics coupled with the prevailing attitude of judicial deference, that has been exhibited across the globe are clear signs that arbitration has arrived as a vitally important partner in the business of international dispute resolution.*

The Arbitration Environment and its Importance

The 2010 QM Survey provides a'checklist' for assessing the attractiveness, or otherwise, of a jurisdiction as a seat for arbitrations. The 2010 QM Survey found that the most important factor influencing the choice of the seat for arbitration was the'formal legal infrastructure' at the seat.[14] The passage of the Model Law based legislation in both New Zealand and Australia enhances their position in this respect. New Zealand and Australia, like other attractive international arbitration seats, have stable government institutions.

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10 See the AMINZ Arbitration Appeal Rules at www.aminz.org.nz, noting that rule 1.1 provides:'The purpose of the AMINZ Arbitration Appeal Rules is to encourage, through the use of the AMINZ Arbitration Appeal Panel, the efficient, confidential and high-quality resolution of appeals from arbitral awards on questions of law.' Section 14B of the Arbitration Act 1996 provides that every arbitration agreement the provision applies to'is deemed to provide that the parties and the arbitral tribunal must not disclosure confidential information.'

11 The Hon Chief Justice Menon was appointed Chief Justice of Singapore on 6 November 2012.

12 Sundaresh Menon SC, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, delivered at ICCA Congress 2012 Opening Plenary Session, at paras [6] and [7].

13 http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

14 2010 QM Survey, at p 17.

The governing law of the contract is also an important factor in selecting an arbitral seat – and this and the law of the seat may coincide. Whilst neither New Zealand nor Australian law is as frequently specified as the law applicable to international contracts as, for example, English or New York law, either may be seen as a useful option. Both are based on English common law and each country has developed its own jurisprudence which is regularly cited and applied in other jurisdictions. Of course, arbitrators in New Zealand and Australia can and do apply English law with relative ease; or, similarly, New York, Singapore or Hong Kong law if that is desired. The same applies with respect to civil law systems, such as Indonesia or the Philippines.

The effect of the choice of seat on enforceability of the arbitral award is also a serious matter – and one to be considered carefully. The choice of a jurisdiction where neutrality and impartiality is questionable may invite enforcement problems. Neither New Zealand nor Australia presents any such problem. Additionally, as emphasised in the 2010 QM Survey, a critical factor in choosing the seat is the neutrality and impartiality of the legal system – and New Zealand law (and New Zealand) and Australian law (and Australia) cannot be faulted on that score.

Arbitral institutions and their rules are another factor that may influence the choice of the seat. In particular, the NZDRC, ACICA and IAMA provide a choice of modern arbitration rules – a set of rules of general application to international arbitrations and an expedited set of rules tailored for smaller disputes.[15] AMINZ, NZDRC, ACICA and IAMA have played a leading role in raising the profile of arbitration in New Zealand and Australia, supporting the arbitral process, educating arbitrators and providing general guidance.

In defence of the courts with respect to the perception that they have been too interventionist in, rather than supportive of, arbitration, it might be said that the legislatures could have included *The Nema* guidelines with respect to appeals in the 1980s uniform legislation if this had been the legislative intent. Nevertheless, given the provenance of the legislation and the English case law, I think it would have to be conceded that there were some'unfortunate' decisions.[16] There were also some problems with over intervention in the arbitration process by way of judicial review of awards and as a result of an increasing tendency for parties to challenge awards on the basis of, what is generally best described as,'technical misconduct'. This should not, however, overshadow the very effective and useful work of the courts in expediting and supporting arbitration through very'arbitration friendly' decisions on the operation of the arbitration legislation, and more generally. This is unsurprising and consistent with the approach of the common law over a long period of time. In this respect it is, in my view, worth noting that the common law courts were, as far back as the eighteenth century, extraordinarily supportive of commercial arbitration – as Professor James Oldham's account of the work of Lord Mansfield in the latter part of that century illustrates.[17] More recently, the English, Singapore and Hong Kong courts, for example, have been very

15 See www.acica.org.au; www.nzdrc.co.nz; and www.iama.org.au. Note that AMINZ has an AMINZ Arbitration Protocol – but no designated set of arbitral rules.

16 See below, at p 22 and following.

17 J. Oldham, *English Common Law in the Age of Mansfield* (2004, University of North Carolina Press), at pp 68 – 72.

supportive, as many of the Australian courts have been, and continue to be. The New Zealand courts have also handed down decisions which reflect international arbitration trends and approaches.[18]

Also of concern has been the actual performance of arbitration itself. Although the education programs of arbitral institutions seek to develop and promote innovative techniques which save time and cost, all too often arbitration as practised in Australia has tended to replicate traditional litigation. I say'traditional litigation' as for many years the commercial courts in Australia and other countries have embraced aggressive case management and time saving techniques which have made'innovative litigation' far more attractive than domestic commercial arbitration in many instances. Certainly, New Zealand should be commended for its continual search for approaches to improve case management, as highlighted in a very recent regulatory impact statement prepared by the Ministry of Justice.[19] A reason for the replication of traditional litigation can be explained by a number of factors, including the increase in the size and complexity of arbitral proceedings as well as the concerns of arbitrators in ensuring they provide the parties with a'fair go' in reaching the right decision where there is a lack of avenues for appealing an award. In his paper at the ICCA Congress 2012, Mr Sundaresh Menon SC,[20] noted that arbitration has transformed from its early days of being a'faster, cheaper, less formal and more efficient' process than court proceedings to a'highly sophisticated, complex and exhaustive process dominated by its own domain experts.' He went on to note that:

> *25 … The lack of an avenue of appeal and minimal curial intervention were meant to simplify things. Instead, these factors have given rise to the realisation that there is little room for error in arbitration. The modern era of arbitration is characterised by insulated arbitral decision-making with minimal review …*
>
> *26 Arbitrators, mindful of the principles of natural justice and the fact that there is no appeal against their decision, are sometimes compelled to endure protracted submissions and responses to submissions on every conceivable point.*
>
> *27 Detailed frameworks and rules with an emphasis on legal accuracy, precision and certainty have overtaken the ad hoc compromise-orientated system. Just as arbitration has taken centre stage in the resolution of high value international commercial disputes, it has also become an increasingly complex and formal process burdened by formidable costs.*

18 See, for example, *Hi-Gene Ltd v Swisher Hygiene Franchise Corp* [2010] NZCA 359 where the New Zealand Court of Appeal (referencing an earlier leading case with respect to Article 34, *Amalta Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614) held that the public policy exception to refuse enforcement of an international award is to be narrowly interpreted.

19 *Regulatory Impact Statement – Improvement Case Management for Civil Cases in the High Court* released 14 November 2012, available at <http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-justice-icm-dec12.pdf

20 Sundaresh Menon SC (as his Honour the Chief Justice then was), *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, presented at the ICCA Congress 2012 (Opening Plenary Session).

> *28 … The golden age of arbitration bears a number of distinct hallmarks that may perhaps be surprising to those who shared our trade just a few decades ago. The worry is that these changes have occurred at breakneck pace and have far outstripped any central organising thought process on their potential consequences and pitfalls.*

Aflow on effect of large and complex arbitration is the impact on costs and, naturally, the growing discontent of users of arbitration.[21] Indeed, with respect to the important question of cost (arbitrators', experts' and lawyers' fees alike), steps might be taken to limit or control fee structures which do not encourage efficiency, such as time costing, and which may cut across the objective of legislatures, courts and arbitrators to promote speedy and cost effective processes.[22]

In this context, I observe that in more recent times arbitrators have been emboldened to be more robust in applying active case management and more innovative techniques. This process has also been assisted by cross fertilisation from international arbitration where innovation in arbitration processes has tended to be in advance of domestic arbitration, if only because of very significant time, cost and logistical constrains applying to the former. Interestingly the approach of international arbitrators has also assisted the courts and we now see the application of such techniques as'chess clock' time management being used by the courts. Other positive influences include the very successful special reference procedures which were made available and applied extensively by the Supreme Court of New South Wales – which provide, in effect, an expedited, supervised, commercial arbitration process with minimal appeal potential and no enforcement problems. From my own experience, I can report that these procedures are now being applied more frequently in the Supreme Court of Victoria.

Government and legislative support

There are two primary ways in which governments can assist arbitration: through direct financial assistance (for example, by trade promotion or public-private partnerships) and through the legislative provision of'best-practice' in arbitral regimes, domestic and international.

In relation to the first point, governments across the globe have seen the need to support and encourage efforts to develop particular cities and jurisdictions in a manner favourable to arbitration.[23] In the Asia-Pacific region, Singapore has led the field with Maxwell Chambers. In Australia, the Australian International Disputes Centre, based in Sydney, opened in August 2010. Funded by the Australian Commonwealth and New South Wales governments, it offers modern purpose-built hearing facilities and also houses leading ADR providers in Australia – including ACICA, CIArb, the Australian Maritime and Transport Arbitration Commission ('AMTAC') and Australian Commercial Disputes Centre

21 Sundaresh Menon SC (as his Honour then was), *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, presented at the ICCA Congress 2012 (Opening Plenary Session) at paras 35-37.

22 And see, in the litigation context, Justice Clyde Croft,'AON and its implications for the Commercial Court', a paper presented at the Commercial Court CPD and CLE – *Aon Risk Services Australia Ltd v ANU* [2009] HCA 27: What does this mean for litigation and how will it affect trial preparation?' seminar on 19 August 2010, available at http://www.supremecourt.vic.gov.au/wps/wcm/connect/justlib/supreme+court/home/library/su preme+-+aon+and+its+implications+for+the++commercial+court.

23 See, for example, *Arbitration in Toronto: An Economic Study* (6 September 2012); referred to in (2012) 86 ALJ 723 at 726.

('ACDC'). It is envisaged that other Australian States, including Victoria, will also follow suit, acting in conjunction through a'grid' of coordinated centres throughout Australia to offer services to international and domestic parties alike.[24] Likewise in Auckland, the Arbitration and Mediation Centre was recently opened. Modelled on arbitration centres in Australia, Hong Kong, Singapore, London and Toronto, the Auckland centre reflects the positive growing demand for dispute resolution services.

The other key to the rise of arbitration globally is the harmonisation of arbitration legislation across differing (nation) States. This is reflected by the work undertaken by UNCITRAL in developing, revising and promoting its Model Law and Arbitration Rules.[25] This highlights the desirability of harmonisation, internationally, in the way in which arbitrations are conducted and supervised. It ensures familiarity with arbitral processes which, in turn, leads to confidence in its role as a dispute resolution mechanism underpinning the global commercial and trading system. The use of the amended Model Law as the basis of both the international and domestic commercial arbitration legislation in New Zealand and Australia provides legislation which is based on current international consensus and accepted practice and which is well understood internationally. Consequently, the New Zealand and Australian legislation, at both levels, becomes immediately accessible and understood internationally – particularly as the New Zealand experience is that the legislation is interpreted and administered by the courts on the basis of accepted international jurisprudence. It is expected that the same approach will be adopted by the Australian courts. In terms of substance, the Model Law is an internationally drafted and accepted arbitration regime that is very supportive of commercial arbitration. It has been enacted in over sixty nation states. It allows parties the freedom to decide how they want their disputes resolved – with minimal court intervention, but with maximum court support. Consequently, the Model Law is the arbitration law against which all other arbitration laws tend to be judged.

The choice of the Model Law as the basis for the CAA in Australia will assist in achieving a great deal of uniformity between the international and domestic regimes. As both the IAA and the CAA apply the Model Law provisions, with some additions and adaptations to accommodate their particular contexts, judgments under one regime can and will inform judgments under the other. State and Territory Supreme Court judges, when making decisions under the CAA, will need to be acutely aware of the impact of their judgments on the interpretation of the IAA, as they have jurisdiction under both regimes.[26] Additionally, international and domestic parties are likely, and entitled, to assume that a decision on similar or identical provisions under one regime will be found to apply with equal force under the other regime. Consequently, decisions under the CAA will also be considered in determining whether Australia is an attractive seat for international arbitrations. Given that, at least initially, it is likely that there will be more decisions under the CAA than the IAA, it would seem that Australia's Model Law jurisprudence will be developed, at first, by the State and Territory Supreme Courts – as the Federal Court of Australia, which has jurisdiction under the IAA, has no jurisdiction in the domestic regime. There was some

24 The Hon Marilyn Warren AC, Chief Justice of Victoria'Victoria's Commitment To Arbitration Including International Arbitration And Recent Developments', remarks at the Australian Centre for International Commercial Arbitration reception at the Melbourne Office of Mallesons Stephen Jacques on 13 May 2010.

25 See Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2010, Sweet & Maxwell); and Clyde Croft, Christopher Kee, and Jeff Waincymer, *A Guide to the UNCITRAL Arbitral Rules* (2013, Cambridge University Press).

26 A position which is reinforced, and required, by section 2A of the CAA.

controversy surrounding the question whether the Federal Court should be given exclusive jurisdiction under the IAA during the process of review which led to the amending legislation.[27] At the time this issue was being discussed the only context was the proposed amendments to the IAA and not also the effect of applying the Model Law domestically in terms of the CAA; which raises the variety of additional considerations to which reference has been made.

In New Zealand, the substantive provisions of the AA apply to both international and domestic arbitration. The First Schedule, which contains provisions reflecting the Model Law, applies to both international and domestic arbitration. The Second Schedule, which contains a set of optional rules designed for domestic arbitration, can also be'opt-in' by parties to an international arbitration agreement. In that sense, whilst there remains, strictly speaking, a distinction between international and domestic arbitration, there is, by and large, uniformity between the two regimes.

Similarly, the Hong Kong Arbitration Ordinance provides for a unitary regime, removing the distinction between domestic and international arbitrations. Singapore, however, continues to maintain a distinction between domestic and international arbitrations, the former operating under the *Arbitration Act* (Chapter 10), and the latter under Singapore's *International Arbitration Act* (Chapter 143A). Nonetheless, Singapore's domestic *Arbitration Act* relies heavily on Model Law provisions, and thus the provisions of the domestic Act are substantially similar to those of the international regime.

Key provisions in the Australia and New Zealand arbitration legislation

Some of the important legislative changes introduced by the uniform CAAs and the amendment of the IAA (for Australia) and the AA (for New Zealand) will go a long way in both requiring and encouraging the courts to support both domestic and international arbitration.

Court assistance and supervision generally

Courts are given certain functions under the Model Law. The functions include the appointment of arbitrators (Articles 11(3) and (4)), the removal of arbitrators (Articles

13(3) and 14), decisions on arbitral jurisdiction (after the tribunal has already been appointed) (Articles 16(3)) and the setting aside of arbitral awards (Articles 34(2)). In New Zealand, this is generally reflected in Schedule 1 of the AA with the New Zealand High Court being the supervisory court. Under section 18 of the Australian IAA these functions can be performed by the relevant state or territory Supreme Court or by the Federal Court of Australia. This gives parties a choice of forum and thus encourages the courts to provide efficient court procedures. As discussed below, the Arbitration List in the Commercial Court, which is part of the Supreme Court of Victoria, is designed to provide an efficient and expeditious service in support of commercial arbitration; domestic and international.

It has been argued that giving jurisdiction to multiple courts will create inconsistency in interpretation of national legislation. In my view, this will be avoided by courts having regard to the interpretation

27 The issue was raised in the Commonwealth of Australia Attorney General's department *Review of the International Arbitration Act* 1974, Discussion Paper, November 2008 in section H.

provisions of the IAA in the context of the international character of the Model Law, by the establishment of specialist arbitration lists and with the assistance of the ACICA Judicial Liaison Committee.[28] In relation to domestic arbitrations, the Supreme Court of the relevant state or territory is the court appointed to perform the various facilitative and supervisory functions under the CAA. Other courts can be given jurisdiction to perform these functions if the parties agree. In New South Wales both the District Court and the Local Court are available to the parties if they agree either before or after their dispute has arisen.

Staying court proceedings

An obvious way for a court to support arbitration is to insist on the parties complying with their arbitration agreement. Quite frequently, a party to an arbitration agreement will issue court proceedings resulting in the other party making an application to the court for a stay of that proceeding. Article 8 of the Model Law provides that:

> *Article 8 Arbitration agreement and substantive claim before court*
>
> *(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

The IAA applies these Model Law provisions internationally,[29] as does the CAA domestically.[30] In New Zealand, the AA contains a similar provision.[31] If there is a valid arbitration agreement the court must grant a stay, unless the dispute subject to the court proceedings lies outside the ambit of the arbitration agreement. That said, it will be rare for a court to not stay court proceedings even if there is some doubt as to whether the matter is within the scope of that agreement. First, from a practical point of view, most arbitration agreements are drafted so widely these days that they will capture most of the parties' disputes. Secondly, the courts have reached the position that arbitration agreements should be construed liberally, in line with commercial realities and to give effect to the presumed intention of parties wishing to resolve their disputes by arbitration (though there is no legal presumption in favour of arbitration).[32] In

28 The ACICA Judicial Liaison Committee was established to provide consistency on Australian arbitration matters. The eight member Committee was formed as a response to legislative changes resulting from the International Arbitration Act 2010, which came into force in July, and the establishment of the Australian International Disputes Centre, which opened in August. The Committee was headed by former High Court Chief Justice, the Hon Murray Gleeson AC as Chairman. Other members included: The Hon Chief Justice Wayne Martin (Supreme Court of Western Australia); The Hon Justice James Allsop (then President of the New South Wales Court of Appeal; now Chief Justice of the Federal Court); The Hon Justice James Douglas (Supreme Court of Queensland); The Hon Justice John Middleton (Federal Court of Australia); The Hon Justice Judith Kelly (Supreme Court of the Northern Territory); The Hon Justice Clyde Croft (Supreme Court of Victoria); The Hon Justice Tim Anderson (Supreme Court of South Australia), The Hon Justice Richard Refshauge (Supreme Court of the Australian Capital Territory) and Doug Jones AM.

29 IAA, section 16.

30 CAA, section 8.

31 *Arbitration Act* 1996, Article 8 of Schedule 1

32 See, for example, *Ferris v Plaister* (1994) 34 NSWLR 474; *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Walter Rau v Cross Pacific Trading Ltd* [2005] FCA 1102; and *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.

Comandate Marine Corp v Pan Australia Shipping Pty Ltd,[33] Allsop J (as he then was) (with Finn and Finkelstein JJ agreeing) said:

> *164 … The court should, however, construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration.*
>
> *165 This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places. This may be seen to be especially so in circumstances where disputes can be given different labels, or placed into different juridical categories, possibly by reference to the approaches of different legal systems. The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy.*

The use of the court's powers to stay proceedings could be used quite strategically by the parties to establish whether or not the issues in dispute are in fact covered by the arbitration agreement. Indeed, there is a genuine concern that if the subject matter of the dispute is beyond the ambit of the arbitration agreement, then any resulting arbitral award could either be challenged[34] or refused recognition (in relation to international arbitral awards only).[35] Although the arbitral tribunal has a power to determine its own jurisdiction under the principle of *kompetenz-kompetenz*,[36] parties may seek more certainty from the courts by requesting it to exercise its powers to stay the court proceedings.

Evidence

In relation to both international and domestic arbitration in Australia, the courts can assist the parties in the taking of evidence,[37] including the issuing of subpoenas for oral or documentary evidence.[38] It should be noted that the use of subpoenas for the purposes of arbitration may be a little different to the way in which it is utilised in court proceedings. In the matter of *Transfield Philippines Inc v Luzon Hydro Corp*,[39] the arbitral tribunal, of which I was a member, directed that subpoenas be issued before pleadings were delivered, before discovery was conducted and some time before the arbitral hearing. Byrne J of the Victorian Supreme Court described this approach as'unusual in litigation' but did not question that the tribunal was acting within its competence.

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33 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 87.
34 Article 34(2)(iii) of the Model Law.
35 Article 36(1)(iii) of the Model Law and Article V(1)(c) of the NY Convention.
36 Article 16 of the Model Law.
37 Article 27 of the Model Law and CAA s 27.
38 IAA s 23 and CAA s 27A.
39 *Transfield Philippines Inc v Luzon Hydro Corp* [2002] VSC 215

In relation to arbitrations in New Zealand, Article 3 of Schedule 2 (opt-in for international arbitration and opt-out for domestic arbitration) expands on the powers of the New Zealand High Court or District Court with respect to assisting the arbitral tribunal in the exercise of its powers including, amongst other things, the power to order:

- the discovery and production of documents or materials within the possession or power of a party;
- the answering of interrogatories;
- that any evidence be given orally or by affidavit or otherwise; and
- that any evidence be given on oath or affirmation.

Interim Measures

Prior to the 2010 amendments, the IAA adopted Article 17 of the 1985 Model Law, which states that the arbitral tribunal may'order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.' The fundamental problem with this provision was that there is no procedure within the Model Law for a party to have an interim measure granted by an arbitral tribunal enforced by a court. Enforcement provisions under the 1985 Model Law only apply to'awards', which, at the very least, must finally determine some of the issues in dispute.

In practice, interim measures ordered by an arbitral tribunal are often complied with as it is not prudent tactics to ignore the arbitral tribunal that is to decide the issues of substance, and also because the same interim measure can be applied for from a court under Article 9 of the Model Law. The latter option may raise res judicata issues if it puts the court in the position of having to determine something already dealt with by the arbitral tribunal. Parties may be better off avoiding this possible complication and applying directly to a court, rather than applying to the arbitral tribunal. This means, however, that parties would not be able to have the entire matter dealt with by an arbitral tribunal; which may have confidentiality implications and perhaps other implications of concern.

The 2006 amendments to the Model Law avoid some of these complications and issues by the creation of an enforceable interim measures regime. The IAA adopts all these amendments in relation to interim measures apart from Article 17B, which gives arbitral tribunals the power to grant ex parte interim measures. Article 17H(1) allows interim measures to be enforced by a court subject to the limited grounds for refusing enforcement set out in Article 17I. Section 18B of the IAA specifically prevents arbitral tribunals from making *ex parte* interim measure orders, known as preliminary orders, under Article 17B of the Model Law. The major criticism of *ex parte* orders in arbitration is that they run counter to the consensual nature of arbitration. This criticism may be overstated as Article 17B of the Model Law is an opt-out provision, which can be excluded by party agreement, so that if parties do not wish to have the option of *ex parte* preliminary orders available then, consistently with the principle of party autonomy, they can exclude them. Article 17J also provides that the court shall have the same power of issuing an interim measure in relation to arbitration proceedings, though it should exercise that power'in accordance with its own procedures in consideration of the specific features of international arbitration.'

With respect to domestic arbitration in Australia, although parties to an arbitration agreement are not to make substantive claims in court, they can still apply to a court for an interim measure of protection. The types of interim measures sought are usually injunctions to preserve the status quo, freezing orders and the like. Arbitral tribunals, under section 17 of the CAA, also have the power to order interim measures. Under section 17H of the CAA interim measures made by an arbitral tribunal are enforceable by the court. Enforcement can only be refused on the limited grounds provided for in section 17I. Parties to arbitration are likely to comply with interim measures ordered by the arbitral tribunal as they risk costs consequences in court in the event that such recourse is made necessary by non-compliance. Similar to the Model Law, section 17J of the CAA also grants the court the same power of granting an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts.

The AA reflects the Model Law, as discussed above, but also contains provisions which allow arbitral tribunals to issue preliminary orders.[40] The conditions set out in Article 17D of Schedule 1 set a high bar before a preliminary order can be granted:

> *(1) The arbitral tribunal may issue a preliminary order if it considers that prior disclosure of the request for the interim measure to the respondent risks frustrating the purpose of the measure.*
>
> *(2) An applicant for a preliminary order must satisfy the arbitral tribunal of the matters specified in article 17B. That article applies to a preliminary order subject to—*
>
> *(a) the modification that the harm to be assessed under article 17B(1)(a) is the harm likely to result from the order being issued or not; and*
>
> *(b) all other necessary modifications.*

Determination of preliminary point of law – domestic arbitrations only

Section 27J of the CAA allows a party to apply to the court for a determination on a preliminary point of law. This can only occur with the consent of the arbitrator or all the other parties; so it is not a provision inherently likely to be abused. Delays may arise, however, if the determinations made by the court are sought on a regular basis; but this is unlikely under the new legislative regime. Nevertheless the safeguard adopted in New Zealand with respect to this type of application would be helpful.

Article 4 of Schedule 2 of the AA is similar to section 27J of the CAA but requires the New Zealand High Court, before embarking on the determination, to be satisfied that the determination'(a) might produce substantial savings in costs to the parties' and'(b) might, having regard to all the circumstances, substantially affect the rights of one or more of the parties.'

Setting aside and appealing awards – domestic arbitrations only

Section 34 of the CAA, which is based on the Model Law, sets out the very limited grounds under which a party can apply to have an award set aside. The grounds do not include errors of law or fact by the arbitral tribunal, but rather deal mainly with situations were there was no power to issue the award in the

40 *Arbitration Act* 1996, Articles 17C – 17G of Schedule 1.

first place. Among other things an award can be set aside because the dispute is not within the scope of the arbitration agreement; there is not a properly constituted tribunal; the arbitration agreement is void; or the award is in conflict with the public policy of the state. The grounds are very narrow, and are unlikely to be successfully relied upon on frequently. Similar grounds apply under the enforcement provisions in section 36 of the CAA.

In the domestic context the grounds provided for in section 34 of the CAA (based on Article 34 of the Model Law) were thought, at least potentially, to be too narrow. Consequently there is a broader appeal right given under section 34A of the CAA. This section is an addition to the Model Law provisions, which are reflected in section 34 of the CAA, but section 34A only applies to domestic arbitrations. Section 34A of the CAA allows an appeal on a question of law if the parties agree that such an appeal may be made and the court grants leave.[41] This section is the high point of the court's supervisory role and goes further than the grounds set out in section 34. Although section 34A does go further than section 34, the appeal right is still restricted. Determinations of fact cannot be subject to appeal, but, of course, there is often difficulty in separating law from fact to the extent that a failure with respect to the determination of factual matters may amount to an error of law.[42] The decision of the arbitral tribunal must be'obviously wrong' or the question must be one of'general public importance' and the arbitral decision is open to'serious doubt'. These tests are somewhat similar to those under the Commercial Arbitration Act 1984 (Vic) ('CAA 1984'), but they appear to be more constrained and should be seen as at least incorporating the more restrictive approach to appeals contained in the *Nema guidelines*.[43]

It should be emphasised that in relation to international arbitrations there is no appeal right conferred under the IAA over and above any right with respect to court supervision provided for in the Model Law.

Article 5 of Schedule 1 of the AA, again, is largely reflected in its later Australian legislative counterpart. The article usefully clarifies that a'question of law':

> *(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but*
>
> *(b) does not include any question as to whether—*
>
> *(i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and*
>
> *(ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.*

41 Under s 34A(1)(a) of the CAA, the parties may agree, before the end of the appeal period referred to under sub-s 34A(6), which provides:
(6) An appeal may not be made under this section after 3 months have elapsed from the date on which the party making the appeal received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal (in this section referred to as the'appeal period').
Section 33 of the CAA contains provisions with respect to correction and interpretation of award; additional award (cf Model Law Act 33).

42 Cf Article 5 of Schedule 2 of the New Zealand AA; and s 34A of the Australian Uniform CCAs.

43 See *Pioneer Shipping Ltd v BTP Tioxide Ltd ('The Nema')* [1982] AC 724 at 742; and see JA Sharkey and JB Dorter, *Commercial Arbitration* (1986, LBC), 268 – 274.

Confidentiality

One of the key provisions of any piece of arbitration legislation now relates to confidentiality. One of the important developments for Australian arbitration was with respect to confidentiality. Although confidentiality had also been considered as an inherent feature of arbitration, the Australian High Court decision in *Esso Australia Resources Ltd v Plowman*[44] was that confidentiality was an obligation only when it was expressly provided for in the arbitration agreement. To avoid any confusion, the IAA and the CAA now provide confidentiality regimes that apply unless the parties decide to opt out.[45] Taking the IAA as an example, section 23C prohibits parties and the arbitral tribunal from disclosing confidential information except as provided for by the Act. Section 23D specifies the situations when confidential information can be disclosed; such as with the consent of all the parties, for the purpose of obtaining professional advice or when required to be disclosed by a court. Section 23E gives the arbitral tribunal the power, on application of a party, to allow disclosure of confidential information in circumstances outside section 23D. Sections 23F and 23G give the court the power to prohibit disclosure or allow disclosure, respectively, after an application under section 23E has already been made.

The confidentiality regime under AA contains similar, but more comprehensive, protections and prohibitions than its Australian counterparts.[46] Indeed, the New Zealand provisions go significantly further and make the distinction between privacy and confidentiality. Under section 14A arbitrations must be private. In sections 14F to 14I the AA sets up a regime which allows for the possibility of court proceedings relating to an arbitration being conducted in private and being confidential. A party seeking privacy and confidentiality must apply for the court proceedings to be so conducted (sub-section 14F(2)(a)) and state their reasons for doing so (section 14G). The court needs to balance the public interest aspects and must consider the factors set out in section 14H. These are:

(a) the open justice principle;

(b) the privacy and confidentiality of arbitral proceedings;

(c) any other public interest considerations;

(d) the terms of any arbitration agreement between the parties to the proceedings; and

(e) the reasons stated by the applicant under section 14G(b).

In this context, it should be observed that the establishment of the AMINZ Arbitration Appeals Tribunal and the AMINZ Arbitration Appeal Rules ensures that privacy and confidentiality extends to arbitral on questions of law without the need to satisfy the court with respect to privacy and confidentiality.[47]

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

45 See s 22(2) with respect to ss 23C to 23G of the IAA; and ss 27E to 27I of the uniform CCAs.

46 See ss 14A to 14I.

47 See above at pp 21-22.

Court support for arbitration?

It has been observed there are'tentative signs suggesting a modest return to greater judicial oversight of arbitration'.[48] In recent years, arbitration has had to deal with some counterproductive decisions with respect to a number of issues. Australia, in particular, has been the source of a number of decisions which have caused anxiety within the arbitration community. Some related to the extent of reasoning required in arbitral awards. Dealing with the old commercial arbitration legislation and the requirement that an arbitrator'include in the award a statement of the reasons for making the award', both the Victorian Supreme Court[49] and the Victorian Court of Appeal[50] found that the arbitral proceedings in question required the arbitrators to provide reasoning at the same standard expected of the judiciary. This finding was met with some concern by the arbitration community; many taking the view that this requirement would undermine one of the strengths of arbitration, which was expedition and a quick turn around of decisions. The NSW Court of Appeal, however, took diametrically opposed view to its Victorian counterpart:[51]

> *216 The underlying difference between arbitration and court litigation should be borne in mind at all times: see in particular the article by Lord Bingham'Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award' op cit. Though courts and arbitration panels both resolve disputes, they represent fundamentally different mechanisms of doing so. The court is an arm of the state; its judgment is an act of state authority, subject generally in a common law context to the right of appeal available to parties. The arbitration award is the result of a private consensual mechanism intended to be shorn of the costs, complexities and technicalities often cited (rightly or wrongly, it matters not) as the indicia and disadvantages of curial decision making.*
>
> *217 That some difficult and complex arbitrations tend to mimic the procedures and complexities of court litigation may be a feature of some modern arbitration, but that can be seen perhaps more as a failing of procedure and approach rather than as reflecting any essential character of the arbitral process that would assist in a conclusion (erroneous in principle) that arbitrations should be equated with court process and so arbitrators should be held to the standard of reasons of judges.*

The matter ultimately found its way to the High Court[52] where the High Court held that the requirement that arbitral awards display a judicial standard of reasoning'placed an unfortunate gloss upon the terms of s 29(1)(c)'[53] and that what was required by way of reasons in a given case depended on the

48 Sundaresh Menon SC (as his Honour then was), *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, presented at the ICCA Congress 2012 (Opening Plenary Session) at paras 51-65.

49 *BHP Billiton Ltd v Oil Basins Ltd* [2006] VSC 402

50 *Oil Basins Limited v BHP Billiton Limited* [2007] 18 VR 346; see in particular paras [50]-[57].

51 *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74

52 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239

53 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239 at para [53].

circumstances of the case.[54] It was, naturally, important that the issue be clarified but some dicta, together with the Victorian decision, tended to reinforce the perception that the courts were not supportive of arbitration – particularly some comments by Heydon J in the High Court casting doubt of the merits of arbitration:[55]

> *111 The arbitration proceedings began on 15 October 2004 when Gordian served points of claim. This appeal comes to a close seven years later. The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy … But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater relevant expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three.*

There were also some other decisions which were the focus of the recent legislative reforms, including *Esso Australia Resources Ltd v Plowman*[56] (see above with respect to confidentiality), *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardts GmbH*[57] (relating to the proposition that the adoption of the ICC arbitral rules constituted an opt-out of the Model Law),[58] and *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies57*[59] (in relation to the interpretation of an arbitration clause and staying of related court proceedings).

However, despite some less supportive or problematic decisions and comments, there are recent signs that the courts do, in reality, strongly support arbitration and the system that underpins it. In the decision of *Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd*[60] the NSW Supreme Court rejected a challenge to the constitutionality of the CAA 2010 (NSW). An arbitral award had been rendered against the plaintiff for its wrongful cancellation of wheat contracts. Under the CAA, an appeal to the court on a question of law required leave of the court as well the parties' agreement. The plaintiff failed to establish that there had been such an agreement. It was argued that the CAA: (a) was an impermissible attempt to remove the court's constitutionally entrenched jurisdiction to review arbitral awards for'jurisdiction error'; and (b) impermissibly impaired the'institutional integrity' of the court by requiring the court to enforce an award of an arbitral tribunal infected by'jurisdiction error'. Stevenson J rejected both arguments:

54 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239 at paras [53]-[54] and [169]-[170]; cf *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor* [2010] VSC 139 ('Thoroughvision').

55 *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239 at 288.

56 (1995) 183 CLR 10

57 [2001] 1 Qd R 461

58 Noting that the amendments to the IAA now addresses this, which no longer permits the parties to opt out of the Model Law.

59 *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies* [2011] ACTSC 59.

60 *Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd* [2012] NSWSC 1306

> *53. The source of the arbitrator's power to decide the dispute between the parties in a 'consensual arbitration' arises from the agreement of the parties … The authority of private arbitrators is'derived solely from agreement of parties to the determination'…*
>
> *54. The parties in a consensual arbitration are not compelled to resolve their disputes by arbitration; they do so because that is their agreement. An award binds the parties because they have agreed to abide the arbitrator's decision.*
>
> *55. Their position is quite different from that of a citizen subject to the exercise of state, judicial, governmental or executive power; that citizen has no choice.*
>
> *56. The arbitrator, acting under contract, is not exercising state, judicial, governmental or executive power.*

Even more recently, the High Court unanimously upheld the constitutional validity of the IAA in *TCL Air Conditioner v The Judges of the Federal Court of Australia*.[61]

The decision related to an arbitration involving an Australian company (Castel Electronics Pty Ltd ('Castel')) and a Chinese company (TCL Air Conditioner (Zhongshan) Co Ltd ('TCL')). The parties' distribution agreement contained an arbitration clause. The arbitration was heard in Australia and an award was ultimately rendered in favour of Castel for $3.5 million. Castel then sought to enforce the arbitral award, which TCL opposed; unsuccessfully arguing, amongst other things, that the Federal Court did not have jurisdiction to enforce the award.[62] The matter went before the High Court where TCL argued that enforcement of the arbitral award was at odds with the exercise of judicial power by the Federal Court of Australia:[63]

> *4 The plaintiff's argument, as refined in oral submissions, reduces to the proposition that the inability of the Federal Court under Arts 35 and 36 of the Model Law to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award either: undermines the institutional integrity of the Federal Court as a court exercising the judicial power of the Commonwealth, by requiring the Federal Court knowingly to perpetrate legal error; or impermissibly confers the judicial power of the Commonwealth on the arbitral tribunal that made the award, by giving the arbitral tribunal the last word on the law applied in deciding the dispute submitted to arbitration. The undermining of the institutional integrity of the Federal Court is compounded, the plaintiff argues, because the arbitral award that is to be enforced by the Federal Court, in spite of any legal error that may appear on its face, is one that Art 28 of the Model Law, or an implied term of the arbitration agreement, requires to be correct in law.*

61 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5

62 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21

63 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para [4] (per French CJ and Gageler J).

More specifically, the argument was that the IAA gave effect to articles in the Model Law which provide for the exercise of the judicial power of the Commonwealth contrary to Chapter III of the Constitution. TCL argued that: (a) the IAA required the court to act in a manner which impairs the institutional integrity of the court by prohibiting the court from refusing enforcement of an award on the basis of an error of law on the face of the award; and (b) the IAA vested judicial power of the Commonwealth in tribunals because the enforcement provisions of the IAA rendered the arbitral award final and determinative.

With respect to the first argument, French CJ and Gageler J said:

> *34 The inability of the Federal Court, as a competent court under Arts 35 and 36 of the Model Law, to refuse to enforce an arbitral award on the ground of error of law appearing on the face of the award does nothing to undermine the institutional integrity of the Federal Court. Enforcement of an arbitral award is enforcement of the binding result of the agreement of the parties to submit their dispute to arbitration, not enforcement of any disputed right submitted to arbitration. The making of an appropriate order for enforcement of an arbitral award does not signify the Federal Court's endorsement of the legal content of the award any more than it signifies its endorsement of the factual content of the award.*

Hayne, Crennan, Kiefel and Bell JJ found that a court hearing the enforcement application pursuant to the IAA could refuse enforcement or set aside an award for a number of reasons – and that these provisions provided protection for the institutional integrity of the Australian courts.[64] Their Honours also observed that'[t]he Federal Court's determination of the enforceability of an award, upon criteria which do not include a specific power to review an award for error, serves the legitimate legislative policy of encouraging efficiency and impartiality in arbitration and finality in arbitral awards.'[65]

TCL also argued that Article 28(1) of the Model Law should be read as requiring the arbitral tribunal to decide a dispute correctly if it is to be taken to be acting within the powers conferred by the arbitration agreement. This argument was rejected on the basis that it'runs counter to the autonomy of the parties to an arbitration agreement and is opposed by the drafting history of Art 28'.[66] Hayne, Crennan, Kiefel and Bell JJ found that:[67]

> *72 Even if any of these provisions can be understood as obliging arbitrators to decide a dispute according to law, senior counsel for TCL correctly accepted in argument that the Model Law makes it plain that recognition and enforcement of an arbitral award could only be denied in limited circumstances. Legal error is not one of those circumstances.*

64 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para [103].

65 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para [105].

66 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para [15] (per French CJ and Gageler J).

67 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at paras [72]-[74] (per French CJ and Gageler J).

> *73 TCL's argument must be rejected: it depends on treating the language of part of Art 28(1) as forming part of the agreement between the parties, whilst simultaneously treating the provisions of the Model Law regulating the recognition and enforcement of awards as not forming part of that agreement.*
>
> *74 The alternative argument advanced by TCL, that it is an implied term of every arbitration agreement that the authority of an arbitrator is limited to the correct application of the law, must also be rejected. No term of the kind asserted can be implied into an agreement to submit a dispute to arbitration. Implication of such a term (even if it could be said to be reasonable and equitable) is not necessary to give business efficacy to an arbitration agreement and is not so obvious that'it goes without saying'.*[68]

The High Court also unanimously rejected the argument that the judicial power of the Commonwealth had been delegated to arbitral tribunals:[69]

> *28 Underlying each of those dimensions of the judicial power of the Commonwealth is its fundamental character as a sovereign or governmental power exercisable, on application, independently of the consent of those whose legal rights or legal obligations are determined by its exercise. That fundamental character of the judicial power of the Commonwealth is implicit in the frequently cited description of judicial power as'the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects', the exercise of which'does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action'. Judicial power'is conferred and exercised by law and coercively','its decisions are made against the will of at least one side, and are enforced upon that side in invitum', and it'is not invoked by mutual agreement, but exists to be resorted to by any party considering himself aggrieved'.*
>
> *29 Therein is the essential distinction between the judicial power of the Commonwealth and arbitral authority, of the kind governed by the Model Law, based on the voluntary agreement of the parties. The distinction has been articulated in the following terms:*[70]
>
> > *'Where parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the*

68 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

69 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at paras [28]-[29] (per French CJ and Gageler J).

70 *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 658 [31]; [2001] HCA 16. See also *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 at 14.

> *agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.'*
>
> *The context of that articulation puts its reference to 'private arbitration' in appropriate perspective. The context was that of a challenge to the capacity of a statutory body consistently with Ch III of the Constitution to exercise a statutory function to settle a dispute where so empowered by an agreement entered into as a result of statutory processes. The reference to 'private arbitration' was not to a private function, as distinct from a public function, but rather to a function the existence and scope of which is founded on agreement as distinct from coercion.'*

It is safe to say the arbitration stakeholders in Australia breathed a collective sigh of relief when the High Court unanimously rejected the challenge. The decision now strongly re-affirms judicial support for arbitration in Australia, at the highest level – as a reliable and final method for determining disputes. I endorse the observations of Justice Allsop that:[71]

> *The clear trend in judicial decision-making about arbitration in Australia [has transformed] from suspicion, to respect and support … In terms of intervention [by the judiciary], restraint is essential. Arbitration depends for its success on the informed and sympathetic attitude of the courts.*

The ongoing role of courts with respect to arbitration

The judiciary will continue to play an essential role in supporting and facilitating the development of arbitration. The majority of courts in developed arbitral jurisdictions are vested with at least some degree of supervisory, supportive and enforcement jurisdiction over all forms of arbitration. Over the last few years, there has been a significant increase in the number of specialist arbitration lists of courts in the Asia- Pacific region.

In August 2010, Bombay's High Court announced the creation of a court dedicated to arbitration-related applications. In China, a lower court decision not to enforce an award is, in practice, referred automatically to a higher court for review. If the decision on review is not for enforcement, this decision must, in turn, be reviewed by the Supreme People's Court. Developments of this nature help to ensure specialisation in the resolution of arbitral matters, leading to consistent and predictable outcomes in line with global arbitration jurisprudence and international conventions and obligations. The High Court of Hong Kong and the High Court of Singapore are outstanding examples of courts in this region which achieve these results; having done so for very many years. The Dubai International Financial Centre Court has similar goals and has a good relationship with the DIFC-LCIA Arbitration Centre.

71 Justice James Allsop,'International Arbitration and the Courts: the Australian Approach' in CIArb's Asia Pacific Conference 2011 – *Investment & Innovation: International Dispute Resolution in the Asia Pacific* (2011), 1 and 7, as referred to in Peter Megens and Andrew Vincent,'Case Note: To Stay or Not to Stay? Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies [2011] ACTSC 59' (2011) 30(2) *The Arbitrator and Mediator* 57, 63.

The specialist Arbitration List of the Commercial Court of the Supreme Court of Victoria

The Supreme Court of Victoria is vested with broad jurisdiction to assist with all aspects of both domestic and international commercial arbitration. As noted previously, the Federal Court of Australia only has jurisdiction with respect to international arbitration, as defined in the Australian IAA, as amended in 2010. On 1 January 2010, the new Arbitration List of the Commercial Court in the Victorian Supreme Court began operation; which, together with the Commercial Arbitration List of the New South Wales Supreme Court,[72] are the only specialist arbitration lists in Australia.[73]

All arbitration matters brought in the Victorian Supreme Court are heard in the Arbitration List of the Commercial Court. Arbitration matters are exempt from the usual Commercial Court fee, which applies because of the managed list and expeditious processes which are available. The operation of the arbitration list is set out in *Practice Note 2 of 2010 – Arbitration Business*.[74] The Practice Note sets out procedural information as well as useful guidelines for those considering an application. Parties are encouraged to communicate directly with my Associates before filing an application at the Registry. There are a number of advantages to this approach. First, the parties can seek to clarify any procedural or administrative issues. Secondly, enquiries are made with Associates who have experience in handling arbitration related enquiries. Thirdly, and most importantly, parties are given a very early opportunity to suggest when the application should be heard. This is essential given the expedition of matters that the Arbitration List aims to achieve. In fact, given the priority put on hearing arbitration related matters quickly, the parties have often asked for a more relaxed timetable than has been offered to them.

Benefits of specialist lists

It is clear that there are substantial benefits that flow from providing a specialist list, with a specialist judge or judges. A court that has established an arbitration list is likely to be more aware of the specific issues that arise in the arbitration context. Also, a consistent body of arbitration related decisions can be developed by judges that have an interest and expertise in arbitration. Given that the legislation governing Australia's arbitral regime is relatively new, there will be great importance placed upon court decisions interpreting these provisions, which are largely based on the Model Law. It is essential that consistent interpretation and application is given to both the international and the domestic legislative provisions – contained in the IAA and the CAA, respectively – not only to conform with international thinking and arbitral practice (particularly having regard to the Model Law's international heritage), but also to assist in developing sound arbitration law expertise and to support Australia's reputation as an arbitration-friendly jurisdiction.

72 See Practice Note No. SC Eq 9 at <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/012e70809f4424c1ca2579a30079a2db?OpenDocument>

73 The Federal Court of Australia has a panel of judges available to hear arbitration matters, but it has not established a separate list.

74 See Appendix I.

As part of so doing, courts need to ensure that any procedures to be applied with respect to the making of and dealing with applications under both the IAA and the CAA are clear and easily accessible. In this context, procedure must also include listing procedures and expedition.[75] Specialist courts with arbitration lists assist in this respect. The procedural approach to applications under the IAA and the CAA will have a major impact on the way that Australian arbitration law is viewed. For example, staying court proceedings in favour of an arbitration is a pro-arbitration step, but if it takes an excessive time for the stay application to be heard and determined, the arbitration process has probably been thwarted anyway. Procedural consistency and expediency is far more likely to be achieved when there are specialist arbitration lists and judges; as the experience in leading commercial arbitration centres such as London, Singapore and Hong Kong shows. Specific arbitration practice notes and rules are essential to this process.

Liaison between courts and with arbitration users

If the objectives of the IAA and the CAA are to be fully realised, the courts need to communicate with and receive feedback from commercial arbitration stakeholders. Specialist courts with arbitration lists are particularly well placed to do this as they are in contact with the relevant parties and practitioners to the greatest extent possible. An Arbitration Users' Group for the Supreme Court of Victoria has been established and has provided valuable input with respect to the development of new court rules for the commencement and disposition of applications under the IAA and the CAA. This ongoing consultation process through the Users' Group will also lead to further improvements to the Arbitration Business Practice Note.[76] I would expect that other courts will establish similar consultative mechanisms.

The courts in a federal state like Australia, where the jurisdiction is spread between a number of different courts, need to liaise with each other to develop and share their arbitration expertise and experience. The existence of specialist arbitration lists will help in this regard by directing arbitration business to particular judges within a court who can then share their knowledge and experience with the arbitration judges from other courts. This consultation between judges of the Federal Court and the judges of the State and Territory Supreme Courts will be essential if, as I expect, the majority of Model Law decisions are initially made under the CAA.[77] I have no doubt that such communication and consultation between arbitration judges in New Zealand is equally important. Additionally, having regard to the extent of international arbitration in this region of the world, it would also be beneficial to develop further the communication and consultation that already exists between the courts in our two countries – and, additionally, the corts in centres such as Singapore and Hong Kong.

75 Noting in this respect that the Victorian Supreme Court Arbitration List (List G) is available 24 hours per day, seven days per week and hearings can and do take place outside court hours as required.

76 Practice Note No. 2 of 2010 – Arbitration Business.

77 This process is being assisted by the ACICA Judicial Liaison Committee which was established in late October 2010. This Committee is chaired by a former Chief Justice of the High Court of Australia, the Hon Murray Gleeson AC. The Committee includes the judges hearing arbitration-related cases from the Supreme Courts and the Federal Court, as well as representatives from ACICA. It aims to promote uniformity in the rules and procedures relating to arbitration in Australia – particularly concerning the enforcement of arbitration agreements and awards, as well as the appointment of arbitrators, and the provision of interim measures or other assistance in support of arbitration.

Raising the expectations on arbitrators and practitioners

In order to achieve the general objectives discussed, courts need, and value, assistance from parties and their representatives. Solicitors and counsel are able to provide significant assistance to the courts in applying the Model Law provisions, as applied by the IAA or as adopted by the CAA, in a manner consistent with international and domestic jurisprudence. Assistance by reference to commentaries and case law in submissions informed by comprehensive research, including consideration of the broader policy considerations underlying the legislation – policy considerations which may have an international dimension, for the purposes of the AA, the IAA and the CAA – is essential. The existence of a specialist arbitration list with a specialist judge or judges can provide a focus for arbitrators and arbitration practitioners, both for the purpose of educating arbitrators and practitioners in this respect and providing an understood level of knowledge and expectation having regard to the expertise of the court.

Decisions in the Victorian Supreme Court Arbitration List

The Arbitration List has attracted a significant amount of work since it began. During that time I have handed down judgments in a number of arbitration matters,[78] some quite significant, and dealt with a variety of other applications. Each case that hasgone to judgment has raised a different issue regarding the extent to which the Court can intervene or assist in arbitration decisions or processes, including enforcement – both issues of procedure and substance. A few of the decisions were made under the CAA 1984, which is the old domestic commercial arbitration legislation. However, the principles in those cases are still very relevant in examining the relationship between the Court and arbitration more generally. *Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors*[79] raised issues regarding court intervention in procedural decisions made by an arbitral tribunal. *Oakton Services Pty Ltd v Tenix Solutions*[80] was a successful application to stay court proceedings in favour of arbitration as there was an arbitration agreement in place. *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor*[81] involved an application for leave to appeal an arbitral award under section 38 of the CAA 1984 and an application to set aside an award for misconduct under section 42 of that Act on the basis of insufficient reasons provided in the award. I found that there was no manifest error of law on the face of the award for the purposes of sub-section 38(5)(b)(i) and that there was no misconduct on the part of the arbitrator for the purposes of section 42 on the basis asserted. This required examination of the quality of reasons required of an arbitrator under sub-section 29(1)(c) of the CAA 1984 in the context of a decision of the Victorian Court

78 *Arnwell Pty Ltd v Teilaboot Pty Ltd & Ors* [2010] VSC 123; *Thoroughvision Pty Ltd v Sky Channel Pty Limited & Anor* [2010] VSC 139; *Oakton Services Pty Ltd v Tenix Solutions IMES Pty Ltd* [2010] VSC 176; *Winter v Equuscorp Pty Ltd* [2010] VSC 419; *Altain Khuder LLC v IMC Mining Inc & Anor* [2011] VSC 1; *Altain Khuder LLC v IMC Mining Inc & Anor* (No 2) [2011] VSC 12 (referred to with approval by the Hong Kong Ultimate Court of Appeal in *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* CACV 136/2011); *Yesodei Hatorah College Inc v Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622; and *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249 (noting that both Altain Khuder decisions were reversed on appeal [2011] VSCA 248; cf *DampskibsselskabetNorden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696 and *Traxys Europe SA v Balaji Coke Industry pvt Ltd [No 2]* (2012) 201 FCR 535.

79 [2010] VSC 123

80 [2010] VSC 176

of Appeal[82] and NSW Court of Appeal in that area (as discussed above). More recently Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd[84] involved consideration, in the context of a stay application under section 53(1) of the 1984 Act, of the nature and operation of an arbitration agreement in the context of a variety of other agreed dispute resolution mechanisms.

Yesodei Hatorah College Inc v Trustees of the Elwood Talmud Torah Congregation[85] was a significant decision for a number of reasons. In that proceeding, I found that an arbitrator had failed to discharge his mandate under section 22(2) of the CAA 1984 to determine issues by reference to'considerations of general justice and fairness', which is a conflation or amalgam of the concepts'*amiables compositeur*' and'*ex aequo et bono*', both of which are found in UNCITRAL's Model Law and Arbitration Rules. The parties were in dispute over a lease and entered into an arbitration agreement, appointing a sole arbitrator, who was a distinguished former judge and empowered by the agreement to'determine any question that arises for determination in the course of the arbitration by reference to considerations of general justice and fairness.' The parties submitted three issues for determination: (i) whether the parties had entered into an agreement for lease of land; (ii) whether the landowner (the'Congregation') was estopped from denying the parties had entered into a lease agreement; and (iii) if the first two questions were in the negative, the period of notice required for the College to vacate the land. The sole arbitrator dismissed the first two claims. The College then sought to appeal the award under section 42 of the CAA 1984 on the basis that the arbitrator had failed to: (i) determine all matters before him and that the Congregation had acted unconscionably and was thereby estopped; and (ii) failed to exercise his jurisdiction by applying strict law and not determining the matters in accordance with section 22(2) of the CAA 1984. I concluded that the arbitrator had failed to exercise the powers granted to him and that there were'equitable' factors which should have been considered by him. This is a departure from the usual position which requires an arbitrator to apply the law strictly. The judgment in this case is one of the very few instances where a common law court (in any jurisdiction) has considered the nature and operation of a mandate of this kind. I should note though that I was concerned to emphasis that the court's power was only to set aside the arbitrator's findings if it was found that he had failed to exercise his powers. On the other hand, had the arbitrator exercised that power, the court would not have been in a position to review that exercise of his power in circumstances where he was not required to decide according to law.

81 [2010] VSC 139
82 *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346.
83 *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57.
84 *Biosciences Research Centre Pty Ltd v Plenary Research Pty Ltd* [2012] VSC 249
85 *Yesodei Hatorah College Inc v Trustees of the Elwood Talmud Torah Congregation* [2011] VSC 622

Conclusion

The importance of judicial support for the development and growth of arbitration on both the domestic and international level cannot be overestimated. With the continuing progress of globalisation arbitration now plays a crucial role in international trade and investment and in the commercial life of industrialised economics – especially those in the Asia-Pacific region. Although governments can support international arbitration through legislative reforms and other direct assistance, the judiciary must be actively involved and demonstrate a willingness to support arbitration, facilitating its processes and enforcing its results.

The changes introduced by the arbitration legislation in New Zealand and Australia reaffirm the role of courts in providing critical assistance and guidance in the arbitration process, and with respect to arbitration generally. Crucially, recent decisions in both New Zealand and Australia also indicate that despite some problematic decisions – especially in Australia – the courts are now strongly supportive and will ensure that arbitration, international and domestic, will continue to develop in both countries. Indeed it must flourish for the benefit of our trading nations of, or the imposition of severe restrictions on, arbitral dissent.

In short, the capacity of arbitrators to give dissenting reasons is a bulwark against arbitrators who are overbearing, who skimp their work, or who delegate their work. The capacity to dissent constitutes a healthy and invigorating element in the system.

How to maintain a fair and just process when counsel, clients and co-arbitrators appear to be conspiring against you[1]

Professor Doug Jones AO[2]

Introduction

The arbitration process is, by its very nature, fraught with uncertainty due to a large number of variables. Despite the many months (and sometimes years) of preparation that are devoted to a party's case, the success of the arbitration for all concerned rests mostly on the application of a fair and just process throughout the entire proceedings, and not only at the hearing. While any form of equivocation is typically unwelcomed in any aspect of an arbitration, it is arguably *most* unwanted when it comes to process, as the rules by which the game is played must be fair and clear for all involved in order for the game to be played fairly at all. Thus, as an arbitrator, and more specifically as the president of a tribunal, it is important to ensure that the mechanics of the procedure by which the dispute is resolved are well thought out and account for all circumstances. After all, being'conspired against' by counsel, clients and co-arbitrators *really* only becomes an issue when any of these entities' actions go beyond the standards acceptable in arbitration.

Maintaining a fair and just process throughout an arbitration normally requires strict adherence to the general notions of good faith and equal treatment of parties. Such an observation may be readily drawn from the obvious conclusion that no process may be contemplated to be'fair' or'just' where it benefits one party to the detriment of another, or where it allows for, or promotes, a party's deviance or commission of foul play. Any such threats to the integrity of an arbitration may usually be said to fall within one (but sometimes more) of three broad groups of issues: arbitrator misconduct, counsel misconduct, or parties approaching the proceedings in bad faith. By way of example, a scenario that involves conduct from two of these groups of issues might be where the relationship between counsel and arbitrator is one which gives rise to justifiable doubts regarding the impartiality and independence of the arbitrator, or one which incites a real danger of arbitrator bias.[3] In this case it is practically likely that any duty to avoid such a conflict will rest mostly with the arbitrator, however it is possible to see that the impropriety may realistically exist on the part of both the arbitrator and counsel.

The actions of the arbitrators are usually those most closely watched by anyone involved in an arbitration, as well as by the courts and professional bodies. Thus, while arbitrator misconduct is typically more easily identifiable, and bears quite serious repercussions for the arbitrator(s) found to have misconducted

1 This paper was first presented at the 2013 AMINZ Conference in New Zealand. The author gratefully acknowledges the assistance provided in the preparation of this paper by John Karantonis, Legal Assistant and Juliana Camacho Arias, Intern, both of Clayton Utz, Sydney

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3 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, article 12i

themselves, counsel misconduct often goes unnoticed, and the consequences for the counsel concerned – if any – are often uncertain. In continuing this trend of ambiguity, party misconduct (by intentionally acting in bad faith) is even more difficult to diagnose and deal with.

In light of the immense importance of a fair and just process and the confusion that surrounds many of the threats to such a procedure, this paper will identify and address some of the common problems under each of the three abovementioned categories, as well as the attempts that have been made to thwart their impact on the arbitral process and the relative effectiveness of such solutions. However, in considering any potential resolutions to these problems which tarnish arbitration, the age old adage which has been noted by many arbitration practitioners in the past must be borne in mind: we must be careful to cure the disease, and in doing so, not kill the patient.

Arbitrator Misconduct

The astronomical increase in both international and domestic trade and commerce witnessed in the past few decades and the sheer size of the corresponding disputes which have evolved from such activity mean that arbitrators today, more than ever, have a heavy responsibility resting on their shoulders. This is exacerbated by the absence of the possibility of an appeal to a court on a point of law, which means that arbitrators are under considerable pressure to get it right the first time.

The disputes that find their way to arbitration are increasingly high value and complex, especially as institutions develop procedures to enable consolidation of disputes arising out of related contracts or involving multiple parties. Alongside the inevitable challenges and difficulties that arise from handling arbitrations of this complexity, arbitrators are faced with the procedural consequences of lawyers who are often willing to go to any length to satisfy their clients' expectations. Tribunals are quite often faced with more procedural issues than would arise in a first instance case in the courts, and are compelled to give seemingly unmeritorious applications more attention than would a judge.

Given these difficulties, the overwhelming majority of arbitrators do perform commendably in navigating the arbitration through the procedural minefield often created by the parties, and arriving at the correct destination on the merits of the dispute. In light of these difficulties, and given the enormous growth in the use of arbitration, a number of concerns regarding the conduct of arbitrators have come to the attention of the global arbitration community in recent times. Such concerns include that arbitrators face a temptation to be biased towards a particular party in an arbitration, or class of party, in an effort to become more appealing for reappointment purposes, or that a number of arbitration practitioners work as both counsel and arbitrators, or share chambers/firms/offices with other practitioners who are involved in the same arbitration, which might also give rise to concerns of bias. More generally, however, there is a fear amongst the arbitration community that there is simply insufficient disclosure of arbitrators' conflicts of interest. In terms of party favouring, criticisms regarding the'repeat player' type of arbitrator have abounded, however the arbitration community has refuted such accusations, claiming that they are not only overstated but also rare amongst the end users of arbitration.

In an attempt to thwart the potential impact of such problems, it has been suggested that a universal code of conduct and practice should be developed for arbitrators, and that such a code would ensure a level

of oversight and accountability for arbitrators that would in turn provide a greater level of reassurance, not only to the end users of arbitration, but also to fellow arbitration practitioners and, ultimately, to the courts. It is quite likely that the creation and implementation of such a code would benefit the arbitration profession greatly – at a minimum, ensuring that all arbitrators abide by the same high standards that most currently abide by would certainly improve the public's perception of the profession.

In this context, there are various'hard' and'soft' laws which attempt to regulate arbitrator conduct in Australia and New Zealand, as well as in other international jurisdictions.

The Legislative Position on Arbitrator Conflicts in Australia and New Zealand

To begin our analysis on arbitrator conduct, it is helpful to first look at the'hard' Australian and New Zealand legislative construction of the most hotly discussed issues with respect to arbitrator ethics: conflicts. Issues of conflict of interest and disclosure by arbitrators in domestic and international arbitrations in Australia are essentially governed by article 12 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (**Model Law**), which provides:

> *'(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.*
>
> *(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.'*

The terms of article 12 are given effect by *Australia's International Arbitration Act* 1974 (Cth) (**IAA**), and captured by sections 12(1)–(4) of the State/Territory based *Commercial Arbitration Acts* (**CAAs**). New Zealand's *Arbitration Act* 1996 (NZ), which governs both international and domestic arbitrations in New Zealand, adopts these terms as they are in sections 12(1) and (2). However, the Australian legislation goes beyond the scope of the Model Law. Article 12 of the Model Law is supplemented at section 8A of the IAA, which clarifies the circumstances in which'justifiable doubts' arise:

> *'(1) For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of that person in conducting the arbitration.*
>
> *(2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.'*

The same provisions apply to domestic arbitrations, with sections 12(5)–(6) of the CAAs being cast in identical terms.

In substance, these latter provisions employed by the Australian legislation capture claims of both'actual' and'apprehended' bias. Actual bias would arise during the conduct of the arbitration as it flows from the actual manifestation of the conduct of an arbitrator. A claim of actual bias would be made out where'the complaining party satisfies the court that the arbitrator is predisposed to favour one party, or, conversely, to act unfavourably towards him, for reasons peculiar to that party, or to a group of which he is a member'.[4]

On the other hand, imputed or apprehended bias is the perception of possible bias that arises out of the circumstances of the arbitrator, and would ordinarily be present prior to the arbitral proceedings. As such, concerns about apprehended bias are the source of the disclosure obligations that attach to arbitrators. Thus, although apprehended bias concerns the *appearance* of partiality rather than requiring proof of *actual* partiality, the test applied here is objective and does not depend upon the subjective concerns of the parties to the proceedings. Interestingly, neither Australian nor New Zealand law provides for separate standards of disclosure for presiding arbitrators and co-arbitrators.

The 2004 IBA Guidelines on Conflicts of Interest in International Arbitration

Moving away from the'hard' law and into the field of'soft' law, the global arbitration community's experience with the ethical standards published by the International Bar Association (**IBA**), the Guidelines on Conflicts of Interest in International Arbitration (**IBA Conflicts Guidelines**) and the Rules of Ethics for International Arbitrators (**IBA Ethics Rules**), has shown that a standardised set of expectations for arbitrators is likely to make it easier for arbitrators to ensure that they do not find themselves in breach of any ethical norms. What has also been experienced in the case of the IBA publications, and which is likely to occur with any similar standardised codes, is a reduction in parties' vexatious and unmeritorious claims for procedural error. This added benefit arises from the simple fact that codes clarify the differences between acceptable and unacceptable behaviour, thereby removing (not completely, but nevertheless to a large degree) any blurred lines between the two categories.

The IBA Conflicts Guidelines were developed between 2002 and 2004 by a Working Group consisting of the Arbitration and ADR Committees of the IBA. The IBA Conflicts Guidelines were produced in response to a growing need for guidance in relation to the identification, disclosure and effects of arbitrator conflicts of interest arising in international arbitrations.

The Working Group consisted of members from 14 different States, representing both civil and common law jurisdictions. Part of the preparation for the initial draft of the IBA Conflicts Guidelines consisted of the preparation by each member of a National Report, detailing the general policy of the relevant State in regards to arbitrator bias, the presence or not of a standard of disclosure, the position of the State in comparison to the particular rules of the 1987 IBA Ethics Rules relating to conflicts of interest

4 *Bremer Handelsgesellschaft mbH v Ets Soules et Cie and Anthony G Scott* [1985] 1 Lloyd's Rep 160 at 164 per Mustill J.

(Rules 3 and 4),[5] and a discussion of Article 6 of the European Convention on Human Rights. In addition, each individual member was required to draw up its own definition of the policy of bias and disclosure.

The IBA Conflicts Guidelines went through two drafts before the final version was published in July 2004. The first draft was produced following discussions between the members of the Working Group alone. The second draft was the result of the comments, criticisms, suggestions and input of a larger range of participants, including various international arbitral institutions. The Working Group subjected the second draft to a'hazardous operation review', whereby the opinions of leading practitioners around the world were sought and many of their suggestions were incorporated in the third and final version of the IBA Conflicts Guidelines. In an effort to maintain contemporaneity, which doubles as evidence of continued progress in the field of arbitrator conduct regulation, the IBA has established a taskforce for the review and updating of its Conflicts Guidelines and is contemplating the establishment of a taskforce for the revision of its Ethics Rules.

The result of the labours of the Working Group was a set of guidelines which, although it draws on local standards, seeks to put forward a general standard of best international practice in relation to the identification and management of conflicts of interest of arbitrators participating in international arbitrations. In addition, it has been suggested that the IBA Conflicts Guidelines may also be of use to local courts and legislatures in the evaluation of conflicts where the judge-made law lacks clarity.

The IBA Conflicts Guidelines were designed to provide greater clarity and uniformity to the approach to conflicts of interest, in order to ensure that conflicts are identified where they arise, and managed appropriately. In this way, the IBA Conflicts Guidelines have not only aided in the ethical management of conflicts which pose a threat to the independence and impartiality of an arbitrator, but they also assist in preventing overly zealous parties from successfully challenging an arbitrator, and thereby disrupting and delaying the arbitration, where the situation does not pose a conflict. The IBA Conflicts Guidelines thus have a useful role to play both as protectors and moderators of challenges to arbitrators by parties.

In their introduction, the IBA Conflicts Guidelines make it clear that they do not supplant national laws. When evaluating potential conflicts of interest, the national laws and any arbitral rules applicable to any given arbitration must, of course, be given preference over the IBA Conflicts Guidelines to the extent of any inconsistency. However, the IBA Conflicts Guidelines, which examine the issues of impartiality and independence in considerable detail and from an international perspective, are intended to and indeed have the potential to effectively support and work alongside those laws, and fill the gaps where necessary and appropriate.

In drafting the IBA Conflicts Guidelines, the Working Group considered it important that the abstract principles be accompanied by realistic and concrete examples in order to aid in their practical application to international arbitrations. Together, based on case law and their own experiences, the members of the Working Group listed various recurring situations which were divided into three colour-coded categories:

5 Per the introduction to the IBA Conflicts Guidelines, it is important to note that the IBA Ethics Rules cover more topics than the IBA Conflicts Guidelines. Thus, they remain in effect as to subjects that are not addressed by the IBA Conflicts Guidelines, however are superseded insofar as they overlap with the IBA Conflicts Guidelines.

- **Green list** – no conflict of interest; no need for disclosure.
- **Orange list** – the circumstances may give rise to justifiable doubts in the eyes of the parties as to the independence and impartiality of the arbitrator. Disclosure should be made in order to evaluate any potential conflict of interest, however disclosure will be purely to open the discussion and will not raise any presumption of disqualification. Parties may raise objections within 30 days of the disclosure, after which time the right to challenge the arbitrator is deemed to have been waived.
- **Red list** – the circumstances do give rise to justifiable doubts in the eyes of the parties as to the independence and impartiality of the arbitrator. Situations are divided into'waivable' (where the party may waive the right to challenge if certain considerations are met, but must do so explicitly) and'non-waivable' (actual conflicts, where parties have no right of waiver).

Whilst the lists of situations enunciated in the IBA Conflicts Guidelines are by no means exhaustive, they do provide a good starting point for disclosure and for management of conflicts and thus, are able to serve as a benchmark of sorts for the evaluation of bias and partiality on the part of arbitrators.

Like the IBA Ethics Rules, the IBA Conflicts Guidelines specify that the independence and impartiality of an arbitrator should be determined objectively. Thus, an arbitrator should decline to act or step down where the circumstances give rise to justifiable doubts as to his or her independence and impartiality in the eyes of a reasonable third party with knowledge of the relevant facts. Where the arbitrator fails to step down, he or she should be disqualified. On the other hand, a subjective test should be applied in relation to the standard for disclosure. That is, disclosure should be made of circumstances which give rise to justifiable doubts in the eyes of the parties as to the independence and impartiality of the arbitrator.

The IBA Conflicts Guidelines stress that the mere fact of disclosure will not lead to disqualification of the arbitrator. This is an important point, as it shifts the focus from the revelation of actual conflicts, to the evaluation of potential conflicts. Disclosure under the IBA Conflicts Guidelines aims to be a springboard for open discussion between the parties. Under the older IBA Ethics Rules, which are now superseded in this regard, however, it is stated that failure to make disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification. Further, the IBA Conflicts Guidelines require that disclosure of potential conflicts be made regardless of the stage at which they become known. Thus, disclosure should not be avoided simply because the arbitration is already underway. Under the IBA Conflicts Guidelines, evaluation of potential conflicts is the paramount concern.

The 1987 IBA Rules of Ethics for International Arbitrators

In the realm of the IBA's'soft' law publications, given that arbitrator conflicts are now dealt with exclusively by the IBA Conflicts Guidelines, it is of no real use discussing the aspects of the IBA Ethics Rules which pertain to this subject. Instead, the other aspects of arbitrator conduct which the IBA Ethics Rules address would be much more appropriate for assessment, namely, acceptance for appointment, communications with parties, diligence duties, and involvement with settlement proposals.

Before any discussion is commenced, however, it is worth noting that these rules, as published by the

IBA in 1987, have now become quite dated. For example, in no place do they address the issues that arise out of the use of technology, and their treatment of often complex issues such as arbitrator fees and confidentiality is sometimes underdeveloped. While it is true that such issues are either dealt with substantively by the institutional or other rules by which an arbitration is governed, or by legislation, it is for the broader conceptual approach that the IBA Ethics Rules take that they have been understood to serve as more of an overarching collection of principles and guidelines which arbitrators should keep in mind when discharging their duties, rather than an exhaustive set of rigid rules and scaffolds for implementation by arbitrators. In this way, the title of the document might come across as a little misleading, and it may have been more appropriate for the IBA better to have re-established the rules as more of a'code' or'guidelines' for arbitrator ethics. This may well be one of the results of the IBA's committee for the review and revision of the rules if that endeavour is eventually pursued – only time will tell.

Nevertheless, the rules do remain useful, as they go to the core of an arbitrator's duties and provide some level of guidance. For example, the rules relating to acceptance of appointment (Rule 2) and arbitrators' duties of diligence (Rule 7) have as much meaning today as they did in 1987. These rules overlap somewhat, as they both focus on the requirements that arbitrators only accept an appointment if they are fully satisfied that they are competent to determine the issues in dispute, and if they are able to devote to the arbitration the time and attention that it requires. Rule 7 clarifies that the purpose of such requirements is so that the costs of the arbitration are not allowed to rise to an unreasonable proportion of the interests at stake in the dispute. This is a common fear of modern parties choosing to settle their disputes via arbitration and a recently well voiced criticism of the arbitration process as a whole. As such, these rules have remained quite relevant, and do well to assist in keeping both prospective and already appointed arbitrators in check.

Communication with parties is another important aspect of an arbitrator's duties, and it is no coincidence that Rule 5 of the IBA Ethics Rules, the rule that governs arbitrator-party communications, is the longest of them all. It is important that arbitrator-party communications are conducted in a way that is fair to all parties involved in the arbitration, and this typically means that arbitrator-party communications should be made in the presence of all parties to an arbitration, and never unilaterally. To this end, Rule 5.3 of the IBA Ethics Rules provides that arbitrators should avoid any unilateral communications regarding the case with any party or its representatives, and if such communication does occur, arbitrators should inform all other parties and arbitrators of its substance.

The Chief Justice of Singapore, His Honour Sundaresh Menon, spoke recently at a London School of Economics debate of his experiences with respect to unilateral arbitrator-party communications and the disasters that they bring for party relationships and effective dispute resolution.[6] In his speech, His Honour noted that such arbitrator behaviour has been commonly experienced in Asian arbitrations, with arbitrators sometimes going so far as to advise counsel on strategy and provide input into the merits of their case. At this point, His Honour also noted that such behaviour would not likely be seen in arbitrations in other parts of the world, and it is these discrepancies between legal cultures that require

6 The debate was titled'Is Self-Regulation of International Arbitration an Illusion?' and is available at http://www.youtube.com/watch?v=_ShMaMWmHZ8.

uniform, effective and enforceable global rules as to arbitrator conduct generally, and as to arbitrator-party communications specifically.

An interesting omission of the IBA Ethics Rules is any attempt at the regulation of arbitrator-arbitrator communications at any point throughout an arbitration – before, during, or after. It has been suggested by many in the profession that there should be a system to manage these communications, and it is not difficult to envisage certain scenarios where, for whatever reason, two of three arbitrators in a tribunal may communicate and develop their reasoning together in neglect of the third arbitrator. Such conduct will not necessarily be detrimental to any of the parties directly, however it may have an indirect adverse impact on the costs of the arbitration and the otherwise efficient resolution of the dispute, as the relationship between arbitrators may sour and become unworkable. At this stage, there appears to be no formal standard of regulation for arbitrator-arbitrator communication, with the only form of governance stemming from the commercial disadvantages and impracticalities that may result from poor inter-tribunal communications as mentioned above. While this has recently been a widely discussed issue amongst the global arbitration community, it is unlikely that it has only become an issue as of late. Such concerns have more than likely existed since before the drafting of any formal regulations of arbitrator conduct, including the IBA Ethics Rules, and it is a wonder that none seek to address this important aspect of arbitration. Perhaps, as mentioned above, the proposed review and revision committee of the IBA will turn their mind to this issue in the future.

Finally, the issue of arbitrator-party communication also arises in the context of arbitrators' involvement in settlement proposals. Rule 8 of the IBA Ethics Rules provides that in the context of party settlement, arbitrators may make proposals for settlement to both parties simultaneously and preferably in the presence of each other, since the discussion of settlement terms with any one particular party in the absence of any of the other parties will likely result in the arbitrator's disqualification from the remainder of the arbitration. In this case, the repercussions of unilateral arbitrator-party communications are exacerbated given the obvious increase in severity of such communications in circumstances of settlement.

Counsel Misconduct

The extraterritorial condition of international arbitration brings with it great difficulty in defining which disciplinary system and rules of ethics would be applicable to the conduct of counsel acting on behalf of a party in an international arbitration. This difficulty also extends to the determination of which authority would police that misconduct, and enforce the sanction, if any. The lack of a uniform and enforceable code of ethics to regulate the legal representatives' activity in international arbitration has led to several unresolved questions: should the arbitral tribunal refer to the ethical standards of the jurisdiction, or jurisdictions, where the counsel has been admitted to practice, or is it more appropriate to rely on the standards of the seat of the arbitration, taking into account that the counsel may not even be familiar with them? Counsel in arbitrations, especially international arbitrations, may come from completely different ethical standards backgrounds to one another, and choosing only to apply one such standard may result in an unequal treatment of both counsel and parties to the dispute.

Arbitral tribunals are continuously exposed to the question of whether the tribunal has a deontological

obligation over the conduct of parties' legal representatives. The answer to this question, which, more specifically, centres upon exactly what may constitute ethical misbehaviour from counsel and what the arbitral tribunal's power to impose sanctions related to such misconduct is, is not currently found in any arbitral institution's rules. In this context, the assessment of costs should not be considered as a direct policing instrument to control the conduct of counsel – such an approach does not really go to the root of the problem, as it ends up practically affecting the parties more than having any positive impact on counsel's behaviour.

Arbitral tribunals have often confronted the issue of the counsel misconduct, with decisions leading to different, and sometimes conflicting or contradictory results. Indeed, some arbitral tribunals have declared themselves as competent to dismiss a lawyer, either by relying on general principles of ethics or in their obligation to treat parties fairly and equally. Contrarily, other international arbitral tribunals have found that the tribunal should not be, and is not entitled to such a power. A further consideration relates to whether the inherent power of the arbitral tribunal to preserve the integrity of the proceedings implies a power to exclude counsel from the arbitration for acts of misconduct.

The confusion in the way this aspect of international arbitration has been handled in the past reveals a need for the creation of some form of uniform code of ethics which is applicable to the particular conditions of international arbitration. The creation of such a set of rules would assist in preventing the arbitral tribunal from (somewhat) arbitrarily deciding on which set of ethical rules are to be applied to an arbitration. Such a set of rules would also assist in diminishing the lack of uniformity and transparency in arbitrators' decisions regarding counsel misconduct.

It is a reality that international arbitration continues to expand as international transactions become more frequent and more complicated. Thus, it is important that the confidence that international parties have put, and continue to put, in it is well preserved. The introduction of a uniform code of ethics for counsel would contribute well in preventing the loss of parties' confidence in the process and in ensuring that impunity does not become the norm, for when parties agree to arbitrate their disputes, they expect that the arbitral tribunal will do its best to guarantee a transparent and fair procedure.

The creation of a uniform code carries with it numerous areas of uncertainty; in particular, questions abound as to how such a code would be implemented and enforced. For instance, would it require incorporation into the arbitration rules of the major arbitral institutions, and, correspondingly, would this strengthen the respective institutions' powers over the arbitrations which they administer? The answer to this question would be given in part by whether the functions assigned to the institution are so extended – that is, should the institution be limited to a mere supervision of the arbitral tribunal's use of the code, or should the institution play a more hands on role and be in charge of enforcement and sanctions on counsel? In any case, it is certain that the global arbitration community would not expect the intervention of national courts into the arbitral proceedings to police counsel conduct; this would likely cause extra delay and expenses, and would also likely result in inconsistent and arbitrary decisions.

There are many and various considerations which would require to be effectively attended to by a uniform code. It should ensure that no sanctions imposed have a negative effect on the parties acting in good faith; for example, imposing sanctions such as disregarding evidence, or drawing adverse inferences

because of counsel's misbehaviour during the procedure. Furthermore, attempts to regulate counsel conduct must also take into account the reality of international arbitration's culture and the practices which have been developed. Thus, it remains a fact that a reputational factor between lawyers acting as arbitrators and as counsel may affect their decisions regarding the imposition of sanctions. This issue gives some force to the argument that, in the interests of impartiality, the arbitral institution should be the decision maker in the context of counsel misconduct.

Various attempts at the regulation of counsel conduct in international arbitration have been introduced by the IBA. Despite their status as'soft' guidelines that are not binding in any sense, they act as a good reference point for arbitral tribunals and signify conscious efforts in the regulation of counsel ethics in international arbitration. In a more binding sense, the LCIA has recently announced that it will soon introduce a regulatory scheme for counsel conduct in the new edition of its arbitration rules – an astounding innovation in the area. These various attempts are discussed below.

IBA Guidelines on Party Representation in International Arbitration and IBA International Principles on Conduct for the Legal Profession

The IBA has, for a long time, been committed to the improvement of ethical standards in international arbitration. Its most recent input into the area, which concerns counsel conduct specifically, was the release of the IBA Guidelines on Party Representation in International Arbitration (**IBA Party Representation Guidelines**). The IBA had also previously introduced the International Principles on Conduct for the Legal Profession (**IBA Legal Profession Principles**) which, although not explicitly relating to arbitration, also apply to the conduct of counsel in international arbitration.

On 25 May 2013, the IBA Party Representation Guidelines. In 2008, the IBA Arbitration Committee established the Task Force on Counsel Conduct in International Arbitration.[7] The Guidelines do not intend to displace applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules,[8] or to concede the arbitral tribunal powers such as the type that bars or professional bodies may have. Also, the IBA Party Representation Guidelines do not intend to undermine the counsel's duty of loyalty to its client or its obligation to present its case to the arbitral tribunal. In stark contrast, the guidelines strive to maintain the integrity and fairness of the arbitral proceedings.

The IBA Party Representation Guidelines' are of a contractual nature, and the parties may adopt them in whole or in part in the arbitration agreement or subsequently. The arbitral tribunal must determine if it has the authority to rule on matters of party representation and to apply the guidelines, and it may ask for the parties' agreement to be able to rely upon them. Interestingly, the IBA Party Representation Guidelines hold that'an obligation or duty bearing on a Party Representative is an obligation or duty of the consequences of the misconduct of its Representative'.[9]

7 IBA Guidelines on Party Representation in International Arbitration, Preamble.
8 IBA Guidelines on Party Representation in International Arbitration, guideline 3.
9 IBA Guidelines on Party Representation in International Arbitration, Comments to Guidelines 1-3.

IBA Party Representation Guidelines 4 to 6 entitle the arbitral tribunal to exclude a party representative from participating in all or part of an arbitration if compelling circumstances so justify and if it has found that it has the required authority to do so. Guidelines 7 and 8 establish that a party representative should not engage in ex parte communications concerning the arbitration, and that it is not improper to have an ex parte communication with a prospective arbitrator to determine his'expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest' (in case it is the prospective presiding arbitrator, with the agreement of the other party). Also, it is not improper to have such communication'for the purpose of the selection of the Presiding Arbitrator'. However, counsel must not seek the views of the prospective arbitrators on the substance of the dispute.

IBA Party Representation Guidelines 9 to 11 deal with the submissions made by the parties' representatives to the arbitral tribunal. By these guidelines, counsel must not make any knowingly false submissions, and party representatives should not submit witness or expert evidence knowing it to be false. Several non-exhaustive remedial measures are considered by the IBA Party Representation Guidelines in the case of knowledge of such misconduct, including advising the witness or expert to testify truthfully, taking reasonable steps to deter the witness or expert from submitting false evidence, correcting or withdrawing the false evidence or urging the witness or expert to do so, and withdrawing as party representative if the circumstances so warrant. Considerations of confidentiality and privilege may prevent counsel from correcting false submissions of fact previously made to the tribunal.[10]

Regarding document production, the IBA Party Representation Guidelines require counsel to inform their client of the need to preserve documents which are potentially relevant to the arbitration. Counsel are required to explain to the client the necessity of producing such documents, and potential consequences of failing to produce, and advise and assist the client to ensure that a reasonable search is made for documents. Further, counsel should not make requests to produce, or object to any requests to harass or cause unnecessary delay. Finally, party representatives should not suppress or conceal documents requested by another party or that the party has undertaken or been ordered to produce, or advice the party to do so.[11]

IBA Party Representation Guidelines 18 to 25 provide that the parties' representatives should make any potential witness aware of the right to inform or instruct his/her own counsel about the contact and to discontinue the communication with the party representative. Guideline 19 establishes that a party representative may assist witnesses in the preparation of witness statements and experts in the preparation of expert reports, but he/she must seek to ensure that it reflects the witness' own account of facts and circumstances or the expert's own analysis and opinion. Within those limits, counsel may meet with witnesses and experts to discuss and prepare their prospective testimony. Payment is only permitted for expenses reasonably incurred in preparing to or testifying at a hearing, reasonable compensation for the loss of time incurred and, reasonable fees for the professional services of a party-appointed expert.

Finally, IBA Party Representation Guideline 26 defines the remedies the arbitral tribunal may resort to if it finds that a party has committed an act of misconduct, and guideline 27 sets out a non-exhaustive

10 IBA Guidelines on Party Representation in International Arbitration, Comments to Guidelines 9-11.
11 IBA Guidelines 12-17.

list of elements the tribunal should take into account when addressing issues of misconduct such as the nature and gravity of the misconduct, the good faith of the counsel, relevant considerations of privilege and confidentiality, and the potential impact on the rights of the parties.

The IBA Guidelines are complemented by the application of the IBA Legal Profession Principles, adopted on 28 May 2011, which superseded the IBA International Code of Ethics 1988. The IBA Legal Profession Principles consist of ten principles that the IBA conclude as'common to the legal profession worldwide'.[12] These principles aim at establishing a generally accepted framework to serve as a basis on which lawyers' codes of conduct may be established.

When drafting these principles, the IBA considered national professional rules from states throughout the world, the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, and the Universal Declaration of Human Rights.[13]

The IBA Legal Profession Principles are intended to act as a constitution of sorts in the regulation of counsel conduct, and apply equally to all forms of alternative dispute resolution and litigation where legal representatives are involved. The principles read as follows:

1. Independence. A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.

2. Honesty, integrity and fairness. A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

3. Conflicts of interest. A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

4. Confidentiality/professional secrecy. A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.

5. Clients' interest. A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.

6. Lawyers' undertaking. A lawyer shall honour any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.

12 Commentary on IBA International Principles on Conduct for the Legal Profession, May 2011, p. 10, §2.
13 Commentary on IBA International Principles on Conduct for the Legal Profession, May 2011, p. 10, §4.

7. Clients' freedom. A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

8. Property of clients and third parties. A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.

9. Competence. A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.

10. Fees. Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.

In general, the IBA Legal Profession Principles call for counsel acting in an international arbitration to observe the relevant rules regarding each principle when engaging in the practice of law outside the jurisdiction in which he/she is admitted to practice. In fact, the IBA refers to a'double deontology' which commits the counsel to'observe applicable rules of professional conduct in both home and host jurisdiction'.[14] The IBA Commentary on the principles stipulates that where there is any inconsistency between the rules of ethics from the jurisdiction where the counsel is admitted to practice and the jurisdiction of the seat of the arbitration, the stricter rules should be complied with. This might appear to work well in theory, however it must be appreciated that certain rules, when actually complied with, might present either unforseen austerity or slackness. This is an issue that is not, and quite frankly cannot be, dealt with by the principles.

Imposed on Misbehaving Counsel

The LCIA will soon present its new arbitration rules (New LCIA Rules) after having revised its 1998 version. Particular attention should be paid to the possible introduction of the following two rules entitling the arbitral tribunal to directly exclude misbehaving counsel from the arbitration, either in whole or in part:

> *Rule 18.5: In compliance with its general obligation to participate in the arbitration in good faith, each party shall seek to ensure that its legal representatives shall comply at all times with the general guidelines contained in the Annex to the LCIA Rules.*
>
> *Rule 18.6: In the event of a complaint by any party against a legal representative to the Arbitral Tribunal or upon its own initiative, the Arbitral Tribunal may consider (after consulting the parties and granting that representative a reasonable opportunity to comment upon the allegation against him) whether or not he has engaged in a serious or persistent violation of the general guidelines and, if such violation is found by the Arbitral Tribunal, it may order that legal representative to be excluded from the arbitration, in whole or in part.*

14 Commentary on IBA International Principles on Conduct for the Legal Profession, May 2011, p. 14.

An annex to the Draft LCIA Rules titled'General Guidelines for the Parties' Legal Representatives' will also be included in the new edition, and this will set out ethical standards for legal representatives appearing for parties to a LCIA arbitration. The guidelines in the annex to the New LCIA Rules intend to influence the good conduct of the parties' legal representatives within the arbitration. Further, it has been suggested that under the New LCIA Rules, the arbitral tribunal will be able to consider proprio motu if a legal representative has violated the guidelines.

The LCIA Court Rules Sub-Committee, which is in the process of preparing the new edition of the rules for issue, has suggested for discussion that the guidelines are an attempt to ensure that parties' legal representatives discharge their duty with integrity, honesty and efficiency, and do not engage in activities designed deliberately to produce unnecessary delay, expense, or to obstruct the arbitration or jeopardise the award. The guidelines will also contain dispositions regarding the parties' legal representatives' obligations to'always act in good faith, maintaining the dignity of the arbitral process'. The guidelines will also include provisions on the obligation of counsel to participate in good faith with regard to requests and orders for document production and not to conceal any document which is ordered to be produced by the tribunal.

Further dispositions that the Sub-Committee is suggesting may be introduced in the guidelines relate to acting with courtesy, treating with respect all members of the arbitral tribunal and all other legal representatives, not knowingly making false statements to the arbitral tribunal or the LCIA Court, not assisting in the presentation of or relying upon any false evidence, and not initiating unilateral communications relating to the arbitration or the parties' dispute during the arbitration with any member of the tribunal or of the LCIA Court.

The LCIA suggestions appear be a positive inspiration for other arbitral institutions to set up their own ethical rules or guidelines regarding the parties' representatives' conduct. Only time will tell whether the draft suggestions will be adopted and if so whether they will influence parties' and counsel's behaviour. However, various questions remain about their practical application. For instance, the behaviour and misconduct condemned by the New LCIA Rules leaves open the possibility that the rules, instead of preventing the parties and counsel from engaging in activities that cause unnecessary delay and expense, may be used as a tactical weapon for the same purpose.

Parties Not Approaching Proceedings in Good Faith

Finally, the threat that parties who approach arbitrations in bad faith pose is of significant concern to the global arbitration community. While the results of acting in'bad faith' (or, put more appropriately, not acting in good faith) are generally easily observed, it is much more difficult to pin down an exhaustive explanation of this nebulous concept and what, exactly, might constitute corresponding conduct. Further, whether such conduct can, in fact, be regulated is an issue that is currently being hotly debated, for who would be responsible for enforcing a set of standards and imposing sanctions for their breach? With respect to the imposition of sanctions against recalcitrant parties, it must be remembered that arbitration is ultimately a creature of agreement. With regard to enforcing a universal set of standards, as with the regulation of counsel conduct, jurisdictional problems arise. Again, it is seen that significant and difficult questions abound!

Before any analysis of good faith in arbitration is proffered, however, it is first necessary to develop a basic understanding of the concept more generally. To this end, a definition would assist – however several definitions exist. In any case, it is helpful to note that good faith is not a new concept – it is implied in many types of contract in the United States and many civil law systems in Europe. However, given that good faith is a relatively new concept in Australia and New Zealand (unlike the United States, where it has been the subject of much discourse for well over a century), the obligations it imposes on parties are still somewhat unclear.

In Australia, there has been strong authority to suggest that good faith is a general rule, applicable to every single contract, that each party agrees, by implication, to do all such things as are necessary on its part to enable the other party (or parties) to have the benefit of the contract.[15] This idea approaches the issue from a *positive* action perspective, requiring parties to contracts to actually do something. However, approaching the issue from a more negative perspective – that is, requiring parties to not do something – it has also been held that the law implies the concept of good faith in a negative covenant agreed by the parties to not hinder or prevent fulfilment of the purpose of the express promise to which the contract relates.[16] Although Australia has applied general rules applicable to contract, it has so far refused to imply a general obligation to act in good faith in contractual performance.

The position in New Zealand is slightly less clear. Like Australia, it too does not currently recognise an explicit general obligation of good faith, and there is a paucity of judicial comment on the issue. As noted by some academic commentators,[17] the main judicial comment on the doctrine of good faith was by Thomas J in 1992, where His Honour stated in obiter that he'would not exclude from our common law the concept that, in general, the parties to a contract must act in good faith in making and carrying out the contract'.[18] Unfortunately, His Honour's dicta was struck out in a series of subsequent cases,[19] and thus New Zealand's relationship with the concept of good faith has hung in limbo ever since.

Notwithstanding its measurable imprecision and lack of clear judicial authority, at least some form of concept of contractual good faith has been recognised in both Australia and New Zealand, among other international jurisdictions, and thus its potential extension to, and influence on, parties to arbitration is a worthy consideration. After all, the instrument which gives rise to the arbitration is the arbitration agreement, which is itself a contract, and so the extension of good faith obligations to parties to arbitration is a logical one. Further, in the international arena, the concept of good faith has a solid footing in international law.

In Australia's domestic arbitration regime, the CAAs, section 24B imposes upon parties general duties of good faith. It is interesting to note that neither Australia's international arbitration regime nor New Zealand's Arbitration Act 1996 (NZ) contain any equivalent provisions. Section 24B of the CAAs provides that:

15 *Butt v McDonald* (1896) 7QLJ 68 at 70-71.

16 *Byrne v Australian Airlines Ltd* (1995) 131 ALR, per Brennan CJ, Dawson & Toohey JJ at 428.

17 J Edward Bayley, *A Doctrine of Good Faith in New Zealand Contractual Relationships*, University of Canterbury, 2009.

18 *Livingstone v Roskilly* [1992] 3 NZLR 230, at 237.

19 See, for example, *Isis (Europe) Ltd v Lateral Nominees Ltd* (High Court, Auckland, CP 444/95, 17 November 1995), at 6 and *Archibald Barr Motor Company Ltd v ATECO Automotive New Zealand Ltd* (High Court, Auckland, CIV 2007-404-5797, 26 October 2007), at [79].

> *(1) The parties must do all things necessary for the proper and expeditious conduct of the arbitral proceedings.*
>
> *(2) Without limitation, the parties must:*
>
> *(a) comply without undue delay with any order or direction of the arbitral tribunal with respect to any procedural, evidentiary or other matter, and*
>
> *(b) take without undue delay any necessary steps to obtain a decision (if required) of the Court with respect to any function conferred on the Court under section 6.*
>
> *(3) A party must not wilfully do or cause to be done any act to delay or prevent an award being made.*

However, the legislation does not equip the tribunal with any corresponding enforcement powers. It might be possible to derive such powers from sections 19(2) and 19(6) of the CAAs, which allow the tribunal to conduct the arbitration in a manner it considers appropriate subject to any party agreement, and provide for the enforcement of an order made or direction given by the tribunal in the course of arbitral proceedings, respectively, but this is unclear. Further, while section 2A of the CAAs and article 2A of the Model Law stipulate that regard is to be had to the observance of good faith in the interpretation of the respective laws, this reference is in more of a broad, overarching and conceptual nature rather than a standalone or concrete idea.

Thus, of particular interest, and importance, is how exactly an arbitral tribunal may apply the concept. By this very implication, it is readily observed that the influence of the concept of good faith is not limited to any particular role/s in an arbitration – it is likely to have some impact on arbitrators, the parties to the dispute, as well as anyone else participating in the arbitral proceedings.

As Cremades notes, it is difficult to find any international arbitration award not based on, or that does not at least mention, good faith – but its omnipresence does not mean that it is clearly understood, that we know how to use it, or that we are able to predict how an arbitral tribunal may apply good faith in a particular case.[20] Thus, it appears there has been an acceptance of the principle of good faith in international arbitration, however it is not clear what the concept of good faith in this context actually means. The tribunal's ruling in the investor-state arbitration of Methanex v United States (2005) may assist in answering this difficult question:[21]

> *'…in the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of 'equal treatment' and procedural fairness.'*

20 Bernardo M. Cremades, *Good Faith in International Arbitration*, Am.U.Int'lL.Rev. 27:4 at 761.

21 *Methanex Corp. v United States*, Final Award of the Tribunal, as Bernardo M. Cremades, *Good Faith in International Arbitration*, Am.U.Int'lL.Rev. 27:4 at 788.

Thus, to provide some form of conclusion, Cremades considers that'the duty to arbitrate in good faith is infringed upon when improper pressure is applied to the arbitrators, when illegally obtained evidence is used, when the principle non venire contra factum propium is violated, when anti-suit injunctions are abused, when the arbitrators are challenged for the sole purpose of obtaining a delay or when the proceeding is delayed as a consequence of the refusal to pay the arbitration costs and expenses'.[22] Such a list of indecent dealings is by no means exhaustive, however it does provide for us some clarification of what standard of behaviour is required.

Assuming the above to be true, what then are the repercussions for parties who venture beyond the illuminated path in their conduct? Another question arises as a precondition to this question: do arbitral tribunals even have the authority to order sanctions for parties who have acted in'bad faith'?

The latter of the above two questions arose in the United States domestic arbitration of *ReliaStar Life Insurance Co v EMC National Life Co* (2009).[23] In this case, the arbitral tribunal awarded costs and fees against the losing party (EMC) because it found it to be lacking in good faith, despite an express provision in the parties' arbitration agreement that each party to the arbitration would pay their own costs and fees. The award was upheld by the United States Second Circuit Court of Appeals on appeal. In its decision, the Court held that the parties' agreement regarding the payment of their own costs and fees could be fairly understood as based upon the general notions of good faith dealings and, because the underlying assumption was that both parties would act in good faith and that it was broken, the clause did not prohibit the arbitral tribunal from issuing such a sanction.

The obvious tension between party autonomy and an arbitrator's discretionary authority was once again raised in this case, although this time in the context of good faith. On this issue, Professor Moses comments that arbitrator power to sanction bad faith conduct is necessary in order to accomplish a major goal of arbitration – that is, the quick and efficient resolution of disputes.[24] In furtherance of Professor Moses' contention, there was dicta from one of the appeal judges that, although it formed part of a dissenting judgment, confirmed that parties not acting in good faith is:[25]

> *'…the heart of the issue. As arbitration becomes more like litigation, with more obstructive and dilatory tactics used by parties, arbitrators need to be able to control the process by having the ability to effectively sanction, and thereby discourage, bad faith conduct.'*

While this case is obviously not binding on Australian or New Zealand courts, it serves to inform our jurisprudence on this interesting and important aspect of arbitration.

In terms of what types of sanctions should be available at the arbitral tribunal's discretion, given that parties acting in bad faith often results in increased costs to the arbitration, it is arguably most appropriate for an arbitral tribunal to impose any such increase in costs on the party whose conduct caused the

22 Bernardo M. Cremades, *Good Faith in International Arbitration*, Am.U.Int'lL.Rev. 27:4 at 788.
23 Docket No 07-0828-CV (2d Cir April 2009).
24 Margaret L Moses, *Arbitrator Power to Sanction Bad Faith Conduct: Can it be Limited by the Arbitration Agreement?*, (2010) 84 ALJ 82.
25 Above n22, at 83.

increase in costs.[26] There has, however, been much discussion on the appropriateness of other types of sanctions that might be used, namely those in the area of fines and punitive damages. The general consensus at this stage is that such sanctions should not be allowed to be imposed by arbitral tribunals.

Conclusion: So How Should We Regulate Conduct?

The discussion above leads to a simple conclusion: to administer a fair and just process throughout an arbitration, the conduct of the various parties involved, including the arbitrators, must be regulated to a significant degree. Finally, the issue then turns on the precise method of regulation to be implemented – should this take place via institutional rules, as the LCIA has suggested, or international arbitration guidelines, such as those previously (and recently) published by the IBA? Some arbitration practitioners and commentators have supposed that an extension of the regulations of domestic bar associations might suffice, while others have advocated a unification of such regulations into a single global regulatory scheme.[27] In any case, the old proverb which speaks of the various ways to skin a cat applies here too – but it is worth noting the various benefits and complexities associated with each technique, and the reasons for which any one of them may be either more easily implemented or more effective in its results.

There is much controversy in the arbitration world as to the desirable method, and any in depth analysis of the pros and cons of each system of regulation would require a paper of its own. However, to provide some general commentary and to highlight the debate on foot, the following is put forward:

Institutional Rules

As discussed above, the inclusion of a regulatory scheme for conduct in institutional rules may first be attempted by the LCIA in its forthcoming latest edition of its arbitration rules. An interesting question to ask at this point is whether this would have any impact on parties' agreements to be governed by the rules, and thus how effective they will be – the risk being that parties wishing to avoid procedural over-regulation may choose against them, or against arbitration altogether. Nevertheless, from the viewpoint of the advocate for conduct regulation, it is convenient to have a regulatory scheme neatly placed within institutional rules for the obvious reason that it then becomes enforceable. As parties agree from time to time to engage in arbitrations under any such institutional rules, the regulatory scheme for conduct embedded within them will automatically become binding upon them, their counsel, and their arbitrators, and no more needs to be done.

Arbitration Guidelines

The IBA's various guidelines provide instructive insight as to how the multiple entities involved in an arbitration should behave are detailed and immensely helpful, but they are exactly that – guidelines. Having been likened to a'toothless tiger', such guidelines are only ever enforceable upon the various actors in an arbitration if parties expressly agree to them – that is, in addition to whatever arbitration

26 The tribunal's power to do this is found in section 33B of the CAAs in Australia's domestic arbitration regime and section 27 of the IAA in Australia's international arbitration regime, and in section 6 of New Zealand's *Arbitration Act* 1996 (NZ).

27 See, for example, His Honour Sundaresh Menon's keynote address to the International Council for Commercial Arbitration (ICCA), 2012.

rules they choose to be governed by. This may present quite an inconvenience to parties at the arbitration agreement stage as a result of the evaluations, negotiations and consultations that will naturally arise in the process of incorporating further contractual terms into their agreement. The main problems with such'soft law' are thus obvious. On a much more positive note, the advantage such guidelines present is the ability to meld aspects of regulation from multiple jurisdictions globally into one set of standards. Organisations such as the IBA have been tremendously successful at this, often liaising extensively with representatives from various jurisdictions to arrive at what would appear to be a good balance of standards from each jurisdiction.

Domestic Bar Associations

Domestic bar associations present an established means of regulating the conduct of legal professionals in their respective jurisdictions, but whether such regulation translates well into the international arena is subject to some doubt. The main advantage arising from the extension of their regulation is that lawyers will be well versed in the ethical standards required by the bar association in their relevant jurisdictions and can simply behave themselves in a like manner in any international dispute in which they are involved. This means that there will be no confusion on the part of the individual lawyer as regards his/her conduct obligations, but considerable confusion is likely to come about when lawyers from different jurisdictions are involved in the same arbitration as what is acceptable in one jurisdiction may not necessarily be acceptable in another. Common law and civil law discrepancies may also add fuel to the fire. This significant drawback is likely to outweigh the advantage of hometown familiarity accorded the individual lawyer.

The foregoing brings into focus the important issues that surround the question of the most appropriate means of regulation, and it is obvious why such debate continues. In the author's opinion, something of a mix of the above methods is required to ensure a form of effective regulation; enforceable in the sense of institutional rules, all-encompassing in the nature of global guidelines, and somewhat already familiar to lawyers in the character of domestic bar association regulations. While it is unlikely that this question will be settled in the near future, the global arbitration community would benefit greatly from its timely resolution, as it has already taken far too long in the history of arbitration to get to the point at which we find ourselves with this issue, and if left to linger for too much longer, it may escape our grasp yet again.

Arb-Med in Hong Kong: Corrected Position Or Enduring Suspicion?

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Abstract

In *Gao Haiyan and another v Keeneye Holdings and another* [3] (**Gao v Keeneye**), the Hong Kong Court of Appeal upheld the validity of arb-med in Hong Kong, reversing the first instance decision. While this decision allows commercial parties to breathe a sigh of relief, strong views about the fallibility of arb-med still permeate the Hong Kong judiciary. Whereas arb-med is an entrenched method of alternative dispute resolution in Europe and in other parts of Asia, in the bustling commercial world of Hong Kong suspicions endure about the practice. In this article we explore whether those suspicions have been eradicated by the Court of Appeal's decision or whether deep-seated distrust for arb-med endures.

Introduction

It is beyond question that arb-med[4] (or med-arb)[5] is internationally acknowledged as an effective means of alternative dispute resolution. Its origins are rich in their antiquity, its use in Europe and in parts of Asia extensive and its success rate high, making it an attractive option for parties seeking to resolve their dispute with as little aggression as possible.

What is arb-med?

The phrase 'arb-med' refers to the practice of combining the two processes – arbitration and mediation – into one. In China, for example, mediation's long history draws on lineage traceable to Confucianism, emphasising conciliation and harmony and rejecting the exercise of sovereign force.[6] In Japan, arb-med is enshrined in Japan's Arbitration Law 2003 and the Japan Commercial Arbitration Association Arbitration Rules.

Arb-med flourishes in civil law countries where dispute resolution is not grounded in an adversarial regime. For example, Taiwan, Singapore, Germany and Switzerland have long embraced arb-med.[7]

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3 [2012] 1 HKC 335

4 This configuration of the phrase refers to the process initiated as an arbitration in which the conversion of the same process from an arbitration to a mediation is permitted, hence its name 'arb-med'.

5 This configuration of the phrase refers to the process initiated as a mediation in which conversion of the same process from a mediation to an arbitration is permitted, hence its name 'med-arb'.

6 See Gabrielle Kaufman-Kohler and Fan Kun, *Integrating Mediation into Arbitration: Why it Works in China* (2008) 25 Journal of International Arbitration 4.

Similarly, Bermuda's international commercial arbitration legislation expressly incorporates arb-med.

In Asia in particular, however, the acceptability of arb-med seems to be linked to whether the legal system in the country of a would-be arbitrating party is civil law or common law. While there is a suggestion that civil law jurisdictions are more accepting of arb-med, common law jurisdictions tend to approach the process more cautiously. The decision-maker's impartiality – a cornerstone of the common law – may be called into question if they participate in arbitration then actively engage in the resolution of that same dispute by mediation, as they will be receiving confidential information about the strengths and weaknesses of each party's case.

Although variations on the process exist, in its most usual form arb-med involves the appointment of one person as an arbitrator, with the power for that person to move to acting as a mediator. This usually occurs after the conclusion of the hearing and after the award has been written, but prior to the handing down of the arbitral award.[8]

The advantage of arb-med is that the outcome of the arbitration is guaranteed. The hearing has been held and the award has already been written, but the parties have a final opportunity of reaching an amicable resolution of the dispute prior to the imposition of an award.

The downside to arb-med lies in the fact that the same person may achieve a partial resolution by mediation and if he or she is then required to return to the role of arbitrator to wholly resolve the dispute, their views will inevitably be coloured by the mediation proceedings.[9] Critics say such a result is antithetical to impartial justice.

Even with those so-called shortcomings, arb-med has been in use very effectively for a long time in various parts of the world in the resolution of commercial arbitrations.

Adherents to arb-med include the following arb-med benefits over the adversarial system inherent the common law:

- the mediation phase of the arbitration can be commenced at any time during the hearing of the arbitration;
- the mediation can be undertaken once all parties have tested their evidence on key issues and once the parties have a good basis for assessing their strengths and weaknesses on key issues;
- in commercial cases, the monetary amount that will resolve the dispute is ascertained much more quickly;
- in certain arb-med situations, the mediation can be held on an issue-by-issue basis, so that once the evidence on each issue is heard, but prior to a determination being made on that issue, the parties have an opportunity to resolve that issue before turning to the next issue; and
- importantly, the parties can save face, a point particularly relevant in an ongoing commercial relationship.

7 See the comments of Teresa Cheng SC, *Possibilities for Combining Arbitration and Mediation: The Perils and Opportunities* www.ciarb.org/south-east/possibilities-for-combining-arbitration-and.php

8 See Renate Dendorfer and Jeremy Lack, *The Interaction between Arbitration and Mediation: Vision v Reality* (2007) 1 Dispute Resolution Journal 73, 87.

9 Op cit at 88.

Those who are opposed to arb-med cite the following as drawbacks to it:

- the person arbitrating the dispute forms views about the party's respective cases and then that same arbitrator, still labouring under those impressions, seeks to reach a mutually advantageous resolution of the dispute knowing full well, for example, that a key witness may not be a witness of truth;
- confidential information (possibly highly damaging information) is exchanged between the mediator and a party during the mediation phase then the mediator, seized of that information, later resumes the role of arbitrator still carrying with him or her a view about that confidential information; and
- if the parties are sensitive about the mediator being unable to put out of his or her mind the confidential information exchanged at the mediation phase, the parties will be less inclined to be open and forthright about resolution during the mediation phase.

Arb-med in Hong Kong

Hong Kong's approach to arb-med represents something of a curiosity. Geographically adjacent to Mainland China (self evidently, a non-common law country), yet steeped in western formalities by reason of its long-term English connection, Hong Kong is a common law legal system. For decades Hong Kong has been reticent about embracing arb-med,[10] even though Hong Kong's *Arbitration Ordinance* has been in operation for some time and notwithstanding the high volume of arbitrations dealt with in Hong Kong under China International Economic and Trade Arbitration Commission, UNCITRAL, the New York Convention and other regimes. Unlike in Singapore, Taiwan, Japan and China, Hong Kong has not enthusiastically adopted arb-med as a legitimate tool in its dispute resolution armoury.

The *Gao v Keeneye* litigation – the factual setting

The efficacy of arb-med in Hong Kong was brought into sharp focus by long-running litigation of *Gao v Keeneye*, at first instance[11] and on appeal.[12] The Vice President of the Court of Appeal described the facts of the case as 'complicated and murky'[13] – and with good reason.

The case concerned a fight over the shareholding in a Hong Kong company called Bai Jun Tian Cheng Ltd (**Baijun**). The applicants (**the Gaos**) owned 50% of the shares in Baijun. Baijun owned shares in other companies that had derived very significant wealth from coal mining, including Angola Ltd.

While being held in detention in Yulin, the Gaos entered into a share transfer agreement (and later a supplemental share transfer agreement) with Keeneye for the transfer of their 50% interest in Baijun. It appears that the Gaos and the coal mining operator fell into disagreement about the running of the coal mine. The Gaos alleged they entered into the share agreements at a time when they were in very poor

10 See www.allenovery.com/publications/en-gb/Pages/The-dangers-of-arb-med-.aspx
11 [2011] HKCFI 240 (Reyes J).
12 [2012] 1 HKC 335 (Tang VP, Fok JA and Sakhrani J).
13 [2012] 1 KHC 335 at [7] (Tang VP)

health and their lives were in danger. Under the share transfer agreements the price of the shares in Baijun were to be separately valued or, failing agreement, the price was to be the amount of the Gaos' actual capital contribution or investment in Baijun. People's Republic of China Contract Law governed the share agreements, article 54 of which permitted a party to request arbitration in respect of a contract that was 'concluded as a result of a serious misunderstanding' or in respect of a contract that was 'manifestly unfair when it was concluded'.

At arbitration

Keeneye applied to the Xi'an Arbitration Commission (**XAC**) on 7 July 2009, seeking confirmation of the validity of the two share transfer agreements. The Gaos counterclaimed to XAC, contending that the share transfer agreements should be revoked on the ground that they were manifestly unfair and there was exploitation of the Gaos' precarious position when signing the agreements.[14]

XAC convened a three-member arbitral tribunal consisting of the chief arbitrator (Jiang Ping), an arbitrator appointed by the Gaos and one appointed by Keeneye. The arbitration was duly convened, and in December 2009 XAC's arbitral tribunal produced an award. The arbitrators determined the value of the shares in Baijun. The Gaos disputed the award saying that the true value of the shares was tenfold greater than the value attributed to them by the arbitrators. Keeneye sought to enforce the award. The Gaos challenged the enforcement of the award under section 40E(3) of the Hong Kong *Arbitration Ordinance*, contending that it would be contrary to public policy to enforce the award.

The application before Saunders J – leave to enforce the award

This was the factual setting for the point of present relevance, namely arb-med. Keeneye's application to enforce the award was made ex parte and Saunders J granted leave to enforce the award.[15] On 16 September 2010 the Gaos brought an inter partes summons seeking to set aside the ex parte orders. On 8 November 2010 Saunders J ordered that summons to be heard nine days later. In the course of fixing directions, Saunders J undertook the unusual task[16] of pronouncing detailed reasons[17] for his decision to refer the matter to another judge for the hearing of the application to set aside the enforcement order. In the course of his reason Saunders J addressed the claim by the Gaos that the arbitral tribunal had behaved improperly and that section 40E of the *Arbitration Ordinance* was thereby contravened as it would be contrary to public policy to enforce the award.

Saunders J summarised the allegations of impropriety in the following way:

14 [2012] 1 HKC 335 at [25].

15 On 2 August 2010

16 We say 'unusual task' because Saunders J was dealing with a limited and discrete application, scarcely calling for a detailed examination of s 40E of the Arbitration Ordinance. Yet the reasons of Saunders J give a good insight into the views held by that judge about aspects of arb-med. The views of Saunders J on point align with the views of Reyes J yet the views of those two judges are at odds with the views on the same point of the judges who comprised the Court of Appeal. That divergence of view underpins our basic contention in this article that views still divide the judiciary of Hong Kong on the issue of arb-med.

17 [2010] HKCFI 980

- the substantive arbitral hearing took place on 21 December 2009;
- before completion of the hearing and prior to the delivery of the award, one of the arbitrators made contact with Zeng Wai, an intermediary of the Gaos, stating that the Secretary General of the XAC had 'something for him';
- Zeng flew to Xian on 27 March 2010 and met with that arbitrator at the Shangri-La Hotel;
- Zeng was told that the arbitral tribunal had considered the case and determined that the share transfer agreements were valid but that Keeneye had to make a compensation payment of RMB 250 million;
- the arbitration was reconvened on 31 May 2010; and
- the arbitral tribunal published its final award on 3 June 2010.

Applying the observations of Sir Anthony Mason NPJ[18] of the Hong Kong Court of Final Appeal in *Hebei Import & Export Corp. v Polytek Engineering Co. Ltd.*,[19] Saunders J held that the expression 'contrary to public policy' in section 40E of the Hong Kong *Arbitration Ordinance* meant 'contrary to fundamental conceptions of morality and justice', and that at 'first sight it was an extraordinary proposition that a member of the Tribunal, in the course of an arbitration, could be involved in a mediation process'[20] Saunders J observed that 'basic notions of morality and justice in Hong Kong would not permit *ex parte* communications between a member of a tribunal and party once an arbitration process has commenced'.[21]

The referral to Reyes J

Rather than dismissing the Gaos summons in accordance with the request of Keeneye, Saunders J referred the summons for hearing before Reyes J on 30 March 2010.

Reyes J said his task was to address section 40E of the Arbitration Ordinance.

After reserving judgment for a less than a fortnight, on 12 April 2011 Reyes J gave judgment.[22] His Honour set aside the ex parte leave to enforce the award that Saunders J granted.

The reasons of Reyes J reflected a more detailed examination of the events at the Shangri-La[23] and were determinative in Reyes J's decision to set aside the leave given by Saunders J to enforce the award.

Reyes J said that after the first segment of the arbitration, the tribunal decided to suggest that a settlement could be achieved if Keeneye paid the Gaos RMB 250 million. The tribunal appointed Pan Junxin (XAC's Secretary General) and one of the arbitrators, Zhou Jian, to contact the parties with that suggestion. Pan's office made contact with the Gaos' legal representative, Kang Ming. Pan and Zhou also made

18 Sir Anthony Mason sat as a Justice then later as the Chief Justice of the High Court of Australia between 1972 and 1995, 23 years in total. He is hailed one of Australia's greatest jurists.
19 (1992) 2 HKCFAR 111
20 [2010] HKFCI 980 at [14]
21 [2010] HKFCI 980 at [16]
22 [2011] HKCFI 240
23 [2011] HKCFI 240 at [22] to [27].

contact with one Zeng Wei, a person friendly to Keeneye and a shareholder in Angola, one of the 50% shareholders of Baijun. A dinner was arranged at the Shangri-La. Present were Pan, Zeng and Zhou Jian. Pan suggested that Keeneye pay the Gaos the sum of RMB 250 million and Pan suggested that Zeng should 'work on' Keeneye. Before Reyes J, Zeng gave evidence that Pan told those at the dinner that the arbitral tribunal had decided on a 'result', being the validity of the share transfers and a compensation payment of RMB 250 million. Zeng told Reyes J that Pan said at the dinner that Keeneye could end up with something worse in the arbitration (inferentially, if the proposal was not accepted). Zeng gave evidence that he passed on what he had been told by Pan to a representative of Keeneye. Subsequently, Keeneye refused to pay the sum Pan suggested and the arbitration continued, there being no complaint about the conduct of Pan or Zhou at the Shangri-La.

When in June 2010 the arbitral tribunal published its award, the 'result' was different to the one Pan foreshadowed. The arbitrators dismissed Keeneye's claim in its entirety, revoked the share transfer agreements and recommended that Keeneye make economic compensation to the parties of RMB 50 million.

Was the dinner at the Shangri-la a 'mediation'?

In reaching his conclusion with what he called 'serious hesitation',[24] Reyes J held that the dinner was in fact a mediation,[25] despite it being unsuccessful and not following the procedure prescribed by Article 37 of the XAC's *Arbitration Rules*.[26] Reyes J recited Keeneye's description of the dinner as a 'none-too-subtle attempt to put pressure' on Keeneye into paying the Gaos a vast sum of money in return for a decision in Keeneye's favour about the validity of the share transfer agreements. In amplifying his reservations about the propriety of the dinner as a mediation, Reyes J said, first, the discussions at the Shangri-La were not conducted by the whole tribunal (but instead were conducted by Pan and Zhou); second, Pan (a third party) was not authorised to act as a mediator; third, the time and place for the discussions were not consented to by all parties; and fourth, the proposal expressed by Pan and Zhou did not come from Gaos but rather it was devised and conveyed by Pan and Zhou.

Reyes J gave lukewarm and much qualified support for arb-med.[27] 'There is nothing wrong in principle with med-arb … From the point of view of impartiality the med-arb process runs into self-evident difficulties. The risk of the mediator turned arbitrator appearing to be biased will always be great.'[28] Or, later, 'The problems inherent in med-arb are such that many arbitrators decline to engage in it. They view the risks of apparent bias arising from their participation in med-arb as an insurmountable difficulty.'[29]

24 [2011] HKCFI 240 at [40].
25 [2011] HKCFI 240 at [40].
26 [2011] HKCFI 240 at [41].
27 [2011] HKCFI 240 at [71]. In that passage Reyes J described the process as 'med-arb', although nothing turns on that nomenclature.
28 [2011] HKCFI 240 at [72].
29 [2011] HKCFI 240 at [77].

So much for the ambivalent 'support' for arb-med. On the facts, Reyes J held that the mediation was not conducted in a manner that avoided apparent bias.[30]

On public policy grounds Reyes J held that a Hong Kong award tainted by apparent bias was unenforceable in Hong Kong and it should make no difference to the principle that the award is that of a foreign tribunal. Relevantly, His Honour said, 'Upholding such an award will have the consequence that justice would not be seen to be done. Enforcement of such an award would be an affront to this Court's sense of justice.'[31]

His Honour refused Keeneye's application for leave to enforce the XAC award.

Off to the Court of Appeal

After its initial success with the *ex parte* application for leave to enforce the XAC award, Keeneye thereafter suffered two losses (one before Saunders J and the other before Reyes J), yet Keeneye's determination in appealing to the Court of Appeal ultimately bore fruit.

In a very short judgment, the Court of Appeal held, in essence, that the Gaos failed to complain about any apprehension of bias until the award was handed down, and that their failure to complain about the events at the Shangri-la amounted to a waiver and for that reason the appeal should be allowed. Further, the Court of Appeal held that no case of actual or apparent bias had been made out and that Reyes J erred in finding to the contrary.

Importantly, the Court of Appeal said nothing about arb-med. But the court did make observations about what happened at the Shangri-La. The Court of Appeal said that the mainland court was better able than a Hong Kong court to decide whether the practice of mediating over dinner in a hotel is acceptable.[32] The court rejected the notion that 'there was any wining and dining by Pan' as 'it was Zeng who paid for the dinner'.[33]

Otherwise, the Court of Appeal gave no consideration to the appropriateness or suitability of arb-med to commercial disputes in Hong Kong. Nor did the Court of Appeal make any statements that qualified or negated the views of Reyes J regarding the fallibility of arb-med.

The court allowed Keeneye's appeal and set aside Reyes J's orders. The upshot was that Keeneye was permitted to enforce the XAC arbitral award.

What do we glean from this pitch battle?

Several issues emerge from this litigation – some specific to the particular dispute between the Gaos and Keeneye and some of general importance to arb-med in Hong Kong.

30 [2011] HKCFI 240 at [80].
31 [2011] HLCFI 240 at [99].
32 [2012] 1 HKC 335 at [99].
33 This expression puts a complexion on the facts that was not open, in the authors' views. The person who pays for the meal is not necessarily the person who wines and dines others.

First, the Hong Kong judiciary is divided on the key point of whether arb-med undermines the impartiality of the arbitration process. In certain quarters, various judges (Saunders and Reyes JJ, for example) have highlighted how impartiality should be a beacon that illuminates the attainment of justice in Hong Kong – whether in the hearing of cases or in the enforcement of arbitral awards. Those judges equate impartiality with the important public policy of justice and fairness. For them, the court should not assist a party where an arbitral award is tainted by the appearance of bias; such an appearance is particularly likely to arise during the arb-med process.

In the other camp are the judges (such as Tang VP, Fok JA and Sakhrani J) who prefer to give effect to, rather than frustrate, the workings and awards of arbitral tribunals of other countries. For them it is neither desirable nor efficacious to embark on an excursus into the way other countries undertake their arbitral process.

One cannot predict with reliable certainty how a differently constituted Court of Appeal might address the issue. After all, the Court of Appeal in *Gao v Keeneye* did not pronounce upon (whether adversely or positively) the observations of Saunders J or Reyes J on aspects of arb-med. The reasons for judgment of Tang VP were, for the most part, confined to the facts of the case and to the complexion of apparent bias. Are legal practitioners to understand from the decision of the Court of Appeal in Gao v Keeneye that in Hong Kong a mood of support exists for arb-med in the context of international commercial arbitration? Or do legal practitioners tread warily, knowing that the judiciary is divided on point?

It seems counterintuitive that the parties, having elected to resolve their dispute by arbitration and thus outside the arena of court, would wish a high level of curial involvement with the possibility of a court denouncing the decision of the arbitral tribunal. The decision of the Court of Appeal was wholly consonant with the pro-enforcement bias underpinning the Model Law and the New York Convention. Yet, by the same token, legal systems grounded in the English common law are affronted by the notion that a judicial or quasi-judicial determination might have been procured by bias, something antithetical to the fundamental nature of justice.

Has the decision in *Gao v Keeneye* brought the law of Hong Kong into line with the law of most other jurisdictions in relation to the efficacy and use of arb-med? Hence, has the law of Hong Kong now been corrected, away from the heretical views of opponents to arb-med? Or is the judiciary of Hong Kong divided on point with the result that a simmering suspicion still pervades the use of arb-med? Will a differently constituted appeal court reach a different view about the enforceability of an award that was procured by conduct potentially amounting (on one view, at least) to apparent bias?

As the Court of Appeal in *Gao v Keeneye* confined its decision to the facts, it cannot be said that future challenges to the enforceability of arbitral awards on the basis of the inherent bias of the arb-med process will be decided in the same way. Sufficient underlying suspicion still pervades arb-med in Hong Kong.

Dos and don'ts for drafting alternative dispute resolution causes[1]

Ian Gault[2] and Sophie East[3]

In our experience there are a number of matters commonly overlooked when parties draft alternative dispute resolution (ADR) clauses. The following piece does not purport to be a complete guide to drafting such clauses, but rather we have highlighted what we see as five key issues to address.

Scope: defining 'dispute'

It is surprising how often one sees ADR clauses that refer to determining a 'dispute', but nowhere in the contract do the parties identify or define the scope of disputes that may be submitted to ADR. It is important to identify this and to ensure that the scope covers precisely what the parties intend. In most cases, this will be all disputes 'arising out of or in connection with' the contract. The phrases 'arising out of or in connection with' and 'arising out of or relating to' have become the model for many of the arbitration clauses published by the major arbitral institutions around the world (for example, the standard arbitration clause under the International Chamber of Commerce (**ICC**) Rules of Arbitration and the recommended arbitration clause under the London Court of International Arbitration (**LCIA**) Rules). By using a more-limited description, for example one which covers only disputes 'arising out of' the contract, the parties risk a Court finding that the parties did not intend a certain fact pattern to be the subject of ADR (see, for example, the United States Federal Appeal Court decision of *Vetco Sales, Inc v Vinar*, 98 F. App'x 264, 266-67 (5th Cir. 2004), where the Court held that 'arising out of' language in an arbitration clause indicated that 'the parties intended to limit the applicability of this clause', and holding that claims for breach of a related agreement were outside the scope of the arbitration clause).

The issue is highlighted by considering the two alternative formations of the definition of 'dispute' below:

Example 1

'Dispute' means any dispute, difference or question which may arise at any time hereafter between X and Y with respect to this agreement.

Example 2

'Dispute' means any dispute, difference or question arising out of or in connection with this agreement or its formation.

1 This paper was first presented at the 2013 AMINZ Conference in New Zealand

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The clause in example 1 would cover disputes as to the interpretation or application of certain contractual provisions. However, it is unlikely to cover claims in tort, statute, or related equitable claims. By contrast, in example 2, the words 'in connection with' are wide enough that pre-contractual misrepresentations and related statutory and tort claims would comfortably fit within the ambit of the clause. The use of the word 'formation' makes this doubly clear (in relation to pre-contractual conduct) and includes disputes as to whether there is a contract.

Multi-tier clauses: a clear process and boundaries

It is increasingly common in complex commercial contracts to see 'multi-tier' ADR clauses: clauses that set out a number of escalating steps in the ADR process. These often start with compulsory negotiation and end with binding arbitration. It is important that these clauses are carefully considered. Clauses that simply say, for example, that the parties are to engage in 'good faith negotiations' before proceeding to arbitration leave a number of issues open. How is it clear that the parties are in the contractually mandated negotiation process? How long can the parties take in the negotiating process? If negotiations are futile, how does a party escalate the matter to the next level of ADR? When has a party not acted in 'good faith' in a negotiation process? Generally in drafting these clauses it is preferable to remember the following rules.

- Specify how the ADR process is initiated. For example, it may be initiated by one party serving the other party with a notice setting out brief details of the dispute.
- Set time limits on the various stages of the ADR process. For example, the clause could provide that in the negotiation stage of ADR the parties must make representatives with authority to settle the dispute available for the purpose of meeting in an effort to resolve the dispute and that such meeting must take place within 30 days of service of a notice of dispute. If the negotiation turns out to be fruitful and not enough time has been allocated, the parties can always agree to extend the time period. By setting a time limit the parties eliminate the risk that either party will cause undue delay by declining to participate in the negotiation.
- Spell out how a dispute is moved from one stage of the ADR process to the next. This should be triggered by an indisputable event, for example expiry of a time period. In the example above, if the dispute is not settled by the authorised representatives in the 30 days, make it clear that the dispute shall proceed to be determined in accordance with the remainder of the ADR clause.
- Avoid the use of terms which may cause a dispute in themselves. For example, a requirement that negotiations be conducted in good faith adds nothing, other than an invitation to a dispute about whether one party acted in good faith.

Arbitration: making key choices

Place of hearing (domestic) / place of arbitration (international)

Among the key issues that parties to an arbitration clause should consider is the place of the hearing for domestic contracts, and the place of arbitration for international contracts (i.e. contracts where the parties reside in different jurisdictions). Where the contract is a wholly domestic one, the location for the hearing may not be an issue if both parties reside in, say, Auckland (the parties would invariably designate

Auckland as the place for the hearing). However, if the parties reside in different cities and the contract does not designate a hearing location, unless the parties can agree, this will be up to the arbitrator to decide (adding time and cost to the process while this issue is being determined). The issue is very simply avoided by a clause specifying the place of the arbitration, for example 'The arbitration will be held in Auckland, New Zealand.'

In an international contract parties should designate a 'place' or 'seat' of arbitration (for example 'The place of the arbitration shall be Paris, France.'). This is more than simply a place of hearing, and in fact can be different from where the hearing physically takes place. The choice of a place of international arbitration determines the governing arbitration law (i.e. the law that will determine such matters as the conditions for validity of the arbitration agreement, the scope of the arbitration agreement, the appointment and removal and replacement of arbitrators, challenge of arbitrators, power of arbitrators and courts to grant interim measures, power to consolidate proceedings, the form and validity of the award and the finality of the award/rights of appeal). This is to be distinguished from the law governing the parties' contract (i.e. the law identified by the governing law clause in the contract or determined by applying conflicts of law principles). The governing law or law of the contract is the law under which the arbitrator decides the substance of the parties' dispute, and this may be different from the law of the place of arbitration.

The chosen forum (or place of arbitration) will also determine the degree of risk that local courts might interfere in an arbitration and the risk of an unenforceable arbitral award. If the parties unwisely choose a place of arbitration where the legal regime is hostile to arbitration or to foreign parties, they expose themselves to the risk of interference by a local court and to the risk of an unenforceable award. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) is a key consideration in this respect. The New York Convention facilitates recognition and enforcement in each signatory state of international arbitral awards rendered in other signatory states (of which there are currently around 140). It also restricts the grounds for refusing to enforce awards. However, one of the grounds for refusing to enforce an international arbitral award under the New York Convention is that the award has been set aside at the place of arbitration. This makes the selection of the place of arbitration important. Moreover, the pro-enforcement regime of the New York Convention is in most instances available only with respect to awards rendered in nations that are party to the Convention (making it advisable not only that the country designated as the place of arbitration has an arbitration-friendly regime, but that it is a signatory to the New York Convention).

Administered or ad hoc arbitration (international)

In an international contract, parties should consider whether or not to have the arbitration administered by an arbitral institution, for example the ICC, LCIA, New Zealand Dispute Resolution Centre or Singapore International Arbitration Centre, to name a few. By selecting an institution in their arbitration clause, the parties then pay the institution to assist, in accordance with its rules, in the initiation of the arbitration and in the constitution of the arbitral tribunal, to intervene as appropriate before the arbitrators are selected (and occasionally after), and to assist throughout the process with matters such as payments, notice, mailings, and arranging for hearing facilities. Recommended clauses for the selection of the various institutions are available on their websites.

By contrast, non-administered or 'ad hoc' international arbitrations are arbitrations conducted by the parties and the arbitrators (once appointed) without the assistance of an administering institution. The parties may also choose a designated set of rules even without an administering institution (such as the United Nations Commission on International Trade Law Arbitration Rules).

Arbitrators

A further issue to consider, both in a domestic and in an international contract, is the method of selection and number of arbitrators. If the place of arbitration is New Zealand, the default position under the Arbitration Act 1996 (NZ) is that there is one arbitrator for a domestic arbitration and three arbitrators for an international arbitration (Article 10, Schedule 1). The parties are free to agree otherwise and free to agree on a procedure for the appointments of arbitrators. Failing agreement on arbitrator appointment, in an arbitration with a sole arbitrator, the arbitrator may be appointed by the High Court (Article 11(3)(b), Schedule 1). In an arbitration with three arbitrators, the fall back position is that each party appoints one arbitrator and those two arbitrators appoint a third (again, if the parties cannot agree, this reverts to the High Court for determination) (Article 11(3)(b), Schedule 1, Arbitration Act 1996). If the parties desire something different, this must be specified in the contract. The parties may indeed want something different where, for example, it is a domestic contract with a large monetary value attached to it and a multi-tier dispute resolution clause. A dispute that reaches arbitration (the last step) is likely to be a dispute of some commercial and financial significance to the parties. Accordingly, the parties may wish to provide for a panel (i.e. three arbitrators) rather than leaving the matter in the hands of a sole arbitrator (i.e. the default position under the Arbitration Act). Of course, the parties are free to agree this procedure at any time, but often these issues are most easily dealt with at the contract drafting stage, before a dispute has arisen.

Language

Language may also be an issue. Where parties share a language and their contract is in that language, there is no need to specify the language of the arbitration. However, if the parties use different languages, the arbitration clause should specify which language will be used in the arbitration (for example 'The language to be used in the arbitral proceedings shall be English.'). Without this, the arbitrator(s) will determine this, and it is likely that they will decide that the language of the contract will be the language of the arbitration.

Making the process exclusive

Effective ADR clauses mandate ADR (whether it is negotiation, mediation, expert determination, arbitration or a combination of all of them (i.e. a multi-tier clause)). Ineffective ADR clauses unintentionally provide an *option* of ADR or litigation, for example providing that any disputes which cannot be settled by negotiation 'may' be submitted to arbitration (not 'must' or 'shall'). Another error is for a contract to contain, in successive clauses, a consent to the jurisdiction of certain courts and a consent to arbitration, leaving it uncertain whether the parties intended arbitration to be the exclusive dispute resolution process. These errors are avoided by careful drafting and word choice.

Addressing ongoing performance obligations

Finally, it is worth clarifying that the parties must continue to perform their obligations under the contract while the ADR process is underway. This answers any party who, while engaged in the ADR process, effectively 'downs tools' and refuses to perform obligations unrelated to those which may be the subject of the dispute. A clause to the following effect deals with that situation:

> *'Each party must continue to perform its obligations under this agreement as far as possible as if no dispute had arisen pending the final resolution of any dispute.'*

Conclusion

An ADR clause might still be workable despite the fact it fails to address the issues we have discussed above. However, these issues will need to be dealt with at some point and it is much easier to do so at the contract drafting stage than when a dispute is afoot and relations between the parties have deteriorated.

Fight or flight: the importance of understanding our defence system[1]

Barbara McCulloch[2], Dr Cathy Stinear[3] and Jeremy Scuse[4]

Abstract

This article discusses various aspects of our fight and flight response and considers what this means for us as dispute resolvers, and how we can work with our clients most effectively when they show us that they are in distress or feeling high levels of emotions. We thought about what conflict means, why we fight and what motivates us to engage with others in a state of conflict. We also thought about what works to reduce levels of destructive conflict and how we might assist others to achieve that goal.

As authors we have collaborated to bring together our experience in neurology, psychology, conflict coaching and mediation. We have drawn from the work of other professionals and from our own experience, individually and combined. Collaborating in this way proved to be not only satisfying professionally but also a learning curve for us which was a lot of fun.

Why do we fight? What motivates us to engage in conflict or even combat with another?

> *'Our relations to one another grew more and more hostile and at last reached a stage where it was not disagreement that caused hostility but hostility that caused disagreement. Whatever she might say, I disagreed with beforehand, and it was just the same with her … We no longer tried to bring any dispute to a conclusion. We invariably kept to our own opinions even about the most trivial questions … As I now recall them the views I maintained were not at all so dear to me that I could not have given them up; but she was of the opposite opinion and to yield meant yielding to her, and that I could not do.'*
>
> Leo Tolstoy

If I think of the times that I have been in conflict with another person it can be hard to articulate what we were in conflict about without sounding and feeling really stupid. Why did I argue with my partner about what to save and what to delete on the My Sky recorder last week? It wasn't even full and there's not that much that we want to record … So, why did we engage in the conflict? Neuroscience tells us that it is because each of us (my partner and I) felt threatened in some way. Here we were: two middle-class, middle-aged, educated professionals arguing about something trivial. Where was the threat?

1 This paper was first presented at the 2013 AMINZ Conference in New Zealand

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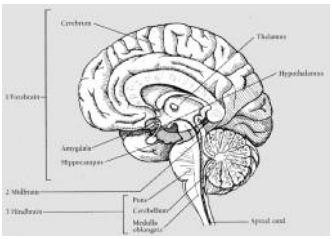
One way of understanding this is to consider meeting your brain. Your brain is the most precious organ in your body. It can't be replaced – there are no transplants – and if part of it becomes damaged or dies it can't repair itself or grow back. Everything you know, everything you remember, everything you know how to do and everything that makes you you is stored in your brain. So, now we're going to learn some basic things about how your brain responds to danger, where emotions and feelings come from, and how your brain can and will change, depending on how you use it.

The fight or flight response

The outer surface of the brain is called the cerebral cortex. It's grey and wrinkly, and contains millions of neurons. The cortex is responsible for the things you're conscious of – what you see, hear, think, say, do and remember. Each region of the cortex communicates with the others, and also with other areas located deep within the brain. These deep areas are responsible for the things you don't consciously control – your temperature, heart rate, hormones, sleep and digestion. So how do the conscious and unconscious processes in your brain interact?

Your conscious perceptions affect the unconscious control of your body. When you perceive that you're safe, the deep areas of your brain respond by helping your muscles relax, your heart rate is slow and steady, your digestion is good and you sleep well. When you perceive a threat – whether it's stepping on broken glass or seeing someone with whom you're in conflict – the fight or flight response is triggered in the deep areas of the brain. This unconscious response prepares your body for survival by focusing your attention, increasing your heart rate, dilating your pupils and diverting blood flow away from digestion and towards your muscles.



An important deep area of the brain is called the amygdala, which plays a critical role in regulating fear. Sensory information about your body and your environment is sent to the amygdala and the cortex at the same time. This means that the amygdala can respond to a threat and initiate a fight or flight response even before you consciously experience fear. The amygdala also helps you to link events with rewards, promoting positive emotions.

The amygdala has numerous connections to the cortex, particularly the forebrain. Communication between the forebrain and the amygdala occurs in both directions. During an emotional response, the amygdala influences the cortex and what you pay attention to, which memories you retrieve, and your decision-making strategy. Conversely, remembering previous traumas, or imagining future ones, can trigger the amygdala to initiate a fight or flight response. It's the partnership between the amygdala and the frontal areas of cortex that give us our emotions and feelings.

Dr Laura Crawshaw uses the term 'TAD dynamic' to explain the impact of threat in our relationships; her theory has its roots in neurological, anthropological, psychological and sociological thinking. Laura asks us to consider a mouse: mice have fairly small lives in the scheme of things. They spend their time collecting food and exploring their environment (or at least the edges of their environment) and breeding

baby mice and smelling like mice. Some would say that they do no harm. Now, consider a cat. More importantly, consider a cat in relation to a mouse. Cats pose a threat to mice; when a mouse sees a cat it feels anxiety and its only defence to that feeling of anxiety is flight. If mice were different (and if they had access to Tasers or flame throwers) they might have an alternative defence: to fight the cat. Possibly it's good that this defence doesn't exist for mice or they would simply join us in the fight or flight dichotomy.

So we have the brilliantly simple and effective TAD response:

A sense of **threat** creates a reaction of
anxiety and our response to anxiety is to use our
fight or flight **defence**.

Charles Darwin (1859) contributed to this theory of conflict with his research on the survival of the fittest. The theory was further advanced by Walter Cannon who coined the phrase 'fight or flight' in 1928. Sigmund Freud (1894 and 1936) made further contributions when he established that the fight or flight response was activated not just by physical threats but also by the psychological perception of threat.

The role of perception

A perception of threat is primarily internal and individual rather than external and able to be assessed as factually existing, but perception is important. Think about what makes you feel anxious or afraid and then analyse the level of threat contained. How many of us are afraid of spiders? Of singing out loud in public? Of walking across a transparent platform high up in a building? Typically we drown spiders in the shower (fight) and avoid karaoke bars and glass floors high up in buildings (flight).

Freud's contribution to this theory of conflict was expanded when he stated that humans are mostly anxious about loss; annihilation was the loss of life and abandonment was the loss of love. Thus, anxiety could be provoked and the *perception of threat could be created* if a person felt such a possibility of loss and that person would react with one of the fight or flight defences.

Returning to my argument with my partner about the My Sky box: What was our perception of loss and how did that provoke anxiety and why did we engage in our argument? I ask because many of our day-to-day interactions are fuelled by this same kind of provocation and we tend to engage with those who are closest to us: our family members and co-workers and flatmates and partners and friends. If we can reflect on and understand what fuels our own conflicts – even our own squabbles – we may in turn develop a better understanding not just of another's conflicts but of how best to assist them when they approach us for help.

It has been both my experience and observation that we learn our conflict responses in childhood and that our fight or flight preferences can be established before we can even articulate the 'why' of our choices. What did you fight about with your siblings? How were those disputes resolved? Did you develop a well-practised response whenever you felt crossed? Was your preference for fight or flight?

Emotions and feelings

Aren't these the same thing? We tend to use the words 'emotion' and 'feeling' interchangeably, but in neuroscience they're thought to be two different things. Emotions are the physiological responses that occur more or less unconsciously when the brain detects threats or opportunities. The pounding heart and tense muscles when you're in danger, the tears and sobs when you're experiencing loss, and the gasps and giggles when you have a wonderful surprise are emotional responses that you don't have much control over. Emotions serve as important cues which shape our behaviour to our advantage. The initial processing of emotions occurs unconsciously in the deep areas of the brain, including the amygdala. This unconscious processing leads to feelings, which are the conscious perceptions of your emotional responses.

What's the advantage of becoming consciously aware of physiological emotional responses? How are feelings adaptive? One answer might be that if we had emotional responses but didn't consciously experience feelings we'd be less able to anticipate and plan behaviour. Feelings help us to learn about the people, things and situations that cause our emotional responses and understand their significance so we can plan appropriately our future actions when we encounter these people, things and situations again. In summary, our unconscious emotional responses are automatic signals of threat and opportunity. In contrast, conscious feelings engage our thinking skills and let us modify and adapt our behaviour to avoid or cope with threat and take advantage of opportunities.

How does this adaptation of behaviour happen, and can we control it? Jeremy Scuse of Catalyst Mediation in the United Kingdom says that to make use of our combined emotions, feelings and thoughts we need to be motivated:

> *'Motivations are the end result of "e-motions". They act to make us do things – so our muscles tense or relax, our blood vessels dilate or contract. When we feel emotionally, we also feel physically. Our emotions can thus make us feel uncomfortable or comfortable, sending us signals to do something urgently or to stay in our comfortable state.*
>
> *'We make many decisions, and sometimes we are more or less logical about them. And it is arguable that all decisions are ultimately emotional. When we say that we use logic to make decisions, we are seeking to exclude emotions, using only rational methods, and perhaps even mathematical tools. The foundation of such decisions is the principle of utility, whereby the value of each option is assessed by assigning criteria (often weighted). However, there is a whole range of decision making that uses emotion, depending on the degree of logic that is included in the process.*
>
> *'A totally emotional decision is typically very fast. This is because it takes time (at least 0.1 seconds) for the rational cortex to get going. This is the reactive (and largely subconscious) decision making that you encounter in heated arguments or when faced with immediate danger.*
>
> *'Common emotional decisions may use some logic, but the main driving force is emotion,*

which either overrides logic or uses pseudo-logic to support emotional choices (this is extremely common). Another common use of emotion in decision is to start with logic and then use emotion in the final choice.'

Brain research

Neuroscientist Antonio Damasio studied people with brain injuries that had damaged the part of the brain where emotions are generated. In all other respects they seemed normal – they just lost the ability to feel emotions. He found their ability to make decisions was seriously impaired. They could logically describe what they should be doing, but in practice they found it very difficult to make decisions about where to live, what to eat etc. In particular, many decisions have pros and cons on both sides. Shall I have the fish or the beef? With no rational way to decide, they were unable to make the decision.

So rationality and emotions are involved in all decisions, to one degree or another.

Your changing brain

If you spent time on a farm as a child you quickly learned to treat electric fences with a great deal of respect. The memory of receiving a painful shock, and the fear of receiving another, quickly modified your thinking and behaviour so that you made safer decisions around electric fences. This type of learning depends on the adaptability of the connections between the amygdala and the cortex, and is essential for your survival. It's also a quite simple type of learning. The types of situations for which people seek mediation are far more complex than electric fences, and sometimes more painful, but the basic principles of learning in the brain are the same.

Your brain learns and remembers by changing the number and strength of connections between neurons. This process is ongoing throughout your life, and is called neural plasticity. A famous example comes from a study by Woollett and Maguire (2011), who scanned the brains of taxi drivers before and after they trained to sit 'The Knowledge', an exam which tests drivers' knowledge of central London in a six-mile radius around Charing Cross Station. The training requires learning around 25,000 streets and locations, and takes three to four years! Woollett and Maguire showed that the hippocampus, which is an area of cortex responsible for spatial memories, grew significantly larger during training, but only in the drivers who passed the exam. This study and others like it clearly show that the structure of the brain can change, with repeatedly-used areas getting physically larger.

On numerous occasions I have been briefed by a HR professional or manager and asked to mediate between two people engaged in a workplace conflict, and the briefing includes the assessment that 'they'll never get on; they have a personality conflict'. So, we might also ask if we also have 'a conflict personality'.

In order to consider this question we first need to define the terms 'personality' and 'conflict'.

Roget's Thesaurus talks about personal make up, character, traits, attributes, self being the id-ego, individuality, idiosyncratic, personal, typical … the self being the psyche, the unconscious … qualities, instincts, passions, disposition, temperament …

The Fontana Dictionary of Modern Thought talks about personality types being '… idealised descriptions derived either by statistical procedures or by theoretical postulation or by some more or less skilful combination of the two … based upon differences in physiological and hormonal functioning that reflects itself in temperament …'

Jung used the terms 'introversion' and 'extroversion' and talks of differences of orientation towards the world; he divides personalities into thought-orientated, feeling-orientated and instinct-orientated. (If you think about it, it is possible to join the dots between the emotional and instinct oriented personalities and the TAD dynamic.)

'Conflict is an expressed struggle between at least two interdependent parties who perceive incompatible goals, scarce resources, and interference from others in achieving their goals.' [5]

'We say that conflict is natural, inevitable, necessary and normal and that the problem is not the existence of conflict but how we handle it.' [6]

'No man can think clearly when his fists are clenched.'

[7]A clear difficulty with this analysis is that we tend to consider that personality traits are fixed and so not subject to change. Paulo Freire suggests that this can lead us into fatalism and the belief that nothing can or should change. He calls this a lack of 'temporality'; an inability to differentiate between past, present and future. Lack of temporality is indicated by the use of language such as 'it's always …' or 'you never …'. The fatalistic approach undermines the power we have as humans to choose and to learn and to behave differently on another occasion.

The brain can change very rapidly in response to short-term increases or decreases in use. For example, Alvaro Pascual-Leone and colleagues (1995) studied the activity of the brain area controlling the index finger in people who proofread Braille for a living. They found that the activity was higher at the end of the work day than at the beginning, and this was specific to the index finger as no changes in activity were found for the area of brain controlling the little finger on the same hand. In a separate study, they also showed that the activity of the area controlling the index finger was higher in regular Braille readers than infrequent Braille readers, or in people who don't read Braille. This tells us that there are short-term effects of practice on brain activity, and these can accumulate into long-term effects with ongoing practice.

It may be useful then for us as conflict resolvers to think about behaviours rather than personality because behaviours are learned and therefore are subject to change and influence. Instead of describing people as being engaged in a 'personality conflict' or analysing their 'conflict personality' we might think about it as a clash between one person's behaviour and another person's interpretation of that behaviour. For

5 William Wilmot and Joyce Hocker (2001), *Interpersonal Conflict*, p.41
6 Bernard Mayer (2000), *The Dynamics of Conflict Resolution*, p.3
7 George Jean Nathan (1882–1958), the leading American drama critic of his time

example, if someone at work is regularly late (late for work, late for meetings) we might interpret from that behaviour of lateness that the colleague is rude, disrespectful, cavalier or unreliable. The interpretation is subjective and in narrative terms it privileges one kind of behaviour over another without sufficient evidence of superiority. While it may be possible to persuade someone to change their behaviour and become more punctual, it is much less possible to persuade the unpunctual person to accept the interpretation of their lack of punctuality as rude, disrespectful, cavalier or unreliable.

Conflict occurs because person A behaves in a way that is unacceptable to person B because of their interpretation about what that behaviour means and often voicing their interpretation as factual.

Jeremy Scuse says, 'If another's behaviour is not what we expect, our trust bleeds away and their motivations are increasingly seen as deliberate, damaging, and possibly even evil. To move from this negative interpretation to something more positive requires us to trust each other, and trust is like a stalagmite – it builds up slowly each time we interact with someone and they respond positively, so we come to expect or "trust" in their response. But trust is brittle – one or two adverse interactions and the stalagmite snaps and has to be rebuilt, drop by interaction by drop.'

In terms of us as conflict resolvers assisting our parties to build trust, one of our roles might be to open up the possibility of another way of interpreting behaviour. We do this by asking questions, such as:

- 'How else might we interpret lack of punctuality? Can we just as accurately say, flexible, engaged in what they are doing, passionately involved, concentrating hard?'
- 'Are you aware that when you are late to work or to a meeting that others feel aggrieved?'
- 'Are there ways that we could arrange hours of work or meeting times that would mean that you could comply with others' expectations of starting and finishing times?'
- 'Are there reasons why you seem to struggle with complying with time constraints?'
- 'What does time mean to each of us and how can we do things so that everyone's needs are met?'

If we practise this technique of opening it is less likely that conflict will occur as a result of our initially different interpretations of certain behaviours like punctuality. We do, of course, need to be aware of our own interpretations and not allow these to show or we risk becoming partial and failing in our role as conflict resolvers.

An often-quoted statement in addiction counselling is 'If you do what you've always done, you'll get what you've always got.' In other words, try something different and see what happens. When we coach someone to consider a behaviour change it does not have to be permanent; it works better initially if we consider that we are 'just trying' something. (Actually the reason that this works better is that we are often anxious about failing and so changing behaviour or trying something new can in itself be perceived as a threat. Not being willing to try something new is an indicator of the TAD dynamic in practice – not trying is flight behaviour.)

If we are willing to practise the new behaviour until it becomes familiar and then practise enough to form a new habit, we also have used our brain's plasticity.

My suggestion is that in the first instance we reflect on an experience we have had ourselves of learning something new. How did we achieve the new activity?

As an example, in 2011 I made a decision to learn how to swim with my face in the water. As a child I didn't ever have swimming lessons other than those we all received in the almost-freezing water of a primary school pool in the late 1960s. My family had emigrated from Scotland to New Zealand and neither of my parents could swim. Going to the beach, boating, water activities … none of these were part of my experience growing up. My mother gets sea sick on the Devonport ferry; she considers that voluntarily getting into undomesticated water is a dangerous activity. Somehow I learned to swim sufficiently well to not be considered a freak but I never learned to swim with my face in the water and I always experienced a sense of terrible panic when I tried to do so. (This was possibly a result of nearly drowning at Karekare beach one year; further proof of my early learning that water was a dangerous environment.)

In order to learn to swim with my face in the water I had to have a desire to drive me forward and discomfort with the old way to prevent me from returning to that. My desire was about wanting to be fit and flexible and mobile after an accident that broke my ankle very badly and so having fewer options for fitness activities. Going swimming in a pool and discovering that I enjoyed being in the water, wanting to be 'normal' in a family of in-laws who (almost literally) grew up sailing, and having neck and back problems which swimming with my face out of the water exacerbated provided enough discomfort.

Learning to swim with my face in the water was a long slow process of practice and being kind enough to reassure myself that I was making progress. Basically I can now do it; I swim 40 lengths three or four times a week and feel very proud of myself. However I still have barriers and boundaries: I can swim properly in a pool with goggles on but not in the sea without goggles. I tried snorkelling this summer and felt all of the old panic returning. I count my breath when I swim face in the water (because this helps me to manage my ongoing feeling that panic is still there on the edge of my consciousness). I have a planned escape route so that if the panic returns, I can turn over onto my back and float myself out of trouble. I gave myself permission to try something different and to succeed in my own way and my own time and to not have to be perfect at the new skill. I also gave myself permission to acknowledge that I had a 'problem' and that I could try changing. And I gave myself permission to risk failure. In other words I exhibited kindness towards myself in order to learn a new behaviour in a conscious manner.

In narrative terms, my dominant story was 'I can't change'. In neurological terms the response driven by my amygdala was 'Water is dangerous!', so I had to create a new chapter in the story of my life and I had to create a new message for my brain ('Water can be fun'), so that the process of learning a new skill could happen. My personality traits don't really include bravery – especially about physical things – and I have a real fear of seeming to be stupid or clumsy. Creating a new story meant dealing with those messages.

So, do we regularly engage in 'personality conflicts' which are unresolvable, or do we have 'conflict personalities' which need accurate analysis before we can engage with each other? One conclusion is to

consider that we probably do have a conflict personality and that means that we have a tendency to being seduced into behaving in particular ways and that the behaviours are learned and become normalised through repeated practice and that these practised behaviours are subject to influence and change even if initially they feel awkward and we have to practise them consciously. We can teach ourselves new habits by using the power of our conscious brain.

One way of considering the realm of conflict personalities is that we can fall into one of three different conflict personality types: the pacifist, the interventionist or the hero. Pacifists are good at keeping things in perspective. Interventionists are good at being helpful and competent. Heroes can stand up for others even when there is little or no benefit to them personally. However, we all have bad days. On a bad day pacifists avoid dealing with people and issues and deny that problems exist, interventionists become control freaks, and heroes suffer from a permanent state of road rage where they are angry at everyone. It is of course just as useful to consider that these descriptions are of common behaviours and default positions. A default position is a position you take on something before you think too much about it.

Bad days (or, as they sing in the theme song to *Friends*, bad weeks and months and even bad years) can be caused by too much stress, too much bad luck, too little resilience, too much anxiety and too little assistance to reflect and decide to do something differently. People who have too many bad days don't necessarily become bad people; they can still be well intentioned but their behaviour drives people away and creates perceptions that can be damaging. Assisting people to manage their bad days and change the behaviours that create the damaging perceptions is one of the ways that we can contribute to the process of conflict resolution. The skills of conflict resolution – empathy, acceptance, reflective listening, summarising and questioning – are all useful contributions which can be shared with others. It is of particular interest to me that learning such 'soft skills' can be achieved very early in life.

Narrative philosophy calls having too many bad days 'having a dominant story'. It suggests that our stories are created to make meaning and understanding of what has happened. As conflict resolvers we understand that new stories or new chapters in a story are always possible.

In conflict-resolution terminology, working with behaviour is more productive than working with personality. Because behaviour is much more subject to change, and because as conflict resolvers we are engaging ourselves and encouraging others to engage in the practice of hopefulness, focusing on behaviour provides more opportunities for success.

When someone approaches us about a conflict they are involved in, it is likely that they have either recently experienced a TAD response or that they are still experiencing it and in particular that they are still (often highly) anxious.

Dr Sandra Fenton (La Trobe University) has done research on working with people who regularly exhibit high-conflict behaviour and she describes the process of being stuck in the following way: the stuck person has a 'MAD' (mistaken assessment of danger (threat)) response followed by a 'BAD' (behaviour that is aggressively defensive) response to their perception. Dr Fenton says that if you stay stuck in your 'MAD–BAD' response then that can become a generalised pattern of behaviour and it becomes easy in that mindset to perceive everything and everyone as a threat.

How does this relate to the brains and behaviour of people experiencing conflict? When the fight or flight emotional response is repeatedly triggered by a person or situation, this may strengthen the connections in the brain so that fear and anxiety become the default conscious perception each time that person or situation is encountered. These feelings, and the underpinning physiological response, have a powerful influence on behaviour, which becomes aggressive defensive (BAD). It can be very difficult for people to modify this behaviour because they're working against their brain's default responses. They simply get stuck in a state of anxiety that has a persistent effect on thoughts on behaviour.

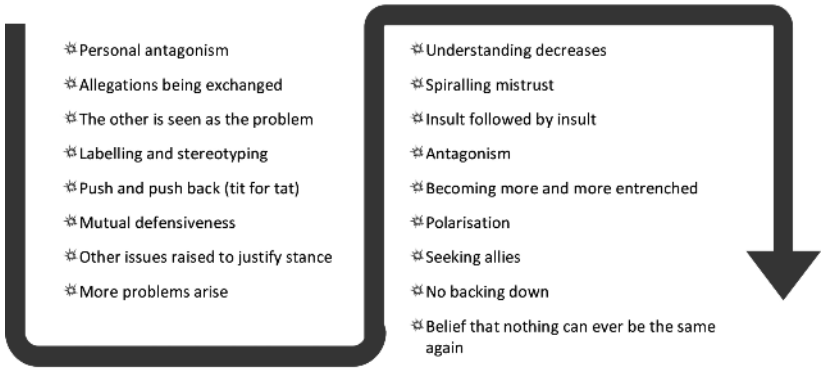
What are the signs that someone has had or is having a MAD or BAD response? We might observe some or all of the following:[8]

- raised blood pressure;
- sweating;
- fast breathing;
- flushed face;
- muscle tightness; or
- loud or high voice.

We might also hear one person engaging in these types of behaviours (described as 'The Four Horsemen of the Apocalypse'):[9]

- criticising;
- stonewalling;
- defensiveness; and
- contempt.

In mediation we might observe each person engaging in these behaviours against the other. Communication of course, suffers – participants to the conflict will increasingly respond more to the emotional content they perceive (threatening, talking down to us, belittling our contributions etc.) and less to the information content. So we have a downward spiral – a specific problem or issue arises and damages trust, which is followed by:



8 Wilmot and Hocker, p.250
9 Wilmot and Hocker, p.49

So how do we as conflict resolvers 'manage' these behaviours? What works when someone is in a state of anxiety, perceives that there is a looming threat and is engaging in fight or flight defensive behaviours? How do we encourage either ourselves or others to try something different?

> *'Simply letting it out is no solution – expressing anger has been shown to make people angrier.'* [10]

My suggestion is that the first step for conflict resolvers is to be comfortable with the participants' high emotion and to assist their participants to become less anxious. How do we achieve that?

Giving people suggestions about strategies to manage their thinking so that their conscious mind can quell the unconscious emotional response equips them to behave in a way that breaks the cycle of threat, anxiety and defence that occurs between people in conflict. Consciously practising alternative and more appropriate thoughts and behaviours can help the brain change again. It's our everyday habits that determine who we become, and it's never too late to change or to try new approaches to old problems.

Jane Schaverien, another New Zealand conflict-resolution specialist and trainer, suggests the following: 'Whenever you have a choice to be either clever or kind, be kind,' she says. 'There are lots of clever people and there is likely to be someone who is cleverer than you but kindness is in short supply.'

In narrative philosophy we consider that, to be healthy, our life story is mostly drama and that we are the heroes in our own stories. Good drama is about overcoming obstacles and challenges. We can use these analogies in conflict coaching and mediation; our clients have conflict stories which can seem insurmountable and our task as a coach or mediator is to assist the client to create a new story. The story, remember, is the way we make meaning of the things that happen and the choices we make. The fact that we may have made choices in the past (fight or flight choices) does not mean that we cannot make a different choice in the future. Robert Benjamin, a mediator and academic in Portland, Oregon says that 'we have no neurological imperative to resolve our conflicts – our neurological imperatives are to fight or flight … we are pre-programmed to this … to engage in resolution we must overcome this programming and make conscious decisions … we must engage with the process of conflict cognitively as well as emotionally …'.[11]

Sometimes people disclose (either accidentally or purposefully) that they behave as they do because that is all they know. They aren't aware of other behaviour choices because the other choices may be foreign to them, unpractised or attached to a negative judgement. I asked a young man once why he hit people so often and his reply was that they needed to respect him and if he didn't hit them they would disrespect him. (I'm paraphrasing here – his own language was much more colourful but less printable.)

So, you are approached by another person who presents in a state of high anxiety. How best can we, as conflict resolvers, deal with the problem? By being welcoming, by reassuring them, by offering tea or coffee or water or tissues, by showing empathy, being non-judgemental, being attentive and not being distracted (turning off phones, shutting the door, not continuing to work on your computer …), by practising high-quality listening and reflecting, by going at their pace …

10 Tavris, C (1989) Anger: The Misunderstood Emotion New York: Simon and Schuster

11 AMINZ Conference, 2012, Wellington, NZ

For some clients this is enough of an intervention; they overcome their anxiety and once they feel calm, they can access their own resources and deal with whatever conflict they were engaged in.

Sometimes lowering anxiety can take quite a long time, whether it is our own anxiety or that of others. People can be stuck in their anxious response and therefore stuck in their fight or flight response.

There is a great deal of research to support what some might regard as ordinary human common sense and kindness. Dr Fenton's research led her to conclude that reflective listening works best. Bill Eddy (High Conflict Institute) reaches a similar conclusion. He says that using your EAR (empathy, attention, and respect) followed by BIFFFing the person (providing brief information in a firm, friendly and fair manner) works best.

Please note that you have to lend your EAR before you BIFFF anyone, because of course when you are feeling high levels of anxiety there is insufficient capacity in your brain to hear and process and consider new information, however useful and correct that new information might be.

Dr Crawshaw's research led her to conclude that coaching works best to deal with aggressive and abrasive behaviour patterns, even with high-flying executives.

One of our roles as conflict resolvers is to allow, encourage and coach our parties to engage their cognitive abilities. We encourage the skills and practice of self-reflection and the acceptance that, while our personality traits may predispose us to either fighting or flight, we still have choice, and by exercising our right to choose we can consider which behaviour we might try today and what we are hoping to achieve and how we want to regard ourselves after the surge of adrenalin has passed. We must also remember that we can make other choices if the first thing we try doesn't work as well as we'd hoped.

To engage successfully in mediation both parties must be able to control their behaviour to at least some degree, otherwise we are unable to meet our first requirement of providing safety. This does not suggest that people in mediation are on their best behaviour; they are not! However they do need to demonstrate that they can be respectful and follow behavioural and procedural guidelines if they choose the option of mediation. The role of the mediator is to provide a safe process for all parties and to coach them to make best use of the mediation intervention. Getting participants to trust you as the mediator and to trust the process of mediation is often more important than any other task you may have as the person who facilitates the resolution of conflict.

As mediators we need to demonstrate that we can be comfortable with other people's (high) emotion. Few of us have conflict about things that we don't care about and, remembering Freud's theory, we can feel anxiety about loss without literally fearing death or abandonment.

Often people come to mediation because they fear loss of reputation, loss of status, loss of belonging or loss of place. That fear of loss dominating the person's thinking-feeling processes will need you, the conflict resolver, to provide assistance and management of the process. It won't require you to represent or agree with or like the people who engage with you.

As conflict resolvers we can first develop our own self-awareness, practise our own reflective learning and use the support resources available to us so that when we engage with our clients, we can encourage

and ask the good questions that we have some experience of asking ourselves because that is an intervention that is likely to help when it all seems overwhelming for the parties. As Jane Schaverian says, we should practise kindness more often because it works.

Neurology, emotions and decision making

If we consider that one purpose of conflict coaching or mediation is to support a party or parties to make better or more mutually-acceptable decisions, then one stage of any conflict resolution process is to 'try out the possible outcomes or offers or decisions that are possible'.

> *And would some Power the small gift give us*
> *To see ourselves as others see us!*
> *It would from many a blunder free us.*[12]

The problem is that content of a person's communication is shaped by aspects of their persona we will never know and it matters little what they *meant* by their communication, it is our perception, also shaped by elements of our persona, which creates a response that can be unexpected or conflictual.

12 Robert Burns 1786

For team leaders and mediators, the perception of Person 1 is their reality, whether it is also yours or that of Person 2 doesn't matter – Person 1 is sure that what was done or said is 'real' and 'true' and that is what you have to work with.

This is why two people in conflict can have very different views of what the conflict is about:

> *'There are multiple unique views of conflict, yet each looks 'real' to the one seeing it.'* [13]

Attribution theory

Even normal interaction may involve faulty communication, but conflict seems to worsen the problem. When two people are in conflict, they often attribute negative motivations to each other.

Consequently, a statement that might have seemed innocuous when two parties were friends might seem hostile or threatening when the same parties are in conflict.

Research shows that we make different attributions about ourselves than about others. This is known as 'fundamental attribution error'.

This means that we tend to attribute other people's behaviour

- more to disposition
- less to circumstances

To compound this, we tend to attribute our own behaviour

- less to disposition
- more to circumstances

> *'We are most prone to fundamental attribution error when we are under stress or in conflict. All of this seems to apply just as forcefully to groups: we tend to attribute the behaviour of 'out-group' members to their internal disposition rather than circumstances.'* [14]

Implications for conflict resolution

Disentangling skewed attributions can be constructive because research has shown that attribution is closely linked to emotional response.

Behaviour
You didn't turn up for my meeting.

Perception
You have no respect for me.

Attribution
Your actions undermine me.

13 Wilmot & Hocker, 2001, p.27
14 Attribution Theory Bernard Weiner, 1992

- If I think you harmed me deliberately, or because you couldn't care less, I am likely to feel angry. Once emotionally aroused I am more likely to retaliate, perpetuating a cycle of conflict and hostility.
- However, if I find out that your actions were affected by circumstances beyond your control, my response is likely to change from anger to sympathy.

Behaviour
You didn't turn up for my meeting.

Understanding

You rushed your partner to hospital.

Response
This was not your fault. I empathise.

Related ideas

- **Accuser bias:** The tendency for an observer who is harmed by someone else's behaviour to attribute it to causes under the other person's control.
- **Bias of the accused:** Tendency to attribute my bad behaviour to circumstances beyond my control.
- **Actor/observer bias:** Tendency to see our own behaviour as the product of the situation but other people's behaviour as the product of their internal state.
- **Status quo bias:** If change is perceived to be too hard or the other person is perceived to be too untrustworthy then the status quo, however uncomfortable that may be, will tend to seem more attractive in comparison to any change. Certain conditions, especially in long mediation sessions, can add to that. People feel forced into making or not making decisions when they are hungry (including dehydrated), angry, lonely or tired.

These biases combine and then work together to render conflict not only insoluble but incomprehensible to those involved. The external circumstances driving my actions are painted out of your picture, while they become the headlines in my own story ('I had to respond because of what you did').

Useful strategies in mediation

- Educate people about attribution biases so they become less prone to them.
- Help people to take the other person's perspective to gain an appreciation for the factors beyond their control. Even the simple strategy of 'checking my understanding' can limit the negative potential of attribution error e.g. 'Do you mind saying what you meant by that?' or 'I notice you use the word "disrespect" – can you say what respect means to you?'.
- Mediators can use the technique of 'circular questions' if they consider that educating causes them to compromise their impartiality.

❄ Help people reflect on their own attributions and emotions – 'mediators may need to do more than bring the emotion to the surface; they need to help parties appraise and reappraise the emotion'.[15] We can help people to re-tell their initial story so as to arrive at a different emotion and subsequent actions and significantly open up the possibility of a different ending to the conflict story. Jameson et al suggest that we can adapt standard mediator practices such as 'paraphrasing and perspective taking' to include discussion of emotion.

Integrating our responses to conflict into decision making

When confronted, our first decision is between engaging and withdrawing.

Our fight or flight response is useful, ingrained and automatic. Its purpose is our survival. However, it makes mistakes, sometimes about 'the amount of danger' that we face (MAD). We fight or flee when we feel threatened, and, as Freud discovered, this occurs just as much at a psychological level, especially when others respond to us in an unexpected manner, as it does when we are confronted by actual physical danger.

We expect certain situations to be threatening – racing car driving or abseiling down a cliff – so we prepare for it. But when someone we know – a friend or partner or colleague – behaves in an unexpectedly-negative way, we have no warning, so stress hormones pour into our body, diverting blood into our arms and legs.

If we consider that a constructive way to respond to conflict is with the full capacity of our minds being rational and thoughtful and our emotions being fully managed, we might understand why conflict is described sometimes as 'inevitable' – when we are challenged, we mostly respond at the exact time blood is leaving our brain.

So we might conclude that an initial decision is as likely to be irrational as rational. In narrative terms, these two terms are a part of the conflict dichotomy because one word, 'rational', is often understood as 'a better response' than the other word, 'irrational'. I would encourage you to consider that rational and irrational are simply subjective judgements, usually made by one person about another with whom they are in disagreement. The judgement 'rational' implies a degree of agreement and shared priorities, whilst the judgement 'irrational' implies a degree of disagreement and different priorities. The act of judging in itself is likely to escalate the conflict and make a shared decision harder to achieve.

The things we have conflict about can be considered as a combination of practicalities, principles and power. For example, think of how decisions are made about doing domestic chores whenever two or more people share a living space. If we consider a cliché situation where one person works outside the home and earns a salary and another works unpaid inside the home to raise children, discussions about how to share the domestic work would include:

- practicalities: time and other resources that are available;
- principles: fairness and equity of contributions; and
- power: how the different contributions are valued.

15 Jameson et al, 2010, p.44

Once the conversation becomes defined by 'rational versus irrational' then it escalates and becomes much less manageable or resolvable.

The key, then, is to consider decision making as an exercise which includes all three factors to everyone's satisfaction, and that value judgements are identified as such and discussed in that context.

Family-life example

Person 1: 'In my value system my expectation is that the person whose primary role is to provide a home environment for the children we have should also do the housework.'

Person 2: 'I understand that, and in my value system my expectation is that each of us works the same number of hours at our primary role: you earning an income to support our family priorities and me engaging with the children, and the domestic work of cooking, cleaning, shopping and ground maintenance should be shared between us.'

This is a different conversation than:

Person 1: 'You are so lucky to be able to stay home and play with the kids all day. You spend most of the time with your friends. It's irrational and impractical to expect me to come home from working all day and help around the house.'

Person 2: 'You don't understand how stressful it is to be with young children all day; I never even get to finish my sentences and then you come home and expect a tidy house and clean children and a gourmet dinner. It's not fair.'

Person 1: 'You're being emotional!'

Decision making is at its best (and usually most sustainable) when our thoughts and emotions and values are aligned. Each person's values are respected. Fairness and trust in each other are considered as much as any practicalities are addressed. Each person's need for 'the right amount of time for me' is included.

When parties come to us as dispute resolvers and are at the decision-making stage we also need to take these concepts into account. How might we do this?

Other than our professional requirement to 'stay in the mediator role' (i.e. not be tempted to bang heads or make the decisions ourselves or give up and create an agreement that is meaningless but ticks the boxes) we have some possible strategies available to us as coaches or mediators, including:

- being able to acknowledge when there is a problem and suggest a 15-minute 'cooling off' period, after which you will happily discuss the issues the other may have – this allows for the fight or flight reaction (the amygdala) to exert less control over the thinking brain (the pre-frontal cortex) and for the participants to reassert their ability to 'think and feel in parallel';
- asking questions about the tensions between practicalities, principles and power and how these tensions might be more balanced;
- assisting the parties to understand more about their preferred method of responding to conflict to help them to re-direct their behaviour and self-regulate;

- talking about the power of language and whether the parties' use of language is inviting resolution or inviting further conflict escalation; and
- being compassionate – conflict is something we all struggle with and parties come to a professional and ask for help because they are stuck in the dark. Our role is to cast light, open up possibilities and stay with the conflict story at its most difficult time.

Given that we have chosen this profession, our skills and self-care processes are open to scrutiny. Hopefully sharing our stories of successful conflict resolution will help us to maintain our own dignity and self-awareness and sense of humour.

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Arbitration through the Ages

Russell Thirgood[1]

Arbitration has a long and rich history. Despite this, 'the writers of texts on arbitration have either substantially ignored the history of arbitration or have dealt with it in a most dismissive way'.[2]

Although widely utilised by the Ancient Greeks and Romans, with the rise of the courts of common law in England towards the end of the middle ages came a degree of hostility towards arbitration that saw it lose favour well into the 19th century.

Despite the courts adopting a friendlier attitude towards arbitration in recent times, domestic arbitration has been in a state of malaise, particularly in Australia. The reason for this is twofold. First arbitration has often been viewed as mimicking drawn out and costly court litigation. A further complication was that the arbitral process was often subject to judicial intervention, undermining the finality of the arbitral award. The enactment of the revised uniform arbitration legislation in all Australian states and territories (with the exception of the ACT), replacing the previous arbitration regime, provide a real opportunity for arbitration to become an effective means of alternative dispute resolution in this country.

The Ancient Greeks and Romans

> *'Everywhere in the Ancient Greek world, including Ptolemaic Egypt, arbitration was normal and in arbitration the mediation was primary.'*[3]

From 700 BC to 200 BC the Greeks utilised arbitration to settle disputes between states. A treaty of peace between Sparta and Argos, made in 418 BC and lasting for 50 years, 'reads much like a modern arbitration clause':[4]

> *'If there should arise a difference between any of the towns of the Peloponnesus or beyond, either as to frontiers or any other object, there shall be an arbitration. If among the allied towns they are not able to come to an agreement the dispute will be brought before a neutral town chosen by common agreement.'*

But it was not only international disputes that the Greeks settled by arbitration. In Athens, there were both private and public arbitrators. Parties to a dispute would select private arbitrators to resolve the dispute between them. The arbitrators took an oath to decide the dispute without partiality and, according to Demosthenes, Athenian law provided that once an arbitrator's decision had been handed down the parties should, 'stand fast by his decision and by no means carry an appeal from him to another tribunal but let the arbiter's sentence be supreme'.[5]

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2 Sir N Stephen, 'Historical Origins of Arbitration' The Arbitrator, August 1991 at page 45

3 D Roebuck, '*The Myth of Modern Mediation*', (2007) 73 Arbitration 1, 105, at 106

4 Ibid (Stephen at page 47)

5 Sir N Stephen, 'Historical Origins of Arbitration' *The Arbitrator*, August 1991 at page 47

At the start of their history, the Romans were an agrarian people. Between 750 BC to 500 BC they were not involved in trading by land or sea.[6] However, their military conquests brought them into contact with most of the nations of the civilised world. Such contact promoted trade. In this regard the Romans drew a distinction between the law applicable to Roman citizens and the law applicable to foreigners, traders and merchants. The former were subject to the ius civile while the ius gentium was applied to any dispute involving the latter. The *ius gentium* was characterised by the absence of formalities and allowed for arbitration.[7]

However, at the fall of the Western Roman Empire in 476 AD, 'Europe was dominated by invading barbarians. During the period that followed, known as the Middle Ages, international commerce [and the laws that regulated it] disappeared almost completely.'[8]

During the 12th century the Crusades saw a revival of trade as relations between Europe and the East were re established.[9]

Medieval English arbitration

At this time, England was a well established trading nation. Merchants from all over Europe came to England to trade their wares at large fairs:

> *'One gets some idea of the size of these international fairs from Beawes' description of one of England's principal international fairs, held annually at Stourbridge. It spread over half a mile square and to it merchants from all the Mediterranean, and from France and the Hansa towns of Northern Europe brought their wares.'* [10]

A custom became established whereby disputes between merchants were resolved by panels comprised of fellow merchants. These panels determined the dispute according to the customs and usages of the trade, also known as the *lex mercatoria* or law merchant.[11]

It appears that this custom was established as English courts were not considered to be an appropriate resolution for disputes that arose at these fairs. This was for three main reasons:

the court process was considered too slow;

judges did not have the required expertise; and

foreign merchants had no recourse to local courts and needed their disputes resolved quickly before leaving the jurisdiction.

Beyond this, the concept of the *lex mercatoria* has been understood and used in widely divergent senses.[12]

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6 Marlene Wethmar-Lemmer, 'The Development of the Modern Lex Mercatoria: A Historical Perspective, *HeinOnline*, 2005
7 Ibid (Wethmar-Lemmer)
8 Ibid (Wethmar-Lemmer)
9 Ibid
10 Ibid (Stephen at page 50)
11 Ibid (Stephen)
12 JH Baker, 'The Law Merchant and The Common Law Before 1700,' (1979) 38(2) *Cambridge Law Journal*, 295

It has been regarded by some as a distinct and independent system of legal doctrine, comparable to civil or canon law and derived from Roman law.[13] Others have regarded it as an aspect of the natural law, akin to international law, while again another school of thought regards it as 'a form of immemorial custom, which by familiarity was eventually noticed by common-law judges'.[14] However, in any of these views, the law merchant could not have originally been 'law' as far as the courts of common law were concerned. Indeed, much academic discussion has been dedicated to determining the precise nature of the process by which the law merchant became fused with the common law of the England.[15]

In 1845 Blackburn wrote that there was no part of the history of English law more obscure than the account of how the law merchant became part of the law of the land.[16]

The orthodox story as to how the *lex mercatoria* became merged with the common law of England usually begins with the reign of Edward III. During this time trade in wool and cloth became concentrated in a few main (staple) towns, where the crown could more easily levy taxes on the sales.[17] In return for the payment of these taxes the crown gave privileges and safeguards to the merchants trading in these towns. It was by the Statute of the Staple (27 ED.III c2) that the law merchant was first officially recognised in England. The statute provided 'that all merchants coming to the staple ... shall be ruled by the law merchant in all things touching the staple and not by the common law of the land nor by the usage of boroughs'.[18]

The statute further stated that the Royal Judges were 'not to attempt to take cognizance of things affecting the trade of the staple but were instead to leave such matters to be settled by the Lay Tribunals elected by the merchants.'[19]

It appears that courts who administered the staple were presided over by merchants and that if any dispute arose as to its rulings it was a matter not for the courts of the common law but for the courts of chancery. Other than these few scant details we know very little of the courts of the staple as they kept no records.

However, as Sir Ninian Stephen stated in his article *Historical Origins of Arbitration*, '[T]he mercantile community were not destined for long to be allowed in England to settle their own disputes according to their own laws. The Royal Courts were eager to assume jurisdiction and the 15th century saw the beginning of this process.'[20]

In the mid-1300s the Court of Admiralty was established with its predominant function being to keep the King's peace upon the seas and thus thought itself well suited to administer the *lex mercatoria*. From the 14th to the 17th centuries the special courts at port towns and fairs slowly ceased to exist, their jurisdiction being taken over by the Admiralty.[21]

13 TE Scrutton, *Elments of Mercantile Law* (1891(, pp. 4-16)
14 JH Baker, 'The Law Merchant and The Common Law Before 1700,' (1979) 38(2) *Cambridge Law Journal*, 295
15 JH Baker, 'The Law Merchant and The Common Law Before 1700,' (1979) 38(2) *Cambridge Law Journal*, 295
16 C. Blackburn, '*The Contract of Sale*', (1845) p 207
17 Sir N Stephen, 'Historical Origins of Arbitration' (August 1991) *The Arbitrator*, 51
18 Ibid (Stephen at 51)
19 Ibid (Stephens at 51)
20 Ibid (Stephens at 51)
21 Ibid (Stephens at 53)

This instantly provoked the professional jealously of the practitioners of the common law and a challenge to the jurisdiction of the Court of Admiralty was soon mounted by the Courts of the common law. The chancery judges also attempted to obtain jurisdiction over the law merchant – after all, it had been to the Chancellor that disputes arising out of the courts of staple had been referred to much earlier. However, it was the common law which proved to be the ultimate victor.[22]

Vynior's Case[23] concerned the enforcement of a penalty for breach of agreement to arbitrate. The parties had previously made an agreement as to the penalty to be awarded should one party refuse to arbitrate and the court ultimately held that this agreement was binding.

Although not directly relevant to the decision in this case, Sir Edward Coke said in dictum that an award debtor was free to 'countermand [an arbitration agreement], for a man cannot by his act make such authority, power or warrant not countermandable which is by the law or of its own nature countermandable ...'

That is, a party to a dispute could revoke the arbitrator's authority to decide cases at any time before the award was rendered. Arbitration agreements were revocable at will. This statement is considered by many as the catalyst for judicial hostility towards arbitration throughout the 16th and 17th centuries.[24]

In 1746 in the case of *Kill v Hollister* [25] the court allowed an insurance action to proceed despite the existence of an arbitration clause on the grounds that an agreement to arbitrate could not oust the jurisdiction of the court.

Ward v Periam[26] and *Nichols v Roe*[27] are examples of the Court of Chancery attempting to maintain some jurisdiction over the arbitration. In *Nicols v Roe* the defendant occupied a farm as tenant to the Plaintiff. The Defendant owed a debt to the Plaintiff and assigned to the Plaintiff his household furniture and crops to secure the debt. Under this arrangement the parties had agreed to refer any disputes to arbitration. Where the arbitrators could not agree it was provided that an umpire should be appointed to make a final decision.

The Plaintiff was not satisfied with the decision made by the umpire and applied the Court of Chancery to have the Bill set aside. The Plaintiff also sought an injunction to prevent the Defendant from seeking to have the dispute decided by a Court of Common Law.

The High Court of Chancery held that it retained inherent jurisdiction over arbitral disputes and set aside the award made by the umpire in equity.

It was during this struggle for jurisdiction between the various Royal Courts that Lord Campbell famously stated in *Scott v Avery* that 'when emoluments of judges depended largely on fees there was great competition to get as much as possible of litigation into Westminster Hall'.[28]

22 Ibid (Stephens at 54)
23 *Vynior's Case* (1572-1616) 8 Co Rep 80
24 See *Dobbs v The National Bank of Australasia Ltd* (1935) 53 CLR 643
25 *Kill v Hollister* (1746) 19, Geo.II 1746; 1 Wils. Kb 129
26 (1822-1824) Turn & R 136
27 (1834) 3 Mt & K 43
28 Ibid (Stephens at 54)

Scott v Avery (1855-56) 5 HLC 811 – A change in attitude to arbitration

The Plaintiff and Defendant in *Scott v Avery* were shareholders in an insurance company who underwrote an insurance policy. The policy stated that a committee appointed by the insurer should determine any sum to be paid to a shareholder.

The contract further provided that:

> *'The sum to be paid by this association to any suffering member, for any loss or damage, shall in the first instance be ascertained and settled by the committee, ... that no member who refuses to accept the amount of any loss as settled by the committee, hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law, or suit in equity, on his policy, until the matters in dispute shall have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award. And the obtaining of the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.'*

The Court held that this clause did not oust the jurisdiction of the court because no cause of action accrued until the arbitrators had made their determination.

Lord Campbell stated:

> *'In the first place, I think that the contract between the shipowner and the underwriter in this case is as clear as the English language could make it, that no action should be brought by insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared a condition precedent to the bringing of the action.'*

Therefore the intention of the parties was clear. Lord Campbell considered that there was no precedent for holding that such a clause was illegal and the idea that such a clause could be considered illegal 'probably originated in the contests of the different courts in ancient times jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction'.

This case is authority for the general proposition that if a contract makes arbitration a condition precedent to litigation, courts should stay litigation until arbitration has been conducted. Importantly, this decision provided the Courts with an invitation to take a friendlier attitude to arbitration in the future.[29]

Anderson v G H Mitchell & Sons

In *Anderson v G H Mitchell & Sons*[30] the High Court of Australia accepted the proposition set down in Scott v Avery that if a contract makes arbitration a condition precedent to litigation, courts should stay litigation until the arbitration has been conducted. However, the Court held that unless the parties

29 Doug Jones, *Commercial Arbitration in Australia* Thomson Reuters, 2011 at page 104

30 *Anderson v G H Mitchell & Sons* (1941) 65 CLR 543

expressly provided that arbitration was to be a condition precedent, as a matter of contractual construction it was unlikely to be considered as such.

The appellant contracted to sell lambs to the respondent. The contract contained a clause in the following terms:

> *'Should any dispute arise hereunder between the purchaser and vendor the matter shall be settled by arbitration in the usual manner (as provided by the Arbitration Act 1891-1934 (SA) or any statutory modification or re-enactment thereof for the time being in force) within 20 days of the date nominated herein for delivery to be given and taken'.*[31]

The respondent refused to accept delivery of the lambs. After the expiration of the 20 day period mentioned in the arbitration clause, and without arbitration being sought by either party, the appellant brought an action for damages for non-acceptance.

The key question which the Court had to decide was whether the appellant could maintain an action for non acceptance notwithstanding that he did not first submit his claim to arbitration.

It was held that the appellant could maintain the action as the parties had made an absolute contract creating rights and liabilities that were not conditional upon arbitration taking place. That is, arbitration was not a condition precedent to the plaintiff's action. Rather, the arbitration clause stipulated that 'arbitration should take place within twenty days of delivery', but it went no further.

As stated by Sir Stephen, despite the decision in Scott v Avery, 'there seems to have been a degree of hostility towards arbitration on the part of the courts, a sense that the jurisdiction of the courts was being impaired by this instance of private enterprise' well into the 19th century and beyond.[32]

Legislative history of arbitration in Australia

Prior to colonisation, indigenous communities utilised a dispute resolution procedure similar to arbitration. Tribal elders, elected upon the basis of their personal qualities such as bravery, compassion and knowledge of the law, performed a role similar to today's arbitrators.[33]

When the British settlers arrived, arbitration was an immediate feature of dispute resolution in the young colonies.[34] In Victoria, a meeting of the residents of the colony held on 1 June 1836 – later described as the first meeting of Victoria's unofficial Parliament – resolved that arbitration was to be the method of dispute resolution. James Simpson was appointed as sole arbitrator in all disputes, except in questions relating to land, with power to impose and collect fines. He held this position until April 1837 when he was officially made a magistrate.[35] Similarly, Captain James Stirling was appointed Lieutenant Governor of the Swan River Settlement in Western Australia as the colonies' sole arbitrator until the magistracy was appointed at the end of 1829.[36]

31 Anderson v G H Mitchell & Sons (1941) 65 CLR 543, 548
32 Ibid (Stephens at 55)
33 Doug Jones, *Commercial Arbitration in Australia* Thomson Reuters, 2011 at page 5
34 Ibid (Jones at page 6)
35 Ibid
36 National Archives of Australia. *Stirling Commission.* Available via http://foundingdocs.gov.au/item-did-94.html

In 1867 New South Wales was the first state to enact its own arbitration legislation, the *Arbitration Act 1867* (NSW). Prior to this, the *Common Law Procedure Act 1854* (UK) had regulated arbitration in New South Wales and all other states and territories.

In enacting the *Arbitration Act 1867* (NSW) the New South Wales Government sought to 'render references to Arbitration more effectual'.[37] However, this purpose was ultimately not realised as the Act contained several provisions (taken from the *Common Law Procedure Act 1854* (UK)) that undermined the finality of the arbitral award. In particular, these included the powers for courts to intervene in the appointment of arbitrators and to remit an arbitral award to the arbitrators for reconsideration and redetermination at any time.

Arbitration legislation in New South Wales was revised in 1892 with the adoption of the *Arbitration Act 1892* (NSW), and again in 1902 when the *Arbitration Act 1902* (NSW) was enacted. The *Arbitration Act 1902* (NSW) was based on the *Arbitration Act 1889* (UK). The key provisions of this Act can briefly be summarised as follows:

a submission to arbitration is irrevocable, except by leave of the court, and has the same effect in all respects as if it had been made an order of the court (section 4);

provisions to be implied into an arbitration agreement; for example an implied term that unless the parties otherwise agree there shall be one arbitrator (section 5);

power of court to stay proceedings where there is a submission to arbitration (section 6);

power of the court to appoint the arbitrator(s) in limited circumstances (section 7);

powers of the arbitrator to take evidence (section 23);

power of the court to compel witnesses (section 8);

powers of the court to remit any award to arbitration for reconsideration by the arbitrators (section 12)

set aside an award where the arbitrator has misconducted himself (section 13), and

enforcing an award in the same manner as a judgment or order to the same effect (sections 14); and

case-stated procedure (section 19).[38]

The *Arbitration Act 1902* (NSW), like the *Arbitration Act 1867* (NSW), provided that a court could remit an arbitral award to the arbitrators for reconsideration and redetermination at any time (section 12), and that 'any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, also referred to as case-stated procedure' (section 19).

37 Preamble, *Arbitration Act* 1867 (NSW)

38 Ibid (Jones at 6)

Section 19 of the *Arbitration Act 1902* (NSW) had a significant impact on the legislative framework governing arbitration in Australia as it essentially provided a party with an automatic right to have any point of law arising out of an arbitration determined by a court. This limited the exclusive jurisdiction of an arbitral tribunal to issues of fact and therefore severely reduced the viability of arbitration as an alternative dispute resolution process.

Further, in *Czarnikow v Roth, Schmidt & Co* [39] it was held that parties could not contract out of the UK legislation's equivalent of section 19 as it was considered against public policy for the court's jurisdiction to be ousted.[40] That case concerned rule 19 of the rules of the Refined Sugar Association, which stated 'neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid shall require, nor shall they apply to the court to require, any arbitrators to state in the form of a special case for the opinion of the court any question of law arising in the reference, but such question of law shall be determined by arbitration in manner herein directed'.

Scrutton LJ stated:

> *'I am of opinion that r 19 of the rules of the Refined Sugar Association in so far as it purports to prevent a party to an arbitration before the Association from exercising his right under the Arbitration Act to ask for a special case for the opinion of the court on a question of law is contrary to public policy and so unenforceable. In countless cases parties agree to submit their disputes to arbitrators whose decision shall be final and conclusive. But the courts, if one of these parties brings an action, never treats this agreement as conclusively preventing the courts from hearing the dispute. They consider the merits of the case, including the fact of the agreement of the parties, and either stay the action or allow it to proceed according to the view they form of the best method of procedure; and they have always in my experience declined to fetter their discretion by laying down any fixed rules on which they will exercise it. If they allow the action to proceed they pay no further attention, and give no legal effect, to any further proceedings in the arbitration.'* [41]

The High Court of Australia approved this statement in *Compagnie Des Messageries Maritimes v Wilson*.[42]

Up until the enactment of the Previous Uniform Acts, legislatures in Victoria, South Australia, Tasmania and Western Australia took a similar approach to New South Wales, basing their respective arbitration legislation on the Arbitration Act 1889 (UK).[43] Over the next century, no significant amendments were made to this legislation until the enactment of the Previous Uniform Acts in the 1980s. This was notwithstanding the continual amendments made to the United Kingdom's legislation in 1950, 1975 and 1979.

39 *Czarnikow v Roth, Schmidt and Co* [1922] 2 KB 478
40 Ibid
41 Ibid at 487
42 *Compagnie Des Messageries Maritimes v Wilson* (1954) 94 CLR 577
43 Doug Jones, *Commercial Arbitration in Australia* Thomson Reuters, 2011 at page 11

Queensland was the only state to take a different course, retaining the *Interdict Act 1867* (Qld), based on England's 1698 legislation, until 1973 when it enacted the *Arbitration Act 1973* (Qld). The *Interdict Act 1867* did not deal exclusively with matters relating to arbitration. However, it did provide that a party to an arbitration agreement was not required to commence an action in the courts for referral to arbitration and provided that awards could be set aside if procured by fraud or undue means.[44]

After lagging behind the other states for three quarters of a century (as the 1973 Act was based on the *Arbitration Act* 1950 (UK)), Queensland ended up with the most up to date arbitration legislation in the country – for a short time.

As each state had separate arbitration legislation, arbitration practice in Australia varied depending on the jurisdiction.

Revised Commercial Arbitration Acts

The recently enacted Commercial Arbitration Acts (**Revised Commercial Arbitration Acts**) represent a comprehensive overhaul of domestic arbitration legislation in Australia.

Prior to the introduction of the Revised Commercial Arbitration Acts, domestic Arbitration in Australia was in a state of malaise. The reasons for this were twofold.

First, domestic arbitration too often imitated court proceedings and in so doing failed to fulfil its potential as an efficient and cost effective alternative dispute resolution process. Meanwhile, the courts were adopting more efficient processes in the management of civil disputes.

History of the reform process

The uniform arbitration legislation in Australia used to comprise of:

Queensland – Commercial Arbitration Act 1990 (Qld);

New South Wales – Commercial Arbitration Act 1984 (NSW);

Australian Capital Territory – Commercial Arbitration Act 1986 (ACT);

Victoria – Commercial Arbitration Act 1984 (Vic);

South Australia – Commercial Arbitration Act 1986 (SA);

Tasmania – Commercial Arbitration Act 1986 (Tas);

Northern Territory – Commercial Arbitration Act 1997 (NT); and

Western Australia – Commercial Arbitration Act 1985 (WA),

(Previous Uniform Acts).

In 2002 the Standing Committee of Attorneys General (**SCAG**) began a review of the Previous Uniform Acts. However, the reform process stalled in 2007.

44 Ibid (Jones at 7)

On 21 November 2008, the Federal Attorney-General announced a review of the *International Arbitration Act 1974* (Cth). At the same time, a discussion paper was released proposing certain amendments to the international arbitration regime in Australia to bring it into line with international best practice.

On 10 December 2008, Chief Justices of the various State and Territory Supreme Courts made a submission to the Federal Attorney General in respect of the discussion paper. Their Honours stated:

> *'It would not assist Australia's position in relation to international arbitration if the law with* ***respect to domestic arbitration develops in a significantly different manner [to the law with respect to international arbitration]****.'* [45]

Spigelman CJ (as he then was), referring to the stalled reform process, stated:

> *'In my opinion, the way out of the impasse is to adopt the UNCITRAL Model Law as the domestic Australian arbitration law. It is a workable regime, itself now subject to review at the Commonwealth level. Its adoption as the domestic Australian Arbitration law would send a clear signal to the international commercial arbitration community that Australia is serious about a role as a centre for international arbitration.'* [46]

In late 2009, SCAG circulated an Issues Paper together with a draft Commercial Arbitration Bill.

There was little opposition to the adoption of the United Nations Commission on International Trade Law Model Law (**Model Law**) as the backbone of the new domestic arbitration acts.

Enactment of Revised Commercial Arbitration Acts

The following Australian states and territories have implemented new legislation:

New South Wales – *Commercial Arbitration Act 2010* (NSW) (commenced 1 October 2010);

Victoria – *Commercial Arbitration Act 2011* (Vic) (commenced 17 November 2011);

South Australia – *Commercial Arbitration Act* (SA) (commenced 1 January 2012);

Tasmania – *Commercial Arbitration Act 2011* (Tas) (royal assent 16 June 2011);

Northern Territory – *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) commenced 1 August 2012); and

Western Australia – *Commercial Arbitration Act 2012* (WA) (passed 29 August 2012).

On 17 May 2013, the *Commercial Arbitration Act 2013* (Qld) was proclaimed and came into force.

To date, the Australian Capital Territory is still reliant on the previous Uniform Act, the *Commercial Arbitration Act 1986* (ACT).

It is worth noting that since 1996 there has been significant reform to arbitration legislation in other

45 See comments by the Chief Justices of the Australia States and Territories, available at http://www.ag.gov.au/internationalarbitration/

46 Address by the Honourable JJ Spigelman AC, Opening of Law Term Dinner, 2009, the Law Society of New South Wales, Sydney, February 2009, available at http://www.ipc.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman020209.pdf/$file/Spigelman020209.pdf

parts of the world, including the United Kingdom, New Zealand, Malaysia, Hong Kong and Scotland. Thus the reforms in Australia 'have not occurred in a vacuum'.[47]

Paramount object of the Revised Commercial Arbitration Acts

Section 1AC of the *Commercial Arbitration Act 2013* (Qld) provides that the paramount object of the new legislation is to 'facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delays or expense'. The Act aims to achieve this object by enabling parties to agree about how their disputes are to be resolved and providing arbitration procedures that enable commercial disputes to be settled in a cost effective manner. Section 1AC(3) goes on to state that the Act must be interpreted and the functions of the arbitral tribunal must be exercised so that (as far as practicable) the paramount object of the Act is achieved.

Key Provisions

Section 19(1) provides that, subject to the provisions of the Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal when conducting proceedings. Failing such an agreement, the arbitral tribunal may, subject to the provisions of the Act, conduct the arbitration in such a manner as it considers appropriate. Section 24B provides that parties must do all things necessary for the proper and expeditious conduct of the arbitral tribunal.

The interplay between sections 19 and 24B and the paramount object results in a check on, and thereby a departure from, the previously enshrined principles of broad party autonomy. Parties should not agree to, and arbitrators should not allow, processes that cause undue delay and expense.

When coupled with section 5 of the *Commercial Arbitration Act 2013* (Qld), which provides 'in matters governed by this Act, no court must intervene except where so provided by this Act', the removal of court discretion in granting a stay of proceedings subject to an arbitral agreement under section 8(1) and the limited grounds for setting aside an award contained in section 34, arbitrators are now equipped with the power to lift domestic arbitration out of the malaise.

Conclusion

The recognition of arbitration as a preeminent form of alternate dispute resolution has ebbed and flowed throughout history. The enactment of the Revised Commercial Arbitration Acts provides an opportunity for arbitration to rise out of the doldrums.

The combined effect of section 19 and the paramount object of the Revised Commercial Arbitration Acts is the conferral of sweeping powers on arbitrators to control and design the dispute resolution process. Arbitrators must now combine this power with distinct skills, novel approaches and different techniques to revolutionise the dispute resolution process in Australia and ensure arbitration reaches its full potential.

47 Albert Monichino, 'Arbitration Law in Victoria Comes of Age' (2012) 31(1) the ° 41,46

Selecting the Arbitrator[1]

David Kreider[2]

Introduction

Each set of arbitration rules, as well as most arbitration laws, lay down their own procedures and deadlines for the appointment of arbitrators. The arbitration agreement between the parties may also specify directions for appointing the arbitrators.

Under the UNCITRAL Arbitration Rules, which were developed for use in *ad hoc* arbitration cases (those not administered by the International Chamber of Commerce (**ICC**), London Court of International Arbitration, China International Economic and Trade Arbitration Commission, International Centre for Dispute Resolution, Hong Kong International Arbitration Centre, Singapore International Arbitration Centre or other arbitral institution), if the parties' arbitration agreement has not specified an 'appointing authority' or body tasked with selecting the arbitrator(s) where the parties fail timely to do so, then the Permanent Court of Arbitration in The Hague will, upon the request of one of the parties, designate an institution or body to serve as the appointing authority, which will, in turn, select the arbitrator(s).

The methods and possibilities for arbitrator appointment are many and will not be covered in depth in this paper. Rather, the goal of the writer will be to highlight current views regarding the unilateral appointment of co-arbitrators, or the appointment of sole arbitrators or the chair by mutual agreement, by the parties themselves.

Professor Jan Paulsson poses the counterfactual: The appointment of all arbitrators by institutions

In his April 2010 Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair at the University of Miami School of Law, Professor Jan Paulsson (**Paulsson**) spoke on the topic 'Moral Hazard in International Dispute Resolution'. The transcript of his address makes engaging reading for its scathing yet compelling indictment of the currently well-accepted practice of unilateral appointments of co-arbitrators by the parties to disputes.[3]

Imploring his audience to 'heed this voice in the desert',[4] Paulsson dissects and analyses the reasons most often cited by commercial parties for clinging to the practice of unilateral appointments, which include:

1 This paper was first presented at the 2013 APRAG Conference in Beijing

2 David Kreider, Chartered Arbitrator, DipICArb, FCIArb, Attorney and Solicitor at David L. Kreider, International Arbitrator

3 Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (ICCA, 24 June 2010) <www.arbitration-icca.org/articles.html?author=Jan_Paulsson&sort=author> accessed 30 April 2013.

4 Paulsson (n 2) 11.

1. ‘My nominee will help me win the case’;
2. ‘Three heads are better than one, especially when the stakes are high’;
3. ‘Parties have greater confidence in arbitrators selected for their special knowledge or skill’; and
4. ‘My nominee will ensure that the tribunal as a whole understands my culture’.

Admonishing that ‘the reasons for parties’ attachment to the practice of unilateral appointments are ill-conceived’, Paulsson opines that ‘the only decent solution … is that any arbitrator, no matter the size of the tribunal, should be chosen [by the parties] jointly or selected by a neutral body’.[5]

A comprehensive and considered review of Paulsson’s remarks, which have touched off something akin to a firestorm within arbitration circles, is beyond the scope of this paper. Suffice it for present purposes to acknowledge that parties in international arbitration are indeed deeply attached to the practice of the unilateral appointment of co-arbitrators, as will be shown by recent empirical survey data.

In the common international arbitration scenario of a tripartite panel, with each party appointing one arbitrator and the party-appointed arbitrators then selecting the presiding arbitrator, each side's selection of ‘its’ arbitrator is perhaps the single most determinative step in the arbitration. The ability to appoint one of the decision makers is a defining aspect of the arbitral system and provides a powerful instrument when used wisely by a party.[6]

The Queen Mary, White & Case *2012 International Arbitration Survey*

That the practice of the unilateral appointment of co-arbitrators by the parties in dispute remains near and dear to the hearts of arbitration users and stakeholders is born out by the finding of the *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, conducted by the Queen Mary School of International Arbitration at the University of London (**Survey**). Comprising the results of 104 interviews and responses to 710 questionnaires directed to in-house counsel, private practitioners and arbitrators, the Survey represents an important tool for gauging the current sentiment of key users and stakeholders in relation to best arbitral practice.[7]

5 Paulsson (n 2) 9, 11.

6 Doak Bishop and Lucy Reed, ‘*Practical Guidelines for Interviewing Selecting and Challenging Party-Appointed Arbitrators In International Commercial Arbitration*’ (1998) 14 Arbitration International, 400.

7 Paul Friedland and Dr. Stavros Brekoulakis, ‘2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process’ (Queen Mary University of London, School of International Arbitration, 3 October 2012) <www.arbitrationonline.org/survey>, accessed 2 May 2013. The authors of the Survey note: ‘Unlike the previous surveys, views were sought not only from in-house counsel, but also from private practitioners and arbitrators. This provided a pool of respondents which was both highly knowledgeable of international arbitration and dramatically larger than earlier surveys. An unprecedented 710 questionnaire responses were received and 104 interviews were conducted – a five-fold increase from the previous survey in 2010. The sheer number of questionnaire respondents and interviewees makes the 2012 survey the most comprehensive empirical study ever conducted in the field of international arbitration’.

The Survey found that a substantial majority (76%) 'disapproved of recent proposals calling for an end to unilateral party appointments of co-arbitrators', while only 7% of those questioned responded in favour of the selection of co-arbitrators by an arbitral institution or appointing authority.[8]

The reasons most frequently cited by the Survey interviewees were:

1. *'It gives the parties control over the constitution of the tribunal and inspires confidence in the arbitral process, which consequently raises the legitimacy of any final award';*
2. *'Parties are better placed to know what skills and knowledge are required for resolving the dispute'; and*
3. *'Many interviewees expressed some distrust in arbitral institutions selecting arbitrators. In particular, they were concerned about the small and static pool from which some institutions pick their arbitrators, and of the fact that not all institutions are paying sufficient attention to the availability of arbitrators'.*[9]

Let us consider the three reasons cited by respondents to the Survey in support of the practice of the unilateral appointment of arbitrators by parties.

Cited reason no. 1:

The unilateral appointment of co-arbitrators gives the parties control over the constitution of the tribunal and inspires confidence in the arbitral process, which consequently raises the legitimacy of any final award

Experienced trial lawyers and barristers, especially those who practice in small or medium-sized cities where they appear in front of the same judges with regularity, tend to have their preferred or favourite judges. These may be judges whose personal or professional backgrounds share similarities with those of counsel, or who may even have ruled in favour of the lawyer or barrister's client in a particularly significant case, or who picked up on a key point raised by the lawyer during the heat of trial. The possible reasons why trial lawyers have their favourite judges are many, and this truism need not – indeed, ought not – be presumed to arise from any corrupt or illegitimate source.

It is also a truism that a party will strive to select an arbitrator who has some inclination or predisposition to favour that party's side of the case such as by sharing the appointing party's legal or cultural background or by holding doctrinal views that, fortuitously, coincide with a party's case. Provided the arbitrator does not 'allow this shared outlook to override his conscience and professional judgment', this need carry no suggestion of disqualifying partiality. This is a natural and unexceptional aspect of the party-appointment system in international arbitration.[10]

8 Survey (n 6) 5.
9 Survey (n 6) 5.
10 Bishop (n 5).

It is submitted that the large majority of responses in support of the unilateral appointment of co-arbitrators makes clear that the practice engages and empowers the parties by vesting in them a measure of control over the composition of the tribunal, which in turn inspires a greater level of confidence and 'buy in' in the arbitral process. It suggests that more subtle and nuanced forces are at work than is suggested by the proposition ('my nominee will help me win the case') posed, perhaps to serve as the proverbial 'straw man', by Paulsson.

The distinction is more than mere semantics. It is a bright line of demarcation. As noted by Bishop and Reed:

> *'There is a distinction to be drawn, however, between a general sympathy or predisposition and a positive bias or prejudice. Bias in favor of, or prejudice against, a party or its case encompasses a willingness to decide a case in favor of the appointing party regardless of the merits or without critical examination of the merits. Bias or prejudice constitutes partiality, which is the most fundamental basis for disqualification of an international arbitrator.'* [11]

One experienced arbitrator, cited by Bishop and Reed, summarised the beneficial aspects of the party-appointment process in this way:

> *'As I see it, party-appointed arbitrators in international controversies perform two principal and overlapping functions.*
>
> *'First, I think the presence of a party-appointed arbitrator gives some confidence to counsel who appointed him or her, and through counsel to the party-disputant. At least one of the persons who will decide the case will listen carefully – even sympathetically – to the presentation, and if the arbitrator is well chosen, will study the documents as well, whether or not they would have done so in any case. Thus the presence of a well chosen party-appointed arbitrator goes a long way toward promising (if not assuring) a fair hearing and a considered decision.*
>
> *'Second, in an international case a party-appointed arbitrator serves as a translator. I do not mean just of language, though occasionally that is required as well, as even persons highly skilled in the language of arbitration may be confused by so-called faux amis (false friends) – words that look the same but have different meanings in different languages. I mean rather the translation of legal culture, and not infrequently of the law itself, when matters that are self-evident to lawyers from one country are puzzling to lawyers from another.'* [12]

Nonetheless, it bears repeated emphasis that party-appointed and presiding arbitrators alike are expected to maintain an impartial demeanour and to decide the case in favour of the party with the better factual and legal position. Overt or evident partisan behaviour by a party-appointed arbitrator, whether or not

11 Bishop (n 5).
12 Bishop (n 5).

effective, undermines confidence in the system. The common wisdom is that when a party-appointed arbitrator crosses the line and acts as an advocate for the appointing party, the other arbitrators, particularly the presiding arbitrator, will discount or disregard the views of such an 'advocate arbitrator'.[13]

In this author's experience managing the negotiations of arbitration agreements and the selection of arbitrators in offshore proceedings for large multinational companies, the mere engagement of members of a corporate party's senior management and legal advisors in the process of nominating or appointing a co-arbitrator invests these key decision makers in the legitimacy of both the process and the outcome – the arbitral award.

This involvement in the process, it is submitted, may be seen to facilitate understanding, inspire confidence and build trust. This is a worthy objective that operates on a different level from any corrupt motivation to win the case with the help of 'my' nominee – although it must at the same time be admitted that the desire to win the case will, as Paulsson suggests, to some degree guide every step that each party and its counsel will take.

Commentators addressing the issue within the context of ICC arbitration practice have put forward the identical rationale for unilateral appointment, expressing the proposition thusly:

> *'The purpose of allowing each side to select a co-arbitrator is not to gain representation on the arbitral tribunal, but rather to grant the parties peace of mind by allowing them to have at least one known quantity on the arbitral tribunal.'* [14]

Parties may be best served by co-arbitrators who have an international outlook and are culturally-neutral

Many arbitration rules provide that the presiding arbitrator cannot be of the same nationality as any of the parties, absent party agreement. In circumstances where the applicable rules do not include such a requirement, this safeguard should be adopted by mutual agreement of the parties.

Beyond this fundamental requirement of national neutrality for presiding arbitrators, however, it is said that every arbitrator must embody juridical open-mindedness, and an international outlook characterised by sympathy for other countries' legal cultures and institutions (i.e. a comparative law approach) and an absence of legal nationalism or parochialism:

> *'This test of international mindedness makes sense because the arbitral panel may be required to determine the credibility of witnesses from differing cultures, to apply the laws of different nations and to create a procedural framework for resolving the dispute that accommodates the legitimate expectations of parties from different legal systems. These tasks require an open mindedness toward different legal procedures and rules.'*

It has been argued that, while co-arbitrators need not be required strictly to be culturally neutral, there are good and valid reasons for selecting culturally-neutral party-nominated arbitrators:

13 Bishop (n 5).

14 Jason Fry, Simon Greenberg and Francesca Mazza, '*The Secretariat's Guide to ICC Arbitration*' (International Chamber of Commerce (ICC) 2012) 3-452.

> *'While this aspect of neutrality [cultural neutrality] should, to the greatest extent possible, apply to the sole or presiding arbitrator, it should not be applied to party-appointed arbitrators because it may prevent a party, in some circumstances, from appointing an arbitrator who hails from a common culture or legal system. While neutrality in the sense discussed here should not be required of party- appointed arbitrators, parties should consider nominating arbitrators who embody these traits because such arbitrators will likely have greater credibility with the presiding arbitrator.'*[15]

Commercial parties faced, perhaps for the first time, with the prospect of arbitration proceedings offshore, the outcome of which may materially impact the company, or the career prospects of key company officers and employees, or both, will often take considerable comfort by having one 'known quantity' on the arbitral tribunal. This knowledge or familiarity with the candidate arbitrator may have been obtained by means of an interview process, or it could derive from a word-of-mouth recommendation of the candidate arbitrator by a trusted external lawyer, an in-house counsel or a business colleague.

The Survey results bear witness to the validity and broad acceptance of the proposition that this level of engagement of the parties in the process of constituting the tribunal promotes confidence in the process and in the resulting arbitral award.

Cited reason no. 2:

The parties are best placed to know what skills and knowledge is required to resolve the dispute

As has been noted above, a substantial majority of the respondents to the Survey believe that parties should be permitted to nominate co-arbitrators because the parties are better placed than an arbitral institution or judicial appointing authority to apprehend the specific skills and knowledge required to resolve the particular dispute.

Again, a similar rationale for unilateral appointments has been put forward within the context of ICC arbitration practice:

> *'A party will often select a national of the state from which it originates. A party may also seek an arbitrator with a deep understanding or extensive knowledge of the legal or business tradition or the industry sector in which that party operates.'*[16]

In relation to this reason, Paulsson gives a nod to its superficial appeal, but observes that Party A and Party B may arrive at different conclusions as to the particular skills and experience required to resolve a given dispute.[17]

15 Bishop (n 5) 12.
16 Fry (n 13) 3-452.
17 Paulsson (n 2) 10.

In this author's experience, once again, the parties themselves are in many instances likely to have deep insight into the specific industry background and knowledge relevant to a particular dispute. The risk identified by Paulsson, that the parties may reach different conclusions as to the particular skills and experience required to decide a given dispute, appears to this writer to present little possibility for detriment beyond that which any disputant may suffer should its strategic assumptions about the case be proven by subsequent events to have been incorrect.

Where is the unfairness to a party if, in hindsight, it should appear that the party 'made the wrong call' about the requisite skills and experience required of the decision maker? It would appear reasonable to surmise, moreover, that a three-member tribunal comprising co-arbitrators having distinct and different specialist industry skills and experience (assuming a healthy chemistry and a professional working relationship among the panel members) would in many instances be reflected positively in the award.

Whether or not the proposition can be said objectively to be correct, what does appear is that the substantial majority of the Survey respondents favouring the unilateral appointment of co-arbitrators subjectively believe that they 'know best' what specialist skills and experience is required of the decision makers.

So long as parties believe that they know best what skills and experience arbitrators should have, their proactive engagement in the appointment of arbitrators can only enhance their confidence in the process and the legitimacy of the final award – which takes us back to cited reason no. 1.

Cited reason no. 3:

Parties are concerned about the small and static pool from which some institutions pick their arbitrators, and of the fact that not all institutions are paying sufficient attention to the availability of arbitrators

Paulsson points to the 'searing indictment' of arbitral institutions that parties are unwilling to fully trust the institutions to appoint all arbitrators in lieu of the practice of unilateral appointment of co-arbitrators by the parties. Paulsson asserts moreover that 'many if not most arbitral institutions are empty edifices waiting for someone to bother to dismantle them'.[18]

We should be careful, however, not to tar the truly-exceptional arbitral institutions with this same broad brush.

In this author's experience, parties to arbitration proceedings (especially those for whom arbitration is a new and unique experience) and their regular external legal advisors will often be ill prepared to make an informed and educated choice among available arbitrators from a standpoint of each candidate's experience, knowledge and skill as arbitrator.

The arbitration industry is well known for its 'clubbiness' and opacity. Its processes operate privately and often beyond the view of the public. While the parties may indeed be expected to have greater

18 Paulsson (n 2) 13.

insights into the substantive industry and technical issues underlying a given dispute, and hence are best positioned (or *believe* themselves to be) to assess the industry skills and experience required of the decision maker, it will be a rare in-house counsel or corporate executive indeed who will possess the insight and experience exercised by the secretariats of the major arbitral institutions, who select and appoint arbitrators to cases each and every working day, as to the capabilities of individual candidates as arbitrators. In this writer's experience, the usual external legal advisors employed by client corporations to provide general legal advice may themselves lack this specialist knowledge.

Verifying the workloads and availability of candidate arbitrators

Yet the focus of concern of a substantial majority responding to the Survey is that the arbitral institutions regularly pick the same high-profile arbitrators. There is an undercurrent of concern that in doing so some institutions may not be taking steps to adequately confirm the availability of these same arbitrators prior to appointing them.

As but one noteworthy example of positive and remedial steps being taken, Article 11(2) of the 2012 ICC Rules requires that prospective arbitrators complete a 'statement of acceptance, availability, impartiality and independence', whereas the former Article 7(2) referred only to a 'statement of independence'.[19] Since 2009, the disclosure statement 'has placed stronger emphasis on availability and requests arbitrators to provide any additional information that may help clarify their statements regarding availability'.[20]

It has been this author's experience that the secretariats and staff of the major arbitral institutions are open to discussion with parties and are sensitive to the needs and concerns of parties about the workloads and availability of candidate arbitrators.

A candidate arbitrator's existing caseload and availability is, in any event, a 'safe' topic for inquiry by a party directly, within the context of an interview, or possibly even indirectly by the arbitral institution (at the request of the party). It appears to this writer that a party willing to proactively pursue the information ought not be precluded from obtaining at least a degree of assurance as to the availability of a particular candidate arbitrator.

Pre-appointment 'interviews' of candidate arbitrators

The Chartered Institute of Arbitrators' Practice Guideline 16 entitled 'The Interviewing of Prospective Arbitrators' recites at paragraph 1.3, 'In preparing these guidelines, the Chartered Institute has consulted widely across many jurisdictions and different legal cultures … the overwhelming majority of responses have been very supportive.' [21]

19 Fry (n 13) 3-378.

20 Fry (n 13) 3-381.

21 Chartered Institute of Arbitrators, '*Practice Guideline 16: The Interviewing of Prospective Arbitrators*' <http://www.ciarb.org/resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols> accessed 8 May 2013.

That a substantial majority of the users and stakeholders of international arbitration favour to some extent the practice of interviewing candidate arbitrators is borne out by the Survey.

The results of the Survey reflect that a considerable majority of those surveyed (86%), considered pre-appointment interviews to be appropriate (46%), or appropriate sometimes (40%). The reasons given are that such interviews provide a better picture of a candidate's availability, personality and knowledge or experience in the field relevant to the dispute.

Many of the arbitrators surveyed said that they make it their practice to set ground rules in advance to limit the interview discussion, such as by invoking the Chartered Institute's Practice Guideline 16.

Interestingly, only 84% of those responding to the Survey deemed it *inappropriate* to discuss the candidate's position on legal topics relevant to the case. While this obviously represents a substantial majority, the Chartered Institute's Practice Guideline 16 states flatly that it is *not acceptable* to enquire as to the arbitrator's views in relation to particular areas relevant to the dispute, although it is acceptable to enquire as to the candidate's knowledge of a particular area in dispute. In fact, the Chartered Institute's Practice Guideline 16 points to the difficulties involved in avoiding any transgression of this prohibition as justification for tape recording the entire interview 'to avoid any risk or suspicion of impropriety'.[22]

Further, Practice Guideline 16 provides that 'subject always to the overriding provisions of (9)' [i.e. it is never acceptable to inquire about the candidate arbitrator's views on a particular area in dispute], questions may be asked to test the candidate's knowledge and understanding of 'the particular area of law applicable to the dispute', provided again, that such questions '*should be general in nature and neutrally put to test the interviewee and should not be put in order to ascertain his or her views or opinions on matters which may form part of the case*'.[23]

Although 64% of responses to the Survey expressed the view that it would be inappropriate in an interview setting to enquire as to whether the candidate is a strict constructionist or 'black letter' lawyer, or would be influenced by the equities of the case, and a further 59% expressed that it would be inappropriate to enquire about the candidate's prior views expressed on a particular issue, it appears that such matters are not proscribed by Practice Guideline 16, provided that there is no discussion either directly or indirectly of the facts or circumstances giving rise to the dispute, the positions of the parties, or the merits of the case.

Notify the opposing party of the interview

One-half of the responses to the Survey consider that the interviewed arbitrator should notify the opposing party of the interview. Of those based in Asia, 53% expressed the view that the interviewing party should notify or disclose the notes of the interview to the opposing party, or both.[24]

22 Practice Guideline 16 (n 20) 7, 9(iii).
23 Practice Guideline 16 (n 20) 9(ii), 11(ii) and (iii).
24 Survey (n 6) 8.

Significantly, the Chartered Institute's Practice Guideline 16 observes that interviewing candidate arbitrators is common practice in some jurisdictions, but not in others.[25] On this point, 12% of those questioned in the Survey felt that interviewing prospective arbitrators is improper under any circumstances.[26]

In sum, though it appears from the Survey results and anecdotal sources that the practice of arbitrator interviews is well-established in many quarters, strong opposition to the practice can be observed. Moreover, the proper boundaries for interview questioning can be subtle and difficult to discern, especially for those less practiced.

Make a record of the interview

The Chartered Institute's Practice Guideline 16 recommends that a tape recording or arbitrator's file note of the interview be made and transmitted to both the opposing party and to the appointing authority at the earliest available opportunity following the interview.[27] Some commentators consider that tape recording the interview is intrusive and demeaning, and may serve only to promote challenges and litigation.[28]

This author's consistent practice in relation to pre-appointment interviews is to employ the recommendations set out in Practice Guideline 16 and to prepare a detailed file note promptly following the interview, which is then made available to the opposing party and the appointing authority. It is hoped that this practice will promote the confidence of commercial parties in the process and in their own decision making while maintaining a high degree of transparency.

Involve the client's in-house counsel in the selection process

Given the prevailing view that each side's selection of 'its' arbitrator is perhaps the single most determinative step in the arbitration, the close involvement and participation of each party's in-house counsel will often be warranted.

If prospective arbitrators are interviewed, in-house counsel should participate and form an independent opinion as to the suitability of each arbitrator to the extent this is reasonably possible. Those opinions may differ materially from those of external counsel. Examples of questions that might be asked are whether they are willing and prepared to involve the parties' in-house counsel in selecting the chair; whether they will be sufficiently available so as to ensure a speedy proceeding; or whether they are prepared to act as settlement facilitators (if this is desired by the party).[29]

Since in-house counsel will play a key role in handling witnesses and evidentiary documentation, when selecting 'its' co-arbitrator, in-house counsel for the claimant should consider carefully the nationality of its preferred candidate from a standpoint of the influence the arbitrator's national background may

25 Practice Guideline 16 (n 20) 1.2.
26 Survey (n 6) 6, 9.
27 Practice Guideline 16 (n 20) 7.
28 Mark Friedman '*Regulating Judgement: A Comment on the Chartered Institute of Arbitrators Guidelines on the interviewing of Prospective Arbitrators*' [2008] Dispute Resolution International 288.
29 Ugo Draetta, '*The Role of In-house Counsel in International Arbitration*' 75 Arbitration 4 (2009) 474.

have on issues of document discovery and the presentation of evidence. It is said that an arbitrator of United States or United Kingdom nationality may be inclined to grant broader document disclosure and may expect more of the evidence to be presented at an oral hearing.[30]

Based on the author's experience, however, such generalisations, even if true in the past, ought not be presumed in the current day, given the emergence of the IBA Rules on the Taking of Evidence in International Arbitration (2010) and other 'soft' arbitration authorities and the adoption of truly international arbitration practices which now cut across national practices and past parochial norms. To achieve greater assuredness in relation to such concerns, however, it is perhaps better to conduct an appropriate interview of the candidate arbitrator.

The respondent's in-house counsel should approach the selection of the co-arbitrator with a view in mind of who it would like to see as the chair. Specifically:

- in references involving particularly specialised issues, the respondent may wish to preserve a particular candidate arbitrator for the role of the chair, by appointing a different co-arbitrator;
- appointing a co-arbitrator with the same nationality as the claimant's nominated co-arbitrator may lead to the appointment of a chair with the same nationality (which may or may not be desirable); and
- if the first arbitrator is of nationality X, and for whatever reason the respondent does not want a chair of nationality Y, it may itself select a co-arbitrator of nationality Y in the expectation that the two co-arbitrators will not select a chair of nationality X or Y (in order not to have a chair of the same nationality as either of the co-arbitrators).[31]

Appointing the presiding arbitrator: better to rely on a sole arbitrator, or a tribunal of three?

As to the issue whether a sole arbitrator or three, Paulsson states the proposition: 'Three heads are better than one, especially when the stakes are high.'[32] Article 12(2) of the ICC Rules 2012 provides that, where the parties have not agreed on the number of arbitrators, the Court will appoint a sole arbitrator, unless the dispute warrants the appointment of three.

As a general rule of thumb, it is said to be unusual for the ICC Court to appoint a three-member panel where the value of the dispute is less than US$5 million, or to appoint a sole arbitrator where the amount in dispute is more than US$30 million. The ICC Court applies a holistic approach and will consider not only the dollar amount in dispute, but such other factors as the legal and factual complexity, political sensitivity or other non-financial significance of the controversy.[33]

30 Draetta (n 35).
31 Draetta (n 35) 475.
32 Paulsson (n 2) 10.
33 Fry (n 13) 3-439, 3-440.

Selecting the presiding arbitrator[34]

With respect to the process to be employed when selecting either a sole arbitrator or the chairman of a tribunal consisting of three arbitrators, the Survey showed that once again a majority of interviewees (54%) prefer selection by agreement of the parties.[35]

In this context, however, a considerably larger proportion of those surveyed (27%) expressed a preference for institutional appointments – a figure starkly greater than the proportion of interviewees favouring the institutional appointment of co-arbitrators (7%).[36] One possible reason for the larger proportion of respondents favouring institutional appointments in this context may be the apprehension by parties of the need that presiding arbitrators be known personally to the appointing authorities and will have been assessed by them as having the requisite arbitration skills and experience to manage the proceedings fairly and efficiently.

The role of the in-house counsel in the selection of the chair

In addition to the qualities and abilities required of co-arbitrators, the chair must have the ability to:

- manage and control the case efficiently;
- inject realism into the parties' expectations;
- identify at an early stage the determinative issues, and which of these issues can possibly be resolved by a partial award; and
- possibly exclude cumulative or duplicative evidence or testimony, as the circumstances of the case may require.

In circumstances where the two co-arbitrators exchange short lists of preferred candidates for chair, it is often up to the in-house counsel, who has the most direct interest in avoiding unnecessary cost or delay, to guide external counsel in proposing appropriate slates of potential chairs and to approve the chairperson finally selected.[37]

Should parties be permitted to exchange views with their appointed co-arbitrators regarding the selection of the chair?

The Survey confirms that a substantial majority of those questioned (74%) believe that party-appointed arbitrators should be allowed to exchange views with their appointing party regarding the selection of the chair or president. Sixty percent of the Asian-based respondents consider this practice appropriate – a figure less than that among surveyed parties based in North America.[38]

As has been discussed above in the context of pre-appointment interviews of candidate co-arbitrators,

34 'Presiding Arbitrator' means an arbitrator who is either a sole arbitrator or the chairperson of a three member arbitral tribunal.
35 Survey (n 6) 6.
36 Survey (n 6) 5.
37 Draetta (n 35).
38 Survey (n 6) 9.

unless otherwise agreed by the parties, ex parte communications with an arbitrator concerning the arbitration are generally inappropriate.[39] This general prohibition on ex parte communications notwithstanding, it is common practice in international arbitration for parties to formally stipulate and agree with the opposing party that their respective representatives may communicate with their nominated co-arbitrator, or with a prospective presiding arbitrator (or both in relation to the constitution of a tribunal consisting of three arbitrators).

It should again be emphasised that in no circumstances should a party, a party representative or a co-arbitrator seek to obtain in such an occasion, the prospective presiding arbitrator's preliminary views on the substance of the dispute. The same prohibitions circumscribing the matters that may appropriately be discussed in interviews with prospective co-arbitrators should be taken to apply.

Recommendations and conclusion

The overall objective of a party appointing a co-arbitrator should be to select someone who will have as positive an influence as possible on the tribunal as a whole. In fact, the co-arbitrator's first task will be to identify candidates for the chair who may be acceptable both to the appointing party and the other side. Beyond that, the role of the party-appointed arbitrator is to ensure that his appointing party's case and evidence are considered and understood by the other arbitrators.[40]

Some of the qualities to consider when making up your shortlist of co-arbitrator candidates, several of which have been discussed above, might include:

- familiarity with likely candidates for the chair;
- familiarity with languages relevant to the dispute;
- expectations as to remuneration or usual hourly rate;
- experience as arbitrator in similar disputes;
- gravitas: is he or she able to command respect;
- reputation as an arbitrator;
- availability;
- preferred style or procedural approach;
- relationship with counsel on each side;
- familiarity with the governing law;
- familiarity with technical or industry practice relative to the dispute; and
- residence and proximity to where the hearings will be held.[41]

39 'Ex Parte Communication' means oral or written communications between a party or a party representative and an arbitrator or prospective arbitrator without the presence or knowledge of the opposing party or parties.

40 Michael McIlwrath and John Savage, '*International Arbitration and Mediation: A Practical Guide*' Kluwer Law International [2010], 5-072.

41 McIlwrath (n 39) 252.

Parties will themselves do well to insist on retaining a strong voice in the process of nominating a co-arbitrator (where the tribunal will consist of three arbitrators) and in agreeing with the other side upon the nomination of the presiding arbitrator (sole arbitrator or chair, as the case may be). Diligent and proactive engagement in the selection process by the parties' in-house counsel, working closely with the external advisors, will help to shape the arbitration proceeding and should lead to a better result.

As recommended by McIlwrath and Savage, it almost always makes sense to try and reach agreement with the opposing party on the nomination of the chair, or of a sole arbitrator.[42] They explain:

> *'While the panels [of approved arbitrators] of many institutions are strong, and it is difficult to quarrel with most appointments made by institutions and other appointing authorities, they do not always get it right. It therefore almost always makes sense to try and reach agreement with the opposing party on the nomination of a chair or sole arbitrator. In this way, you may not get the most desirable candidate, but you will by definition get an acceptable candidate. Most importantly, you will avoid unsatisfactory appointments by the third party, which, although rare, are certainly not unheard of.'* [43]

This writer's advice to in-house counsel and their external advisors is to be proactive always in your efforts to collaborate and compromise with opposing in-house and external counsel to reconfigure and amend whatever deficiencies or inefficiencies you find within the arbitration agreement governing the dispute or the applicable arbitration rules, so as to ensure that you will have a say in relation to the critical question of the selection of arbitrators.

And as for the future of international arbitration practice 50 years hence – notwithstanding the current widespread acceptance of unilateral appointments – let's not place any bets against Paulsson's prediction of the institutional appointment of all arbitrators!

42 McIlwrath (n 39) 5-050, 5-051.
43 McIlwrath (n 39) 5-060.

Dual Nationals in Investment Arbitration

Sergei Gorbylev[1]

Introduction

Investor–State arbitration allows foreign investors to claim directly against the State in which they have invested.[2] In order to commence investor–State arbitration, an investor must meet a number of requirements, one such fundamental requirement being that an investor must be a national of a specific foreign country. More specifically, in order to benefit from the protections provided by bilateral investment treaties (BITs), an investor must be a national of a contracting State, but not a national of the host State (the State in which they invest or a third party State). Despite this simplicity, the issue of investor nationality can be surprisingly complex. In the present globalised world economy, when many international business people carry two or more passports, the nationality of individual persons can be difficult to determine. Discussed below are a number of scenarios and questions that arise in this context.[3]

Scenarios and questions

> *A BIT has been signed between States A and B. An investor holding the nationalities of both A* and *B makes an investment in State B. Is B's investment a foreign investment which will be protected by the BIT, or is it a domestic investment which will not?*
>
> *A BIT has been signed between States A and B. An investor holding the nationalities of A and another State, C, makes an investment in country B. Is such an investment covered by the BIT signed by A and B?*

This paper seeks to clarify these issues by analysing the specific requirements of nationality under the ICSID Convention and drawing attention to the exact wording of Article 25 of the ICSID Convention. It then describes the approaches to determining the nationality of an investor in existing BITs. Finally, the paper addresses the concept of nationality under the local laws and the international law, and describes the approach to determining nationality of individuals as expressed in the case law.

Determining nationality under ICSID Convention

Determining who is eligible to claim is one of the key jurisdictional issues in investment arbitration. Generally speaking, the term 'investor' is given a broad definition in the applicable international instruments.[4]

Investors who are nationals of both contracting parties are expressly excluded from the definition of investor under the ICSID Convention.[5] Under Article 25(2), 'national of another Contracting State'

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2 See Robert Wisner and Nick Gallus, 'Nationality Requirements in Investor-State Arbitration' (2004) 6 Journal of World Investment and Trade 5, 927.

3 Suzy H. Nikièma, *Best Practices: Definition of Investor* (IISD March 2012), 2-3.

4 Antoine Romanetti, 'Defining Investors: who is eligible to claim?' (2012) 29 J. Int. Arb. 3, 231.

means: 'any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered … but does not include any person who on either date also had the nationality of the Contracting State party to the dispute'.

Thus the investor's status under ICSID proceedings is subject to a positive and a negative nationality requirement.[6] The investor not only has to be a national of a contracting State (a positive requirement), but also must not be a national of both contracting parties (a negative requirement). Furthermore, Article 25(2)(a) of the ICSID Convention provides that this nationality requirement must be met at two different moments: first, on the date on which the parties consented to submit the dispute to arbitration, and, second, on the date on which the request for arbitration is registered at the Centre by the Secretary-General.

The definition of the natural person investor in BITs

Investment treaties define the term 'investor' in various ways.[7] In most cases the term 'investor' is defined in a BIT by reference to national law. For example, the relevant provision of the Australia–India BIT defines investor as a 'national' or 'company' of a contracting party. Whether an investor is a 'national' or 'company' of a contracting State will be determined by the laws of the contracting countries and the wording of the particular BIT.

Some BITs contain more restrictive definitions and require that the individual must have permanent residence in the investor's home State.[8] For example, the Germany–Israel BIT provides, that the term 'nationals', with respect to Israel, means 'Israeli nationals being permanent residents of the State of Israel'.[9]

In some investment agreements the criterion of permanent residence is used as an alternative to citizenship or nationality.[10] For instance, in the Energy Charter Treaty (ECT)[11] the term 'investor', with respect to a Contracting Party, means 'a natural person having the citizenship or nationality of Contracting Party or who is permanently residing in that Contracting Party in accordance with its applicable law'.

Most of the BITs do not mention the case of dual nationalities. However, some include a specific clause on this matter in order to resolve potential conflicts in the case of dual nationality.[12] This is the case in

5 Yas Banifatemi, 'Unresolved Issues in Investment Arbitration' in *Modern Law for Global Commerce – Proceedings of the UNCITRAL Congress* (9-12 July 2007, Vienna), <http://www.uncitral.org/pdf/english/congress/Banifatemi.pdf>

6 Roberto Echandi, *Investor–State Dispute Settlement and Impact on Investment Rulemaking*, UNCTAD Series on International Investment Policies for Development (2007), <http://unctad.org/en/Docs/iteiia20073_en.pdf>

7 See generally, Rudolf Dolzer and Margaret Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995).

8 More details can be found in *International Investment Law: Understanding Concepts and Tracking Innovations. A Companion Volume to International Investment Perspectives* (OECD 2008), <http://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf>

9 Article (1)(3)(b) of the Germany–Israel BIT.

10 *International Investment Law: Understanding Concepts and Tracking Innovations. A Companion Volume to International Investment Perspectives. Ibid.*

11 Article 1(7)(a)(i) of the Energy Charter Treaty.

the United States–Uruguay BIT, which provides that a 'natural person who is a dual national shall be deemed exclusively a citizen of the State of his or her dominant and effective citizenship'.[13]

Nationality of investors in ICSID arbitration

Despite the abovementioned straightforward formulations, some complexities have arisen based on dual or changing nationality of natural persons.[14] When faced with such cases, respondent States have typically raised several objections to the jurisdiction of the tribunal, arguing that the 'investor' is not eligible to bring the claim.[15] Depending on the facts of the case:

- respondent States may argue that the claimant is a nationality of the host State;
- respondent States may argue that the claimant is not 'a national of a Contracting State'; and
- the 'effective nationality' test may be invoked.

The claimant is a national of the host State

Respondent States may argue that the individual does not qualify as an 'investor' within the meaning of the ICSID Convention because the claimant has a dual nationality, including that of the host State, which is expressly prohibited under Article 25(2)(a) of the ICSID Convention.[16]

This principle is reflected, for example, in *Champion Trading Company and others v Arab Republic of Egypt*.[17] In this case, the claimants – three brothers – were born in the United States to parents who were both United States citizens; however the father of the claimants had previously held Egyptian nationality and had only later become a citizen of the United States. The Egyptian Government sought to argue that the father had also retained his Egyptian national status as he had never given up his Egyptian nationality. On this basis it was contended that the claimants automatically acquired Egyptian nationality at birth. Egypt argued that the claimants were nationals of both the home and host State and therefore could not comply with the requirement of Article 25(2)(a) of the ICSID Convention.[18] The claimants argued that they never had any particular ties or relations with Egypt and that such 'involuntary nationality' should not be considered in determining jurisdiction under the ICSID Convention.[19]

The tribunal found that in addition to being United States nationals the claimants were all Egyptian nationals and were therefore precluded from claiming against Egypt by Article 25(2) of the ICSID

12 Suzy H. Nikièma, *Ibid*, 11.
13 Article 1 of the United States–Uruguay BIT.
14 Alexandre de Gramont and Maria Gritsenko, Key Issues and Recent Developments in International Investment Treaty Arbitration, ABA Section of International Law Spring Meeting (2007, Washington, D.C.), <http://www.crowell.com/documents/Key-Issues-and-Recent-Developments-in-International-Investment-Treaty-Arbitration.pdf >
15 Antoine Romanetti, *Ibid*, 238.
16 Antoine Romanetti, *Ibid*, 239-240.
17 Champion Trading Company and others v Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003.
18 Roberto Echandi, *Ibid.*
19 Alexandre de Gramont and Maria Gritsenko, *Ibid.*

Convention. The tribunal referred to Egyptian law, under which the sons of Egyptian nationals retain that nationality for one hundred generations, regardless of where they are born or where they live.[20] In doing so, the tribunal stated that while they had never even been to Egypt, the brothers were all the sons of an Egyptian national and therefore fell within this bracket. The tribunal did recognise, however, limits to the rule that the laws of the State in question are applied to determine an investor's nationality. Applying Article 32(b) of the Vienna Convention on the Law of Treaties,[21] the tribunal held that:

> *'One could envisage a situation where a country continues to apply the jus sanguinis [blood line] over many generations. It might for instance be questionable if the third or fourth foreign born generation, which has no ties whatsoever with the country of its forefathers, could still be considered to have, for the purpose of the Convention, the nationality of this state.'* [22]

The claimant is not 'a national of a contracting State'

A respondent State may argue that the claimant is not 'a national of a Contracting State'.[23] This was exactly the case in *Hussein Nuaman Soufraki v The United Arab Emirates*.[24]

In this case, Mr. Soufraki was a national of both Canada and Italy. He filed an ICSID claim against the United Arab Emirates (**UAE**) under the Italy–UAE BIT.

The UAE argued that Mr. Soufraki was not an Italian national. As evidence of his Italian nationality, Mr. Soufraki relied on two Italian passports and several letters issued by the Italian Ministry of Foreign Affairs certifying that he was indeed an Italian citizen.[25]

On the facts of the case, tribunal rejected the claim because it found that, according to Italian law, Mr. Soufraki was not an Italian at the time he made the claim. Under Italian law, Italian citizens acquiring another nationality and residing abroad automatically lose their Italian nationality. However, Italian legislation also permits former citizens to reacquire Italian nationality by taking up residence in Italy for a period of at least one year.[26]

The tribunal interpreted the Italian law on nationality and applied an Italian law finding that when Mr. Soufraki left Italy to settle down in Canada and became a Canadian citizen, he lost his Italian nationality. Mr. Soufraki had not effectively demonstrated that he had complied with the residency requirements necessary to re-establish Italian citizenship.[27]

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20 Robert Wisner and Nick Gallus, *Ibid*, 929.

21 That Article states: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: … (b) leads to a result which is manifestly absurd or unreasonable.'

22 *Champion Trading Company and others v Arab Republic of Egypt*, supra, footnote 21.

23 Antoine Romanetti, *Ibid*, 238.

24 *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No. ARB/02/7, Award rendered on 7 July 2004.

25 Antoine Romanetti, *Ibid*, 238-239.

26 Roberto Echandi, *Ibid*.

The tribunal therefore held that Mr. Soufraki was not entitled to bring a claim under the Italy–UAE BIT. He was not an Italian national under the laws of Italy at the two relevant times required by the ICSID Convention, namely the date of the parties' consent to ICSID arbitration and the date on which the request for arbitration was registered with ICSID.[28]

The 'effective nationality' test

International law has long recognised the importance of an individual's 'effective' nationality.[29] In the Nottebohm case, the key issue to be determined was whether the claimant could be said to have a real and effective connection or a genuine link with Liechtenstein.[30]

The case concerned the question of whether Liechtenstein should provide diplomatic protection to Mr. Nottebohm, a national of both Liechtenstein and Germany, in respect of certain acts committed by Guatemala which were alleged to be breaches of international law. Mr. Nottebohm sought to show that Liechtenstein had the rights to exercise diplomatic protection. The Court invoked the 'effective nationality' test.[31]

The Court found[32] that a genuine connection with a State conferring nationality may be evidenced by the fact that the individual is 'closely attached by his tradition, his establishment, his interests, his activities, his family ties'[33] to that State, to form a nationality as a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.[34]

Given the fact that Mr. Nottebohm had a long-standing and close connection with Guatemala, where he had lived for most of the previous thirty years, but only a minor connection with Liechtenstein, Court ruled that Mr. Nottebohm did not have a sufficient connection to Liechtenstein, and therefore denied Liechtenstein's rights to exercise diplomatic protection.

Although this case concerned a determination of whether a State could exercise diplomatic protection, given that the ICSID Convention leaves room for the customary international law to come into play the 'effective nationality' may be applicable in certain circumstances.[35]

The recent ICSID decisions have helped to clarify the role of the effective nationality principle in investment arbitration to a certain extent, however some ambiguity still remains. For instance, in *Viorel*

27 Alexandre de Gramont and Maria Gritsenko, *Ibid.*
28 Roberto Echandi, *Ibid.*
29 Robert Wisner and Nick Gallus, *Ibid*, 930.
30 Nottebohm Case (Liechtenstein / Guatemala), (06 April 1955), (1955) ICJ Reports, 4.
31 Robin R. Churchill, *The Meaning of the 'Genuine Link' Requirement in Relation to the Nationality of Ships* (International Transport Workers' Federation 2000), 21.
32 See more on Court's finding in Valts Nerets, *Nationality of investors in ICSID arbitration, (2011)* 2 RGSL Research Papers, <http://www.rgsl.edu.lv/images/stories/publications/2_nerets_final.pdf >
33 Nottebohm Case, *Ibid*, 24.
34 Nottebohm Case, *Ibid*, 23.
35 Par Andrea K. Bjorklund, Ian A. Laird, Sergey Ripinsky, *Investment Treaty Law: Current Issues III – Remedies in International Investment Law: Emerging Jurisprudence of International Investment Law* (British Institute of International and Comparative Law 2009), 187.

Micula and others v Romania,[36] attempts to invoke the Nottebohm case were rejected. In this case, two brothers made claims under the Sweden–Romania BIT. Both were Romanian expatriates who had apparently applied for, and acquired, Swedish citizenship at the time of the subject investment. Romania sought to invoke Nottebohm's 'effective link' test as a means of defeating jurisdiction, notwithstanding the factual finding of Swedish citizenship. The tribunal held that:

> *'The Tribunal must … examine whether there is any room for the Nottebohm requirement of a "genuine link" in this proceeding … The ICSID Convention requires only that a claimant demonstrate that it is a national of a "Contracting State". In fact, Article 25(2)(a) of the ICSID Convention does not require that a claimant hold solely one nationality, so long as its second nationality is not that of the State party to the dispute … The regime established under Article 25 of the ICSID Convention does not leave room for a test of dominant or effective nationality.'* [37]

Thus, here the tribunal held that the rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor–State arbitration.

On the other hand, in *Eudoro Armando Olguín v Republic of Paraguay*,[38] Mr. Olguín, a dual national of Peru and the United States, brought a claim against the Republic of Paraguay under the Peru–Paraguay BIT. Paraguay objected to the claim on the grounds that Mr. Olguín was also a national of the United States, in which he was living at the time of the claim. Paraguay accordingly argued that Mr. Olguín should be considered a national of the United States and precluded from claiming under the Peru–Paraguay BIT.[39] The arbitral tribunal rejected Paraguay's objection to jurisdiction based on the claimant's dual nationality by relying on the fact that Mr. Olguín's Peruvian nationality was effective, which was deemed enough for purposes of the ICSID Convention and the BIT. To this tribunal, the effectiveness of his Peruvian nationality was enough to determine that he could not be excluded from the provisions for protection under the BIT.[40] Thereby, in this case the tribunal ruled that customary international law requirements of determining nationality could be used.

Conclusion

Moving back to the scenarios and questions outlined in the introduction to this paper, it is clear that there are no easy answers. Recent ICSID decisions demonstrate that, although investment treaties include provisions that define an investor, at the end of the day, the tribunal often has to refer back to national law for the purpose of determining nationality. Alternatively the tribunal has to decide whether customary international law is applicable to investor–State arbitration.

36 *Viorel Micula and others v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction, 24 September 2008.
37 *Ibid*, para 100.
38 *Eudoro Armando Olguín v Republic of Paraguay*, ICSID Case No. ARB/98/5, Award rendered on 26 July 2001.
39 *Ibid*, para. 60.
40 *Ibid*, para. 61.

Innovation and alternative dispute resolution[1]

Tania Sourdin[2]

Abstract

*Most current alternative dispute resolution (**ADR**) processes and systems are the result of innovation that has taken place within the justice system[3] over the past three decades. In common with innovation that takes place outside the justice system, often 'old' concepts, theories and constructs are duplicated, extended and/or re-engineered to create more innovative processes and systems. That is, by using, blending and extending existing processes in the dispute resolution field, 'new' processes and skills are invented, explored, used and embedded to support system-wide approaches. These 'new' processes are supported by current knowledge and understandings about human behaviour as well as developments in technology and in other areas. The extent to which these innovations can be regarded as successful is linked to the extent to which these processes and systems achieve more effective and efficient results. Innovation in the ADR area can also be linked to the extent to which sustainable change takes place that is in turn linked to cultural change factors. Using these measures, innovation in the ADR field has largely been successful. ADR has been translated or 'mainstreamed' to many locations and sectors, although duplicative approaches may not be as successful as original efforts. An issue for the future of ADR is the extent to which ADR is not only embedded but also optimised and how it retains innovative and flexible characteristics. This article considers past and current developments in ADR in the context of innovation theory and foreshadows future developments.*

Introduction

There have been numerous ADR innovations introduced in the justice system over the past three decades. These innovations range from the establishment of the extensive external dispute resolution (**EDR**) environment and 'super-tribunals' to support a range of resolution processes, to the spread of numerous models of arbitration, mediation, conciliation, expert, dialogue and collaborative processes as well as more court-focused processes that include managerial and 'blended' approaches used by practitioners as well as judges in courts. For example, some innovations in the court and tribunal system include the development of hybrid processes that enable ADR components to be more closely linked to the judicial role. The early neutral evaluation (**ENE**) program at the Magistrates' Court and judicial mediation are examples of such developments in the Victorian jurisdiction.

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1 Parts of this paper are drawn from T. Sourdin, *Alternative Dispute Resolution* 4th ed (Thomson Reuters, Sydney, 2012) and T. Sourdin, *The Timeliness project, Background Report*, Australian Centre for Justice Innovation (ACJI), Monash University, October 2013.

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3 In this article, the term 'justice system' is used to describe the informal and formal justice processes and supports that are used by people when in dispute: see T. Sourdin, 'A Broader View of Justice' in M. Legg, *The Future of Dispute Resolution* (Lexis Nexis, Sydney, 2012).

Some innovations in the context of skills and the preparation required for ADR have been informed by better understandings about human behaviour as developments in neuroscience and neurobiology have revealed more about negotiation and conflict resolution behaviours and the effectiveness of ADR interventions. Technology has also enabled large-scale surveying, mapping and reporting of perceptions about processes and outcomes and informed participatory and procedural justice approaches in ADR as well as promoting more accessible information and support for those engaged in ADR. Other innovations have been prompted by social and economic crises that have spawned larger numbers of disputes and a requirement to create more effective processes to deal with them.

The location and application of ADR has changed over the past three decades as ADR skills, processes and systems have been created, revised, adapted, replaced and, in some cases, abandoned. Policy-makers have struggled to deal with the codification and regulation of a system that is often not well understood and is the subject of much innovation and change.

There are other factors that have supported ADR diversity and at the same time may have limited the transfer of successful innovations from one ADR area to another. While the justice system now incorporates an extensive complaints handling system (it is estimated that Australians make more than eight million formal complaints per year), a robust EDR environment (that sits outside courts and tribunals and involves more than 800,000 disputes per year in the family, personal injury, finance and other industry sectors), and a comparatively small court and tribunal sector (where ADR is used at varying points), often discussion about ADR is not focused on the system or 'flow through' and is more likely to be oriented towards process models and skills. This means that developments in one part of the ADR field may not be replicated (or even known about) in other parts of the justice sector.

Although there has been some systemic innovation across the ADR sector innovations are more often than not ad hoc as there is no institutionalized arrangement for sharing knowledge. For example, in some parts of the sector, there is a clear divide between those who use adjudicative forms of ADR, such as arbitration, and those who use more facilitative forms of ADR, such as mediation. Often what occurs in the financial sector is not known about in the health or family dispute resolution (**FDR**) sectors. What takes place in courts may not be replicated or even considered in the EDR sector. Innovation theory suggests that without systemised thinking, useful innovations can be lost or degraded over time. Fortunately, newer technologies and the increasing professionalisation of ADR provide greater opportunities for ADR to be informed by initiatives in different areas and enable it to avoid redundancy by being flexible and adaptive to changing dispute and societal needs.

Systemic innovation

Systemic thinking requires that innovation be applied across the entire ADR sector. . This more systemic approach is currently limited in respect of ADR, partly because of the myriad innovations that arise in this area. However, there are also structural or institutional arrangements that limit this type of approach. For example, within the justice system, the relationship of pre-action ADR to the court and tribunal system and the forms of ADR used in that system may be unclear. Although ADR is now often used as a pre-condition to the commencement of proceedings, courts may have little information about how long this process took, what forms of ADR were used or whether or not it produced a narrowing of issues or

promoted the timely resolution of disputes. At present, more often than not, if an ADR process has not been used in the pre-action area, ADR will be used when proceedings commence in a court or tribunal (and may be used more than once). The extent to which these processes are evaluated varies across different areas, and significant data gaps mean that much ADR activity is not measured or considered.

There are many other difficulties in considering the system in a systemic way. ADR practitioners include judicial officers, court staff, registrars, legal practitioners, mediators accredited through the National Mediator Accreditation System, family dispute resolution practitioners, experts conducting evaluative processes (or working as referees), medical practitioners who may make up a panel, arbitrators, dispute review boards, community workers and others. ADR practitioners are diverse in terms of backgrounds, working arrangements and professional or other affiliations and may not be aware of developments outside their disciplinary area or immediate environment.

Furthermore, ADR may be used as a result of a court referral, contract, legislation, private agreement, regulatory scheme, standard, obligation or through agreement. ADR has been used in immigration, tax, medical, injury, estate, commercial, construction, family, workplace, property, administrative law, planning, environmental and other categories of dispute. ADR takes place through myriad EDR schemes in the banking, retail lease, financial and health sector as well as through specialist conciliation and state-based services and in the private sector. In the court and tribunal system, a mix of private and government ADR practitioners conduct much of the ADR work. This spread of ADR use is not well understood. Unlike research and evaluation in the health system, there has only been limited research and evaluation attempts to explore how ADR functions in one part of the justice sector and affects others.

The impact of this vast ADR system on disputes in the court and tribunal system is even less clear than the impact of ADR on disputes in much of the external ADR environment. This is partly because many available court statistics regarding the period before and after the introduction of extensive ADR arrangements are somewhat questionable. EDR systems – for example, industry-based schemes and family dispute resolution arrangements – often have more modern systems that track ADR use within their systems. Many also have external review and reporting requirements. In terms of measuring successful innovation by reference to effectiveness, there is clearly much material in the EDR area that suggests that ADR innovation has been successful in this sector.

In contrast, many court and tribunal IT systems relied on limited, and at times inaccurate, technologies into the 1990s and beyond. Often ADR use has not been tracked, particularly when undertaken by external practitioners. Considering court and tribunal statistics can also be an unreliable marker of ADR effectiveness and the impact of innovation because increased ADR use has often been coupled with significant legislative changes that have limited litigation in some areas (for example, in the personal injury area) and increased litigation in others (wills and estates).

However, despite the unreliability of lack of statistics in this area it seems that from the early 1980s (when a 'litigation explosion' had been forecast), numerous court-led ADR initiatives (for example, the Spring Offensive and the portals scheme) undoubtedly cleared backlogs within courts. Basic reporting suggests that the continuing use of ADR has also meant that many civil matters currently commenced within courts and tribunals are likely to be resolved through an ADR process. Little is known about the

quality of these processes, and only recently a more concerted effort has been made to consider how and what makes ADR more effective in this area.

The diverse nature of ADR practice areas can mean that information about effectiveness, innovation in process use and skills developments may not be shared or understood. This lack of integrated or systemic thinking can also be considered in the context of ADR innovation in determinative, advisory and facilitative contexts.

Innovation in the ADR determinative setting

ADR can involve a blending of facilitative, advisory or determinative approaches and the most common form of determinative ADR is arbitration which is increasingly blended with 'mediation'. However, determinative forms of ADR now extend well beyond arbitration. While arbitration has continued to develop within Australia and is increasingly supported by legislative arrangements (discussed further below), there has also been much innovation over the past decade in respect of the use of determinative ADR within courts and tribunals.

For example, there are many recent innovations in ADR processes that have been directed at blending ADR with and improving more conventional court-based adjudicative processes. For example, an innovation that has been extensively trialled and developed involves concurrent evidence or 'hot tubbing' approaches whereby expert evidence is given simultaneously as part of a court hearing process. The development of therapeutic judicial processes, problem-solving courts and less adversarial trials (or LATs in the family context) are also examples of combining ADR and court-based processes and are designed to promote more effective and durable outcomes. These processes may make adjudicative processes more time efficient (if, for example, cross examination of experts is shortened) or may enhance effectiveness while lengthening the time that a matter is in the 'system' if judicial review is required (this may ultimately reduce court contact into the future and impact on recidivism rates).

These types of blended processes and the extent to which they are used vary across jurisdictions, and only some are integrated into a judicial hearing process. It remains unusual for judges in Australia to conduct 'mini trials' or to mediate (as is the case in some overseas jurisdictions, see below), although the use of abbreviated ADR adjudicative processes can be supported in various court systems. For example, ENE has been introduced on a pilot basis in the Magistrates' Court of Victoria and involves a magistrate hearing the parties in an informal setting and offering a non-binding evaluation of the dispute. The Court has focused on disputes over $50,000 where a trial and adjudication are the likely outcome. Participation is mandatory and is aimed at encouraging the parties to find an early resolution of the matter.[4]

In some jurisdictions, judges will not integrate ADR into a judicial adjudication model and may use an 'add-on process' or referral model. For example, in New South Wales, in the past it was common to use a 'referee' to determine an aspect of a dispute (and in some cases most issues in dispute). In *Park Rail*

4 Magistrates' Court of Victoria, *Annual Report 2010–2011* (Magistrates' Court of Victoria, Melbourne 2011), 55, available at http://www.magistratescourt.vic.gov.au/publication/annual-report-2010-2011 (accessed 25 September 2013).

Developments Pty Ltd v RJ Pearce Associates Pty Ltd,[5] Smart J suggested that, when deciding whether to refer a question to a referee, a number of factors would be relevant, including the nature of the dispute, costs and time factors.

The trend towards using ADR to support adjudication in courts is also linked to the development of protocols and obligations that promote more discussion-focused approaches to resolve and narrow issues. In this respect ADR is increasingly coupled with obligations to progress matters through the litigation system, narrow issues and divert cases for settlement wherever possible. For example, in the court system, the 2012 Western Australian Family Court *Case Management Guidelines*[6] encourage agreement making and ADR that can narrow 'points of difference' as well as support settlement. However, in many jurisdictions, ADR is regarded as separate from a judicial hearing and will only be used via a referral model rather than a more integrated approach (retaining the 'alternative' in 'alternative dispute resolution'). ADR in this context may be the subject of referral (where referral criteria and approaches may vary significantly from judge to judge and court to court).

Some of the process innovation work that has taken place in the court and tribunal system has not always been followed by similar innovation in the adjudicative ADR area outside courts and tribunals. Arbitration has, for example, been criticised for mimicking the worst excesses of court-based litigation, and the concurrent evidence, case management and other innovations in the court system have not necessarily been adopted as readily in the private arbitration area. It is partly for this reason that recent innovation in the arbitral area has been directed at reducing time and cost by combining case management, issue identification and mediation processes with arbitral processes. However, it remains rare in private arbitration to include expert referral or engage in 'add-on' referral (presumably because arbitrators will often be chosen on the basis of their subject matter expertise). There may also be a reluctance in parts of the adjudicative ADR environment to 'blend' adjudicative and non-adjudicative forms of ADR, although there are examples of blended conciliation and adjudication models used in some dispute areas in Australia (most notably the New South Wales Workers Compensation jurisdiction), where strict timelines are imposed and a conciliation conference (where a matter is not resolved) is followed by an adjudication within a few weeks (conducted by the same arbitrator).

Innovation in this sector has often been undertaken in response to client feedback and criticism, although little empirical work has been produced in respect of processes such as arbitration. For example, short-form arbitration, issue arbitration and other variations in arbitral processes have been designed by arbitrators and professional bodies to support more flexible arbitral approaches and to identify diversity in processes that, at present, may be dependent on the identity and particular approach adopted by arbitrators.

Some large-scale systems dependent on abbreviated adjudicative processes (including determination on the papers) have blossomed in the construction area (for example, in respect of security for payment

5 *Park Rail Developments Pty Ltd v R J Pearce Associates Pty Ltd* (1987) 8 NSWLR 123.

6 Family Court of Western Australia, *Case Management Guidelines* (7 May 2012), available at http://www.familycourt.wa.gov.au/C/case_management_guidleines.aspx?uid=1169-2104-2460-9295 (accessed 25 September 2013).

schemes) and the financial sector. The activity and innovation work undertaken in these areas has not necessarily been translated to or developed in other parts of the ADR determinative system.

Use of advisory and facilitative processes

All courts and tribunals in Australia now have some form of ADR connected to the court or tribunal, and often the preferred forms of court-connected ADR are advisory or facilitative (or both). However, the form and nature of the ADR processes vary significantly. Often, cases will be referred to an ADR process that either is supported by internal ADR practitioners or by external practitioners. The Productivity Commission's 2012 *Report on Government Services* notes that, within the litigation system, diversion to ADR programs supports faster dispute resolution[7] and cites examples that include ADR and, more specifically, mediation, noting that:

> *'A court may require parties to complete a mediation program within a specified time, or can consider the timeframe to be "open-ended" (for example, referrals from the Federal Court to the Native Title Tribunal). Completion time can also be affected by the complexity of the dispute and the number of parties involved and can therefore vary significantly from case to case.'*

As with determinative forms of ADR, there have also been extensions of facilitative and advisory ADR into the court system. In Victoria, there has been a focus on judicial mediation, and a number of issues have been raised as difficulties regarding judges participating in ADR. The role of the mediator has been seen as requiring different skills from those required for adjudication, and there has been conjecture about whether or not judicial mediation is a constitutionally valid exercise of judicial power under the Commonwealth Constitution. In Victoria, judicial immunity and immunity from giving evidence now flow through from the bench to a range of ADR processes, including mediation, in which judges may participate.[8]

Outside the court and tribunal system, there has been extensive process adaptation. Child-inclusive, child-focused and other models of mediation are now well established in the family area. Other innovations include collaborative practice – now widely used in FDR – which supports dispute resolution outside courts and may play an increasingly important role in other dispute areas as well.

In many dispute resolution schemes that are located outside the court and tribunal system, a mix of processes may be used. The Financial Ombudsman Service, for example, uses a mix of facilitative, advisory and determinative processes. Many processes outside the court and tribunal system focus on telephone conciliation, and some use forms of video conferencing or may make use of technology in other ways.

Process innovation in this area is significant, with narrative, therapeutic, transformative and other mediation processes explored and used by mediators in various pockets of the system. Skills used in

7 SCRGSP (Steering Committee for the Review of Government Service Provision) 2012, *Report on Government Services 2012* (Productivity Commission, Canberra), 7.32, available at http://www.pc.gov.au/gsp/rogs/2012 (accessed 25 September 2013).

8 See *Courts Legislation Amendment (Judicial Resolution Conference) Act 2009* (Vic).

ADR in the family sector have been explored in detail through clinical supervision, debriefing and peer-learning systems. However, the developments have not been uniform across the sector, and many ADR practitioners may rely on process models and skills developed without reference to research or input by other practitioners. Research and evaluation remains patchy, with some parts of the system considerably more developed than others.

Past innovation

The ADR sector has evolved rapidly, and developments in this area have often not been tracked or evaluated. The limited evaluation work that has been undertaken suggests that factors that limit innovation in this area include the lack of a systemic framework and approach and the diversity and spread of ADR activities. At present, there are many examples of ADR innovation that appear to work well but are unlikely to be translated to other parts of the system. In the context of future innovation in the ADR area, there is a need to create more knowledge and practice sharing to ensure that developments can be more successfully spread, reported on and developed across the sector.

There are many factors that are continuing to impact on innovation in the ADR sector. Innovation will continue to be responsive to social, economic and political changes that in turn respond or shape changes in dispute patterns. Developments in science and enhanced understandings about human and organisational behaviour and cultures will continue to shape and influence the interventions, skills and processes that are used in ADR. However, perhaps the most significant innovation areas result from rapid technological change, which will not only support considerable innovation in ADR processes, but also has the capacity to reshape systemic approaches to ADR through more effective understanding and knowledge sharing.

Impact of new technologies

Technology is having, and will continue to have, a significant impact on ADR innovation across the justice system. These impacts are difficult to measure. In some circumstances, they can affect the substance of disputes. For example, on one hand, technology has often increased (rather than decreased) the documentation and material used by those involved in disputes. On the other hand, technology has the capacity to reduce the time involved in dispute resolution by enabling prompt, more focused and online engagement and better tracking, and by supporting collaborative and innovative processes into the future.

Given the geographical limitations and remote access issues that can arise in a vast and relatively sparsely populated country such as Australia, and the reality that disputes can include international, national and local interaction, it is likely that supported technological solutions will exert a significant influence on the ADR system into the future. In addition, the ‘digital divide’ issues that existed in the past are decreasing as simpler technologies have evolved and as internet access has increased across communities. Each of these factors, coupled with growing technological competencies and preferences, means that technological impacts are likely to be even more relevant into the future.

Changing process technology

Online dispute resolution (ODR) has grown significantly in the past decade in Australia and overseas.[9] ODR is 'dispute resolution processes [that are] conducted with the assistance of information and communications technology, particularly the Internet'.[10]

Internet access to Australian households increased to more than 73% in 2010 and 2011.[11] Internet access tends to be higher in households with children. Comprehensive recent research on internet usage in Australia shows that, despite rapid growth in internet use in the Australian community, there are still some minority groups within the community who have limited or no access to this technology. These groups include homemakers, older people, people with less education and lower-income individuals.[12] Also, families in rural households are less likely to have internet usage than those living in capital cities (81.8% outside capital cities compared to 89.6% living in capital cities).[13]

Many commentators suggest that ODR has the potential to broaden the range and reach of existing dispute resolution services:

> *'Compared to the costs of litigation or even prolonged alternative dispute resolution, the investment in online technologies is potentially both value adding and cost saving.'*[14]

Online options can include those that replicate face-to-face interactions in online settings (discussed further below) or may include new technologies that provide negotiation support, indicative outcome information and advice. Bellucci, Macfarlane and Zeleznikow suggest that, in the Australian context, 'computers can help negotiation by providing quick and easily accessible decision support'.[15] In this way, technology can play an increasing role in some forms of dispute resolution (particularly in the family area) and support faster negotiations and dispute resolution with the development of online negotiation support systems:[16]

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9 T. Sourdin and C. Liyanage, 'The Promise and Reality of Online Dispute Resolution in Australia' in M. S. A. Wahab, M. E. Katsh and D. Rainey (eds), *Online Dispute Resolution: Theory and Practice — A Treatise in Technology and Dispute Resolution* (Eleven International Publishing, The Hague, 2011), p. 457.

10 M. Conley Tyler and M. McPherson, 'Online Dispute Resolution and Family Disputes' (2006) 12 *Journal of Family Studies* 1 at 5.

11 See http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8146.0Media%20Release12010-11?opendocument&tabname=Summary&prodno=8146.0&issue=2010-11&num=&view= (accessed 12 September 2013).

12 S. Ewing and J. Thomas, *CCi Digital Futures 2012: The Internet in Australia* (ARC Centre for Excellence for Creative Industries and Innovation, 2012), v, available at http://apo.org.au/research/cci-digital-futures-2012-internet-australia (accessed 23 September 2013).

13 S. Ewing and J. Thomas, *CCi Digital Futures 2012: The Internet in Australia* (ARC Centre for Excellence for Creative Industries and Innovation, 2012), 3, available at http://apo.org.au/research/cci-digital-futures-2012-internet-australia (accessed 23 September 2013).

14 E. Bellucci, D. Macfarlane and J. Zeleznikow, 'How Information Technology Can Support Family Law and Mediation' in W. Abramowicz, R. Tolksdorf and K.Węcel (eds), *Business Information Systems 2010 Workshops* (Springer-Verlag, Berlin, 2010), pp. 243, 252.

15 E. Bellucci, D. Macfarlane and J. Zeleznikow, 'How Information Technology Can Support Family Law and Mediation' in W. Abramowicz, R. Tolksdorf and K. Węcel (eds), *Business Information Systems 2010 Workshops* (Springer-Verlag, Berlin, 2010), pp. 243, 243.

16 T. Sourdin, *Alternative Dispute Resolution* 4th ed (Thomson Reuters, Sydney, 2012).

> *'Many negotiation support systems such as AdjustedWinner, Smartsettle and FamilyWinner use bargaining and game theory to provide win-win solutions to participants in disputes. Adjusted Winner and SmartSettle can be used to provide negotiation advice, whereas Split-Up, Family-Winner and Asset Divider … focus upon decision support for negotiation.'* [17]

In Australia, the area of family law has seen widespread growth in the application of ODR in the telephone and internet-based conferencing technologies. In discussing the statistical trends of this growth, Bilinsky notes that:

> *'… most family/divorce/access/support issues take place in families where the age of the parties are often under 35. This demographic group is familiar with technology as well as having access to technology. Given the large geographic challenges faced in Australia, this factor alone is driving the use of this system.'* [18]

In the family area, many disputes are now dealt with through the Family Relationship Advice Line, Telephone Dispute Resolution Service and increasingly across Australia through video-conferencing (Skype or purpose built). These options are particularly suited to disputants who may be geographically isolated from services or one another and also in circumstances where family violence may be an issue. Some issues about the increased use of technology include concerns about privacy, confidentiality, ease of use and the impact of reduced face-to-face interaction.

The most comprehensive and recent study of the use of technology in the FDR area was undertaken by Relationships Australia in 2011, which evaluated an online FDR (**OFDR**) project funded by the Commonwealth Attorney-General's Department.[19] The Relationships Australia report found that there were very high rates of satisfaction with the OFDR services that were set up as part of the project in Queensland. Their research suggests that many factors support the use of effective OFDR, including:

- the type of technology – the ease of use, reliability, accessibility and staff assistance (help desk and like supports);
- the skills and experience of staff; and
- the training given to staff.[20]

17 E. Wilson-Evered, D. Macfarlane, J. Zeleznikow and M. Thomson, 'Towards an Online Family Dispute Resolution Service in Australia' (Paper, 9th Forum on New Technologies of Information and Communication Applied to Conflict, Buenos Aires, 2–3 June 2010), 4–5, available at http://www.odrandconsumers2010.org/wp-content/uploads/2010/06/3.2-Wilson_Towards_Online-1.pdf (accessed 12 September 2013).

18 D. Bilinsky, *Report from the ODR Conference in Buenos Aires* (ODR and Consumers 2010, 3 June 2010), available at http://www.odrandconsumers2010.org/2010/06/03/report-from-the-odr-conference-in-buenos-aires (accessed 18 September 2011).

19 Relationships Australia, *Development and Evaluation of On Line Family Dispute Resolution Capabilities* (Relationships Australia, 2011).

20 Relationships Australia, *Development and Evaluation of On Line Family Dispute Resolution Capabilities* (Relationships Australia, 2011), pp. 150–187.

Other technology that supports disputants in this area includes 'supportive service technology', such as that offered by Anglicare in Tasmania where e-counselling is provided to clients in the remote north-west of that state.[21] Real-time counselling is provided online using software developed by Anglicare. Partnerships have been developed with local community organisations that allow clients to use their computer facilities for counselling sessions.[22]

There are numerous examples of dispute resolution in the consumer sector that are conducted completely online. One of the largest commercial operators in this area is Modria.[23] These systems, which mainly deal with consumer disputes and specialise in large-scale operations, have dealt with more than 400,000 disputes. The eBay and PayPal online systems deal with approximately 60 million matters per year.[24] These systems are expanding rapidly, particularly in Europe following the establishment of the European Union ODR regulations (which will become fully operational in 2015). The regulations have already been set up in some European countries and deal with consumer disputes.[25]

In areas beyond consumer dispute resolution there has been less growth in fully online options. The integration of these online systems with mediation, advisory ADR and determinative forms of ADR will change the ADR system into the future. They will support integrated intake systems and tracking and reshape process use.

There is some growing convergence between these online systems and court and tribunal systems outside Australia. For example, in British Columbia in Canada, a new Civil Dispute Tribunal is intended to operate using an online platform so that disputants will make initial contact and commence proceedings through an online format.[26] It is intended that processes used by the Tribunal will be mainly online, at least initially.[27] Online-supported negotiation and supported online dispute resolution are features of the system, together with adjudication, with most cases decided '… on evidence and arguments submitted through the tribunal's online tools. However, when necessary, the adjudicator will have discretion to conduct a telephone or video hearing.'[28]

In Ireland, the Northern Ireland Courts and Tribunals Service now offers an online process in respect of small claims. A specialised Civil Processing Centre operates according to time-based and other rules to make orders, although final adjudication remains a face-to-face option.[29]

21 H. Brookes and T. Smith, 'Servicing rural and remote communities through e-counselling' (2010) 16 *Family Relationships Quarterly: The Newsletter Of The Australian Family Relationships Clearinghouse* 14, available at http://www.aifs.gov.au/afrc/pubs/newsletter/frq016/index.html (accessed 23 September 2013).

22 H. Brookes and T. Smith, 'Servicing rural and remote communities through e-counselling' (2010) 16 *Family Relationships Quarterly: The Newsletter Of The Australian Family Relationships Clearinghouse* 14 at 15–16, available at http://www.aifs.gov.au/afrc/pubs/newsletter/frq016/index.html (accessed 23 September 2013).

23 See https://www.modria.com/ (accessed 12 September 2013).

24 See https://www.modria.com/ (accessed 12 September 2013).

25 See a discussion of these developments at http://www.infolaw.co.uk/newsletter/2013/01/online-dispute-resolution/ (accessed 12 September 2013).

26 http://www.ag.gov.bc.ca/legislation/civil-resolution-tribunal-act/ (accessed 12 September 2013).

27 http://www2.news.gov.bc.ca/news_releases_2009-2013/2012JAG0068-000600.htm (accessed 13 September 2013).

28 See http://www.ag.gov.bc.ca/legislation/civil-resolution-tribunal-act/pdfs/CRT-Business-Model.pdf (accessed 13 September 2013).

29 See http://www.courtsni.gov.uk/SiteCollectionDocuments/Northern%20Ireland%20Courts%20Gallery/Online%20Services%20User%20Guides/Small%20Claims%20Online%20User%20Guide.pdf (accessed 13 September 2013).

Those within the litigation system have noted that technology changes have the potential to dramatically transform the way in which dispute resolution is carried out.[30] Within the court system, e-callovers,[31] e-filing,[32] video conferencing and applications[33] are now commonplace in many jurisdictions.[34] Technology courts, virtual courts or cyber courts now exist in many jurisdictions, and the presence of such initiatives may produce more participatory court processes as well as better communication and document management. Other changes have occurred in the handling, collation and storage of information and in the way that research occurs. The information available online increases access to court systems and can assist parties to observe and understand what takes place within the court system.

While many technology and virtual courts do not necessarily support online and ADR processes, some do. Some envision that this will become an increasingly important way to deliver ADR services to the community. The Federal Court of Australia, for example, began developing the eCourtroom forum as early as 2001.[35] It consists of an online courtroom that is integrated with an eLodgment system.[36] The eCourtroom forum 'is a virtual courtroom that assists in interlocutory matters and allows for directions and other orders to be made online'.[37] It can also be used in mediation to assist with case management, and includes messaging and other services. The eCourtroom enables updated online conversations to take place, and protocols have been developed to assist users and the court. These newer technologies can reduce delays by supporting earlier resolution, faster exchange of documentation and more rapid communication.

At present, outside systems that have clear structural elements (courts, tribunals and EDR schemes) where private ADR practitioners operate there remains limited interaction with these newer technologies. However, over the next decade this will change as the technological advances support cheaper and more reliable referral networks and pathways.

30 Australian Law Reform Commission (ALRC), Review of the Adversarial System of Litigation. Technology –What it Means for Federal Dispute Resolution, *Issues Paper 23* (ALRC, Canberra, 1998), available at http://www.austlii.edu.au/au/other/alrc/publications/issues/23/ALRCIP23.html (accessed 23 September 2013).

31 For example, New South Wales Land and Environment Court.

32 For example, Federal Court of Australia.

33 Bail applications are commonly carried out by video in the Supreme Court of New South Wales.

34 See http://www.judiciary.gov.hk/en/crt_services/tech_crt.htm (accessed 13 September 2013).

35 See http://www.fedcourt.gov.au/ecourt/ecourt_slide.html (accessed 30 May 2011); see Justice B. Tamberlin, 'Online dispute resolution and the courts' (Paper presented to the United Nations Third Annual Forum on Online Dispute Resolution, held in Melbourne on 5–6 July 2004), note 14, available at http://www.odr.info/unforum2004/tamberlin.htm.

36 See http://www.fedcourt.gov.au/online-services/ecourtroom (accessed 13 September 2013).

37 Justice B. Tamberlin, 'Online dispute resolution and the courts' (Paper presented to the United Nations Third Annual Forum on Online Dispute Resolution, held in Melbourne on 5–6 July 2004), note 14, available at http://www.odr.info/unforum2004/tamberlin.htm.

New styles of interaction

Information technology can provide opportunities to facilitate communication and so assist in prevention and management of disputes to provide information to parties and to complement, or substitute for, traditional face-to-face interventions.[38] Outside the courts, there has been extensive work in this area. For example, Consumer Affairs Victoria (CAV) provides a partial ODR environment. Not only does it provide full support packages for those involved in consumer disputes, but also provides for lodging of complaints in an online environment.[39] As with some other schemes, CAV uses technology to maintain contact with consumers. CAV's 2009–10 Annual Report noted:

> *'In May, Consumer Affairs Victoria launched on Twitter. We now tweet court outcomes, consumer alerts, media releases, advice and tips to help consumers, traders and industry. Twitter enables us to disseminate information quickly and connect with some target markets that were traditionally hard to reach.'*[40]

Technology is changing the way in which disputes progress through the justice system. For example, newer 'cloud' technology has the potential to enable all participants in a dispute as registries to have instant access to all of the information relevant to a dispute. Disputants can provide instant links to websites where documents may be held via clusters of interested parties in secured groups on the internet.

Newer communication approaches have the potential to overtake the limitations of email and offer new collaborative styles and processes. Together with online meeting facilities, the interactions that have traditionally slowed down capacity to respond 'on time' can now be instantaneous. In addition, parties constantly communicating in groups can develop more sophisticated and timely solutions to process issues as well as the final outcome of the case. Creating rules around these interactions to ensure that due process is followed will be the new challenge for justice agencies. Many Australian ADR environments now use Facebook, Twitter and YouTube to engage with businesses, consumers and stakeholders about dispute resolution and to support dispute avoidance and self-managed negotiation strategies.[41]

In addition, technology is already replacing some court and dispute resolution processes. Networking sites and social media may offer a new source of accountability in ADR and pose challenges in the context of confidentiality. In the business sector, various sites now exist whereby people actively monitor

38 National Alternative Dispute Resolution Advisory Council (NADRAC), Dispute Resolution and Information Technology Principles for Good Practice (Draft) (2002), 2, available at http://www.nadrac.gov.au/publications/PublicationsByDate/Documents/Dispute%20Resolution%20and%20Information%20Technology%20-%20Principles%20for%20Good%20Practice.pdf (accessed 13 September 2013).

39 See Consumer Affairs Victoria, 'Make a complaint', available at http://www.consumer.vic.gov.au/contact-us/make-a-complaint (accessed 13 September 2013).

40 Consumers Affairs Victoria, Informed Consumers. Responsible Traders, *Annual Report* (2009–10), 40, available at http://annualreport.consumer.vic.gov.au/previous-annual-reports/pdf/CAV-Annual-Report-2009-2010.pdf (accessed 13 September 2013).

41 http://gov2.net.au/blog/2009/12/31/guest-post-the-victorian-department-of-justice-and-web-2-0/#more-1750 (accessed 13 September 2013).

responsiveness and posit solutions to improve service.[42] The issue will be how best to engage with these emerging and pervasive critics as well as with more constructive commentators.

In the quest to find innovative approaches to ADR that use information technology to streamline processes, an important area for development will be improving systematic collection of data regarding the quality of processes.[43] New technology presents a range of challenges for the ADR area and those practitioners who may not be 'tech savvy' or who wish to focus on the human interaction.

Impact on dispute management

At the most basic level, technology is having an impact on dispute management and reporting. Progress is being made on the legislative front to recognise and facilitate electronic processes as being essential to the courts. For instance, in Western Australia, the Courts and Tribunals (Electronic Processes Facilitation) Bill 2013 was introduced in September 2013. According to the explanatory memorandum, the purpose of the Bill is to provide courts and tribunals with broad, overarching powers to carry out processes electronically where appropriate and mandate that, where a document is in electronic form or a process is to be performed electronically, it will be afforded the same legal status as anything in paper form or carried out using a paper process.[44] These initiatives, coupled with robust e-filing frameworks, are intended to promote more rapid processing and exchange of material.

Some courts and tribunals are using technology in different ways to expand the range of options available to support more collaborative workspaces. The Administrative Appeals Tribunal and the Federal Court of Australia are both active in this area as an extension of existing e-court facilities. As noted in the *Self-Represented Litigants* report[45] by the Australian Centre for Justice Innovation in 2012, these technologies have the capacity to produce higher-quality analytical data about the passage of disputes in the litigation system. They may also present and enable more demographic information to allow for a better understanding of the needs and issues of disputants.

These types of approaches are also present in the EDR system where electronic filing and case management is now commonplace. In the private ADR practitioner area, it is, however, rare for disputes to be tracked or for systems to be used that promote the online exchange of information (other than via email or dropbox systems).

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42 For example, the Social Media Centre used by the National Australia Bank (NAB) in Melbourne: see http://www.zdnet.com/au/nab-launches-social-media-centre-in-melbourne-7000008196/ (accessed 13 September 2013).

43 One such system being the Integrated Courts Management System (ICMS), proposed in 2008 by the Department of Justice, and which is currently on hold. Information about this is available at http://www.audit.vic.gov.au/reports__publications/reports_by_year/2009/20090610_icms.aspx (accessed 13 September 2013).

44 *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* WA, available at http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3910615cf138f8f86c01948548257be4000c94a0/$file/tp-615.pdf (accessed 17 September 2013).

45 See E. Richardson, T. Sourdin and N. Wallace, *Self-Represented Litigants: Literature Review and Research* (ACJI, Monash University, Melbourne, November 2012), available at http://www.civiljustice.info/ (accessed 24 September 2013).

Using big data

Some innovation in the use of technology in the justice system has recently focused on finding ways of accessing what is known as 'big data'. The inferential techniques being used on big data can offer great insight into many complicated issues, in many instances with remarkable accuracy. The quality of business decision-making, government administration, scientific research and much else can potentially be improved by analysing data in better ways.[46]

Researchers at the Hague Institute for the Internationalisation of Law studying big data's impact on the justice environment have noted that these benefits are generally not being realised:

> *'For most justice systems, the goal of court information systems is to get accurate statistics about workloads, disposition times, sentence rates, appeal and reversal rates, etc. However, our research indicates that existing court IT and organisational tools and mechanisms have limited capacity to extract valuable knowledge and insights from massive data sets.'*[47]

Ingo Keilitz, an expert consulting with justice institutions throughout the world on measuring and improving their performance, offers the following example of how big data could affect court administration issues such as court consolidation:

> *'For example, court location data could be compared against a number of public databases with information from inside and outside the justice system including Zip codes, populations, demographics of the population (race, age, disability), travel times between locations, numbers and types of cases heard by different courts, levels of courts, and availability of public transportation.'*[48]

The result of this analysis would support the more targeted delivery of ADR and support services and enable better understandings to emerge about how and what ADR interventions might be more effective. It is also possible that big data will support more sophisticated measuring in respect of effectiveness. In various forms of dispute resolution, computer-assisted document coding and review (often referred to as 'predictive coding')[49] for the analysis of large sets of data is likely to have a game-changing impact on ADR. The technology collapses the time (and costs) needed to review millions of pages of discovered

46 D. Bollier, 'The Promise and Peril of Big Data' (2010) *The Aspen Institute 2*, available at http://india.emc.com/collateral/analyst-reports/10334-ar-promise-peril-of-big-data.pdf (accessed 14 September 2013).

47 G. Lim, 'Courts and big data' (2013), available at http://www.innovatingjustice.com/blogs/big-data (accessed 14 September 2013).

48 I. Keilitz, 'The Courts' Big Data: What If Only?' (2013), available at http://made2measure.blogspot.nl/2012/11/big-data-data-analytics-and-access-to.html (accessed 14 September 2013).

49 M. Tamburro, 'The Future of Predictive Coding – Rise of the Evidentiary Expert' *Findlaw* (website) (25 July 2012), available at http://technology.findlaw.com/electronic-discovery/the-future-of-predictive-coding-rise-of-the-evidentiary-expert-.html (accessed 13 September 2013).

material, to identify relevant aspects without devoting massively costly person hours.[50] Other, less sophisticated technologies exist that can organise files to simplify and reduce the time necessary to review and analyse files.[51]

Conclusions

At present, innovation across the ADR sector can be ad hoc and may not be shared or understood across the sector. This remains a significant issue into the future as ADR continues to develop across myriad dispute areas and given the diversity in ADR processes and practice approaches. One significant issue for the industry that requires a concerted sharing of information (and may support further innovation) is related to technology and the impact it will have on this sector.

There areas in which technology is currently impacting on innovation in the ADR system can be summarised as follows:

- **Changing process technology**. This includes using technology as a medium to 'support or supplant' existing processes (for example, through the use of video and Skype conferencing) to replace steps or stages in dispute resolution with basic artificial intelligence solutions and online dispute resolution.
- **Using technology to change styles of interaction**. In particular, using more collaborative 'working together' techniques to prepare documents, manage tasks and disputes and provide more support and referral avenues for disputants.
- **Improving case management, reporting and data collection**. This can take place through the use of disputant-focused (rather than service-focused) inputs and through efficient tracking technologies.
- **Using data in different ways**. This can be either as 'big data' [52] to link dispute criteria and data fields or to map and promote transparency and comparability. This development is also coupled with a growth in social media and internet use that promotes the spreading of information and the exchange of views among disputants.

50 J. Markoff, 'Armies of Expansive Lawyers, Replaced by Cheaper Software', *The New York Times* (online) (4 March 2011), available at http://www.nytimes.com/2011/03/05/science/05legal.html?_r=0 (accessed 13 September 2013).

51 Stratify, 'Stratify Legal Discovery 6.0 Service Expands Discovery Capabilities and Increases Attorney' *Findlaw* (website), available at http://technology.findlaw.com/electronic-discovery/stratify-legal-discovery-6-0-service-expands-discovery.html (accessed 13 September 2013).

52 The term 'big data' is used to describe big and complex data-sets that are hard to use, difficult to report on, search, share or analyse. Many courts and tribunals have data-sets that are cumbersome and require specially written programs to enable analysis about timeliness issues to take place. This big data can, however, reveal much about timeliness, particularly if it can be linked or if it can be managed in a way that enables analysis to take place. For big data to be useful into the future, some common data definitions are necessary and common variables need to be collected.

There are, however, issues about how technology can be integrated and used effectively in the ADR system, and, more particularly, with ADR practitioners who operate with bespoke systems or in courts and tribunals that operate 'legacy' systems with content management features that make it difficult to add and support more sophisticated systems. In addition, filing systems remain paper-based in many areas, and there are cultures operating within and outside the ADR system that may find it difficult to adapt to newer technologies. Nonetheless, these newer technologies have the capacity to change ADR approaches by supporting the exchange of material, enabling prompt exchanges to take place, ensuring that data is relevant and produced in a way that encourages sophisticated planning responses and by creating more innovative processes that enhance access to and greater understanding of ADR processes and systems.

How might culture impact on communication and negotiation during commercial mediation?

John Morhall[1]

Introduction – What is culture?

There are probably more definitions of what culture is than there are varieties of cultures which permeate modern society. Nevertheless, there are certain inherent aspects of culture which are constant. CARLA[2] defines culture as 'shared patterns of behaviors and interactions, cognitive constructs, and affective understanding that are learned through a process of socialization' which 'identify the members of a cultural group while also distinguishing those of another group'. In essence, culture is those shared behaviours which influence our social interactions, learning and understanding within a social group which distinguishes them from other groups. Hofstede[3] succinctly defined culture as 'the collective programming of the mind which distinguishes the members of one category of people from another'.

Culture is a group construct which influences the mind, the thinking patterns which determine how we speak, what we hear and how we act: in short, the ways in which we communicate. Storti[4] states that 'communication is one of the most common of all human behaviours'. It is important to understand what we mean by 'communication'. Adler[5] and Gibson[6] separately both define communication as an 'exchange of meaning'. It is a complex, multi-layered process, dependent upon the perception of the recipient as well as the intent of the donor. It involves the interpretation of what is said, how it is said and the accompanying framework of body language in which it is set.

Mediation

It is useful to consider the contrast of cultures within the context of mediation: a process in which a neutral person, the mediator, seeks to assist disputing parties reach a mutually-acceptable resolution of the matters in dispute. Thus, where the parties are of different cultures, it is clear that this will inform their thinking patterns, communication expressions and behaviours. It will influence what they value and what their expectations might be. This is particularly important in times of high stress, such as a

1 John Morhall Sc. Eng. (Hons), LLB (Hons), LLM, PGC Arb, PGD Int. Arb, CEng., CPEng. General Counsel Sakari Resources Ltd, Singapore.

2 Centre for Advanced Learning on Language Acquisition (CARLA), University of Minneapolis. At <www.carla.umn.edu/culture/definitions/html> at 12 October 2012.

3 Hofstede Geert. *National Cultures and Corporate Cultures* (1984). In: LA Samovar and R.E. Porter (Eds.) *Communication Between Cultures.*

4 Craig Storti, *The Art of Crossing Cultures*, (1999) at page 87.

5 Nancy J Adler, Allison Gundersen, *International Dimensions of Organisational Behaviour* (1999) at page 68.

6 Robert Gibson, *Intercultural Business communication: An introduction to the theory and practice of intercultural business communication for teachers, language trainers, and business people* (2002) at page 18.

commercial business dispute, where corporate survival or reputations might be at stake. Culture sets the framework for communication, and perhaps expectations, across the wide range of transactions and interactions: what a party might hear, understand or not understand, and their expectations of outcomes. Within the context of mediated dispute resolution, understanding the impact of culture on communication and negotiation is the key to allowing the parties to resolve the dispute on mutually-acceptable terms.

Culture – the East–West divide

There are several factors which influence our perceptions and understandings of cultures. Much has been written on the differences between Eastern and Western cultures. There is a tendency in much of the literature to equate Eastern culture to Chinese culture, and to presume that it is the same for cultures such as Japanese, Korean, Taiwanese or perhaps Vietnamese. These distinctions might be broadly correct, but it needs to be borne in mind that within these two broad definitions there are distinctive differences. Macduff points out, citing Cogan, that within French culture there is a marked preference for a high-context Eastern model, with elliptical references, and selection of the right moment, for comment.[7] In societies such as in Singapore it is not uncommon to find Western-educated familial Chinese executives, imbued with a mélange of both Eastern and Western cultures. Although modern structured mediative processes are essentially a Western construct,[8] mediation has long been a part of Eastern culture.[9]

Eastern, high-context cultures

Cultural distinctions

There are distinct differences between Eastern cultures, but they have a common root in Confucian values and traditions and, perhaps to a lesser extent, in Daoist and Buddhist traditions. Dryburgh notes that 'the Confucian canon in China did much to shape the mental landscape of the ruling classes … demonstrated proper and improper behaviour'.[10] Chinese culture in particular is shaped by the core values of Confucianism: the importance and value of the family, education, and public service,[11] within a framework of established hierarchical and personal relationships (*guānxi*).[12] Hence in Chinese business culture the key focus is on the development of personal relationships or mutual obligations.

Chinese culture using Edward T. Hall's[13] constructs is a high-context culture which reflects its genesis in the Confucian focus on family. Accordingly, in a familial context communication may involve covert and implicit messages with much non-verbal communication, reflecting strong people bonds. Non-verbal

7 Ian Macduff, '*Contradiction and Conflict: High and low- Context Communication in Mediation*' (unpublished work), citing Charles Cogan, French Negotiating Behaviour: *Dealing with La Grande Nation*, (2003) Washington DC, USIP.

8 Modern structured mediation started in California about 30 years ago whereas it has been practised in China for over 5,000 years.

9 See Goh Joon Seng, *Mediation in Singapore: the Law and Practice* (2006) Asian Law Association. At <www.aseanlawassociation.org/docs/w4_sing2.pdf> 16th October 2012.

10 Marjorie Dryburgh, *Foundations of Chinese Identity*, in Xiaowei Zang (Ed.) *Understanding Chinese Society* (2011) at page 12.

11 Ibid.

12 Mandarin Chinese: 'connection'.

13 Edward T. Hall, *Beyond Culture* (1976).

communication is a vital element of communication, allowing comprehension where there is ambiguity or a lack of understanding of verbal messages; non-verbal communication may provide the real message which is intended to be delivered. High-context cultures like those of the East rely heavily on non-verbal messages delivered through gestures, posture, the use of silence, spatial relationships and emotional expressions. Nodding one's head in assent – a common Western gesture – may mean nothing or imply dissent in the East, thus it is important to use one's eyes as well as one's ears to understand the messages being conveyed. McFadden[14] notes that only 7% of the content of spoken words cause a reaction, and 38% of the pitch, tone or pace of the delivery cause a reaction, but 55% of recipients will be influenced by the body language: the gestures and appearance of the person delivering the message, essentially categorising the nature of the message itself.

Familial relationships

High-context cultures have a commitment to long-term relationships, reserved inward reactions and personal acceptance of failure. Their sense of time is polychronic: it is open and flexible, wherein the process is more important than the outcome and the journey more important than the destination. For example, within a high-context culture, a business contract reflects the familial nature of the cultural basis: it is based on mutual understanding wherein it is not necessary to write everything down as trust is a vital component of the relationship and the contract itself is like a memorandum of understanding, capable of future change as circumstances might dictate.[15] Thus, in a high-context culture, what is not said is often as significant as what is said, as there is a fundamental reliance on trust and relationship as key drivers in any contractual engagement.

Face

Face is an important part of high-context Eastern cultures. It is defined in many ways. Novinger describes it as 'the value or standing of a person in the eyes of others … that relates to pride or self-respect'.[16] It reflects status or standing within a relationship and is an essential part of any communication or negotiation. An insult (whether intentional or unintentional), a loss of temper, an intemperate expression or a sign of impatience can be devastating to a negotiation. There is an implicit loss of face from insult or anger and the recipient's standing in their community may be lowered. Face has no direct counterpart in Western cultures but is a significant part of Eastern cultures. Giving and maintaining face may thus be vital to any successful outcome in communication or negotiation with the East. Loss of face may build an impregnable barrier to further reasoning or concession. In communication and negotiation it is essential to minimise any loss of face.

Deference

Deference in Eastern cultures derives from familial piety and the existence of a high-power distance demanding respect. Age also requires respect, and an older person will be accorded deference due to

14 Danny McFadden, *CEDR Mediation Notes* (2012) Presentation to SMU LLM October 2012

15 John Hooker, *Cultural Differences in Business Communication* (2008), at page 2; at <www.ba.gsia.cmu.edu/jnh/businesscommunication.pdf> at 10 October 2012.

16 Tracy Novinger, *Intercultural Communication*, (2001) University of Texas Press, at page 84.

their age and implied experience. Seeking to avoid embarrassing superiors or elders is essential. Deference is also shown by way of posture and greetings. The Japanese *meishi* (business card) ceremony is a universal basis for deference and acknowledgement: the donor offers his card with both hands for the recipient to receive, the recipient then acknowledges its receipt and reads it, usually with positive comment on the implied titular success of the donor. A junior individual offers his card at a lower level to that of their senior. Within the context of mediation deference is important to avoid unnecessary offence and costs nothing but a little pride. Understanding and giving recognition and deference to positional authority may yield inestimable benefit in moving to agreement.

Western, low-context cultures

Just as Eastern cultures derive much of their roots from Confucianism, Western cultures derive their bases in the Judaeo-Christian ethic. Western low-context cultures include most cultures with Western European roots: most of Europe, the United States and Australia. Western cultures leave little to be unsaid and the 'spoken word carries most of the meaning'.[17] Within most Western cultures negotiations are undertaken much as a game, where winning is the major objective; hence, attitudes can be confrontational. This is the antithesis of the relationship-driven, low-content style of the East. High-context cultures may eschew detailed forms of contract, as being antithetical to an implicit familial trust; low-context Western cultures, imbued with the Judaeo-Christian ethic, seek detailed express forms of contracts which have their roots embedded within the ethic itself. Many forms of contractual agreement and torts stem from the biblical Old Testament, such as the Decalogue.[18] Western contracts are inflexible, containing express terms and considerations such as 'time is of the essence' which reflects a linear commutative concept of time.

Whereas Eastern cultures utilise deductive reasoning and will go from a general proposition to a specific view derived from the general, Western culture is based on induction and reasoning travels from the specific to the general. This distinction causes Western cultures to analyse and decompose generalities into their component parts, rather than the reverse, integrative approach of the East. In negotiation Western cultures tend to be direct, confident and decisive, and aware of their rights. Negotiations are often driven by sole individuals seeking to win for themselves; in contrast with the Eastern cultures, where consensus is important and deliberation may take time to reach a consensus. What is said is of great consequence and there is often little subtlety in the message delivery, with open body language directly conveying emotions. Messages are clearly and succinctly delivered in a confident assertive manner, with little left to interpretation from non-verbal metaphors.

17 Craig Storti, *The Art of Crossing Cultures*, (1999) at page 92.

18 The Decalogue is the Ten Commandments: an express contract. See also for example: Exodus Chapters 21, and 22, which outline express forms of contract for freeing slaves, and debtor-creditor relations. A more detailed reference on this is: Richard H. Hiers, *Ancient Laws, Yet Strangely Modern: Biblical Contract and tort Jurisprudence*, (2011) University of Detroit Mercy Law Review, Vol 88.473, at page 473 et seq.

The impact of cultural differences on communication and negotiation in mediation

Current mediation is a staged process and successive stages can be used to examine the influence of these two dominant cultures within the mediation process itself. These stages may be considered to be preparation, opening, exploration, bargaining and conclusion.[19]

Preparation

During this phase, the mediator will start to develop an understanding of the facts surrounding the matter, analyse the issues and preliminarily determine the parties' strengths and weaknesses. He[20] may formulate what he believes will be the arguments submitted by either side. Importantly, in a cross-cultural mediation the mediator will try to determine who the attendees might be and their roles, since ultimately the outcome will rely on their abilities to come to a mutually-acceptable agreement. In light of this, the mediator will also need to consider what style might be adopted in the mediation: that of a facilitator, avoiding comment or opinion but getting the parties through a process of continuous re-evaluation to move to 'yes',[21] or a transformative approach to bring the parties to agreement. Although planning lacks the dynamic of the mediation itself, it is essential precursor for consideration of available options based on the facts. The mediator will also focus on being able to interpret the anticipated different cultural styles of the parties.

Opening

The opening is critical, as it sets the scene for what follows in terms of gauging the parties' reactions to each other and to the dispute itself. The seating arrangement will be crucial in determining how the parties react. Establishing an appropriate seating arrangement is crucial to ensure that it fosters dialogue and the mediator is able to observe the parties' body languages,[22] dress and eye contact, and manner in which they address each other. What they say and the tones and phrases used and their expression of emotions may indicate what they think about each other. By observation, the mediator may establish who the true decision makers are and their level of their authority. The opening is critical in setting the scene.

The mediator will also need to be able to address the contrasting styles of the lawyers. Western-trained lawyers or participants may focus on their rights or on the law and merits of their case, making express demands, perhaps loudly and forcefully.[23] In contrast, Eastern-trained lawyers and their clients may say little or stay silent, perhaps implying suppressed anger. It is vital that the mediator recognises the varying styles of the participants and correctly interprets the underlying emotions. The opening sets the

19 Danny McFadden, *CEDR Mediation Notes* (2012) Presentation to SMU LLM October 2012

20 Whereas I have used 'he' for convenience, it in no way implies a sexist view of mediators as a male preserve.

21 Roger Fisher and William Ury with Bruce Patton, *Getting to Yes* (2011), 3rd Edition.

22 'Body language is a window to the mind', James Borg, *Body Language*, (2011) 2nd Edition, at xxv.

23 Note that Roy Lewicki, David Sunders, and Bruce Barry, *Essentials of Negotiation*,(2011) 5th Edition, at page 244 et seq. state that 'although a little understanding of another culture is clearly better than ignorance, it may not be enough to make effective adjustments to their negotiation strategy'. In any event a change of strategy may not bring about a better outcome.

foundation for what is to follow. Recognition of the styles and cultural influences of the parties is essential but it is important that the mediator remains true to his own particular style, maintaining neutrality and transparency.

Exploration phase

This is the critical phase in which the mediator engages in 'shuttle diplomacy', holding private meetings with each of the parties separately to establish the fundamentals of each party's case, seeking them to perhaps disclose their reasons for the dispute. The mediator's primary objective at this stage is to build trust, hence being aware of the cultural differences and nuances of the parties' expressions, understanding 'the language without words', is essential. Dealing with face within Eastern cultures can be especially important as redressing a perceived slight can be the key to bringing the parties to resolution.

The mediator will need to be aware of the parties' different concepts of time. Western parties tend to be process-driven, seeking to manage achievement of outcomes against a definitive time schedule. By contrast, Eastern parties' concepts of time are different and the time taken to reach an outcome is often unimportant in itself. I became acutely aware of this in the early 1980s in a long negotiation for a petrochemical project in Beijing, when I sought to expedite proceedings by stating that I was booked on a flight the next day and would leave unless a conclusion was reached. My counterpart smiled genially and said nothing, since he knew that at that time the Chinese government with which I was negotiating controlled all flights and decided who would gain seats on those flights. Some years later, meeting again after a successful but much longer negotiation, we smiled at my naivety.

The mediator will need to seek to interpret the gap across the cultures, such that he can represent what each is trying to say and what is important with respect to individual issues under consideration. Active listening and an appropriate use of questions will be essential.

Negotiation and bargaining phase

During this phase, the mediator will challenge each parties' *shibboleths*,[24] exploring their strengths and weaknesses, seeking to bridge the gaps, relying on the trust hopefully established during the exploration phase. The mediator's understanding of what each party is trying to say and what is important is the key to a successful outcome. An understanding of the culture, emotion and negotiating styles and managing the expectations is a key part of the mediator's strategy. Eastern parties may see 'haggling' as a marketplace activity only, whereas Westerners may see it as a triumph. The mediator may need to communicate the differences in cultural norms as a means of bringing the parties closer, perhaps explaining the benefits of an apology in relation to a loss of face (which may be required). Engaging with the parties' lawyers (especially with Western concepts of rights under law) against settlement of the overall interests is vital. Consideration of long-term relationships could be the key to unlocking the cooperation of Eastern cultural parties.

24 Distinguishing customs or usages of a group perhaps void of meaning.

Conclusion of mediation

'It is not over until the fat lady sings'[25] means that until the mediator is able to bring the parties to a final, sustainable, viable, concluding agreement, covering all of the issues and capable of sustaining a future legal challenge, the process is not complete. It is imperative that the agreement is workable and that the parties are satisfied. It is probable that this phase may occur at the end of a very long day and the mediator must ensure, to the extent that he is able, that emotions are kept in check and that gains made in negotiation are not unwound. Monitoring body language will be vital as an Eastern culture party may not verbalise dissent or dissatisfaction. The palpable relief upon signing what will hopefully be a binding and lasting agreement will be evident, with hopefully a few smiles.

Conclusion

Understanding the basis of the cultural differences between East and West is necessary to reach satisfactory and lasting agreements in cross-cultural communication and negotiation, particularly in mediation. The cultural differences may require the mediator to have a 'foot in both camps' in terms of his knowledge and understanding. Earning trust, demonstrating patience and an ability to listen and observe, together with neutrality and cultural knowledge, are essential tools for the mediator to bridge the gap between East and West. The mediator's role to act as a catalyst requires an understanding of cultures, their underpinnings and modes of expression.

Culture is the essence of communication. To understand a culture it is very important to understand the language which defines it and which expresses its nuances and subtleties. Language, above all else, is communication and requires observation and understanding of both verbal and non-verbal messages to reach an understanding of what another might be really saying. Mediation is an arena in which the stark differences between cultures (such as between East and West) are most evident. Recognising these differences is key for communication and, through communication, is valuable when negotiating an agreement. Agreements based on cultural understanding will have a solid foundation, assisting in maintaining their permanence.

25 The expression derives from Wagnerian operas, particularly in the operas of the 'Ring Cycle', where the heroine is usually an amply proportioned soprano who sings the final aria.

Case Note
WTE Co-Generation v RCR Energy

Erin Lewis,[1] Laura Neil[2] and Darren White[3]

Summary

While the decision of the Victorian Supreme Court in *WTE Co-Generation & Anor v RCR Energy Pty Ltd & Anor* [2013] VSC 314 (**WTE Co-Generation v RCR Energy**) has followed recent decisions in finding that courts should construct dispute resolution clauses robustly to give them commercial effect, it nevertheless found that a dispute resolution framed in similar terms to clause 42 of Australian Standard 4000 or 4902 was unenforceable. This was because the dispute resolution process set out in the clause left part of the process to be determined by further agreement between the parties.

As a result of this decision, contracts which include dispute resolution clauses that leave the manner of dispute resolution subject to further agreement, such as the Australian Standard 4000 or 4902, may be unenforceable. These dispute resolution clauses should be amended to avoid having the clause being found unenforceable by a court.

Facts

WTE Co-Generation v RCR Energy concerned a contract for the construction of a co-generation facility which was intended to be fired by paper mill residues. The principal, WTE Co-Generation (**WTE**), issued a notice to the contractor, RCR Energy Pty Ltd (**RCR**), purporting to terminate the contract and commenced court proceedings.

RCR applied to the court to have the proceedings stayed until the parties had complied with clause 42 of the contract. Clause 42 was a dispute resolution clause. It relevantly provided:

> *'**42.2 Conference***
>
> *Within 7 days after receiving a notice of dispute, the parties shall confer at least in the presence of the Superintendent. In the event that the parties have not resolved the dispute then within a further 7 days a senior executive representing each of the parties must meet to attempt to resolve the dispute **or agree on methods of doing so**.*

If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute may be referred to litigation.'

1 Erin Lewis research clerk, McCullough Robertson Lawyers
2 Laura Neil research clerk, McCullough Robertson Lawyers
3 Darren White BA, LLB (Hons); University of Queensland, LLM University of Cambridge and Partner at McCullough Robertson Lawyers

Judgment

Justice Vickery found clause 42.2 to be uncertain and unenforceable and refused to grant the stay in proceeding applied for by RCR.

His Honour considered that, once clause 42 was triggered, the parties were required to either meet and attempt to resolve the dispute or agree on methods for doing so. However, clause 42.2 failed to provide a process to determine which of the two options should be pursued and so it was possible that clause 42.2 could be complied with by meeting and attempting to agree on methods to resolve the dispute without also attempting to resolve the dispute. Given one of the options for complying with clause 42.2 simply required senior executives to agree on methods of resolving the dispute but failed to specify what method was to be adopted, it amounted to an agreement to agree on the dispute resolution process.

Vickery J referred to the judgment of Giles J in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*, who stated that: '*What is enforced is not cooperation and consent but participation in a process from which consent might come*.' Vickery J also considered the statement made by Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd,* that: '*It is for this reason that the process from which consent might come must be sufficiently certain*.' His Honour also noted that in Aiton Australia Pty Ltd v Transfield Pty Ltd, a failure to set out a provision for the apportionment of the mediator's costs meant that the relevant dispute resolution clause was unenforceable due to uncertainty.

His Honour drew a distinction between clause 42 and the dispute resolution clause that was held to be enforceable in *United Group Rail Services v Rail Corporation of New South Wales* [2009] 74 NSWLR 618. In that case, the relevant dispute resolution clause provided that:

> *'... the dispute or difference is to be referred to a senior executive of each of the Principal and the Contractor who must:*
>
> *(c) meet and undertake genuine and good faith negotiations with a view to resolving the disputes or differences; and*
>
> *(d) if they cannot resolve the dispute or difference within fourteen days after the giving of notice...the matter at issue will be referred to the Australia Dispute Centre for Mediation.'*

Vickery J placed heavy emphasis on the words '*or agree on methods of doing so*' in clause 42.2 in distinguishing it from the relevant clause in *United Group Rail Services v Rail Corporation of New South Wales*. Furthermore, the clause in *United Group Rail Services v Rail Corporation of New South Wales* was relatively well defined and stipulated a staged set of procedures required to be strictly observed as necessary preconditions to the right to commenced proceedings.

His Honour also set out a number of principles to guide courts in assessing the certainty of dispute resolution clauses:

- dispute resolution clauses in contracts should be construed robustly to give them commercial effect;
- narrow and pedantic approaches to construction should to avoided; and

- the court does not need 'to *see a set of rules set out in advance by which the agreement, if any, between the parties may in fact be achieved, the process needed not be overly structured. However, the process from which consent might come must be sufficiently certain to be enforceable. A contract which leaves the process or model to be utilized for the dispute resolution ill defined, or the subject* ***of further negotiation and agreement****, will be uncertain and unenforceable*'.

Practical effect of this decision

The decision in WTE Co-Generation v RCR Energy has significant ramifications for contracts which include dispute resolution clauses based upon Australian Standard 4000.

The dispute resolution clause in Australian Standard 4000 relevantly provides that:

> ***'42.2 Conference***
>
> *Within 14 days after receiving a notice of dispute, the parties shall confer at least once to resolve the dispute* ***or to agree on methods of doing so****. ...*
>
> *If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute shall be and is hereby referred to arbitration.'*

Essentially, Vickery J of the Victorian Supreme Court found that the requirement to either resolve the dispute or agree on methods of doing so was unenforceable as it constituted an agreement to agree in two senses. Firstly, whether the parties would attempt to resolve the dispute or agree on methods of doing so. Secondly, what methods would be chosen if the parties agreed on a method of doing so. As Australian Standards 4000 and 4902 incorporate these features, a court following this precedent will likely find this clause invalid.

A critical issue for the dispute resolution clause in Australian Standard 4000 is whether the unenforceability of the requirement to have a meeting in the first paragraph of clause 42.2 also results in the referral of the dispute to arbitration in the second paragraph of clause 42.2 is unenforceable. This was not an issue in WTE Co-Generation v RCR Energy as the relevant clause led to litigation rather than arbitration if the dispute was not resolved.

If courts are to construe dispute resolution clauses '*robustly to give them commercial effect*', as Vickery J found in WTE Co-Generation v RCR Energy, then it may be that the second paragraph of clause 42.2 will be enforceable on the basis that it is not necessarily tainted by the unenforceability of the first paragraph of clause 42.2. This is because the trigger for referral of the dispute to arbitration is the period of time that has elapsed since a notice of dispute was served and is not dependent on whether a conference was held in accordance with the first paragraph of clause 42.2.

> *It should be noted that the dispute resolution clause in Australian Standard 2124 may be distinguishable from clause 42 as different wording is used. It provides that:*
>
> *'Within 14 days after service of a notice of dispute, the parties shall confer at least once, and at the option of either party and provided the Superintendent so agrees, in the presence of the Superintendent, to attempt to resolve the dispute* ***and failing resolution***

> ***of the dispute to explore and if possible agree on methods of resolving the dispute by other means**.'*

Despite the differences in wording, drafters should be aware that it is still arguable that this clause may be unenforceable on the ground that it is uncertain.

Dispute resolution clauses of the kind in WTE Co-Generation v RCR Energy should be amended by removing any reference alluding to attempting to agree on other methods of resolving the dispute to reflect this expression of the law.

Case Note

The Singapore Court of Appeal's decision in the Astro-Lippo Dispute

Tamlyn Mills[1]

Abstract

In PT First Media (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal *[2013] SGCA 57 (**Lippo v Astro**), the Singapore Court of Appeal allowed Lippo's appeal against the decision of the High Court and refused enforcement of certain arbitral awards rendered in favour of Astro. The decision has important ramifications for international commercial arbitration. In particular, the Court's findings in relation to an award debtor's choice of remedies and the joinder of third parties to an arbitration represent an important contribution to the law in this area.*

Introduction

The most recent instalment in the ongoing dispute between the Malaysian Astro Group and the Indonesian Lippo Group, the Singapore Court of Appeal's decision in Lippo v Astro deals with two topical and controversial issues in the field of international commercial arbitration:

- whether an unsuccessful party can resist the enforcement of an arbitral award on the grounds of an alleged lack of jurisdiction of the arbitral tribunal in circumstances where that party did not take up available avenues to challenge the tribunal's finding on jurisdiction at an earlier stage (the **choice of remedies issue**); and
- whether the tribunal had power to join third parties who were strangers to the arbitration agreement under the 2007 SIAC Rules without the consent of all the parties (the forced joinder issue).

Factual Background

The dispute arose out of a joint venture between companies belonging to the Lippo Group (an Indonesian conglomerate) and certain companies within the Astro Group (a Malaysian media group) for the provision of multimedia and television services in Indonesia. The terms of the joint venture were contained in a subscription and shareholders' agreement (**SSA**) which contained an agreement to arbitrate any disputes by arbitration under the auspices of the Singapore International Arbitration Centre (**SIAC**). Certain companies in the Astro Group (the sixth to eighth Respondents in the proceeding) were not parties to the SSA.

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1 Tamlyn Mills is an Associate in the Commercial Advisory and Dispute Resolution Group at Minter Ellison Lawyers. Tamlyn holds a Master of Laws (Distinction) from the London School of Economics and Political Science and a Bachelor of Laws (Honours I) and Bachelor of Arts from the University of Queensland.

When it became clear that the joint venture would not close due to the failure of certain conditions precedent, a dispute arose over the continued funding of the joint venture vehicle. Astro commenced arbitration at the SIAC on 6 October 2008. The seat of the arbitration was Singapore. To overcome the problem that the 6th to 8th Respondents were not parties to the SSA, Astro stated in their Notice of Arbitration that the 6th to 8th Respondents had consented to being added as parties to the Arbitration and filed, at the same time, an application to join the 6th to 8th Respondents under rule 24(b) of the 2007 SIAC Rules. The joinder application was contested by Lippo. In 2009, the Tribunal rendered an Award on Preliminary Issues in which it held that it had power under rule 24(b) to join the 6th to 8th Respondents as long as they consented and that this power should be exercised. The Tribunal went on to hear the merits of the dispute and subsequently rendered four further awards. The five awards are referred to collectively as 'the Awards'.

Decision of the Singapore High Court

The proceedings began when Astro brought ex parte applications in the Singapore High Court for leave to enforce the Awards. Leave was given and two enforcement orders were served on Lippo in Indonesia. After the time for filing an application to set aside the enforcement orders had expired without any action being taken by Lippo, Astro entered judgments in Singapore on the Awards. Lippo successfully applied to set aside the judgments on the basis that service of the enforcement orders was irregular and was granted leave to seek to set aside the enforcement orders. In 2011, Lippo commenced proceedings to set aside the enforcement orders on the ground, relevantly, that there was never any arbitration agreement between it and the 6th to 8th Respondents.

The High Court dismissed the application without determining the merits, having found in favour of Astro on two threshold issues:

- the grounds raised by Lippo are not recognised as grounds for resisting enforcement of a domestic international award under Singapore's International Arbitration Act (**IAA**); and
- Lippo was precluded from raising the same jurisdictional objections which formed the subject-matter of the Award on Preliminary Issues given that it had not challenged the award as it was entitled to do under Article 16(3) of the Model Law within the prescribed time.

The High Court's decision on the first point turned on its construction of section 3 of the IAA, which provides that the Model Law shall have the force of law in Singapore, *with the exception of Chapter VIII*. Chapter VIII of the Model Law contains Article 36, which sets out the grounds for refusing recognition or enforcement of awards and applies equally to domestic and foreign international awards. On this basis, the High Court held that a domestic international award is either recognised as final and binding and not set aside, or not recognised as final and binding and set aside.

The second point turned to the High Court's interpretation of Article 16(3). In summary, Article 16(3) allows a party to an arbitration to immediately challenge a tribunal's preliminary award on jurisdiction and prescribes a thirty-day time limit. The High Court found that Article 16(3) is a 'one-shot remedy'; once the time limit for bringing a challenge has expired without an application being made the parties lose the ability to subsequently challenge the ruling on jurisdiction, either by way of setting aside application or at the enforcement stage.

Lippo challenged these findings on appeal. Sundaresh Menon CJ delivered the judgment of the Court.

Key Issues

The Singapore Court of Appeal had to determine two threshold questions before it could determine the merits of Lippo's joinder objection:

- whether the courts have a power to refuse enforcement of an award under section 19 of the IAA, and, if so, what the ambit or content of that power is; and
- whether Article 16(3) is a 'one-shot remedy' so that Lippo's failure to challenge the Award on Preliminary Issues precluded it from later raising the joinder objection.

Lippo argued that there is a clear and indelible distinction between 'active' and 'passive' remedies, which is encapsulated in the Model Law's policy of 'choice of remedies'. Parties may take active steps to invalidate an award, for example by challenging a preliminary ruling on jurisdiction under Article 16(3) or applying to set aside an award on the grounds set out in Article 34(1) of the Model Law. However, parties may also choose to passively defend themselves against an award by challenging it at the recognition or enforcement stage. Accordingly, Lippo argued that it was entitled to resist enforcement of the Awards even though it had not actively challenged the Award on Preliminary Issues.

Lippo further argued that section 19 of the IAA, which provides that an award may, by leave of the court, be enforced in Singapore in the same manner as a judgment or order, had to be interpreted as adopting internationally-accepted minimum standards as grounds for refusing recognition and enforcement, notwithstanding the operation of section 3. More specifically, section 3 should not be construed as having the effect of removing the court's power to refuse recognition or enforcement of domestic international awards rendered in Singapore on the grounds stated in Article 36.

On the other hand, Astro argued that there is no general concept of 'choice of remedies' under the Model Law, so a party disaffected by an award must actively attack it as failure to seek an active remedy precludes recourse to a passive remedy. Alternatively, Astro argued that even if there is no general concept of 'choice of remedies' the nature of Article 16(3) is such that all preliminary rulings on jurisdiction must be challenged within the prescribed time limit. Finally, Astro argued that even if Lippo could resist enforcement the grounds on which it could do so are extremely limited. Relying on section 3 of the IAA, Astro asserted that while section 19 of the IAA imports a residual power to resist enforcement on restricted grounds, such as enforcement being contrary to public policy, tainted by corruption or by breach of natural justice, jurisdictional grounds (such as those in Article 36(1) of the Model Law) are unavailable.

Findings Of The Court

The Court's power to refuse enforcement under section 19

Tracing the legislative history of section 19 of the IAA, the Court held that the court's power to refuse enforcement in certain circumstances had not been removed by the enactment of the IAA and was retained under section 19. As to the *content* of this power, the Court began its analysis with the proposition that, given that the primary objective of the IAA is enacting the Model Law in Singapore, Parliament intended that the power to refuse enforcement under section 19 be exercised in a manner which is compatible with the overarching philosophy of the Model Law on the enforcement of awards.

Delving into the *travaux* of the Model Law, the Court concluded that 'choice of remedies' is not just a facet of the Model Law enforcement regime; it is the heart of its entire design:

> *Thus, in our view, the* travaux *make it clear beyond argument that the Model Law provides for the system of 'choice of remedies', and that this system applies equally to both foreign and domestic awards which are treated uniformly under the Model Law. It follows that under the Model Law, parties that do not actively attack a domestic international award remain able to passively rely on defences to enforcement absent any issues of waiver.*[2]

For the Court, maintaining the award debtor's 'choice of remedies' was a key part of the Model Law's attempt to de-emphasise the seat of arbitration and facilitate the uniform treatment of international arbitration awards. The Court went on to find that section 3 of the IAA in no way constrains the power of the court to determine the grounds upon which it would refuse enforcement of domestic international awards under section 19 and it remains open to the courts to align the exercise of that discretion with the grounds under Article 36. The Court noted that significant practical ramifications would follow if it were to interpret section 3 as having the effect of excluding the application of 'choice of remedies' from domestic international awards. Parties involved in arbitrations in Singapore would be compelled to engage their active remedies in the Singapore courts with potentially far-reaching effects on the practice and flourishing of arbitration in Singapore.

Article 16(3)

Turning again to the travaux, the Court found that Article 16(3) was not intended to be a 'one-shot remedy' nor an exception to the 'choice of remedies' philosophy underlying the Model Law. Therefore, parties who elect not to challenge the tribunal's preliminary ruling on its jurisdiction are not thereby precluded from relying on its passive remedy to resist recognition and enforcement on the grounds set out in Article 36(1). However, the Court did express doubt whether a party's active remedy under Article 34 to set aside the award remains available if it fails to trigger the instant controls available under provisions such as Article 16(3).

2 PT First Media (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal [2013] SGCA 57 at paragraph 71.

Joinder objection

Having resolved the threshold issues in favour of Lippo, the Court went on to consider the merits of Lippo's joinder objection.

Rule 24(b) of the 2007 SIAC Rules provides that the tribunal shall have the power to allow other parties to be joined in the arbitration with their express consent. Accordingly, the critical issue before the Court was the meaning of 'other parties'. The Tribunal had understood rule 24(b) as permitting parties who are *strangers to the arbitration agreement* to be joined to the arbitration. The Tribunal's reasoning drew on the English law doctrine of 'double-severability', which distinguishes between the agreement to refer future disputes to arbitration and the separate agreement arising when an existing dispute becomes the subject of a reference to arbitration. The Tribunal found that the term 'party' in the 2007 SIAC Rules refers only to the subjects in the separate agreement formed by the reference to arbitration. Further, the only consent necessary was from the party which was to be joined.

The Court disagreed with the Tribunal's reasoning, holding that 'other parties' refers to parties who, though party to the agreement to arbitrate, had not hitherto joined or been involved in the arbitration. The Court was wary of the potential implications of the Tribunal's construction and ultimately found it difficult to accept that the 2007 SIAC Rules empowered a tribunal to join a stranger to the arbitration agreement as a party to the reference. The Court reasoned that any provision purporting to have this effect would need to be in clear and certain terms given the extent to which the forced joinder of non-parties may expose an arbitrating party to further obligations to arbitrate. In particular, the Court held that forced joinder of non-parties would constitute a major derogation from the foundational principle of party autonomy. Describing forced joinder as an 'utter anathema to the internal logic of consensual arbitration',[3] the Court held that a rule allowing such joinder must be unambiguous and that rule 24(b) was not so. As a consequence, the Awards were not enforceable by the 6th to 8th Respondents.

Comments

Although the case concerned certain particularities in Singapore's IAA, because that Act largely adopts the Model Law, the Court's comments on the objectives of the Model Law and its interpretation of Article 16(3), in particular, are of wide relevance and importance. The Court's decision indicates a firm position in favour of 'choice of remedies' and party autonomy and confidentiality. Further, the decision is useful in clarifying the scope of the Singaporean courts' discretion to refuse enforcement of arbitral awards rendered in Singapore.

3 Ibid at paragraph 197.

Notes for Authors

Contributions to the Journal are welcome, and should be sent to:

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If you are interested in contributing an article, book review, or case note, the Journal Committee recommends the following criteria for the authors' assistance:

Manuscript

1 Authors are required to denote their details including postnominals, position, organisation and other relevant information (50 words or less) in the first footnote of the manuscript.

2 In all submissions, the first footnote should denote the author's name, position and other relevant information.

3 The manuscript should be provided electronically via email in word format.

4 Authors should provide an abstract of the manuscript (60 to 100 words) to be included at the beginning of the published submission.

5 Word length for the manuscript should be approximately 3000 to 5000 words for articles, 1000 to 2000 words for case notes, and 750 to 1000 words for book review. Case notes should provide a brief outline of the facts and judgment together with evaluation and analysis of the importance of the decision for alternative dispute resolution.

6 The manuscript should be in its final form, as corrections on proofs will generally be limited to literal errors or changes necessitated by legislative developments. However, manuscripts may on occasion be edited to correct spelling and syntax errors, clarify meaning, or enhance expression. Minor amendments may occur without the editor seeking the authors approval. The Author will normally be consulted should major changes be considered advisable.

7 When preparing the manuscript, please refer to the, *Style Points*, on the next page. More detailed information is available from the *Australian Guide to Legal Citation* (*AGLC*), published by Melbourne University Law Review Association. An online copy of the AGLC is available at: www.law.unimelb.edu.au/files/dmfile/FinalOnlinePDF-2012Reprint.pdf. The recommended dictionary is the Macquarie Dictionary.

8 Authors are totally responsible for the accuracy of case names, citations and other references, spelling of judges names, accuracy of quotations, etc.

9 It is assumed that submissions for *The Arbitrator & Mediator* have not been sent to another publisher or journal or that the material published in the journal has not been already published elsewhere. (It is the author's responsibility to inform the editor if the article has been submitted to another publisher or journal.) It is the Institute's Journal Committee Policy to publish material that has been published only with the agreement and/or acknowledgement of the previous publisher.

10 Articles published in *The Arbitrator & Mediator* are critically appraised or reviewed by external academic or professional peers of the authors.

Style Points

General

1. Levels of headings should be clearly indicated (no more than five levels).
2. Authorised reports should be used in citations.
3. Gender-neutral language should be used.
4. Quotations use single quotation marks. Double quotation marks are reserved for use within a quotation. Use a colon to introduce block quotations.
5. Ensure that hyphens and dashes are differentiated.
6. Use a colon to introduce lists set off from the text, and to introduce run-on lists except those that begin with for example, that is, including, such as and so on, which do not require punctuation.
7. Abbreviations (except those that begin with an initial capital, e.g.'Mon.') and contractions do not take a full stop.

Citations

In all submissions, case, legislation, book, journal and internet citations should appear not in the text but as footnotes, numbered consecutively throughout. All citations must conform to the AGLC (see 7 above). The following style is preferred:

Cases:

Case citation follows case name. Case names should generally be omitted in accompanying footnote when referred to in the text. Abbreviated case names may be used in references subsequent to the initial citation. Abbreviated case names should be italicised in parenthesis following initial citation, e.g. *Imperial Leatherware Co Pty Ltd v Macri & Anor* (Imperial Leatherware).

Legislation:

International Arbitration Act 1974 (Cth). Abbreviations should be used in pinpoint references to delegated legislation, excepting at the start of a sentence.

Books:

David St John Sutton and Judith Gill, *Russell on Arbitration* (22nd ed, London: Sweet & Maxwell, 2003) 3.

MJ Mustill and SC Boyd, *The Law and Practice of Commercial Arbitration* (2nd ed, London: Butterworths, 1989) 349.

Journal Articles:

Scott Ellis,'Arbitrators and Self Represented Parties' (2004) 23 (3) *The Arbitrator & Mediator* 20, 20–25.

Internet references:

References should include (where available): author, document title, year, website name, pinpoint reference, URL and date of retrieval. The URL should be enclosed within angle brackets. The following style is preferred:

Craig Pudig, *Domestic Lessons from International Arbitration* (2004) The Institute of Arbitrators & Mediators Australia [29] <www.iama.org.au> at 22 February 2005.

In footnotes,'op cit','loc cit','supra' and'infra' should not be used. The abbreviated form of the title and surname of author(s) should appear in subsequent references. Ibid should not be used to refer to a source of legislation, but the legislation should be cited in full in all subsequent references. Cases and treaties should be cited in full in all subsequent references. Subsequent references to a source other than legislation, cases and treaties should use'above n'. Ibid should be used to refer to source in the immediately preceding footnote (whether'above n' or full citation). Pinpoint references should only appear if a different page number is referred to. For example:

1. David St John Sutton and Judith Gill, *Russell on Arbitration* (22nd ed, London: Sweet & Maxwell, 2003) 3.
2. Ibid. 57.
3. Scott Ellis,'Arbitrators and Self Represented Parties' (2004) 23(3) *The Arbitrator & Mediator* 20, 20–25.
4. Sutton and Gill, above n 1, 33.

Deadline for Submissions

The Journal is published two times a year and submissions are due eight weeks before publication. Late submissions may be considered for future editions. Further details are available on our website at: www.iama.org.au/resources/publications.

NOTES

The Institute of Arbitrators & Mediators Australia (IAMA) is the nation's largest, independent and most experienced alternative dispute resolution (ADR) organisation. Founded in 1975, membership comprises some of Australia's eminent and experienced ADR professionals drawn from a diverse range of sectors including commercial, legal, education and government. With offices in all states and territories, it also plays a key role in industry and consumer schemes. The IAMA provides services in all forms of ADR including arbitration, mediation, conciliation, adjudication and expert determination, and is involved in the professional development, training and accreditation of ADR across Australia and internationally.

The Institute provides:

Dispute Resolution Services:

- Access to a wide range of highly qualified and experienced dispute resolvers, who have been graded as Arbitrators, or accredited as Mediators, Adjudicators or other ADR practitioners.
- Nomination of Arbitrators, Mediators, Adjudicators and other ADR neutrals from lists of practitioners accredited by the Institute on the basis of their training and experience and compliance with the Institute's CPD requirements.
- *The IAMA Arbitration Rules (incorporating the* IAMA Fast Track Arbitration Rules).
- *Rules for the Conduct of Commercial Arbitrations* (incorporating the Expedited Arbitration Rules).
- *Mediation Rules*.
- *Conciliation Rules*.
- *Expert Determination Rules*.
- Administered Industry-based Consumer Dispute Resolution Schemes.
- Practice Notes for Practitioners.
- Assistance in dispute resolution process selection or design, and available practitioners.

Education and Training:

- *The Professional Certificate in Arbitration* (in conjunction with the University of Adelaide and provider universities across Australia).
- *The Practitioner's Certificate in Mediation*.
- Training programs in other forms of ADR, such as adjudication, expert determination and conciliation.
- A high quality Continuing Professional Development Program delivered across Australia, covering arbitration, mediation, adjudication, conciliation, expert determination (and appraisal) and other forms of ADR.
- Pupilage training and experience for newly-qualified practitioners.

Other Services:

- A high quality peer reviewed ADR journal, *The Arbitrator & Mediator*, published two times a year.
- A national newsletter on recent developments in the ADR Community, *The IAMA Pulse*, distributed widely throughout Australia and internationally.
- Website database of accredited and graded ADR professionals.
- The central administration of the Institute is conducted from the National Office based in Sydney.
- Chapter Offices around Australia which provides administrative services as well as regular educational and networking activities, Chapter newsletters, and continuing professional development opportunities.
- Dispute Resolution Centre with excellent hearing rooms facility located in Sydney. www.iamadrc.org.au
- Annual National Conference, featuring an interesting and varied program dealing with topics of interest in ADR.

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THE INSTITUTE *of* ARBITRATORS & MEDIATORS AUSTRALIA

Australia's leading ADR organisation since 1975