The Chartered Institute of Arbitrators (CIArb) is the professional home of dispute resolvers. As an international not-for-profit organisation, our mission is to promote the use of alternative dispute resolution (ADR) as the preferred means of resolving disputes throughout the world.

We pride ourselves on being a truly global network, with over 13,000 members working in sectors as diverse as finance, construction, oil and gas and agriculture in over 120 countries worldwide. In addition to providing education, training and accreditation for arbitrators, mediators and adjudicators, CIArb acts as an international centre for practitioners, policymakers, academics and businessmen.

We provide dedicated professional guidance to our members through world-renowned training, conferences, events, research and publications. We can ensure that all of our members have access to CIArb training and benefits, wherever they are in the world. Most importantly, CIArb’s international reputation and academic rigour provide our members with a powerful mark of quality assurance to help open doors.

The CIArb Australia is one of 40 branches offering institute members a prestigious, globally-recognised qualification and access to a global professional community and regular networking opportunities. Visit www.ciarb.net.au

About us

The CIArb Australia

+13,000
CIArb has over 13,000 members worldwide

+120
Our members are based in over 120 countries across the world

+40
There are over 40 CIArb branches active in six continents

+6
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Welcome to our new flagship publication, The CIArb Australia News.

As this is my first report as President of CIArb Australia, I wish to express what an honour and privilege it is to be given the opportunity to lead this great organisation. With the support of the national Council and our Chapters, I shall strive to deliver value for members.

My Opening Remarks at the 9th Annual International Commercial Arbitration Dinner with Prof The Hon Andrew Rogers QC as Guest Speaker, held on 24 July, in conjunction with prominent international arbitrators: Karyl Nairn QC on 30 July, which was the first event held at the newly opened Melbourne Commercial Arbitration and Mediation Centre (MCAMC), and Prof Doug Jones AO on 28 August hosted by global law firm, Herbert Smith Freehills. The next event in the series will be held at the MCAMC with Dr Gavan Griffith QC.

We are also honoured to have our patron, former Chief Justice of Australia, The Hon Murray Gleeson AC as our guest speaker at the New South Wales Chapter re-launch on 31 October, which will be hosted by global law firm, Bakers & McKenzie.

There are plans for a re-launch of the South Australian Chapter in February - March 2015.

Education and Accreditation

Education and accreditation continues to be the core activity of our Branch. On 27 - 28 June 2014 we held an Accelerated Route Fellowship (ARF) Course in Perth at the offices of Clyde & Co, with senior practitioners from around Australia attending. Thereafter, on 9 August 2014 we began an International Arbitration Award Writing Course in Melbourne, again attracting attendances from across Australia. Following a second tutorial in Sydney on 1 November, the Course will culminate with an award writing exam on 22 November 2014.

Meanwhile, the Education Committee, chaired by Caroline Kenny QC, has been busy planning the new Diploma of International Arbitration Course for 18 - 26 April 2015. At the time of going to print, London has given formal approval for us to hold the course. The co-Course Directors will be Malcolm Holmes QC and myself. Expressions of interest so far are extremely encouraging.

The 6th CIArb/YL International Arbitration Moot

In addition to sponsoring and supporting moots from various universities and organisations, including the Vis Moots in Hong Kong and Vienna, we are pleased to announce that the 6th CIArb/YL International Arbitration Moot will be held 27 - 30 September 2014. The moot is a joint venture between CIArb Australia and the Young Lawyers section of the NSW Law Society. Attracting participants from Canberra, Brisbane, Sydney, Melbourne and Perth, this event is a showcase of young legal talent and has cemented its place as a progressive and high quality competition.

Inaugural CIArb Australia Essay Competition

Recently we launched the inaugural CIArb Australia Essay Competition amongst law students from around Australia. This is part of our endeavour to engage with young lawyers and to increase their representation within the Australian branch.

The winning essay will be published in the December edition of The CIArb Australia News.

CIArb Centenary Celebrations 1915 - 2015

The Chartered Institute of Arbitrators turns 100 in 2015. Each branch around the world is organising events to mark this great milestone. For its part, CIArb Australia will be hosting various events during 2015 and will be launching a media project of an oral history of the branch.

Sydney Arbitration Week 2014

After the success of last year’s inaugural event, Australia will again be hosting Sydney Arbitration Week. I am pleased to announce CIArb Australia has negotiated an exclusive member discount for GAR Live Sydney. To register at the discounted CIArb member rate of $430, please click here.

Media and Publications

I am very pleased to report that we have engaged Gianna Totaro as our PR advisor. A review and upgrade of our communications platforms, including website, publications and media relations is currently underway.

The “Anti-ISDS Bill”

On the 28 August 2014, the Australian Senate’s Foreign Affairs, Defence and Trade Legislation Committee issued a report in which it sensibly concluded that there should be no blanket prohibition by legislative means on the inclusion of ISDS clauses in future BITs/FTAs entered into by Australia. Rather, a case-by-case approach should be adopted. The Committee recognised that while there are risks for a State in submitting to an ISDS mechanism, those risks can be appropriately managed by proper treaty drafting (for example, in respect of potential claims by tobacco companies, including an express public health exception).

The continuing process of reform to further open the economy and strengthen its competitiveness has been a key ingredient of Australia’s success. It has never been more important that Australian arbitration provide an effective means to resolve the disputes that inevitably arise.

This is an exciting time for dispute resolution in Australia and with strong support from government, the courts, business and legal communities, the opportunities for our membership have never been more promising.

Albert Monichino QC

President
Good evening

Distinguished Guests,

I am Albert Monichino QC, the President of CIArb Australia. I am pleased to be with you tonight and to have the opportunity to introduce our special guest speaker, Prof The Hon Andrew Rogers QC, which I will do later.

I am especially pleased that we have here tonight six former Presidents (and Chairmen) of our Branch, in order, they are:

• James Creer (Foundation Chairman at the time of the establishment of the Australia Branch in 1995);
• The Hon Garry Downes QC AM;
• Professor Doug Jones AO;
• Michael Shand QC (the first President upon the incorporation of the Branch in 2006, and a fellow Victorian);
• Malcolm Holmes QC; and
• John Wakefield.

All of these individuals have made a significant contribution to the Australia Branch. I thank them for that, as well as for their ongoing guidance and support.

The Chartered Institute of Arbitrators is a learned society involved in the world-wide promotion of arbitration and ADR practice. CIArb Australia is one of 40 branches of this fast-growing global professional community with 13,000 members in 120 countries.

At the time of the establishment of our Branch we had 88 members in 1996. We now have 340.

CIArb Australia remains committed to:
• promoting intelligent debate regarding arbitration;
• developing international arbitration as a core competency of the Australian legal profession; and
• building a critical mass of (professionally trained, accredited and experienced) Australian arbitrators.

It is governed by a Council of 14 members, coming from each of the States of Australia (with the exception of Tasmania). It is perhaps of little surprise that the greatest representation on the Council comes from New South Wales and Western Australia.

Similarly, not surprisingly, we have a substantial contingent of women on the Council, a branch-record of five. I think this deserves mention and helps put to the myth that the arbitration profession is made up by those who are “male, pale and stale”.

WOMEN FLOOD ARBITRATION BOARD

Leanne Mezrani
Lawyers Weekly
1 August 2014

A record number of women have been elected to the board of the Chartered Institute of Arbitrators (CIArb) in Australia. The five female board members, which include silks and global firm partners, were acknowledged at the annual CIArb dinner held in Sydney last Thursday (31 July).

Caroline Kenny QC from the Victorian Bar; Beth Cubitt, a partner at Clyde & Co in Perth; Sydney-based barristers Julie Soars and Sandrah Foda, and special counsel Jo Delaney from Baker & McKenzie’s Sydney office are among 14 newly-elected councillors, the highest ratio of women to men in CIArb’s history.

Speaking at the dinner, Melbourne barrister and CIArb Australia president Albert Monichino QC (pictured) said the milestone “helps put to the myth that the arbitration profession is made up by those who are male, pale and stale”.

He also acknowledged Kenny, who is also CIArb’s chair of education, for doing “much of the heavy lifting” along with Soars, the Institute’s company secretary.

Kenny commented that unprecedented growth in international arbitrations in Australia and Asia had made it “an exciting time to be involved in commercial arbitration”.

Former NSW Supreme Court judge Andrew Rogers QC also delivered a keynote on the night. He revealed that he is a strong advocate for the involvement of business leaders in commercial dispute resolution.

However, he admitted that his attempts to affect change in this area have so far been unsuccessful.

“This notion that you leave the resolution of commercial disputes to commercial people is a wonderful pipedream,” he told attendees.

Rogers said the legal profession needs champions of change to bring more commercial minds to the arbitration table.

“I’m absolutely convinced there is a better way, but whether we have a number of heroic leaders who would advocate following that path is a debatable point,” he added.

The CIArb celebrates its centenary in 2015.

9th Annual International Commercial Arbitration Dinner

When: 24 July 2014

Where: NSW Law Society, Sydney

Photos: Rick Stevens

Opening Remarks: Albert Monichino QC

I am pleased to announce that the Council resolved this evening to hold the next Diploma Course in Sydney in April 2015.

Historically, a major purpose of this dinner has been to congratulate the Diploma Course graduates. The Diploma Course started in Sydney in 2006. It was devised by Malcolm Holmes QC. Tonight’s guest speaker taught in the 2006 and 2007 courses.

Since 2012 the Diploma Course has been held in Malaysia in conjunction with the CIArb Malaysian Branch and the Kuala Lumpur Regional Centre for Arbitration (KLRCA).

Since our last dinner in July 2013, we held two Diploma Courses, which was a significant feat – one in November 2013 and the other in April 2014, attracting a total of 45 candidates.

Three students from the November 2013 and April 2014 classes are here this evening:

• Stephen Ip;
• Sandrah Foda who is one of our new Councillors; and
• Erika Williams.

I am pleased to announce that the Council resolved this evening to hold the next Diploma Course in Sydney in April 2015.

As well as holding the Diploma Courses, since the last dinner we have held two Fast Track to Fellowship courses – one in Sydney in August 2013 and another in Perth in June 2014. We also held an international arbitration moot for law students and young legal practitioners in September 2013, and have plans to hold a similar Moot in September 2014.

Recently we launched the inaugural CIArb Australia Essay Competition amongst law students from around Australia. These last two initiatives are part of our endeavour to engage with young lawyers and to increase their representation within the Australian branch.

All in all we have been quite busy over the past year. While we may pause to reflect (and even congratulate ourselves) on our achievements, we cannot afford to be complacent, for there is still much to be done.

The CIArb remains committed to:
• developing international arbitration as a core competency of the Australian legal profession;
• building a critical mass of (professionally trained, accredited and experienced) Australian arbitrators.

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The CIArb celebrates its centenary in 2015.
I endorse the Law Society President Ros Everett’s remarks about justified confidence in the future of international arbitration in Australia, and while I am at it, thank her for the Law Society’s support in hosting and arranging this dinner for the past nine years. The last year has seen:

- the launch of the Melbourne Commercial Arbitration and Mediation Centre Ltd in March 2014, to complement Sydney’s Australian International Dispute Centre (AIDC);
- moves to establish a dispute resolution centre in Perth, with vigorous support from Chief Justice Wayne Martin of the Supreme Court of Western Australia, reminding anyone that cares to listen that Perth is closer to Singapore than either Sydney or Melbourne, and shares the same time zone as the major Asian centres;
- the hosting of the Asia Pacific Regional Arbitration Group Conference in Melbourne in March 2014;
- a welcome change in the Australian government policy as to the inclusion of arbitration clauses in free-trade agreements;
- growing judicial support for arbitration – such as the recent scholarly judgment of the Full Court of the Federal Court of Australia in TCL v Castel. This changed approach is a far-cry from earlier judicial suggestions as to the “unwisdom of consenting to arbitration.”

But it is well to remember that our neighbours in the Asia-Pacific have similar aspirations and are “on the move”. Two particular developments are worth mentioning:

- first, the KLRCA is about to open a new 22 hearing room “state of the art” arbitration centre (substantially funded by government);
- secondly, Singapore is moving to establish an International Commercial Court by which international parties, by agreement, may refer to their disputes for resolution by the Singapore High Court. This last development may prove to be a “game-changer” in the field of international dispute resolution in our region.

While the current Australian Government recognises the opportunities presented in the Asia Pacific for international commercial arbitration, and supports the aspiration of developing major Australian cities as centres for international dispute resolution, it is extremely unlikely that we can look forward to any financial support in the short-term, and certainly not the sort of financial support that is received by other centres in our region.

Notwithstanding this, as we look forward to celebrating the Centenary of CIArb next year, there is much that can, and should, be done to promote international arbitration in Australia, and Australian arbitration practitioners in the region, which we are committed to do.
Guest Speaker Introduction: Albert Monichino QC

I t falls to me to introduce our guest speaker, Prof The Hon Andrew Rogers QC. As an eminent jurist and arbitrator, our guest hardly needs any introduction amongst this audience. He was a Judge of the New South Wales Supreme Court between 1979 and 1993 and foundation Chief Judge of the Commercial Division of that Court between 1987 and 1992. It was famously said that he ruled the Commercial Division with an ‘iron fist in a titanium glove’.

His Honour practised case management long before law reformers and academics caused forests to be felled analysing the subject, running his cases with brutal efficiency. A fellow of the Chartered Institute of Arbitrators since 1985, Professor Rogers, together with another CIArb Fellow, Gavan Griffith QC, was a member of the Australian Delegation to the United Nations Commission on International Trade Law at the time of the drafting of the Model Law on international commercial arbitration.

Since retiring from the bench 20 years ago, he has remained active as an international legal consultant, arbitrator and mediator, and more recently as a Director of ENDISPUTE, a provider of tailor-made dispute resolution services in respect of complex disputes. In addition, Professor Rogers has taught in the CIArb Diploma in International Commercial Arbitration both here and overseas and is currently a Visiting Professor of Law at the University of Technology. Without further ado, I give you Prof The Hon Andrew Rogers QC.

Closing Address: Damian Sturzaker CIArb Australia Vice President

C hief Justice, Judges of the Supreme and Federal Courts, distinguished guests and students of the diploma course, it falls to me to respond to the address of Prof The Hon Andrew Rogers QC. The first comment that I have to make is that the invitation to Andrew is long overdue. Andrew continues a fine tradition of excellent speakers at this event starting with The Hon Garry Downes QC AM who delivered this address in 2007 and was then continued by arbitration giants such as Malcolm Holmes QC, Doug Jones AO, Gavan Griffith AO QC and finally our Chief Justice, The Hon Tom Bathurst QC.

That continuity and sense of tradition is also reflected in the fact that many of the former presidents of the Australian Branch are also here tonight. At the beginning of his speech Andrew threatened that he may entertain us with song. Whilst he did not sing he certainly entertained. For me, the address was peppered with fascinating insights into the means by which we seek to resolve disputes. Fortunately, Andrew adopted a broad canvas throughout the speech and did not limit himself to the topic of arbitration. In answering the question “are we making progress with the resolution of disputes?” Andrew managed to examine a recent, large commercial dispute and draw important lessons from it and fit in a paid ad for a certain dispute resolution service.

We are deeply privileged to be able to call upon persons of the standing of Andrew Rogers and he has our thanks for his attendance tonight and his valuable words.
9th Annual International Commercial Arbitration Dinner

Left – Right: 1. Jo Delaney (Special Counsel, Baker & McKenzie), Shaun Bailey (Partner, Corrs Chambers Westgarth) and Cameron Scholes (Senior Associate, Corrs Chambers Westgarth) 2. Gregory Nell SC (Seven Wentworth Chambers) and Donny Low (Senior Associate, King & Wood Mallesons) 3. The Hon Justice David Hammerschlag (NSW Supreme), The Hon Tom Bathurst AC (Chief Justice of NSW) and Peter Callaghan SC (Nigel Bowen Chambers) 4. Michael Talbot (Chair, AIDC) and the Hon Justice Steven Rares (Federal Court of Australia) 5. Francis Douglas QC (Seven Wentworth Chambers) and Angela Bowrne SC (Budstone Chambers) 6. Stephen Ipp (Nine Wentworth Chambers) and Barry Tozer (Tozer & Associates) 7. Derek Wong (Solicitor, King & Wood Mallesons) and Donny Low (Senior Associate, King & Wood Mallesons) 8. John Dawson (Arbitration Liaison Committee/Carneys Lawyers) and Chris Lemercier (Director CLE, UNSW).

Left – Right: 1. Theresa Dinh (Sixth Floor Sebourne Wentworth Chambers) and Steve White (SW Computer Law) 2. Anne Hoffmann Senior Legal Associate (Herbert Smith Freehills), Jim Baillie (Special Counsel, Thomson Geer), Erika Williams (Associate, Baker & McKenzie) and Deb Tomkinson (ACICA SG) 3. John Wakefield (Vice Chair, AIDC), the Hon Garry Downes AM and Ron Salter (CIArb Australia National Councillor) 4. Deborah Lockhart (CIArb Australia EO) 5. John McGruther and Alan Limbury (Strategic Resolution) 6. Tim Grave (Partner, Clifford Chance), Nicola Nygh (Special Counsel, Allen) and Prof Luke Nottage, (University of Sydney) 7. Marilyn Scott (UTS), Geraldine Daley (Cohn Daley Quinn) and Bridget Sordo (Sollicitor, NSW Law Society) 8. Milica Djurdjevic (Sollicitor, William Roberts Lawyers) and Louise Dargan (Lawyer, Clayton Utz).
The CIArb Australia Diploma of International Commercial Arbitration

If you have ever considered practicing in the field of International Arbitration then I highly recommend you undertake the intensive CIArb Australia Diploma Course in International Commercial Arbitration.

Since 2006, the Diploma course, developed by CIArb Australia, has attracted students from across the country, and for the last three years, it has been successfully promoted and held in Asia.

Last year, I participated in the November nine-day course held in Kuala Lumpur, Malaysia conducted by CIArb (Australia) in a joint venture with the Kuala Lumpur Regional Centre for Arbitration.

Along with 25 other students from Singapore, Malaysia, United Arab Emirates, Hong Kong, the Sultanate of Oman, the Republic of the Union of Myanmar, Spain and Australia, I had the privilege of being educated by world leaders in the field of International Arbitration.

We were taught the practice of international commercial arbitration, including all major forms of international arbitration and related dispute settling mechanisms such as WIPO, WTO and Investment Treaty Arbitration, and are well on the path to appearing in or acting as an arbitrator in such arbitrations in different contexts.

All the students are grateful for Rashda’s commitment, with the assistance of Michael Sanig and lecturers, in presenting a course of the highest calibre.

In addition to the educational component of the Course, we had the opportunity to learn and socialise in a vibrant group of people all with different professional backgrounds from different jurisdictions.

On a personal level, we socialised and dined at the Malaysian Petroleum Club located in the Petronas Towers in the heart of the Kuala Lumpur. Not only was this a night to remember, friendships were made which will last a lifetime.

Having successfully completed the Course, I have come to realise the importance of being actively involved in the international arbitration community.
In Conversation with Karyl Nairn QC

When: 30 July 2014
Where: Melbourne Commercial Arbitration and Mediation Centre
Panel: Albert Monichino QC and Caroline Kenny QC, CIArb VIC State Convenor
Photos: David Johns

n conjunction with the Victorian Bar and CommmBar, the Chartered Institute of Arbitrators Australia recently hosted a fireside chat with prominent international arbitration practitioner, Karyl Nairn QC, Albert Monichino QC and Caroline Kenny QC.

The capacity event which was attended by judges, silks, global law firm partners and young lawyers.

A Fellow of the Chartered Institute of Arbitrators, and global co-head of Skadden Arps International Litigation and Arbitration Group, Ms Kairn, a London-based Australian is a highly respected advocate in international arbitration and one of only three female solicitors to be appointed QC in the UK. She focuses on complex international commercial arbitration and other litigation, as well as investment treaty arbitration. In 1999 she was appointed to represent Australia on the ICC International Court of Arbitration and is now a Vice President of the Court. She was named one of the 50 most influential women in the law by Business magazine in 2007 and is ranked among the top 20 business lawyers in the UK Chambers 100 in 2013, and included in The Lawyer magazine’s “Hot 100” list of top lawyers in the UK in 2013. The Times of London nominated her Lawyer of the Week highlighting her star defence of Chelsea Football Club owner Roman Abramovich regarding the multimillion-dollar proceedings brought against him in the English High Court by Boris Berezovsky (the largest private litigation in the world).

The panel asked insightful questions which addressed some of the important issues in international arbitration.

Ms Nairn addressed each issue with great knowledge and experience, but also with humour and transparency.

She spoke of her first case in WA in the 1980s where her successful client announced to her after the hearing that “It is just like an episode of LA Law, but without the sex.”

Ms Nairn also spoke about the differences between litigation and arbitration and the cross-cultural pressures faced by international arbitration practitioners, including the need to modify advocacy style given the lack of favour in which aggressive cross-examination is held by certain arbitrators, especially from some civil law countries. She highlighted the success of Australian practitioners in international commercial arbitration and encouraged local practitioners to look to Asia for work in the field by building links with practitioners and institutions in that region.

The event, which was a huge success, is the first in a series with prominent arbitrators, including Prof Doug Jones AO and Gavan Griffith AO QC.

*The following is an excerpt from the conversation with Ms Nairn:

Albert Monichino QC: Can you provide a perspective on the quality of Australian arbitrators and arbitration practitioners, and opportunities for Australian lawyers in Asia?

Karyl Nairn QC: There are a lot of opportunities in Asia for Australian arbitrators. Asia is a marvellous opportunity for (Australian lawyers) to get out there and show your stuff. With robust international disputes, the contracts are drafted in English. The core principles of Contract law are basically the same wherever you go. I do cases in the civil code jurisdictions as well as the common law and it’s rare that cases are won or lost on some intricacy of the local law; it’s general principles or the evidence. If you’re really good at contract and tort law in your home jurisdiction and you’re a clever person and a fair person, you should be a good arbitrator.

For the next generation there are opportunities long as you get your first chance to prove who you are. It is a competitive market but like all competitive markets if you’re really good you’ll succeed. From the number of Australians that I employ, I know the quality of Australian education is very high, the quality of the legal profession is very high. The competitiveness that they have, and the very strong ethical standards of Australians means they should generally be very good arbitrators abroad. The natural market for Australia is Asia.

Caroline Kenny QC: How do Australian lawyers exploit the opportunities in Asia?

KNQC: The institutions need to know you exist. The institutions in the region need to know who you are, see something you’ve done; they need to hear about you. Get on their panels, know your own ICC committee; know who the other international arbitrators being appointed are. The institutions want to see you have authority, be open-minded and international;

be independent; doing one or two cases really well gets you known. There are Australians out there who are doing well; they are being chosen by parties even where the dispute has no link to Australia.

CKQC: Is investment treaty arbitration in decline?

KNQC: Not in my experience, although there are tensions in the field. For example, there are concerns about the same people acting as both arbitrator and as counsel. This can be a problem as in the treaty cases some of the same issues arise frequently.

CKQC: What are the differences between running an international arbitration and running a piece of litigation?

KNQC: In some ways, they are very different - the procedures are different. Some of the procedures will be truncated compared with what you have in litigation and your opponents are usually going to be from different jurisdictions so you’re not starting from the same familiar baseline. Whereas if you’re litigating it’s an even playing field, you’re playing cricket in the same way. In (international) arbitration you’re approaching it differently because you have a whole international context to worry about. Your decision-maker is different. Instead of having a single judge who is bound by precedent, you’re dealing with three different people from different jurisdictions and you are going to have to present arguments that each of them will like. They will have their own baggage which comes from being from a different jurisdiction.

You will approach the dispute differently in that way. What isn’t different is your assessment of the merits of the case. It should be the same because you’re deciding the case according to law (although there might be a choice of law argument). You may have to get to the facts in a slightly different way that you do in litigation. You still have the same end game – you still want to win the case. I don’t want to see you have authority. Be open-minded and international;

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KNQC: Not in my experience, although there are tensions in the field. For example, there are concerns about the same people acting as both arbitrator and as counsel. This can be a problem as in the treaty cases some of the same issues arise frequently.

CKQC: What are the differences between running an international arbitration and running a piece of litigation?

KNQC: In some ways, they are very different - the procedures are different. Some of the procedures will be truncated compared with what you have in litigation and your opponents are usually going to be from different jurisdictions so you’re not starting from the same familiar baseline. Whereas if you’re litigating it’s an even playing field, you’re playing cricket in the same way. In (international) arbitration you’re approaching it differently because you have a whole international context to worry about. Your decision-maker is different. Instead of having a single judge who is bound by precedent, you’re dealing with three different people from different jurisdictions and you are going to have to present arguments that each of them will like. They will have their own baggage which comes from being from a different jurisdiction.

You will approach the dispute differently in that way. What isn’t different is your assessment of the merits of the case. It should be the same because you’re deciding the case according to law (although there might be a choice of law argument). You may have to get to the facts in a slightly different way that you do in litigation. You still have the same end game – you still want to win the case. I don’t want to see you have authority. Be open-minded and international;

be independent; doing one or two cases really well gets you known. There are Australians out there who are doing well; they are being chosen by parties even where the dispute has no link to Australia.
think the result in any case I’ve done in arbitration would have been any different in litigation. The result should be the same but it is a different journey to get there. The biggest challenge for those going from Australian litigation to arbitration is that you get far less time at the hearing.

**KNQC:** Take the Abramovich case in the English High Court. How would this have been different if it had been arbitrated?

**KNQC:** I think the result would have been the same but the case would have been shorter and there would not have been the additional stress of the intense media glare during the hearing. The Abramovich case had a lot of publicity (which you wouldn’t have had if it was an arbitration). The trial went for four months. Beregovoy’s team cross-examined Abramovich for nine days. In an arbitration, it would be unusual for a witness to be cross-examined for more than about a day. It would be unlikely for the whole hearing to take more than 3 weeks. You certainly wouldn’t get four months. You do not get much, if any, time to do cross-examination as to credit in arbitration. You might have enough time for three questions on credit so you have to get those absolutely right. Arbitrators can be very interventionist during cross-examination (although some judges are too). Some arbitrators are just not used to cross-examination in their home jurisdictions and so do not cut you as much slack as maybe a common law judge would. You have to be very flexible and adjust your game in arbitration. I know some Continental arbitrators who are very uncomfortable with an antagonistic cross so be ready to adjust your court room style.

But there are real advantages for advocates too. A sincere witness can come across much better in an arbitration (than in litigation) due to the relative informality of the hearing. There can also be huge differences in admissibility of evidence in arbitration compared with litigation and so an advocate should be ready for anything in arbitration.

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**Karyl Nairn QC** addresses the capacity audience at the Melbourne Commercial Arbitration and Mediation Centre.

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**IN CONVERSATION WITH KARYL NAIRN QC**

John Arthur

Laywers Weekly

18 August 2014

Karyl Nairn QC is one of Australia’s leading lawyers overseas.

Read more

KARYL NAIRN QC: THE GOOD FIGHTER

Jonathan Barnett

Australian Financial Review

30 August 2014

Karyl Nairn QC swapped the barre for the bar and now, as an international arbitrator, settles the wrangles of oligarchs and oil...
The CIArb Australia News September 2014

Nairn – originally from Perth, in Western Australia – is partner and Queen’s Counsel at Skadden Arps Slate Meagher & Flom in London, where she co-heads the global international litigation and arbitration practice. Her talk on 30 July was the first in a series of “fireside chats” with leading arbitration specialists hosted by the Victorian chapter of the Chartered Institute of Arbitrators in Australia.

In Conversation with Prof Doug Jones AO

Global law firm, Herbert Smith Freehills hosted the second of the series of CIArb Australia Victorian Chapter’s ‘fireside chats’ with prominent arbitrators. Supported by the Victorian Bar and CommBar, the event was a resounding success and provided an opportunity for aspiring and experienced arbitrators to obtain useful insights from one of the world’s leading international commercial arbitrators and infrastructure and dispute resolution lawyer.

Click below

Kristy Haining (Solicitor, Herbert Smith Freehills), Bruno Zeller (Professor of Law, University of WA) and Catherine Eglezos (Solicitor, Herbert Smith Freehills).
Nairn was also asked about opportunities in arbitration. “It is a competitive market but, as in all markets, if you’re really good for them,” she said. “It is a competitive market but, as in all markets, if you’re really good for them.”

Nairn said that in arbitration, it would be unusual for a witness to be cross-examined for more than a week. In arbitration, it would be unusual for a witness to be cross-examined for more than a week. Nairn went on to comment on how cross-examination is approached differently in arbitration. “You have little or no time to do cross examination as to credibility in arbitration. If you do, you might have time for three questions so you have to get those absolutely right.”

Nairn added that some arbitrators are “very interventionist” and don’t appreciate aggressive cross-examination. “You have to be flexible and adjust your game.”

She was asked about the trend for witness coaching in some jurisdictions and whether it worried her that witnesses for the other side may have rehearsed their evidence. She said that it did not; good arbitrators are usually able to tell if a witness is giving sincere evidence or sticking to a script, she explained. She emphasised the importance of giving witnesses a proper chance to tell their own story. A truthful but nervous witness can come across much better in arbitration than litigation due to the relative informality of the proceeding, she said.

Nairn was also asked about opportunities for Australian arbitration practitioners, suggesting that Asia is “a natural market” for them. “It is a competitive market but, as in all competitive markets, if you’re really good you can succeed,” she said.

Nairn noted the quality of Australian legal professionals, their competitiveness in terms of cost and their strong ethics, all of which make them a good choice as arbitrators. The challenge is to get themselves known in the field, especially by the administering institutions, she said.

The Melbourne Commercial Arbitration and Mediation Centre, where the event took place, opened in March, offering hearing facilities for international and domestic disputes. Its board was initially chaired by Clyde Croft SC, an arbitrator and justice of the Supreme Court of Victoria, where he manages the commercial and arbitration lists. It is now chaired by Stephen Charles QC.

Australia already has such a hearing centre in Sydney, the Australian International Disputes Centre, which opened in 2010, and plans to open another in Perth to serve the large offshore oil and gas industry off the coast of Western Australia.

Since the event featuring Nairn, the Melbourne centre has held a second “fireside chat” with leading Australian arbitrator and former global president of CIArb Doug Jones, conducted on 28 August by Monchino and Bronwyn Lincoln, partner at Herbert Smith Freehills in Melbourne.

Themes that were explored included Australia’s success as an arbitral venue to date and how to promote Australian practitioners and arbitrators internationally. Jones was also asked about the need for a code of ethics or global standards to govern the conduct of arbitration counsel.

Shortly before that event, Jones had picked up a lifetime achievement award from Australian publication Lawyer’s Weekly at a ceremony in Sydney on 6 August. The award recognises Australian legal leaders who have made a substantial contribution to the profession and the development of the law.

Jones is a partner at Clayton Utz in Sydney but is expected to leave the firm soon to focus on his practice as an international arbitrator. He has received many accolades, including being made an officer of the Order of Australia in the Queen’s Birthday Honours List 2012.

At the awards ceremony, Jones was accompanied by his wife Janet Walker, a Canadian arbitrator and global academic adviser to CIArb and his children, along with colleagues from Clayton Utz.

Pictures of the two fireside chats and the awards ceremony are in the gallery below. A third fireside chat will be held with the former solicitor general of Australia, Gavan Griffith QC, on 9 October, soon after his return from the Bangladeshi capital of Dhaka where he has been arbitrating a dispute.

GAR to host its own event in Australia later in the year: GAR Live Sydney on 11 November.
The “Anti-ISDS Bill” before the Australian Parliament

O n 6 August 2014, the Senate’s Foreign Affairs, Defence and Trade Legislation Committee held public hearings on The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, introduced on 3 March by Senator Peter Whish-Wilson of the Australian Greens Party. His private Member’s Bill seeks to prevent the Australian government from entering into any future treaties containing provisions on investor-state dispute settlement (ISDS).

The Bill simply provides, in clause 3, that: “The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however described) with one or more foreign countries that includes an investor-state dispute settlement provision.”

The Explanatory Memorandum provides no guidance as to the background to this proposal, or its pros and cons. However it seems to be aimed at reinstating the policy shift announced by the April 2011 “Gillard Government Trade Policy Statement”. That is no longer found on Australian government websites and is inconsistent with the present Government’s policy on ISDS, which allows for such provisions on a case-by-case basis. Australia now has ISDS provisions with 29 economies, derived from: • all 21 bilateral investment treaties (BITs) presently in force, signed since 1988; • four out of eight bilateral free trade agreements (FTAs), signed since 1982; and • Australia’s sole regional FTA, signed in 2009 with ASEAN member states (thus adding ISDS protections between Australia and four more states – Brunei, Cambodia, Malaysia and Myanmar). The Gillard Government negotiated the omission of ISDS in the investment chapters in FTAs with New Zealand (signed in 2011) and Malaysia (2012). By contrast, the Abbott Government has reverted to the inclusion of ISDS on a case-by-case basis.

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The recent Committee hearings on the Bill have broad national and international significance. The video-recordings can be accessed via the Parliament’s website. On 6 August 2014 the Committee heard from 9 witnesses, based on 141 Submissions (including a version of the author’s Submission below).

Readers of this note are further encouraged to view the Senator’s Second Reading Speech, along with a critique by Professor Luke Nottage and Dr Romesh Weeramantry (experts in international arbitration who also opposed the Bill). The Chief Justice of Australia has weighed in recently on this topic as well.13 Even if this Bill does not pass, ISDS will remain an important issue before KAFTA is ratified,14 and for Australia’s pending FTA negotiations, especially for major regional treaties.15

The Bill, like the previous Trade Policy Statement in this respect, may be well-intentioned, but it is premature and misguided. Treaty-based ISDS is not a perfect system, but it can be improved in other ways – mainly by carefully negotiating and drafting [BITs] and [FTAs].16 This may also have the long-term benefit of generating a well-balanced new investment treaty.
at the multilateral level, which is presently missing and unlikely otherwise to eventuate.

The treaty-based ISDS system is particularly important when dealing with developing countries, where local courts and substantive rights may not meet widely-accepted global standards, although ISDS is also now found in some treaties among developed countries.

Reflecting concerns about the capacity of national courts to deal with specialized cross-border investment disputes, BITs and FTAs also commonly include inter-state arbitration procedures.

However, these are very infrequently invoked, because they require the home state to run the case for its investor against the host state that has illegally interfered with the investment. This involves financial costs to the home state as well as delays and potential diplomatic embarrassment.

Because of its advantages over other existing and immediately foreseeable international dispute resolution mechanisms, the treaty-based ISDS system is increasingly accepted by Australia’s major existing and potential treaty partners, including both developed and developing countries in the Asia-Pacific region. It is more responsible therefore for Australia to keep engaging with the system by negotiating specific improvements in future treaties. This is also the approach taken recently by the European Commission and US government, which have been pressing ISDS as well. Otherwise, there is also a serious risk of preventing—or at least seriously delaying—the conclusion of any future FTAs. Those include several major treaties currently being negotiated by Australia, including the FTA with Japan, the Trans-Pacific Partnership Agreement and the Regional Comprehensive Economic Partnership (“ASEAN+6”).

Opposition to ISDS in Australia is epitomized by the majority opinion in the Productivity Commission’s 2010 report on trade policy, which argued in particular that (i) there is no clear evidence that offering ISDS significantly increases inbound FDI, and (ii) Australia’s outbound investors do not rely on or need treaty-based ISDS protections. However, there appear to be more such benefits for Australia in treaty-based ISDS than hypothesized by the Productivity Commission in 2010.

The Commission in 2010 also queried the potential costs or risks involved for Australia as a whole when agreeing to ISDS. This concern is also emphasised by those keen to preserve national sovereignty and to avoid “regulatory chill”. However, there has only ever been one claim brought against Australia (by Philip Morris, regarding our tobacco plain packaging legislation) and it may well fail. The concerns raised by the Productivity Commission, as well as other community groups and scholars, are certainly worth exploring further—and risks inevitably associated with ISDS can and should be managed more effectively, especially through more careful treaty drafting.

If anything, the Australian government should seek to implement the drafting of old treaties (especially as they come up for renewal or may be supplanted by FTA investment chapters) and to consider developing and publicising a well-balanced Model Investment Treaty (along the lines of many of our major treaty partners). No Act of Parliament is needed to pursue such alternatives.


The topic will be discussed at the Law Council of Australia’s 2014 International Trade Law Symposium, 18-19 September, Canberra, and Sydney on 24 September. To register, click here.

Addendum

University of Sydney professor Luke Nottage disagreed, noting the provisions only resulted in one claim, even though they have been around in Australia since the 1980s.

“We shouldn’t overreact to it first and only case to be brought against Australia,” he said, referring to the claim brought by Philip Morris.

— The Australian Financial Review 15 August 2014

Additional Report also “welcomes current empirical research being conducted by leading Australian academics into the impact of ISDS on investment flows (at para 1.6), referring to our (broader) ARC project over 2014-16.”

The report concluded (footnote omitted, emphasis added):

The Chief Justice of the High Court has warned a move towards international arbitration could not only challenge the power base of the court but create uncertainty for litigants.

Speaking at the Supreme and Federal Courts Judges’ Conference, Chief Justice Robert French said more attention should be given to the investor dispute provisions in trade agreements, as these could be used by global corporations as an alternative to Australian courts.

If forum shopping became more common, the law could become unclear and create uncertainty for business as a result of negotiations already being decided by a court.

The Chief Justice referred to an arbitration claim by a tobacco company against Morris for an order that the government suspend the enforcement of the plain packaging legislation and also sought compensation for a loss as a result, totalling billions of dollars.

The arbitration claim, filed in 2011, is ongoing after the High Court ruled in 2012 that plain packaging laws did not amount to an acquisition of tobacco companies’ intellectual property rights.

The investor state dispute settlement provisions allow international corporations to sue the Australian government through overseas arbitration tribunals, which can challenge the decisions of even Australia’s highest court.

Critics referred to the provisions in trade agreements as a “Trojan horse” for international corporations.

Tobacco sues government

To date, the only user of the controversial provisions has been tobacco powerhouse Philip Morris Asia, which mechanistically acquired Philip Morris Australia to sue the Australian government on the plain packaging laws four months later.

An international tribunal will decide if there has been unconstitutionally expropriation of the tobacco company’s investment in Australia.

The High Court’s plain packaging decision could be at risk if the international tribunal comes to a different conclusion, the Chief Justice said.

A number of multi-lateral and bilateral agreements that have been negotiated under the current government contain the investor dispute provisions, including a free-trade agreement with Korea signed in April. However, controversy surrounds the dispute resolution clause and there is currently a private member’s bill before Parliament seeking to ban current and future government from entering into agreements containing the dispute settlement provisions.

According to its architect, Greens senator Peter Whish-Wilson, the number of trade agreements that contain those provisions is exploding.

“We’re entering into dangerous waters,” he said.

The Senate committee is due to report on the bill by August 27.
DON’T RULE OUT ISDS, SAYS AUSTRALIAN SENATE COMMITTEE

Alison Ross
Global Arbitration Review
3 September 2014

Sam Luttrell and Romesh Weeramantry, Australian arbitration specialists practicing at Clifford Chance in Perth and Hong Kong respectively, provided a submission that addressed regulatory chill along with many other issues. Empirical evidence for the phenomenon is still lacking and “more work needs to be done” before it can be considered a reliable policy premise, they said.

In another passage quoted by the committee, Luttrell and Weeramantry explained why ISDS provisions are a necessity even for a country like Australia with low sovereign risk and reliable courts. The reciprocal provisions cut both ways, providing “essential protection” for Australians investing abroad, they reasoned.

This point was echoed in submissions by the Department of Foreign Affairs and Trade and the Australian Chamber of Commerce and Industry, which stressed the importance of ISDS provisions to Australian businesses operating overseas. The department also voiced its concern that the bill could potentially exclude Australia from plurilateral trade agreements which include ISDS provisions, such as the Trans-Pacific Partnership.

ISDS provisions currently appear in Australia’s free trade agreements with Chile, Singapore, Thailand and the Association of South East Asian Nations (ASEAN), as well as its agreement with Korea, which has yet to enter force. The provisions also appear in 21 bilateral investment treaties the country has signed.

The Senate is the upper house of Australia’s bicameral parliament, the lower house being the House of Representatives. All bills must be passed by both houses before they become law.

The Trade and Foreign Investment Bill (Protecting the Public Interest) Bill 2014 was introduced as a private bill by the Green Party’s Senator Whish-Wilson on 5 March. It is not clear when each house will consider the bill.

While parliament is not bound by the report of the committee, commentators suggest that it is now unlikely that the bill will be passed. However, Weeramantry tells GAR that the failure of the bill will not mark the end of debate on ISDS provisions in Australia. “There are many who vocally oppose them because of the tobacco packaging case,” he says.

GREATER GOOD FROM INVESTOR ARBITRATION SHOULD NOT BE IGNORED

Sam Luttrell and Romesh Weeramantry
The Australian Financial Review
12 September 2014

Read more

2.59 On balance the committee is not convinced that legislation is the best mechanism by which to address the concerns raised about risks associated with ISDS provisions. The committee agrees with Professor Notottage and others that the risks associated with ISDS can and should be managed more effectively and in ways which do not require legislation, including careful treaty drafting (of both old and new agreements) and development of a well-balanced Model Investment Treaty.

2.60 The committee is of the view that many of the alleged risks to Australian sovereignty and law making arising from the ISDS system are overstated and are not supported by the history of Australia’s involvement in negotiating trade agreements. While the committee acknowledges that past experience may not be an accurate guide to the future in terms of potential ISDS claims against Australia, it stresses that the investment treaty arbitration field is evolving in positive ways to enable countries, including Australia, to put exclusions in place, limit the application of ISDS to the investment sections of agreements, and generally tighten up the wording of agreements. The committee is of the view that it is far more important for Australia to manage any risks associated with ISDS provisions than to reverse its longstanding treaty practice and opt out of the ISDS system altogether.

2.61 The committee accepts the view that the ISDS system has improved significantly over recent years both in the way treaties are drafted in relation to ISDS clauses and in the way that cases are argued and how arbitrators decide cases. Australia therefore stands to gain more by remaining actively engaged with the international investment law system, including where ISDS provisions apply. The committee is concerned that the Australia to legislate for a blanket ban on ISDS provisions in trade agreements, it would be sending a message to existing and potentially new trading partners that Australia was turning inward-looking and distancing itself from the international law system.

2.62 The committee is of the view that a blanket ban on ISDS would impose a significant constraint on the ability of Australian governments to negotiate trade agreements that benefit Australian business. It is for this reason that the committee considers the current case-by-case approach to ISDS is in Australia’s long-term national interest and a sound policy for weighing the risks and benefits of ISDS provisions in trade agreements.

Accordingly, on September 4, I wrote on behalf of my ARC co-researchers to the Minister and federal Attorney-General, indicating our willingness to assist with a public consultation aimed at developing a Model Investment Treaty (and/or clauses) for Australia, as agreed by the Committee. There remains much hard work to be done in this field. And the issue will certainly not go away. Having lost their day in Parliament, arch-critics of all forms of ISDS have turned back to the court of public opinion, with The Age newspaper in Melbourne reporting on 30 August: “Trade treaties expose Australia to costly litigation, experts warn.”

3. Above n 222

DOUG WILCOX
CArb Australia President

I have been an eventful time here in Perth with the launch of the new WA Chapter which has coincided with us hosting the Accelerated Route to Fellowship Course.

We were pleased to welcome CIArb Australia President Albert Monichino QC and guests from a who’s who in the WA dispute resolution sector including senior lawyers, academics and in-house counsel representing major multinationals, in addition to those from interstate who were attending the Accelerated Route to Fellowship course.

The successful launch reflected the support amongst legal representatives of WA business, most of whom are CIArb members or Fellows.

Western Australia has seen a significant boost in the volume of arbitration in the State following the overhaul of existing State arbitration legislation in 2012, and also the introduction of a specialised commercial arbitration list in the Supreme Court of Western Australia in 2014.

Specifically, there has been a significant increase in resources related domestic and international arbitration in Western Australia resulting from the slowdown in mining and related investment in the State.

The high-end evening also provided the occasion to announce membership of our hardworking committee: Simon Davis (Barrister, Francis Burt Chambers); Tom French (Senior Associate, Clyde & Co); James Healy (Barrister, Francis Burt Chambers); and Prof Colin Roberts (Centre for Research in Energy & Mineral Economics (CREME) Curtin University).

Laburnum Chambers 2013

The lawyer - international law

Top 50 Global

Arbitration Report

The Lawyer - International仲裁

(CREME) Curtin University).
Left – Right: 1. Ian Cartwright (Director, Contract Services, Turner & Townsend), Yicheng Chen (Associate, Clyde & Co) and Tom French (Senior Associate, Clyde & Co) 2. Chris Doepel (Dean – School of Fremantle, Notre Dame University) and Gabriel Moens (Professor of Law, Curtin University) 3. Ian Percy (Barrister, Owen Dixon Chambers) and Shane Bosma (Special Counsel, Ashurst) 4. Philip Adams (Manager Contracts, Kellogg Brown & Root) 5. Albert Monichino QC and Tom Porter (Barrister, Francis Burt Chambers) 6. Phillip Loots (Counsel, Wheatstone Project LNG Plant) and Michael Hollingdale (Partner, Allens).

Albert Monichino QC introduces CIArb National Councillor and WA State Convenor Beth Cubitt pictured with Clyde and Co team, Tom French and Glen Warwick.

Left – Right: 1. Paul Kelly (Lead Contracts Advisor, Chevron Australia Pty Ltd) 2. Prof Colin Roberts (CIArb Australia Treasurer) and Bruce Connell (Barrister, Blackstone Chambers) 3. Gordon Smith ( Arbitrator) and Sam Luttrell (Partner, Clifford Chance) 4. Anthony Willinge (Barrister, Francis Burt Chambers) and Albert Monichino QC 5. Glen Warwick (Partner, Clyde & Co) and James Healy (Barrister, Francis Burt Chambers) 6. Michael Collins (Francis Burt Chambers).
The facts

The appellants, Mr Carr and a company of which he was a director, had been in negotiations with a third party to settle various disputes. A settlement agreement was reached which was conditional on the completion of certain transactions by 4pm on 31 May 2007, time being of the essence. The transactions were not completed on time. The third party cancelled the settlement. After a period of unsuccessful litigation seeking to restore the settlement agreement, the appellants turned their sights on Gallaway Cook Allan (GCA), the appellants’ mistaken intention, that is, even if GCA had not been negligent, the earliest settlement could have been completed was 7 minutes too late.

The appellants then applied to the New Zealand High Court for an order setting aside the award or, in the alternative, for leave to appeal upon the grounds of errors of fact and law by the arbitrator.

The problem

One cannot appeal against a New Zealand arbitration award on a question of fact. The Arbitration Act 1996 (NZ) (the Act) permits only two modes of recourse against arbitral awards rendered in New Zealand:

• the first, applicable to all arbitrations, domestic or international, is set out in Article 34 of the First Schedule. This reflects the New York Convention and Model Law approach of setting aside only on limited grounds concerning jurisdiction, procedure or public policy. New Zealand case law confirms that serious irregularity is required.1

• the second, applicable to domestic arbitrations unless excluded by agreement, and inapplicable to international arbitrations unless included by agreement, is set out in clause 5 of the Second Schedule. This permits an appeal on a question of law if the parties agree, or with leave of the court. This route, following 2007 amendments of the Act, does not extend to what might be termed ‘camouflaged’ questions of fact (cl 5(10)).

Accordingly, although the appellants could apply to set aside the award, or to appeal on a question of law, they could not appeal on a question of fact. So why did the appellants try to do so? The answer is because this stipulation formed part of their September 2010 arbitration submission:

The parties undertake to carry out any award without delay subject only to such rights as they may possess under Articles 33 and 34 of the First Schedule to the Arbitration Act 1996 (judicial review), and clause 5 of the Second Schedule (appeals subject to leave) but amended so as to apply to “questions of law and fact” (emphasis added).

The Supreme Court’s decision

There were three discrete issues before the Supreme Court. First, whether the parties’ “arbitration agreement” for the purposes of the Act was limited to the submission to arbitration or also included procedural matters, such as the provision for a right of appeal on questions of fact and law.

The Court decided unanimously that the meaning of “arbitration agreement” is not limited to the submission but encompasses procedural matters also. The Court based its conclusion on the first issue largely on a contextual analysis of the use of the phrase “arbitration agreement” within the scheme of the Act. However, this approach was also said to accord with the “purposes and principles” underlying the Act, in that it respects party autonomy by enabling parties to agree to arbitration “with particular features.”2

Secondly, whether the ineffective words providing for a right of appeal on factual questions could be severed from the remainder of the parties’ agreement. The Court decided unanimously that whether or not a contractual term can be severed is an issue of contractual construction. It is likely to be permissible to sever an invalid promise which is subsidiary to the main purpose of the contract, but severance may not destroy the main purpose of what has been agreed or alter the very nature of the contract.

In this case, the italicisation of the words “questions of law and fact” and the notation of “emphasis added” demonstrated that the scope of the right of appeal was fundamental to the parties’ agreement to arbitrate. In other words, the provision for this particular right of appeal was so material and important a promise that it could not be severed.

Justice Arnold dissented on this final point, holding, on the basis of a detailed review of the legislative history of the New York Convention and the Model Law, that the correct interpretation of art 34(2)(a)(ii) must be informed by the principle underlying art 34(2)(a)(i) – which is that setting aside ought usually be unavailable where the irregularity has arisen due to the parties’ failed attempt to contract out of a non derogable provision (here, by providing for an invalid appeal on a question of fact).

In so deciding, the Supreme Court overruled the decision of the Court of Appeal below.3 That Court had concluded that the words “and fact” could be severed from the arbitration submission, for essentially the following reasons:

• There was in substance an agreement to submit a dispute to arbitration for a final and binding determination. That subject matter and the parties’ primary obligations remained essentially unchanged by excision of the words “and fact”. Such a deletion altered “only the extent of an ancillary right of appeal but not the nature and character of the agreement to arbitrate”.

• The underlying mutual promises remained valid. The primary consideration passing from each party was the agreement to submit to arbitration. Each party stood equally to gain or to lose from performance of the agreement. The invalid promise to allow each party to exercise a right of appeal on questions of fact stood apart from the underlying promises.

• The invalidity arose from a statutory prohibition, not from a “more reprehensible cause” such as being contrary to public policy, and did not taint the agreement as a whole.

• The parties performed their mutual promises by following the agreed procedure, and the arbitrator had issued a...

1. Indeed, the Arbitration Act 1996 states that one of its purposes is to “redefine and clarify the limits of judicial review of the arbitral process and arbitral awards” (s 5(3)).


3. At 45.
Some observations

The issue of parties impermissibly seeking to alter the grounds of judicial review has arisen before in New Zealand. In Methanex Motoruni Ltd v Spellman the Court of Appeal confirmed that the grounds in Article 34 were mandatory and could not be excluded by a contrary contractual provision.

The issue has also arisen overseas, most notably in the United States, where the Supreme Court in Hall St Associates v Matteo held that parties cannot by agreement expand the judicial review grounds in the Federal Arbitration Act (in that case, to include review for legal error).

Hall St followed the decision in Kyocera Corp v Prudential-Bache. The Court of Appeal decided that the grounds in Article 34 were mandatory and could never be excluded by a contrary contractual provision.

It is important to construe “arbitration agreement” in its broadest sense.”

First, the Court’s reasoning is inherent in the New York Convention and the Model Law. There is no reason to construe the phrase “arbitration agreement” as further limiting the scope of the Convention. The Model Law provides that an arbitration agreement is “in writing” if it is in the form of an exchange of communications,

The purpose or policy. In Carr, the Supreme Court was concerned with the question of what constitutes an arbitration agreement. The Court of Appeal decided that the grounds in Article 34 were mandatory and could never be excluded by a contrary contractual provision.

Thirdly, the broad interpretation is inherently uncertain. The Court’s conclusion is that the parties’ arbitration agreement is “at least the whole of cl 1 of the submission agreement.” This does not make for a good argument, as the very agreement to arbitrate in the New York Convention includes a broad interpretation. The most reasonable interpretation is that the parties’ intention was to arbitrate the entirety of their dispute.

Secondly, although common law severability principles have existed for well over a century, the Court is not permitted to raise it once the appeal has been determined.

One might consider that the answer lies in Arnold J’s dissent. The author is not so sure. At least, there is no arbitration agreement, as Arnold J agreed to be the case. It would be rare indeed – if not imprudent – for the Court to now determine not to set aside the award. Justice Arnold’s reasoning concerning the interrelationship of different sub-clauses of Article 34, though based on considerable scholarship, seems like an intricate fix to a simpler problem.

Conclusion

In conclusion, the clash of legal cultures, evident in Australia in Westport Insurance, is part of the DNA of arbitration law, which inherently relies on domestic courts to support an extra-judicial process.

The Carr decision owes more to common law principles (even if converted for use in an unusual context) than to international arbitration orthodoxy. But, as the TCL case shows, the last word always remains to be said.

5. [2004] 3 NZLR 454 (CA).
7. 341 F 3d 987 (9th Cir 2003).
8. See New York Convention, Article 8(1) and UNCITRAL Model Law, Article 7(1), the wording of which appears in the Act, s 2.
12. See the failure of agreed conditions precedent (such as the mediation requirement of a multi-tiered dispute resolution clause): 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 27. See also Born, above, 279 (“even where an agreement provides for arbitration only after a lengthy process of other dispute resolution mechanisms, it is still an arbitration agreement. Arbitration delayed is not, so to speak, not arbitration”). It is difficult to see why the failure of agreed conditions subsequent should be treated any differently.
15. At [81].
16. At [46]. See also its conclusion of severability: “there is no single statement of principle that will provide an answer in all cases” at [93].
17. Article 160 of the First Schedule requires jurisdictional objections to be raised not later than the statement of defence.
18. See [30].

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Some observations

The issue of parties impermissibly seeking to alter the grounds of judicial review has arisen before in New Zealand. In Methanex Motoruni Ltd v Spellman the Court of Appeal confirmed that the grounds in Article 34 were mandatory and could not be excluded by a contrary contractual provision.

Hall St followed the decision in Kyocera Corp v Prudential-Bache. The Court of Appeal decided that the grounds in Article 34 were mandatory and could never be excluded by a contrary contractual provision.

It is important to construe “arbitration agreement” in its broadest sense.”

First, the Court’s reasoning is inherent in the New York Convention and the Model Law. There is no reason to construe the phrase “arbitration agreement” as further limiting the scope of the Convention. The Model Law provides that an arbitration agreement is “in writing” if it is in the form of an exchange of communications,

The purpose or policy. In Carr, the Supreme Court was concerned with the question of what constitutes an arbitration agreement. The Court of Appeal decided that the grounds in Article 34 were mandatory and could never be excluded by a contrary contractual provision.

Thirdly, the broad interpretation is inherently uncertain. The Court’s conclusion is that the parties’ arbitration agreement is “at least the whole of cl 1 of the submission agreement.” This does not make for a good argument, as the very agreement to arbitrate in the New York Convention includes a broad interpretation. The most reasonable interpretation is that the parties’ intention was to arbitrate the entirety of their dispute.

Secondly, although common law severability principles have existed for well over a century, the Court is not permitted to raise it once the appeal has been determined.

One might consider that the answer lies in Arnold J’s dissent. The author is not so sure. At least, there is no arbitration agreement, as Arnold J agreed to be the case. It would be rare indeed – if not imprudent – for the Court to now determine not to set aside the award. Justice Arnold’s reasoning concerning the interrelationship of different sub-clauses of Article 34, though based on considerable scholarship, seems like an intricate fix to a simpler problem.

Conclusion

In conclusion, the clash of legal cultures, evident in Australia in Westport Insurance, is part of the DNA of arbitration law, which inherently relies on domestic courts to support an extra-judicial process.

The Carr decision owes more to common law principles (even if converted for use in an unusual context) than to international arbitration orthodoxy. But, as the TCL case shows, the last word always remains to be said.

5. [2004] 3 NZLR 454 (CA).
7. 341 F 3d 987 (9th Cir 2003).
8. See New York Convention, Article 8(1) and UNCITRAL Model Law, Article 7(1), the wording of which appears in the Act, s 2.
11. See the failure of agreed conditions precedent (such as the mediation requirement of a multi-tiered dispute resolution clause): 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 27. See also Born, above, 279 (“even where an agreement provides for arbitration only after a lengthy process of other dispute resolution mechanisms, it is still an arbitration agreement. Arbitration delayed is not, so to speak, not arbitration”). It is difficult to see why the failure of agreed conditions subsequent should be treated any differently.
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15. At [81].
16. At [46]. See also its conclusion of severability: “there is no single statement of principle that will provide an answer in all cases” at [93].
17. Article 160 of the First Schedule requires jurisdictional objections to be raised not later than the statement of defence.
18. See [30].
Casenote: TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83

In Brief

The Full Court of the Federal Court of Australia has upheld an earlier decision rejecting an application to set aside or not enforce an international arbitral award. The appeal was brought on the grounds that the rules of natural justice were breached in making the arbitral award. The case clarifies how the rules of natural justice apply to arbitration in Australia.

How does it affect you?

The decision follows a string of recent pro-enforcement decisions by the Federal Court and serves to further illustrate that the Federal Court has jurisdiction to enforce international arbitral awards made in Australia and has the power to set aside an award in the Federal Court. TCL’s application that the Federal Court lacked jurisdiction to enforce international arbitral awards made in Australia was rejected by Justice Murphy (see our report in the May 2012 Arbitration Quarterly).

The decision

The Full Court (comprising Chief Justice Allsop, Justice Middleton and Justice Foster) unanimously rejected TCL’s appeal.4 As a starting point, their Honours found that at [54]:

“The application was a disguised attack on the factual findings of the arbitrators dressed up as a complaint about natural justice.”

TCL then applied in the original jurisdiction of the High Court to prohibit the Federal Court from dealing with the matter on the basis that certain amendments to the IAA were constitutionally invalid. The High Court unanimously rejected TCL’s case (see our March 2013 Focus: Courts uphold arbitration laws in Australia).2

In November 2012 Justice Murphy delivered a second judgment dismissing TCL’s application to set aside the award on the basis that a breach of the rules of natural justice occurred in connection with the making of the award.3

The Federal Court had jurisdiction to enforce the award. As a result, the substance of TCL’s appeal was that Justice Murphy failed to find that the rules of natural justice were breached and the award was in conflict with the public policy of Australia under Articles 34(2)(b) (ii) and 36(1)(b)(i) of the Model Law and sections 16 and 19 of the IAA.

The rules of natural justice relate to procedural fairness. Specifically, TCL argued that:

• there was no evidence (or no probative evidence) for the three critical factual findings made by the arbitrators (broadly alleged under the “no evidence rule”); and

• the arbitrators could not reasonably make findings as to loss other than in accordance with TCL’s expert evidence, when the arbitrators accepted that Castel’s expert witness lacked expertise (broadly alleged under the “no hearing rule”).

TCL’s Federal Court appeal

Following the High Court decision, TCL abandoned those grounds of appeal that related to whether

TCL noted that while Justice Murphy rightly rejected TCL’s submission, for completeness, his Honour nevertheless spent three days hearing the parties’ arguments about the factual findings made by the arbitrators.

The court made the following observations about the rules of natural justice:

• The rules of natural justice are part of Australian public policy. The essence of natural justice is fairness. There can be no breach of any rule of natural justice unless there is real unfairness and true practical injustice in how the dispute resolution was conducted.

• The content of the rules of natural justice vary according to the circumstances and in particular the context of the dispute resolution process in question. In this case, the relevant context is international commercial arbitration, where parties consent to a private arrangement under which errors of fact or law are not legitimate bases for curial intervention.

• Articles 34 and 36 of the Model Law and ss 16 and 19 of the IAA deal with fundamental conceptions of fairness and justice. They are not technical rules that can be invoked by parties consent to a private arrangement under which errors of fact or law are not legitimate bases for curial intervention.

• In maintaining the balance between swift enforcement of arbitral awards and legitimate testing of those fundamental norms, the Model Law and the IAA require the demonstration of real unfairness, prejudice or practical injustice.

• In most, if not all cases, a party that claims to have suffered such unfairness or injustice should be able to show it with tolerable clarity and expedition, without a detailed re-examination of facts or factual evaluation as occurred in the first instance of TCL.

• There may be real unfairness or injustice if a party can readily demonstrate that it has been denied an opportunity to be heard on an important and material issue that could reasonably have made a real difference to the outcome of the arbitration.

The Full Court rejected TCL’s appeal and dismissed TCL’s application that the Federal Court lacked jurisdiction to enforce international arbitral awards.

Comment
Australian courts continue to approach the enforcement of arbitral awards pragmatically and without undue technicality. They have resisted submissions to effectively re-litigate issues or to refuse enforcements because of differences between the way the arbitral tribunal expresses itself and how an Australian court might deal with similar issues. The public policy exceptions are not allowed to be used to avoid enforcement of awards simply because the award looks different to the outcome if the matter had been litigated in an Australian court.

Facts
This decision relates to the enforcement of three interim awards made by an arbitral tribunal in an arbitration seated in London. The arbitration commenced by Armada dealt with a single contract to deliver six cargoes of coking coal/coal in each of the years 2008 to 2012. The coal was not delivered Gujarat in respect of the six shipments in 2009 and the first three in 2010.

Each of the interim awards dealt with matters disposed of by the arbitral tribunal as it heard the matter progressively. In its first award, the arbitral tribunal held that it had jurisdiction to determine the dispute. In its second award, it made declarations largely in favour of Armada, the purchaser, awarded £245,488 in costs to Armada (the second award) and then in the third award the tribunal assessed damages for the failure to deliver for the years 2009 and 2010 at US$7,793,126.30 together with interest of US$676,753.39 and costs of £43,500 (the third award). The award made further directions about the calculation of future interest, including interest on costs.

By the third award the tribunal resolved the damages to which Armada was entitled for the years 2009 and 2010 but did not finally determine all other claims, counterclaims and costs, reserving those matters for a future award. Therefore the arbitration was not concluded and all awards were interim.

Armada sought to enforce the three interim awards in the Federal Court of Australia. The judgment notes that at the time of the hearing of the enforcement application, the Court was advised the tribunal had issued a fourth (partial) award and that Gujarat had commenced proceedings in the High Court of Justice in England seeking to set aside the Fourth Partial Award. The Court was unaware of any further awards or the outcome of the proceedings in the High Court.

Decision
The Court noted that Armada had established the arbitration agreement and the terms of the award that relied upon the arbitration agreement. It had established it was a foreign award, and therefore had established on a prima facie basis that the award was binding on the parties to the action for all purposes. If Gujarat was to succeed in opposing enforcement it had to make out one of the grounds in s8(5) or (7) of the International Arbitration Act 1974 (Cth), which reflect Art V of the New York Convention and Art 36 of the UNCITRAL Model Law on International Commercial Arbitration.

Although five grounds were raised by Gujarat to resist enforcement the manner in which the Court (Foster J) dealt with the grounds meant there were three substantive issues to be considered.

Carriage of Goods by Sea Act
The first issue was based on the Carriage of Goods by Sea Act 1991 (Cth) (‘COGSA’). An earlier decision of the same Justice in relation to s11 of the COGSA suggested that the operation of that Act limited the efficacy of the arbitration agreement – in particular that because of section 11 of the COGSA a provision for a foreign arbitration was ineffective. The earlier decision was the subject of an appeal to the Full Court and the present decision was held in abeyance pending the Full Court’s determination. Ultimately the Full Court appeal in the other matter (Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd [2013] FCAFC 107) was successful, meaning the COGSA point was no longer arguable.

A charterparty is not a “sea carriage document” for the purposes of s11 of the COGSA.

Hence the attempt to resist enforcement based on the COGSA fell away.

Tribunal’s constitution in accordance with the arbitration agreement
The second issue arose out of Gujarat’s argument that the tribunal was not properly constituted as the arbitration agreement required the tribunal to consist of “commercial men”. It submitted two of the tribunal members – both senior lawyers with considerable experience in arbitrating commercial disputes - were not. The Court did not accept they were not commercial men and accordingly grounds one and two failed.

Public policy and futurity
The third issue focused on part of the declarations made in the second award which had an aspect of futurity about them.

The declaration provided in part that “declares that Armada will be entitled to damages in respect of future shipments (if any) which Gujarat fails to perform”. It is not clear how the tribunal made the declaration not yet knowing the individual circumstances of any potential non-delivery.

Gujarat submitted that in Australia it would be contrary to principle to make a declaration in those terms and that accordingly this aspect of the award was not binding on the parties within the meaning of s8(5) of the IAA (reflecting Article V (1) (e) of the New York Convention), alternatively was inconsistent with Australian public policy.

The Court accepted that an Australian court would not make such a declaration in similar circumstances. However the Court did not accede to this submission as justifying the public policy exception for non-enforcement. Nevertheless, it did accept that this aspect of the award was not yet binding on the parties and therefore indicated that the Court would not enforce this aspect of the second award at this time.

The Court gave the parties liberty to apply to seek orders with respect to this aspect of the award at a later date when the issue of the award not yet being binding on the parties would likely have passed. The aspect of futurity in that aspect of the declaration did not impact upon the enforcement of the balance of the award.
An international arbitration tribunal in the Netherlands under the auspices of the Permanent Court of Arbitration has awarded the shareholders of the now-defunct Yukos oil company more than US$50 billion, ruling that the Russian government wrongly seized the company from investors.

The tribunal also ordered Russia to reimburse $60 million in legal fees to Yukos shareholders, which amounted to 75% of the total legal fees incurred over the 10-year dispute. This is the largest international arbitration award in history.

Predictably the Kremlin has already dismissed what it calls a “politically biased” decision and vowed to appeal it. The award is considered final and binding, so the outcome of any “setting aside” motion entered with the Dutch courts would be unclear, however it would certainly delay enforcement of the award.

So how do you enforce a $50 billion award?

If the Kremlin still refuses to pay following a final ruling, the plaintiffs would have to pursue Russian assets outside of the country and via the New York Convention.

Although this lacks the dramatic flair of a march on Moscow, it’s far more likely that Yukos shareholders will achieve the results they want by using courts of the over 150 signatory countries to the New York Convention to seize Russian state-owned property worldwide.

The Federal Court of Australia has been prepared to help in similar situations before. In 2011 it made freezing orders against a party to arbitration proceedings in Switzerland in relation to over AUD$700 million of shares in a publicly listed Australian company (Fortescue Metals). This order was made despite the fact that both parties were foreign, and the only connection to Australia was the fact that the assets in contention were located here. There are, of course, exceptions and sovereign immunity is the big one. If any assets were to be seized, they would have to be assets used for “commercial activity”, so Yukos shareholders couldn’t just claim ownership over a Russian warship docked in Sydney Harbour. Nonetheless, there are still some pretty good prizes up for grabs. Gazprom and Rosneft would be fair game, and they have significant assets located outside of Russia. Although we don’t imagine Yukos shareholders will take a crowbar to Gazprom pipelines in Central Asia any time soon, a court order freezing those assets would cause the Kremlin to sit up and take notice.
The Accelerated Route to CIArb Fellowship

Where: Clyde & Co, Perth
When: 27-28 June 2014

Compared to the ARF course which I participated in abroad some years ago, the Australian course was of a very high standard which was due in no small measure to the in-depth knowledge and inexhaustible energy of the Course Director, Mr Albert Monichino QC. I found that the pre-course assignments and the in-course written exercises significantly maximised the participation of all candidates in the group discussion. I could not have been more pleased with the way the course progressed over the two days and the feedback which I received from the candidates reinforced my view about the high standard of the course in a friendly, social and collegiate environment.

Congratulations to the following candidates who passed the course:

- Shane Bosma
  Special Counsel, Ashurst Qld
- Michael Collins
  Barrister, WA Bar
- Bruce Connell
  Barrister, NSW Bar
- Greg Curtin SC
  Barrister, NSW Bar
- Greg Harris QC
  Barrister, Vic Bar
- Phillip Loots
  Counsel, Bechtel WA
- Paul Menzies QC
  Barrister, NSW Bar
- Robert Newlinds SC
  Barrister, NSW Bar
- Bridie Nolan
  Barrister, NSW Bar
- Ian Percy
  Barrister, Vic Bar
- Glen Warwick
  Partner, Clyde & Co, Perth

Note: The next ARF will be held in 2015 on a date to be advised.

Testimonials

The two day “Fast Track to Fellowship” Course held recently in Perth was genuinely interesting, stimulating and in every sense worthwhile. I certainly learnt that there is a lot more to international arbitration than I had previously appreciated. Albert Monichino’s enthusiasm, depth of knowledge and gift for facilitating genuinely interesting discussions is to be applauded. The facilities and hospitality provided by Clyde & Co were first class and very much appreciated.

Robert Newlinds SC, Banco Chambers, Sydney

The course was stimulating and engaging, conducted in a truly collegiate manner, which both drew the best from all participants and promoted learning along the way. Rarely is one educated in such a pleasant environment. I learnt a great deal.

Paul Menzies QC, 12 Wentworth Selborne Chambers, Sydney

The course was excellently organised. The approach to teaching was also excellent. The decision to use the Socratic Method was central to the proper elucidation of the philosophies underpinning international arbitration. Albert should be congratulated on the way in which he involved participants in the lively discussion that was had.

Michael Collins, Francis Burt Chambers, Perth

Intensive, informative, current and extremely relevant for all of those who are involved in international commercial transactions. The presenter and observers not only raised practical issues for discussion in a clear and concise manner but provoked good discussion and highlighted the most important advantages of international arbitration, and provided forewarning against common pitfalls. I found that in hindsight some further preparation on my part before the course would have added to what I got out of it. Nevertheless, the course is to be highly recommended.

Philip Loots, Bechtel, Perth
prominent speakers and delegates from the Asia Pacific and beyond descended on Melbourne to celebrate APRAG’s 10th Anniversary. Hosted for the first time in Melbourne, the conference attracted support from global institutions and featured an impressive line-up of prominent and distinguished speakers operating across a number of different cultures and legal systems from around the world. Proceedings opened with a Welcome Reception at the Sofitel on Collins, Melbourne, the conference Hosted for the first time in Melbourne, to celebrate APRAG’s 10th Anniversary Group (APRAG) Conference.

When: 26-28 March 2014
Where: Sofitel On Collins, Melbourne

D

Regional seats where the courts have a reputation for supporting rather than interfering with arbitration predictably gain a lot more popularity with the users of arbitration.

Prominent examples include Hong Kong and Singapore, which are fast developing a strong reputation as “safe” and neutral arbitral seats. Speakers such as His Honour Chief Justice James Allsop AO of the Federal Court of Australia and His Honour Justice Clyde Croft of the Supreme Court of Victoria also noted the rise in the perception that Australia is becoming a more arbitration-friendly seat. This may be related to recent legislative changes to modernise the national and state arbitration frameworks. Also relevant are a series of recent Australian court decisions which illustrate a restrained approach to interfering with the parties’ choice in selecting to resolve a dispute through arbitration, and a readiness to enforce arbitration agreements and final arbitral awards.

The conference also featured an interesting discussion on some regional jurisdictions which are still perceived as needing to liberalise and modernise their approach to arbitration. Speakers reflected on the difficulties that frequently arise in certain jurisdictions during the enforcement stage. The varying domestic interpretations of the “publicly policy” exception to enforcement of an award under the New York Convention was noted as a particular problem. Those jurisdictions that interpret this exception overly broadly or idiosyncratically in order to refuse enforcement in a wide number of scenarios predictably had greater difficulty with attracting arbitration users.

As such, speakers and participants were optimistic about Australia’s ability to attract a greater volume of arbitration work in the coming future.

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EUGENIA LEVINE
BARRISTER, VICTORIAN BAR
View Profile
Welcome and Session 1 - A 10 Year Report Card for APRAG and Arbitration in the Region

I am greatly honoured to have been asked to address this 10th anniversary conference of the Asia Pacific Regional Arbitration Group. It is particularly apt that this conference is being held in Australia as it was at a propitious meeting in Australia in 2004 that APRAG was established. Before going any further, I would like to acknowledge the traditional owners of the land on which we meet, including the various cultural groups who together comprise the Kulin Aboriginal nation, and acknowledge that we meet on their country, and pay my respects to their Elders past and present. I would also like to acknowledge our many distinguished guests, too numerous to mention specifically.

To our various overseas guests I would like to reiterate a warm Australian welcome to those who have travelled from other countries, and in some cases quite long distances, in order to join us here in Melbourne. As you will have gathered from Ron’s generous introduction, I am not, myself, from Melbourne, but hale from Perth. Visitors to this country might not be aware that there is great competition between the capitals of the various States in a variety of fields, including sport and commerce.

Perhaps I might be forgiven for indulging in that rivalry for just a few moments, by pointing out that although Western Australia has only about 10% of Australia’s population, teams from Western Australia played in the Grand Final of last year’s national football competition, the final of the national cricket competition held last week, currently lead the national basketball competition, and hold the top two places in the national football competition...
10th Anniversary Asia Pacific Regional Arbitration Group (APRAG) Conference

Networking Lunch: Expected Economic Growth in the Asia-Pacific and the Consequences for Arbitrators
- Bernard Salt, Partner, KPMG, Melbourne.

Australia’s newest hub for dispute resolution, the Melbourne Commercial Arbitration and Mediation Centre (MCAMC) Ltd recently opened for business as part of Australia’s national arbitration grid of centres. Melbourne has a strong history as an attractive destination for dispute resolution. Indeed two high-profile international and domestic arbitrations held here were rated by The American Lawyer as in the top ten arbitrations in the world for the years in which they were heard.

The establishment of the Melbourne Commercial Arbitration and Mediation Centre Ltd (MCAMC) enhances this well deserved reputation and follows the 2011 introduction of a new Victorian Commercial Arbitration Act, based on international model rules.

An initiative of the Victorian Bar with the Law Institute of Victoria (LIV), it was developed with the support of the Victorian Attorney-General Robert Clark and The Hon Marilyn Warren AC, Chief Justice of Victoria.
ASIAN MARKETS TARGETED IN MELBOURNE’S DISPUTES BOON

Ban Butler
The Age
22 March 2014

Melbourne is trying to increase Australia’s share of the multibillion-dollar Asian market for commercial arbitration - a service in demand by global corporates seeking to keep potentially costly and embarrassing disputes out of the courts.

The Melbourne Commercial Arbitration and Mediation Centre, which opened last week, aims to join Australia to a “grid” of international arbitration centres.

Arbitration, where complex commercial stoushes can be settled in private, is increasingly popular with multinational corporations keen to reduce the expense associated with court proceedings - and avoid airing their dirty linen in public.

Last year, 259 cases worth more than $5.2 billion were started in Singapore, a popular choice of arbitration venue.

Victorian Supreme Court Judge Clyde Croft, who has been instrumental in setting up Melbourne’s centre in the heart of Melbourne’s legal district, said it would provide a venue for both domestic and international disputes.

“In this part of the world, particularly based in Hong Kong and Singapore, there’s a huge amount of international commercial arbitration work, and for a trading nation like Australia it’s very important we be part of that as a venue and not just participants offshore,” he said.

Justice Croft said he could not quantify Australia’s existing share of the arbitration market. However, he said his experience as judge in charge of the Supreme Court’s arbitration list showed “a steady stream of business since that specialist list was established at the start of 2010. And we know from the cases that have been issued and run, plus inquiries that have been made, that there’s a reasonable amount of commercial arbitration work happening in Melbourne. There’s also a reasonable amount of international commercial arbitration work coming through Melbourne.”

He said arbitration allowed parties to avoid some of the problems highly technical expert evidence can pose for courts. “If you’ve got a complex engineering dispute, you might well be better to appoint an engineer as an arbitrator, or at least as a member of a panel of three arbitrators, so you then don’t have to try and educate a lawyer judge in relation to technical matters.”

The centre adds to one in Sydney, with a high end service for national and international matters to be resolved in a neutral, purpose built location and provides an innovative online venue booking facility, and links to directories of arbitrators and mediators, and a wide variety of other information about dispute resolution.

In addition it is an attractive venue for hosting events and CPD programs.

It is an honour to head this facility and I welcome you all to take advantage of all what it can offer.

The MCAMC is supported by the Chartered Institute of Arbitrators, the Australian Centre for International Commercial Arbitration and the Institute of Arbitrators and Mediators Australia. Court Services Victoria officially joined the Bar and the LV in the operation of the Centre from 1 July.

Headquartered at the William Cooper Justice Centre in William Street, in the heart of Melbourne’s legal precinct, the Centre provides a high end service for national and international arbitration and international matters to be resolved in a neutral, purpose built location and provides an innovative online venue booking facility, and links to directories of arbitrators and mediators, and a wide variety of other information about dispute resolution.

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The Hon Robert Clark MP (Attorney General of Victoria), The Hon Marilyn Warren SC (Chief Justice of Victoria), The Hon Jonathan Beach (Justice of Federal Court of Australia) and Geoff Bower (President, Law Institute of Victoria).
In the Nick of Time: Interim Measures and Emergency Arbitrators

When: 31 July 2014
Where: Baker & McKenzie, Melbourne

The need for interim measures may arise in any type of dispute. It may be necessary for one of the parties to seek an injunction to freeze assets, to prevent certain measures being taken, to obtain security for costs or to obtain an Anton Pillar order, for example. In domestic disputes, the party seeking the injunction will apply to the appropriate court in Australia as part of the proceedings that may be pending or may soon be commenced before the courts or an arbitral tribunal.

In international disputes, seeking interim measures may be more complicated. The assets may be in a country different to the seat of the arbitration. Interim measures may be sought on an urgent basis before the tribunal is constituted. The party against whom interim measures have been ordered may not comply with those measures giving rise to questions of enforcement. It was these types of issues that were addressed by this seminar chaired by Caroline Kenny QC with presenters, The Hon Neil Brown QC, Philippa Murphy, Partner, Baker & McKenzie and Head of the Asia-Pacific Risk and Crisis Management Practice Group, and myself.

Caroline provided an informative introduction with an overview of the recent case, ‘Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd’. The presenters then addressed interim measures by an arbitral tribunal and emergency arbitrators, interim measures by a court and the specific case study of domain name disputes.

Interim measures by the arbitral tribunal

I started the discussion with an overview of the basis upon which interim measures may be issued by an arbitral tribunal. There is a view that the parties should first try to obtain interim measures from the tribunal before approaching the courts. The parties have given power to the tribunal to issue interim measures. It may be said that the tribunal is better placed to do so because it is more familiar with the facts of the dispute and whether the dispute for issuing the interim measure have been satisfied. Indeed, some courts have emphasised that they should only assist where the tribunal is unwilling or unable to do so.

There are some restrictions with seeking interim measures from an arbitral tribunal as opposed to the courts. It is difficult for a tribunal to issue interim measures on an ex parte basis. A tribunal cannot grant interim measures directed towards third parties. Interim measures may not be granted urgently if the tribunal has not yet been constituted and interim measures may be difficult to enforce if not complied with.

The need for urgent interim measures has been addressed by the introduction of emergency arbitrators, this being the second part of my presentation. I briefly provided an overview of the source of the tribunal’s power from the arbitration agreement, the arbitral rules that apply to the arbitration (eg ACICA Rules, Article 26 and UNCITRAL Arbitration Rules, Article 26) and the seat of the arbitration (eg UNCITRAL Model Law, Article 17) and the need to find support in other arbitral awards or the applicable law to support your position. Also, the tribunal may order security for interim measures under the arbitral rules (eg ACICA Rules, Article 28.4 and UNCITRAL Arbitration Rules, Article 26.6) and the law of the seat (eg UNCITRAL Model Law).

Enforcement of an interim measure issued by a tribunal is one of the key difficulties that may arise if the interim measures are not complied with. Most courts do not have the power to enforce interim measures. Regardless of the form in which the interim measure is made, whether it be an order or an award, it is not usually a final determination of an issue in dispute. For that reason, most jurisdictions will not enforce an interim measure as an award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Only a few jurisdictions will enforce interim measures.

Interim measures by emergency arbitrators

I then addressed briefly the recent introduction of emergency arbitrators. A number of arbitral institutions have recently provided for the appointment of an emergency arbitrator to grant interim measures urgently, usually before the tribunal has been constituted. These provisions were first introduced by the American Arbitration Association and have since been adopted by, for example, ACICA, SIAC, HKIAC and the ICC.

The processes relating to emergency arbitrators vary slightly from institution to institution. I provided a brief overview of the process under the ACICA Rules and provided some examples of interim measures that have been granted by emergency arbitrators appointed by SIAC.
Interim measures by the courts

Philippa Murphy then addressed the basis upon which parties may obtain interim measures from the court in support of an arbitration and the types of interim measures that may be granted by the courts.

Often the parties have expressly stated in the arbitration agreement that they retain the right to request interim measures from a court even though they have agreed to refer the dispute to arbitration. In any event, most arbitral rules and arbitration laws provide that seeking interim measures from the court is not incompatible with the arbitration agreement.

The courts have wide ranging powers to grant interim measures. In short, they are the same as may be obtained in domestic litigation. Philippa addressed five key points in relation to the basis upon which interim measures may be sought:

1. the IAA and the Commercial Arbitration Acts provide that the courts may grant interim measures in accordance with their own procedures with specific consideration to the features of arbitration. For example, for an injunction application, the court will consider whether there is a serious question to be tried, whether the balance of convenience favours the granting of the interim measure and whether damages would be an adequate remedy;
2. the Australian courts may issue interim measures in support of a foreign seated arbitration under Article 17J of the UNCITRAL Model Law. A question was raised as to whether this extends to court orders provided to assist with the taking of evidence, such as the subpoena of a witness. It is arguable that Article 17J only addressed measures for the preservation of evidence rather than the taking of evidence. However, there are also arguments that the taking of evidence is within the court’s usual powers to grant interim measures;
3. a court may order interim relief in support of arbitral proceedings not yet commenced;
4. it is not necessary for parties to an arbitration to obtain permission from an arbitrator before seeking interim measures from the court at least under the IAA; and
5. a court is able to grant interim measures on an ex parte basis.

Philippa concluded with some comments about the fact that sometimes the decision to apply to the court or the tribunal may be based on questions of strategy as well as questions of necessity. The strategy may just be that parties know, from past behaviour, that the opposing parties will not comply with orders and that the tribunal ordered interim measures will eventually need to be enforced by a court in any event. Alternatively, an application to the court might be driven by a desire to place as much pressure as possible on an opposing party to try and secure an early or favourable resolution of the matter. However, recent cases have indicated that the courts are more inclined to refer the parties to arbitration unless the tribunal is unable or unwilling to act.

Domain name disputes: a case study

The Hon. Neil Brown QC provided an entertaining overview of the resolution of domain name disputes and, in particular, the issue of interim measures within that process.

Domain names are the names used to identify a site or address on the internet. Disputes may include commercial disputes or disputes arising from cybersquatting, fraud or counterfeiting. There is a separate arbitration process for domain name disputes. It is a compulsory process that is agreed upon by the party when buying a domain name. There have been about 40,000 domain name cases so far. The process shows that disputes can be resolved quickly and urgent disputes can be resolved even more quickly.

Disputes are dealt with under the Uniform Domain Name Dispute Resolution Policy (UDRP). Urgent disputes are addressed under the new Uniform Rapid Suspension System (URS). The urgent process results in the suspension of the domain name for the remainder of its registration term.

Neil then addressed the procedure and time frames under both the UDRP and the URS systems. Both systems provide for a very quick resolution of the dispute. Neil provided some specific examples of domain name disputes, including examples relating to the video game, Legenda of Zelda, the Game of Thrones and Yves Saint Laurent.

It was evident from these examples that domain name arbitrations provide a useful case study of interim measures and emergency arbitrators.

Conclusion

In the short time available, the seminar sought to provide an overview of the types of interim measures that may be obtained by an arbitral tribunal or a court or even an emergency arbitrator in support of an international arbitration. The resolution of domain name disputes provides one example of where a quick and effective dispute resolution process has been adopted by an industry on an international basis. Much may be learnt from this useful case study.

Lawyers Weekly Law Awards 2014

No Argument That Doug Jones is Disputes King

Justin Whealing
12 August 2014

The winner of the Michael Kirby Lifetime Achievement Award, proudly sponsored by the Nexus Law Group, has had a profound impact on the international legal scene.

Senior Clayton Utz partner Professor Doug Jones received the highest individual award at the Lawyers Weekly Law Awards, proudly sponsored by Michael Page Legal, on Friday night (8 August).

Doubt, the holder of many prestigious domestic and international legal positions, received a standing ovation from over 300 people at Sydney’s Four Seasons Hotel as he made his way to the lectern to accept the Award.

Read more

Photo Gallery: Law Awards 2014

20 August 2014

Spot yourself, colleagues and peers in our photo gallery from the Lawyers Weekly Law Awards, proudly sponsored by Michael Page Legal.

Around 300 people attended this year’s event held at the Four Seasons Hotel in Sydney on Friday, 8 August. The guest list included distinguished and up-and-coming lawyers from across the spectrum of legal practice.

Congratulations to all the winners and finalists. See our photo gallery below for a selection of event snapshots.

Read more
The Chartered Institute of Arbitrators Centenary Year Celebrations

It is an honour to be leading the celebrations marking CIArb’s Centenary next year.

The Centenary is a unique opportunity to showcase the Institute and its work in the promotion of arbitration and other forms of dispute resolution worldwide.

We are planning a number of flagship events including conferences in the UK and overseas, a Centenary Book and the creation of a Research Endowment Fund to finance future research and projects in private dispute resolution.

The Institute will focus its Centenary activity on the future rather than just a retrospective look at the first 100 years.

These events offer you the chance to meet the 13,000 members of our Institute in 120 countries and 40 branches, and are being organised at the international, regional, national and branch level.

We do hope you can join us in celebrating this historic milestone. A complete calendar detailing the dates of our celebrations is available by clicking on the banner below.
Sydney Arbitration Week

On 5 December 2013 ACICA, the Business Law Section of the Law Council of Australia (“BLS”) and the IBA Arbitration Committee presented a highly successful conference entitled ‘Key Issues in International Arbitration in the Asia-Pacific Region’.

The Conference was held at the Intercontinental Hotel, Sydney and was supported by many regional dispute centres.

The Conference welcomed 140 delegates speaking on particular characteristics of International Arbitration in the region, Asia-Pacific International Arbitration capability, roadblocks to efficiency and economy in International Commercial Arbitration and an overview of Investor State Arbitration in the region.

We were fortunate to be addressed by Justice James Allsop AO, Chief Justice of the Federal Court of Australia, with a stellar group of speakers reflecting the region and the world of International Arbitration, including Doug Jones AO, Sunil Abraham, John Beechey, Neil Kaplan QC and Michael Pryles, as well as many other prominent speakers from Australia, USA, Paris, London, The Hague and Beijing.

The Conference and complementary events were so successful that the BLS and ACICA have once more resolved to support and develop Sydney Arbitration Week 2014 from 10-14 November 2014.

The BLS/ACICA International Arbitration Conference will be on Thursday 13 November 2014 at the Sheraton on the Park Sydney.

Click below to access the full program
Launch of CIArb Australia Qld Chapter 2014-2015

When: 19 August 2014
Where: Corrs Chambers Westgarth, Brisbane
Panel: Ben Davidson, Partner, Corrs Chambers Westgarth, Albert Monichino QC and Dr Stephen Lee, CIArb Australia Qld Convenor
Photos: Stuart Riley

The CIArb Australia Queensland Chapter celebrated its relaunch with pre-eminent lawyer and arbitrator, Walter Sofronoff QC who addressed a distinguished gathering hosted by Corrs Chambers Westgarth.

Left – Right: 1. Henry Trotter (Barrister, Qld Bar), Michael Drysdale (Barrister, Qld Bar), Melissa Yeo and Ben Davidson 2. Todd Spiller (Senior Associate, Corrs), Dr Therese Wilson (Griffith Law School), Patrick McClanahan (Graduate Lawyer, Corrs) 3. Joanna Jenkins (Partner, Ashurst), Matthew Williams (Barrister, Qld Bar), Shane Bosma (Special Counsel, Ashurst) and Suzanne Cleary (Special Counsel, Ashurst) 4. Matthew Scott (Graduate, Ashurst), Rebecca Dunlop (Solicitor, Ashurst), Lillian Yeung (Associate, Ashurst) and Matthew Taylor (Solicitor, Ashurst) 5. Katherine Truce (Manager, KordaMentha), Melissa Yeo, Poppy Potter (Senior Executive Analyst, KordaMentha) and Julia Gracey (Senior Executive Analyst, KordaMentha) 6. The Hon Justice Richard Chesterman AO RFD, Albert Monichino QC and Walter Sofronoff QC 7. Robert Morgan (Barrister, QLD Bar) and Liam Prescott (Partner, DLA Piper) 8. Louise Young (Solicitor, Ashurst) and Gisele Vanderweerden (Solicitor, Ashurst).

BACK IN BUSINESS
A dispute resolution body has returned to the legal fold, writes Melissa Yeo.

Melissa Yeo
Lawyers Weekly
1 September 2014

It was with great enthusiasm that Corrs Chambers Westgarth hosted the re-launch of the Queensland chapter of the Chartered Institute of Arbitrators Australia (CIArb Australia) on 19 August.

Queensland barrister, Dr Stephen Lee, the newly appointed State Convenor for the Queensland chapter, kicked off the evening with a warm welcome to the 70 plus distinguished guests, including His Honour Justice Greenwood of the Federal Court of Australia and the Honourable Richard Chesterman AO RFD in addition to senior lawyers and in-house counsel.

Stephen gave an enlightenment overview of CIArb, detailing its history and charter, and explained the organisation’s aim to promote and facilitate the development of arbitration and other forms of private dispute resolution worldwide.

The aim of the Institute is in step with the momentum arbitration is enjoying as the preferred mechanism for dispute resolution, particularly in Queensland.

Popping the champagne corks
The festive atmosphere peaked when Albert Monichino QC, President of CIArb Australia, popped the cork off a bottle of bubbly to officially re-launch the Queensland chapter of this great organisation.

With the official part of the festivities complete, Stephen introduced the keynote speaker for the evening, Walter Sofronoff QC, who addressed a distinguished gathering hosted by Corrs Chambers Westgarth.
Haviland Tiger Moth two weeks earlier. Despite such recent dramas, Walter delivered an engaging address on Arbitration in Queensland.

He began by explaining how the practice of arbitration had come a long way. Previously, if an arbitrator made an award, the rights from the award were a substitution for pre-existing rights within the contract.

A court would not interfere unless there was an error of law. Even then, there were avenues for, inter alia, cartellorit. This led to arbitrations producing inconclusive awards. Queensland required a system that made awards final; a method to transform an award into a ruling of a court. However, the Commonwealth had no head of power to legislate for arbitrations.

This changed in 1974 under the Whitlam Government, when the external affairs power was relied upon to support legislation for the enforcement of foreign awards in Australia.

A Model Law

A seminal event later occurred with the introduction of the UNCITRAL Model Law in Vienna in 1985, which was designed to govern the conduct of arbitrations. At this time, while parties were able to agree to the proper law of arbitration agreements, an overarching law involving a jurisdiction was still needed, a “Lex Arbitri”, or a meta-law that gives arbitral awards effect.

Walter explained that if the Model Law was adopted it could be the meta-law and provide certainty, uniformity and finality. With a fair, predictable and conclusive draft Model Law, there could be fair, free and efficient international trade, which leads to peace.

In Eisenwerk, a German company sued an Australian company for mining equipment. The contract between the parties included an arbitration clause that referred to the ICC rules in the contract, the transaction was not subject to the ICC.

The Court of Appeal in 2001 found that by agreeing to the ICC rules in the contract, the transaction was not subject to the Model Law. This decision has been criticised in arbitral circles and was subsequently found by a single judge of the NSW Supreme Court in Cargill International SA v Peabody Australian Mining Ltd [2010] to be “plainly wrong”.

Walter explained that the decision in Eisenwerk should be considered in the context of the time that the case was decided: that is, the field of arbitration was new, and as such, there was a lack of appreciation of the three bodies of law being the proper law of the contract, the applicable procedural rules and the Lex Arbitri.

The decision in Eisenwerk has since been corrected with the introduction of the amended International Arbitration Act...
Having only recently been appointed to this role it is great to see that the State Chapters with the support of the CIArb Australia Council, have been reinvigorated and that a number of initiatives have been implemented to ensure that members gain the most from their membership.

A vibrant and professional CPD program is currently underway.

For younger members (under 40 years), we are planning to hold a practical workshop in Australia next year on international resources arbitrations.

If you are interested in participating either as a facilitator or a participant please contact me at jhealy@francisburt.com.

For further details, please visit http://www.ciarb.net.au/join.

If you have any feedback or suggestions please feel free to contact me so we can continue to ensure that the CIArb Australia can support your professional requirements.

CIArb Australia Membership Update

Congratulations to the following who were recently accredited as Fellows

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<td>Mr John Fisher</td>
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<td>Professor Colin Roberts</td>
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<td>Mr Anthony Clifford</td>
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<td>Mr Peter Cash</td>
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Welcome to our new Members and Associates who joined between 1 Jan and 31 July 2014

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<td>Mr Greg Curtin SC</td>
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<td>Mr Donovan Ferguson</td>
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<td>Ms Sandrah Foda</td>
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<td>Mr George Fraser</td>
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<td>Ms Eugenia Levine</td>
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<td>Mr Anthony Lo Surdo SC</td>
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<td>Mr Cormac MacNally</td>
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Our flagship issue for publication October

asiatodayinternational.com  asiatoday@asiatoday.com.au
Patron Profile: The Hon Murray Gleeson AC

The Hon Murray Gleeson AC was Chief Justice of the High Court of Australia (1998-2008). Read more

What/Who inspired your interest in arbitration?
I appeared in a number of arbitrations as a barrister. My last major case before my appointment to the Bench in 1988 was an arbitration, heard partly in Melbourne and partly in London, with arbitrators from the UK, the USA and Australia, and lawyers from Australia and the USA.

As a barrister and later a judge, I formed some fairly clear views on the respective advantages and disadvantages of litigation and arbitration as forms of commercial dispute resolution.

What traits make a good arbitrator?
They are much the same as those that make a good judge. They include a capacity to identify the issues in a dispute and to analyse arguments, and a commitment to independence and impartiality.

Some of the arbitrators before whom I appeared as Counsel were not lawyers, and the importance of legal knowledge and judgement depends upon the nature of the dispute.

Matching the qualities of an arbitrator to the particular dispute is an important aspect of the task of selecting an appropriate arbitrator.

What do you consider the most over-rated virtue?
Resignation.

What is your favourite destination?
Lord Howe Island, off the mid-north coast of New South Wales.

What is your favourite book?
As at August 2014, The Sleepwalkers by Christopher Clark.

What credo/maxim/motto inspires you?
Equality is equity.

Refer to an historical conflict you wish you could have participated in and why?
Somerset v Stewart in which Lord Mansfield (William Murray) declared that slavery had no place in the law of England was a great legal conflict, although why the principle was limited to England is not clear.
Why train with us

As the professional home of dispute resolvers with over 13,000 members worldwide, there is no better place to develop your ADR skills. CIArb provides a world-class training programme in arbitration, adjudication, and mediation.

Whether you’re new to ADR and keen to find out more or an experienced practitioner looking for career-enhancing training, CIArb has a course and qualification to fit your needs.

Our Pathways programme - ranging from Introductory Certificates through to advanced level Diplomas - will give you the specialist knowledge and skills you need to get ahead in ADR, whilst also qualifying you for membership of CIArb as Associate (ACIArb), Member (MCIArb) or Fellow (FCIArb). These internationally recognised qualifications provide our members with a powerful mark of quality assurance.

Other training features include:
- Expert tutors who are leading practitioners and academics
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- Courses delivered worldwide
- Supportive learning community

Training ranges from one-day introductory sessions to seven month courses. Courses are delivered worldwide through international branches. For global training opportunities, find your local branch at www.ciarb.org/branches

To find out more about training opportunities in ADR, visit:

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