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The CIArb Australia News

December 2016

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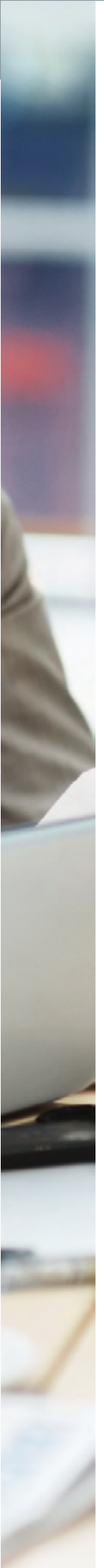

About us

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 14,000 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**

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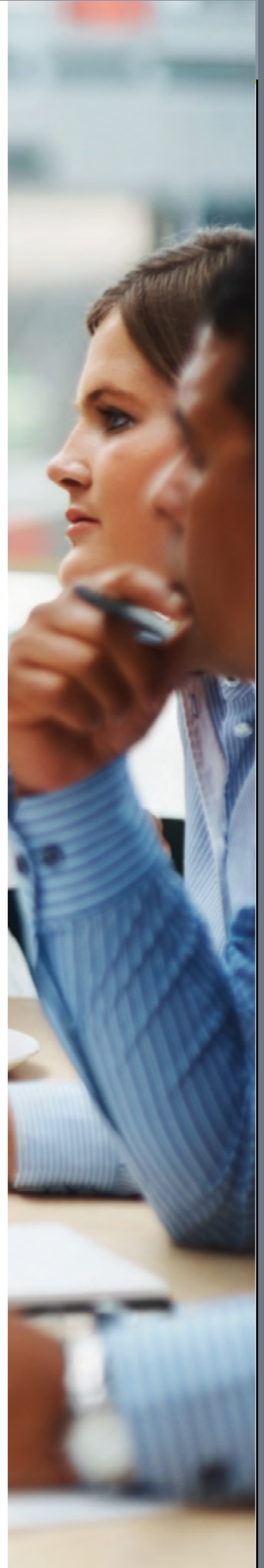

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ALBERT MONICHINO QC
CIARB AUSTRALIA PRESIDENT
BARRISTER, VICTORIAN BAR
View Profile

President's Report

Welcome to the December 2016 edition of our flagship publication, *The CIArb Australia News.*

The 2016 calendar year has been eventful for CIArb Australia, reflecting increasing interest in international arbitration. Following the inaugural **Asia-Pacific Diploma Course in International Commercial Arbitration**, we held the **Accelerated Route to Fellowship** course on 15-16 October and the first of the **2016 Award Writing** course tutorials in Melbourne on 12 November, attracting senior practitioners from across Australia and the Asia Pacific region.

Sydney Arbitration Week 2016

The **4th International Arbitration Conference** was held in Sydney on 22 November. The theme of the conference was ***"New Horizons in International Arbitration"***. Held at the Federal Court of Australia, the conference was presented to a full house. The speakers comprised local and international arbitration experts. The topics were far-ranging, including developments in third party funding in the Asia Pacific, privilege disputes in international arbitration and recent developments in the *Astro v Lippo* dispute.

With respect to the latter, on 5 December, the Hong Kong Court of Appeal (HKCA) dismissed Lippo's appeal from a first instance decision enforcing the awards against the Lippo parties, notwithstanding that the Singapore Court of Appeal, the court at the seat, had held that the arbitral tribunal had no jurisdiction to make the awards against the relevant Lippo parties. This was because the Lippo parties had been guilty of inordinate delay in making application to the Hong Kong court to set aside the order nisi granting leave to enforce the awards. For the full text of the HKCA decision, please click here.

The separate holding by the trial judge that the Lippo parties should not be permitted to rely on section 44(2) of the Hong Kong Arbitration Ordinance (implementing Article V of the New York Convention) to resist enforcement of the awards on the ground that they had acted in breach of a "good faith" principle (in particular, by failing to challenge the tribunal's ruling on jurisdiction under Article 16 of the Model Law as they were entitled to, but instead continuing to participate in the arbitration), was overturned. The HKCA clarified that good faith is relevant to the exercise of the enforcement court's discretion to enforce an award, but is not a separate basis for disentitling an award debtor from relying on one of the limited grounds for resisting enforcement (as the trial judge had held).

Immediately following the conference, we held our annual dinner at Studio, the fine dining restaurant at the iconic Sydney Tower. Sponsored by global law firm, **Holman Fenwick Willan**, the event attracted over 130 guests. International arbitrator and President of the SIAC Court of Arbitration, **Gary Born**, delivered the after dinner address, and La Trobe University student, **Jagpreet Sandhu**, was awarded

Albert Monichino QC addressing the inaugural CIArb Asia Pacific Diploma Class 2016 in Singapore

the **2016 CIArb Australia Essay** prize.

Other notable events included a joint **CIArb Australia and ICC Asia** seminar, and the launch of the **CIArb Australia Young Members Group**, with **the Hon Michael Kirby AC CMG** delivering the keynote address.

CIArb Australia Vis Pre-Moot

The first initiative of the CIArb Australia Branch Young Members Group Committee is the organisation of the inaugural **CIArb Australia Vis Pre-Moot**, which is open to all Australian teams competing in the Willem C Vis International Commercial Arbitration Moot in Vienna, or the Vis East Moot in Hong Kong, in 2017. The Pre-Moot offers a unique extension of the Vis Moot experience for Australian students. For more information, please click here.

Appointments

Congratulations to former CIArb President, **John Wakefield**, who has been appointed the CIArb Australasia Trustee. He succeeds **Malcolm Holmes QC**, who has served the Institute with distinction, not only as President, but as the designer of the Australian version of the Diploma Course, which celebrated its 10th Anniversary this year.

Congratulations are also extended to **Julie Soars**, CIArb Councillor and NSW State Convenor, who has resigned to take up a position as Magistrate at the NSW Local Court in March, and to **Julia Dreosti**, SA Committee Member, who has been appointed CIArb Representative to the Asia-Pacific Forum for International Arbitration (AFIA).

2017 Continuing Professional Development Program

Members are reminded that one of the benefits of membership includes free registration for CIArb Australia CPD events held across Australia and discounts to national and international conferences. The 2017 CPD program will be kicked off with a seminar entitled **"Current Issues in International Arbitration"**. It will involve a panel discussion led by **Dr Michael Pryles AO PBM**. The event will be hosted by **Corrs Chambers Westgarth**, Melbourne. For more details, please click here.

Season's Greetings

As my term as President ceases in April 2017, this is my last presidential report... I thank **Councillors**, and our **CEO, Gianna Totaro**, for their tremendous support over the past two years and eight months.

During this time, we have worked hard to expand the Institute's offerings and consolidate CIArb Australia's leadership in the arbitration space.

On behalf of CIArb Australia, I extend our best wishes for the festive season and the year ahead.

Albert Monichino QC
President

JESSE KENNEDY
ASSOCIATE
SKADDEN ARPS SLATE MEAGHER & FLOM LLP, NEW YORK
View Profile

The Threat of Winter Lingers Over Sydney Arbitration Week

"Winter is coming," warned **Gary Born, WilmerHale partner and President of the SIAC Court of Arbitration**, as the clouds parted outside to reveal yet another spectacular warm and sunny day to herald the 2016 Sydney Arbitration Week. Mr Born was not, of course, warning of the weather, but of impending challenges facing the world of international arbitration.

With "Brexit" and the United States presidential election still fresh, the implications of inward looking national policies was a theme running through much of Sydney's 4th International Arbitration Conference, organised by **CIArb Australia** in partnership with the **Business Law Section of the Law Council of Australia** and the **Australian Centre for International Commercial Arbitration ("ACICA")**.

Before a full house at the Federal Court's Sydney premises, the conference was opened by **The Hon Chief Justice James Allsop AO of the Federal Court of Australia**, who espoused the important relationship between courts and arbitrators in creating an effective international justice system; something gaining importance as globalisation comes under increasing scrutiny. His comments were echoed by the **Chief Justice of the New South Wales Supreme Court, The Hon Thomas Bathurst AC**, who also explained how judicial attitudes towards arbitration have developed to such an extent that there is now an effective and efficient dialogue and relationship between arbitrators and courts.

According to Gary Born, it is the same relationship between arbitration and national courts and legislatures that has led to a "long golden summer" for arbitration in the Asia-Pacific. He was the keynote speaker in a session of the conference entitled "International Arbitration in the Asia Pacific Region", and chaired by **CIArb Australia Vice President, Caroline Kenny QC**, with commentary from **Dr Fuyong Chen, Deputy Secretary-General Beijing Arbitration Commission** and **Prof David Williams QC**. Despite the long summer, however, Mr. Born warned that arbitration now faced two key challenges.

First, Mr Born warned that the criticisms levelled at investor-state arbitration will have repercussions for international commercial arbitration. While some of those critiques do not apply equally to commercial arbitration, Mr Born argued that arbitration is not divorced from the attitudes of national legislatures and courts; its efficiency depends on their willingness to support the process. If there is a loss of faith in arbitration – or perhaps a loss of faith in globalisation more generally – national support of the international arbitration regime may wane. Indeed, he noted that the recent comments in the **2016 Bailii Lecture by The Right Hon Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales**, arguing that arbitration threatens to undermine the development of the common law, was a step towards the arbitral winter.

Second, the day-to-day conduct of individual cases threatens to jeopardise arbitration's success. According to Mr Born, arbitration is promoted as being more expert, efficient and even-handed than other forms of alternative dispute resolution. Unless it can deliver on these promises, it will be unable to defend itself against the broader critiques presented by the first challenge. This concern was echoed by Prof Williams, who pointed his finger towards the abuse of "due process" challenges. These threaten to intimidate tribunals, undermining arbitration's efficiency. One useful solution, he suggested, was the awarding of indemnity costs against frivolous challenges, as has been done by the courts of Hong Kong and Australia.

The solution to the first and broader challenge to arbitration may not be so simple. In his keynote address at the **CIArb Australia Annual Dinner at Sydney Tower, sponsored by Holman Fenwick Willan**, following the conference, Mr Born spoke of arbitration as integral to the international rule of law. However, unless the arbitration community can persuade national legislatures and courts that international arbitration respects national policies and concerns, it may become increasingly difficult for arbitration to continue to benefit from the supportive regimes currently in place. In an age when symbolism matters, it was perhaps noteworthy that this was all said as the delegates sat atop Sydney's tallest tower, enjoying a three-course meal in a restaurant offering spectacular views over the city. It seems a daunting task ahead to convince the people on the ground of the virtues of the international justice system to which arbitration is so fundamental.

Of course, the challenges we, the arbitration community, face was not the sole focus of the day. Through various panel sessions, other contemporary issues on international arbitration were addressed and debated. This included a discussion of the *Astro v Lippo* dispute and other recent regional developments in a panel session chaired by **David Bateson of 39 Essex Chambers, Singapore** in discussion with **Beth Cubitt, Partner, Clyde & Co Australia, Alastair Henderson, Herbert Smith Freehills, Singapore** and **Susan Dunn, Chair of Investment Committee, Harbour Litigation Funding, Hong Kong**.

From the floor, James Kwan of Hogan Lovells, Hong Kong, suggested that one explanation for why a Hong Kong court dismissed the jurisdictional challenge in *Astro v Lippo* as out of time, when a Singapore court (and the seat of arbitration) had already refused to enforce part of the award, is the different versions of the UNCITRAL Model Law adopted in each jurisdiction. Hong Kong has adopted the 2006 version, including article 2A's reference to the "observance of good faith." The issue is currently on appeal to the Hong Kong courts.

The role of tribunal secretaries is still making the rounds, with both Gary Born and Prof Williams opining that the efficiency of arbitration can be improved if secretaries undertake more substantive duties, with the caveat that the arbitrator cannot and should not delegate her decision-making function. Mr. Born noted that, as rules regarding tribunal secretaries mostly speak of performing only administrative duties, it is time to align the rhetoric with reality.

Other sessions saw a panel which included CIArb Australia President, Albert Monichino QC, and chaired by the Chief Justice of the Western Australian Supreme Court, The Hon. Wayne Martin AC, explore the choice of law minefield that is legal privilege in arbitration. Andrew Paton of De Berti Jacchia, Italy highlighted the problems with requiring some civil law lawyers to disclose documents when they would face sanction for doing so under their own laws. And Brenda Horrigan of Herbert Smith Freehills, Australia noted that the issue

FRENCH COURTS CULLETON, NO TURKEYS

Katie Walsh
The Australian Financial Review
25 November 2016

Among the final scenes of an illustrious career in the law, the nation's foremost judicial officer, High Court chief justice Robert French, perhaps did not expect a colourful The Castle-inspired session that canvassed hugs between senators, rehydrating piggy banks and lovelorn political parties.

Yet so it was on Monday as One Nation senator Rod Culleton represented himself before the court in directions hearings for the case that will decide if his election to the Senate was constitutional.

"Well, let us not talk about the Constitution, your Honour," pleaded Senator Culleton to his fellow West Australian at one point.

"Well, we are talking about the Constitution really," the chief justice responded.

The **transcript** makes for a good read ahead of his January retirement. The chief justice was spotted, still glowing with the flush of a lively sitting, in Perth on Thursday at a colloquium held by the Western Australian Bar Association in his honour. Among those giving virtual hugs in speeches reflecting on the French court were fellow bench member justice Michelle Gordon and constitutional law genius University of Sydney professor Anne Twomey.

GIVING THANKS TO A TURKEY

If only senator Culleton had the option of resolving the matter in the privacy of a closed-door arbitration session, where he may well be able to "hug [Attorney-General George Brandis] and say, look, perhaps there is a way that we can move forward?"

Luminaries of the international arbitration world, including WilmerHale partner and industry "rock star" **Gary Born**, descended upon the Federal Court in Sydney this week for the fourth International Arbitration Conference, opened by **New South Wales Supreme Court chief justice Tom Bathurst**.

Championing the privacy, efficiency and cost effectiveness of arbitration, chief justice Bathurst borrowed a comical

anecdote about the turkey placed on a table and charged with selecting the winning party. An appeal by the losing party was thrown out, such was the court's respect for the role of the arbitrator (yes, the turkey).

"I certainly don't wish to imply that the job of the arbitrator is as simple as the turkey's," reassured chief justice Bathurst.

"It does say something about judicial respect for arbitral awards."

General acceptance of arbitral awards, he said, had "gone a long way towards increasing Australia's attractiveness as an international arbitral hub". He warned against arbitrators adopting the strict procedural rules followed by the courts, lest it lose a key benefit.

POST-TRUMP WINTER IS COMING

But is cross-border arbitration under threat?

Brexit and the US election of Donald Trump, who on Tuesday promised to withdraw from the Trans-Pacific Partnership (with its investor state dispute settlement rules), has made some arbitrators shiver.

Federal Court chief justice James Allsop, resplendent in trademark tortoiseshell glasses, delivered a welcome incorporating a warning of his own.

"At a time, without seeking controversy, when internationalism and a sense of international commercial community is under threat of nationalism and protectionism, a fair international justice system is vital," he said.

The visiting Mr Born went further, declaring "Winter is Coming", in a shameless admitted Game of Thrones reference.

"In a sense we've had a long golden summer for international arbitration," he said.

Investment disputes, a close sibling to international arbitration, was under "unprecedented judicial attack", said Mr Born. Attacked for eroding state sovereignty, and allowing the "global elite behind closed doors of smoked filtered rooms, if that was still allowed" to substitute decisions.

He warned those gathered not to dismiss it as something that was happening to "just investment arbitration".

Unless they could deliver the more efficient and responsive resolution expected in arbitration, they were at risk of having to defend what was "beyond the wall", he said.

Albert Monichino, QC, president of the Chartered Institute of Arbitrators Australia, said that in the face of "increased nationalistic sentiment", arbitrators could not "afford to be complacent" despite increasing numbers of cross-border disputes in the Asia-Pacific region.

For all the talk of chills, the room was remarkably warm. Chief justice Allsop apologised that the air conditioning was "a bit underpowered".

goes further than the applicable law, as companies have vastly different document management systems depending on their own country's disclosure regimes. Even applying the same privilege laws to all parties may create an unequal playing field.

The Hon Justice Peter Vickery of the Victorian Supreme Court chaired the "graveyard shift," and woke up the delegates with six hypotheticals on common ethical issues arising in arbitration. Perhaps as a sign of a globalised practice, there was broad agreement on the appropriate ethical responses among a panel comprised of practitioners from **Australia (Monique Carroll, King & Wood Mallesons), Hong Kong (James Kwan, Hogan Lovells)** and **Switzerland (Elliott Geisinger, Schellenberg Wittner and President of the Swiss Arbitration Association)**.

The final panel comprising **Lisa Bingham, Legal Counsel, PCA and Deputy Executive Director, ICCA, The Netherlands, Leah Ratcliffe, Associate General Counsel, BHP Billiton, Australia** and **Andrea Martignoni, Partner, Allens Linklaters, Australia**, and chaired by **Nick Watts of Holman Fenwick Willan, Australia**, discussed various pros and cons of procedural and time mechanisms in arbitration, including that "horrible Australian term": "hot-tubbing" the experts. This session was the most hotly debated of all, but as should be expected, the take-away ultimately boiled down to "one size does not fit all." And is that not one of the key benefits of arbitration, that the procedures can be shaped to best meet the individual needs of the case?

With the "nuts and bolts" issues out of the way, the day came to an end with the **President of ACICA, Alex Baykitch of King & Wood Mallesons**, reminding us all of the earlier warnings on the challenges facing arbitration. It seemed rather fitting, therefore, that the conference was closed with a presentation by **Dr Fuyong Chen**, entitled "Seeking Truth from Facts" and discussing the BAC's efforts in facilitating mutual understanding between China and the rest of the world as part of China's broader "Belt and Road Initiative." While some parts of the world begin to look inwards, China continues to look beyond its borders, and one can expect arbitration to play an important role in facilitating the cross-border relationships that will follow.

And so the formalities were closed with a clear message left for us all: winter is coming, but now is not the time to retreat indoors to the fireplace. Dust off the old coat, head out into the cold, and face the challenges head-on. But if you find the winter's chill becomes too much, the maturity shown by Australia's judiciary and arbitration community at the 4th International Arbitration Conference suggests that there will always be a nice warm spot for arbitration somewhere between the Opera House and the Harbour Bridge.

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The Hon Tom Bathurst AC: "Alternative dispute resolution has long been an integral part of the operation of the legal profession."

The 4th International Commercial Arbitration Conference

Opening Address

The Hon Tom Bathurst AC
Chief Justice of NSW
View Profile

It is a pleasure to have the opportunity to open the fourth international arbitration conference. I would like to begin by acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders past and present.

International arbitration has been described as "a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week."[1] Indeed, last year, almost five thousand requests for arbitration were filed worldwide in leading arbitration institutions.[2] In the Asia Pacific, the common golden thread of the UNCITRAL Model Law runs throughout most of the region. This, in addition to an exponential increase in transnational trade and commerce, has led to the increasing popularity of international arbitration as a method, if not the primary method, of international commercial dispute resolution.[3]

In this context, the theme of today's conference, 'New Horizons in International Arbitration', allows us to take stock of recent developments and issues in international arbitration and look to the future. Today, you will hear from leading arbitration experts from around the world on recent issues in international arbitration, arbitration in the Asia-pacific region, privilege disputes, ethical considerations and procedural and time issues.

In this opening address, I will use my prerogative as a judge to make some comments on the relationship between the courts and arbitration in the Australian context. I will keep my remarks brief, so as not to encroach on today's program.

Alternative dispute resolution has long been an integral part of the operation of the legal profession. It significantly pre-dates the English justice system, was prominent in ancient Egypt, China, Greece and Rome, and was the preferred method for resolving civil disputes in Europe during the Middle Ages. It would be trite for me to stand here and wax lyrical about the benefits of arbitration. Safe to say, arbitration is clearly beneficial to parties who desire a high degree of control over proceedings. It offers flexibility, privacy, efficiency, industry-expertise and it can be more costeffective than litigation, assuming it is effectively managed.

However, the private agreements of parties in arbitration have not always been respected by us members of the judiciary. Traditionally, English courts exercised extensive supervision over arbitral processes and outcomes. In 1609, the great English jurist, Sir Edward Coke, held that an arbitral agreement was "by the law and of its own nature countermandable".[4] Two hundred years later, the United States Supreme Court referred to an arbitration tribunal as "a mere amicable tribunal", the decisions of which were essentially non-binding and irrelevant to the court's task.[5]

In December 1934, **Professor Earl S Wolaver** reiterated a frequently held view that arbitral awards were a "species of moral and economic justice".[6]

He stated that

> [w]hile arbitration probably antedates all the former legal systems, it has not developed any code of substantive principles, but is, with very few exceptions, a matter of free decision, each case being viewed in the light of practical expediency and decided in accord with the ethical or economic norms of some particular group.[7]

As noted by **Luke Nottage** and **Richard Garnett**, "in the 19th century, there was [a] direct incentive for English judges to keep a wary eye on arbitration: it diverted cases away from the courts, which in those days were much more dependent on court user fees than on general government grants".[8]

Australian courts inherited this traditional wariness towards arbitral agreements. Under the old Commercial Arbitration Acts, arbitral awards were often challenged for "technical misconduct".[9] However, over time, as arbitration has become more and more attractive for commercial parties, and certainly with the advent of the UNCITRAL Model Law and New York Convention, courts have become more supportive of enforcing arbitral awards.

One comical example of judicial acceptance of arbitral awards is described by **Sir Robert Megarry** in the latest edition of 'Miscellany at Law'.[10] I have recounted this story on a previous occasion, but I think it warrants a retelling. At some point in the 19th Century, in County Down, Ireland, a local form of arbitration involving a turkey was practiced. The arbitration took place at a long table, with the parties sitting at the head and an independent person acting as a referee. Grains of oats were placed at intervals along the centre line of the table. The grains stopped about a foot from the head of the table and two corn kernels were placed in front of each party. A turkey was deposited at the far end of the table and gradually pecked its way down the table before delivering its final verdict by selecting one of the corn kernels. The party whose kernel was consumed by the turkey would be the ultimate winner in the arbitration.

Unsurprisingly, one party whose corn kernel was not selected by the turkey was dissatisfied and decided to challenge the award. On appeal, the matter came before **Chief Justice Lefroy**, who was unfamiliar with the local practice. During cross-examination of the disgruntled party, inevitable confusion arose about the role of the turkey in the arbitration. On realising that the turkey was in fact the arbitrator, and that the method was an established local form of arbitration, the Chief Justice

THREAT OF WINTER LOOMS OVER SUNNY SYDNEY

Jesse Kennedy
Global Arbitration Review
1 December 2016

It may be high summer in Sydney but in a sequel to a speech he gave on impending challenges facing international arbitration earlier this year **Gary Born** has warned that "winter is coming". **Jesse Kennedy** of Skadden Arps Slate Meagher & Flom in New York reports.

With "Brexit" and the United States presidential election still fresh in people's minds, the implications of inward looking national policies was a theme running through much of Sydney's fourth international arbitration conference, organised by the Chartered Institute of Arbitrators Australia in partnership with the business law section of the Law Council of Australia and the Australian Centre for International Commercial Arbitration. Indeed, on the day of the conference president elect Donald Trump confirmed that he would take the US out of the Trans-Pacific Partnership trade deal on his first day in office.

Before a full house at the Federal Court in Sydney, the conference was opened by the chief justice of the court **James Allsop**, who highlighted the important relationship between courts and arbitrators in creating an effective international justice system; something gaining importance as globalisation comes under increasing scrutiny.

His comments were echoed by the chief justice of the New South Wales Supreme Court, **Thomas Bathurst**, who said that judicial attitudes towards arbitration have developed to such an extent that there is now an effective and efficient dialogue between arbitrators and courts.

According to Born, it is the relationship between arbitration and national courts and legislatures that has led to a "long golden summer" for arbitration in the Asia-Pacific. In a keynote speech during a session chaired by CIArb Australia's vice President, **Caroline Kenny QC**, he warned that arbitration now faces two key challenges.

First, Born warned that the criticisms levelled at investor-state arbitration will have repercussions for international commercial arbitration even if they do not apply directly to them. If there is a loss of faith in arbitration – or perhaps a loss of faith in globalisation more generally – national support of the international arbitration regime may wane.

The recent comments of the Lord Chief Justice of England and Wales, **Lord Thomas**, that arbitration threatens to undermine the development of the common law are a step in this direction, he said.

Second, the day-to-day conduct of individual cases threatens to jeopardise arbitration's success. According to Born, arbitration is promoted as being more expert, efficient and even-handed than other forms of alternative dispute resolution. Unless it can deliver on these promises, it will be unable to defend itself against broader criticisms.

This concern was echoed by New Zealand arbitrator and Born's co-panellist **David A R Williams**, who particularly noted how the abuse of due process challenges threatens to intimidate tribunals, undermining arbitration's efficiency, as described by arbitrators **Lucy Reed** and **Bernardo Cremades** in recent speeches.

One solution Williams suggested was for courts to impose indemnity costs on those who bring frivolous challenges, as had been done by the courts of Hong Kong and Australia.

The challenges facing the arbitral community were not the sole focus of the day. Other highlights included a discussion of the *Astro v Lippo* dispute and other recent regional developments by a panel chaired by **David Bateson** of 39 Essex Chambers in Singapore and featuring Beth Cubitt of Clyde & Co in Perth, **Alastair Henderson** of Herbert Smith Freehills in Singapore and **Susan Dunn**, who chairs the investment committee at Harbour Litigation Funding in Hong Kong.

From the floor, **James Kwan** of Hogan Lovells in Hong Kong suggested that one reason why a Hong Kong court dismissed the jurisdictional challenge in *Astro v Lippo* as out of time, after a court at the seat – Singapore – had already refused to enforce part of the award, is that it adopts a different version of the UNCITRAL Model Law. Hong Kong has adopted the 2006 version, including Article 2A's reference to the "observance of good faith", while Singapore uses an earlier version, although it has made many amendments to the law. The dismissal of the jurisdictional challenge is currently being appealed in Hong Kong.

The role of tribunal secretaries is still a matter of concern. Both Born and Williams opined that the efficiency of arbitration could be improved if secretaries were to undertake more substantive duties, with the caveat that the arbitrators cannot and should not delegate their decision-making function. If they are to perform only adminstrative duties, as is often called for and as most rules state, he said it is time to align the rhetoric with reality.

A panel chaired by the Chief Justice of the Western Australian Supreme Court, **Wayne Martin**, and including the president of CIArb Australia, **Albert Monichino QC**, explored the choice-of-law minefield that is legal privilege in arbitration. **Andrew Paton** of De Berti Jacchia in Milan highlighted the problem of requiring civil law lawyers to disclose documents when they would face sanction for doing so under their own laws. And **Brenda Horrigan** of Herbert Smith Freehills in Sydney noted that the issue goes further than the applicable law, as companies have vastly different document management systems depending on their own country's disclosure regimes. Even applying the same privilege laws to all parties may create an unequal playing field.

Justice **Peter Vickery** of the Victorian Supreme Court chaired the "graveyard shift", and woke up delegates by presenting six hypothetical ethical conundrums that commonly arise in arbitration. Perhaps as a sign of the globalised nature of practice, there was broad agreement on the appropriate ethical responses on a panel comprised of practitioners from Australia (**Monique Carroll**, King & Wood Mallesons), Hong Kong (**James Kwan**, Hogan Lovells) and Switzerland (**Elliott Geisinger**, Schellenberg Wittmer).

The final panel comprised **Lisa Bingham**, legal counsel at the Permanent Court of Arbitration in The Hague and deputy executive director of ICCA, **Leah Ratcliff**, associate general counsel at BHP Billiton Australia in Perth and **Andrea Martignoni**, partner at Allens Linklaters in Sydney. Chaired by **Nick Watts** of Holman Fenwick Willan in Sydney, the panel discussed the pros and cons of various procedural mechanisms aimed at saving time in arbitration, including “hot-tubbing” the experts – that "horrible Australian term".

This session saw the hottest debate, but as was to be expected, the take-away message boiled down to "one size does not fit all." Is it not one of the key benefits of arbitration that the procedures can be shaped to best meet the individual needs of the case?

As the day came to an end, the president of ACICA, **Alex Baykitch** of King & Wood Mallesons in Sydney, recalled Born’s warnings of the challenge growing national sentiment

became irate. “Do you meant to tell me that the plaintiff has brought this case in disregard of the award of an arbitrator?” he asked. “That is so, my Lord”, was counsel’s reply. “Disgraceful!”, the Chief Justice exclaimed, “Appeal dismissed with costs here and below”. To which counsel remarked, “The Lord Chief Justice affirms the turkey”.[11]

Now, by recounting this story, I do not wish to imply that the job of arbitrators is as simple as a turkey eating oats. Or that the decisions of arbitrators are as arbitrary as who has the tastiest looking kernel of corn. Admittedly, comparing arbitrators to turkeys is a sure fire way to insult many of you in this room. However, the story does say something about judicial respect for arbitral awards, even where the method of arbitration is dubious. Indeed, some may argue that Chief Justice Lefroy’s decision provides a best practice standard for the review of arbitral awards.

While historically, Australian courts have not always taken a consistent approach towards arbitration, in my opinion, in recent years, Australian courts have demonstrated a willingness to enforce arbitral agreements. Before I turn to some recent decisions demonstrating this, let me briefly describe the legislative framework governing Australia’s international arbitration regime.

The *International Arbitration Act*[12] incorporates the UNCITRAL Model Law on International Commercial Arbitration and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or New York Convention, into Australian federal law. In regard to the conduct and enforcement of international arbitration in Australia, the Act states that the Model Law provides an exclusive code setting out parties’ rights and obligations in respect of international arbitration conducted in Australia. In respect of foreign arbitral awards, the Act adopts the New York Convention, which provides an internationally accepted framework for the recognition of foreign arbitral awards. Its adoption in Australia provides parties with reasonable certainty that arbitral awards can be enforced in multiple jurisdictions.

All States and Territories in Australia, with the exception of the ACT, have also adopted uniform commercial arbitration legislation based on the Model Law. In New South Wales, the *Commercial Arbitration Act* applies the Model Law, with some amendments, to domestic arbitrations. In 2012, I released an Arbitration Practice Note for the Supreme Court. The Arbitration note provides for an efficient, inexpensive and relatively informal procedure for resolving disputes arising in the context of arbitration agreements, awards or proceedings. The Federal Court and some other state courts have similar rules and practice notes.

In 2010, Australia’s first international dispute resolution centre, the Australian Centre for International Commercial Arbitration, opened its doors. In 2011, the *International Arbitration Regulations*[13] came into force, appointing the Centre as the sole authority to perform arbitrator appointment functions under the Act where parties haven’t agreed on an appointment process. The Centre also released its arbitration rules in 2011. In January 2016, the most recent version of the Centre’s rules was formally adopted. The new rules “build on [the Centre’s] established practice of providing an effective, efficient and fair arbitral process. Developments of note include provisions on consolidation and joinder and the conduct of legal representatives, along with the introduction of an expedited procedure for lower value or urgent matters commenced under the Arbitration Rules.”*14*

The implementation of this legislative framework and the new Centre for Arbitration in Sydney has led practitioners and judges alike to become increasingly familiar with the law and practice relating to international arbitration. A number of recent decisions have confirmed that Australian courts are supportive of enforcing arbitral awards in accordance with the Model Law and New York Convention.

Three years ago, in the case of *TCL Air Conditioner*, the High Court rejected a constitutional challenge to the Federal Court’s entitlement to enforce arbitral awards under the Model Law. The High Court rejected the argument that section 16 of the *International Arbitration Act*, to the extent it gives effect to certain articles of the Model Law, is invalid because it impairs the institutional integrity of the Federal Court and further, because it vests judicial power in arbitral tribunals.[15] The Court found that the Act made it plain that arbitral awards could only be set aside in limited circumstances, which did not include a legal error.

After the case was returned to the Federal Court, the full Federal Court endorsed the objects underpinning the Model Law.[16] The Court stated that

> “The avowed intent of [the Model Law] is to facilitate the use and efficacy of international commercial arbitration … [t]he system enshrined in the Model Law was designed to place independence, autonomy and authority into the hands of arbitrators, through a recognition of the autonomy, independence and free will of the contracting parties.”[17]

The Court went on to note that this system would be undermined by interference by national courts beyond that permitted under the Model Law.

In subsequent cases, the Federal Court has affirmed that it will only interfere with the enforcement of arbitral awards in very limited circumstances, such as where a party is not given a fair and reasonable opportunity to present their case before the arbitrator.[18]

In the case of *Armada (Singapore) v Gujarat,*[19] the Federal Court held that Armada had a prima facie entitlement to the enforcement of a foreign arbitral award. It also held that while the Court had the power to determine whether the arbitral tribunal had jurisdiction, it should only make such determination when necessary. Further, the Court held that “[t]he mere fact that enforcing [an arbitral decision] might not be consistent with principles developed in Australia” for domestic declarations was not, of itself, “sufficient to constitute a reason for refusing to enforce [an] award on the grounds that to do so would be contrary to public policy.”[20]

Most recently, last year, the Victorian Court of Appeal affirmed that there is generally no basis for Australian courts to engage in a review of arbitral awards where there is no unfairness or breach of natural justice and there is no basis for courts to decline to enforce such awards merely because the court considers that the award contains an error of fact or law. In *Sauber Motorsport*,[21] a driver sought to enforce a foreign arbitral award against the Sauber Formula One team very shortly before the Australian Grand Prix. The Swedish award required the Formula One team to refrain from any action which would prevent the driver from participating in the 2015 Formula One season. The Court of Appeal dismissed an appeal against an order enforcing the award in Australia, holding that

> “[c]ourts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator ‘dressed up as a complaint about natural justice’. Errors of fact or law

poses to arbitration. But a presentation by **Fuyong Chen**, deputy secretary general of the Beijing International Arbitration Centre, served as a reminder that not all countries are looking inwards. He spoke of the centre's efforts to facilitate mutual understanding between China and the rest of the world as part of the country's broader "belt and road" initiative, in which one can expect arbitration to play an important role.

At CIArb Australia's annual dinner following the conference, Born spoke once again, stressing international arbitration's integral part in the rule of law and the need for the arbitral community to persuade national legislatures and courts that it respects national policies and concerns.

It was perhaps symbolic that this was all said as the delegates sat at the top of Sydney's tallest tower, enjoying a three-course meal in a restaurant offering spectacular views over the city. It seems a daunting task to convince the people on the ground of the virtues of arbitration and the international justice system as a whole.

Winter may be coming but rather than retreat to the fireplace, members of the arbitral community will face the chill head-on. However, if it becomes too much, the maturity shown by Australia's judiciary and arbitration community at this conference suggests there will always be a nice warm spot for arbitration somewhere between the Opera House and Harbour Bridge.

A version of the "winter is coming" speech, inspired by hit US television show "Game of Thrones", **was given by Born in New York in May**, before Brexit and the Trump victory in the US election revealed the extent of rising nationalist feeling.

INTERNATIONAL ARBITRATORS CONVERGE ON SYDNEY

Melissa Coade
Lawyers Weekly

13 December 2016

Speaking at a Sydney arbitration conference, London-based lawyer

are not legitimate bases for curial intervention."[22]

On previous occasions, I have noted that it is overly simplistic and unhelpful to apply blunt labels such as 'pro-arbitration', 'internationalist', 'interventionist' or 'anti-arbitration' to domestic decisions. It fails to appreciate the peculiarities of individual cases and the novel questions which can arise. However, in my opinion, the general approach taken by Australian courts in these decisions is representative of the general approach taken towards commercial arbitration in Australian courts. It is safe to say that Australian courts have generally been reluctant to review or interfere with arbitral decisions where there is no issue of procedural fairness.

As my predecessor, **James Spigelman**, stated in his foreword to the book, *International Arbitration in Australia*, in Australia, "the longstanding tension between judges and arbitrators has disappeared. Most judges no longer consider arbitration as some kind of trade rival. Courts now generally exercise their statutory powers with respect to commercial arbitration by a light touch of supervisory jurisdiction directed to maintaining the integrity of the system."[23]

The general acceptance by Australian courts of arbitral awards, as well as our adoption of the Model Law and New York Convention, has gone a long way towards increasing Australia's attractiveness as a regional international arbitration hub.

Since the Australian International Commercial Disputes Centre opened its doors in 2010, there has been a significant increase in the use of Australian arbitration seats by international parties. In 2014, the Melbourne Commercial Arbitration and Mediation Centre opened and in 2015, the Perth Centre for Energy and Resources Arbitration opened its doors. Australia's emergence as a seat for international arbitration has been reinforced by Australia being selected by the International Council for Commercial Arbitration to be a joint host for its 2018 conference.

The advent of international arbitration in Australia has required courts and practitioners alike to change the way in which we operate and do business. Ultimately, the efficacy of international arbitration as a dispute resolution mechanism depends on widespread support throughout the profession and the judiciary.

It also requires a dialogue between the judiciary and the profession and requires us to stay up to date with recent developments and future issues that may arise in the field.

In this way, conferences such as the International Arbitration Conference are increasingly important. I extend my thanks to the Chartered Institute of Arbitrators for bringing us all together today and offering crucial training and education opportunities for arbitrators, mediators, adjudicators and practitioners. I also thank all of you for being part of the dialogue I have described. I hope that you find today both informative and thought provoking.

I express my thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this address.

1. JH Carter (ed), The International Arbitration Review 6th ed (Law Business Research Ltd, 2015) vii.
2. M Altenkirch and N Gremminger, 'Parties' Preferences in International Arbitration: The Latest Statistics of the Leading Arbitral Institutions' (Global Arbitration News, 2015) available **here**
3. C Ong, 'Asia Pacific Overview: Regional Overview and Recent Developments: Asia Pacific' in S Finizio and C Caher (eds) The International Comparative Legal Guide to: International Arbitration 2016 (Global Legal Group, 13th ed, 2016).
4. Vynior's Case, 8 Cohe. Rep 81b, 82a, 77 Eng Rep 597, 599 (England, King's Bench).
5. Hobart v Drogan 35 US 108 (1836) (US Supreme Court) p 119.
6. Earl S Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83 University of Pennsylvania Law Review 132, 133.
7. Ibid 132.
8. L Nottage and R Garnett, 'Introduction: Addressing Australia's Arbitration Ambivalence' in L Nottage and R Garnett (eds) International Arbitration in Australia (The Federation Press, 2010) 2.
9. Ibid 3; V Donneberg, 'Judicial Review of Arbitral Awards under the Commercial Arbitration Acts' (2008) 30 Australian Bar Review 177.
10. See The Rt Hon Sir R Megarry, A New Miscellany-at-Law: Yet Another Diversion for Lawyers and Others (The Lawbook Exchange Ltd, 2005) pp 77-78.
11. Megarry cites "an Irish judicial source" secondhand.
12. *International Arbitration Act 1975* (Cth).
13. *International Arbitration Regulations 2011* (Cth).
14. Australian Centre for International Commercial Arbitration, 'ACICA Rules 2016' (2016) available **here**.
15. TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 251 CLR 533 at [40], [111].
16. TCL Air Conditioner (Zhongshan) Co v Castel Electronics Pty Ltd (2014) 311 ALR 387.
17. Ibid at [109].
18. See Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd (2013) 304 ALR 468.
19. Armada (Singapore) Pte Ltd (Under Judicial Management) v Gujarat NRE Coke Limited [2014] FCA 636.
20. *Ibid at [67].*
21. *Sauber Motorsport AG v Giedo Van Der Garde BV [2015] VSCA 37.*
22. Ibid at [8].
23. The Hon JJ Spigelman AC, 'Foreword' in L Nottage and R Garnett (eds), International Arbitration in Australia (The Federation Press, 2010) viii.

Gary Born of international firm WilmerHale has warned of the challenges facing international arbitration.

According to Mr Born, the world can expect more national policies with an "inward-looking focus". He added that the implications of political developments such as Brexit and Donald Trump's win in the US presidential election will impact international arbitration.

"Winter is coming," Mr Born said.

He also identified the turning of the tide against globalisation as a threat to the international arbitration regime, suggesting that where there is a loss of faith in arbitration, national support for an international regime may wane.

Reflecting on the state of arbitration in the Asia-Pacific region, his seasonal analogy changed.

Mr Born, who is also the president of the Singapore International Arbitration Centre (SIAC) Court of Arbitration, said arbitration in the region has enjoyed a "long, golden summer" with the national courts and legislatures of the Asia-Pacific.

Mr Born's speaking engagements were part of a series of events jointly hosted by CIArb Australia, the Australian Centre for International Commercial Arbitration (ACICA) and the business law section of the Law Council of Australia.

This is fourth time that the international arbitration conference has been held, with Sydney Arbitration Week 2016 running from 21 to 25 November. **Read More**

BIG WIGS

Teresa Ooi
The Australian
10 December 2016

They gathered from all over the world to mark the annual dinner of the Chartered Institute of Arbitrators (Australia). The line-up of past and present judges included Singapore International Arbitration Court president, **Gary Born**, Australian jurist, **Michael Kirby**, Beijing Arbitration Commission's **Fuyong Chen** and CIArb Australia president, **Albert Monichino QC**.

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4th International Arbitration Conference:
New Horizons in International Arbitration, 22 November 2016

9.00 am Welcome To Delegates

The Hon. James Allsop AO, Chief Justice of the Federal Court of Australia

9.10 am Opening address

The Hon. Tom Bathurst AC, Chief Justice of the Supreme Court of New South Wales

9.30 am Recent Issues in International Arbitration

- Developments in third party funding;
- Are enforcement courts mandated to follow decisions of courts at the seat?- recent developments in the Astro v Lippo dispute;
- Rebalancing the relationship between the Courts and Arbitration - a response to the Baili lecture 2016 delivered by the Lord Chief Justice of England & Wales, the Right Honourable the Lord Thomas of Cwmgiedd.

Chair: David Bateson, International Arbitrator, 39 Essex Chambers, Singapore

Panellists:
Beth Cubitt, Partner, Clyde & Co Australia
Alastair Henderson, Partner, Herbert Smith Freehills, Singapore
Susan Dunn, Chair of Investment Committee, Harbour Litigation Funding, Hong Kong

10.30 am International Arbitration in the Asia Pacific Region

Keynote address: Gary Born, Partner, Wilmerhale and President of the SIAC Court of Arbitration, United Kingdom

- Pro–arbitration attitude of courts in the region;
- Is a regional jurisprudence developing?
- Is there an Asia Pacific brand of arbitration?
- Recent case law developments.

Chair: Caroline Kenny QC, Barrister and International Arbitrator, Vice-President of CIArb, Australia

Commentary:
Dr Fuyong Chen, Deputy Secretary-General Beijing Arbitration Commission
Prof. David Williams, ICCA, New Zealand

11.45 am Morning Tea

12.15 pm Privilege Disputes in International Arbitration

- Common law/civil law –diversity on privilege
- Which privilege rules apply?
- Time for an international standard?
- Appointment of a separate arbitrator or expert to determine privilege disputes in practice?
- Perspectives about document production techniques/ disputes - when are they worth pursuing?

Chair: The Hon. Wayne Martin AC, Chief Justice of Western Australia

Speakers:
Albert Monichino QC, Barrister and International Arbitrator, Australia, President of CIArb, Australia
Brenda Horrigan, Partner, Herbert Smith Freehills, Australia
Andrew Paton, Partner, De Berti Jacchia, Italy

1.15 pm Lunch

2.15 pm A Hypothetical in Ethical Considerations in International Arbitration

- How to make it an even playing field?
- Does it matter?
- What are the tools for dealing with unfair 'unethical' practices?

Chair: The Hon. Peter Vickery, Justice of the Supreme Court of Victoria, Australia

Speakers:
Monique Carroll, Special Counsel, King & Wood Mallesons, Australia
Elliott Geisinger, Partner Schellenberg Wittmer, President of the Swiss Arbitration Association
James Kwan, Partner, Hogan Lovells, Hong Kong

3.15 pm Afternoon Tea

3.45 pm Procedural and Time Issues in International Arbitration

- Use of oral opening or closing submissions;
- Use of witness statements;
- Controlling cross-examination;
- Use of bifurcated proceedings/preliminary hearings to narrow issues in dispute or determine evidential questions;
- Presentation of expert evidence;
- Chess clock procedure;
- Post hearing additional evidence/written submissions.

Chair: Nick Watts, Partner, Holman Fenwick Willan, Australia

Speakers:
Leng Sun Chan SC, Partner, Baker & McKenzie, Singapore,
Leah Ratcliffe, Associate General Counsel, BHP Billiton, Australia
Andrea Martignoni, Partner, Allens Linklaters, Australia

4.50 pm Closing addresses

Alex Baykitch, Partner, King & Wood Mallesons, President of ACICA (introducing the Beijing Arbitration Commission, Diamond Sponsor for ICCA 2018).

5.20 pm Ian Nosworthy, Consultant, Cowell Clarke, Law Council of Australia, Business Law Section.

Chartered Institute of Arbitrators CIArb Australia
ACICA
Law Council of Australia Business Law Section

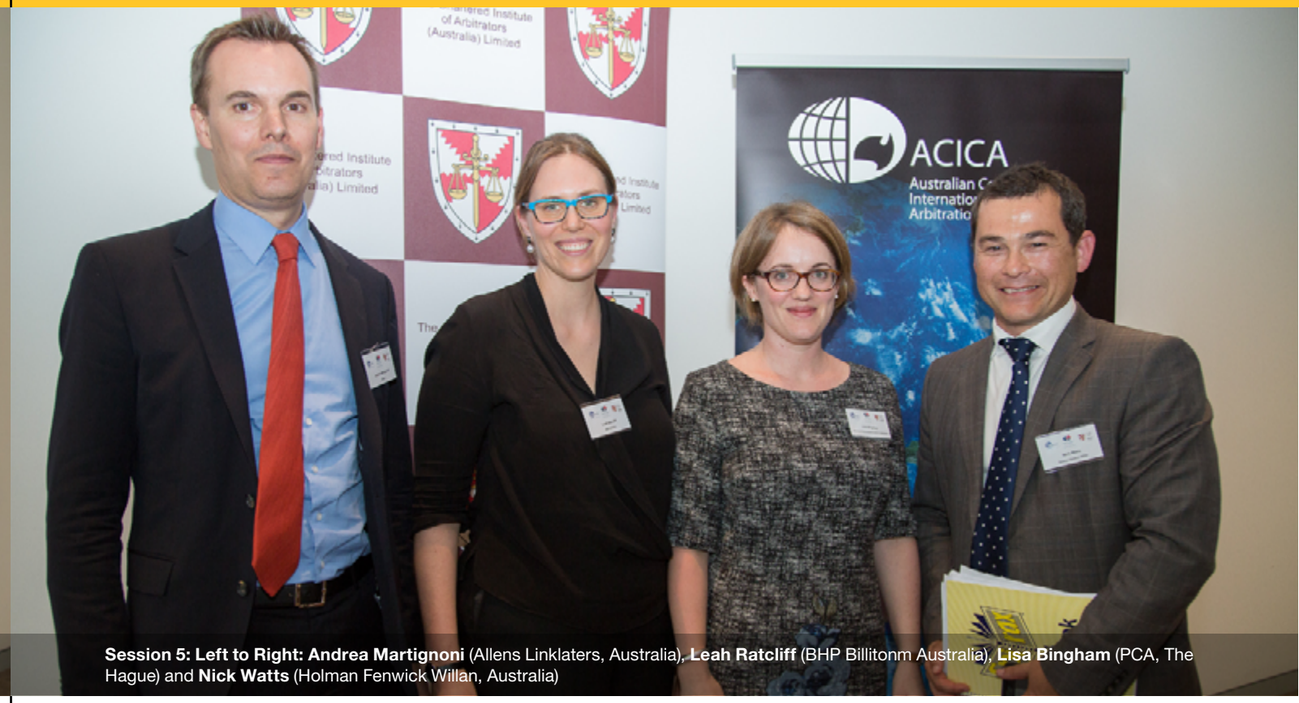
The Hon James Allsop AO, Chief Justice of the Federal Court of Australia delivering Welcome to Delegates address.
Photos: Rick Stevens

Session 1: Left to Right: Beth Cubitt (Clyde & Co, Australia), **Susan Dunn** (Harbour Litigation Funding Hong Kong)**, Alastair Henderson** (Herbert Smith Freehills, Singapore) **and David Bateson** (39 Essex Chambers, Singapore)

Session 2: Left to Right: Gary Born (Wilmerhale and SIAC Court of Arbitration, UK), **Caroline Kenny QC** (CIArb Australia Vice President), **Prof David Williams QC** (ICCA, New Zealand) and **Dr Fuyong Chen** (Beijing Arbitration Commission)

Session 3: Left to Right: Andrew Paton (De Berti Jacchia, Italy), **Brenda Horrigan** (Herbert Smith Freehills, Australia), **The Hon Chief Justice Wayne Martin AC** (WA Supreme Court) and **Albert Monichino QC** (CIArb Australia President)

Session 4: Left to Right: James Kwan (Hogan Lovells, Hong Kong), **Monique Carroll** (King & Wood Mallesons, Australia), **The Hon Justice Peter Vickery** (Victorian Supreme Court), **Elliott Geisinger** (President Swiss Arbitration Association)



Session 5: Left to Right: Andrea Martignoni (Allens Linklaters, Australia), **Leah Ratcliff** (BHP Billitonm Australia), **Lisa Bingham** (PCA, The Hague) and **Nick Watts** (Holman Fenwick Willan, Australia)

Closing Addresses: Ian Nosworthy (BLS, Law Council of Australia), Alex Baykitch (ACICA) and Dr Fuyong Chen (BIAC)

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CIArb Australia Annual Dinner 2016

Chartered Institute of Arbitrators
CIArb
Australia

7:00 - 7:30 pm
Arrival drinks and canapes

8:00 - 11:30 pm
Dinner
Studio, Sydney Tower

Master of Ceremonies
Richard Ackland AM, Legal Editor-at-Large, *The Guardian Australia* and Publisher, *Justinian* and *Gazette of Law and Journalism*

President's Welcome
Albert Monichino QC, CIArb Australia President

Sponsor's Welcome
Nick Watts, Partner, Holman Fenwick Willan

Guest Speaker Introduction
Caroline Kenny QC, CIArb Australia Vice President

Dinner Address
Gary Born, President of SIAC Court of Arbitration

Vote of Thanks to Speaker
Albert Monichino QC, CIArb Australia President

CIArb Australia International Arbitration Essay Presentation
Damian Sturzaker, CIArb Australia Vice President

Closing Remarks
Richard Ackland AM, Legal Editor-at-Large, *The Guardian Australia* and Publisher, *Justinian* and *Gazette of Law and Journalism*

Photos: Rick Stevens

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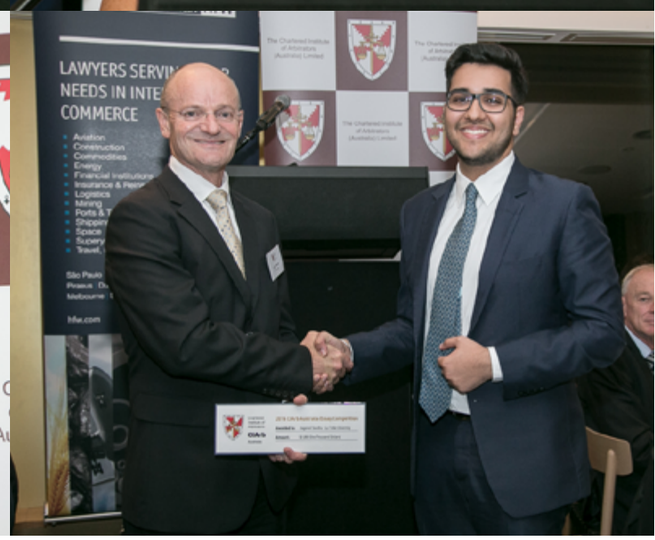
100 Years



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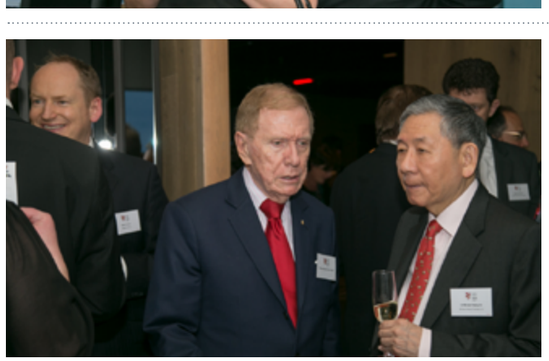
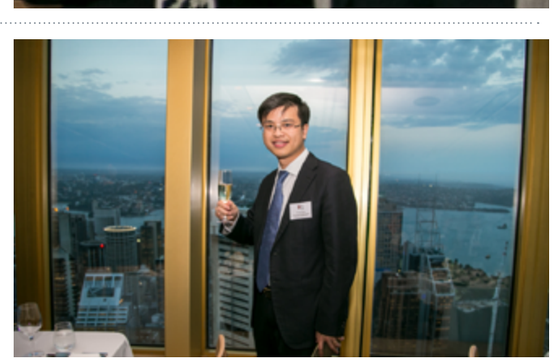
1. Studio 2. Adrian Bembrick (Studio2501) **3. David Barnes** (39 Essex Chambers, UK) and **Gavin Denton** (Arbitration Chambers, Hong Kong) **4. Dennis Wilson, The Hon Justice Peter Vickery** (Victorian Supreme Court) and **Leonie Vickery. 5. David Hardiman** (Driver Trett Australia Pty Ltd, Brisbane) and **Nadine Emsley** (Norman Disney & Young, Sydney) **6. Deborah Hart** (AMINZ, Wellington)**, John Walton** (AMINZ, Auckland) and **Gary Born. 7. Kate Grimley** (Deloitte Australia, –Brisbane) and **Laura Keily** (Victorian Bar, Melbourne)**. 8. John Temple-Cole** (KordaMentha, Sydney)**, Damian Sturzaker** (Marque Lawyers) and **Dr Vicky Priskich** (Victorian Bar)



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A Moveable Feast: Securing Australia's Seat At The Cross-border Dispute Resolution Table

CIArb Australia Essay Winner 2016
Jagpreet Sandhu
La Trobe University, Victoria
View Profile

No choice we can make as a nation lies between our history and our geography. We can hardly change either of them. They are immutable[1].

It is no hidden secret that Australia, to the dismay of a great deal of local arbitrators and businessmen alike, escaped the blessings of the Geography Gods. Where Singapore and Hong Kong are blessed, Australia is not. This is not, however, reason enough to deny Australia its right to engage the global business community in its potential capacity as a leading dispute resolution hub.

No discussion of cross-border dispute resolution in the twenty-first century can be considered thorough or even somewhat complete without mention of arbitration, which has taken the international legal community by storm over the last two decades. Indeed, it would not be too long of a bow to draw to suggest arbitration as the modern international dispute resolution community's golden goose.[2] However, arbitration as a cross-border dispute resolution mechanism is not a perfect one-size-fits-all solution. This essay shares a similar view as **Singapore's Chief Justice Sundaresh Menon** on the topic of arbitration's shortcomings in the context of promoting international commerce,[3] and accordingly seeks to promote a number of alternative, less explored avenues that will see Australia succeed in realising its goal of establishing itself as a cross-border dispute resolution hub.

As a first precursory indicator,

this essay will not seek to contribute to the narrative of Australia's technical legal capabilities to establishing itself as a cross-border dispute resolution hub. Australian lawyers and judges are some of the world's finest, and the legal framework is modern enough to facilitate and invite cross-border dispute resolution. This remains a well settled point of discussion and needs no further expanding upon.[4] Second, and in the same vein, discussions of establishing an Australian International Commercial Court shall be avoided altogether, bar acknowledgement to the work of those in much more knowledge positions who have addressed it to great lengths.[5] Regardless, this essay supports establishment of such a court, but considers that there are other matters that warrant more immediate attention.

Therefore, the focus of this essay shall be upon avenues to be explored that are of a less considered, but equally important, nature. These are avenues that will leave Australia well suited to address upcoming economic growth that will bring with it new and exciting international dispute resolution opportunities. Put simply, Australia must wean itself off the beaten path if it is to secure a future as a cross-border dispute resolution hub. It must forge its own path and its growth must be organic.

This essay makes three points.

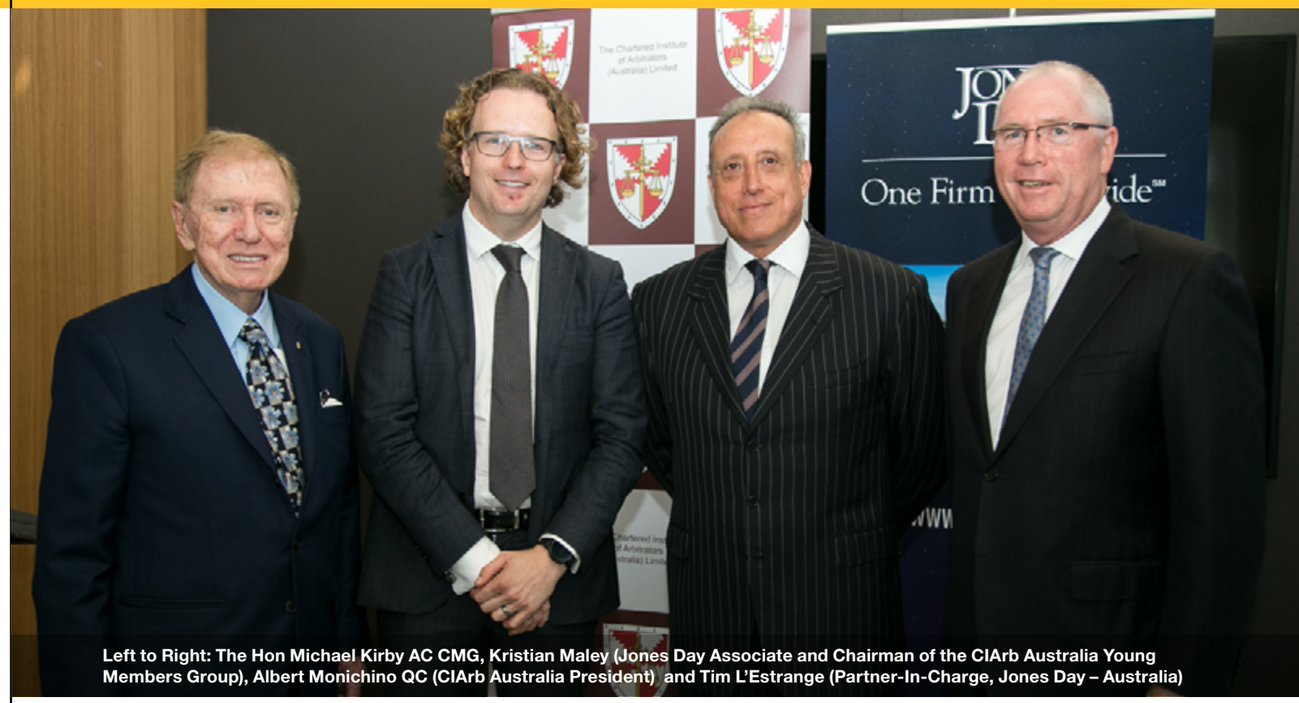
First, there is a pressing lack of involvement from Australia at the formation stage of new international standards in international trade law – the root of cross-border disputes. It is a member of only two Working Groups (arbitration and conciliation, and security interests) from a total of six at the United Nations Commission on International Trade Law ("UNCITRAL"). Involvement at the forefront of developing the latest standards in international trade law may only benefit Australia's aspirations in the field of international dispute resolution by putting it in a higher position of possessing the requisite foresight and technical competence to mount new trends to great international success. More importantly, Australia must seek to engage those beyond large, conventional international dispute resolution clients. Micro, small, and medium-sized enterprises present a largely untouched client group in targeted dispute resolution services. Australia may bolster its cross-border dispute resolution service experience by engaging with this largely untapped client group at present.

Secondly, there is more to Australia's geography than meets the eye. It is in an ideal location to foster relationships with growing economies that will soon see the need to arbitrate as foreign investment increases in their own economies. They will need a guiding hand and a suitable venue to resolve their likely cross-border disputes. Australia may fulfil this need by assisting in providing technical assistance and effectively growing an upcoming number of clients-to-be.

Secondly, there is more to Australia's geography than meets the eye. It is in an ideal location to foster relationships with growing economies that will soon see the need to arbitrate as foreign investment increases in their own economies. They will need a guiding hand and a suitable venue to resolve their likely cross-border disputes. Australia may fulfil this need by assisting in providing technical assistance and effectively growing an upcoming number of clients-to-be.

Thirdly and finally, Australia has the benefit of being a world-leader in the area of transparency in legal proceedings. This essay therefore suggests that Australia, with the aim of establishing itself as an international dispute resolution hub, should consider and increase its focus on maintaining this advantage, which will likely garner greater interest from foreign parties that are pressured to litigate in a transparent manner. Read More

1. The Honourable Paul J Keating, 'A Prospect of Europe' (Speech delivered at the Robert Schuman Lecture, The University of New South Wales, 4 September 1997) http://www.keating.org.au/shop/item/a-prospect-of-europe---4-september-1997.
2. See, eg, Alan Redfern, 'International Arbitration: The Golden Goose?' (2008) 2(1) *Dispute Resolution International* 184-186; Lucy Greenwood, 'Keeping the golden goose alive: could alternative fee arrangements reduce the cost of international arbitration?' (2011) 28(6) *Journal of International Arbitration* 591-598.
3. "(A)rbitration, by its very nature, cannot provide a complete solution to propel the vessel of global commerce forward. Arbitration was conceived as an ad hoc, consensual, convenient and confidential method of resolving disputes. It was not designed to provide an authoritative and legitimate superstructure to facilitate global commerce. It cannot, on its own, adequately address such things as the harmonisation of substantive commercial laws, practices and ethics." Sundaresh Menon SC, Chief Justice of Singapore, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution' (Opening lecture for the DIFC Courts Lecture Series 2016 at para 14).
4. See, eg, The Hon. Justice Clyde Croft, 'Recent Developments in Arbitration in Australia', (2011) 28(6) *Journal of International Arbitration* 599-616; The Hon. Marilyn Warren AC, Chief Justice of Victoria, 'Australia – A vital commercial hub in the Asia Pacific Region: Victoria – a commercial hub' (Speech delivered at the Federal Court and Supreme Court Commercial Seminar, Monash Law Chambers, 25 February 2015); Fiona McLeod SC, 'Australia's Approach to International Commercial Dispute Settlement and Enforcement' (Speech delivered at the Doing Business Across Asia: Legal Convergence in an Asian Century – International Conference, Singapore, 21 January 2016).
5. See The Hon Chief Justice Marilyn Warren AC and The Hon Justice Clyde Croft, 'An International Commercial Court for Australia: Looking Beyond the New York Convention' - A paper presented by the Honourable Chief Justice Marilyn Warren AC and the Honourable Justice Clyde Croft at the Commercial CPD Seminar Series, Melbourne, 13 April 2016.



Left to Right: The Hon Michael Kirby AC CMG, Kristian Maley (Jones Day Associate and Chairman of the CIArb Australia Young Members Group), Albert Monichino QC (CIArb Australia President) and Tim L'Estrange (Partner-In-Charge, Jones Day – Australia)

Launch of the CIArb Australia Young Members Group

When: 23 November 2016
Where: Jones Day, Sydney
Photos: Rick Stevens

The launch of the CIArb Australia Young Members Group spearheaded by Chairman, **Kristian Maley**, attracted young (and not so young) professionals from across Australia and overseas. CIArb Australia greatly appreciates the support of global law firm, **Jones Day** and its **Partner-In-Charge, Tim L'Estrange**, who hosted and sponsored the event, and to **Special Guest Speaker**, retired High Court Judge of Australia, **The Hon Michael Kirby AC CMG** who delivered an engaging keynote address: ***International Arbitration, Young Players and Critical Intelligence***, which started an erudite discussion amongst those in attendance. The group's activities will be designed to be relevant to all CIArb Australia members aged 40 years and under. The first initiative is the **2017 CIArb Australia Vis Pre-Moot**, which offers a unique extension of the Vis Moot experience for Australian students.

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Kristian Maley: "My sense is that we are in the midst of a rapid growth in international arbitration work in Australia."

The CIArb Australia Young Members Group: What, Why, and How

Opening Address
Kristian Maley
Young Members Group Australia Chairman
View Profile

Today we formally launch the CIArb Young Members Group (YMG) in Australia.[1] I will cover the what, the why, and the how of the YMG.

The What

What is the YMG? For that matter, who are Young Members? Are we just a group of self-aggrandising Gen-Ys, too preoccupied with brunching on smashed avocado to concern ourselves with worthier pursuits?[2]

The author **Samuel Ullman** said: 'Youth is not a time of life; it is a state of mind…it is a matter of the will, quality of the imagination, a vigor of the emotions'.[3] (On this measure, I suspect **Mr Michael Kirby** may be the youngest person in the room.) CIArb takes a more prosaic view: Article 29 of the CIArb Regulations stipulates that youth ends at 40.

The YMG consists of all CIArb members under 40 worldwide, which is about 3,000 in total. Being part of a global network is a major benefit for young practitioners. Internationally, the YMG has an annual conference, and an expanding social media presence.

That said, most YMG activity is driven at national level. Today we are kicking off these activities in Australia. The current core of the YMG in Australia is the YMG Committee, which includes a member from each mainland state plus the ACT. We have a diverse bunch, including lawyers and non-lawyers, from commercial firms, the independent bar, and the Commonwealth government.

The Why

A collegiate professional network is, of course, an end in itself. My sense is that we are in the midst of a rapid growth in international arbitration work in Australia. This has brought a corresponding growth in the numbers of young professionals exposed to arbitration. From my personal experience, this is certainly happening for those who (like me) are in the business of resolving disputes on resources construction projects, and who (like me) are based in Perth.

The How

To my fellow Young Members, I humbly suggest that, as we work towards this lofty goal, we focus our efforts in three main areas:

1. Building a community of young arbitration practitioners in Australia, particularly those focusing on international arbitration. This community will be a source of mutual support, collegiality, and professional and personal development for us.
2. Acting as ambassadors for young professionals in arbitration. This means engaging the broader arbitration community with a simple message: young practitioners add value to commercial dispute resolution. A 'young' approach to arbitration can bring new, different, and innovative perspectives to bear on existing or entrenched problems.
3. Imparting an understanding of the process and practice of arbitration to young professionals. By focusing on those at the beginning of their career, we can cultivate an interest and understanding of arbitration among emerging and future leaders.

One way we are putting this into action is by supporting international arbitration moots.

CIArb has long been a supporter of the annual CIArb/NSW Young Lawyers International Arbitration Moot, which was recently recognised as Highly Commended in the NSW Young Lawyers Patron Awards.

Building on this, I am pleased to announce today that the YMG will hold the inaugural CIArb Australia Vis Pre-Moot in 2017. This competition will provide Australian teams competing in the Willem C Vis and Vis East Moots an opportunity to prepare and to network with students and professionals from across Australia.

It's great that you have all joined us today to mark this milestone. I hope that today is the start of a growing community of young arbitration professionals across Australia and beyond.

Introducing The Hon Michael Kirby AC CMG

Turning to the main event, it is my absolute honour and privilege to introduce Michael Kirby.

Michael Kirby was appointed a justice of the High Court of Australia in 1996. His retirement in 2009 coincided with my 'retirement', if you like, from law school. The prevailing view of Justice Kirby, as he then was, among law students at the time was somewhere between a superhero and a rock star.

This admiration was no doubt earned to some extent through his generous use of sub-headings in his judgments (as Mr Kirby himself has noted, writing extra-judicially). For the most part though, this admiration was due to his unwavering commitment to human rights, and his well-deserved reputation as a compassionate jurist.

His awards, honours, and achievements are far too long to take you through in full. I will instead focus on three qualities of Michael Kirby which I think we can strive to emulate as young arbitration practitioners.

A Legal Communicator

Michael Kirby's engagement with the public has been important to democracy and the rule of law in Australia, especially on issues of importance to him, such as human rights and LGBT issues. For arbitration practitioners, engaging with the broader community could hardly be more urgent. World events of 2016 have left no doubt that we live and work amidst a rising tide of populism and economic nationalism, which we ignore at our peril. This has been accompanied by intense criticism of arbitration. So far, this has been directed mostly at investor-state arbitration. I do not mean to be dismissive. Many of these concerns are about real problems, and warrant our serious attention.

This growing populist sentiment presents a real threat, not only to investment arbitration, but also international commercial arbitration. Some of the criticisms of investment arbitration apply to arbitration generally. More broadly though, most members of the community would not distinguish between investment and commercial arbitration. Nor would they know that investor-state dispute settlement mechanisms can and increasingly do incorporate strong protections for the interests of host states and their citizens. It is incumbent on all of us to engage with the broader community about how arbitration practitioners are responding to those concerns.

An internationalist outlook

Throughout his career, Mr Kirby made an immense contribution to cultivating an internationalist outlook among Australian lawyers. This is no doubt driven in part by his passion for human rights.

As he noted writing extra judicially: 'Deep-seated judicial attitudes toward international law have proved difficult to dislodge in Australia.'[14] Australian lawyers have long been relatively comfortable referring to decisions of other state courts within the common law world. Even so, Mr Kirby had quite a reputation for pushing counsels' boundaries, both by giving added prominence to foreign judgments, and by thinking beyond the common law world.

One key example of this internationalist approach is his

dissenting judgment in *Al-Kateb v Godwin*[5], where he said that the Australian Constitution and Australian statutes should be construed to conform with principles of international human rights, where their language permits.[6] *Al-Kateb* is just one of the seeds of internationalism that Mr Kirby has sown in Australian legal minds.

So why is this so crucial for us as young arbitration professionals? The first reason is inherent in international arbitration. Its practice will almost inevitably require us to interact with other legal cultures and systems. Many of the countries of our region do not share our common law heritage. So it is not enough to close our eyes to civilian and other legal traditions.

Second, my view is that differing attitudes to international law are critically important to international arbitration in Australia, because they lead to fundamentally different perspectives on the Model Law and New York Convention. A good example of this is the High Court's judgment in the *TCL Air Conditioner case*[7]. The minority judgment, by **French CJ** and **Gageler J**, is decidedly internationalist, focusing on the UNCITRAL Analytical Commentary and *travaux préparatoires*. The majority[8] reached the same destination, but took quite a different path, via the historical development of English arbitration law from the seventeenth century onwards (but mostly bypassing the Model Law and Convention).

I am not so presumptuous to say that one approach should prevail over the other. However, TCL does show a tension between internationalist and comparativist approaches to the Model Law. This tension creates ample scope for conflicting outcomes, which we as young practitioners must grapple with.

A commitment and contribution to arbitration

Mr Kirby is a strong supporter of arbitration and alternative dispute resolution. He served as President of the Institute of Arbitrators and Mediators Australia from 2009 to 2010. He has also served as a member of the board of ACICA. He has served on a number of international arbitral tribunals, and is a member of the arbitration panel of the International Centre for Settlement of Investment Disputes.

If we can emulate these three traits – an internationalist approach, engaging with the public, and making a contribution to the field of arbitration – we may not quite reach the lofty achievements of Michael Kirby, but we will go a long way to ensuring that international arbitration is all that it can be, and that we are the best young arbitration practitioners that we can be.

1. The YMG Committee is grateful to Albert Monochino QC, President, for making Young Members a priority of his presidency, and for the support of the councillors and the CEO, Gianna Totaro. We are also grateful to the hosts of the YMG launch event, Jones Day. The Committee thanks Tim L'Estrange and the partners for their support.
2. Bernard Salt, '**Moralisers, we need you!**', *The Weekend Australian Magazine*, 15-16 October 2016.
3. Samuel Ullman, 'Youth'.
4. Michael Kirby, 'The Growing Impact of International Law on the Common Law' (2012) ***33 Adelaide Law Review*** 7, 27.
5. (2004) 219 CLR 562; **[2004] HCA 37**.
6. At **[193]**.
7. *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; **[2013] HCA 5**.
8. Hayne, Crennan, Kiefel and Bell JJ.













The Hon Michael Kirby AC CMG: "There are many reasons why international commercial and investment arbitration has expanded significantly in recent years."

International Arbitration, Young Players and Critical Intelligence

Keynote Address
The Hon Mr Michael Kirby AC CMG
View Profile

Status, Dignity and Vigilance

The Chartered Institute of Arbitrators (CIArb) did not rush into the creation of its Australian branch or the launch of its Young Members' Group (YMG). The very first steps towards the creation of CIArb took place in London in 1915, with the establishment of the Institute of Arbitrators. The stated aim was to "raise the status of arbitration to the dignity of a distinct and recognised position as one of the learned professions".

The Institute was incorporated in 1925. It later merged with the London Court of Arbitration and was granted a Royal Charter in 1979. The Australian branch (CIArb Australia) is one of 40 branches worldwide. Globally there are 14,000 members. The YMG comprises all members of the CIArb who are aged 40 and under. YMG has over 3,000 members in more than 90 countries. But it has taken until 2016 to establish a YMG for the Australian branch. I am delighted to launch the branch. Although slightly over 40 myself, I remain forever young at heart. So you have shown good judgment.

Any organisation that was created in the days of Empire to "raise status" and to enhance "dignity" seems likely to be resistant to critical examination of itself and its mission. In the nature of things, young people are much more likely to do this. In part, this is because of the typically lesser concern of young people about status and dignity. In part, it is because their priorities are more likely to be primarily economic. As well, their commitment to the success of the Institute is prone to focus attention on the long-term. In their DNA will be a rational instinct to address, and solve, challenges that endanger the long-term utility of a body such as the Institute. The launch of the Australian YMG is therefore timely; indeed overdue.

Growth in Arbitration

There are many reasons why international commercial and investment arbitration has expanded significantly in recent years. These reasons include:

- The rapid growth of international trade in goods and services that has been encouraged by sustained by long periods of relative international peace and security; but also by the huge developments in technology that promote and occasion international trade. Where there is such trade, there will be disputes. Mechanisms to address, resolve, settle or determine such disputes are an inevitable component of the growth in global trade;
- Although some international disputes can safely and consensually be determined in the place where they arise or where the parties reside or work, in other cases the difference between the nationalities of parties who have engaged in trade and their different places of business, will necessitate prior consideration about the venue of dispute resolution, should that become necessary, both as to the geographical locus and the identification of the court or tribunal to be afforded jurisdiction. Prior determination of these matters has become very common to remove doubt and delay;
- In many countries which enjoy substantial international trade, established courts of high quality (including now many with specialist commercial judges) have been created. Often such courts exhibit the independence, impartiality and neutrality that make their determinations acceptable to all parties.[1] However, in the nature of the increases in global trade, disputes quite often arise as to the integrity of some municipal decision-makers. And also as to their impartiality and independence of government and other local pressures. Merchants and investors will commonly only participate in trade with such countries or their nationals if they have the prior assurance of access to decision-makers whom they will regard as independent, impartial and appropriately neutral. This has resulted in a surge in international arbitration. Often trade will not flourish without prior agreement on these issues. Given this fact, reluctant countries, which following political independence are proud of their own institutions, are often obliged to accept prior agreement to arbitration as the price of securing the benefits of trade enhancement;
- The insertion in agreements of clauses ousting the jurisdiction of local courts and providing for agreed international arbitrations has now become standard. Whereas in earlier times ouster of jurisdiction clauses were often regarded as contrary to public policy in many jurisdictions, the law on this subject has substantially changed. It has generally been forced to adapt to the demands and expressed 'entitlements' of contractual parties to nominate the governing law and to special tribunals for resolving any disputes if they arise. An added complication has enlarged the pressure for such developments. Many international agreements will be made between parties in countries of significantly different legal traditions, languages, practices and sources of law. These disparities have multiplied the need, and justifiability, of the parties' determining the mechanisms for dispute resolution in advance, against the chance of a dispute arising. In this sense, the growth of international commercial and investment arbitration is simply the inevitable consequence of the growth of international trade in goods and services with its inherent features. The inability of many national courts and jurisdictions to cope efficiently, expertly and promptly with such disputes has reinforced the international economic imperative that suggest a rosy future for international arbitration.

Freedom of Contract and Residual Challenges

Notwithstanding these considerations criticisms and doubts are occasionally voiced of the intrusion of international commercial and investment arbitration into municipal legal systems. Sometimes it is seen as a derogation from the rule of law in national jurisdiction. Defenders argue that the concept of the rule of law has to adapt. Critics and opponents have to sink their differences and to accept arrangements for international arbitration as necessary and an inescapable feature of procuring the advantages of trade and membership of the global economic system.

However, assertions that it is open to 'the parties to agree' between themselves on dispute mechanisms sometimes appear to echo the claim for uncontrolled freedom of contract which, until the 20th century was another feature of common law countries. Such assertions have also had to give way to adjustments necessitated by competing social priorities. Thus the entitlement of employers to pay wages as 'agreed' or of landlords to charge rents as 'agreed' have had to adapt in municipal jurisdiction to competing legal requirements designed to protect adequate minimum wages and fair maximum rents.[2] Uncontrolled freedom of contract has had to adapt to other values. Should total freedom of contract to oust

local jurisdiction, nominate the governing law and identify ad hoc tribunals now be accepted without demur in international jurisdiction? Or should some controls be imposed to prevent or remedy significant wrongs or to defend other values? If so, what should such controls be?[3]

It will be the obligation of the Young Members of CIArb Australia to debate these questions. An attitude of complete self-satisfaction and complacency would be more suitable to the circumstances of 1915 ("status", "dignity") than to those of arbitration practitioners in the burgeoning economic world of today.

The CIArb YMG should address itself to new puzzles and controversies in the field of international commercial and investment arbitration. Some of the issues for today on the agenda of young arbitration practitioners will include the following:

1. Constitutional Norms:

Ordinarily, a party cannot by private agreement with another party negotiate its way out of compliance with essential constitutional or other legal norms otherwise applicable in a given jurisdiction. If a party exhausts appeal to local jurisdiction, its subsequent invocation of an exceptional international jurisdiction may sometimes give rise to a fundamental objection that it is circumventing, even undermining the operation of the rule of law by that initiative.

In some jurisdictions, in such cases, constitutional and other legal provisions reserve a residual role for the courts in upholding basic local considerations of justice, fair procedures and vital constitutional values. The courts' attitudes, sometimes encouraged by legislative prescription, may demand deference to an agreement to arbitrate. However, in other instances there will be objections so fundamental to the composition, operation, procedures or decision of an arbitral tribunal that application of the local norm may be more convincing.

The limits of the power of parties, by their commercial agreements, to exclude constitutional norms established by public law and otherwise applicable to a dispute, can present puzzles that will continue to engage international commercial and investment arbitration for so long as the clash of values arises. The YMG should devote attention to this quandary. It goes to the place of consensual arbitral jurisdiction alongside otherwise applicable jurisdiction of the courts, in competition with one another.

2. Public Interest Values:

Apart from constitutional norms, instances may arise where non constitutional public interest concerns are presented by any dispute although not raised by a party. In such cases, what procedures or remedies (if any) should be available to an international commercial and investment arbitration to permit such concerns to be considered and determined?

In a recent international arbitration that I chaired outside Australia, the parties eventually reached agreement with one another. The possibility of a public interest concern affecting the environment, distinct from the investment dispute between the parties yet possibly relevant to the resolution, might sometimes necessitate initiatives to ensure that the public interest has a voice. Trade and investment are vitally important to economic welfare and predictable commercial and investment dealings. Yet there are sometimes other values and considerations beyond the economic. Those values can include environmental, human rights, health and security concerns. Courts can occasionally use their general or specific powers to address and deal with such issues, beyond the submissions and interests of the parties. But should such procedures be available to international arbitral tribunals in the growing world of commercial and investment arbitration? And if so when and by what means?

3. Governmental Pressure:

It is not uncommon for disputes involving international commercial and investment arbitration to include a governmental party that has the power of appointment of one member of the arbitral tribunal. The notion of independence, impartiality and neutrality of the tribunal comes naturally to those practising in jurisdictions that guarantee and observe the features of integrity in judicial decision-making, as a matter of course. But what is to be done when a governmental party to an international arbitration has no respect for such virtues? Where it places pressure, direct or covert, on a national who has been appointed to serve on the tribunal? Or where it intrudes inappropriately upon the members of the tribunal? Or intercepts their communications and invades their privacy?

Assumptions that are accepted without hesitation in national courts and tribunals of established democracies may sometimes be ignored or undermined in international commercial arbitration, especially in places where the seat of the arbitration has been fixed by contract in a hostile or dangerous venue. A new and different jurisprudence may be needed to develop means to defend the virtues of independence, impartiality and neutrality of the tribunal in such a case and all of its members and parties.

4. Appeals and Fact Finding:

New principles to govern the conduct of international arbitration may also be required as this facility matures and expands, together with new procedures that are protective of the essential values of the process.

In some instances, the creation of special international courts alongside national courts may be required. The value of finality is an important objective of international dispute resolution. So is efficiency, timeliness and decision-making competence. Where large sums are at stake, these features will be a pre-supposition of international trade and investment. But there are other values that can sometimes be viewed as equally important.

In my service over 25 years as an appellate judge in Australia, I learned that mistakes of fact-finding will sometimes be so serious as to undermine completely the integrity of a judicial decision. If this can happen in a court judgment, can it not sometimes also occur in an arbitral award? With the rapid growth of international arbitration, is there a need for enhanced procedures of appeal and review, including on important factual findings, notwithstanding the delays, uncertainties and opportunities for abuse that such remedies might sometimes present?

5. Women and Minorities in Arbitration:

There is a final feature, often remarked upon, that international commercial and investment arbitration, particularly in investment disputes, are congenial playgrounds for repeat performers. The same names are repeatedly seen in arbitral tribunal. Breaking into the field is often difficult or even virtually impossible. To what extent is this no more than a consequence of habit, familiarity or predictability of outcomes? To what extent does it suggest an uncritical culture that inadequately defends the value of impartial determination?

In most municipal courts and tribunals, certainly in Australia, the parties have no effective say in the constitution of the decision-maker(s). This is itself often thought to be a feature that safeguards the independence, impartiality and neutrality of those who decide the outcome. The control of the parties over choosing members of an international arbitral tribunal is sometimes said to be an advantage, allowing a greater measure of self-determination and certainly influencing the predictability of outcomes.

However, this feature can occasionally diminish the participation of women and minorities as members of international arbitral tribunals. In my experience (which may not be universal) women play a much smaller part in international arbitration than is now the case in municipal litigation, at least in Australia. There appear to be fewer women advocates with speaking parts and definitely fewer tribunal appointments.

In international arbitration, as in domestic judicial appointments, the growing proportion of the legal profession who identify as deriving from Asia is a cohort that may be under-represented in appointments. This is a feature of population today that may prove a positive advantage in the future. Young Members' of CIArb should be vigilant about these developments.

Governments today are subject to appropriate political and professional pressure to appoint women and minorities to take their place in national courts and tribunals. But what can be done to ensure that international arbitral tribunals likewise adjust to the contemporary commitment to reflect fully the talent and viewpoints of diverse participation?

Conclusions

The decades ahead will continue to witness further growth in the number and complexity of international commercial and investment arbitrations. This is inevitable and a natural outcome of the demands and expectations of parties participating in the global economy.

Those parties will seek remedies apt to international jurisdiction. In default of permanent international institutions, parties will themselves, pursuant to contract, seek to create their own arbitral tribunals. Municipal courts will generally defer to that action, it being the price of reaping the dividends of full participation in the global economy. It is therefore a prudent move of young Australians with appropriate skills to become engaged in international arbitration – as litigators, experts and tribunal members.

Progress has been made in

recent decades, largely out of sheer necessity. Problems exist, some of which I have identified. Young Members' of CIArb Australia who interest themselves in this area have probably made a good career move. However, that career is more likely to survive and flourish if the young members address the problems and challenges that come with international arbitration. Some of these I have identified; and there are others. An attitude of complacency, self-satisfaction or anxiety over status and dignity must give way to a self-critical attitude. That is the feature all healthy living organisms. They evolve by adapting to the changing environment in which they must exist.

Charles Darwin in *The Origin of Species*[8] called the essential requirement for survival and evolution "the rule of variation". It applies to us as a species. It applies to international arbitration. It governs its future prospects. Brexit and other contemporary political developments indicate what happens when those who understandably advocate global trade and institutions lose contact with local values and responsiveness to important local concerns.

1. United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct*, Vienna, 2007, expressing the principles of judicial integrity. The principles also include "Propriety", "Equality" and "Competence and Diligence".
2. Contrast *Allgeyer v Louisina*, 165 US 578 (897); *Lochner v New York* 198 US 45 (1905) but see Holmes J at p.75 and *Muller v Oregon* 208 US 412 (1908) and *Bunting v Oregon* 243 US 426 (1917).
3. See the comment of Nobel Laureate Joseph E. Stiglitz reported in The Guardian, 10 January 2016, criticising the *Trans Pacific Trade Agreement*, article 9 providing for investor-state dispute resolution as undermining the ability of elected governments to set public policy. He suggests that this could "severely constrain environmental, health and safety regulations and even financial regulations with significant macro-economic impacts."
4. *Tobacco Plain Packaging Act 2011* (Cth). Australia was the first country in the world to require tobacco products to be sold in plain (not branded) packaging. The legislation was upheld in the High Court of Australia as constitutionally valid notwithstanding the absence of compensation for preventing the display of brand packaging. See *British American Tobacco Australasia Ltd v The Commonwealth* (2012) 250 CLR 1 [2012] HCA 43. Proceedings under a Hong Kong Australia investment treaty for loss of the benefit of trade marks failed in December 2015.
5. See e.g. *The Arbitration and Conciliation Act* 1996 (India) s 48(2)(b) "contrary to the public policy of Indian law – explanation (ii) contravention within the public policy of India; (iii) conflict with the most basic notions of morality or justice".
6. See e.g. *The Arbitration and Conciliation Act* 1996 (India) s 59.
7. "Aus should leverage arbitration, avoid ICC", *Lawyers' Weekly* (Aust) December 2016, 6.
8. Charles Darwin, *The Origin of Species* (John Murray, London, 1859) Chapter 4.

Click below

CIArb Australia Vis Pre-Moot

The Chartered Institute of Arbitrators (CIArb) Australia Branch Young Members Group Committee invites you to participate in the inaugural CIArb Australia Vis Pre-Moot.

Chartered Institute of Arbitrators

CIArb

Australia

The Pre-Moot is open to all Australian teams competing in the Willem C Vis International Commercial Arbitration Moot in Vienna, or the Vis East Moot in Hong Kong, in 2017. The Pre-Moot offers a unique extension of the Vis Moot experience for Australian students. Students will face interstate counterparts and seasoned arbitration professionals.

The Pre-Moot will be structured in two parts. First, state rounds for Queensland, Western Australia, New South Wales/Australian Capital Territory, and Victoria will be held between 13 and 18 February, 2017. State rounds will be held over one day in a city centre venue. The dates, venues, and tournament formats for these rounds will be confirmed after team registrations close.

The winning team of each state round will then be invited to compete in finals in Melbourne on 1 March, 2017. CIArb Australia will enable successful teams to attend by contributing to the travel costs of two students and one coach, being:

- Return economy class airfares from the state capital city; and
- Accommodation in Melbourne for one night (Qld and NSW/ACT teams) or two nights (WA team).1

Students will be required to join CIArb as a Student Affiliate member before the Pre-Moot. Student membership is free of charge.

If you wish to register for the event, please confirm by email to the following address – CIArbPreMoot@gmail.com by 13 January 2017.

Please include:

- Name of University
- Coach details
- Name
- Position
- Email address
- Phone number
- Team members' names
- Confirmation of availability for 13-18 February and 1 March 2017.

* Payment will be by reimbursement to the team's coach after the national round. Teams will provide evidence of expenses (e.g., tax invoices) before reimbursement. Reimbursement will only be available to teams that attended the national round. A maximum amount per team will apply.

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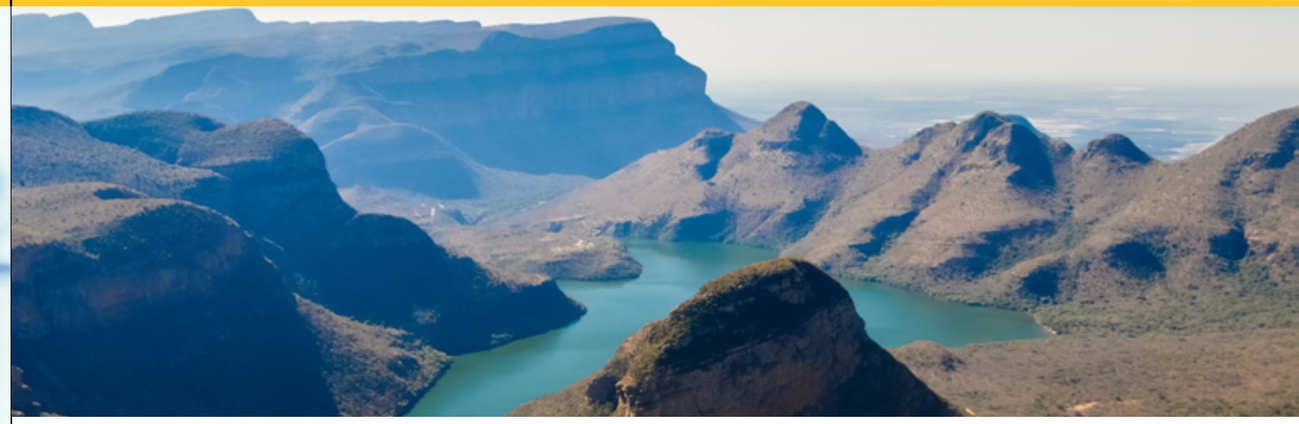

HKIAC resolves Australian-Chinese mining dispute

Featured Article: *Global Arbitration Review*
Douglas Thomson
7 September 2016

An Australian gold mining company has won an HKIAC claim against a Chinese metals group over the sale of South African assets, prevailing on the lower of two alternative damages claims.

In an award dated 1 September, a tribunal seated in Hong Kong awarded Australia's Stonewall Mining US$12.6 million plus interest and costs rather than the US$110 million it had also claimed against Shandong Qixing Iron Tower, a subsidiary of Chinese aluminium processing group Qixing.

The tribunal was chaired by Hong Kong barrister Anselmo Reyes, who sat with Australian Gavin Denton of Arbitration Chambers Hong Kong and the UK's Christopher Moger QC of 4 Pump Court.

Stonewall filed the claim in March last year after Qixing withdrew from a 2013 agreement to purchase Stonewall's South African subsidiary.

Under the Australian law-governed share purchase agreement, Qixing would have paid US$141.5 million for the subsidiary, which holds stakes in two South African gold mines. But the Chinese group backed out of the deal in November 2014, in what some media reports have suggested was a response to a drop in gold prices.

In its award, the tribunal upheld Stonewall's claim that Qixing had repudiated the contract but only accepted the lower of the two bases upon which the Australian company had advanced its damages claim.

The tribunal awarded damages on the basis of the difference between the US$141.5 million price agreed by the parties in 2013 and the value of the relevant assets at the time Qixing backed out of the deal, which it assessed on the assumption that an alternative buyer would have been prepared to make the same expenditures to develop the assets as Qixing had proposed.

Stonewall argued unsuccessfully that the assets were worth considerably less by November 2014 because it would have been unlikely to find an alternative buyer.

The award also requires Qixing to pay Stonewall's legal costs of US$1.2 million, along with US$245,000 in tribunal costs and US$52,600 in HKIAC administration costs. The Chinese company also owes 8 per cent quarterly compounded interest dating from 1 January 2015.

In an Australian Stock Exchange filing on 5 September, Stonewall confirmed that it had received funding for the claim from a consortium of its shareholders, who will receive 45 per cent of the award amount along with reimbursement of their original contributions.

Stonewall chairman Trevor Fourie said he was pleased that the tribunal estimated the South African subsidiary's value at US$127.5 million, which he said was "significantly higher than the current value placed on these assets by the market."

Norton Rose Fulbright acted for Stonewall in the case, while Qixing took counsel from King & Wood Mallesons, both firms having also acted on the original share purchase deal. Neither firm would comment for this article.

Stonewall Resources v Shandong Qixing Iron Tower Co. Ltd.

HKIAC Tribunal

- Anselmo Reyes (Hong Kong) Chair
- Gavin Denton (Australia)
- Christopher Moger QC (UK)

Counsel to Stonewall

- Norton Rose Fulbright

Partner Peter Cash in Melbourne

- Albert Monichino QC at List A Barristers in Melbourne

Counsel to Qixing

- King & Wood Mallesons

Partners Meg Utterback in Shanghai, Ge Yan in Beijing and Alex Baykitch in Sydney

- Vernon Flynn QC at Essex Court Chambers in London

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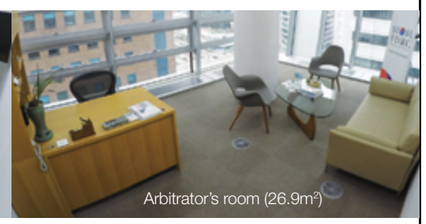
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CIArb Fellow, Professor Chester Brown representing the University of Sydney with 2016 Guest Lecturer, Elliott Geisinger, President of the Swiss Arbitration Association at the Federal Court of Australia, Sydney.

Clayton Utz/University of Sydney 2016 International Arbitration Lecture: Elliott Geisinger

When: 23 November 2016
Where: Federal Court of Australia, Sydney

The 2016 Clayton Utz / University of Sydney International Arbitration Lecture was delivered by **Elliott Geisinger**, **President of the Swiss Arbitration Association**, whose paper, *"International Arbitration and Independence – Off the Beaten Track"* explored the following issues. The term 'independence' invariably brings to mind the independence and impartiality required of arbitrators. However, this is a far too narrow viewpoint: What of the duties of independence of the other participants in international arbitration proceedings? Which duties of independence are incumbent on, for example, experts (especially party-appointed experts), arbitral institutions or counsel? What are the roots and contents of these duties of independence, to whom are they owed and which sanctions, if any, are attached to a failure to live up to them? Thoughts on the most difficult form of independence there is: independence from one's self.

View lecture speech online
About the Speaker

Click below

Speakers: Albert Monichino QC, Ben Olbourne, Jo Delaney, Tim Grave, The Hon James Spigelman AO QC and Gavin Denton

ICC Asia and CIArb Australia Conference

When: Wednesday, 23 November 2016
Where: Clifford Chance, Sydney
Photos: Rick Stevens

ICC Asia and **CIArb Australia** held two successful half day conferences in Sydney and Melbourne where speakers addressed topics such as **"ICC and CIArb Arbitration: Significant developments for a visionary future"**, focusing on recent developments and changes that have now been incorporated in the ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration and the recent guidelines published by the Institute of Chartered Arbitrators. The topic **Blood, sweat and tears: The secrets to becoming an international arbitrator** focussed on the work of the ICC Australia's Nominations Committee and the process of receiving the appointment request from the ICC Secretariat. The panel also discussed the challenges of breaking into the international arbitration ranks for practitioners from Australia. Both conferences attracted attendance from in-house counsels, legal practitioners, arbitrators and academics.The Sydney conference, which held during Arbitration Week, was sponsored and hosted by **Clifford Chance**.

Moderator

Tim Grave
Partner, Clifford Chance, Sydney

Presenters

Abhinav Bhushan
Director, South Asia, ICC Arbitration & ADR

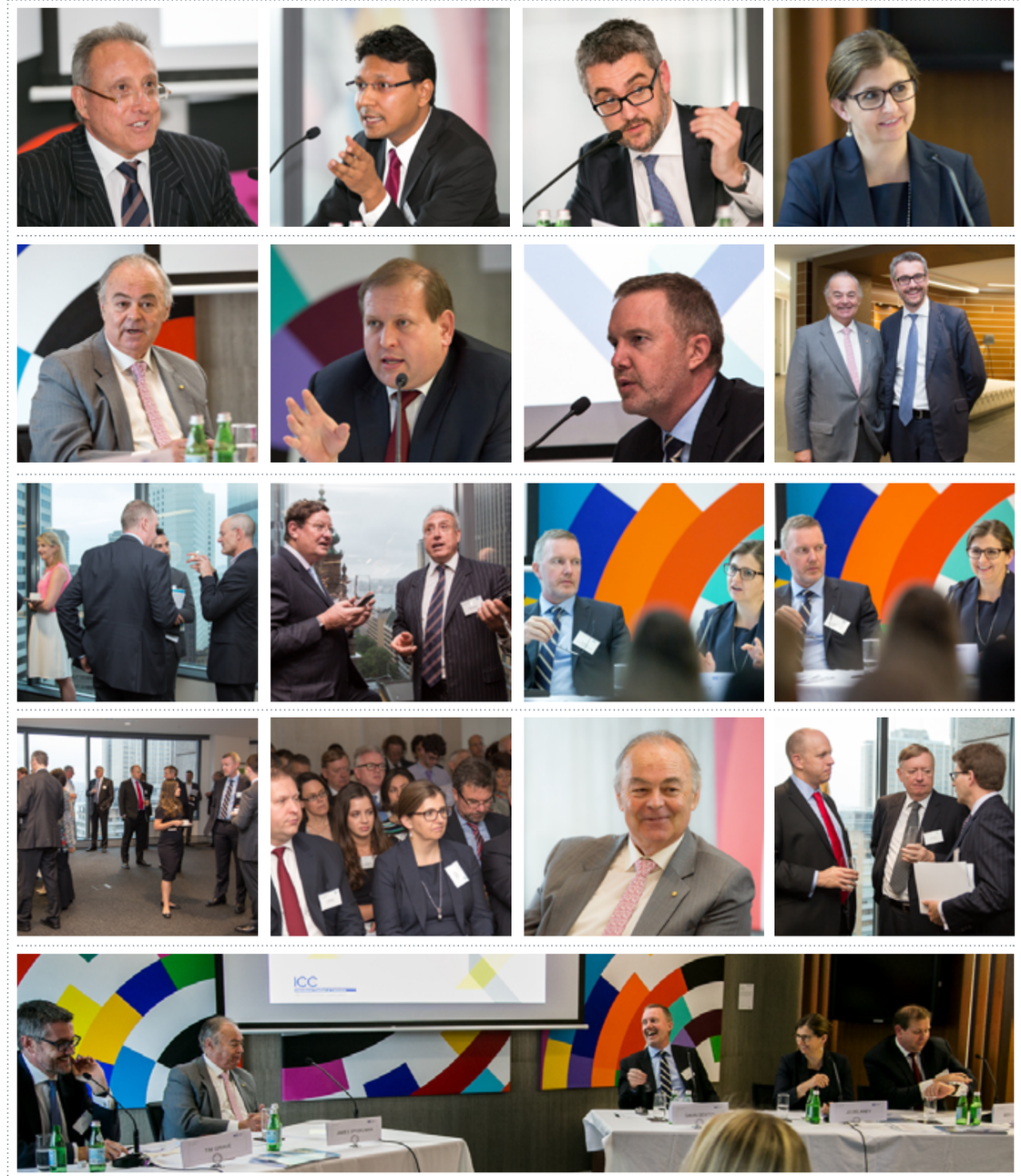
Jo Delaney
Special Counsel, Baker & McKenzie, Sydney

Gavin Denton
Head of Arbitration Chambers Hong Kong; Chairman of ICC Australia's Arbitration Committee

Albert Monichino QC
President of CIArb Australia

Ben Olbourne
Barrister, 39 Essex Chambers, Singapore

The Hon James Spigelman AC QC
Former Chief Justice of the Supreme Court of New South Wales



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Abhinav Bhushan speaking on recent developments and changes that have now been incorporated in the ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration

ICC Asia and CIArb Australia Conference

When: Monday, 28 November 2016
Where: Melbourne Commercial Arbitration and Mediation Centre
Photos: David Johns

ICC Asia and **CIArb Australia** held two successful half day conferences in Sydney and Melbourne where speakers addressed topics such as **"ICC and CIArb Arbitration: Significant developments for a visionary future"**, focusing on recent developments and changes that have now been incorporated in the ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration and the recent guidelines published by the Institute of Chartered Arbitrators. The topic **Blood, sweat and tears: The secrets to becoming an international arbitrator** focussed on the work of the ICC Australia's Nominations Committee and the process of receiving the appointment request from the ICC Secretariat. The panel also discussed the challenges of breaking into the international arbitration ranks for practitioners from Australia. Both conferences attracted attendance from in-house counsels, legal practitioners, arbitrators and academics. The Melbourne conference was hosted and sponsored by the **Melbourne Commercial Arbitration and Mediation Centre** and **Arbitration Chambers, Hong Kong**.

Welcome Address

Dr Michael Pryles AO PBM
International Arbitrator and former Chairman, ICC Australia

Presenters

Abhinav Bhushan
Director, South Asia, ICC Arbitration & ADR

Caroline Kenny QC
Vice President of CIArb Australia

Gavin Denton
Head of Arbitration Chambers Hong Kong; Chairman of ICC Australia's Arbitration Committee

Albert Monichino QC
President of CIArb Australia

Ben Olbourne
Barrister, 39 Essex Chambers, Singapore

Dr Vicky Priskich
Barrister, Owen Dixon Chambers, Melbourne

DR VICKY PRISKICH
BARRISTER
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Promoting ICCA 2018 in China

The International Council for Commercial Arbitration (ICCA) holds a congress every second year for the presentation and discussion of papers on different aspects of international dispute resolution, including international arbitration. It is the largest international dispute resolution seminar in the world.

The next Congress will be held from 15 – 18 April 2018 and will be hosted by **ACICA** (Sydney) and **AMINZ** (Queenstown). The event is expected to attract a large number of participants from all parts of the world. The Beijing Arbitration Commission/Beijing International Arbitration Center (**BAC/BIAC**), one of the largest and most established arbitral institutions in China, is also the exclusive Diamond Sponsor for the ICCA Congress 2018.

On 30 August 2016, an Australian delegation organised and led by **Caroline Kenny QC** presented a seminar at BIAC to promote the ICCA Congress 2018 to China. Attended by over 100 Chinese arbitrators and dispute resolution lawyers, the event was supported by **CIArb Australia** with networking drinks sponsored by the **Victorian Bar**.

Early registrations for the ICCA Congress 2018 are now being accepted. For further details see the ICCA website: http://www.icca2018sydney.com/

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Zhiwei Lin, Secretary –General of the BAC/BIAC; Justice Jingdong Liu, Associate Chief Judge of Civil Division of the Supreme People's Court; Dan Tebutt, Senior Trade Commissioner, Austrade; Elizabeth Peak, Minister-Counsellor Australian Department of Foreign Affairs and Trade; Caroline Kenny QC; Khory McCormick; Alex Baykitch; Prof Song Lu, Professor of Law, Chinese Foreign Affairs University; Dr Fuyong Chen, Deputy Secretary-General of BAC/BIAC

Seminar Program

Moderator: Dr Fuyong Chen, Deputy Secretary-General of the Beijing Arbitration Commission/Beijing International Arbitration Center

ICCA2018 Sydney Australia 15-18 April 2018

2:00 - 2:10 PM Introductory remarks on behalf of the BAC / BIAC -Exclusive Diamond Sponsor for ICCA 2018

Speaker: Zhiwei Lin, Secretary-General of the Beijing Arbitration Commission/Beijing International Arbitration Centre

2:10 - 2:25 PM Address on Australian / Chinese Trade

Speaker: Elizabeth Peak, Minister-Counsellor (Economic), Australian Department of Foreign Affairs and Trade

2:25 - 2:40 PM Address on Arbitration in China

Speaker: Justice Jingdong Liu, Associate Chief Judge of Civil Division No. 4 of the Supreme People's Court

2:40 - 3:00 PM The Australian Legal System and Australian / Chinese Trade Relations

Speaker: Khory McCormick, Vice President and Executive Member of ACICA, Partner, Minter Ellison, Queensland, Australia

3:00 - 3:20 PM The Highlights of the ICCA Congress in Sydney in 2018

Speaker: Alex Baykitch, President of ACICA, Partner, King & Wood Mallesons, Sydney, Australia

3:20 - 3:45 PM Coffee Break

3:45 - 4:10 PM Enforcement of International Arbitration Awards in Australia: A review of cases involving Chinese nationals

Speaker: Caroline Kenny QC, International Arbitrator, Vice President of the Chartered Institute of Arbitrators (Australia), Director of ACICA

4:10 - 4:35 PM Enforcement of International Arbitration Awards in China

Speaker: Professor Song Lu, Associate Professor of Law at Chinese Foreign Affairs University, International Arbitrator

4:35 - 4:45 PM Closing Address

Speaker: Dan Tebbutt, Senior Trade Commissioner, Austrade

4:45 - 5:00 PM Q&A and Closing Remarks

Speaker: Dr Fuyong Chen, Deputy Secretary-General of the Beijing Arbitration Commission/ Beijing International Arbitration Center

Followed by networking drinks proudly sponsored by the Victorian Bar

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Casenote: Court Slams Sino Dragon's Attempt To Set Aside Arbitral Award

Case: *Sino Dragon Trading Ltd v Noble Resources International*

In *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd*,[1] the Federal Court of Australia heard an application by Sino Dragon Trading Ltd (Sino) to set aside an arbitral award made in Sydney and recognised as enforceable by the Hong Kong High Court. The conduct of Sino throughout the arbitration, and the arguments put forward by Sino for setting aside the award did not assist its cause. The judgment emphasises that Australian courts will only set aside an arbitral award when there are clear grounds for doing so.

Sino's application to set aside the award rested upon three grounds. First, Sino argued that because a notice of repudiation was written in Chinese and not English, the tribunal was not entitled to consider it as it fell outside the scope of the arbitration agreement. Second, Sino contended that technical and translation difficulties, which arose in a video link it had arranged and at the hands of a translator it had appointed, gave rise to a lack of procedural fairness. Finally, it asserted that bias afflicted the arbitral tribunal, including an arbitrator appointed by an independent authority in consequence of Sino's failure to make its own appointment.

Foreshadowing his later criticism of Sino, Justice Barry Beach noted at the outset of his judgment that some of Sino's grounds 'lacked conceptual coherence'[2] and that it 'may be seen largely to be the author of its own misfortune'.[3]

Facts

Sino contracted to purchase 170 000 dry metric tonnes of iron ore from Noble Resources International Pte Ltd (**Noble**). The contract required Sino to obtain a letter of credit, which did not occur within the stipulated time. By email in the Chinese language, Mr Pang of Sino informed Noble that, in consequence of its failure to obtain credit, Sino could not perform the contract. By letter in response, Noble purported to accept Sino's alleged repudiation, and terminated the contract. Noble later asserted that Sino's breach had caused loss and damage to Noble because it was forced to find an alternative buyer for the ore at a lower price.

The contract of sale provided for arbitration of disputes arising thereunder to be referred to arbitration in Australia pursuant to the UNCITRAL Arbitration Rules (**Rules**). On 1 May 2014, Noble issued a notice of arbitration to Sino. Following the appointment of an arbitral panel, an arbitral award was ultimately issued against Sino. Sino then applied to the Federal Court to set aside the award under article 34 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law), which has the force of law in Australian under the *International Arbitration Act 1974* (Cth) (IA Act).

Awards will not be set aside lightly

Article 34 of the Model Law sets out the bases on which a court at the seat may set aside an arbitral award, including for lack of jurisdiction. Justice Beach was emphatic that Article 34 'significantly limits the circumstances under which an award may be set aside'.[4] This approach is consistent with the courts' promotion of arbitral awards as providing certainty and finality. His Honour considered himself bound to exercise 'significant judicial restraint'[5] in entertaining an application to set aside an award, such a challenge not being an occasion for a merits review of the award.[6] It is unsurprising, then, that Sino's application to set aside the award was refused.

'Floccinaucinihilipilification'

The contract of sale required all notices and documents in connection with the contract to be in the English language. Despite this, the email from Sino to Noble, alleged by Noble to amount to a repudiation of the contract, was in Chinese. Sino argued that the tribunal was wrong to consider the email as evidence of repudiation because the email, not being in English, could not fall to be considered within the terms of the contract of sale.

Justice Beach was highly critical of Sino's contention. His Honour observed that the 'line of reasoning breaks down at a number of levels'[7], that the 'submissions lacked conceptual coherence'[8] and that the argument 'takes it nowhere.'[9] Justice Beach went so far as to say that Sino's arguments were 'little more than a confected attempt to run a merits challenge under the guise of an [article 34] challenge'. Most impressively, His Honour said in relation to Sino's contention:

'Floccinaucinihilipilification is a not inapposite description of my assessment of this argument.'[10]

In addition to his legal qualifications, his Honour holds Bachelors qualifications in physical chemistry and philosophy, and a Masters degree in the philosophy of science. It is, therefore, unsurprising that his Honour is comfortable using such complex words as floccinaucinihilipilification which, for us mere mortals, means to deem something worthless.

Video conferencing and other tragedies

Sino further contended that it had been denied natural justice in consequence of technical faults and mistranslation in the giving of video evidence by its witnesses.

In a pre-trial conference, Sino rebuffed a request by Noble to have certain witnesses attend the hearing in person for cross-examination. Rather, Sino requested that the evidence be given by video link. The tribunal granted this request but noted that any difficulties in the video link would be at the risk of Sino. Sino also was also charged with arranging the attendance of a qualified interpreter.

Sino failed to respond to requests for testing of the video link, and instead arranged for the evidence to be given over the Skype-like Chinese service, 'WeChat'. During the course of the hearing, the video link broke down and alternative arrangements to have the evidence received over poor-quality internet and telephone

HFW WINS NOBLE CASE

Sol Dolor
Ausralasian Lawyer
22 September 2016

The Federal Court of Australia has struck down a commodities trading firm's push to quash a $2m arbitration award stemming from a botched iron ore deal.

On Friday, the court ruled in favour of Singapore's Noble Resources International, represented by Holman Fenwick Willan, in a case brought by Hong Kong's Sino Dragon Trading citing the latter's contradictory arguments.

In January 2014, Sino Dragon inked a contract governed by the laws of Western Australia with Noble to buy 170,000 metric tons of iron ore. However, it subsequently missed two deadlines to open a letter of credit as required by the contract.

The HK-based company claimed that the same day Noble cancelled and sold the iron ore to another firm, it had given notice of its failure to perform the contract.

As the contract contained an arbitration clause for disputes to be resolved by arbitration in Australia under UNCITRAL rules, Noble took Sino Dragon to the Australian Centre for International Commercial Arbitration (ACICA).

Earlier this year, Noble won $2m in damages against Sino Dragon.

Sino Dragon, in a bid to quash the award, asked the Federal Court of Australia to rule in its favour because it claimed technical difficulties and translation problems for a couple of their witnesses who appeared via video link from China caused the whole arbitration proceedings to be prejudiced against the company.

However, Justice Barry Beach pointed out this argument contradicts Sino Dragon's claim during arbitration that the witness testimonies were not too hampered by technical difficulties and that the company was itself to be partly blamed for the technical and translation problems.

"Sino Dragon's own counsel perceived and said to the arbitral tribunal that, notwithstanding the technical difficulties, the evidence of his witnesses had come out clearly and consistently with their evidence in chief," the judge noted. "Sino Dragon's present challenge and its assertions of substantial injustice because of misunderstanding or mistranslation are puzzling to say the least." Read More

connections were made. In its award, the tribunal found the giving of evidence to be 'quite unsatisfactory'. Further, the accredited translator appointed by Sino struggled to translate the evidence into English, and translating responsibilities had to be assumed by a paralegal employed by the solicitor for Sino.

Before the Federal Court, Sino alleged that the procedure for the giving of evidence was unfair, that its witnesses were mistranslated and misunderstood, and that it was denied a proper opportunity to present its case.

Justice Beach rejected these contentions, noting that the issues were not raised with the tribunal at any stage during or after the hearing, and that Sino, despite possessing the transcript of evidence upon which the tribunal would rely, did not seek to correct any mistranslation. His Honour said:

'At the time of the arbitration hearing, Sino Dragon took no objection to the procedure which had been adopted… Indeed, its acts and omissions were principally its cause.'[11]

Remarkably, in his closing address, counsel for Sino said that the witnesses 'gave their evidence clearly' and submitted that the tribunal 'would accept their evidence'.[12] In light of this, Beach J said that Sino's later assertions of injustice were 'puzzling to say the least'.[13] His Honour also noted that the technical difficulties arose in cross-examination of the witnesses by Noble, such that it was Noble who was 'put in a more unequal and less favourable position by reason of the mode and technical difficulties.'[14] Finally, the difficulties in receiving evidence did not lead the tribunal to wholly or partially exclude the evidence of Sino's witnesses and, as such, did not provide a justification for setting aside the award.

If at first you don't appoint…

When Noble issued its notice of arbitration to Sino, it appointed **Terry Mehigan** as arbitrator and proposed the Australian Centre for International Commercial Arbitration (ACICA) as the appointing authority in accordance with Article 2 of the UNCITRAL Arbitration Rules. Under the Rules, Sino had 30 days to appoint the second arbitrator and to respond to Noble's proposal of ACICA as the designated appointing authority. Sino failed to do either within the time required.

The Rules provide that, where the parties have not agreed on the appointing authority, any party may request the Secretary-General of the Permanent Court of Arbitration (PCA) to designate the appointing authority.[15] Accordingly, on application by Noble, the PCA designated **David Williams QC** as appointing authority. As Sino had also failed to appoint an arbitrator, in accordance with the Rules, Noble requested Mr Williams QC appoint the second arbitrator. Mr Williams QC appointed **Max Bonnell** to the tribunal. The two arbitrators then appointed **Jonathan Hoyle** as the presiding arbitrator. In large part, then, Sino's complaints in relation to the arbitrators were grounded in its own failure to exercise its right to influence the composition of the tribunal.

Prior to the present proceedings, Sino had instituted five challenges against the appointed arbitrators, both within the arbitration and before the Federal Court. These prior challenges included complaints such as the arbitrators were not properly appointed and that they were 'culturally biased', shared a 'cultural system' and were 'in connection with each other' because they all lived in Sydney.[16] All five challenges failed.

In the setting aside proceeding, Sino again objected to the appointed arbitrators, arguing that they were not appointed in accordance with the agreement of the parties and that Mr Bonnell and Mr Hoyle were biased because they had a financial interest in the outcome of the arbitration. In relation to the appointment procedure, Justice Beach found this complaint to have no substance as the tribunal was property appointed. In relation to the alleged bias of two of the arbitrators, Sino's argument was based on the fact that Mr Bonnell was a partner in the law firm King & Wood Mallesons (KWM) and Mr Hoyle was an associate partner at the firm until 2009, and that the Chinese arm of KWM had acted as lawyers for Noble in an unrelated matter.

His Honour was unimpressed with the 'disjointed and conceptually misconceived propositions'[17] in relation to bias. It was noted that Mr Bonnell is a partner of the Australian arm of KWM, whereas Noble is a client of the Chinese arm, with no connection between the Australian and Chinese partnerships apart from an association of name and marketing. It was also relevant that Mr Bonnell had never acted for Noble, and that KWM China's involvement was in an unrelated matter.[18] It was held that Sino's case went 'nowhere near' satisfying the test for bias,[19] which requires a 'real danger of bias'.[20] Justice Beach also noted that the conduct alleged to constitute bias on the part of Mr Bonnell was within the 'green list' of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.[21] Matters on this list, including the allegations against Mr Bonnell, give rise to 'no appearance of, and no actual, conflict of interest'.[22] His Honour also referred to the common law test for bias and remarked that 'no fair-minded lay observer would perceive any possibility of bias'.[23]

Indemnity costs?

On application by Noble, the Court ordered Sino to pay two-thirds of the costs of the setting aside application on an indemnity basis, and pay the remaining one-third on a party/party basis. Justice Beach noted that the Model Law and IA Act are silent as to the allocation of costs in an article 34 challenge, implying an intention that costs be determined by the law of the forum.[24]

Noting the Court's broad discretion on costs,[25] Beach J found that an order for indemnity costs would be warranted where a party makes an unsuccessful article 34 challenge that did not have reasonable prospects of success.[26] It is not necessary that the party had actual or constructive knowledge of its poor prospects at the outset of the challenge.[27] Justice Beach noted that the threat of an adverse costs order on an indemnity basis would 'discourage the bringing of unmeritorious article 34 challenges',[28] and that '[a] party launching an article 34 challenge should take positive steps to ensure that at inception it does have reasonable prospects of success'.[29]

His Honour determined that Sino's challenges on the basis of the Chinese email, and on the basis of bias of the arbitrators, did not have reasonable prospects of success.[30] The challenge on the basis of the faulty video link was not found to be so lacking.[31] Given that two of three grounds of challenge lacked reasonable prospects of success, the justice of the case required Sino to pay two-thirds of the costs on an indemnity basis.[32]

Conclusion

The decision of the Federal Court in *Sino Dragon v Noble Resources* reaffirms the Australian courts' restrictive approach to the grounds on which an arbitral award will be set aside. Most significantly, the decision demonstrates the courts' vigilance towards applications which are disguised as natural justice arguments but are, in essence, challenges to the merits of an award. It is also clear that the courts will not refrain from criticism of an applicant which asserts tenuous and poorly constructed grounds for such an application. Rather, the Australian judiciary looks favourably upon arbitration as a means of 'efficient, impartial, enforceable and timely' resolution of disputes and will seek to uphold arbitral awards unless grounds for refusal of enforcement are clearly established.

***The authors would like to thank Daniel Argyris, research clerk of McCullough Robertson, for his assistance in the preparation of this article.**

1. *[2016] FCA 1131.*
2. *Ibid [10].*
3. *Ibid [6].*
4. *Ibid [71].*
5. *Ibid [73].*
6. *Ibid [73].*
7. *Ibid [113].*
8. *Ibid [101].*
9. *Ibid [116].*
10. *Ibid [116].*
11. *Ibid [150].*
12. *Ibid [152].*
13. *Ibid [152].*
14. *Ibid [164].*
15. *UNCITRAL Arbitration Rules (as revised in 2010), article 6(2).*
16. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131 [36].*
17. *Ibid [187].*
18. *Ibid [192].*
19. *Ibid [198].*
20. *Article 12 Model Law; ibid [61], [191]-[193].*
21. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131 [194].*
22. *International Bar Association Guidelines on Conflicts of Interest in International Arbitration Pt II [6].*
23. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131 [198].*
24. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2) [2016] FCA 1169 [6]-[7].*
25. *Federal Court of Australia Act 1976 (Cth) s 43.*
26. *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2) [2016] FCA 1169 [26].*
27. *Ibid.*
28. *Ibid [28].*
29. *Ibid [26].*
30. *Ibid [31]-[32].*
31. *Ibid [33].*
32. *Ibid [34].*
33. *International Arbitration Act 1974 (Cth) s 39(2)(b)(i).*

JULIE SOARS
BARRISTER
CIARB AUSTRALIA NATIONAL COUNCILLOR
View Profile

Recognising and managing guerilla tactics in international arbitration

The most common complaint of users of international arbitration is that the costs of arbitration can quickly spiral out of control. Recognising, managing and defusing guerilla conduct in arbitration is a top priority in order to control costs. This was the theme of recent seminars held in November and December 2016 in Sydney, Melbourne, Shanghai, Beijing and Hong Kong that were jointly organised by The Australian branch of the Chartered Institute of Arbitrators (which joined with the East Asia Branch for the Chinese seminars) and global law firm Herbert Smith Freehills. The writer was part of an expert panel, including local experts at each venue, that explored these issues using practical examples.

With the increased take up of international arbitration to resolve international disputes, guerilla conduct in international arbitrations is also on the rise. Guerilla conduct frustrates, delays or seeks to improperly impede the arbitration process.

Examples of guerilla conduct include multiple and unmeritorious challenges to arbitrators, refusing to appoint a party's own arbitrator, refusing to pay the deposit on costs required, improper document requests (or responses to such requests), seeking unnecessary adjournments and delays in compliance with timetables, unmeritorious jurisdictional challenges and conduct that crosses the ethical line - from attempting to 'influence' arbitrators right through to downright illegal and intimidatory conduct (including kidnapping arbitrators) and seeking national court restraining orders against the arbitrators personally.

Even after an award is rendered the guerilla conduct often continues unabated with unmeritorious setting aside applications and opposition to the enforcement of awards. It includes award debtors going through all available appeal procedures in national courts regardless of the strength of their arguments. This can run up excessive costs and cause delay. The delay generated while appeals are in the system is sometimes used by an award debtor to dissipate assets and to "phoenix" business interests into new companies that are not liable for the arbitral award. Finally, when all else fails, award debtors often make use of local insolvency procedures (such as administration and deeds of company arrangement) to avoid having to make any payment or to only make a partial payment of the award.

If parties can anticipate guerilla tactics they can use the 'nuclear weapon' in the fight against them – that is seek freezing orders over assets to prevent dissipation prior to enforcement where appropriate.

Australian courts have granted freezing order relief in appropriate cases in aid of arbitrations seated in Australia as well as in aid of foreign arbitrations with the seat or place outside of Australia. Where Australia is the seat of the arbitration the Australian court and the tribunal have concurrent jurisdiction to grant freezing order relief. Post award the tribunal is *functus* and only the Australian court has jurisdiction to grant freezing order relief. The seminars explored the fact that the position in Hong Kong is similar to that in Australia, while the position is China is very different with a two-step approach needed while the arbitration is on foot – first referring the request for freezing order relief to the Chinese arbitral institution administering the arbitration, which then refers the request to the Chinese court.

Parties can also seek indemnity costs orders against unsuccessful applicants in arbitration related court matters in Hong Kong and Singapore, but not yet in Australia as a usual or default rule. Australia is out of step with Hong Kong and Singapore on indemnity costs. This is not because of a lack of willingness of the Australian courts to assist but because under Australian law there is (arguably) no clear juridical basis for Australian courts to order indemnity costs in unsuccessful arbitration-related court matters. This has led to potentially conflicting court decisions until this issue is resolved at appellate level. In China there is no rule in litigation that costs follow the event and so there is currently no role to be played by an order for indemnity costs.

In order to control guerilla tactics in arbitration a strong arbitral tribunal that is prepared to act swiftly to control and defuse guerilla tactics is a must.

In institutional arbitrations it is imperative to have a supportive arbitral institution prepared to act promptly and authoritatively. Having supervisory courts at the seat of the arbitration that are supportive of arbitration and pro-arbitration in their approach is also essential.

Australian and Hong Kong courts are very supportive and pro-arbitration, with specialist courts to deal with arbitration matters. The Australian and Hong Kong courts also act in aid of and assist foreign arbitrations, including by ordering freezing order relief, where appropriate. In China the role of the court in relation to arbitrations is generally supportive but the scope of the support that can be provided is more limited than in Australia and Hong Kong and is still developing. Also Chinese courts do not grant freezing order relief in aid of foreign seated arbitrations.

Some of the take away points from the seminars for Australian arbitration are that if the position on indemnity costs is not resolved in Australia shortly by appropriate appellate authority in favour of indemnity costs as the normal or default rule, then swift legislative change by way of amendments to the *Australian International Arbitration Act* and model domestic arbitration legislation is recommended to provide Australian courts with the indemnity costs 'weapon' to deal with guerilla tactics in stays and enforcement of awards by empowering those courts to order indemnity costs as the normal or default position. This will bring Australia in line with the position on indemnity costs taken by other courts in our region.

There is also an opportunity for the Australian government to further assist in the fight against guerilla tactics by legislating to limit appeal rights from first instance court decisions on arbitration related matters to follow the Hong Kong and Singaporean approach (where leave to appeal is required from first instance arbitration related judgments) and/or ensure that all appellate matters are channeled to the one appellate court, whether they arise in state or federal courts (acknowledging that this would be a challenge given Australia's state and federal system).

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The inaugural CIArb Asia Pacific Diploma in International Commercial Arbitration proved to be a resounding success. Held in Singapore (20 August – 28 August) it attracted 29 candidates from 11 countries with a faculty comprising experienced practitioners who travelled from far and wide. **The course was the result of a joint venture between the Australia, East Asia and Singapore branches of the CIArb**, aimed at meeting the needs of aspiring international arbitration practitioners and arbitrators in the region. Under the terms of the joint venture, the course will be conducted in Singapore (2016), Hong Kong (2017) and Australia (2018). We would like to publicly acknowledge our students, sponsors, supporting organisations, media partners and faculty who made this a course to remember.

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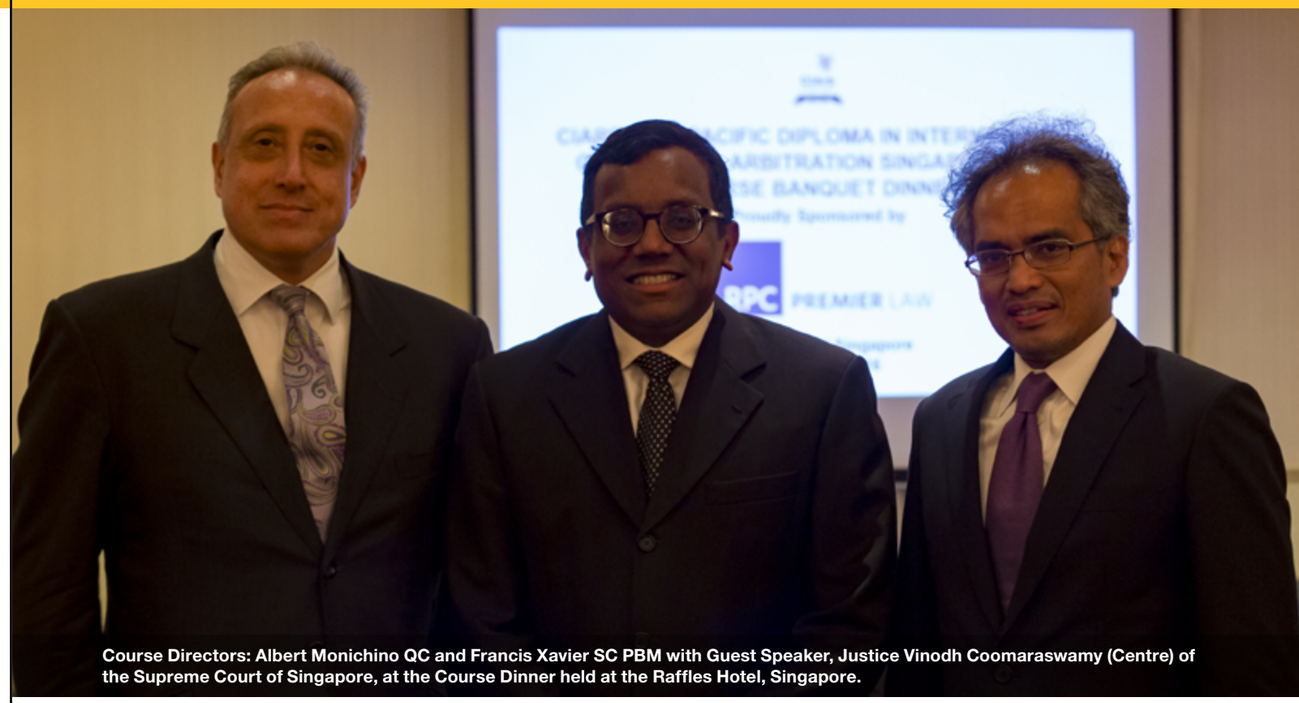

Course Directors: Albert Monichino QC and Francis Xavier SC PBM with Guest Speaker, Justice Vinodh Coomaraswamy (Centre) of the Supreme Court of Singapore, at the Course Dinner held at the Raffles Hotel, Singapore.

Faculty

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CIArb Australia President

Francis Xavier SC PBM
CIArb Singapore Chairman

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Canada

Beth Cubitt
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Francis Douglas QC
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Dr Gavan Griffith AO QC
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Chalee Nai Kin
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D'Arcy Hope
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CIArb Asia Pacific Diploma Class 2016 with some members of the course faculty at Maxwell Chambers, Singapore

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CIArb Asia Pacific Diploma Course: A Student's Perspective

The inaugural CIArb Asia-Pacific Diploma in International Commercial Arbitration was held in Singapore between 20-28 August 2016. The course was the first to be conducted jointly by the Australian, East Asian and Singaporean branches of the Chartered Institute of Arbitrators. Fittingly for a course in modern international arbitration, it was held in Singapore, an active advocate for the growth of arbitration in the region.

The course kicked off in offices looking over Marina Bay in Singapore and Maxwell Chambers with a cohort of 29 students from Afghanistan, Australia, Korea, Japan, England, Vietnam, India, Indonesia, the Philippines, Singapore and Hong Kong and a rather daunting pile of workbook materials. The course itself was well structured and careful thought had obviously been given to building up an understanding of the framework that underpins international arbitration; starting with the key concepts and then moving sequentially through the conduct of an arbitration. At each stage the key legal instruments, cases and guidelines were discussed. Topical issues such as multi-party arbitration and how modern arbitration addresses it (e.g. joinder and consolidation), arb-med and interim measures were all covered.

The final few days of the course were more informal and included an introduction into what I would term 'arbitration pathways' highlighting areas of practice that fit within 'international arbitration' such as investment arbitration, sports arbitration, construction arbitration and their nuances.

While the materials were voluminous, they were well organised and clearly prepared with the tutorials in mind. The tutorials forced students to grapple with the various regimes established by various jurisdictions and institutions and to become 'conversant' with the materials. In my view, these tutorials were some of the best aspects of the course. They were composed of small groups of around six students and two faculty members. This created an environment well suited to testing one's understanding and for challenging some of the more complicated issues. The insight that many of the students obtained from the tutors was invaluable and gratefully received. Prospective students should note that it is worth preparing your own copy of the materials for making notes on – as one copy should be kept for the exam.

To me and others, the course offered two key benefits: the first, the opportunity to sit down for nine days (relatively) uninterrupted and be taught the A to Z of international arbitration principles from a faculty that

Huw Watkins being presented with Course Certificate by Camilla Godman, Director of CIArb Asia Pacific

was clearly passionate about the topic. For some in the course, this was a useful refresher but for others it was their first step into the realm of international arbitration. The second, was the opportunity to meet a diverse range of interesting professionals, each of whom, regardless of whether they were teacher or student, made a unique contribution to the course.

The keynote speech by Justice Vinodh Coomaraswamy at the end of the course provided an insight to views from the bench and forced students to consider the interaction between the courts and arbitration.

On a lighter note, the course had three social events to break up the study: casual welcome drinks, a cocktail party with practitioners from Singapore and the course dinner. These provided an opportunity for students and faculty alike to relax and forge new connections and friendships. The Singapore Slings at the Raffles Hotel were a particularly welcome refreshment to mark the end of an intensive week of study.

I would recommend the course to those with a practice or interest in international arbitration. The course is well structured and provides a solid foundation upon which to step out in the world of international arbitration.

Prospective students should note that successful completion of the course does not entitle the student to a Diploma. Questions should be directed to the course convenor.

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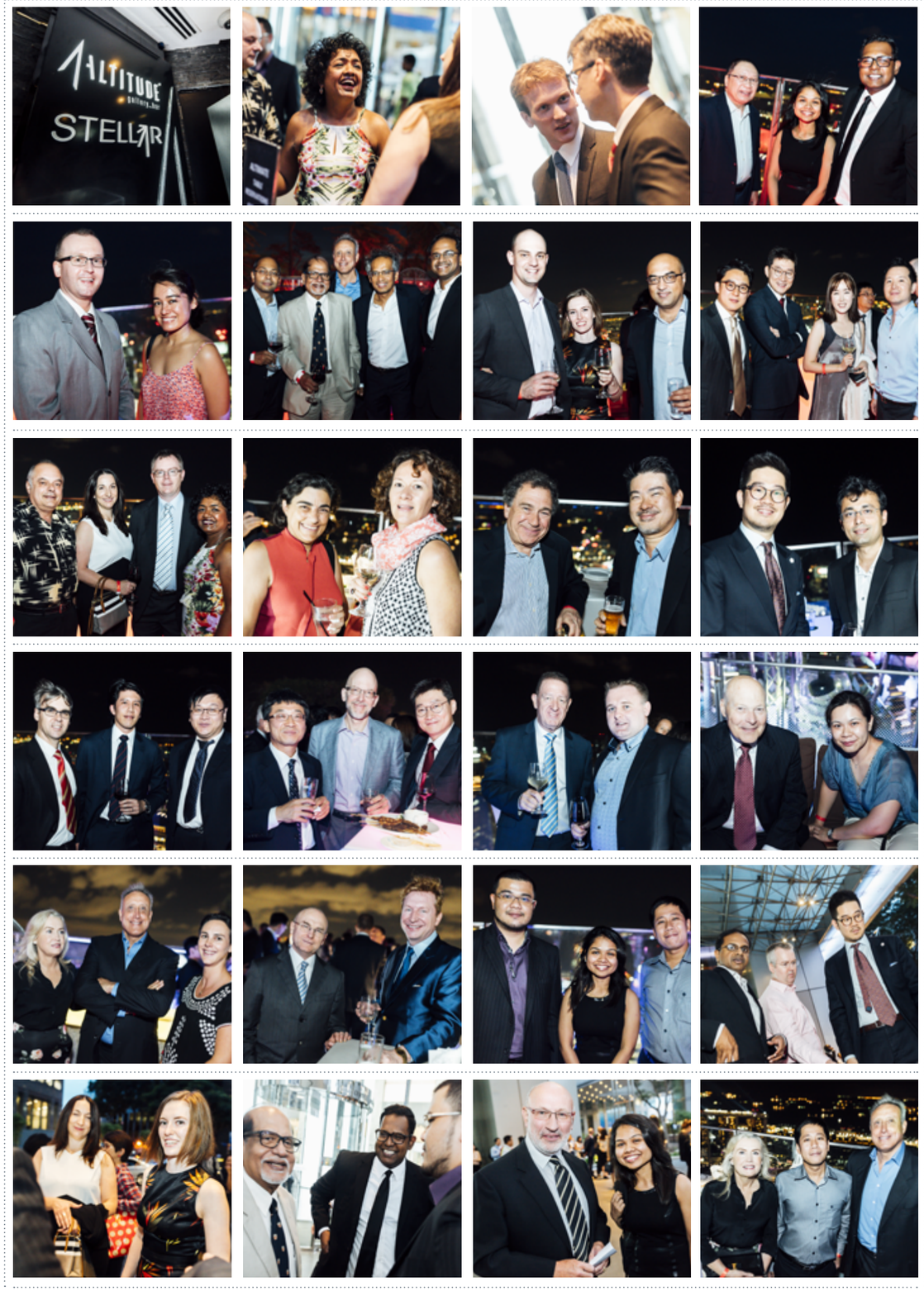

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Course Dinner, Raffles Hotel

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Speakers: Dr Stephen Lee, The Hon Diana Bryant AO, Dr Jacoba Brasch QC, Martin Bartfield QC and Geoff Wilson

Family Law Financial Arbitration

When: Thursday, 10 November 2016
Where: Hopgood Ganim Lawyers, Brisbane
Photos: Stu Riley

One of the most successful CPD events organised by CIArb Australia in 2016 was the **Family Law Financial Arbitration** seminar addressed by **the Hon Diana Bryant AO, Chief Justice of the Family Court of Australia** and **Martin Bartfeld QC, Barrister and Arbitrator**. Hosted by **Hopgood Ganim Lawyers** and supported by **the Australian Institute of Family Law Arbitrators and Mediators**, the event attracted a full house. A highly interactive Q & A session, with the speakers and a panel comprising **Geoffrey Wilson, Partner of Hopgood Ganim Lawyers**, **Dr Jacoba Brasch QC, Barrister and Arbitrator** and **Dr Stephen Lee, CIArb Australia Qld State Convenor and Councillor** made for a highly informative and entertaining evening.

Suggested Reading:
Arbitration would relieve busy family courts: Chief Justice
Sydney Morning Herald, 30 July 2016

Arbitration – the new frontier
Geoff Wilson

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THE HON CHIEF JUSTICE DIANA BRYANT AO
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Arbitration In Family Law

Keynote Address

Arbitration has long been a possible alternative to court proceedings in financial and property matters under the *Family Law Act 1975* (Cth) ('the Act' or 'the Family Law Act'). It was introduced through the Courts *(Mediation and Arbitration) Act 1991* (Cth) and the relevant provisions are now contained in Division 4 of Part IIIB of the Family Law Act, supported by Part 5 of the *Family Law Regulations 1984* (Cth) ('the Regulations') as well as Chapter 26B of the Family Law Rules 2004 ('the Rules').

Under the Family Law Act, arbitration can be, in sum, court-referred or party-agreed.[1] However, in practice all arbitration under the Act is party-agreed.[2] Irrespective of whether the arbitration is court-referred or party-agreed, the Court can make orders to facilitate the arbitration.[3] An arbitration doesn't have to cover all aspects of the dispute and can also deal with interim issues.[4] Once registered, an arbitral decision takes effect as if it were a decree of the court.[5]

The Regulations set out who can act as an arbitrator, namely an Australian legal practitioner who has completed specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators. Further, the person must either be accredited as a family law specialist by a state or territory legal professional body or have practised as a legal practitioner for at least five years, with at least 25 per cent of their work in that time being in relation to family law matters.[6] The person's name must be included in a list of Australian legal practitioners who are prepared to provide arbitration services under the Act; this list is maintained by the Australian Institute of Family Law Arbitrators and Mediators on behalf of the Law Council of Australia.[7]

So why don't people arbitrate?

The availability of arbitration in family law property matters has not led to it being used to any significant extent to date — particularly where the property pool is relatively small in family law terms. This will need to change in the future as pressure on the courts builds thanks to a caseload that is getting ever greater, in number and complexity, whilst government funding stagnates and even diminishes. Thus, in order to facilitate increased use of arbitration, the Family Court amended the Family Law Rules 2004 (Cth) in December 2015, through the Family Law Amendment (Arbitration and Other Measures) Rules 2015 (Cth). Our hope was that the amendments to the Rules would address gaps in relation to disclosure and subpoenas, as these were previously seen as impediments to efficacious arbitration. We hope that this will lead to an increase in the numbers of parties arbitrating rather than litigating their financial disputes.

There are various other explanations as to why arbitration has not been frequently used to date. For instance, it could be difficult for parties with entrenched conflict to mutually decide upon a suitable arbitrator. At the same time, the fact that the parties are in a position to select the person who will arbitrate their matter can also be a positive, allowing parties substantially more control over their proceedings than in the court system.

Further, it must be acknowledged that the cost of arbitration can be prohibitive, though this need not necessarily be so — for example, possibly the most successful family law arbitration scheme in Australia has been that offered by Legal Aid Queensland,[8] which relies upon experienced practitioners working as arbitrators for very modest fees.[9] In any event, the decision to pursue litigation over arbitration once mediation and negotiation have failed is likely to be a false economy — a quick and well organised arbitration could cost significantly less, at the end of the day, than what parties will ultimately spend on legal fees in running protracted litigation.[10]

Another issue is that parties may simply be unaware of arbitration as an alternative, which is why there is some need for the profession to educate clients in this respect.

A more significant concern parties might have about arbitration stems from the perception that challenging arbitral awards is more difficult than challenging judicial decisions. This is because s 13J of the Family Law Act stipulates that arbitral decisions can only be reviewed on questions of law. While there may still be room for the court to correct obviously unjust or inequitable arbitral decisions,[11] until this is considered by the Full Court there will be some uncertainty as to the scope of such review.

Given the various benefits of arbitration — including timeliness, cost savings, increased control and privacy — there is very little reason why most financial matters can't be determined using this methods (where mediation and negotiation have failed).

England and Wales

The situation in the family law of England and Wales vis-à-vis arbitration provides an interesting contrast to ours in Australia. England and Wales have had the Institute of Family Law Arbitration System for financial cases in place since April 2012 and since then more than 90 arbitrations have taken place using that scheme.[12] In July 2016, the Children Arbitration Scheme was launched and forty arbitrators had already been trained for the purposes of arbitrating matters involving where the child should live, time to be spent with each parent and internal relocation within England and Wales.[13]

In this context, various rules have been put into place to ensure that arbitration ensures the safety of parties — and, most importantly, of children — including:

- Requiring the parties to report to the arbitrator and each other any conviction or caution, any involvement with any local authority's children's services and any other matter likely to raise a reasonable apprehension of risk to the physical or emotional safety to either party or to any child;
- Requiring the arbitrator to consider whether the arbitration can safely continue if there may be a risk to the physical or emotional safety of either party or any child and terminate the process where there are unresolved concerns; and
- Requiring the arbitrator, prior to issuing determination, to report to the relevant local authority or government agency concerns arising at any time during the arbitration.[14]

Further, the arbitrator is also empowered to instruct experts to seek a report from an independent social worker in relation to safety issues.[15]

We in the family law system in Australia will watch the Children Arbitration Scheme with interest, and look forward to research on the outcomes it produces for children in the longer term.

Conclusion

One thing is for certain: ensuring future access to justice for all members of the Australian community involved in family law matters relies upon our ability to flex and innovate in what are trying times for public purses everywhere.

1. Patrick Parkinson, 'House and Garden Arbitration' (2016) 25(3) *Australian Family Lawyer* 2, 5.
2. Patrick Parkinson, 'House and Garden Arbitration' (2016) 25(3) *Australian Family Lawyer* 2, 5.
3. *Family Law Act 1975* (Cth) s 13E(2) and s 13F.
4. See Patrick Parkinson, 'House and Garden Arbitration' (2016) 25(3) *Australian Family Lawyer* 2, 6.
5. Patrick Parkinson, 'House and Garden Arbitration' (2016) 25(3) *Australian Family Lawyer* 2, 6.
6. Family Law Regulations 1984 (Cth) reg 67B.
7. See <http://www.aiflam.org.au/>.
8. See Legal Aid Queensland, Property Arbitration (2015) <http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Family-law/Property-disputes/Property-arbitration>.
9. Patrick Parkinson, 'House and Garden Arbitration' (2016) 25(3) *Australian Family Lawyer* 2, 7 (citations omitted).
10. See generally Patrick Parkinson, 'House and Garden Arbitration' (2016) 25(3) *Australian Family Lawyer* 2, 7–8.
11. Patrick Parkinson, 'House and Garden Arbitration' (2016) 25(3) *Australian Family Lawyer* 2, 8 (citations omitted).
12. Suzanne Kingston et al, 'The Child Arbitration Scheme' (2016) 46(7) *Family Law* (UK) (online) 1, 1.
13. Suzanne Kingston et al, 'The Child Arbitration Scheme' (2016) 46(7) *Family Law* (UK) (online) 1, 3.
14. Suzanne Kingston et al, 'The Child Arbitration Scheme' (2016) 46(7) *Family Law* (UK) (online) 1, 4.
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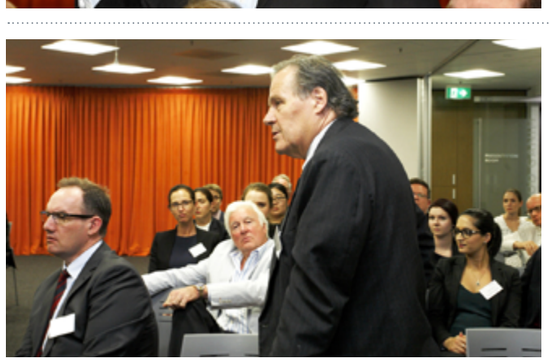



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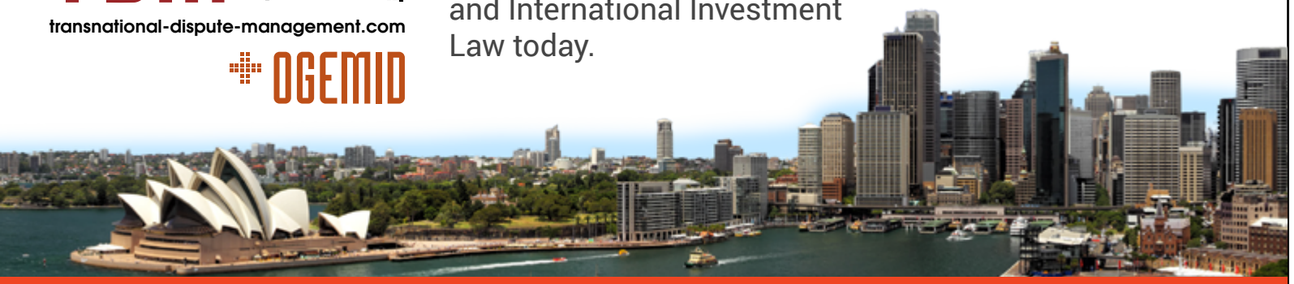

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Casenote: Which Came First, The Chicken Or The Egg?

Case: Malini Ventura v Knight Capital Pte Ltd [2015] SGHC 225

In *Ventura v Knight Capital* the High Court of Singapore was required, in the words of **Prakash J**, to answer the question which comes first, the tribunal's power to determine its jurisdiction, or the tribunal's jurisdiction itself, akin to the old and familiar brain teaser 'which came first, the chicken or the egg?

The case concerned two applications brought simultaneously. First, the plaintiff, Malini Ventura, sought a declaration that she had not entered an arbitration agreement with the defendant, Knight Capital Pte Ltd, and therefore, a SIAC arbitration commenced against her by the defendant was invalid. Second, the defendant sought to stay the plaintiff's court action brought in the face of the alleged arbitration agreement.

Background

Underlying the dispute were two contracts. The first, a loan agreement between the defendant, as creditor, and another company ('Borrower'). The second, a guarantee in favour of the defendant purportedly signed by the plaintiff and her husband ('PV') to obtain the loan. PV was the sole director and shareholder of the Borrower. The guarantee contained an arbitration clause providing for arbitration according to SIAC arbitration rules.

The defendant disbursed the loan moneys, the Borrower soon defaulted and the defendant then sought to enforce the guarantee. When the plaintiff and PV did not make payment, the defendant commenced a SIAC arbitration. SIAC then appointed **Caroline Kenny QC** as sole arbitrator.

The plaintiff, as respondent in the arbitration, in her Statement of Defence submitted that she did not sign the guarantee and that her signature was forged. Therefore, she submitted that there was no valid arbitration agreement and that the arbitrator had no jurisdiction, including any jurisdiction to rule on her own jurisdiction. Instead, the plaintiff argued that the appropriate forum to determine whether there was a valid arbitration agreement was the Singapore courts.

When the arbitrator then requested the parties indicate their availability for hearing, the plaintiff responded by reiterating her demand the proceedings be stayed. However, the arbitrator ruled that she had the power to rule on her own jurisdiction, including in the case where the arbitration agreement was contained in a clause of a contract which the plaintiff contended that she had not signed. The arbitrator also indicated that this ruling would be delivered within the award on merits. The plaintiff then commenced court proceedings and the defendant applied for a stay.

Issues for determination

The Court, comprised of

Prakash J, was required to rule on two issues when considering the application for a stay pursuant to s 6 of the *Singapore International Arbitration Act ('IAA')*. By way of background, that section provides that:[1]

1. Notwithstanding Article 8 of the Model Law, where any party to *an arbitration agreement* to which this Act applies institutes any proceedings in any court against any other party to the agreement *in respect of any matter which is the subject of the agreement*, any party to the agreement may, at any times after appearance and before taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
2. The court to which an application has been made in accordance with subsection (1) s*hall make an order*, upon such terms or conditions as it may think fit, *staying the proceedings* so far as the proceedings relate to the matter, *unless it is satisfied that the arbitration agreement is null and void*, inoperative or incapable of being performed. [emphasis added]

(i) What standard of proof?

The first issue was, what standard of proof did the defendant need to satisfy to establish there was a valid arbitration agreement? To have standing to seek a stay, the defendant under s 6(1) has to prove there was an 'arbitration agreement'. Consequently, the Court was required to determine what standard the defendant must meet in doing so.

Prakash J rejected the plaintiff's submission that the defendant was required to prove on the balance of probabilities the existence of an arbitration agreement. Instead Her Honour found that the defendant *only* had to prove an arbitration agreement on a *prima facie* basis.[2] This was for the following reasons:

1. The Singaporean legislature has circumscribed the role of the courts with respect to international arbitration so that they cannot interfere in matters governed by the IAA and the UNCITRAL Model Law ('Model Law') unless that legislative regime expressly allows them.[3]
2. In relation to jurisdictional questions, the Model Law confers on tribunals the power to rule on their own jurisdiction.[4] Therefore, in Singapore the courts' consideration of whether arbitral tribunals have jurisdiction must come after the tribunals' own examination of the question of jurisdiction.[5]
3. The power of arbitral tribunals to rule on their own jurisdiction in Singapore is also very wide and includes the power to determine the existence of the arbitration agreement to the exclusion of the courts: *cf: Albon v Naza Motor Trading Sdn Bhd ('Albon')*[6] and *Al-Naimi v Islamic Press Agency Inc ('Al-Naimi')*.[7] Prakash J found that this regime was different to the regime in England, and therefore, it was not appropriate to fully take on board the approach of the English courts set out in *Albon and Al-Naimi*.[8]

(ii) Must the court grant a stay?

The second issue was, once it is established that there is an arbitration agreement, must the court grant a stay. Prakash J held that once it was established that there was a prima facie arbitration agreement, a stay *must* be granted *unless* the plaintiff could prove that the putative arbitration agreement was null and void, inoperative or incapable of being performed.[9]

On the facts before her, Prakash J found that prima facie the plaintiff signed the guarantee and therefore there was a prima facie arbitration agreement. This was because:[10]

1. The solicitors representing PV and the Borrower had provided the defendant with a signed copy of the guarantee.
2. It would not be irrational or completely abnormal or unusual for the plaintiff to provide a guarantee given that PV was her husband and the Borrower was a company he controlled.
3. The plaintiff's actions after learning of the Borrower's default suggested knowledge of the transaction rather than fraud.
4. There was independent evidence suggesting that the signature on the guarantee could be the plaintiff's signature.

Accordingly, the Court was required to stay the proceedings because the plaintiff had not proven the agreement was null and void, inoperative or incapable of being performed.[11]

Comment

This decision confirms that the competence-competence principle applies in Singapore even in the conceptually difficult case where the very existence of the arbitration agreement is challenged. In the present case, it fell for the arbitrator, following the stay of the court proceeding, to determine (on a balance of probabilities) whether the plaintiff's signature on the guarantee was forged.12 However, the parties retain the right to challenge the arbitrator's determination in the Singapore courts (under Art 16 or 34 of the Model Law) if they are dissatisfied with it.[13]

1. s 6 of the IAA.
2. [36].
3. [26]; Art 5 of the Model Law.
4. [27]; Art 16 of the Model Law.
5. [27].
6. *Nigel Peter Albon (trading as N A Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] 2 All ER 1075 ('*Albon*').
7. *Ahmad Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyd's LR 522.
8. [28] citing *Arbitration Act 1996* (UK) ss 30 and 32.
9. [42] citing *Albon* [18].
10. [40].
11. [42].
12. [36].
13. Ibid.

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8th CIArb Australia / Young Lawyers International Commercial Arbitration Moot 2016

On 30 August 2016, the Sydney office of King & Wood Mallesons (KWM) hosted the final of the 8th CIArb Australia / Young Lawyers International Commercial Arbitration Moot.

The moot attracts young lawyers and law students from all over Australia, providing participants with a unique opportunity to experience the real world of arbitration while networking with professionals in the field. It also allows students and junior practitioners the chance to autonomously research, draft and deliver submissions which they would not usually have the opportunity to do so.

This year's Moot, the most successful to date, saw 44 mooters registering. The 'arbitral tribunal' was chaired by **The Hon Justice Lindsay Foster (Federal Court of Australia)** with **John Wakefield** (CIArb Australia representative) and **Max Bonnell** (Partner, KWM).

Heather Costelloe, law student from Perth, won the Moot, with **Yvonne Whittaker-Rush** and **Shauna Roeger**, both law students from Adelaide, placing second in the final. Heather was also given the Spirit of the Moot award for pushing on after her partner was not able to participate. **Isabela Devesza**, law student from Adelaide, was crowned Best Orator. Best Written Submissions went to the Sydney team of junior practitioners **Kathleen Morris** and **Michael Swanson**.

The prize for Best Orator, is a place at the Introduction to Arbitration Course run by the CIArb Australia including accommodation and flights, the Winning Team and Best Written Submissions are both awarded a haul of arbitration related textbooks donated by The Federation Press, Wolters Kluwer International, and the International Chamber of Commerce Australia. The Spirit of the Moot award is a lunch with **Prof Doug Jones AO**, one of Australia's preeminent arbitrators.

The mooters faced each other in four rounds at the Australian

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Moot Manager, Erin Eckhoff with Judging Tribunal: John Wakefield (Holman Webb), The Hon Justice Lindsay Foster (Federal Court of Australia) and Max Bonnell (King & Wood Mallesons)

Dispute Centre on Saturday 27 August 2016. Semi-finals followed the next day.

This year's problem was a dispute arising out of a CISG contract between an Australian and Taiwanese company for the sale and production of an album by the Taiwanese company to an Australian record label. The contract prescribed arbitration under the new ACICA Arbitration Rules 2016 with seat in Sydney. The problem was prepared by the members of the International Law Committee of the NSW Young Lawyers: **Bryce Williams** (author), **Brecht Valcke**, **Ruimin Gao**, **Kenneth Tam**, **Rahul Arora** and **Harry Stratton**.

The problem posed the mooters the following five issues:

on the procedural side:

- (1) What language would be most appropriate for the arbitration to be held in?
- (2) A question about the confidential nature of arbitral proceedings and whether the Tribunal should make an order preventing the Claimant from publishing information about the arbitral dispute?
- (3) What is the governing law of the Contract?; and

on the substantive side, (and participants were to assume that the CISG governs the contract):

- (4) Has the Contract been adequately performed; and if it has not, are there any legitimate excuses or defences for the non-performance?
- (5) Was the Contract fundamentally breached? Was the purported avoidance of the Contract effective; and if so, can therefore payment under the Contract be avoided?

The level of preparation and detailed knowledge the mooters expressed during the oral submission truly impressed the mock arbitrators, composed of international arbitration practitioners, both during the main rounds, the semi-finals and the final round.

On the back of the success of this 8th CIArb Australia / YL International Commercial Arbitration Moot 2016, the bar is set high for next year's Moot and participants are already looking forward to it!

Once more we raise our glass to congratulate and thank all the mooters, 'arbitrators' and organisers. A special cheer goes out to the sponsors:, The Chartered Institute of Arbitrators (Australia), The NSW Young Lawyers' International Law Committee, King & Wood Mallesons, Australian Disputes Centre, Australian Centre for International Commercial Arbitration, The Federation Press, Wolters Kluwer International, and the International Chamber of Commerce Australia.

Presentations

1. Heather Costelloe (Murdoch University) on the right and Runners-Up, **Adelaide University: Yvonne Whittaker-Rush** and **Shauna Roeger 2. Best Orator, Isabela Devesza** (University of Adelaide)**. 3. Spirit of the Moot: Heather Costelloe** (Murdoch University) **4. Best Written Submissions: Kathleen Morris** (Federal Court of Australia) and **Michael Swanson** (Kemp Strang Sydney)

Photos: Rick Stevens

Accelerated Route Towards Fellowship 2016

When: 15 and 16 October 2016
Where: Victorian Bar Mediation Centre, Melbourne

Faculty

Caroline Kenny QC
Vice President of CIArb Australia
Course Director

Albert Monichino QC
President of CIArb Australia
Tutor

Gordon Smith
CIArb Australia Councillor (WA)
Tutor

Dr Stephen Lee
CIArb Australian Councillor
Observer

Education Assistant
Thomas Smalley
Monash University

Candidates

Monique Carroll
King & Wood Mallesons, Melbourne

Daniel Crennan
Victorian Bar, Melbourne

Anne Hoffmann
Herbert Smith Freehills, Sydney

Dr Jeanne Huang
University New South Wales, Sydney

Ben Luscombe
Clifford Chance Chambers, Perth

Dr Sam Luttrell
Clifford Chance Chambers, Perth

Patrick O'Sullivan QC
Edmund Barton Chambers, Adelaide

Adam Rollnik
Victorian Bar, Melbourne

Jeremy Twigg QC
Victorian Bar, Melbourne

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Module 4 Award Writing (International Arbitration) Melbourne Tutorial

When: 12 November 2016
Where: Melbourne Commercial Arbitration and Mediation Centre

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President of CIArb Australia
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Caroline Kenny QC
Vice President of CIArb Australia
Tutor

Julie Soars
CIArb Australia Councillor
Tutor

Donna Ross
CIArb Fellow
Observer

Education Assistant

Claire Porter
Deakin University

Candidates

Mark Ambrose
Queensland Bar, Brisbane

Shane Bosma
Ashurst, Brisbane

Monique Carroll
King & Wood Mallesons, Melbourne

Leon Chung
Herbert Smith Freehills, Sydney

The Hon Malcolm Craig QC
Martin Place Chambers, Sydney

Anne Hoffmann
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Dr Jeanne Huang
University New South Wales, Sydney

Desmond Hughes
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RMIT University, Melbourne

Revantha Sinnetamby
Hill International Malaysia, Kuala Lumpur

David Smallbone
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Rod Tatchell Lawyers, Port Adelaide

Jeremy Twigg QC
Victorian Bar, Melbourne

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Afghanistan Lawyers, Kabul/Dubai

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CIArb Australia Membership Update

We are pleased to welcome the following new Chartered Arbitrators, Fellows, Members, Associates and Students to CIArb Australia.

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Mr Frank Cassells	QLD	**Ms Janis McSweeney**	QLD	**The Hon Murray Tobias QC**	NSW
Mr Andrew Day	NSW	**Mr Kok Kuan Ng**	NSW		
Mr Matthew Hocking	QLD	**Mr Adam Rollnik**	VIC		
Miss Stephanie Hunt	VIC	**Mr Gerard Saunders**	QLD		

Associates

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PROF COLIN ROBERTS
CIARB FELLOW AND TREASURER OF THE AUSTRALIAN BRANCH
INTERNATIONAL PETRO & NATURAL RESOURCE GEO-STRATEGIST
INTERNATIONAL ARBITRATOR & MEDIATOR
PROFESSOR: INTERNATIONAL INVESTMENT LAW, INTERNATIONAL DISPUTE RESOLUTION, RESOURCES LAW & MINING & PETROLEUM ENGINEERING
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Member Profile: Prof Colin Roberts

Colin Roberts practices as an international arbitrator, mediator and geo-strategist. He is a Professor at Curtin University, and was a Director of the Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee. Also at the CEPMLP, he has been a Senior Research Fellow and lecturer of International Comparative Law and International Arbitration, and director of the MBA and LLM programs in Resources Management and International Dispute Management.

He now specialises in mitigation of sovereign risk, advising governments in resources law and policy and facilitation of foreign direct investment (FDI) in the resources, energy and infrastructure sectors in the developing world; in particular, conflict and post-conflict zones. Colin does, and has held, numerous public and private directorships, and among others was for eight years, the Honorary Investment Consul for Pakistan in Australia, and is currently, Authorized Emissary for the Multilateral Investment Guarantee Agency (MIGA) - World Bank Group, Director of Natural Resource Geo-Strategy (NRG), Resource Dispute Resolution (RDR), the Centre for International Dispute Resolution (CIDR), Chairman of the AusIMM Minerals Institute -WA, Australian Mineral & Petroleum Law Association (AMPLA), Chartered Institute of Arbitrators (CIArb), Australian Institute of Energy (AIE) and is Past-Chairman of the Society of Petroleum Engineers–WA (SPE) and the Mining Institute of Scotland. He is a Fellow of the CIArb, AusIMM, SAIMM, IMMM, FAVE, DBF-Geneva, EI, and AIE
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What/Who inspired your interest in arbitration?

Because of my resources background, a colleague at the Permanent Court of Arbitration encouraged me to become an arbitrator settling offshore environmental disputes. This eventually led to an increased interest in international arbitration and alternative dispute resolution.

At the University of Dundee, I founded and conducted the LLM degree course in International Arbitration and Dispute Management, which was accredited by the CIArb UK.

In due course, I participated in many arbitrations and mediations, including as mediator to the dispute involving parties engaged in armed conflict in a civil war in Africa, and the mediation of one of the largest Investor/State disputes to-date.

My interest and practice has continued in both arbitration and mediation, with the aim of keeping disputes at a manageable level, thus reducing the need for formal dispute resolution mechanisms involving states. Even though this may seem contrary to the profession of arbitration, I am a firm supporter of international arbitration, if negotiations and mediations fail.

What traits make a good arbitrator?

The ability to identify the issues, to see both sides of the argument,

Prof Colin Roberts and drilling team at Kinsevere copper mine located in the Democratic Republic of the Congo, Africa.

the ability to seek avenues for settlement or compromise and to conduct the proceedings in a firm manner without diminishing the dignity of the parties.

Refer to an historical conflict you wish you could have participated in and why?

I am interested in, and would have liked to participate in the famous mass claims such as: The Iran–US Claims Tribunal, the United Nations Compensation Commission and the WJC Swiss Dormant Accounts. The reasons are that I would enjoy the complexity and the eventual achievement of access to justice to those affected by armed conflict or revolution.

What is your idea of perfect happiness?

Personally, I think I am reasonably happy; however, perfect happiness is seeing my wife, children, grandchild and all, experiencing a life as good or better than mine.

What is your greatest fear?

Involuntary idleness and dementia.

What is your greatest extravagance?

Books and my vintage car, 1924 Austin 12 (12 denotes 12 hp). I don't dare to tell my wife how much I've spent on this nine-year project.

What do you consider the most over-rated virtue?

Temperance, according to Pope Gregory I, is the moderation of needed things and abstinence from things which are not needed.

Which living person do you most admire?

Malala Yousafzai.

What is your favourite journey?

My work takes me to many wonderful places around the world, Chicago and New York are two places I love to be; but my favourite journey is from Perth to Mandurah (70 km south of Perth) to our beach shack.

What is your favourite piece of music?

My classical pick is Samuel Barber's *"Adagio for Strings"*.

I am a Blues fan and like all the Greats.

What is your favourite piece of literature?

I am embarrassed to say, that I haven't read a novel for more than a decade; however, I like Steinbeck's *"Of Mice and Men"*, Harper Lee's *"To Kill a Mockingbird"* and as a non-fiction pick; I enjoyed Tom Bingham's *"Rule of Law"*.

What is your favourite film?

Not many films stay in my mind very long. When I am asked, which films I watched on the plane, I have a problem remembering. However, I did enjoy *"Being There"* starring Peter Sellers.

What credo/maxim/motto inspires you?

The motto of my old army regiment is "Vigilance". I try to be vigilant on behalf of my clients, colleagues and family.

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