CIArb
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Australia Branch

The CIArb Australia News

2018

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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 16,000 members working in sectors as diverse as finance, construction, oil and gas and agriculture in over 130 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**

OVER 16,000 MEMBERS

+16,000

CIArb has over 16,000 members worldwide

+130

Our members are based in over 130 countries across the world

6 CONTINENTS

+40

There are over 40 CIArb branches active in sixcontinents

+250 COMMERCIAL SECTORS

+250

Our members work in over 250 different commercial sectors

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The CIArb Australia News 2018
ISSN 2204-0684 Volume 5 Number 1

Publisher: Chartered Institute of Arbitrators (Australia) Limited | ACN 118 131 016
Editor: Gianna Totaro
Design: Creative Chaos Pty Ltd

CAROLINE KENNY QC
CIARB AUSTRALIA PRESIDENT
BARRISTER, VICTORIAN BAR
View Profile

President's Report

Welcome to the 2018 edition of our flagship publication, *The CIArb Australia News.*

Since my last report, and as evidenced by the following pages, we have increased the level of activity and engaged further with other stakeholders from across Australia and around the region.

On 1 June 2018 we signed an MOU with Australia's peak body for barristers, the **Australian Bar Association** and the branch has also entered an agreement with the East Asia and Singapore branches to host an annual **CIArb Asia Pacific** conference which will provide opportunities for our members as speakers and delegates.

I thank the **Council** and our **CEO**, **Gianna Totaro**, for their support during these 12 months. In this time we have continued to work hard to expand the Institute's profile, offerings and consolidate CIArb Australia as a leader in the international arbitration space. I also wish to acknowledge the support of our various sponsors and the Federal Court of Australia regarding our successful partnership in the International Arbitration Series.

2018 Council Elections

At the last AGM held on 30 April 2018, it was announced the following were elected to the 2018/2019 Council: **Dr Vicky Priskich (VIC)**, **Brenda Horrigan (NSW)**, **James Healy (WA)**, **Jo Delaney (NSW)**, **Gordon Smith (WA)** and **Simon Davis**. Following the AGM, the full Council elected the Executive: **Caroline Kenny QC** (President), **James Healy** (Vice President), **Dr Stephen Lee** (Vice President), **John Arthur** (Treasurer) and **Dr Vicky Priskich** (Company Secretary). **Dr Stephen Lee** was re-appointed Chair of the Education. The following were appointed State Convenors for CIArb Australia Chapters: **Dr Vicky Priskich (VIC)**, **Beth Cubitt (WA)**, **Jo Delaney (NSW)**, **Julia Dreosti (SA)** and **Dr Shane Monks (QLD)**. Retiring and outgoing Councillors throughout 2018 included: **Albert Monichino QC (VIC)**, **Sandrah Foda (NSW)**, **Gordon Smith (WA)**, **Beth Cubitt (WA)** and **Julia Dreosti (SA)**. On behalf of the Institute, I thank them all for their service and particularly, wish to acknowledge the outstanding contribution of longstanding directors, Albert and Beth. **John Wakefield** remains the **CIArb Australasia Trustee**.

CPD Events

Amplifying the significant and expanding importance of international arbitration, we continue to invest in providing high end professional development events. In addition to delivering seminars of general interest and the Federal Court international arbitration program, we hosted two business lunches featuring: former **GATT Ambassador, Alan Oxley** (Melbourne) and **President of the Qld Court of Appeal, the Hon Justice Walter Sofronoff** (Brisbane). In partnership with CIArb HQ, the branch sponsored

Left to Right – Patrick Durkin (Australian Financial Review, Melbourne Bureau Chief), Allan Myers AC QC, Caroline Kenny QC, Tim L'Estrange (Partner, Jones Day) and Dr Matt Collins QC (President, Victorian Bar)

the Gala Dinner at the **2018 ICCA Congress** held in Sydney and played a significant role when Melbourne hosted the **Australian Arbitration Week** in October: **CIArb Australia Lecture**: **The Hon Chief Justice James Allsop AO, Federal Court of Australia; CIArb Australia Annual Dinner: Allan Myers AC QC**; **CIArb Australia Young Members Seminar** and the **6th International Arbitration** Conference (a co-presentation with ACICA and the Business Law Section of the Law Council of Australia). In addition, we had the **Attorney General of Australia, the Hon Christian Porter** and **Chief Justice of the Family Court of Australia, the Hon Will Alstergren** speak at major events.

Education and Accreditation

Education and accreditation continues to be the core activity of our branch. We offer a variety of courses for relative newcomers to ADR, right through to those with advanced levels of knowledge and skills. This year, the Institute launched a new training structure as part of its Golden Thread.

The purpose of this project is to confirm and underpin global recognition of CIArb's rigour in upholding the standards of quality and expertise of its membership, and strengthen the foundations of consistency, fairness and transparency offered by the training and qualification pathways. We held the **Award Writing** course in Melbourne and Sydney; **CIArb Asia Pacific Diploma Course in International Arbitration** in Perth; the **Accelerated Route Towards Fellowship** in Melbourne and the **Introduction To International Arbitration** in Brisbane.

Pre Vis Moot and Moots

In September we celebrated the 10th Anniversary of our joint venture with the **NSW YL International Committee** to organise an annual international commercial arbitration moot. Held at **White & Case** Sydney offices, the Grand Final panel comprised the **Hon Justice Margaret Beazley AO, President of the NSW Court of Appeal**, CIArb Fellows, **Dominique Hogan-Doran SC**, and **Max Bonnell, Partner, White & Case**.

Due to the success of the inaugural CIArb Australia Pre Moot last year, the **CIArb Australia Young Members Group** chaired by **CIArb Australia Councillor**, **Kristian Maley** once again organised a pre-moot event for the Australian teams competing in Vienna and Hong Kong. The event attracted participation of 12 universities from across Australia and culminated in a grand final held at the Federal Court before a panel comprising the **Hon Susan Crennan AC QC**, **Neil Kaplan CBE QC SBS**, and **Dr Michael Pryles AO PBM**.

Vale The Hon Sir Laurence Street AC KCMG QC

It is with sadness I note the passing of CIArb Fellow, the **Hon Sir Laurence Street AC KCMG QC**. Not only was he a giant of the legal fraternity and outstanding jurist, but as *The Australian* reported, our nation's foremost commercial arbitrator.

Season's Greetings

Finally, on behalf of all of us here at CIArb Australia, I would like to take this opportunity to thank you for your support and extend our best wishes for the festive season and the year ahead.

Caroline Kenny

Caroline Kenny QC
President
CIArb Australia

Chartered Institute of Arbitrators
CIArb
Australia

2018 AUSTRALIAN ARBITRATION WEEK IN PICTURES

15 - 19 OCTOBER 2018
MELBOURNE, AUSTRALIA

* Click the above to access pictures

Caroline Kenny QC, The Hon Chief Justice James Allsop AO and **Andrea Martignon**i, Partner, Allens Linklaters after the successful launch of the inaugural CIArb Australia Lecture.

CIArb Australia Annual Lecture: The Role of Law in International Commercial Arbitration

When:	**Monday, 15 October 2018**
Where:	**Allens Linklaters, Melbourne**
Guest Speaker:	**The Hon Chief Justice James Allsop AO, Federal Court of Australia**
Welcome:	**Caroline Kenny QC, CIArb Australia President**
Vote of Thanks:	**Andrea Martignoni, Allens Linklaters**
Photos:	**David Johns**

Maintaining our leadership as a contributor to global arbitration scholarship, we were pleased to host the inaugural **CIArb Australia Lecture**. Held in Melbourne on 15 October, the lecture launched **Australian Arbitration Week**. Our guest speaker was the **Hon Chief Justice James Allsop AO, Federal Court of Australia**, who spoke on The Role of Law in International Commercial Arbitration. Sponsored and hosted by global law firm, **Allens Linklaters**, the lecture addressed a variety of perspectives from which the relationships between arbitration, the courts, and law can be viewed, both practically and theoretically, some of which raise the important question of the nature of law.











THE HON JAMES ALLSOP AO
CHIEF JUSTICE OF THE FEDERAL COURT OF AUSTRALIA
View Profile

The Role of Law in International Commercial Arbitration

I chose the topic of this paper because of the variety of perspectives from which the relationships between arbitration, the courts, and law can be viewed, both practically and theoretically. Further, some of those perspectives raise the important question of the nature of law. For now, I will proceed as if the phrase "the law" has a familiar meaning and usage.

There are at least three laws, or systems of law, that are easily recognisable, which bear upon an international commercial arbitration: the law governing the agreement to arbitrate; the law governing the arbitral tribunal and procedure – the lex arbitri; and the law governing the resolution of the substantive dispute – the applicable or governing or substantive law. Added to these may be the law concerned with a party's capacity to enter into an arbitration agreement, and the law or laws concerned with challenges to and recognition and enforcement of awards. There may also be other applicable rules that the parties may agree upon that perhaps fall for consideration in the above categories.

There is also the woollier (and none the worse for that warmth) application of non-binding guidelines, approaches and recommendations in the form of so-called "soft law", that may importantly affect the resolution of the dispute.

Let me say something briefly about these laws before turning to some aspects of the relationships between law, courts and arbitration that have been and continue to be the subject of contemporary discussion.

The law and the agreement to arbitrate[1]

The now embedded notion of separability or severability of the arbitration agreement from the substantive contract to which it relates[2] makes unreliable any assumption that the law governing the substantive contract will always be the law to govern the agreement to arbitrate. The choice may be different and deliberate – express or implied. See for example Tamil Nadu Electricity Board,[3] where a contract for the supply of electricity was governed by the laws of India, but London arbitration in accordance with English law was chosen. Thus, the scope of the arbitration agreement fell to be decided according to English law.

If no precisely directed choice be made by the parties (expressly or impliedly), the available approaches appear to be between the substantive law (that is, the law governing the rest of the contract) or the law of the seat.

1. See generally N Blackaby, C Partasides, A Redfern and M Hunter (eds), Redfern and Hunter on International Arbitration (Oxford University Press, 5th ed, 2009) at 166-173.
2. See Hancock Prospecting Pty Ltd v Rinehart [2017] FCAFC 170; 350 ALR 658.
3. Tamil Nadu Electricity Board v ST-CMS Electric Company Private Limited [2007] EWHC 1713 (Comm).

If one gives proper weight to the underlying and fundamental notion of separability, the law of the seat can be seen to be a more appropriate approach than the law of the substantive contract. A contract to be governed by New York law, but subject to arbitration in London would see the arbitration agreement (and so such things as the scope of the clause) governed by English, not New York law.[4] This approach seems to have broad support.[5]

An additional approach present in a number of French cases is to apply a non-national law chosen by the parties to govern the arbitration agreement.[6]

The law governing the arbitration[7]

The fact that this law (the lex arbitri) is, or is quite likely to be, different from the law governing the substantive contract and the dispute is a product of at least two considerations: the embedded notion of separability, and the entrenched perceived advantage of a seat that is neutral and so likely to be distant from the interests, commercial relationships and values of the parties that may tend towards a governing law more closely related to those relational features. The related questions of the lex arbitri, and the place and importance of the seat of the arbitration continue to be important in the conceptualisation of arbitration and the extent to which it can be seen to be delocalised. There are important questions of principle to be addressed in the application of any principle of delocalisation. For instance, the approach of the French Cour de cassation in Putrabali[8] in enforcing an award set aside at the seat may, on one view, tend to undermine the institution of arbitration by weakening the prudential control of the fairness of arbitrations by the seat court, deliberately chosen by the parties to control or supervise the conduct (including the farness) of the arbitration. Thus, though delocalisation may stress the autonomy and independence of the parties, by the lessening or undermining of the authority of the seat court, there can be seen to be a weakening of the effect of the parties' choice of seat, and a weakening of the ability of the seat court to ensure the fairness and reliability of arbitration by reference to its own legal culture.

I accept that the correctness of this view is not self-evident. These are contentious issues, for discussion on another day.

The law applicable to the contract and the substance of the dispute

At the point that this question becomes relevant to discuss, we have an operational arbitration agreement covering a dispute in a reference governed by a procedural law. The dispute will require the resolution of contested facts by reference to or against some standard made up of operative legal rules and principles.

What are these rules and principles? What is this law? What questions about arbitration as an institution and a procedure arise from those considerations?

The discussion can perhaps be usefully introduced or framed by recognising at the outset certain matters.

First, whilst the proposition is capable of qualification by reference to the lex arbitri and immanent notions of public policy, as a procedure and an institution, arbitration is built on the free will and choice of autonomous actors in international commerce.

Secondly, not as a qualification to the first point, but as a manifestation or demonstration of it, arbitration is to be recognised as part of a world-wide legal order or system of dispute resolution – of a system of justice. It is part of a complex, integrated justice system that involves courts (national and international), arbitrators, and arbitral institutions, mediators, facilitators and legal advisers. This integrated justice system is the manifestation of a true international legal order. The importance of that development in the 20th and 21st centuries should not be ignored or devalued. The recognition of the importance of this, and of the fragility and dynamism of any such system, should frame all serious discussion about it. It is from these two features – a respect for the autonomy of the individual and the place of arbitration as a fair way of vindicating the rule of law – that the institution draws its international support from nations, legislatures and judiciaries. Read more

4. See C v D [2007] WHC 1542 (Comm).
5. See Bulgarian Foreign Trade Bank Ltd v A.I. Trade Finance Inc (2001) XXVI Yearbook Commercial Arbitration 291 (Swedish Supreme Court); Matermaco SA v. PPMCranes Inc. et al (2000) XXV Yearbook Commercial Arbitration 673 (Brussels Tribunal of Commerce).
6. Municipalite de Khoms El Mergeb c/Ste Dalico, Cass. Civ. 1ere, 20 December 1993, [1994] Rev Arb 116.
7. See generally Blackaby et al (eds), above n 1, at 173-193.
8. Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices (2007) Revue de l'Arbitrage 507.
9. See e.g. UNCITRAL Rules, Art 33.1.

6th International Arbitration Conference:

The Business of International Commercial Arbitration

17 October 2018, Sofitel Melbourne on Collins

9.00am Welcome To Delegates

Ian Nosworthy, Arbitrator, Cowell Clarke Solicitors, Australia

Caroline Kenny QC, Barrister and International Arbitrator, President, CIArb Australia

9.10am Keynote Address: Australia's Place in International Arbitration

Dr Michael Pryles AO PBM, Australia

9.30am Around the Globe in 60 Minutes: Hot Topics in International Arbitration

Chair: The Hon Justice John Middleton, Federal Court of Australia

Panellists: Robin Oldenstam, Partner, Mannheimer Swartling, Sweden
Leonora Riesenburg FCIArb, Group Head of Legal at Gulf General Investment Co PSC (Group of Companies) in Dubai, Middle East
Gowri Kangeson, Partner, DLA Piper, Australia

10.30am Challenges to Jurisdiction: Timing, Practice and Procedure

Chair: The Hon Susan Crennan AC QC, Australia

Panellists: Chou Sean Yu, Partner, Wong Partnership LLP, Singapore
Christopher To, Independent Arbitrator and Mediator, Hong Kong
Ernest Van Buuren, Partner, Norton Rose Fulbright, Australia

11.30am Morning Tea

12.00pm China's Belt & Road: What it Means for the Asia Pacific Region

Chair: Justin D'Agostino, Global Head of Disputes, Herbert Smith Freehills, Hong Kong

Panellists: Vod KS Chan, Barrister, Hong Kong
Max Bonnell, Partner, White & Case, Australia
Ariane Owen, Senior Associate, Allen & Overy, Australia

1.00pm Lunch

2.15pm Evidence and Procedure in International Arbitration: Streamlining for Efficiency and Cost Effectiveness

Chair: Prof The Hon Marilyn Warren AC, Australia

Panellists: Nick Longley, Partner, HFW, Australia
Alan Anderson, Alan Anderson Law Firm LCC, USA
Ben Davidson, Partner, Corrs Chambers Westgarth, Australia

3.15pm Afternoon Tea

3.45pm Enforcement of Awards: Problems and Practical Tips

Chair: The Hon Justice Clyde Croft, Supreme Court of Victoria, Australia

Panellists: John Walton, President AMINZ, New Zealand
Justin Hogan-Doran, 7 Wentworth Selborne, Australia
Jelita Pandjaitan, Partner, Linklaters, Singapore

4.45pm Closing Address

Khory McCormick, Vice President, ACICA, Australia

Ian Nosworthy, Arbitrator, Cowell Clarke Solicitors, Australia

7.00pm Pre-Dinner Drinks

7.30pm CIArb Australia Annual Dinner

Guest speaker: Allan Myers AC QC, Chancellor of the University of Melbourne, leading arbitrator and prominent businessman

MC: Patrick Durkin, Melbourne Bureau Chief, The Australian Financial Review

Law Council of Australia – Business Law Section
ACICA – Australian Centre for International Commercial Arbitration
Chartered Institute of Arbitrators – CIArb Australia

KATHRYN BROWNE
ASSOCIATE TO THE HON JUSTICE CLYDE CROFT,
JUDGE IN CHARGE OF THE ARBITRATION LIST, SUPREME COURT OF VICTORIA
View Profile

6th International Arbitration Conference

The Business of International Commercial Arbitration

On a clear October morning, arbitration practitioners from across Australia, throughout the Asia-Pacific and beyond, even from as far afield as Minneapolis, Minnesota, gathered for the 6th International Arbitration Conference. With coffees in hand we ventured in to the Sofitel on Collins awaiting the delights and insights that this flagship event, organised by ACICA, the Law Council of Australia and CIArb Australia, would have in store for us.

We were not disappointed. The morning began with welcome remarks from **Caroline Kenny QC**, and **Ian Nosworthy**, followed by the keynote address from **Dr Michael Pryles AO PBM** who delivered an unflinching appraisal of both the advantages and disadvantages to parties and practitioners when considering Australia as an arbitral seat. The practice of arbitration has grown markedly in Australia in the last 10 years and we boast a culture of integrity and lack of corruption. However, as Dr Pryles pointed out, Australia lacks the geographic convenience and a commercial centre of the likes of London, Paris, Hong Kong or Singapore. The paucity of venues of international commercial arbitration in Hong Kong or Singapore poses an opportunity for Australia, in Dr Pryles' opinion, however; this is qualified by two aspects of Australian Federalism. Firstly, the traditional competition between cities to be the Australian arbitral seat of choice has undermined a joint effort to promote Australia as a whole. Secondly, our State and Federal court systems boast some beacons of judicial expertise in international commercial arbitration, rather than a consistent and thorough understanding of and interest in the international instruments to which our state, territory and Commonwealth legislation give effect. Dr Pryles' exhortation to promote Australia with one voice, to concentrate on Australia's strength in certain industries (such as resources or agriculture) and arbitrations which include Australian parties was a rousing finish to his address – and start to the conference attendees' day.

The panels that followed traversed a range of topics of practical and theoretical interest to all. They began with a "round the globe" of hot topics, chaired by the **Hon Justice John Middleton** of the Federal Court of Australia. We first heard about the Court of Justice of the European Union decision in *Achmea*, in which the CJEU found that the dispute resolution mechanism in the Slovakia/ Netherlands bilateral investment treaty is contrary to European Union Law, ably explained by **Robin Oldenstam**. **Leonora Riesenberg** introduced us to the incoming changes to the Federal Arbitration Law of the United Arab Emirates. Finally, **Gowri Kangeson** tackled the perennial issue of third party funding. All three presentations stimulated fascinating discussions, however it was quickly time to move on to the next panel, on jurisdictional challenges.

This panel was chaired by the **Hon Susan Crennan AC QC** and began with an excellent introduction to the Model Law framework for jurisdictional challenges from **Christopher To.** Next, **Ernest Van Buuren** offered insights into jurisdictional challenges in the context of maritime arbitration via a trio of contrasting case studies. And **Chou Sean Yu** brought us further into the detail of the different kinds of challenge, deftly bringing the conference participants through the history of the Astro Lippo litigation and appeals, and the latest case law from Singapore, *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2018] SGHC 78, giving rise to some intense discussions in the course of the audience questions that followed.

Next came a most engaging panel entitled, "China's Belt & Road: What it Means for the Asia Pacific Region". Chaired by **Justin D'Agostino**, this panel commenced with the valuable insights of **Vod KS Chan**, who was able to give us a perspective from closer to "the action", so to speak, from his practice in Hong Kong. **Max Bonnell** gave us an exciting overview of the "Blue Book" which describes the dispute resolution mechanism for the Belt and Road Initiative, published in 2016 by the International Academy of the Belt and Road. There is a real appetite for a more Chinese method of dispute resolution, Mr Bonnell explained, rather than the common law enforcement approach with which parties to international commercial disputes are more or less "stuck". Mr D'Agostino described the opportunities presented by the Belt and Road as "a 21st Century gold rush". A more circumspect view was advocated for by panellist **Ariane Owen**, who pointed out that Australia has been hesitant to engage with Belt and Road policy initiatives, albeit this being at odds with the approach taken by Australian businesses. Overall, echoing sentiments expressed by Dr Pryles, Ms Owens suggested that the real opportunity of the initiative lies with individual Australian practitioners in the international commercial arbitration space.

After lunch, we enjoyed a panel chaired by **Professor the Hon Marilyn Warren AC QC**, on the topic of "Evidence and Procedure in International arbitration: streamlining for efficiency and cost-effectiveness". This discussion-style panel really cut to the heart of the question: why arbitrate? Panellist **Nick Longley** shed light on the shipping and construction industry, in which clients value speed and efficiency, and are wholly disinterested in their proverbial "day in court". **Ben Davidson** agreed, and noted the urgency in the construction industry to maximise efficiency, forecasting a "tsunami of disputes" in the Asia Pacific – the needs of which he predicted will not be met in the course of today's international commercial arbitration practices. Finally, **Alan Anderson** delighted us with some movie magic to emphasise his key points, including clients' "need for speed" and the idea that we should stop rounding up "the usual suspects" in terms of arbitrators (with celluloid assistance from Brad Pitt and Humphrey Bogart, of course). Big discovery was confirmed as a huge drain of time and cost, with Professor Warren noting that only once in 40 years had she found the elusive "smoking gun" —a sobering lesson for all modern litigation practitioners and their clients.

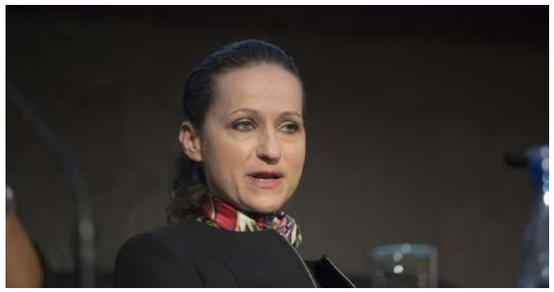
The final panel was hosted by the **Hon Justice Clyde Croft**, on the subject of practical tips and tricks to assist with the enforcement of arbitral awards. **Justin Hogan-Doran** gave us some practical insights into his experiences in the Federal and New South Wale Supreme Courts. **Jelita Pandjaitan** continued the discussion of *Rakna* and the election of active remedies from the enforcement perspective, and took the participants through the vagaries of enforcement procedures in China and Indonesia respectively. Finally, **John Walton** brought us news of developments in New Zealand where varied expertise amongst the judiciary leads to a mixed outcomes for arbitral litigants seeking enforcement.

The closing address, from **Khory McCormick**, summed up the themes explored over the course of the day: the changing professional landscape of international commercial arbitration; that "one belt one road" is not a superstructure, and nor will its dispute resolution mechanisms be; and that, as the 2018 Queen Mary University of London/White and Case survey indicates, the geography and diversity of the users of international commercial arbitration is growing year on year. This can only be to the benefit of the practitioners of international commercial arbitration in Australia.

The 6th International Arbitration Conference proved to be a resounding highlight of International Arbitration Week, and doubtless all involved are eagerly awaiting to mark their calendars for the 7th Conference in 2019 and many more in the years to come.

Welcome Session: **Caroline Kenny QC** and **Ian Nosworthy** flank keynote speaker, **Dr Michael Pryles AO PBM**

Session 1: **The Hon Justice John Middleton** (Federal Court of Australia), **Gowri Kangeson** (Partner, DLA Piper, Melbourne), **Leonora Riesenburg** (Group Head of Legal, Gulf General, Dubai) and **Robin Oldenstam** (Partner, Mannheimer Swartling, Sweden)



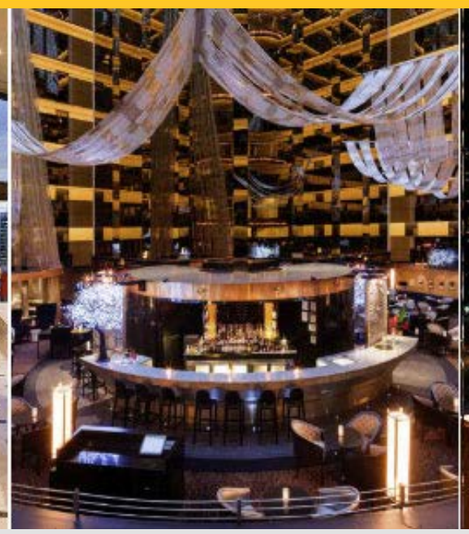
Session 2: **Ernest Van Buuren** (Partner, Norton Rose Fulbright, Melbourne), **The Hon Susan Crennan AC QC** (former High Court Justice of Australia, Melbourne), **Chou Sean Yu** (Partner, Wong Partnership, Singapore) and **Christopher To** (Independent Arbitrator, Hong Kong)

Session 3: **Vod KS Chan** (Barrister, Hong Kong), **Justin D'Agostino** (Global Head of Dispute Resolution, Herbert Smith Freehills, Hong Kong), **Max Bonnell** (Partner, White & Case, Sydney) and **Ariane Owen** (Senior Associate, Allen & Overy, Perth)

Session 4: **Alan Anderson** (Alan Anderson Law Firm LCC, USA), **Nicholas Longley** (Partner, HFW), **Prof The Hon Marilyn Warren AC** (former Chief Justice of Victoria, Melbourne) and **Ben Davidson** (Partner, Corrs Chambers Westgarth, Melbourne)

Session 5: **The Hon Justice Clyde Croft** (Supreme Court of Victoria, Melbourne), **Jelita Pandjaitan** (Partner, Allens Linklaters, Singapore), **John Walton** (President AMINZ, New Zealand) and **Justin Hogan-Doran** (Barrister, 7 Wentworth Selbourne, Sydney)

Closing Address: **Khory McCormick** (Vice President ACICA and Partner, Bartley Cohen, Brisbane)



2018 CIArb Australia Annual Dinner

17 October 2018

CIArb
evolving to resolve
Australia Branch

7:00 - 7:30 pm

Drinks and canapés on arrival

Atrium Bar

7:30 - 11 pm

Dinner

No35

Master of Ceremonies

Patrick Durkin

Melbourne Bureau Chief

The Australian Financial Review

President's Welcome

Caroline Kenny QC

President, CIArb Australia

Guest Speaker Introduction & Sponsor Remarks

Dr Matt Collins QC

President, Victorian Bar

Dinner Address

Allan Myers AC QC

Vote of Thanks & Sponsor Remarks

Tim L'Estrange

Partner, Jones Day

CIArb Australia Essay Presentation

Dr Stephen Lee

Vice President, CIArb Australia

1.**Caroline Kenny QC**, President, CIArb Australia 2. **Patrick Durkin**, Melbourne Bureau Chief, Australian Financial Review 3. **Dr Matt Collins QC**, President, Victorian Bar 4. **Allan Myers AC QC** 5. **Tim L'Estrange**, Partner, Jones Day 6. **Dr Stephen Lee**, Vice President, CIArb Australia

Caroline Kenny QC delivers the President's Welcome to a packed room at No 35 on Collins Street for the CIArb Australia Dinner

CIArb Australia President's Welcome

Caroline Kenny QC

Chief Justice Allsop, Your Honours, Distinguished Guests, Ladies and Gentlemen.

Welcome to the **2018 CIArb Australia Annual Dinner.** We are delighted to be joined by so many guests from across Australia and around the globe including current and former members of the judiciary, representatives from prominent law firms, heads of institutes not only from Australia but as far reaching as the Middle East, Singapore and New Zealand.

Tonight's dinner is the highlight of CIArb's ever increasing program of seminars, training courses and social events which are spread across various jurisdictions.

A brief overview of activities for the year:

We held our 9 day **Diploma course** which we run in joint venture with the Singapore and Hong Kong branches of CIArb in Perth, Western Australia in July. The course attracted senior practitioners from China, Singapore, the Philippines, India and Australia including former justices of the Federal Court and Supreme Court. We held the **Introduction to International Arbitration** course in Brisbane, Queensland, the **Accelerated Route to Fellowship** course in Melbourne and the **Award Writing** course in Sydney, New South Wales and Melbourne, Victoria; all which lead to a global accreditation. In addition we held business lunches in **Melbourne** and **Brisbane**, **Pre Vis Moot** competitions and the seminars on international arbitration which we run in partnership with the **Federal Court of Australia.** This year we introduced two initiative into Arbitration Week: the inaugural **CIArb Australia Annual Lecture** delivered by **The Hon Chief Justice James Allsop AO** and the inaugural **CIArb Young Members Group** organised by the group's chair and **CIArb Australia Councillor, Kristian Maley**.

It is fitting that **Australian Arbitration Week** returns to Melbourne as it is here in 1985 that the **Australian Centre for International Commercial Arbitration (ACICA)** was established under the Cain Labor government. I think all who attended the **6th International Arbitration Conference** today which we organise in partnership with **ACICA** and the **Business Law Section of the Law Council of Australia** will attest to the variety and relevance of the panel discussions and the high calibre of speakers who came from across Australia and Hong Kong, Singapore, the United States, New Zealand, Dubai, and Sweden.

The title for this years' conference is **The Business of International Commercial Arbitration** and it is aptly named because international arbitration is big business. It is interesting to note that although ACICA is the same age as the **Hong Kong International Financial Centre (HKIAC)** and older than the **Singapore International Arbitration Centre (SIAC)**, both the Hong Kong and Singapore centres have gone on to establish themselves as major arbitration hubs. In these jurisdictions arbitration is a multi billion dollar business and growing. There is no doubt that Australia has lagged behind them partly because of its geographical position, but the success of Hong Kong and Singapore is also due to the significant attention, funding and promotion of the centres by their governments. We have much work to do to catch up with our Asian neighbours and much to gain if we do. The Australians in the room will feel very heartened by the address delivered by our keynote speaker, **Dr Michael Pryles AO PBM** at the conference. He made the case that there is room for Australia to develop as a third arbitration hub in the area particularly if Hong Kong becomes more integrated into China.

To make the business case for investing in international arbitration this year, CIArb Australia reached out to both state and federal governments. We were delighted that the **Attorney General of Australia, Christian Porter**, and the **Finance Minister, Mathias Cormann**, were able to join us at our **CIArb Perth dinner** in August. Minister Cormann was particularly interested to understand the initiatives taken by Hong Kong and Singapore to promote arbitration while the Attorney-General made a lasting impression by making the novel claim, though one we are prepared to wholeheartedly endorse, that Magna Carta was the result of a successful arbitration! We were also honoured to have the support of the **Attorney-General of Victoria, Martin Pakula**, at our annual business lunch in Melbourne this year. We have more to do to engage with Government to make the business case for international arbitration and we look forward to working with ACICA and other key stakeholders on this in the years ahead.

On the subject of big business, we are delighted to have **Allan Myers AC QC** deliver the **2018 CIArb Australia Dinner Address** As a partner from a major law firm, observed: "Allan is revered by his clients, feared by his opponents and held in the highest regard by the courts. I have seen him start an appeal against a '30 knot headwind and by lunchtime have the entire court behind him."

While it falls to **Dr Matt Collins QC**, **President of the Victorian Bar**, to formally introduce Allan, I wish to record what a great pleasure it was for me that Allan accepted our invitation to speak tonight. I have known him for more than 30 years. He lectured me in securities law at the University of Melbourne and he was formidable even back then. Much to the annoyance of the students, we had to start at 8.30 am so Allan could get to chambers on time. Allan would arrive, place his briefcase on the desk and proceed to lecture us. When the lecture was finished, he didn't invite questions and I don't recall anyone brave enough to delay his arrival in chambers by asking questions! When I became a solicitor I immediately thought to brief Allan, reasoning to myself that he's working so hard I wanted to help him! Later, I had the great pleasure of being Allan's junior on a number of important matters.

In closing, I wish to acknowledge my **fellow directors** on **CIArb Australia**, most of whom are here tonight, and have come from around Australia. They each contribute their time and effort to make the organisation operate as successfully as it does. A big thanks to our sponsors tonight, **Jones Day** and the **Australian Bar Association** and to our hard working and dedicated **CEO, Gianna Totaro**.

Enjoy the dinner.

Allan Myers AC QC: "Australian lawyers and professional people who are engaged in activities connected with alternative dispute resolution are among the most capable in the world."

CIArb Australia Annual Dinner Address

Guest Speaker
Allan Myers AC QC
View Profile

Madam President, Ladies and Gentleman.

I am greatly honoured to have been asked to speak this evening to this very distinguished gathering of arbitration practitioners.

The Chartered Institute of Arbitrators (Australia) has a long history of serving the community by supporting arbitration and other methods of dispute resolution. The Chartered Institute was established in Australia as a branch of the Chartered Institute established in the United Kingdom more than one hundred years ago. The work of the Chartered Institute is important.

Although I have appeared as counsel in many arbitrations, both local and international, and I have sat in many arbitrations as a sole arbitrator or as a member of an arbitral tribunal with other arbitrators, to my shame, which this evening I confess to you distinguished ladies and gentlemen, I have been, to the Chartered Institute, like **Winston Churchill** described his relationship with the established Church of England, "a buttress rather than a pillar", supporting the Chartered Institute only from without.

Madam President, please accept my offering a few words this evening as a modest first instalment of repayment of the large debt I owe the Chartered Institute.

I remain a practising barrister and arbitrator. As the invitation to this dinner records, I am also the Chancellor of the University of Melbourne. I have taken that fact recorded on the dinner invitation as being a licence (if not an implied request) to say something about University education. The remarks I will make about University education are not irrelevant to Australia's role in international arbitration.

The Chartered Institute offers accreditation and training to arbitrators and mediators. There are other bodies in Australia with similar objectives including at least, the Australian Commercial Disputes Centre which changed its name about 8 or 10 years ago to the Australian International Disputes Centre, the Institute of Arbitrators and Mediators Australia, the Australian Centre for International Commercial Arbitration and the National Alternative Dispute Resolution Advisory Council. The Institute of Arbitrators and Mediators Australia, about 20 years ago, published the "IAMA Rules for the Conduct of Commercial Arbitrations". The Australian Centre for International Commercial Arbitration has published its own arbitration rules since 2005. Thus, there is no shortage in Australia of bodies that have the function of supporting arbitrations and other methods of alternative dispute resolution.

Let me return for a few minutes to universities. The University of Melbourne is, by the standards of those who establish and apply standards by which to judge universities, the foremost University in this country and one of the top three or four universities of the Asia-Pacific region. Those of you who are alumni of other universities need not rise to contest what I have just said because the qualities for which the University of Melbourne is judged thus are shared by many, perhaps most, Australian universities. This is the reason why, in the space of less than 20 years, the provision of university education to persons who come to Australia from abroad now rivals the sale of iron ore and of coal as an engine of the Australian economy and a signal to the whole world of the highly advanced character of Australian society. The rise of tertiary education in Australia has contributed mightily to the social and intellectual life of the country and has created very many fulfilling jobs for Australians. The burgeoning of tertiary education in Australia has educated many young men and women from abroad in the values of a free, tolerant, egalitarian and prosperous country, much to the advantage of those young men and women and to their home countries when they return there with the capabilities to be leaders in their own societies.

The University of Melbourne and other Australian Universities are attractive to the best and brightest students from abroad for some reasons that are pertinent to those who see Australia as a possible centre for the conduct of international arbitrations.

First, the teaching and research at Australian Universities is very good by any standards. Those who teach and undertake research are mostly of outstanding skill and learning.

Second, Australia is a free, tolerant, democratic society under the rule of law. The parents of young people who come from abroad express it thus: we want our young adult children to be educated in a society the values of which we admire and which is free from physical and ideological dangers.

Australian young people who come to the University of Melbourne (and their parents) do not have views markedly different from the students (and parents) abroad. They wish for themselves and their children that the environment in which those students will be educated is safe, but intellectually and culturally stimulating.

Third, almost everyone in the world wishes to be educated in the English language, in an English speaking society.

Fourth, education must lead to a real job. This is true of post graduate education as it is of undergraduate education. There is, of course, an organisation, established in the USA, which compiles annually an index of the "employability" of graduates of universities all over the world. Last year the University of Melbourne was rated 7th in the world for the "employability" of its graduates. Universities undertake a great deal of research. In the 19th Century J.H. Newman could write in his seminal work entitled "The Idea of a University" that the object of a University education was not practical nor was it to be judged by how "useful" was that which I was taught at the University. Learning for its own sake was the end or purpose of a University which it was believed would be apparent from the personal and moral qualities of the young men who were the graduates of the University. Now a University is judged upon the employability of its graduates and the usefulness of its research. The University must serve the needs of the society of which it is part and by which it is sustained.

Does all this about universities have anything to do with arbitration?

We know there is a vigorous contest between nations, states and cities to establish and maintain successful dispute resolution centres. Such a centre is believed to serve the interests of the nation, state or city by efficiently and fairly quelling disputes, especially between commercial enterprises, by alternative dispute resolution mechanisms, alternative that is to the judicial processes of the state which can be slow and a costly imposition on the public purse. Increasingly the operation of those alternative dispute resolution mechanisms is seen as a valuable economic activity, providing employment for local lawyers, administrative personnel, and in hotels and restaurants, because it attracts foreigners who come to utilise the dispute resolution centre to resolve disputes that may otherwise have little or no connection with the place where the centre is established. SIAC is a good example. The ICC in Hong Kong is another regional example. London teams with solicitors and barristers and arbitration rooms offering their skills and facilities to foreigners.

One can readily discern similarities between the impetus to expand the availability of university education to foreign students and the establishment of successful arbitration facilities for the determination of foreign as well as local disputes. Australia has been conspicuously successful in the field of university education but would not be judged so in the field of alternative dispute resolution.

May I say at once that the last remark is not a comment upon the quality of my country men and

AUSTRALIAN LAWYERS 'AMONG MOST CAPABLE IN THE WORLD' WITH ADR

Jerome Doraisamy
Lawyers Weekly
6 December 2018

Australian advocates in alternative dispute resolution are leading the way in international matters, according to a Melbourne-based barrister.

Speaking recently at the **Chartered Institute of Arbitrators (Australia) annual dinner, Allan Myers AC QC** said that to Europeans especially, Australia is, and is situated in, a "remote and unimportant part of the world".

That is not merely a comment on the "tyranny of distance". It reflects an "ignorance of the remarkably advanced society and economy of Australia", he said.

Australia is a "country is free of corruption and is governed under the rule of law. The cities are safe and the facilities for visitors and for the conduct of business are very good indeed", he noted.

"These advantages of people and facilities notwithstanding, we lack in Australia a single institution in the field of alternative dispute resolution which can embody and promote arbitration in Australia and a favourable 'brand image' of Australia and the attributes of the institutions and of the legal and social environment relevant to the resolution of disputes. Singapore, for example, does this well," he mused.

"Second, it does not appear that Australian lawyers, as often as they could do so, advise clients of the advantages of embodying in arbitration agreements provision for the resolution of disputes in Australia, under Australian law and Australian dispute resolution procedures. This is a long-game as is evident, for example, in the many Australian agreements, often written long ago, which refer to disputes being resolved under ICC Rules."

In light of this – as well as the fact that Australian state supreme courts "are of uneven quality", the Federal Court can, he posited, "continue to make an enduring contribution to arbitration in Australia through its specialist arbitration list, with judges of appropriate learning and experience, able to provide an Australia-wide service of high and unvarying quality to deal expeditiously and competently" with disputes arising in connection with arbitration matters. **Read more**

women engaged in the field of alternative dispute resolution. They are equal to the best as arbitrators, solicitors and advocates.

But these qualities are not recognised or acknowledged by many. To Europeans especially, Australia is, and is situated in, a remote and unimportant part of the world. That is not merely a comment on the "tyranny of distance". It reflects an ignorance of the remarkably advanced society and economy of Australia.

May I suggest some remedies. I do so with trepidation being in the presence of so many of you who are more experienced than I in arbitration.

First, Australian lawyers and professional people who are engaged in activities connected with alternative dispute resolution are among the most capable in the world. I have seen it as an arbitrator and experienced it on the receiving end as counsel. English arbitrators with whom I sit invariably remark (as is the fact) that the Australian advocates before us are the best that have appeared before them.

This country is free of corruption and is governed under the rule of law. The cities are safe and the facilities for visitors and for the conduct of business are very good indeed.

These advantages of people and facilities notwithstanding, we lack in Australia a single institution in the field of alternative dispute resolution which can embody and promote arbitration in Australia and a favourable "brand image" of Australia and the attributes of the institutions and of the legal and social environment relevant to the resolution of disputes. Singapore, for example, does this well.

Second, it does not appear that Australian lawyers, as often as they could do so, advise clients of the advantages of embodying in arbitration agreements provision for the resolution of disputes in Australia, under Australian law and Australian dispute resolution procedures. This is a long game as is evident, for example, in the many Australian agreements, often written long ago, which refer to disputes being resolved under ICC Rules.

Third, I believe that the provisions of the Australian Consumer Law which prescribe and provide remedies for "misleading and deceptive conduct" should be amended to provide that the misleading and deceptive conduct provisions do not apply to "commercial" as opposed to "consumer" transactions or at least do not apply to commercial transactions which have an international character, in each case where the transactions are regulated by agreements which exclude the effect of the statutory provisions of the Australian Consumer Law. The effect of the misleading and deceptive conduct law is a reason many persons do not wish to have disputes determined according to Australian Law or in Australia, where the "misleading and deceptive conduct" rules have a much more lively influence on the outcome of dispute resolution procedures.

Finally, it is the fact that the Australian State Supreme Courts (including Courts of Appeal) are of uneven quality. This leads one to the Federal Court, which I believe, can continue to make an enduring contribution to arbitration in Australia through its specialist arbitration list, with judges of appropriate learning and experience, able to provide an Australia wide service of high and unvarying quality to deal expeditiously and competently with disputes arising in connection with arbitration matters.

The Federal Court can, over the long run, create an Australian arbitration law known throughout the world for its contribution to the field of arbitration law. This itself would be another reason for people to choose Australia as an arbitration venue.

In keeping with our policy in promoting and contributing to global arbitration scholarship, CIArb Australia is pleased to announce the launch of the 2018 CIArb Australia Essay Competition.

The topic for this year's essay is as follows:

"How is the public policy ground for setting aside an international arbitral award, or for refusing to enforce or recognise such an award interpreted and applied in Australia? Compare and contrast the Australian approach with that of at least one other model law country in the Asia Pacific region".

Entries are invited from students studying a Bachelor, Juris Doctor or Masters level law degree at the date the entry is submitted. The competition is also open to lawyers in their first five years of practice, who may be members and non members of CIArb.

The winning author will be announced and **awarded $1,000 AUD at the CIArb Australia Annual Gala Dinner to be held on 17 October at the No 35 Restaurant, Level 35, Sofitel Melbourne On Collins**. The essay will also be published on CIArb Australia's website and ***The CIArb Australia News***.

CIArb Australia would like to thank our Supporting Organisations

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View Profile

Enforcing Arbitral Awards: The Public Policy Ground in the Asia Pacific

2018 CIArb Australia Essay Competition Winner

'How is the public policy ground for setting aside an international arbitral award, or for refusing to enforce or recognise such an award interpreted and applied in Australia? Compare and contrast the Australian approach with that of at least one other model law country in the Asia Pacific region.'

Introduction

Arbitration depends upon an effective mechanism for enforcing awards anywhere in the world. The enforcement, recognition and setting aside of awards is governed by UNCITRAL's Model Law which has been adopted into legislation by 80 countries since it was first published in 1985. Since 1958, the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards** ("New York Convention") has also dealt with the subject in similar terms.

One ground for setting aside an award is where it conflicts with the public policy of the jurisdiction in which the application is made. Article 34(2)(b)(ii) provides:

(2) An arbitral award may be set aside by the court specified in article 6 only if:

…

(b) the court finds that:

…

(ii) the award is in conflict with the public policy of this State.

The grounds for refusing to recognise or enforce an award under article 36 are in similar terms.

As can be imagined, without any definition or further detail in the Model Law 'public policy' has the potential to include myriad factors and will mean different things to different people from different legal traditions. As early as 1824, Burroghs J recognised the difficulty inherent in the notion of public policy in Richardson v Mellish:

> …it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.[1]

In the case of the Model Law, at least in the Asia Pacific, it may have been tamed somewhat since but it remains a spirited animal. The common law jurisdictions have a largely consistent approach. Australia and New Zealand favour enforcement and interpret the ground narrowly, while India is now moving towards that position in light of developing authority. In contrast, the Chinese approach to the ground under the New York Convention, while reportedly narrow, is nonetheless broader than in other jurisdictions and introduces uncertainty although this too has improved in recent years.

1. (1824) 2 Bing 229, 252

CIArb Australia Vice President, **Dr Stephen Lee** presents cheque to the winner of the 2019 CIArb Australia Essay, **Andrew Spierings** (Monash University).

Australia

Australia has adopted the Model Law in the International Arbitration Act 1974 (Cth), including articles 34 and 36. In exercising its powers concerning recognition and enforcement, the Act provides that a court must have regard to the fact that awards are intended to provide certainty and finality.[2] This is consistent with the pro-enforcement view of the Model Law and New York Convention taken globally. Courts should be, and are, reluctant to allow parties to re-open matters already dealt with by arbitration. The result would be uncertainty and inefficiency, with the prospect of multiple and repeated litigation across the world.

The Australian courts have endorsed this pro-enforcement interpretation of the Act. In Hui v Esposito Holdings Beach J noted that 'significant judicial restraint must be exercised in considering and determining an Art 34 challenge'. [3] Indeed, in the context of resisting enforcement under article 36, Croft J at trial in Altain Khuder LLC v IMC Mining Inc took the view that a party resisting enforcement had a 'heavy' onus of proving one of the grounds, including that of public policy, which had to be established by 'clear, cogent and strict proof'.4 However, while it was agreed on appeal that the Act should be interpreted with a proenforcement emphasis, it was held that the ordinary balance of probabilities applies.[5]

The provisions concerning public policy 'deal with fundamental conceptions of fairness and justice'.[6] The Full Federal Court stated it succinctly:

> No international arbitration award should be set aside for being contrary to Australian public policy unless fundamental norms of justice and fairness are breached.[7]

Accordingly, the ground should be interpreted narrowly.[8] The alternative, and equivalent, formulation of the Victorian Court of Appeal was that the ground refers to 'the most basic, fundamental principles of morality and justice'.[9] From this, it is clear that a matter must be serious to be contrary to public policy, yet the bounds of the ground remain unclear.

Read more

2. International Arbitration Act 1974 (Cth) s 39(2)(b)(ii).
3. Hui v Esposito Holdings Pty Ltd (2017) 345 ALR 287, [117].
4. Altain Khuder LLC v IMC Mining Inc (2011) 246 FLR 47, [64].
5. IMC Aviation Solutions Pty Ltd v Altain Khuder LLC (2011) 38 VR 303, [128]-[129], [190]-[195] (Hansen and Kyrou JJA).
6. TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361, [111] (Allsop CJ, Middleton and Foster JJ).
7. Ibid.
8. Hui v Esposito Holdings Pty Ltd (2017) 345 ALR 287, [229] (Beach J)
9. Gutnik v Indian Farmers' Fertilizer Co-operative Ltd (2016) 49 VR 732, [19] (Warren CJ, Santamaria and Beach JJA).

YMG Chair, **Kristian Maley** with panellists: **Imogen Kenny** (Associate to Dr Michael Pryles AO PBM), **Andrew Di Pasquale** (Victorian Bar), **Sylvia Tee** (Lipman Karis) and **Jason Choi** (DLA Piper)

Career Pathways in Arbitration: Charting a Course

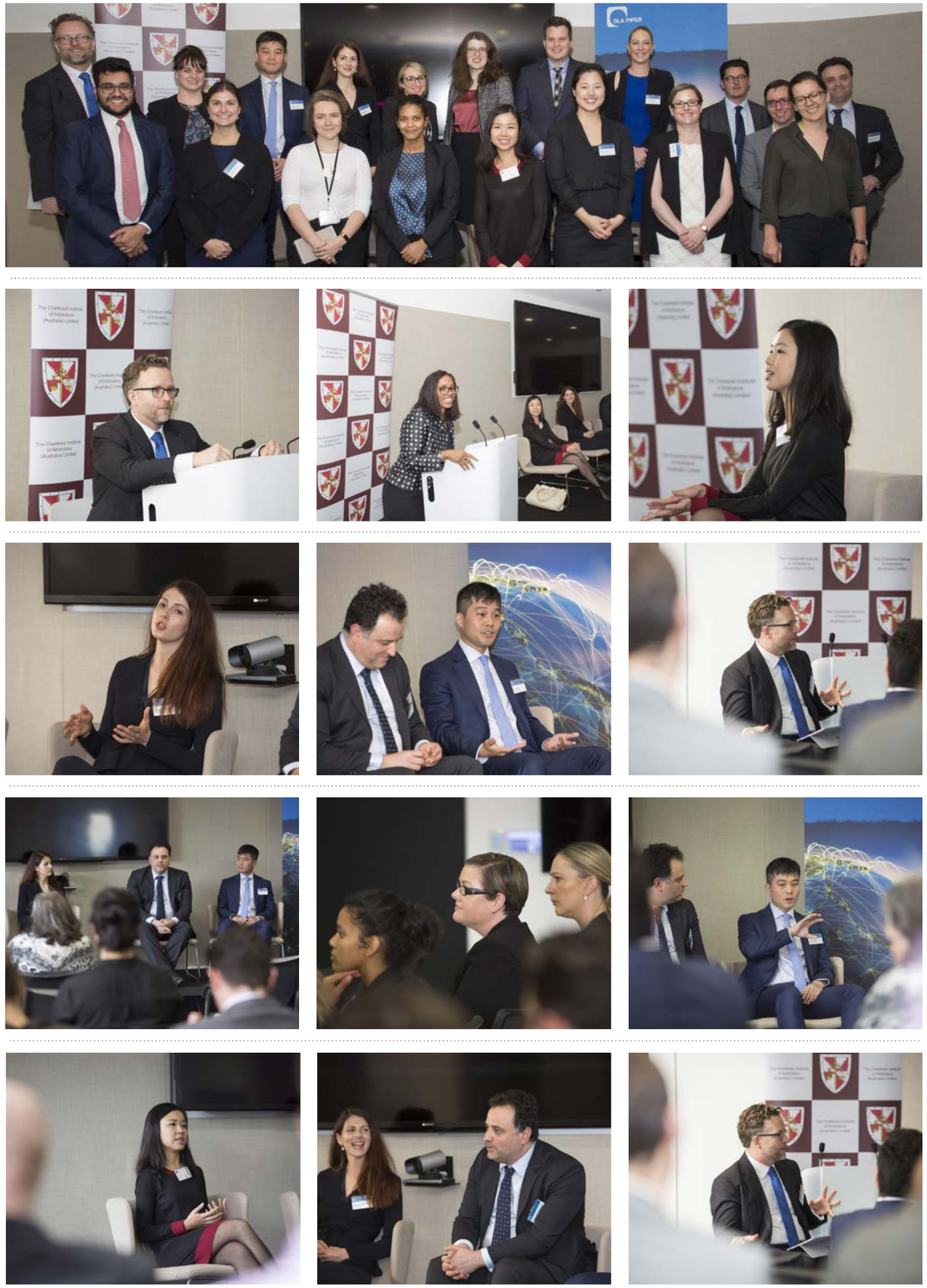
Current and aspiring young arbitration practitioners learnt about the diverse career pathways available in international arbitration at the YMG's event **'Career Pathways in Arbitration: Charting a Course'**, held in Melbourne on 18 October 2018. The event, generously hosted by DLA Piper as part of Australian Arbitration Week, was moderated by YMG Australia Chair **Kristian Maley**, and featured panellists **Andrew di Pasquale**, Victorian Bar; **Imogen Kenny**, Associate to Dr Michael Pryles AO PBM; **Sylvia Tee**, Lipman Karas; and **Jason Choi**, DLA Piper. Given the interactive format of the event, participants also heard interesting perspectives from other attendees.

Participants shared their differing pathways that have led to their current practices in international arbitration. Andrew di Pasquale commented on some of the distinguishing features of working in the area. Following discussion, the prevailing view was that, while procedural knowledge of arbitration is important, for most young practitioners, building a strong skill base and profile in a chosen substantive domain is also central to career progression. Panellists also commented that it can be helpful to focus on a substantive area conducive to international arbitration work, such as construction disputes.

Imogen Kenny shared some interesting insights from her experiences serving as a tribunal secretary. The panel also discussed some practical avenues for seeking opportunities for tribunal secretary work, including the importance of building networks among arbitrators and counsel, and services such as ACICA's register of candidates for tribunal secretary roles. Other panellists and participants shared their positive experiences from working as tribunal secretaries, emphasising the benefits and experience they have gained from the role.

Kristian Maley led a discussion of options for postgraduate study and other specialised training relevant to international arbitration. These options include include a wide range of graduated courses offered by CIArb, and Masters level courses at Australian and international universities. Jason Choi observed that Masters-level and other postgraduate qualifications tend to be more highly valued in civil law jurisdictions, while common lawyers sometimes place relatively more value on practical experience.

Panellists and participants also discussed the benefits and value of working abroad. This raised the pivotal question: can young practitioners hope to launch a successful career in international arbitration from Australia? Panellists discussed that there are undoubtedly a range of diverse opportunities abroad for young Australian practitioners who wish to pursue them. That said, the consensus among panellists was that, while the busiest arbitral seats globally undoubtedly be an attracting proposition for those launching an arbitration career, there are numerous arbitration practices in Australia offering young practitioners exposure to the same calibre of work.



Robin Oldenstam delivers the 2018 Clayton Utz International Lecture at the Federal Court of Australia in Melbourne.
Click here to access video of lecture

The Need for Speed: Is International Arbitration Becoming Overly Fixated with Efficiency?

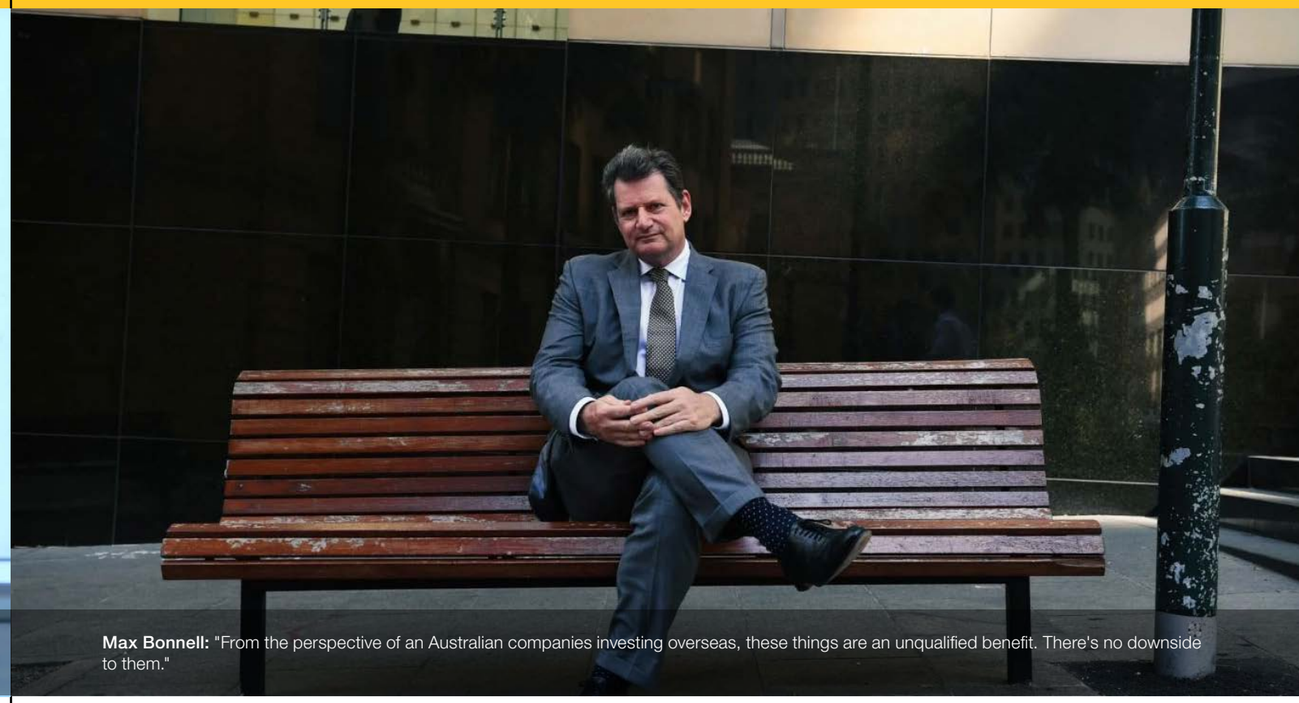
Who: Robin Oldenstam
When: Monday, 16 October 2018
Where: Federal Court of Australia, Melbourne

About the Clayton Utz Lecture

Efficiency is an important factor in arbitration and likely key to its long term survival as a favoured form for resolving international commercial disputes. At the same time efficiency needs to be tempered by basic procedural principles, such as party autonomy and due process, as well as by general considerations of fairness. Recent years have seen tendencies to push the efficiency factor to the extent that it may start to infringe upon such principles and considerations. The lecture offered examples of such tendencies and suggested that it may be time to push back.

About the speaker

Robin Oldenstam specialises in arbitration and civil litigation and is the head of Mannheimer Swartling's International Arbitration Practice. He is also the current Swedish member of the ICC International Court of Arbitration.



Max Bonnell: "From the perspective of an Australian companies investing overseas, these things are an unqualified benefit. There's no downside to them."

ISDS clauses an 'unqualified benefit': White & Case lawyer

17 SEPTEMBER, 2018
Ronald Mizen
Australian Financial Review

Investor State Dispute Settlement provisions in trade agreements provide significant benefits to Australian companies that invest in overseas markets, a point often overlooked, a leading international arbitration lawyers said.

ISDS provisions allow foreign investors to take legal action against governments, including Australia, for breaching their investment obligations; for example, by expropriating property or denying fair procedure.

Critics, including Labor and the unions, claim ISDS provisions are an attack on national sovereignty because the provisions allow foreign investors, in particular multinationals, to sue governments for domestic policy decisions that affect their investments.

Risk management

Max Bonnell, international arbitration partner at global law firm White & Case, told The Australian Financial Review the inclusion of ISDS in trade agreements made it easier for Australian companies to invest in parts of the world with high-levels of sovereign risk and poor legal systems.

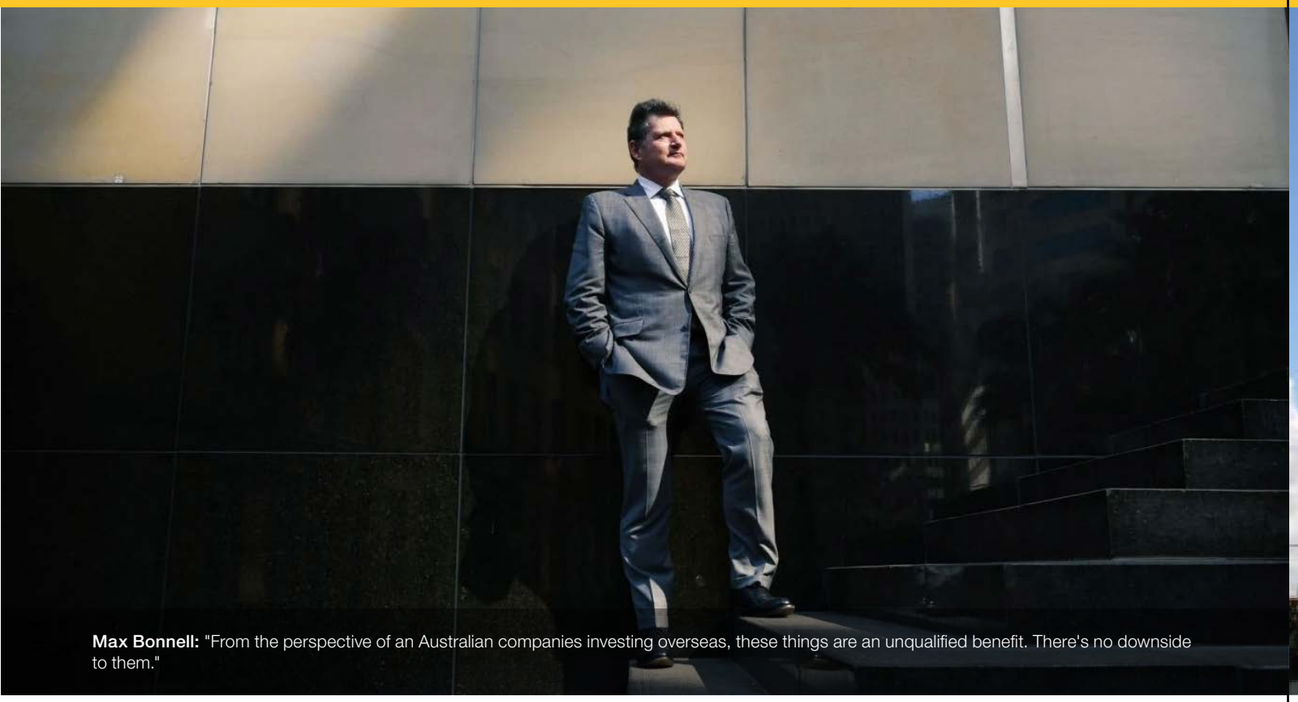
"There is a lot of investment in places like Indonesia, the Philippines, Vietnam, and there's a fair amount in South America and the countries in those parts of the world ... that are not always very politically stable," Mr Bonnell said, noting that international arbitration provided a forum outside of politically compromised local courts.

"I spend quite a bit of my time advising Australian companies to structure their offshore investments in such a way that they are able to take advantage of these treaties.

"People are more prepared to take a risk on investments if they know there is some kind of protection."

Mr Bonnell rejected suggestion ISDS represented a threat to national sovereignty.

"Arbitrators don't have the power to change the law," he said. "If Australia passes a law where the rights of investors are impacted, that remains the law; it's just



Max Bonnell: "From the perspective of an Australian companies investing overseas, these things are an unqualified benefit. There's no downside to them."

that there may be a payment of compensation required if a treaty promise is being breached."

White Industries

Mr Bonnell successfully represented an Australian company, White Industries, in an action against the Indian government in 2010 using ISDS provisions contained in a trade agreement between India and Australia.

The action stemmed from an award made in favour of White Industries in 2002 for an amount of $4.08 million, which, after nine years had still not been paid by the government. White Industries successfully argued India had breached the trade agreement and received an award for the amount owed, plus interest.

"The White Industries case is actually a good example of how investments of Australian companies can be protected," Mr Bonnell said. "That was the first successful investment treaty claim against India and the first successful investment treaty claim by an Australian company.

"So, from the perspective of an Australian companies investing overseas, these things are an unqualified benefit. There's no downside to them."

Domestic debate

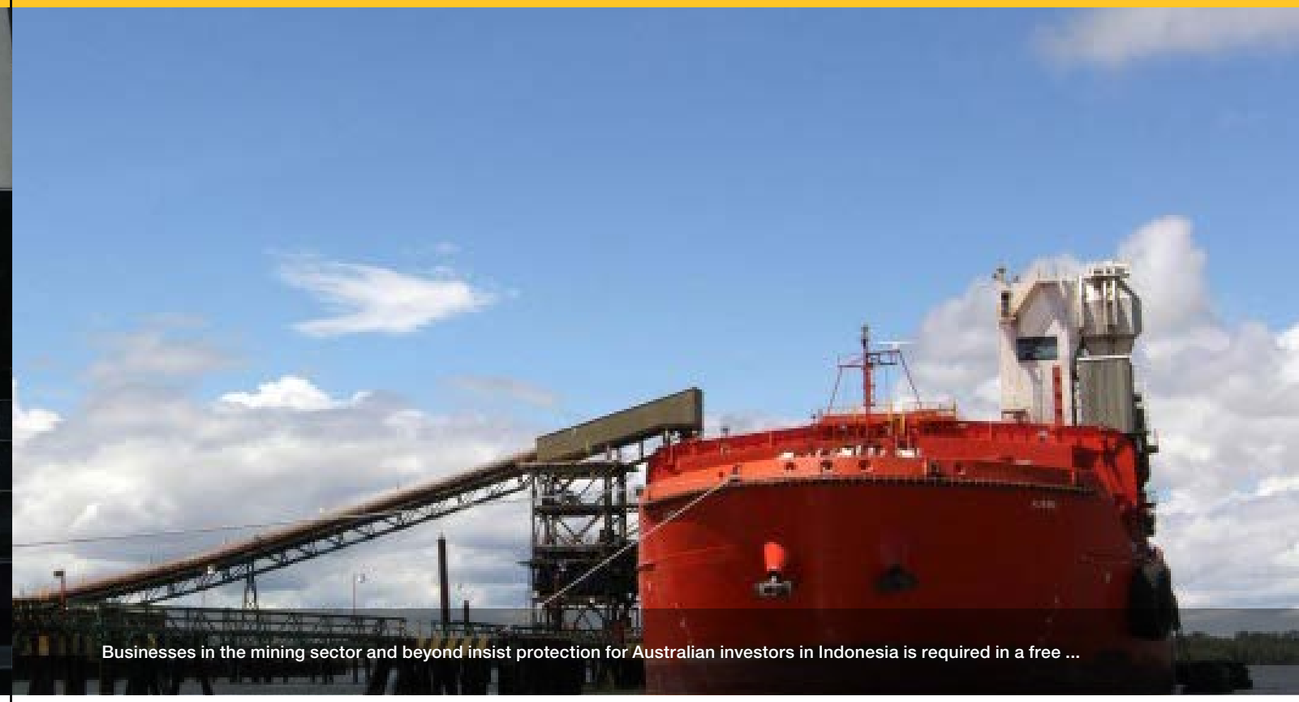
There have only been about 10 known occasions in the past 20 years where Australian companies have sued foreign governments using ISDS clauses, and one action against the Australian government; though there were several threats related to Labor's carbon pricing policy.

The case against Australia was brought by tobacco giant Philip Morris over the Gillard government's plain packaging laws. Australia won the case and Philip Morris was ordered to pay costs, which were reported to be as high as $50 million.

The issue of ISDS was again sparked last week after Labor agreed to support the Trans-Pacific Partnership agreement, which includes ISDS provisions, prompting strong criticism from the union movement.

Labor's foreign affairs spokesperson Penny Wong said Labor was determined to support good trade agreements but would seek to remove ISDS clauses.

"We would be seeking to negotiate those out. We don't think the government should have included them in this agreement," Ms Wong said.



Businesses in the mining sector and beyond insist protection for Australian investors in Indonesia is required in a free ...

Miners want ISDS in Indonesia free trade agreement

16 OCTOBER, 2018
John Kehoe, Ronald Mizen
Australian Financial Review

Businesses in the mining sector and beyond insist protection for Australian investors in Indonesia is required in a free trade deal because of Jakarta's track record of nationalising natural resources and erratic court system.

Indonesian business has also requested to both governments that the free-trade agreement (FTA) between Australia and Indonesia include an investor-state dispute settlement (ISDS) clause, in order to boost foreign investor confidence in the emerging economy.

The Australian Financial Review revealed on Tuesday the FTA is in peril after **Labor said it would not ratify the deal**, or any other FTA in the pipeline, unless provisions allowing governments to be sued by business via ISDS, and the importation of foreign workers, were stripped out.

Australian resources companies, such as Newcrest Mining and Rio Tinto, have been hit by an Indonesian law change forcing foreign firms to sell down stakes in mines and to increase domestic ownership to at least 51 per cent by the 10th year of production.

ANZ, BlueScope Steel, Coca Cola Amatil, Commonwealth Bank of Australia, Newcrest and Telstra are among the leading investors.

Australia-Indonesia Business Council president Phillip Turtle said the commercial relationship had a lot of potential but was historically "underdone".

"Many Australian businesses view Asian markets such as Indonesia as quite risky and there is a perception of higher sovereign risk and that contracts are not always enforced," he said.

"Enhanced International resolution provisions would be viewed positively by Australian investors."

Resolving conflicts

ISDS is an international arbitration procedure that is intended to be an impartial, law-based approach to resolving conflicts between countries and foreign investors.

ISDS provisions allow foreign investors to take legal action

Rio Tinto's Grasberg mine in West Papua is the most high-profile casualty of Indonesia's move towards resource ...

against governments, including Australia, for breaching their investment obligations; for example, by expropriating property or denying fair procedure.

Critics, including Labor and the unions, claim ISDS provisions are an attack on national sovereignty because the provisions allow foreign investors, in particular multinationals, to sue governments for domestic policy decisions that affect their investments.

The Indonesian government has forced Newcrest to cut its 75 per cent **stake in the Gosowong gold mine** to 49 per cent.

Freeport-McMoRan and Rio Tinto's Grasberg mine in West Papua is the most high-profile casualty of Indonesia's move towards resource nationalisation.

The government is **compulsorily increasing its stake from 9 per cent**, to majority ownership.

Rio, for a variety of reasons, is in the final stages of selling its 40 per cent stake in the production from the Grasberg mine.

'You only need to look at Freeport'

Churchill Mining, a British-listed company with an Australian subsidiary, Planet Mining, has been engaged in arbitration with Indonesia over the revocation of mining licences in the East Kutai Regency of Kalimantan since 2012.

Churchill executive chairman David Quinlivan said the Indonesian government was happy when foreign companies wanted to spend money exploring, but "as soon as you find something and start developing" that's when problems arise.

"You only need to look at the Freeport operation to see how that happens," he said.

The Churchill arbitration is being conducted under ISDS clauses contained in bilateral investment treaties signed between Indonesia and Australia, and Indonesia and Britain, which Mr Quinlivan said were at the "forefront" of the decision to invest in Indonesia.

The Morrison government wants to include an updated ISDS clause in the FTA, to ensure more modern safeguards than the 1993 bilateral investment treaty.

Campbell Bridge, a dispute resolution lawyer who represents Australian companies operating in Indonesia, said the Indonesia court system was a "shambles".

"The miners are having a very hard time at the moment because of Indonesian policy," he said.

"ISDS is a good idea as leverage but even if you win you still need to enforce it against the Indonesian government through its court system."

The Australian government's Export Finance and Insurance Corporation website **advises that the risk of expropriation in Indonesia is moderate** and the mining law change was "creating tensions" with investors.

ISDS a last resort

A **submission to the governments** on the trade agreement by the Indonesia-Australia Business Partnership Group, representing leading Indonesian and Australian business groups, shows explicit support for ISDS in the FTA and for it to be used as a last resort.

"Both Indonesia and Australia see the importance of setting up dispute resolution mechanisms that are efficient and enforceable," it says.

"At present, there is a major legal deterrent to foreign investment in Indonesia, namely inefficiency in the court system."

There have only been about 10 known occasions in the past 20 years where Australian companies have sued foreign governments using ISDS clauses, and one action against the Australian government.

The case against Australia was brought by tobacco giant Philip Morris over the Gillard government's plain packaging laws. Australia won the case and Philip Morris was ordered to pay costs, which were reported to be as high as $50 million.

White Industries, in an action against the Indian government in 2010, used ISDS provisions to claim $4.08 million, plus interest.

Law Council of Australia President, Morry Bailes, said: "The Law Council considers that the inclusion of ISDS clauses in free trade agreements do not constitute an insurmountable threat to Australia's sovereignty or the rule of law. They should be considered on a case-by-case basis so as to ensure that the authority of the Australia legislature and Australian courts is not unduly compromised."

Australian Chamber of Commerce and Industry chief James Pearson said it was "hard to understand why big unions are so opposed to ISDS".

"It protects Australian businesses overseas from adverse decisions where their investments might be expropriated," he said.

> ISDS helps to level the playing field for Australian firms who have the courage to take their products, services, talented people and capital into the international market, by giving them, as well as overseas investors in Australia, the right to access an international tribunal to resolve investment disputes.

The Hon Chief Justice James Allsop AO, Federal Court of Australia witnessing the MOU agreement signed by **Caroline Kenny QC** (CIArb Australia) and **Patrick O'Sullivan** (Australian Bar Association)

Launch of MOU between CIArb Australia and Australian Bar Association

When: **Friday, 1 June 2018**
Where: **Federal Court of Australia, Melbourne**
Photos: **David Johns**

The Australian Bar Association (ABA) and the **Chartered Institute of Arbitrators (Australia)** are delighted to announce the launch of a memorandum of understanding aimed at advancing arbitration and mediation work opportunities for Australian counsel internationally as well as developing a more unified local dispute resolution profession.

The MoU encourages the joint promotion and advancement of international arbitration, mediation and alternative dispute resolution methods by Australian counsel to the global market. Their ability to provide early advice, first class advocacy and negotiation skills and their expert knowledge of the Australian and regional legal systems place them in a unique position of being able to conduct all forms of domestic and international arbitrations as well as other dispute resolution methods.

The MoU was launched by the **Hon James Allsop AO**, **Chief Justice of the Federal Court of Australia** at the Federal Court in Melbourne, who expressed that the agreement is a significant step in a strategic alliance to promote the dispute resolution services of these organisations to the global market.

President of the ABA, Mr Noel Hutley SC said: "The ABA is committed to identifying and promoting opportunities for the involvement of Australian counsel in international jurisdictions. That process is not limited to Australian counsel working abroad, whether it be as counsel, arbitrators or mediators, but extends to promoting internationally, the undoubted skills and competence of Australian counsel and the Australian judiciary."

Noting the ABA is delighted to partner with the CIArb Australia, Mr Hutley said: "The CIArb rightly prides itself on being a truly global network, with over 16,000 members working in sectors as diverse as finance, construction, oil and gas and agriculture in over 130 countries worldwide."

"In addition to providing education, training and accreditation for arbitrators, mediators and adjudicators, the CIArb acts as an international centre for practitioners, policymakers, academics and business executives."

"Under the Memorandum of Understanding, the ABA looks forward to working with CIArb Australia to advance arbitration work opportunities for Australian barristers."

Caroline Kenny QC, President of CIArb Australia said

> CIArb is very pleased to partner with the Australian Bar Association, the peak body of Australian barristers. In signing this agreement we both recognise the importance of developing opportunities for our members in the ADR space, especially in the growing arbitration hubs of Asia."

> "CIArb brings to the partnership over 100 years experience in providing the gold standard in training a global accreditation of international arbitrators and a worldwide membership."

NEW PUSH TO INCREASE ARBITRATION WORK FOR AUS BARRISTERS

Jerome Doraisamy
Lawyers Weekly
21 June 2018

The Australian Bar Association (ABA) and Chartered Institute of Arbitrators Australia (CIArb) have signed a memorandum of understanding designed to advance arbitration and mediation opportunities for Australian counsel internationally and develop a more unified local dispute resolution network.

Australian barristers are in a unique position to be able to conduct all forms of domestic and international arbitration, as well as other dispute resolution methods, the ABA and CIArb Australia noted in a statement, in light of abilities to provide early advice, expert advocacy and negotiation skills.

As such, the two representative groups have seen fit to launch and sign a MoU encouraging the joint promotion and advancement of international arbitration, mediation and alternative dispute resolution methods by Australian counsel to the global market.

The MoU was launched by Federal Court of Australia Chief Justice, The Honourable James Allsop, at a ceremony in Melbourne.

His Honour remarked at that event that the agreement was a "significant step in a strategic alliance" in promoting the dispute resolution services of the ABA and CIArb Australia to the global marketplace.

ABA president Noel Hutley SC said his association was looking forward to working with CIArb Australia to advance arbitration work opportunities for Australian barristers.

"The ABA is committed to identifying and promoting opportunities for the involvement [of] Australian counsel in international jurisdictions," he said.

"That process is not limited to Australian counsel working abroad, whether it be as counsel, arbitrators or mediators, but extends to promoting internationally the undoubted skills and competence of Australian counsel and the Australian judiciary."

CIArb Australia president Caroline Kenny QC supported Mr Hutley's remarks, noting that her institute was similarly pleased to partner with the ABA.

"In signing this agreement, we both recognise the importance of developing opportunities for our members in the ADR space, especially in the growing arbitration hubs of Asia," she said.





1 – 5. Signing and announcement of agreement between CIArb Australia and ABA.

6. Ben Davidson (Corrs Chambers Westgarth), **Kathryn Browne** (Senior Associate to the Hon Justice Clyde Croft), **Albert Monichino QC** (Victorian Bar), **Bronwyn Lincoln** (Corrs Chambers Westgarth), **Campbell Bridge SC** (NSW Bar)

7. Hazel Brasington (Norton Rose Fulbright), **Judge Caroline Kirton** (Family Circuit Court) and **Cindy Penrose** (ABA)

8. Dr Vicky Priskich (Victorian Bar and CIArb Australia Councillor), **Anton Trichardt** (Victorian Bar), **Adam Rollnik** (Victorian Bar) and **Robert Heath QC** (Victorian Bar)








1. Patrick O'Sullivan QC (ABA), **Paul Kenny** (Allens Linklaters), **Nick Hopkins QC** (Victorian Bar) and **Neil Young QC** (Victorian Bar)

2. Michael Whitten QC (Victorian Bar), **Mark Dempsey SC** (NSW Bar), **Jennifer Batrouney** (Victorian Bar) and **Campbell Bridge SC** (NSW Bar)

3. The Hon Chief Justice James Allsop AO (Federal Court of Australia), **Kathryn Browne** (Senior Associate to the Hon Justice Clyde Croft) and **The Hon Justice Clyde Croft** (Supreme Court of Victoria)

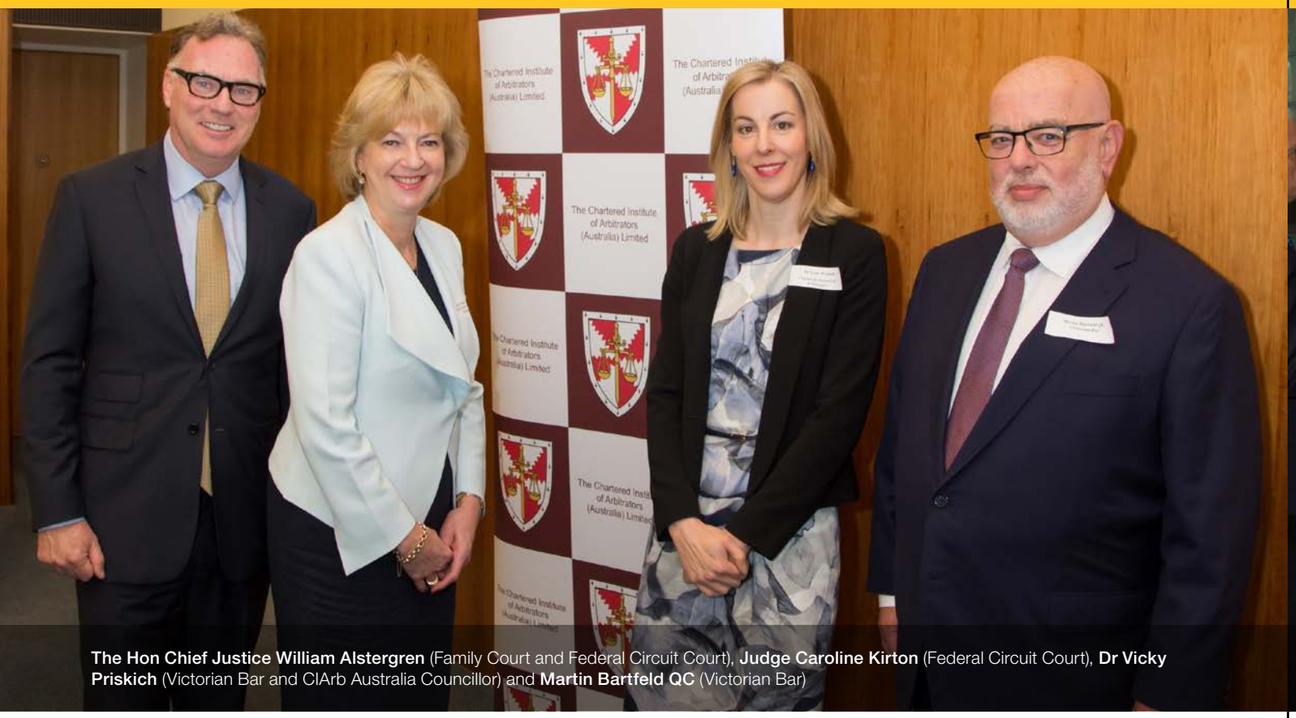
4. Alan Archibald QC (Victorian Bar), **The Hon Justice Jonathan Beach** (Federal Court of Australia) and **The Hon Chief Justice James Allsop AO** (Federal Court of Australia)

5. Judge Caroline Kirton (Family Circuit Court), **Bronwyn Lincoln** (Corrs Chambers Westgarth) and **Elizabeth Brimer** (Victorian Bar)

6. Campbell Bridge SC (NSW Bar), **Michael Whitten QC** (Victorian Bar), **John Arthur** (Victorian Bar and CIArb Australia Councillor) and **Martin Scott QC** (Victorian Bar)

7. Jennifer Batrouney QC (Victorian Bar) and **Raini Zambelli** (Victorian Bar)

8. Caroline Kenny QC, **Paul Kenny** (Allens Linklaters), **Nick Rudge** (Allens Linklaters) and **Nick Hopkins QC** (Victorian Bar)



The Hon Chief Justice William Alstergren (Family Court and Federal Circuit Court), **Judge Caroline Kirton** (Federal Circuit Court), **Dr Vicky Priskich** (Victorian Bar and CIArb Australia Councillor) and **Martin Bartfeld QC** (Victorian Bar)

Family Law and Arbitration

When: Tuesday, 13 November 2018
Where: Federal Circuit Court of Australia, Melbourne
Chair: Dr Vicky Priskich, CIArb Australia Councillor and Victorian State Convenor
Introduction: The Hon Justice William Alstergren, Acting Chief Justice of the Family Court of Australia and Chief Judge of the Federal Circuit Court of Australia
Panel: Judge Caroline Kirton, Judge of the Federal Circuit Court of Australia
Martin Bartfeld QC, Barrister and Arbitrator, Victorian Bar
Photos: David Johns

Family law and arbitration – courts and arbitrators working together to find alternative ways to resolve family law disputes

The Family Court of Australia, Federal Circuit Court of Australia and the Chartered Institute of Arbitrators (CIArb) Australia hosted a seminar on family law and arbitration, which was held on **Tuesday 13 November 2018** at the **Commonwealth Law Courts Building, Melbourne**.

The seminar focussed on the process of arbitration and its particular application in the family law context. Guest speakers included

The Hon Chief Justice William Alstergren, **Renee Corcoran** (EA to CJ Alstergren), **Judge Jillian Williams** (Federal Circuit Court), **The Hon Justice Victoria Bennett** (Family Court of Australia) and **Peter Baugher**, (CIArb Fellow and President, Chicago International Dispute Resolution Association)

Judge Caroline Kirton of the Federal Circuit Court of Australia and **Martin Bartfeld QC**, **Barrister and Arbitrator, Victorian Bar**.

The session was introduced by Acting Chief Justice of the Family Court of Australia and Chief Judge of the Federal Circuit Court of Australia, **The Hon Justice Will Alstergren**, and chaired by **Dr Vicky Priskich**, CIArb Australia National Councillor and Victorian State Convenor.

Acting Chief Justice Alstergren is supportive of this initiative which aims to engage and inform the legal profession on how arbitration could be better utilized to help resolve appropriate family law disputes.

"Private arbitration in appropriate property cases is an extremely efficient way for parties to quickly obtain a determination and resolution of their dispute, rather than waiting for a trial date. It may be for a preliminary issue or to determine the entire matter.

"Arbitration was utilised during the Federal Circuit Court's national call overs of family law matters and we will continue to work with the profession to ensure that the family law courts have the capacity to expeditiously deal with issues that may arise during the course of an arbitration which includes fast tracking applications seeking a review of arbitral wards," **Acting Chief Justice Alstergren said**.

> This seminar signals an important initiative between the Institute and the courts to assist separating families resolve disputes.

Read more

THE HON CHIEF JUSTICE WILLIAM ALSTERGREN

CHIEF JUSTICE OF THE FAMILY COURT OF AUSTRALIA AND CHIEF JUDGE OF THE FEDERAL CIRCUIT COURT OF AUSTRALIA

View Profile

Using Arbitration to Resolve Family Law Disputes

What is arbitration?

Arbitration is a confidential, impartial process where parties consent to their dispute being resolved by a neutral arbitrator who considers evidence and arguments and makes a determination in the form of an award.

The power to arbitrate certain family law matters is formally recognised under the Family Law Act 1975 (Cth) ('Family Law Act'). Presently, the Court cannot mandate arbitration – both parties to the family law dispute must consent to it. Although it is not mandatory for parties to enter into an arbitration agreement it is good practice to do so. If an agreement is made it must be recorded in writing and include all the matters listed in reg 67F of the Family Law Regulations 1984. Reg 67J mandates the confidential nature of the arbitration process, with limited exceptions such as disclosure to protect a child. Significantly, s 13H(2) of the Family Law Act provides that an arbitral award may be registered in court and if registered, has the same effect as if it were a decree made by the Court.

Why use arbitration?

Arbitration is under utilised in family law although it is now the preferred method of resolving cross-border commercial disputes.

There are compelling practical reasons for parties in a family law dispute to consider using arbitration. Pending cases in the family law system are posing challenges in providing effective dispute resolution for families with respect to time and cost. In contrast, it is very achievable for the arbitration process to be completed within 3 months from the date agreement to arbitrate is reached.

In May 2018, I called over 70 matters in Sydney as part of the national family law call overs. I referred nine matters to arbitration. Of those matters, six have been finalised: two matters by consent with minutes filed and orders made in Chambers, and four by delivery of an arbitral award.

Using arbitration has undoubtedly saved these parties considerable time compared with the prospect of a lengthy wait for a trial date. The willingness of practitioners to take up arbitration, or at least consider it, is encouraging.

What kinds of matters are suitable for arbitration?

Sub-section 10L(2) of the Family Law Act specifies the types of matters that may be referred to arbitration. Presently, there is no provision in the Family Law Act for arbitration of parenting matters. Arbitration may be court-referred under s 13E of the Family Law Act in respect of disputes involving property division or spousal maintenance, or party-agreed arbitration without the commencement of court proceedings in respect of a broader range of property or financial disputes. A preliminary question or a discrete aspect of a wider dispute may also be suitable for arbitration.

Parties can choose to have the dispute determined solely on the papers, and avoid costly argument as to the admissibility of evidence by agreeing that the arbitrator is free from the strict rules of evidence. Arbitration is a flexible procedure and can be molded in innovative ways by family law practitioners leading to higher levels of satisfaction from parties.

In family law property disputes involving assets located overseas arbitration offers potential advantages over litigation by the relative ease of enforcement of arbitral awards under the New York Convention.

Safeguards

Section 13J of the Family Law Act gives parties a right to seek review of registered awards on questions of law only. There is no review de novo. This is an appropriate balance in terms of promoting finality of disputes while protecting parties from the consequences of an error of law. Section 13K also permits the Court to reverse or vary a registered award on limited grounds.

The family law courts will continue to work with the profession to ensure that the courts deal expeditiously with issues that may arise during the course of an arbitration.

Concluding comments

Mediation is a process that many family law litigants have at least heard of – arbitration is yet to enjoy the same level of familiarity. During the national family law call overs in Sydney, I had to stand down several matters to allow practitioners to explain to their clients what arbitration involves. Practitioners should not wait until they are sitting with their client in a busy court room or duty list to explain this – be organised and discuss dispute resolution alternatives early.

Family law practitioners have a responsibility to inform their clients about alternative and effective forms of dispute resolution. Sections 12B and 12E of the Family Law Act require practitioners to provide information to clients about non-court based services. This includes arbitration. Australian Solicitors' Conduct Rules r 7.2 and Barristers Rules r 36 require legal practitioners to inform the client about the alternatives to fully contested adjudication of the case that are reasonably available.

Where appropriate, arbitration can be presented as a solution to common complaints by litigants such as:

- having no choice as to when the parties must attend court or the date of final hearing, the length of time court proceedings take, including the wait for a reserved judgment;
- lack of input and control over the process and timeline to resolution and choice of decision maker; and
- parties' concerns about costs or avoiding unforeseen escalation in costs.

Due to the consensual nature of the arbitration process, arbitration may not be appropriate where there is unequal bargaining power between the parties, or due to allegations of family violence. In appropriate cases, however, it is a flexible and efficient method of resolving financial disputes.

Note: This article is adapted from remarks made by Chief Justice Alstergren at the CIArb Australia seminar held in Melbourne on 13 November 2018 held in conjunction with the Family Court of Australia, and the Federal Circuit Court of Australia.

CIRCUIT CHIEF WILL ALSTERGREN TO TACKLE BACKLOG

Nicola Berkovic
The Australian
22 March 2018

New Federal Circuit Court Chief Judge Will Alstergren will attempt to turn around the extraordinary delays in the family law system by making better use of the court's existing resources.

This comes after repeated calls by the legal profession and the courts over many years for more family law judges and resources.

Chief Judge Alstergren told The Australian he was confident the court could "seriously diminish" its backlog of 18,000 family law cases "reasonably quickly".

He would assess where the court was in six months before determining whether extra family law judges were needed.

"It's simplistic to say 'give us more resources' unless we make sure we're running it properly," he said.

However, he will ask for more judges to deal with a huge spike in migration work.

More registrars and family law consultants will be deployed to help families resolve their disputes by mediation and conciliation once they are already in the court system.

Chief Judge Alstergren will also seek to use judges to mediate family law disputes, and wants more property matters referred to private arbitration.

He argues it would be cheaper for litigants to pay a private arbitrator to resolve their disputes quickly than paying legal fees for cases that drag on for many months or years.

"The idea is we can provide people with the opportunity of resolving their disputes even if they've been in the system for a long time," he said.

Sometimes individuals needed a "dignified way" to resolve disputes that had been entrenched, and the "gravitas" of a judge could help a case settle at mediation.

The chief judge recently mediated an $8 million dispute that had been in the system since 2003 and that had been set down for a 10-day hearing. He sat until 8pm to bring the parties together and the case settled the next day.

Read more












ICCA 2018

Australia was at the centre of international arbitration earlier this year in hosting the world's largest international arbitration conference – the **International Council for Commercial Arbitration (ICCA) Congress**. The conference was held in Sydney from 15-18 April 2018 and attended by over 900 delegates representing 60 countries. It was opened in spectacular fashion with a performance at the **Sydney Opera House** by the **Sydney Symphony Orchestra** followed by a cocktail reception. **CIArb Australia** in partnership with CIArb HQ was the proud sponsor of the Gala Dinner attended by delegates and VIPs from across Australia and around the world.

Caroline Kenny QC delivering the welcome address on behalf of CIArb Australia to a packed house at the ICCA Gala Dinner, ICC Sydney

CIArb Australia President's Welcome: Caroline Kenny QC

Your honours, distinguished guests, ladies and gentlemen, as President of CIArb Australia, I am delighted to welcome you to the ICCA Dinner. Let me just say from the outset, how honoured we are to support this magical evening; the highlight of an excellent congress.

Sponsoring such an event is part of our commitment to international arbitration.

As the world's oldest established arbitration association, CIArb remains unique in providing the gold standard in training and the globally recognised accreditation of arbitrators worldwide.

The Institute has come a long way since it was established in 1915 in London as a small association whose purpose was, as one of its founders, HC Emery, said "to raise the status of Arbitration to the dignity of a distinct and recognised position as one of the learned professions", to what is now a global network.

And it is thriving in the Asia Pacific especially with membership trending upwards and increase of our courses to meet the growing demand of accredited practitioners.

I would like to acknowledge the many CIArb representatives including directors, trustees, patrons, branch heads, councillors, management and members who have come from across Australia and around the world to support the congress.

Congratulations to **ICCA** and hosts, **ACICA** and **AMINZ** and conference organisers for producing a stellar event for which we are proud to sponsor.

Enjoy the evening.

Left to Right: Jeffrey Elkinson (Chair, CIArb Bermuda), Francis Xavier SC PBM (Chair, CIArb Singapore), Axel Reeg (Trustee, CIArb Europe), Anthony Houghton SC (Trustee, East Asia), Thayananthan Baskaran (Chair, CIArb Malaysia), James Bridgeman QC (Global President, CIArb), Anthony Abrahams (Director General, CIArb), Caroline Kenny QC (President, CIArb Australia), Prof Doug Jones AO RFD (CIArb Companion), John Wakefield (Trustee, CIArb Australasia), Camilla Godman (Director, CIArb Asia Pacific), Albert Monichino QC (Immediate Past President, CIArb Australia), Chalee Nai Kin (BDM, CIArb Asia Pacific) and Richard Farndale (Chair, CIArb Scotland)

Dinner Under The Southern Skies attracted over 900 delegates from around the world.

Lord Peter Goldsmith QC, **Prof Doug Jones AO**, **David Samuels** (Managing Director, Global Arbitration Review) and **Prof Janet Walker**

GAR-CIArb seat index launched in London

22 NOVEMBER, 2018
Tom Jones
Global Arbitration Review

Ever wished there was a 'hot take' on the pros and cons of different arbitral seats? Well, now there is. The GAR CIArb Seat Index rates seats against 10 principles that fuel a supportive arbitration climate. See how the first seven cities to be measured – London, Paris, Hong Kong, New York, Singapore and Zurich and Geneva – fare **here**. And discover the full story, below.

The **GAR-CIArb** seat index was officially launched at an event in London, on the 15 November.

The launch generously hosted by Reed Smith at its London office on 15 November, featured a panel discussion by CIArb's **Doug Jones**, **Lord Goldsmith QC** and **Janet Walker**.

The index aims to provide one-page summaries of the favourableness of individual arbitral seats assessed against a range of standard criteria.

In its first version it covers six frequently used and well-established jurisdictions for arbitration: Hong Kong, London, New York, Paris, Singapore and Switzerland (including Geneva and Zurich).

The summaries of those seats and concise lists of their "+ves [positives] and –ves [negatives]" can be found **here**.

At the launch event, Jones, Goldsmith and Walker took it in turn to explain the origins and aims of the project.

Walker – a Canadian arbitrator and academic at York University's Osgoode Hall Law School in Toronto – told delegates that the idea for the project could be traced back to CIArb's launch of the "London principles" in 2015, to mark the body's centenary. Unveiled at a conference in London, the principles aimed to distil the factors that are essential to an effective, efficient and "safe" seat of international arbitration.

Walker said members of the CIArb committee were anxious that the London principles should not be forgotten after the centenary celebrations concluded but should have a "lasting legacy". Hence the decision was made to measure individual seats' progress against those criteria and produce an index that would enable parties to choose a seat "with their eyes open", with GAR as a willing participant in the project.

Walker also explained the methodology of the project – stating that the summaries of the first six seats were produced in light of responses to a GAR survey in October 2017, with the information considered by an international "assessment panel" consisting of **Francísco Cossío** of González de Cossío Abogados in Mexico City, **Daniel Kalderimis** of Chapman Tripp in Wellington, **Sae Youn Kim** of Yulchon in Seoul, **Larry Schaner** of Schaner Dispute Resolution in Chicago, **Nathalie Voser** of Schellenberg Wittmer in Zurich and herself.

That panel produced confidential draft reports which were presented to an "oversight board" of senior members of the arbitration community, including **Yves Derains**, **Hilary Heilbron QC**, **Michael J Moser**, **Peter Rees QC**, **John Townsend**, and **Carita Wallgren-Lindholm**.

Once the input of the advisory board had been incorporated, the summaries were settled by Walker, Goldsmith and Jones and circulated to the entire group for any final suggestions.

In his remarks, Australian arbitrator Jones reflected on this year's Freshfields lecture – held in London the night before – in which arbitrator **Gary Born** warned that both commercial and investment arbitration face challenges and that the long "summer" of success arbitration has enjoyed may be coming to an end.

As the arbitration community looks to respond to these challenges, Jones said that increased transparency is critical, including as to the relative performance of seats.

But he said the public information available is often flawed and there is understandably "a massive amount of self-interested promotion by potential and existing seats ... saying how wonderful they are".

The new index aims to provide a "reality check" in the form of objective analysis, he said.

Jones went on to admit that the exercise is inherently controversial, as those whose incomes depend on the preservation and continued success of certain seats are naturally going to fight to protect their image.

He noted that it was apt that the seat index was being launched in London at a time when Brexit is posing challenges for the city's legal market. "The principles were not just designed to measure aspiring seats, but those that are well established and need to maintain their game and continuously improve," he said.

"My own feeling as an 'outsider' who is based here is that London may need to do more in the years ahead," Jones added (a view that has found its way into the index, which says that long-term "complacency" is a "bigger risk" for the seat than Brexit).

Jones also defended the decision to begin the project by considering just six, well-established seats, commenting that even that had been a "huge job to do properly". Starting with well-known seats established a solid "control group" even if it seemed to give undue emphasis to challenges encountered in the world's most often selected seats.

In response to complaints that other cities were not chosen, Jones emphasised that this is no reflection of their worth and said that the absence of Walker's native Canada and his own native Australia from the initial list shows, at the very least, that there was no self-interest at play.

There was also discussion of a plan, when "the right moment" comes, to add Moody's or Standard & Poor's-style ratings of the seats considered in the index – labelling them AAA, AA, A, BBB, BB, B, etc, depending on how desirable they are as a seat and how supportive they are of the international arbitration process and its outcomes. There will also be C and D rankings for seats that pose risks or are not recommended.

The idea has proved controversial, perhaps explaining why it has not been implemented from the outset. At a CIArb conference in Paris last year, one delegate from Mauritius suggested that a poor rating could sound "the death knell" for some developing seats by deterring users, preventing them from gaining crucial experience and resulting in a loss of political backing for their efforts.

At that conference (which also featured Walker and Goldsmith as speakers) it was stressed that the index would examine a range of factors enabling seats to "shine" in different ways and that if countries' offerings improved with time, so too would their rating. The possibility was also mooted of having an "emerging seat" label for jurisdictions that are improving fast.

There was also talk of the tricky "exercise of judgment" involved in rating a jurisdiction like the US, which falls short of the "principles" in possessing a century-old arbitration act but is arguably redeemed by an arbitration-friendly judiciary that has interpreted the act in a way that makes it fit-for-purpose.

And there was discussion of quirks of particular seats that are not necessarily good or bad, such as section 69 of England's 1996 Arbitration Act, which allows appeals on points of law in limited circumstances. That section tends to be viewed ambivalently – seen by some as a positive and by others as a threat to the finality of the arbitration award – and has only limited impact on London-seated arbitration as a result of its application being excluded by the rules of major arbitral institutions and often by the parties themselves. As a result its impact on London's rating would be questionable.

In contrast, an example raised of a measure that might have a significant impact on a seat's rating if not reversed was the United Arab Emirates' amendment to article 257 of its penal code permitting arbitrators to be imprisoned for bias. Dubai is among the next batch of seats to be covered by the index in 2019, along with Cairo, São Paulo, Kuala Lumpur, Stockholm and Vienna.

Speaking at last week's launch, Lord Goldsmith, who is head of European and Asian arbitration and litigation at Debevoise & Plimpton, explained the idea of the index is not to rank seats against one another but to "raise the standard of arbitration" worldwide by encouraging them all to up their game.

He admitted that there continues to be controversy over the planned "competitive" rating system and said views from the arbitration community on how to implement it would be helpful.

Following the launch **Ben Giaretta**, a partner at Mishcon de Reya in London, wrote a **short review** of the index on LinkedIn, saying that its style is "journalistic" with "attention-grabbing summaries" and there are "more...opinions", both positive and negative, than are normally to be found in assessments of arbitral seats.

This mix of description and opinion gives the index a "different feel", he said – concluding that it will be a "helpful" resource in selecting a seat even though further information will probably be needed as well.

GAR has also received reactions from lawyers and institutions in the jurisdictions covered by the index so far. Publisher David Samuels says that all feedback will be taken into account in future editions of the index and encourages those with constructive criticisms to enter them into the "comments" section following each online seat summary "to stimulate debate".

Dr Shane Monks (Queensland Bar and CIArb Australia Councillors), **Caroline Kenny QC**, **The Hon Justice Walter Sofronoff** (President, Queensland Court of Appeal) and **Frances Williams** (Corrs Chambers Westgarth and CIArb Australia Councillor)

2018 Brisbane CIArb Australia Business Lunch

When: Friday, 7 September 2018
Where: River Room, Customs House, Brisbane
Photos: Stu Riley

Due to the success in Melbourne, the Institute expanded its business events program by hosting the inaugural Brisbane Business lunch. Held at the historic **Customs House**, CIArb Australia President, **Caroline Kenny QC**, delivered the welcome address to a packed house. Qld State Convenor, **Dr Shane Monks** introduced Special Guest Speaker, **The Hon Justice Walter Sofronoff**, **President of the Queensland Court of Appeal** who spoke on arbitration and third party funding and the need to consider issues that arise out of the changing nature of legal practice and to recognise that, as always, the key to avoiding or resolving systemic issues is for legal practitioners to maintain the highest standards of ethical conduct. **Corrs Chambers Westgarth** partner, **Frances Williams** delivered the vote of thanks and sponsor's remarks on behalf of the firm. The sold out lunch attracted a diverse range of delegates including barristers and silks, academics, the judiciary and representatives from **Powerlink Queensland**, **PWC**, **DLA Piper**, **King & Wood Mallesons**, **Ashurst**, **Corrs Chambers Westgarth**, **McCullough Robertson**, **Clayton Utz**, **IMF Bentham**, **Clyde & Co**, **Shine**, **HopgoodGanim**, **Law In Order**, **CMC Asia Pacific**, **Holman Webb**, **Stanwell and The Courier Mail**, to name a few.

1. **Hamish Clift** (Queensland Bar) and **Mark Ambrose QC** (Queensland Bar)
2. **Fiona Austin** (Powerline Queensland) and **Catrina Willis** (Powerline Queensland)
3. Team King & Wood Mallesons: **Emma Costello**, **Lucinda Everson**, **Connor Stagg** and **Kirra Reading**
4. **Edmund Robinson** (Queensland Bar) and **Ken Barlow QC** (Queensland Bar)
5. **Oliver Collins** (King & Wood Mallesons), **Gian Chung** (Griffith University) and **Steve Lord** (PwC)
6. Team Ashurst: **Bradley McNamara**, **Emma Solomon** and **Lana Kelly**

1. **Melissa Yeo** (Ashurst), **Daniel Perry** (Level 27 Chambers), **Phil Ware** (Stanwell) and **Jeremy Chenoweth** (Ashurst)
2. **Jay Tseng** (HopgoodGanim Lawyers) and **Mark Eade** (Queensland Bar)
3. **Ashley Hill** (GRT Lawyers) and **James Green** (Queensland Bar)
4. **The Hon Justice Sarah Derrington** (President, Australian Law Reform Commission), **Dr Stephen Lee** (Queensland Bar and CIArb Australia Councillor), **Erika Williams** (McCullough Robertson) and **Richard Morgan** (Queensland Bar)
5. **Ian Miller** (Queensland Bar), **Sandy Thompson QC** (President, Queensland Bar), **The Hon Justice Walter Sofronoff** (President, Queensland Court of Appeal), **David Chesterman** (Queensland Bar), **Glen Newton QC** (Queensland Bar) and **JD Batch SC QC** (Queensland Bar)

The Hon Justice Walter Sofronoff, President, Queensland Court of Appeal delivers his address before a packed room.

Dr Vicky Priskich (Victorian Bar and CIArb Australia Councillor) delivered the vote of thanks; guest speaker, **Alan Oxley** and **Caroline Kenny QC** (CIArb Australia President) who delivered the welcome address and speaker introduction.

2018 Melbourne CIArb Australia Business Lunch

When: Friday, 10 August 2018
Where: Pavilion Room, RACV City Club, Melbourne
Photos: David Johns

We were delighted to host Alan Oxley, our guest speaker for 2018 Melbourne CIArb Australia Business Lunch. A former career diplomat with the **Australian Department of Foreign Affairs and Trade** with postings at the **United Nations in New York and Geneva**, Alan served as **Australia's Ambassador to the GATT** and **Chairman of the GATT Contracting Parties**, the predecessor to the **World Trade Organization**. One of the world's leading experts on globalisation and international trade, Alan is **Managing Director** of **ITS Global**. He spoke on **Opportunities for International Arbitration in the Asia Pacific**. The sold out lunch attracted sponsorship and support from the **Victorian Bar**, **CommBar** and the **Asian Australian Lawyers Association**. Delegates included members of the bar, judiciary, government, academia and representatives from **KordaMentha**, **ASIC**, **Norton Rose Fulbright**, **Herbert Smith Freehills**, **King & Wood Mallesons**, **Corrs Chambers Westgarth**, **Vannin Capital**, **Allens Linklaters**, **Epiq** and **CPB Contractors**.

ALAN OXLEY
MANAGING DIRECTOR, ITS GLOBAL
View Profile

Opportunities for International Arbitration in the Asia Pacific

The spate of international trade agreements negotiated since the mid 1990's is a measure of the internationalization of global trade and investment. During this period, Australia has set the record of the developed country with the longest period of continuous growth, global financial crises in the first decade of the 21st century notwithstanding.

It now rates as one of the most open economies in the world and has actively promoted open markets in the Asian Pacific region. It has one of the best legal systems in the Asian Pacific region. But it has not taken advantage of that and established Australia as a leading regional centre for arbitration. There is the Melbourne Commercial Arbitration and Mediation Centre, the Australian Dispute Centre in Sydney and the Perth Centre for Energy and Resources Arbitrations. They should project a unified image to the world.

Systems of arbitration to settle commercial disputes have a long, legal history. As the reach of modern international trade agreements has spread and increasingly extended to create rights to invest, the demand for arbitration to resolve disputes has also expanded.

Singapore has had the nous to establish a global arbitration centre to settle commercial disputes. It can naturally promote this as part of its global economic and financial function as a regional commercial hub and entrepot economy.

But Australia is in a much better position to provide world class arbitration over international disputes, particularly over compliance with the terms of international trade and investment agreements that have expanded significantly in the last two decades.

A key feature has been Australia's leadership in establishing free trade agreements with major trade and investment partners. International trade law (agreements in the GATT and then WTO) has built in systems for dispute settlement. However, expansion of the ambit of trade agreements to

include new issues not regulated by the WTO system has required some form of adjudication of disputes as well.

Most prominent has been addition to free trade agreements the regulation of trade in services and investment, both increasingly important platforms for promoting growth in national economies. To date disputes over compliance with the terms of these agreements have occurred in the US (mostly over compliance with the terms of NAFTA - the North American Free Trade Agreement - between the US, Canada and Mexico).

The more significant free trade agreements in the last 20 years have been negotiated in the Asian Pacific region and have been led by the US, Australia, Korea, New Zealand, Singapore, Mexico and Chile.

The NAFTA was the first agreement, followed by the Australia US FTA and other inter-regional Asia Pacific FTAs, including the Comprehensive and Progressive Trans Pacific Partnership Agreement

(CPTPP) (with Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam, the US having withdrawn).

> Most notable in most of these agreements has been inclusion of measures to liberalize and protect investment, as well as mechanisms to resolve disputes over compliance with these measures (between government parties and in some cases between government parties and private parties).

> Australia has established itself as a leader in promoting trade agreements in the Asian Pacific region. And clearly it is in a position to provide for commercial arbitration of regional trade and investment disputes.

There are other systems for adjudicating disagreements over compliance. Bilateral Investment Treaties (BIs) have been common place. Historically they were tools to provide external adjudication of compliance with investment agreements between businesses from industrialized economies investing in developing economies.

The US still uses them to establish investment agreements with communist economies. It required one with Vietnam before negotiating a free trade agreement. Negotiation of a BIT by the US with China is underway.

The US has established requirements for Investor State Dispute Settlement (ISDS) provisions in free trade agreements. ISDS gives rights to investors to challenge compliance by states with the investment provisions of the agreement. Traditionally dispute settlement is limited to actions between government parties to the treaty and not to private parties receiving the benefits of the treaty.

ISDS was included in the North American Free Trade Agreement (NAFTA) completed in 1994 and has subsequently become part of modern free trade agreements which provide for investment protection. Australia has accepted inclusion or ISDS provisions in most of its FTAs (e.g.; Korea, Australia/New Zealand/ASEAN FTA, China) but not all (e.g.: there are no ISDS provisions in agreements with the US and Japan). ISDS measures are included in the CPTPP agreement, though with expanded provisions and safeguards addressing process as well as the scope of the right to regulate for public policy goals.

Inclusion of ISDS in free trade agreements has however recently come out of favour. Opposition to including investment in the Canada EU FTA (by Belgium) culminated in a decision by the European Court of Justice ruling that the EU Commission did not have the legal authority to regulate protection of foreign investment. Going forward, investment protection provisions (including ISDS) will not form part of European Free Trade Agreements. This approach has already been adopted in the EU/ Japan FTA (recently signed but not yet in force). As well the Trump Administration does not favour ISDS measures. The current US Special Trade Representative (effectively the US Trade Minister) considers them unnecessary although a number of major US businesses disagree.

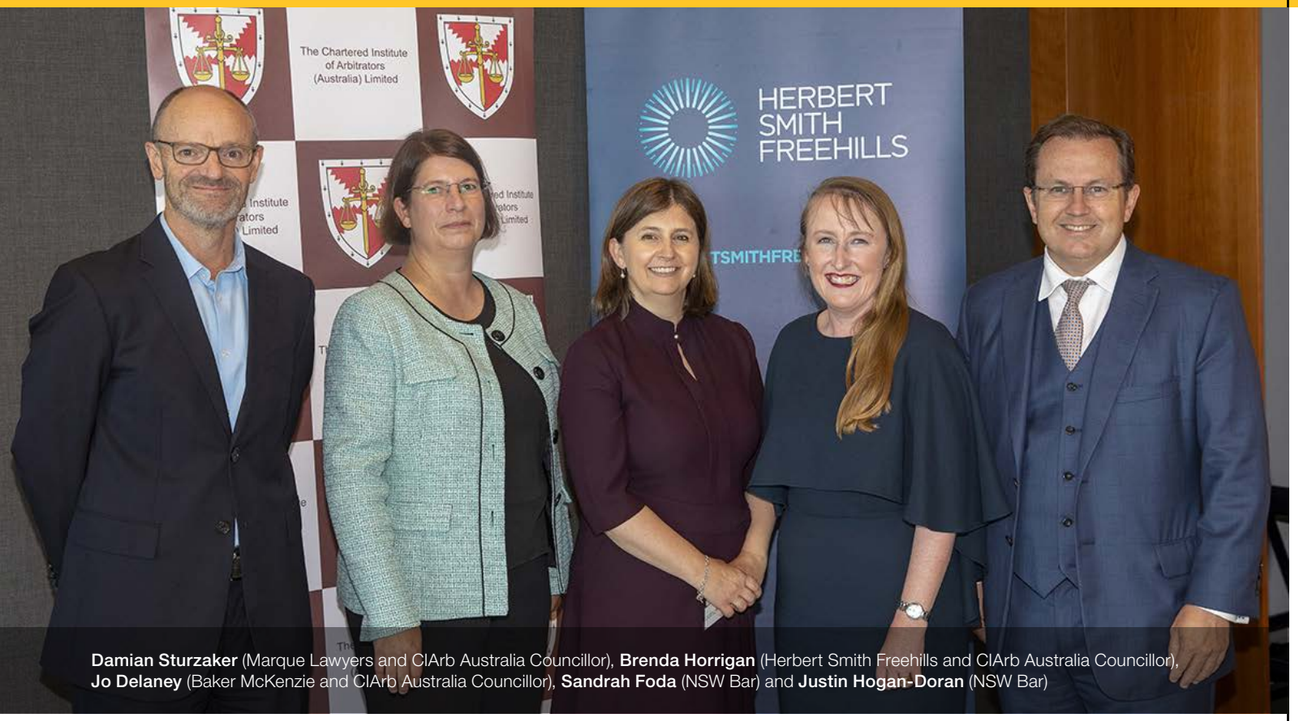
China has promoted the Belt and Road Initiative. It foreshadows immense construction of transport infrastructure from China across Central Asia to Russia, to Central Europe, into Southern Asia (Pakistan and Sri Lanka) and recently apparently into the South Pacific. China has indicated that it will set up a centre to deal exclusively with Belt and Road arbitrations. This would be an innovation. China has indicated some protection for businesses established in China in recent free trade agreements.

European analysts assess the funding China has available to support the Belt and Road construction is quite small. (A related factor is the high level of debt in China. Analysts contend that at some point Beijing will have to address this. Some economists assess within two to three years China will be confronted with almost unmanageable debt).

There is a strong case for establishing Melbourne as a centre for international arbitration given the steady expansion of trade and investment among Asian Pacific economies and the proliferation of trade agreements which now regulate this.

1. **The Hon Martin Pakula** (Attorney General of Victoria) and **Caroline Kenny QC**
2. **Phillip Greenham** (JBM Advisory Pty Ltd) and **The Hon Justice John Digby** (Supreme Court of Victoria).
3. Victorian Bar: **Amanda Utt and Rachel Chrapot**
4. **The Hon Associate Justice Rod Randall** (Supreme Court of Victoria), **The Hon Justice Ross Robson** (Supreme Court of Victorian) and **The Hon Justice Tony Pagone** (Federal Court of Victoria)
5. **Dr Donald Charrett** (Victorian Bar) and **Michael Sweeney** (Victorian Bar)
6. **Bronwyn Lincoln** (Corrs Chambers Westgarth) and **Dr Michael Pryles AO PBM**
7. **Adam Rollnik** (Victorian Bar) and **Tuanh Nguyen** (National AALA President)
8. **Alan Yang** (South Pacifique Pty Ltd), **William Lye OAM** (National AALA Vice President) **and Zubair Mian** (VIC AALA President)

1. **Campbell Jasky** (PwC), **Mark van den Berg** (Quantum Experts), **Leighton Moon** (HWL Ebsworth Lawyers) and **Ben Davidson** (Corrs Chambers Westgarth)
2. **Caroline Swartz-Zern** (Allens Linklaters), **Jonathon DeBoos** (CPB Contractors) and **Monique Carroll** (King & Wood Mallesons)
3. **Kieran Hickie** (Victorian Bar) and **Owain Stone** (KordaMentha)
4. **Joel Harris** (Victorian Bar) and **Raini Zambelli** (Victorian Bar)
5. **Andrew Blogg** (Aitken Partners), **Judge Joshua Wilson** (Federal Circuit Court) and **The Hon Justice Ross Robson** (Supreme Court of Victoria)
6. **Dado Hrustanpasic** (Corrs Chambers Westgarth), **Chad Catterwell** (Herbert Smith Freehills) and **Lee Carroll** (Corrs Chambers Westgarth)
7. **Georgina Thomas** (ASIC), **Caroline Kenny QC** and **Kate Houghton** (ASIC)
8. **Bronwyn Lincoln** (Corrs Chambers Westgarth) and **John Arthur** (Victorian Bar and CIArb Australia Councillor)



Damian Sturzaker (Marque Lawyers and CIArb Australia Councillor), **Brenda Horrigan** (Herbert Smith Freehills and CIArb Australia Councillor), **Jo Delaney** (Baker McKenzie and CIArb Australia Councillor), **Sandrah Foda** (NSW Bar) and **Justin Hogan-Doran** (NSW Bar)

To Arbitrate or Litigate, that is the Question

When: Tuesday, 13 November 2018
Where: Herbert Smith Freehills, Sydney
Photos: Quentin Jones

On 13 November a packed house witnessed an entertaining and informative debate of Shakespearean proportions; indeed of a Danish nature ...

"whether 'tis nobler in the mind to suffer the slings and arrows of outrageous fortune, or to take arms against a sea of troubles, ..." **Motion to Debate**: "To arbitrate or litigate, that is the question" **Moderator: Jo Delaney**, Baker McKenzie **Debaters**: **For Arbitration**: **Brenda Horrigan**, Herbert Smith Freehills and **Damian Sturzaker**, Marque Lawyers **For Litigation**: **Sandrah Foda**, 10 St James Chambers and J**ustin Hogan-Doran**, 7 Wentworth Selborne Chambers. Sponsored and hosted by **Herbert Smith Freehills**, the event showcased the advocating skills of experienced arbitrators and litigators. Who won? All will be revealed in following report.

ANNE HOFFMAN
SENIOR ASSOCIATE
HERBERT SMITH FREEHILLS
View Profile

MADELINE WINTERBOTTOM
GRADUATE
HERBERT SMITH FREEHILLS
View Profile

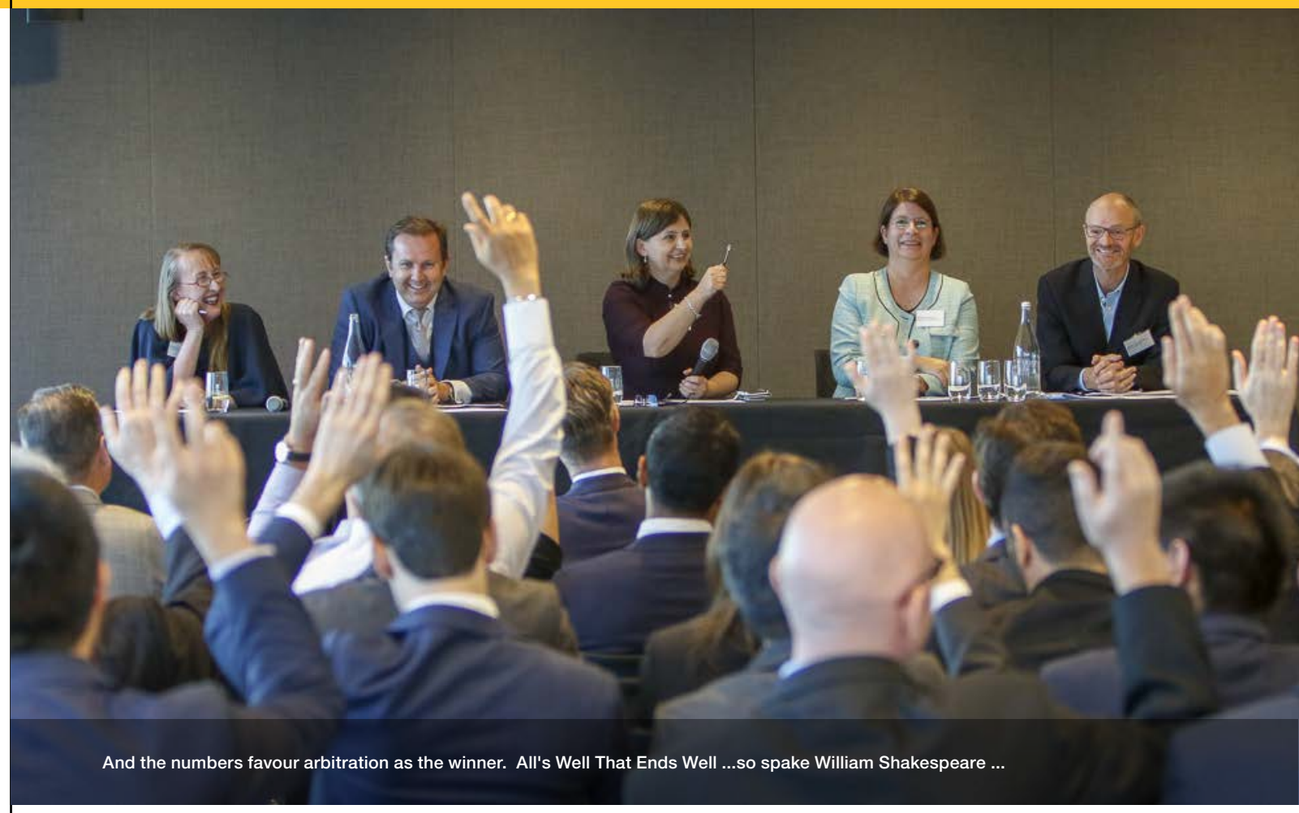
To Arbitrate or Litigate, that is the Question

> Whether 'tis nobler in the mind to suffer the slings and arrows of outrageous jury awards, Or to take arms against this sea of litigation, and by opposing, end the court's involvement.
>
> - William Shakespeare

On Tuesday, 13 November, Herbert Smith Freehills (HSF) hosted a debate in collaboration with the Australian branch of the Chartered Institute of Arbitrators (CIArb) to discuss the motion "To arbitrate or litigate, that is the question". The impressive panel consisted of **Jo Delaney** of Baker & McKenzie as moderator; **Brenda Horrigan** of Herbert Smith Freehills and **Damian Sturzaker** of Marque Lawyers arguing for arbitration; and **Sandrah Foda** from 10 St James Chambers and **Justin Hogan-Doran** from 7 Wentworth Selborne Chambers arguing for litigation.

The debate spanned three topics of contention in relation to cross-border disputes. The first topic, enforcement, concerned the portability of arbitral awards and court judgments. The arbitration team pointed to the power of the 1958 New York Convention, which allows parties to seize assets of another party in any of the 159 countries who are a signatory. They argued that the portability of a litigation judgment is limited, and that parties are often disadvantaged if the assets capable of satisfying the judgement are outside of the jurisdiction in which the judgment is rendered. The litigation team countered by arguing that this portrayal of easily enforceable awards is idealistic; in reality, in their view, award enforcement is often fraught with difficulty as challenges can significantly delay the process. Team litigate extolled the influence of globalisation and the unifying power of the United Nations in encouraging courts from jurisdictions around the world to increasingly recognise and enforce foreign judgments.

The second topic concerned the time and cost issues associated with arbitration compared to litigation. Team arbitrate sought to emphasise that arbitration is a creature of contract, and its efficiency is only limited by the creativity of clients and lawyers in their construction of arbitration clauses. Team litigate countered by arguing that the costs associated with litigation have significantly reduced in modern times owing to the emergence of a case management philosophy in courts to handle matters in a cheap, quick and just manner and only focus on the real issues in dispute. In their view, these procedural avenues combined with the fact that litigating parties do not have to pay a judge whereas arbitrating parties must often pay one or three



And the numbers favour arbitration as the winner. All's Well That Ends Well ...so spake William Shakespeare ...

arbitrators, means that the cost divide between the two forms of dispute resolution has narrowed.

The final topic debated by the panel concerned the availability of the appeals process in litigation versus arbitration in which an award rendered is generally incapable of review by a court on the merits. Team litigate emphasised the importance of the appeals function in ensuring that a decision is legally correct, and stressed that appeals must be sufficiently meritorious for leave to be granted. Team arbitrate responded that clients ultimately want an outcome, rather than a clear, judicious case that contributes to the development of the law. They also pointed to certain arbitral institutions who have the power to scrutinise awards to ensure the arguments of parties are addressed appropriately, as well as to arbitrators' own desire to protect their reputations and the sanctity of the process.

> The debate ended with questions and comments from the audience, which turned into a lively discussion amongst the panellists about further merits of both forms of dispute resolution. An audience vote in favour of team arbitrate decided the debate, though the laudable arguments of both sides left the audience with a lot to consider.

Robert Williams (Hanson Chambers), **Andrew Robertson** (Piper Alderman), **Julia Dreosti** (Lipman Karas) and **Ian Nosworthy** (Cowell Clarke)

Dispute Resolution Clauses – Ensuring Enforceability and Utility

When: Wednesday, 14 November 2018
Where: The Law Society of South Australia, Adelaide
Photos: Tony Lewis

Contracts across all industry sectors often include cascading dispute resolution clauses that escalate disputes from negotiations to formal dispute resolution by arbitration or litigation. This was the theme addressed by CIArb Fellows: **Julia Dreosti**, Lipman Karas; **Andrew Robertson**, Piper Alderman and **Robert William**s, Hanson Chambers as a seminar chaired by **Ian Nosworthy**, Cowell Clarke.

Complex is not always best, as the panel explored the traps and tricks of these types of dispute resolution clauses that practitioners, including transactional lawyers, need to bear in mind. The seminar addressed potential enforceability issues, including 'agreements to agree', negotiations in 'good faith', and interdependence of dispute steps. Key considerations and essentials for the processes of mediation and arbitration, as common features of dispute processes, were also discussed. In addition, the seminar addressed some of the practical considerations that parties and their advisors should bear in mind in tailoring their dispute resolution clause to ensure that it usefully operates as its name suggests dispute resolution clauses usefully operate as their name suggests to 'resolve' disputes

Chartered Institute of Arbitrators **CIArb** Australia

East Asia Branch **CIArb**

Singapore Branch **CIArb**

CIArb evolving to resolve 100 Years

Following the success in **Singapore (2016)** and **Hong Kong (2017)**, **Australia** hosted the **2018 CIArb Asia Pacific Diploma in International Arbitration** as part of the joint venture between the three **branches**. Launched in 2016, the JV is aimed at meeting the increasing demands for accredited arbitrators and arbitration practitioners to resolve cross border disputes in the Asia Pacific.

Held for the first time in **Perth, Western Australia**, the 2018 course was taught by a distinguished faculty headed by course directors, **Caroline Kenny QC** (President, CIArb Australia) and **Mary Thomson** (Chair, CIArb East Asia). The course venue was **Curtin Law School**, a beautiful heritage building located in the Central Business District. The Social Program included a welcome reception hosted by **Herbert Smith Freehills** and course dinner, sponsored by **Jones Day**, which featured the **Hon Christian Porter, Attorney General of Australia**, as the guest speaker.

Sponsors

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Media Partnerships

Faculty

Co-Course Directors

Caroline Kenny QC
President, CIArb Australia

Mary Thomson
Chair, CIArb East Asia

Speakers

John Arthur
Australia

Paul Barrett
Hong Kong

Andrew Battison
Singapore

Simon Bellas
Australia

Abhinav Bhushan
Singapore

Chou Sean Yu
Singapore

Beth Cubitt
Australia

Simon Davis
Australia

Glenn Haley
Hong Kong

Paul Hayes QC
Australia

James Healy
Australia

Dr Michael Hwang SC
Singapore

David Kreider
New Zealand

Dr Stephen Lee
Australia

Richard Leung
Hong Kong

Dr Samuel Luttrell
Australia

Kristian Maley
Australia

Albert Monichino QC
Australia

Kevin Nash
Singapore

Ben Olbourne
Singapore

Dr Vicky Priskich
Australia

Prof Colin Roberts
Australia

Paul Sandosham
Singapore

Gordon Smith
Australia

Richard Tan
Singapore

Dr Christopher To
Hong Kong

Francis Xavier SC PBM
Singapore

Candidates of 2018

David Baldry
Australia

Bryn Bender
Australia

Jocelyn Buenafe
Philippines

Justin Carter
Australia

Wilson Chan
Australia

Shun Cheng
Australia

Ashleigh De La Rosa
Australia

The Hon John Gilmour QC
Australia

Angelina Gomez
Australia

Frederick Hawke
Australia

The Hon Robert Hulme QC
Australia

Sean Mahony
Australia

Tatsuhiko Makino
Singapore

Sean Marriott
Australia

Mihael McCoy
Australia

Xiaolin Qiu
Australia

Dr Pat Saraceni
Australia

Abhishek Srinivasan
India

Rebecca Walker
Australia

Xingzhou Yu
Australia

Course Assistant

Chalee Nai Kin

JUSTIN CARTER
BARRISTER, AUSTRALIA
View Profile

CIArb Asia Pacific Diploma Course - A Student's Perspective

In 2018, the Australia, East Asia and Singapore branches of the Chartered Institute of Arbitrators hosted the Diploma in International Commercial Arbitration course in Western Australia. This was the first for time it was held in Perth. The course attracted candidates from Australia, India, Philippines, and Singapore. The attendees spanned all levels of seniority, with some having extensive experience in international commercial arbitration and others new to the discipline, including professional non-lawyers. Among them were two eminent retired Australian jurists: **The Hon Robert Hulme QC** of the Supreme Court of New South Wales, and **The Hon John Gilmour QC** of the Federal Court of Australia.

The nine days of lectures were both detailed and informative, and exhaustively covered the process of international commercial arbitration both in general, and in specific contexts, such as construction, maritime, and sports arbitration. The expert faculty, from around the world, delivered the carefully structured course content with the kind of practical insight that many decades of experience provides. There was a worthwhile balance of practitioners who focus on tribunal membership and advocate roles, and who could offer distinct perspectives on practices and developments in the hearing and determination of disputes. Given the increasing prominence of arbitral institutions in commercial arbitration, discussion panels presented by representatives of the secretariats of some of the leading bodies for the Asia Pacific region were especially valuable.

The coursework included both large group lectures and seminars, as well as small group tutorial-style sessions. The combination of teaching methods ensured that candidates were able to apply the concepts and principles discussed in the lectures in the context of hypothetical scenarios, which permitted a situation-specific interrogation of those ideas in a real-world environment, aided and guided by expert instructors. Although the focus of the course

Co-Course Director, **Caroline Kenny QC** presents certificate to **Justin Carter** who achieved the highest number of marks in the 2019 Diploma course

was on the UNCITRAL Model Law and its rules, much attention was paid to the nuance afforded by the different institutional rules, especially in the Asia Pacific region.

Our time in Perth was not, however, all work. The course included a number of organised social events, including regular lunches and celebratory dinners, which permitted candidates to forge professional relationships and enduring friendships with faculty and fellow attendees. In particular, the course's final dinner, was addressed by The Hon Christian Porter MP, Attorney-General for the Commonwealth of Australia, who emphasised the Australian Government's ongoing commitment to the arbitration profession in the country. It was a dinner well-attended by Institute members, lawyers, judges, politicians, and other professionals.

Following the time in Perth, candidates were preparing and studying to complete a written examination on practice and procedure in international commercial arbitration. A partially open-book examination, in which students were permitted to consult four volumes of rules and regulations they had used throughout the course, tested the candidates' knowledge of practice and procedure with both essay and hypothetical questions. It was, as it ought to be, a rigorous experience.

Hosted by **Caroline Kenny QC** of the Victorian Bar, President of the Chartered Institute of Arbitrators (Australia), and **Mary Thomson** of the Hong Kong Bar, Chairperson of the Chartered Institute of Arbitrators (East Asia), candidates were armed with the knowledge and skills to excel as practitioners in the field of international commercial arbitration, and primed to complete the further module in award writing. The course is a compelling and engaging introduction to (or, for those more experienced in international commercial arbitration, enhancement of) the complex and dynamic rules and principles at play in the field.

Tutorials and Certificate Presentation

Tutorials and Certificate Presentation

L- R Back Row: James Healy (Vice President, CIArb Australia), The Hon Christian Porter (Australian Attorney General of Australia) Caroline Kenny QC (President, CIArb Australia), The Hon Mathias Cormann (Finance Minister of Australia), Simon Bellas (Partner-in-Charge: Perth, Jones Day,) Front Row: Mary Thomson (Chair, CIArb East Asia) and Francis Xavier SC PBM (Partner, Rajah & Tann Asia, Singapore).

CIArb Asia Pacific Diploma Course Dinner

When: **Friday, 3 August 2018**
Where: **The Western Australian Club, Perth**
Photos: **Trevor Collens**

Sponsored by global law firm, **Jones Day**, the **CIArb Asia Pacific Diploma Course Dinner** was held at the exclusive, **The Western Australian Club**. In addition to international faculty and candidates from the course, the dinner attracted distinguished guests including members of the Australian government, the judiciary (Federal, Supreme and Federal Circuit), heads of global and local institutes, counsel and senior partners of major firms. The Guest Speaker was the **Hon Christian Porter, MP, Attorney General of Australia** who delivered a thoughtful and entertaining address which included the proposition that the Magna Carta's legacy includes arbitration. CIArb Australia President and Vice President, respectively, **Caroline Kenny QC** and **James Healy** delivered the welcome remarks and speaker introduction with **Simon Bellas**, Partner, Jones Day delivering the vote of thanks. A very enjoyable evening in celebrating another successful diploma course.

1. **Elizabeth Bateman** (Victorian Bar) and **George Varma** (Pinsent Masons)
2. **Adrienne Parker** (Pinsent Masons)
3. **His Hon Judge Josh Wilson** (Federal Circuit Court of Australia) and **The Hon Justice Katrina Banks-Smith** (Federal Court of Australia)
4. **Nathan Landis** (IMF Bentham Ltd) and **Tim Hammond** (Francis Burt Chambers)
5. **The Hon Robert Hulme SC** (NSW Bar), **Dr Pat Saraceni** (Clifford Chance) and **Simon Bellas** (Jones Day)
6. **Beth Cubitt** (Clyde & Co), **Mark Dempsey SC** (NSW Bar), **Tom Webb** (Clyde & Co) and **Glen Warwick** (Clyde & Co)

1. **Bryn Bender** (BHP), **Justin Carter** (Qld Bar), **Jocelyn Buenafe** and **Prof Colin Roberts** (CIArb Australia Councillor)
2. **Peter Le** (Asian Australian Lawyers Association), **John Arthur** (CIArb Australia Councillor), **Deborah Tomkinson** (ACICA) and **Sue Kee**
3. **Simon Davis** (CIArb Australia Councillor), **Wilson Chan** (NSW Bar) and **George Varma** (Pinsent Masons).
4. **Hayley Cormann** (President, WA Law Society) and **The Hon John Gilmour QC** (WA Bar).
5. **John Arthur** (CIArb Australia Councillor) and **Sean Mahony** (Chevron)
6. **Kanaga Dharmananda SC** (PCERA).



















Pictured (L-R): Chartered Institute of Arbitrators Australia president Caroline Kenny QC, WA Chief Justice Wayne Martin AC, Western Australia Premier Mark McGowan and Ian Nosworthy from the Law Council of Australia.

Aus must project 'single arbitral face to the world'

9 JANUARY 2018
Melissa Coade
Lawyers Weekly

WA's top judge has called for Australia's states and territories to come together to promote the nation as an arbitral seat to the world.

Wayne Martin AC, the Chief Justice of Western Australia, recently said that for Australia to put its best foot forward in the arbitration world, it was essential "parochial rivalries" between cities be put aside.

"Invidious comparisons are made between the paucity of international commercial arbitration in Australian seats, as compared to the flourishing arbitration scenes in other better recognised seats, both in our region and further afield," CJ Martin said.

The Chief Justice told an audience in Perth that Australia faced a unique challenge, being competition between its cities and the legal professions within those cities as a preferred place to conduct arbitration. He suggested that this was one of the factors that saw Australia punching below its weight on the international arbitration stage.

He went on to observe that Australian lawyers were over-represented in other major arbitration seats abroad, as both counsel and arbitrators. Given the talent and number of local experts, he said that that objective of advancing Australia's standing within arbitration circles should be to further develop a more unified local arbitral profession.

"During a recent visit to London and Paris, I was struck by the number of Australian practitioners working at all levels in the field of arbitration, from the junior to the most senior, and I am sure that the same holds true of other significant arbitral centres like Singapore, Hong Kong, Beijing and so on," CJ Martin said.

The Chief Justice made his remarks at the opening of the 5th International Arbitration Conference last November.

The Hon Chief Justice Wayne Martin AC delivering the Opening Address at the 5th International Arbitration Conference, Perth 2017

His praise for recent moves to restructure and rename a series of Australian arbitration events into a national program to occur across different cities as 'Australian Arbitration Week' also provided a platform for the Chief Justice to discuss the contributions of Western Australia.

"It was [recently] announced that Perth has been chosen as the venue to host the 2018 **Chartered Institute of Arbitrators Diploma in International Commercial Arbitration** – a program which is provided as a joint venture between the Singapore, East Asian and Australian branches of the Chartered Institute.

"The Perth program will follow similar successful programs in Singapore in 2016 and in Hong Kong last month, and can be expected to attract participants from all around the globe," the Chief Justice added.

"The choice of Perth as the venue for next year's program is another very significant step forward in the development and promotion of a unified Australian arbitration community."

2018 Introduction to International Arbitration

When: Saturday, 18 August 2018
Where: Queensland Law Society House, Brisbane
Photos: Stuart Riley

The Introduction to International Arbitration course returned to Brisbane since it was launched there in 2015. The course is designed to provide an introduction of the main principles of international arbitration, and to allow candidates to successfully complete the course (including the post-course assignment) to become members of CIArb at the Associate grade. Along with a faculty of expert in the field, guest speaker, The Hon Justice Andrew Greenwood, Federal Court of Australia opened the proceedings with an address themed on the relationship between international dispute resolution by arbitration and its intersection with superior court judicial determination.

The Relationship between International Dispute Resolution by Arbitration and its Intersection with Superior Court Judicial Determination: **The Hon Justice Andrew Greenwood, Federal Court of Australia**

Faculty

Dr Stephen Lee
CIArb Australia Vice President, Course Director

The Hon Justice Andrew Greenwood
Federal Court of Australia

Erika Williams
McCullough Robertson

Steven Evans
CMC Asia Pacific

Richard Morgan
Jeddart Chambers

Shane Bosma
Mineralogy Pty Ltd

Jeremie Witt
HWL Ebsworth

Candidates

Jennika Anthony-Shaw
Victorian Bar
Melbourne

Jack Donnelly
University of Queensland
Brisbane

Nick Fidler
University of Queensland
Brisbane

Amy Hando
Victorian Bar
Melbourne

John Hennessy
10 Wentworth Chambers
Sydney

Katelyn Lamont
University of Queensland
Brisbane

Helen Mallon
Prime Build (VIC) Pty Ltd
Melbourne

Michelle Markham
Bond University
Brisbane

Peter Markham
Queensland Government
Brisbane

Emily McClelland
The University of Queensland
Brisbane

Justin McLernon
IMF Bentham Ltd
Perth

William Morgan
Morgan Mac Lawyers
Brisbane

Jane Muir
Ground Floor Wentworth Chambers
Sydney










JAGPREET SANDHU
INTERNATIONAL ARBITRATION INTERN, WILMERHALE, LONDON
View Profile

A Student's Pathway

CIArb Australia has been remarkable from its inception. Over the past years, CIArb has continuously demonstrated its ability to meet and exceed the expectations of those with an interest for a detailed and practical education in ADR. The courses offered by CIArb are excellent, bar none. If you're considering a career in ADR or seeking to learn more about the field on a first-hand basis from Australia's finest practitioners, then CIArb will undoubtedly be the organisation for you.

I've had the rare opportunity to work with CIArb Australia as the organisation's Education Course Assistant over the past year. I'm glad to have experienced working with one of the world's leading arbitration bodies. It has been a hugely beneficial experience for my professional career and one I'm deeply thankful for, especially to **CIArb Australia CEO**, **Gianna Totaro** and **Albert Monichino QC**.

My experience with the organisation runs deep, having been involved with CIArb Australia since 2016. I had just undertaken a series of international arbitration internships abroad with **UNCITRAL** and **HKIAC**, and had been considering how best to get involved in the international arbitration scene in Australia upon my return. Thankfully, my interest drew me to the leading arbitration essay competition in Australia – the annual CIArb Australia Essay Competition – and I was fortunate enough to submit a **winning essay that year**. This would eventually lead into other opportunities. In the following years, I worked for Albert Monichino QC as a Research Assistant, which inevitably and gratefully led to my role as the current Education Assistant. Even now, as I sit as a legal intern with WilmerHale's international arbitration practice in London and prepare for my upcoming graduate career with **Clifford Chance** in **Perth** next year, I recall my experience with CIArb Australia to be nothing short of a first-class ticket to the world of international arbitration.

As Education Course Assistant, I've had the great experience of working under Ms Totaro and Mr Monichino's direct supervision to ensure the courses are presented as best as they can be. I've witnessed first-hand the level of detail that is put into the courses. No case goes forgotten and no useful reading goes unread! It's all taken care of first hand under the watchful eyes of the course directors, whom personally tailor the materials to be provided to the candidates to ensure that they are as up-to-date, relevant and useful as they can be in bolstering the candidates' collective and individual knowledge.

The role of Education Course Assistant is an interactive one with. I've constantly been in touch with candidates over the delivery of their subscribed courses and have been able to form strong, professional relationships with a number of practitioners across the legal industry. The candidate pool typically draws former judges, current law firm partners, solicitors and barristers from across Australia and overseas. With experience in working in the delivery of the **Award Writing** and the **Accelerated Route Towards Fellowship** courses, I can say with confidence that the diversity and experience amongst the candidates cannot be understated and makes for interesting learning.

2018 Award Writing

When: 23 March and 16 June 2018
Where: Melbourne Commercial Arbitration and Mediation Centre and ADC

The **Award Writing Course** is designed to provide candidates with a solid understanding of the fundamentals of drafting an enforceable international arbitration award that will not be subject to challenge. Candidates are subject to a take home assignment in the early stages of the course, followed by a 4 ½ hour written exam. Both assessments are particularly renowned for being true knowledge testers – there's no easy way out!

Candidates in the course were provided with a series of materials for their study. These materials included arbitration rules, relevant legislation, cases, articles, book excerpts, and guidelines on drafting arbitral awards. With the benefit of having experience in organising the materials, I can confirm that they truly are precise, informative, and numerous in collection!

The course structure is unique in that it provides for two tutorials, each to be held some months apart. This year's tutorials took place in Melbourne in March and in Sydney in June. The Melbourne tutorials this year were conducted by Course Director **Albert Monichino QC** and fellow tutors **Dr Vicky Priskich** and **Paul Hayes QC** at the **Melbourne Commercial Arbitration** and **Mediation Centre**. The Sydney tutorial was similarly conducted by Course Director Albert Monichino QC, however, with the additional assistance of **Malcolm Holmes QC** as fellow tutor. Both tutorials involved roundtable, Socratic style discussions between the candidates and the tutors on various points of international arbitration practice.

The candidates this year were a diverse and exciting group. It is to have witnessed the practical education process for what are sure to be some outstandingly renowned arbitrators in the future!

2018 Candidates

Ian Davidson SC
Eight Selborne, **Sydney**

James Doyle
Doyles Construction Lawyers, **Sydney**

Michael Gronow SC
Victorian Bar, **Melbourne**

Dr Andrew Hanak
Victorian Bar, **Melbourne**

Kristina Herenda
Herenda Attorneys-at-law, **Zurich**

Nick Hopkins QC
Victorian Bar, **Melbourne**

George Lam
Gilt Chambers, **Hong Kong**

Philip Loots
Loots & Charrett, **Perth**

David Lyons
Workplace Solutions, **Brisbane**

Dr Shane Monks
Level Twenty Seven Chambers, **Brisbane**

Dr Pat Saraceni
Clifford Chance, **Perth**

San-Joe Tan
Jones Day, **Sydney**

Jeremy Twigg QC
Victorian Bar, **Melbourne**

Erika Williams
McCullough Robertson, **Brisbane**

2018 Accelerated Route Towards Fellowship

When: 23 and 24 June 2018
Where: Melbourne Commercial Arbitration and Mediation Centre

The **Accelerated Route Towards Fellowship** course is often identified as the starting point for a bright future in arbitration. As a course targeted at practicing lawyers with a minimum of 10 years' experience, the candidates that present are often well versed in the field of international arbitration.

This year's course was held at the **Melbourne Commercial Arbitration and Mediation Centre** Unlike the Award Writing course, candidates did not have the benefit of having their two tutorials months apart! The course was delivered over two days with a total of five assessments being put to the candidates. Similar to the Award Writing, the ARF course tutorials saw the use of roundtable discussions with a Socratic method employed.

I observed candidates performing extremely well under the supervision of the tutors at the course – Course Director **Albert Monichino QC** and tutors **Dr Vicky Priskich** and **John Arthur**. The calibre of discussion was high and the produced work was certainly impressive. I have no doubt that the candidates will proceed to excel in the Award Writing Course in 2019 and accordingly in the field of international arbitration, with their soon-to-be newfound certifications.

2018 Candidates

The Hon John Byrne AO RFD
Independent, Brisbane

Angelina Gomez
Clifford Chance, Perth

John Gurr
Victorian Bar, Melbourne

David Hannigan
Putranto Alliance, Jakarta

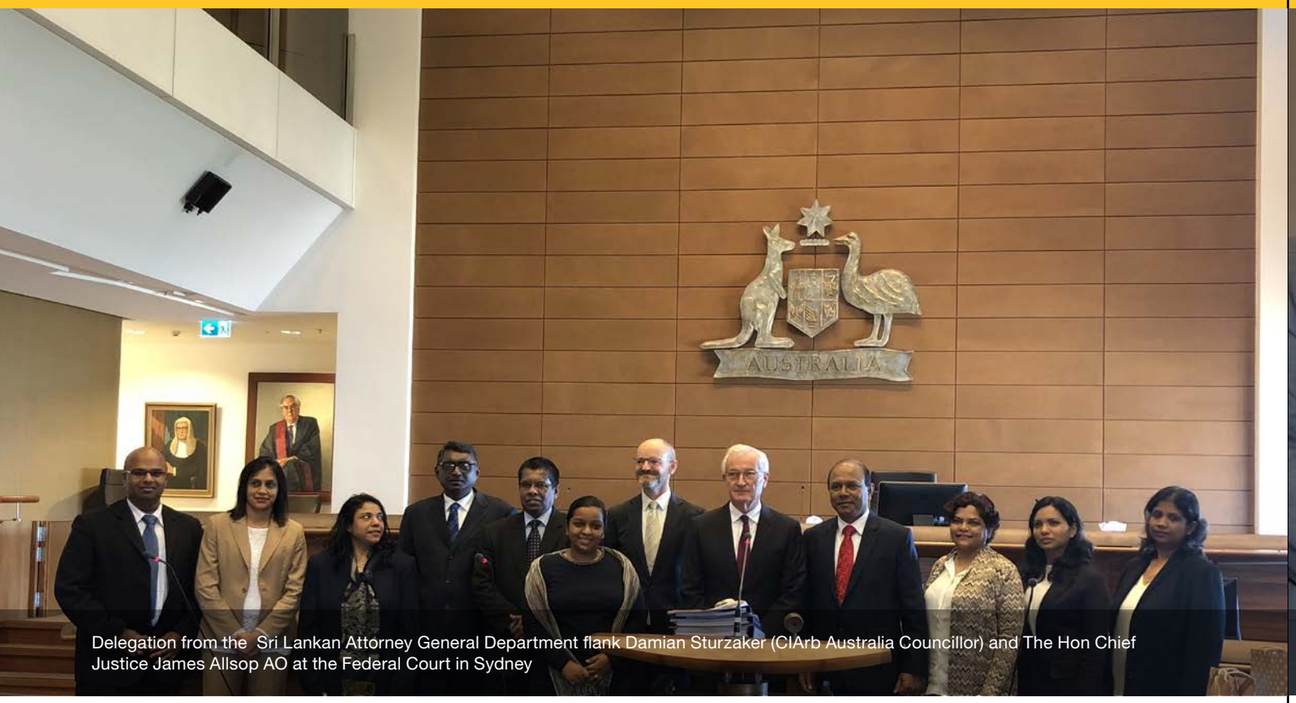
Laura Keily
Victorian Bar, Melbourne

Nathan Landis
IMF Bentham Ltd, Perth

Eugenia Levine
Victorian Bar, Melbourne

Jonathon Moore QC
Victorian Bar, Melbourne

Paul Santamaria QC
Victorian Bar, Melbourne



Delegation from the Sri Lankan Attorney General Department flank Damian Sturzaker (CIArb Australia Councillor) and The Hon Chief Justice James Allsop AO at the Federal Court in Sydney

CIArb Australia Welcomes Sri Lankan Delegation

In collaboration with the University of New South Wales and Australia Awards, a group of ten senior lawyers of the Sri Lankan Attorney General's Department recently visited Sydney to participate in a one week intensive course on International Commercial Arbitration, held 30 April to 4 May 2018.

Course convenor, **Damian Sturzaker** (Partner, Marque Lawyers, Visiting Professorial Fellow at UNSW) was joined by a host of guest speakers including **Chief Justice of the Federal Court of Australia, the Honourable James Allsop AO**. Topics over the week included the law, rules and institutions relevant to the Asia Pacific region, the issues relating to commencing arbitral proceedings and conducting the hearing before concluding with investor state disputes and treaty negotiations (of which Sri Lanka has experience, **having participated as the state in one of the earliest ICSID cases)**.

CiArb was pleased to be involved in the course not only by way of Mr Sturzaker as CIArb Australia Councillor, and fellow Councillor **Jo Delany** (Partner, Baker McKenzie).

The course was a giant success on all accounts and we hear that the participants are keen to ensure that their fellow colleagues back in Sri Lanka are given similar opportunities to visit Sydney to participate in the not too distant future. Should there be a repeat CiArb will no doubt be keen to be involved again.

Click below

Max Bonnell (White & Case), The Hon Justice Stephen Burley (Federal Court of Australia), Jo Delaney (CIArb Australia Councillor) and Angus Stewart SC (NSW Bar)

Independence, Bias and Conflicts in International Commercial Arbitration

When: Tuesday, 25 September 2018
Where: Federal Court of Australia, Sydney
Photos: Rick Stevens

Addressed by a distinguished chair and panel, the theme of the third in the 2018 series of arbitration seminars conducted in partnership with the Federal Court of Australia, focussed on **Independence, Bias and Conflicts in International Commercial Arbitration.**

Chair: The Hon Justice Stephen Burley, Justice of the Federal Court of Australia

Recent approaches to the test to challenge arbitrators for lack of independence or impartiality **– Angus Stewart SC, NSW Bar**

Issue conflicts arising in international arbitrations **– Max Bonnell, Partner, White & Case**

Approach of the courts to challenges relating to bias, conflicts and the conduct of arbitral tribunals **– Jo Delaney, Partner, Baker McKenzie**

2018 International Arbitration Series

Chartered Institute of Arbitrators
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FEDERAL COURT OF AUSTRALIA

JO DELANEY
PARTNER, BAKER MCKENZIE
CIARB AUSTRALIA NATIONAL COUNCILLOR
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Supervision by the Australian Courts of the Conduct of an Arbitral Tribunal

Introduction

The independence and impartiality of the arbitrators is absolutely crucial in the arbitral process. It is not only their independence and impartiality that is important but also the overall conduct and integrity of the arbitral tribunal.

The court's support and supervision of arbitrations is critical to ensure the confidence of the parties in the process and more importantly, to ensure that the cornerstones of our judicial system, such as the independence of the decision maker and the need for natural justice and procedural fairness, are maintained in the arbitral process.

An observation made by Lord Denning in the context of considering the removal of an arbitrator nearly 40 years ago, is equally applicable today. Lord Denning stated:

"[I]t seems to me that it is far more important that this Court should see that arbitrations are properly conducted so that the arbitrator can have the confidence of those who appear before him. Arbitration is now one of the most important spheres of activity in the system of administering justice in this land. The Courts, I feel, must show an example and see that arbitrations are properly conducted so as to earn and deserve the confidence of those who appear before them."

Indeed, the approach of the Australian courts in recent cases has reinforced confidence in the arbitral process as discussed below.

The Australian courts have respected the boundaries set by Article 5 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and repeatedly expressed the need for significant judicial restraint. Article 5 is the article that provides that the courts cannot intervene with the arbitral process except as provided for in the Model Law.

There are three ways in which the courts are permitted to intervene under the Model Law where there may be allegations relating to a lack of independence or impartiality of an arbitrator:

(a) first, through Article 13 which provides for the courts to consider the challenge of an arbitrator after the decision of an arbitral tribunal or institution;

(b) second, through Article 34 where the courts may annul an award on limited procedural grounds or public policy where those grounds relate to the conduct of the tribunal; and

(c) third, through Article 36 where the courts may refuse to enforce an award again on limited procedural grounds or public policy very similar to those under Article 34. These grounds reflect the same grounds for refusing enforcement under Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

1. Modern Engineering (Bristol) Ltd v C Miskin & Son Ltd [1981] 1 Lloyd's Rep 135 at 138.

It has been argued that interlocutory challenges of arbitrators are inconsistent with the general rule inherent in the New York Convention of judicial non-interference in the arbitral process. Indeed this was debated at the time of the drafting of the Model Law. However, it was agreed during the deliberations of the Model Law that challenging an arbitrator would be one of the exceptions to judicial non-interference.

Accordingly, the Model Law framework is intended to work such that an arbitrator may be challenged for lack of independence during the arbitral proceedings but not once the award has been issued. At that stage, any challenge is limited to a narrow set of procedural grounds or public policy pursuant to Articles 34 or 36. Indeed, the lack of independence is not one of the grounds listed in Article 34 for challenging an award or Article 36 for challenging the enforcement of an award.

One important reason why challenges relating to independence are suppose to be raised at an earlier stage during the proceedings is to avoid wasting time and more importantly wasting costs. Otherwise there would be no incentive for a recalcitrant respondent, for example, raising such issues during the arbitration if it could raise them at the end of the process and have the entire award set aside.

In this presentation, I am going to consider the approach of the Australian courts to the misconduct of arbitral tribunals, including the lack of independence and impartiality through first, consideration of challenges to an arbitrator and second, applications to challenge an award or to challenge the enforcement of an award where the grounds raised for the challenge relate to the conduct of the arbitral tribunal.

Challenge of an arbitrator - Article 13

Article 13 of the Model Law is a mandatory provision that the parties cannot contract out of. It provides that the parties are free to agree on a procedure for the challenge of an arbitrator. This procedure is usually set out in the arbitration rules that govern the arbitration. Usually, the challenge is first heard by the other members of the arbitral tribunal, the appointing authority or the arbitral institution depending on the process specified in the arbitral rules. Indeed, many of the arbitral institutions now consider challenges of an arbitrator. For example, under the ACICA Rules, a challenge of an arbitrator is considered by ACICA; under the ICC Rules, a challenge is considered by the ICC Court of Arbitration; under the SIAC Rules, a challenge is considered by the SIAC Court of Arbitration; and under the UNCITRAL Rules, a challenge is considered by the appointing authority.

If the challenge is first considered by the arbitral tribunal or an arbitral institution, then the challenge decision may be referred to the courts of the seat of the arbitration under Article 13(3) of the Model Law. The application must be made within 30 days of notification of the decision on the challenge. If the application is not made within 30 days, then the right to challenge is considered to be waived. There is no right of appeal. This approach is consistent with the Model Law framework already mentioned.

Article 13 of the Model Law has been adopted and applied in other Model Law countries such as Singapore, Hong Kong and New Zealand.

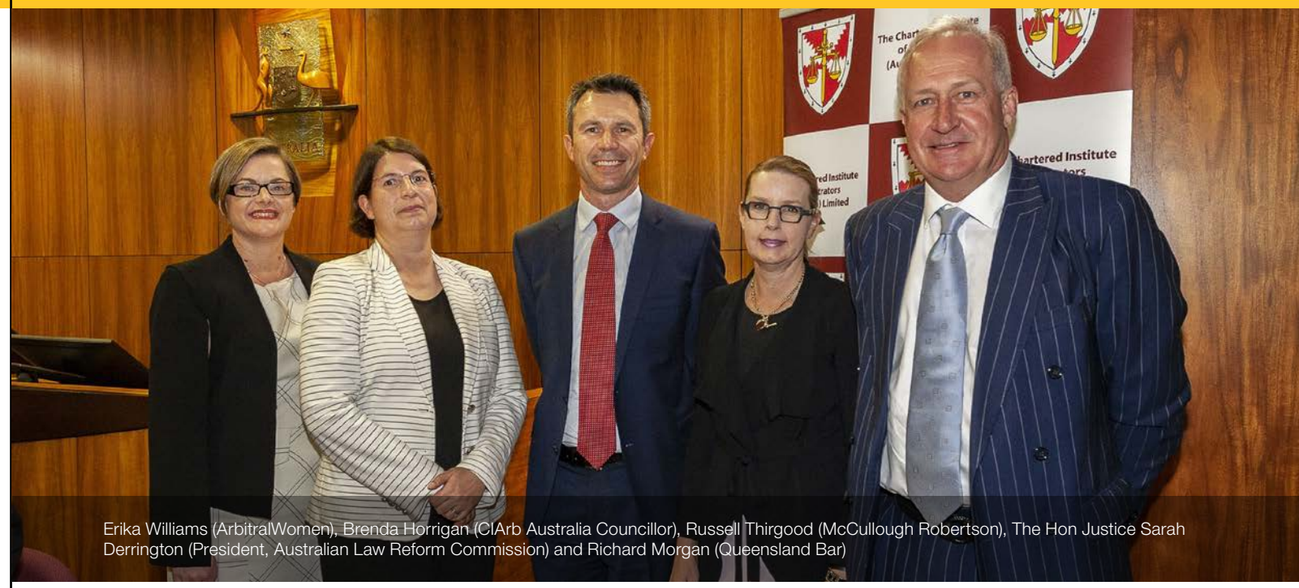
Similarly, England permits the challenge of an arbitrator to be referred to the courts after the decision by a tribunal or institution, though the approach taken by section 24 of the Arbitration Act (England and Wales) 1996 is slightly different. Time does not permit me to consider those differences.

There are some jurisdictions, such as France, that do not permit the courts to consider a challenge of an arbitrator in an international arbitration conducted under institutional rules. Challenges will only be considered by the courts in ad hoc international arbitrations.

In the US, in general, only limited interlocutory challenges to an arbitrator are permitted. It is thought that the challenge process before the institution is sufficient. However, challenges to the court may be permitted in ad hoc arbitrations. As such arbitrations do not benefit from the assistance of a supervisory institution, more judicial intervention may be required to assist the arbitral process.

Read more.

2. There were some similarities between s24 of the English Arbitration Act and the concept of misconduct of the Tribunal under s44 of the previous Commercial Arbitration Acts that applied to domestic arbitrations (these Acts have been repealed and replace d by a new uniform Commercial Arbitration Act has been enacted in each State and Territory since 2010).
3. Article 1456 French Code of Civil Procedure. See "Chapter 12: Selection, Challenge and Replacement of Arbitrators in International Arbitration", G. B. Born, International Commercial Arbitration, 2nd edition, Kluwer Law International, 2014, pp 1636 - 1961 at p1927.
4. Ibid, pp1928-1929.



Erika Williams (ArbitralWomen), Brenda Horrigan (CIArb Australia Councillor), Russell Thirgood (McCullough Robertson), The Hon Justice Sarah Derrington (President, Australian Law Reform Commission) and Richard Morgan (Queensland Bar)

Transparency, Efficiency, Enforceability and Diversity: The Hallmarks of Modern Commercial Arbitration

When: Thursday, 14 June 2018
Where: Federal Court of Australia, Brisbane
Photos: Stuart Riley

Addressed by a distinguished chair and panel, the topics of the second seminar for 2018 focussed on **Transparency, Efficiency, Enforceability and Diversity.**

Chair: The Hon Justice Sarah Derrington, Justice of the Federal Court of Australia and President of the Australian Law Reform Commission

Transparency: *The duty of disclosure by arbitrators of potential conflicts of interest: the role of 'soft' law* **- Richard Morgan, Barrister-At-Law, QLD Bar**

Efficiency: *A new paradigm of resolving disputes: What arbitration can learn from statutory adjudication* **- Russell Thirgood, Head of Arbitration | Arbitrator, McCullough Robertson**

Enforceability: *Enforceability: why the arbitration debate is about more than efficiency and costs* **- Brenda Horrigan, Head of International Arbitration, Herbert Smith Freehills**

Diversity: *Diversity in arbitration: a fresh approach to a familiar topic* **- Erika Williams, Director, ArbitralWomen**

2018 International Arbitration Series

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RUSSELL THIRGOOD
HEAD OF ARBITRATION | ARBITRATOR, MCCULLOUGH ROBERTSON
View Profile

'FAST-TRACK' Arbitration Rules: Room For Development

Darren Williams[1]

Introduction

Statutory adjudication for construction disputes began in Australia in 1999 with the introduction in New South Wales of the *Building and Construction Industry Security of Payment Act 1999* (NSW) **(NSW SOP Act)**. Since that time, each Australian State and Territory has enacted legislation providing for its own regime of statutory adjudication, with some differences between the various jurisdictions. Collectively, these 'security of payment' regimes have changed how construction disputes – both big and small – are resolved and constitutes, in a number of ways, a changed paradigm from the position prior to the introduction of these regimes.

Statutory adjudication does not, however, represent a panacea for all construction disputes. As this article explores, there are a number of limitations inherent with its processes. This means that, for a number of disputes, the features of arbitration make it a preferable manner of dispute resolution.

There has been, particularly recently, an increasing number of arbitral rules offering 'expedited' or 'fast- track' processes. However, comparing the features of the NSW SOP Act against a few of these arbitral rules, this article suggests, **first**, that there is scope for development of arbitral rules which more closely mirror the security of payment model (under a fairly 'fast-tracked' model), and **second**, that for a number of reasons, arbitration may be the preferable 'fast-track' method of dispute resolution.

The body of this article is in five parts. Following this Introduction (which is Part I), Part II contextualises the emergence of the security of payment regime in Australia with the position that then existed for domestic arbitration in Australia. Part III then, briefly, considers the key features of the NSW SOP Act. Part IV suggests what arbitration can learn from the security of payment model, what advantages arbitration offers for a fast-track model, and what a proposed model, reflecting the statutory security of payment model, may resemble. Part V provides a brief conclusion.

Background

(a) The prior context

Between 1984 and 1990, each Australian State and Territory enacted legislation that formed part of a uniform regime for commercial arbitration in Australia. For New South Wales, this was the Commercial Arbitration Act 1984 (NSW) (the **CAA**). While intended to be fast and economical, there were at least four factors that led to the decline of domestic arbitration in the late 1990's.

First, one perceived advantage of arbitration, at least as compared to litigation, was the time and cost savings that could (or 'would') be realised in having a dispute referred to arbitration. This perceived advantage was not always realised. Often, the arbitration would be conducted in a manner which was, in essence, private litigation. Consequently, this would mean the usual costs of litigation, along with the additional costs of the arbitrator's fees and of the arbitral venue.

Second, rightly or wrongly, during this time, it was a criticism of some

arbitrators that, while qualified in technical matters, they were unqualified in the law. Often this went hand-in-hand with criticisms about the manner in which legal principles were applied to decide matters in issue. This also raised issues of natural justice and procedural fairness.

Third, there was broad scope for judicial intervention into the arbitral process. Judicial review of arbitral awards was commonplace. As amended in 1990, under the CAA, the Supreme Court had jurisdiction to grant leave to appeal an arbitrator's award on the basis of a question of law which could substantially affect the rights of one or more parties to the arbitration agreement if there was, inter alia, a manifest error of law on the face of the award.[2]

Among other powers, the Supreme Court could confirm, vary or set aside the award.[3] The Supreme Court also had jurisdiction to set aside an award, in whole or in part, where there had been misconduct by the arbitrator, or where the award had been improperly procured.[4]

Fourth, at the same time, there was, in the late 1990's, a rise in the use of mediation as a method of resolving construction disputes. Part of this was due to Fisher and Ury's Getting to Yes, which popularised the use of 'principled' as opposed to 'positional' negotiation. Generally, clients have benefited enormously through resolving disputes by sophisticated use of negotiation and mediation techniques.

As a result, these factors led to a decline in the use of domestic arbitration during the late 1990's as a method of dispute resolution.

(b) The emergence of statutory adjudication

This is, at least, part of the context in which statutory adjudication emerged in Australia. As foreshadowed in the Introduction, it began in 1999 in New South Wales, with the NSW SOP Act. In 2002, in introducing a Bill to amend this Act, the Minister introducing the Bill said that the NSW SOP Act, in the three years since its introduction, had proved to be '*very successful*' in achieving its purpose of ensuring prompt payment, describing cash flow to be '*the lifeblood of the construction industry*'.[5] Following its introduction in New South Wales, each Australian State and Territory has now enacted its own 'security of payment' statue, albeit with some differences.

As is common ground, there are, broadly, two separate models of statutory adjudication in Australia: the 'East Coast' model, adopted by New South Wales, Victoria, Queensland, Tasmania, South Australia and the Australian Capital Territory, and the 'West Coast' model, adopted by Western Australia and the Northern Territory. The East Coast model, being the dominant security of payment model in Australia, will be the focus of this article, with a particular focus on the NSW SOP Act.

Key Features of the Security of Payment Regimes

(a) Overview

The NSW SOP Act, and its equivalent schemes, establish what is often described as being a 'fast-track' system to resolving construction payment disputes. This is done through establishing an expedited procedure, conducted largely on the papers, under which a dispute as to a progress payment is referred to an adjudicator, who makes a determination on the dispute, with the determination being subject to limited grounds of review and able to be enforced as a judgment. As these features are well-known, this article only considers each one briefly.

(b) A 'fast-track' system

Perhaps the most notable feature of the various security of payment regimes is the speed of these regimes. To take the NSW SOP Act as an example, if a claimant serves a payment claim on a respondent, and the respondent 'schedules' a lesser amount as being payable, if the claimant elects to proceed to adjudication, subject to the parties granting the adjudicator additional time by consent to make his or her determination, the claimant will have a determination on the dispute within 35 business days.[6]

The deadlines under the security of payment regimes are also mostly inflexible. Consequently, the regime places an emphasis on speed over other competing values, such as absolute precision in the determination of a party's entitlement. This has given rise to the NSW SOP Act, for example, being described as a 'somewhat rough and ready' process.[7]

Read more.

1. This paper was co-authored by Darren Williams, Lawyer, McCullough Robertson Lawyers, Australia.
2. Commercial Arbitration Act 1984 (NSW), section 38(5)(b)(i).
3. Commercial Arbitration Act 1984 (NSW), section 38(3)(a).
4. Commercial Arbitration Act 1984 (NSW), section 42(1).
5. New South Wales, Parliamentary Debates, Legislative Assembly, 12 November 2002, 6542 (Morris Iemma, Minister for Public Works and Services).
6. This time frame may also be extended if the adjudicator delays in issuing his or her notice of acceptance. See section 20(1) of the NSW SOP Act for example. From experience however, this is a rare event.
7. Musico v Davenport [2003] NSWSC 977, [107] (McDougall J).

RICHARD MORGAN
BARRISTER-AT-LAW, JEDDART CHAMBERS, BRISBANE
View Profile

The Duty Of Disclosure By Arbitrators Of Potential Conflicts Of Interest: The Role Of "SOFT LAW"

I am going to speak about the legal sources of the obligation of arbitrators as to impartiality and the obligation of disclosure of potential conflicts of interest. I will refer to the UNCITRAL Model Law on International Commercial Arbitration (1985) which is adopted by statute in Australia, though not in England , but where the principles are essentially the same.

I will talk about the impact of so-called "soft law" on this topic , and the recent decision of the English Court of Appeal in *Halliburton v Chubb* [2018] EWCA Civ 817 (April 2018) .

"Soft law" is understood as something comprised in a published Guideline which is necessarily of less status than a treaty or a statute or the rules of one of the many arbitration institutions with nominating or administering functions. Because of a combination of widespread consultation prior to their publication, the standing of the publishing body and widespread usage, certain Guidelines have achieved influence to the extent they are commonly referred to by courts.

Some of the more prominent soft law sources are those published by the Chartered Institute of Arbitrators. The Institute publishes a number of International Practice Guidelines. These cover topics such as Interviews with Prospective Arbitrators, Jurisdictional Challenges, Applications for Interim Measures, Applications for Security for Costs, Documents- Only Arbitration Procedures, and Party Non-Participation. Additionally there is a Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members.

UNCITRAL publishes Notes on Organising Arbitral Proceedings.

The International Bar Association (IBA) publishes Rules on the Taking of Evidence in International Commercial Arbitration, Guidelines on Party Representation and Rules of Ethics for International Arbitrators.

This presentation highlights the influential role of the IBA Guidelines on Conflicts of Interest in International Arbitration. Reference to them by English courts is now frequently seen when considering an application to the court to appoint an arbitrator, or a challenge to an arbitrator's appointment.

The UNCITRAL Model Law on Commercial Arbitration (1985) is adopted in Australia by the **International Arbitration Act 1974**. Article 12(1) concerning impartiality and disclosure provides "when a person is approached in connection with his possible appointment as an arbitrator he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstance to the parties unless they have already been informed of them by him".

The Australian Act in section 18A provides that there are justifiable doubts as to the impartiality of an arbitrator only if there is a real danger of bias.

The English Act in section 24 also uses the language "justifiable doubts as to ... impartiality". The relevant test in England for impartiality and apparent bias was set out by Lord Hope in **Porter v. Magill** [2001] UKHL 67, [2002] 2 AC 357

In **Millar v. Dixon** [2002] 1 WLR 1615 Lord Hope said that the test required the matter to be viewed objectively. This test was

> The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

followed and applied in 2014 by the Privy Council in **Yiacoub v. The Queen** [2014] UKPC 22. It was said that common law bias meant "*an absence of demonstrated independence or impartiality*".

The IBA Guidelines on Conflicts of Interest in International Arbitration were published in 2004 and revised in 2014. They consist of an Introduction, then Part 1: General Standards Regarding Impartiality, Independence and Disclosure, and Part 2 known as The Application Lists. The Application lists have a Non-Waivable Red List, a Red List, an Orange List and a Green List, too voluminous to detail here.

The common law test that impartiality is to be assessed objectively, is replicated in General Principles 1 and 2 of the IBA Guidelines.

Thus, General Principle 2 concerning impartiality says "*If a reasonable third person, having knowledge of the relevant facts and circumstances would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of a case as presented by the parties in reaching his or her decision*" then justifiable doubts are said to exist in any of the situations described in the Non-Waivable Red List. The Non-Waivable Red list is where there is an identity between a party and the arbitrator or the arbitrator has a significant financial or personal interest in one of the parties or the outcome of the case or the arbitrator or his or her firm regularly advises the party or an affiliate or the arbitrator or his or her firm derived significant financial income therefrom.

However, as to disclosure, General Principle 3(a) uses the language of a subjective test, i.e. "If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances..." . This is a heightened test and was apparently introduced to make the IBA Guidelines acceptable to the ICC and perhaps more in conformity with civil law systems.

The IBA Guidelines do not bind the Court, but English Courts have frequently relied upon them for assistance in recent years, for example in **Sierra Fishing Company v. Farran & Ors** [2015] EWHC 140 (Comm), **Cofely Limited v. Bingham** [2016] EWHC 240 (Comm), **W Limited v. MSDN BHD** [2016] EWHC 422 (Comm) and then **Halliburton v. Chubb (2018)** to mention a few.

Cofely Limited v. Bingham was a case of multiple appointments. The judgment refers to both the Chartered Institute of Arbitrator's Code of Professional and Ethical Conduct and the IBA Guidelines including General Standards 2 and 3 and items in the Orange List. The latter provided for situations where the arbitrator had within the past three years been appointed as an arbitrator on two or more occasions by one party or an affiliate. When accepting his nomination, the arbitrator signed a CIArb form stating that he was not aware of any involvements, interests or matters likely to affect his impartiality or be perceived as likely to do so. He had left blank the answer to the question "*If you are aware of any involvement, however remote but in particular an involvement you or your firm has (or has had in the last five years) with either party to the dispute, please disclose*".

One of the respondents was a well-known firm of construction claims consultants. In the previous three years the arbitrator had acted as an arbitrator or adjudicator 25 times in cases involving them as a party or representative of a party. 25% of the arbitrator's total income in the previous three years had come from the 25 appointments.

His Honour held that the Orange List in the IBA Guidelines had been triggered. The arbitrator had avoided addressing requests for disclosure and had responded aggressively upon inquiry. His Honour held that the arbitrator's lack of recognition of the relevance of the relationship demonstrated a lack of objectivity and an increased risk of unconscious bias.

Read more.

Albert Monichino QC (Victorian Bar), Bronwyn Lincoln (Corrs Chambers Westgarth), The Hon Tony Pagone (Federal Court of Australia), Caroline Kenny QC and Nick Longley (HFW

Jurisdictional Challenges in International Commercial Arbitration

When: **Tuesday, 27 February 2018**
Where: **Federal Court of Australia, Melbourne**
Photos: **David Johns**

Chaired by **The Hon Justice Tony Pagone, this seminar launched the series for 2018 and** commenced with **CIArb Australia President, Caroline Kenny QC** delivering welcome remarks before a distinguished panel discussed various topics on jurisdictional challenges in international commercial arbitration.

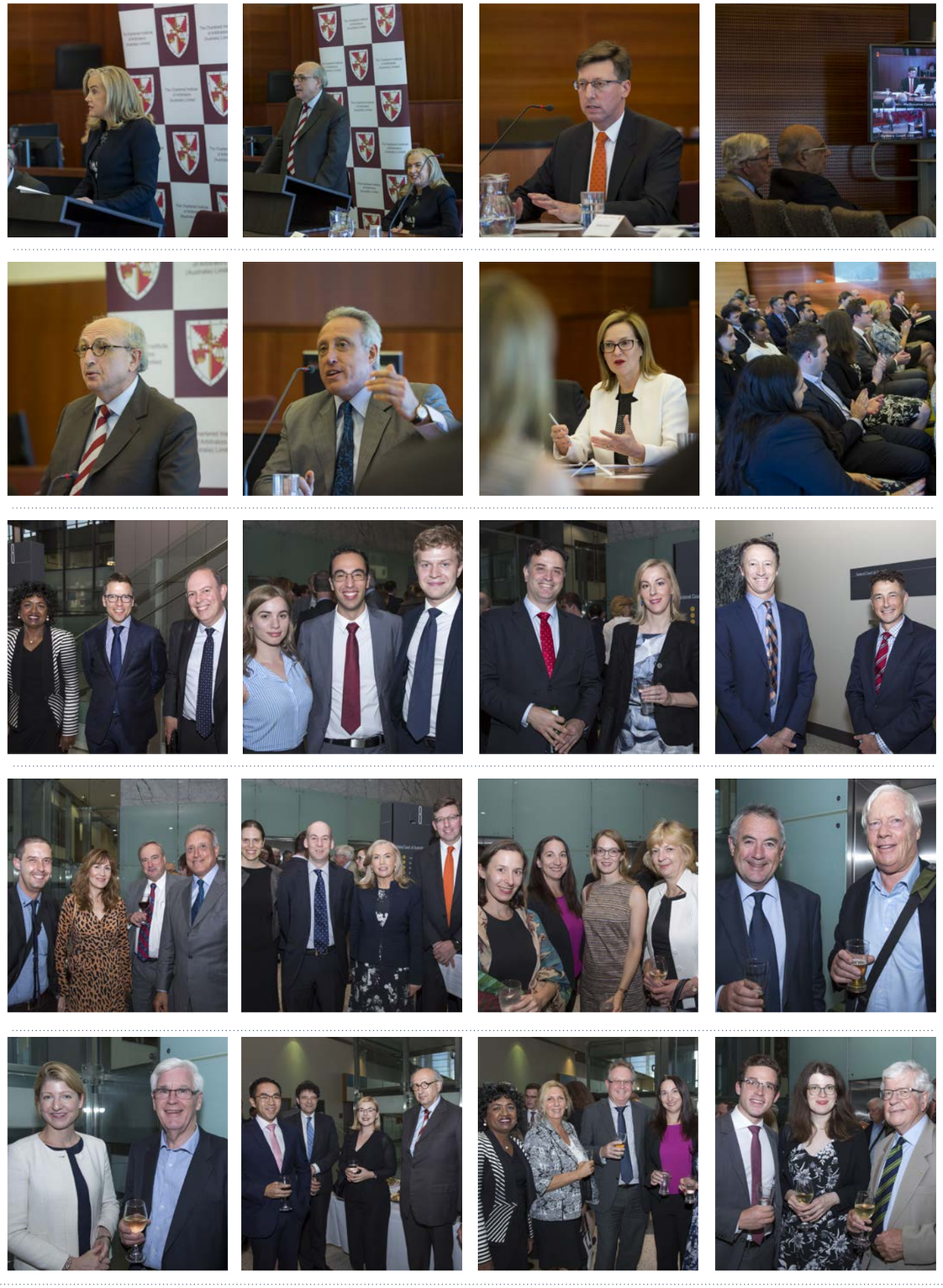
Typical jurisdictional challenges - **Nick Longley, Partner, HFW**

How arbitral tribunals deal with jurisdictional objections in practice - to bifurcate or not, and court review of jurisdictional objections pre award - **Albert Monichino QC, CIArb Australia Immediate Past President**
Challenges to jurisdiction at the award enforcement stage (including applications to set aside) - **Bronwyn Lincoln, Partner, Corrs Chambers Westgarth**

2018 International Arbitration Series

Chartered Institute of Arbitrators
CIArb
Australia

FEDERAL COURT OF AUSTRALIA



NICK LONGLEY
PARTNER, HFW
View Profile

Typical Objections to the Jurisdiction of an Arbitral Tribunal

Introduction

Arbitration is a consensual process. In the arbitration agreement, the parties jointly agree to refer disputes to arbitration. The arbitration tribunal can only decide the disputes that the parties have agreed to refer to it. Ensuring that the arbitral tribunal has the jurisdiction to decide the dispute therefore is a fundamental part of the validity of the arbitration proceedings and ultimately a deciding factor as to whether an arbitration award can be enforced. [1]

In practice, poorly drafted arbitration clauses, rules of contractual interpretation and statutory limits to the scope of what is arbitrable have inevitably led to arguments that tribunals lack sufficient jurisdiction to decide all or part of the dispute.

This paper reviews typical situations where parties to a commercial agreement have not granted sufficient jurisdiction to the arbitral tribunal to decide the disputes referred to it and as a result there has been a challenge to the jurisdiction of the tribunal. In doing so, this paper reviews the International Arbitration Practice Guideline to Jurisdictional Challenges ("the **Guidelines**") issued by the Chartered Institute of Arbitrators ("**CIArb**").

This paper primarily concentrates on arbitration law in Australia under both the International Arbitration Act 1974 (Cth) and the Commercial Arbitration Acts of the states and territories ("the **Uniform Acts**"), which governs domestic commercial arbitration. This paper does though draw on experience from overseas jurisdictions.

The Guidelines

The CIArb issued the Guidelines on 29 November 2016. The purpose of the Guidelines is to set out best practice for handling jurisdictional challenges. This best practice is set out in four short Articles which are accompanied by guidance notes. The four Articles set out general principles for jurisdictional challenges (Article 1), typical sources of challenges (Article 2), comments on admissibility of claims (Article 3) and guidance for the procedure when dealing with jurisdictional challenges (Article 4) [2].

For the purposes of this presentation, the relevant Articles are Article 2, which identifies typical challenges to jurisdiction and Article 3, which provides guidance on dealing with the connected issue of admissibility of claims. [3]

Article 2: Typical Challenges to Jurisdiction

Article 2 identifies the jurisdictional challenges that typically arise. It lists six grounds for challenges, which are:

a. whether the arbitration agreement exists

b. whether the parties to the dispute are the same as the parties to the arbitration agreement

c. whether the arbitration agreement is defective

d. whether the arbitration agreement was made in the required form

e. whether the subject matter falls within the scope of the arbitration agreement

f. whether the arbitrators have the necessary powers

This paper does not deal with all six common grounds for jurisdiction but instead deals with the more

common problems which are:

1. where there is no arbitration agreement;
2. where the arbitration clause is defective; and
3. arguments on the scope of the arbitration clause

1. No Arbitration Agreement

Firstly it should be stated that the courts in Australia as in other UNCITRAL Model Law jurisdictions are obliged to stay any court proceedings and enforce an arbitration agreement if the parties have agreed to arbitrate the dispute. [4]

However it is often alleged that the parties have not agreed to arbitration and therefore the tribunal cannot have jurisdiction. Any party defending such an allegation must show that there is a binding arbitration agreement. There are a number of issues which are relevant:

1. In Australia, under the Uniform Acts and under the International Arbitration Act, an arbitration agreement [5] may be in the form of an arbitration clause in a contract or in the form of a separate agreement but must be in writing. [6] The scope of what is meant by an agreement in writing is extensive and can include electronic communications and an exchange of pleadings in the arbitration itself. [7]

2. Where there is a separate stand alone arbitration agreement or where the arbitration agreement is written clearly within a binding contract, then no problem should arise. However sometimes, a contract may seek to incorporate an arbitration clause from one of the parties' standard terms of business or from a standard form of contract. Difficulties can arise in these circumstances. For the arbitration agreement to be enforceable:

(a) the reference must be sufficiently clear to demonstrate an agreement to arbitrate; and

(b) the reference to the clause must be sufficient to comply with lex arbitri.

Under the Uniform Acts, a reference in a contract to any document containing an arbitration clause is sufficient to constitute an arbitration agreement in writing, provided the reference is such as to make that clause part of the contract. [8] This mirrors Article 7 (6) of the Model Law.

3. Thirdly the doctrine of severability may also have an effect. This doctrine provides that an arbitration agreement within a contract stands as a separate agreement. [9] This legal fiction allows the arbitral tribunal to claim jurisdiction over both claims under the contract and claims as to the validity of the contract itself. Generally this doctrine is useful for an arbitral tribunal as it allows the tribunal to claim jurisdiction over a dispute even if the validity of the underlying contract is challenged.

However severability has caused problems in some jurisdictions. In particular, in some Middle Eastern civil law jurisdictions, it is relatively common for a party wishing to delay a dispute to assert that a contract was not validly executed because the person executing the agreement lacked sufficient authority. Typically, a party defending such an allegation would be expected to provide a suitable power of attorney to demonstrate authority. Where the contract contains an arbitration clause, commonly the party seeking to delay the dispute will allege that the arbitration agreement requires a separate power of attorney on the basis that it is a separate agreement. [10] Therefore when seeking to refer a dispute to arbitration in some jurisdictions, it may be necessary to show that a person executing the contract not only had sufficient authority to enter into the underlying contract but also had sufficient authority to enter into the arbitration agreement.

2. Whether the Arbitration Agreement is Defective

The fact that an arbitration agreement is defective can also lead to challenges to jurisdiction. Defective (or so called pathological) arbitration clauses can include clauses which are incomplete, ambiguous, incoherent or contradictory. It is common for clauses to refer to a body which no longer exists or in fact never existed.

Read more.

1. Note to the CIArb Guidelines on Jurisdictional Challenges
2. Article 4 provides useful guidance on issues such as when to bifurcate jurisdictional challenges from an award on the merits of the dispute and when these issues should be decided together, the form of any award relating to jurisdiction and issues of costs.
3. Strictly speaking there is a distinction between issues of jurisdiction and issues of admissibility. A claim may be inadmissible because of a failure of a party to comply with a time bar. However the tribunal may still have jurisdiction to deal with it.
4. See Article 8 (1) of the UNCITRAL Modal Law and for instance Section 8 (1) of the Commercial Arbitration Act 2011 (Vic).
5. See for instance Section 7 (2) of the Commercial Arbitration Act 2011 (Vic)
6. See for instance Section 7 (3) of the Commercial Arbitration Act 2011 (Vic)
7. See for instance Section 7 (5) and Section 7 (7) of the Commercial Arbitration Act 2011 (Vic)
8. See for instance Section 7 (7) of the Commercial Arbitration Act 2011 (Vic)
9. See Article 16 (1) of the UNCITRAL Modal Law and within the Uniform Acts for instance Section 16(2) of the Commercial Arbitration Act 2011 (Vic).
10. See the UAE Civil Procedure Code (Federal Law No. 11 of 1992). Article 58(2) provides that: "Admission or waiving of the right claimed, settlement or arbitration... or any other action for which the law requires a specific authority shall not be valid other than with such a specific authority. Article 203(4) provides that "An agreement to arbitration shall only be valid if made by someone who has the capacity to act with regard to the right which is the subject of the dispute."

Back Row (L-R): James Sullivan, Andrew Di Pasquale, Kristian Maley. Middle Row (L-R): The Hon Susan Crennan AC QC; Neil Kaplan CBE QC SBS; Dr Michael Pryles AO PBM. Front Row (L-R): Mitchell Brunker and Azaara Perakath (University of Adelaide); Jack Donnelly, Nick Fidler, Emily McClelland, and Katelyn Lamont (University of Queensland)

2018 CIArb Australia Vis Pre-Moot

When: Thursday, 1 March 2018
Where: Federal Court of Australia, Melbourne
Photos: David Johns

The **University of Queensland** narrowly prevailed over **Adelaide University** in the **Grand Final** of the **2018 CIArb Australia Vis Pre-Moot**.

The teams appeared before an esteemed panel featuring **The Hon Susan Crennan AC QC**, **Mr Neil Kaplan CBE QC SBS**, and **Dr Michael Pryles AO PBM** at the **Federal Court of Australia** in Melbourne. As Ms Crennan remarked, the presentations by both teams were of the "highest quality".

In recognition of their performance, the **University of Queensland** team secured places at CIArb Australia's **Introduction to International Arbitration** course in Brisbane later this year. This course is tutored by leading arbitration practitioners and provides a pathway to Associate membership of CIArb.

Organised by the CIArb Australia Young Members Group (YMG), the 2018 Vis Pre-Moot attracted teams from 12 universities: **University of Canberra; University of Sydney; University of Adelaide; Monash University; Griffith University; La Trobe University; Deakin University; University of Notre Dame Australia (Sydney); University of Queensland; RMIT University; Queensland University of Technology** and **Bond University.**

Preliminary Rounds were held in **Brisbane, Sydney**, and **Melbourne** from 14-16 February 2018, with **Bond University**, the **University of Sydney**, and **RMIT University** scoring the highest points in each round. Final Rounds were held in **Melbourne**

on 1 March 2018, followed by a closing reception hosted by the **Victorian Bar**.

CIArb Australia Vis Pre-Moot is open to Australian teams participating in the **Willem C Vis Moot in Vienna** or the **Vis (East) Moot in Hong Kong**. The Pre-Moot gives teams an unprecedented opportunity to test and develop their skills in before experienced arbitration professionals, and to network with fellow students and practitioners, before leaving Australia for Vienna or Hong Kong.

We are grateful to **Corrs Chambers Westgarth**, **McCullough Robertson**, and the **Federal Court of Australia** for hosting the Pre-Moot again this year and very grateful to the many practitioners who generously volunteered their time to serve as arbitrators.

Congratulations to **YMG Chair Kristian Maley** who together with committee members **James Sullivan** and **Andrew Di Pasquale**, organised another stella program with support from **Erika Williams**, **Robert Tang**, and **CIArb Australia**.

CIArb Australia President, Caroline Kenny QC said: “It is gratifying to see once again the success of the Vis Pre-Moot. We will continue to invest in the professional development and engagement of younger professionals by providing a professional pathway through programs such as this and free student membership."












Dr Michael Pryles AO PBM, The Hon Susan Crennan AC QC, Caroline Kenny QC and Neil Kaplan CBE QC SBS join in the post pre-moot celebrations at the Essoign Club, Victorian Bar

2019 CIArb Australia Vis Pre-Moot

Proudly sponsored by DLA Piper who will co-host with university partner, RMIT University

Our thanks also to **Epiq** closing reception sponsor.

The Chartered Institute of Arbitrators (CIArb) Australia Branch Young Members' Group Committee invites you to participate in the **2019 CIArb Australia Vis Pre-Moot**, sponsored by global law firm, **DLA Piper**, who will co-host with university partner, **RMIT University**.

The Vis 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 2019. The Vis Pre-Moot offers a unique extension of the Vis Moot experience for Australian students. Students will face interstate counterparts and appear before eminent arbitration professionals.

The Vis Pre-Moot will be held on **21 and 22 February 2019 in Melbourne**, at the offices of **DLA Piper** and **RMIT University**. Melbourne CBD campus. The proposed timetable is available via **this link**. The **Grand Final** will take place on **22 February 2019** to be followed by a celebratory networking session with drinks and canapés. The oralists of the winning team will secure a place at the **2019 Introduction to International Arbitration Course**, date and venue to be confirmed.

Invitation to Teams

Australian teams participating in the Willem C Vis Moot or Vis East Moot in 2019 are invited to participate in the Pre-Moot.

Through the generosity of **CIArb Australia** and **DLA Piper**, the organisers are pleased to offer a contribution to the costs of interstate travel for participating Australian teams. The contribution is capped at an amount estimated to cover 50% of teams' travel and accommodation costs.

For full details, please see the reimbursement guidelines available via **this link**.

Students will be required to join CIArb as a **Student Affiliate** member before the Vis Pre-Moot. Student membership is free of charge. Details of student membership and the application, along with the application form, are available on the CIArb website via **this link**

Please register for the event by **31 January 2019** using the **online registration form**.

Invitation to Arbitrators

We are pleased to invite arbitration practitioners, scholars, alumni of the Vis Moot and Vis East Moot, and others with an interest and experience in the field to serve as volunteer arbitrators at the Vis Pre-Moot. Confirmed arbitrators will participate in **at least one two-hour oral round in Melbourne on 21 or 22 February 2019**.

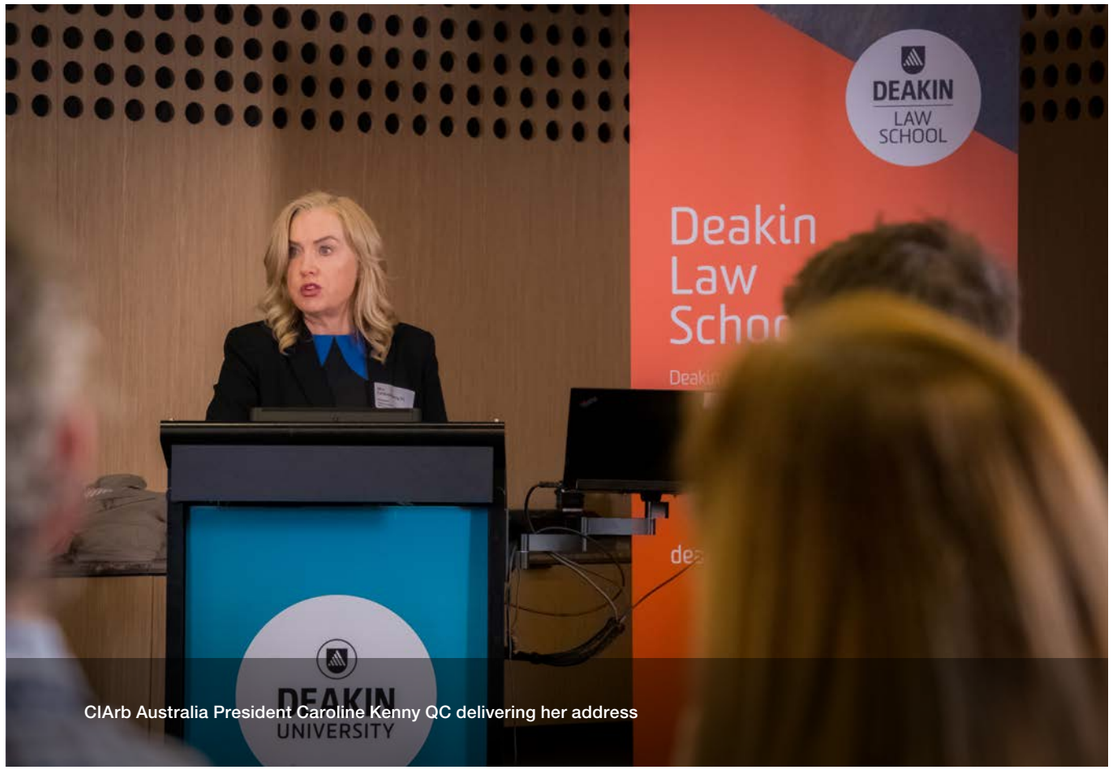
Please register your interest via the **online form**. Following registration, the organisers will be in contact with further details of the role, and to confirm your availability for specific timeslots.

Duncan Travis, Partner of Allens Linklaters; Professor Jenni Lightowlers, Dean of Deakin Law School, Caroline Kenny QC, President of CIArb Australia and Paul Santamaria QC, Victorian Bar.

2018 Alfred Deakin ICA Moot - Grand Final

When: 5 and 6 September, 2018
Where: Deakin Downtown, Melbourne

The 2018 Alfred Deakin International Commercial Arbitration Moot was attended by nine teams of undergraduate and juris doctor law students from seven Victorian Law Schools: Melbourne University, Monash University, RMIT University, Victorian University, Australian Catholic University, La Trobe University and Deakin University. Deakin and Monash competed in the Grand Final held on 6 September with Deakin prevailing as the winner. The moot was conducted at Deakin Law School's city campus over two consecutive days, 5-6 September 2018. Two rounds of heats took place on day one, with the semi-final and grand-final on day two. The Question was set by CIArb Fellow, Professor Jeff Waincymer, who has been a coach for the Vis Moot since its inception in 1993. There were 22 judges of the preliminary rounds and semi-final, all of whom were either currently working as arbitrators or who had previously participated in the Vis Moot. This meant that students were able to gain meaningful feedback from people who have experience in this field. The top two teams, Deakin and Monash competed in the Grand Final with Deakin judged as the winner. The judging panel comprised: **Caroline Kenny QC, President of the CIArb Australia**, **Paul Santamaria QC, Victorian Bar and Duncan Travis, Partner at Allens Linklaters**. Congratulations go to the Deakin Team: **Emma Dixon and James Bell** who scored the $1000 prize money.



CIArb Australia President Caroline Kenny QC delivering her address

The judges with the winning team members, Emma Dixon (who also won best speaker on the night) and James Bell of Deakin Law School.

ASHNA TANEJA
SOLICITOR, BIRD & BIRD
View Profile

10th CIArb Australia /NSW Young Lawyers International Arbitration Moot

In 2009, the International Law Committee and the Chartered Institute of Arbitrators (Australia) Limited (CIArb) and the New South Wales Young Lawyers, International Law Committee joined forces to host the inaugural International Arbitration Moot (the Moot). The annual event attracts young professionals and students from across Australia and abroad having cemented its place as a progressive and high-quality competition.

Starting on Saturday 22 September, this year marked the 10th anniversary of the Moot and its largest edition to date, and included participants from various Australian jurisdictions as well as from Vietnam, Bulgaria and Singapore.

The 10th edition of the Moot joined with three partner law firms, which hosted the competition rounds. The General Rounds were held on the 22 September at **Bird & Bird**, the Semi Finals were held on the 23 September at **Pinsent Masons** and the Grand Final was held on the 24 September at **White & Case** in Sydney.

The fantastic first day of mooting was only made possible due to the high calibre of competitors and the arbitrators who, every year, generously put their hands up to arbitrate the panels.

The results, which saw one split panel, defined the two teams that competed in the Grand Final, namely **Jun Hong Tan** & **Nicholas Liu (Singapore, Singapore)** and **Eric Shi & Keerthi Ravi (Sydney, Australia)**.

The Grand Final celebrated the successful partnership between the New South Wales Young Lawyers, International Law Committee and CIArb (Australia). The opening was made by the Moot Managers **Ashna Taneja**, **Harry Stratton** and **Isabela Deveza**, all past competitors. The Keynote speech was delivered by **John Wakefield**, CIArb Trustee, Australasia and a Fellow of ACICA, who remarked the relevance of the event and the edition and the role played by the CIArb in the area of arbitration.

The prestigious tribunal who kindly donated their time to judge the Grand Final was composed by The Hon Justice Margaret Beazley AO, Max Bonnell (partner, White & Case) and Dominique Hogan-Doran SC (5 Wentworth Chambers).

After an incredible argumentative battle which saw both teams present logical arguments and compelling rhetoric, the prevailing team was Nicholas Liu & Jun Hong Tan, from Singapore.

Following the yearly tradition, the participants were presented with a number of awards, namely The Spirit of the Moot, Best Written Memoranda, Winner of the Moot and Best Speaker. There were also honourable mentions to Best Written Memoranda and Best Speaker Award.

The recipients of the awards were:

Best Written Memoranda:
George Pasas & Major Zhang (Sydney, Australia)

Honourable mentions: Eric Shi & **Keerthi Ravi (Sydney, Australia), and Lewis Graham & Nancy Lee (Sydney, Australia)**

Best Speaker:

Nicholas Liu (Singapore, Singapore)

Honourable mentions:

5th place – Jun Hong Tan (Singapore, Singapore)

4th place – Nancy Lee (Sydney, Australia)

3rd place – **Major Zhang (Sydney, Australia)**

2nd place – **George Pasas (Sydney, Australia)**

The Spirit of the Moot: **Kilian Elkinson (Sydney, Australia) & Velislava Hristova (Sofia, Bulgaria)**

Presented by the CIArb, the Best Speaker prize is the Introduction to International Arbitration course, which forms part of the pathway to becoming a CIArb Member.

The Moot Managers were delighted to watch the great success of this edition, which marked the end of their two years term as Moot Managers. As it happens every year, the Moot presented the arbitrators and spectators of the Grand Final with a showcase of impressive talent, which reassures us that the exercise of the profession is in very capable hands.


Mooters and Arbitrators during briefing


Ashna Taneja, Isabela Deveza and HarryStratton, Moot Managers


Eric Shi and Keerthi Ravi, Mooters from Sydney, Australia


Jacob Smit (Norton Rose Fulbright) and Justin McGovern (Clayton Utz)


Major Zhang and George Pasas, Mooters from Sydney


Mooters during briefing


Nancy Lee, Sara Pacey and Lewis Graham, Mooters


Nicholas Liu and Jun Hong Tan, Mooters from Singapore


The Grand Finalists and the Arbitral Tribunal: Eric Shi, Keerthi Ravi, Max Bonnell, The Hon Justice Margaret Beazley AO, Dominique Hogan-Doran SC, Nicholas Liu and Jun Hong Tan


John Wakefield delivering the Keynote Speech

THEODORE MURRAY
HONOURS STUDENT,
MONASH UNIVERSITY
View Profile

Efficiency In International Arbitration

Analysing the Results of the 2018 International Arbitration Survey

The 2018 International Arbitration Survey ('2018 Survey'),[1] entitled **"The Evolution of International Arbitration"**, was published in May 2018 by the School of Arbitration of the Queen Mary University of London, in partnership with White & Case LLP. It followed the ICCA 2018 Conference in Sydney, Australia, which was themed similarly "Evolution and Adaptation". These two topics highlight how impossible it is to participate in international arbitration and fail to notice that the landscape is constantly changing. Furthermore, it is also clear that there are ongoing concerns about the efficiency of arbitration, in terms of time and cost. This was a major recurring theme in the 2018 Survey, and among the areas which touched on that theme, the two most prominent were the role of institutions and the use of technology in arbitration, both of which, unsurprisingly, are also integral aspects of the direction in which arbitration is evolving. This article takes a dual approach in analysing and responding to these two areas and how they have the potential to improve efficiency of and mould international arbitration in the years to come.

Arbitrators and Arbitral Institutions

Despite one highlighted response (by a full-time practicing arbitrator) calling for a return to ad hoc arbitration, a significant amount of feedback was premised in an appreciation of and reliance on the work of institutions in facilitating arbitrations, providing education and training, and maintaining a level of order and coherency internationally.[2] Institutions are well-placed to gather data, make recommendations, as well as directly train arbitrators on ways to improve their approach to arbitration procedure. In fact, a majority of respondents (80%) stated that they would like to be given the possibility to evaluate arbitrators at the conclusion of the arbitration, which, if in the form of reporting to the arbitral institution, would assist that organisation to better tailor arbitrator training and education accordingly.[3]

During the interview stage of the 2018 Survey, respondents were invited to make suggestions about improvements to efficiency, many of which were related to arbitrator conduct. These pointed to a trend of dissatisfaction with the way that arbitrators are handling arbitration procedure, and their powers during the arbitral process. The critiques included suggestions that arbitrators tend to apply a 'one size fits all approach', allow too many rounds of submissions, and are not proactive enough in using the powers and sanctions available to them under most standard arbitration rules to respond to anti-competitive tactics by parties.[4] Despite a group of counsel and arbitrator respondents defending the conservative conduct by arbitrators as conscientious efforts to ensure enforceability of awards (especially in countries without strong judicial support for arbitration),[5] these critiques and suggestions suggest that the right compromise as to case management and deterrence of dilatory tactics has not yet been reached.

Technology

The second significant trend related to efficiency in the 2018 Survey was the growing ubiquity of various technological options in the stages of arbitration, which is a popular topic at present.[6] The 2018 Survey named five different technologies, namely videoconferencing, hearing-room technologies, cloud storage, artificial intelligence and virtual hearings.[7] It was not explained why these were chosen for the survey, or grouped in this way, but it is presumed that they were considered to be the most common or promising by the 2018 Survey creators. Respondents had varying levels of familiarity and experience with them, but overall had experienced considerably more exposure to the first three and strongly supported their continued use. By contrast, out of the respondent group, 53% stated that they have never used artificial intelligence aids during the arbitration process, and 64% stated they have never used virtual hearing rooms.

This demonstrates a split which also appears to be reflected in the wider commentary. For example, the 2017 ICC Report on Information Technology in International Arbitration reports widely on technology that fits under the first three categories, but does not touch on the use of artificial intelligence or 'virtual hearings'.[8] Nevertheless, it is clear that some in the community are aware of the utility of artificial intelligence aids, especially in the organisation of large volumes of data, and text analysis ('text-mining').[9] 78% and 66% of respondents respectively stated that artificial intelligence and virtual hearing rooms should be used more often in arbitration, overall the 2018 Survey revealed an optimistic result about the potential for technology to improve efficiency.[10] These tools could radically change the arbitration landscape in the years to come by optimising legal work, better predict outcomes, and advise more nuanced strategies by having more synthesised information at their fingertips.[11]

However, resistance to new technologies also exists. A significant number of respondents, primarily counsel and arbitrators, expressed doubts about the effectiveness of videoconferencing for examining witnesses during hearings.[12] This was despite 89% of respondent stating that videoconferencing should be used more often, and many respondents highlighting the savings of time and money that flow from using technology.[13] The other major concerns flagged in the 2018 Survey were a lack of familiarity with AI and virtual hearing due to the entry cost of introducing these newer technological aids. With regard to artificial intelligence, the 2018 Survey also suggested that there is a prevailing "fear of allowing technology to interfere excessively with the adjudication function", however, this view was not supported in the 2018 Survey with statistics or explanation about how such interference might occur.

> Once again, arbitral institutions occupy a key role, this time in managing the transition towards increased integration of technology in arbitration. Many institutions already give guidance about

FUTURE BRIGHT FOR INTERNATIONAL ARBITRATION

Jerome Doraisamy
Lawyers Weekly
18 MAY 2018

ew research from a global law firm paints a positive picture moving forward for the arbitration of cross-border disputes.

A study published by White & Case, in collaboration with Queen Mary University of London, has shown an all but unanimous favourability for international arbitration, with 97 per cent of respondents regarding it their preferred method of resolving cross-border disputes.

In addition, 99 per cent of respondents are likely to choose international arbitration in the future, the study noted.

Speaking to Lawyers Weekly about the findings, Sydney-based White & Case partner Max Bonnell said: "You can expect that international arbitration will become even more common than it already is."

The reasons for this, he explained, are enforcement and confidentiality.

"International arbitration allows for relatively straightforward and uncomplicated enforcement, which is then much easier to enforce in other countries than [relying on the] judgment of courts," he said.

"People are also attracted to the confidentiality of international arbitration, as confidentiality is the default option amongst plaintiffs."

An overwhelming number of the survey's respondents feel that the use of international arbitration will increase in the energy, construction and infrastructure sectors, at rates of 85 per cent and 82 per cent respectively.

"The reason why [use of such arbitration in these sectors] is expected to increase is simply that international arbitration is already a default option and more and more projects in those fields are becoming international in nature," he said.

Movement away from the courts in the resolution of such disputes, he argued, will ultimately be a good thing for the legal profession.

"There are finite government resources and taking the billing off the courts through arbitration can be seen as a positive thing," he suggested.

Elsewhere, the study found that 60 per cent of respondents felt that progress had been made in gender diversity in international arbitration practices.

It also found, however, that only 31 per cent and 24 per cent of respondents felt similar progress was being made in cultural and ethnic diversity respectively.

Mr Bonnell responded to the latter by conceding that, "There's formal areas in diversity which need to be explored, and they include ethic diversity."

But the increase in female representation in arbitration was a positive step, he noted.

"If you look at what arbitration was like when I started practicing in the area nearly 20 years ago, almost all of the tribunals were composed of white men in late middle age," he recounted.

"We are no longer staring at walls of pale 60-year-old faces, and that's a positive thing for everyone."

using electronic documents or incorporating online dispute resolution.14 Institutions can also liaise directly with legaltechs to ensure preservation of confidentiality,15 and provide advice and training to arbitrators to ensure that the role of technology is not overly influential or preventing arbitrators from tailoring proceedings according to the needs of the parties.

They are central for determining the future of international arbitration and should be taking the lead in testing out new technologies and training arbitrators to make the best use of powers and case management techniques. Practitioners should also be proactive in selecting institutions that demonstrate a willingness to do so, and research the quality and nuance of education programs and innovations that institutions are developing.

End Notes

1. 2018 International Arbitration Survey: The Evolution of International Arbitration' (Report, Queen Mary University of London and White & Case LLP, 2018)
2. 2018 Survey, 2, 9, 18, 23, 26-27, 33-34.
3. 2018 Survey, 23.
4. 2018 Survey, 27.
5. 2018 Survey, 27.
6. In addition to being featured at ICCA 2018, technology is also highlighted in Jonathan Mackojc, '10 Hot Topics for International Arbitration in 2018' Kluwer Arbitration Blog (Report, Young ICCA, 2018), and other current blog articles and legal commentary.
7. 2018 Survey, 31.
8. 'Information Technology in International Arbitration' (Report, International Chamber of Commerce Commission on Arbitration and ADR, 2017)
9. Gauthier Vennieuwenhuyse, 'Arbitration and New Technologies: Mutual Benefits' Volume 35 Journal of International Arbitration Issue 1 (2018), 119.
10. 2018 Survey, 33.
11. Gauthier Vennieuwenhuyse, 'Arbitration and New Technologies: Mutual Benefits', 120.
12. 2018 Survey, 32.
13. Ibid.
14. See for example, the Chartered Institute of Arbitrators, the Australian Centre for International Commercial Arbitration, the ICC, the CIETAC, and the HKIAC.
15. See for example, the legaltech Dispute Resolution Data and its case database created with the cooperation of twenty institutions, discussed in Gauthier Vennieuwenhuyse, 'Arbitration and New Technologies: Mutual Benefits' Volume 35 Journal of International Arbitration Issue 1 (2018), 120.

CIArb Australia Membership Update

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

Fellows

Elizabeth Brimer	VIC	**Vesantha Stensin**	VIC
Nunzio Lucarelli QC	VIC	**Michael Whitten QC**	VIC

Members

Muhammad Afzal	NSW	**Andrew Broadfoot QC**	VIC	**Callum Strike**	WA
Alok Agrawal	NSW	**Nicholas Hopkins**	VIC	**Ozlem Susler**	VIC
Sukanthan Arulanandasivam	QLD	**Royston Kemp**	VIC	**William Thomas**	VIC
Stuart Blaxell	NSW	**Ryan McPherson**	NSW	**Michael Ukponu**	VIC
		Adam Murray	SA		

Associates

Sam Adair	VIC	**Amy Hando**	VIC	**William Morgan**	QLD
Elizabeth Bateman	VIC	**John Hennessy SC**	NSW	**Damien O'Reilly**	WA
Joan Fernandes	WA	**Michelle Markham**	QLD	**Timothy O'Shannassy**	WA
James Green	QLD	**Thomas McDonald**	NSW	**Adam Perigo**	NSW

Students

Naseef Abdulla	VIC	**Jack Donnelly**	QLD	**Grant Kynaston**	NSW
Esther Adeyinka	NSW	**Emily Egan**	VIC	**Katelyn Lamont**	QLD
Margery Ai	NSW	**Jenan Elhassan**	VIC	**Helen Le**	VIC
Christopher Alchian	NSW	**Tamanna Ferdous**	VIC	**Dempsey da Costa**	VIC
Melissa Arsov	VIC	**Nicholas Fidler**	QLD	**Meg Lucas**	QLD
John Asimakis	NSW	**Sarah Fitzsimons**	VIC	**Jacky Lui**	NSW
Nicole Batrouney	VIC	**Sebastian Fuentes**	VIC	**Mary Makris**	VIC
Alexander Batsis	VIC	**Pradeep Gaur**	VIC	**Christina Mauro**	NSW
Myles Bayliss	QLD	**Emma Genovese**	VIC	**Alisha Mayor**	VIC
Pierfrancesco Benedetti	QLD	**Madeleine Gome**	VIC	**Emily McClelland**	QLD
Alyssa Britnell	VIC	**Bethany Hosking**	VIC	**Mason Miles**	VIC
Cheyenne Cadence	VIC	**Claire Humphries**	NSW	**Young Hun Min**	ACT
Joseph Calara	VIC	**Cameron Inglis**	VIC	**Justin Mitchell**	VIC
Nell Cameron	VIC	**Nicholas Irwin**	VIC	**Sahra Mohammadi**	VIC
Rhys Carvosso	NSW	**Alfred Jackson**	QLD	**Alexandra Moloney**	VIC
Gideon Caturla	QLD	**Steven Jones**	WA	**Ema Moolchand**	VIC
Rita Charchar	VIC	**Munufe Kabylakis**	VIC	**Gabrielle Nicholls**	VIC
Rui Chi	NSW	**Neha Khan**	VIC	**Leigh Nicholls**	VIC
Jacob Cookson	QLD	**Ryan Kingsmith**	VIC	**James Occleshaw**	VIC
Sophie Crichton	WA	**Kipling Kirkland**	VIC	**Liam O'Connor**	NSW
Emma Dixon	VIC	**Grant Klemm**	VIC	**Donné Opperman**	VIC
Rukiye Dogan	VIC	**Chavala Kobluk**	VIC	**Lachlan Peavey**	VIC

CIArb Australia Membership Update

In recognition of achievements beyond the membership space, we are pleased to announce the following appointments and promotions of CIArb Australia Members. Congratulations!

Mark Ambrose QC

Appointed Queen's Counsel

View Profile

Alain Musikanth SC

Appointed Senior Counsel

View Profile

Elizabeth Brimer SC

Appointed Senior Counsel

View Profile

Andrew Robertson

Elected Chair, Construction Law Society

View Profile

Prof Andrew Christie

Appointed Derek Brewer Visiting Fellow, Emmanuel College, Cambridge

View Profile

Erika Williams

Re-appointed to ArbitralWomen Board (2018-2020)

View Profile

Prof Doug Jones AO

Awarded John Shaw Medal

View Profile

Patrick O'Sullivan QC

Appointed Judge of the District Court of South Australia

View Profile

Sir Laurence Street, 91, left his mark as a reformer of the law

Vale Sir Laurence Whistler Street, AC, KCMG, KSTJ, QC

The CIArb Australia Board and Management on behalf of members, friends and peers express deepest condolences on the passing of CIArb Fellow, Sir Laurence Whistler Street, AC, KCMG, KStJ, QC

23 JUNE 2018
Chris Merritt, Legal Affairs Editor
The Australian

Two days before the death of Sir Laurence Street on Thursday, the former NSW chief justice was visited by one of his oldest friends, who was deeply moved by his condition.

Andrew Rogers had known Street since the 1960s, when Street was a judge and Rogers was still at the Sydney Bar. Rogers would eventually join his friend on the bench and their relationship changed from one of professional respect to a close and long-lasting friendship.

Street, 91, was part of what history might come to view as the nation's greatest legal dynasty. His father, Sir Kenneth, and grandfather Sir Philip, had also been chief justices of NSW. His son Sandy Street is a judge of the Federal Circuit Court, as is his daughter Sylvia Emmett. His mother, Jessie Street, was a well-known social reformer who led campaigns for Aboriginal rights.

Sir Laurence's health had declined recently under the effects of a stroke. But four years ago, a wheelchair-bound Street made a rare return to Sydney's legal precinct to watch one of his successors as NSW chief justice, Jim Spigelman, launch a biography of Murray Gleeson, who also held that position before going on to lead the High Court. Street's life spanned several careers and he left his mark not just on the substantive law but on the business of law and the wider world of commerce.

At the age of 17, he lied about his age to enlist in the Royal Australian Navy during World War II. He became a solicitor after the war and went to the Bar in 1951. In 1965 he was appointed to the NSW Supreme Court bench and, nine years later, became chief justice at age 47.

After retiring from the bench in 1988, he became chairman of the company now known as Fairfax Media and was later, with Rogers, a driving force in what was then the novel concept of alternative dispute resolution.

Rogers, who is a former chief judge of the Supreme Court's commercial division, describes his late friend as a master of delivering judgments that were "beautifully structured and, most of all, perfectly correct".

"Watching him in action was to see a master of the craft," Rogers says.

"During his time as chief justice, the Supreme Court went from being a creature of another age to being a modern court.

"It was a privilege to work with him. It was a privilege to watch a master in action and it was a privilege to be his friend."

Rogers and Street sat together on an inquiry into options for reforming the legal system and Street also went on to chair the federal government's now defunct International Legal Services Advisory Council. Street used his 19 years as chairman of the ILSAC to nudge the legal profession towards acceptance of the now thriving cross-border trade in legal services.

In 1996 he told this writer that the Australian legal profession needed to abandon one of the key rules that had been preventing the entry into this country of law firms from a range of countries.

"If other countries don't want Australian lawyers to practise Australian law within their jurisdictions, they are limiting their capacity to provide international legal services," he said.

He believed there was no reason why Australian lawyers should limit themselves by insisting on reciprocity of practice rights before allowing foreign firms into Australia.

"If we want to make Australia an attractive location for the establishment of regional commercial headquarters, there simply has to be an open market." He warned the protectionists within the legal profession that even if they succeeded in restricting the entry of foreign law firms, they would not be able to prevent the practice of foreign law in Australia.

"If accountants deliver better service, the market will choose," he said.

> At the same time, he built a market-leading position as the nation's foremost commercial arbitrator — a business that Rogers also took up after stepping down as chief judge of the Supreme Court's commercial division.

As chairman of Fairfax, Street sought to stabilise that company after an extended period of upheavals.

It was Rogers who had introduced Street to alternative dispute resolution on his return from a sabbatical in the US in 1984.

"What you see today are the fruits of Street adopting and adapting for Australia the techniques of dispute resolution outside the court system," Rogers says.

"It was fascinating to see how he managed to bring about a resolution so that each side thought they had done reasonably well, but nonetheless did not give away everything.

"He was wonderfully adept at crafting solutions that all contestants could live with."

Street established the Australian Disputes Centre that NSW Attorney-General Mark Speakman described yesterday as a "model for access to justice".

In 2007 Street mediated the return of Aboriginal human remains from the Natural History Museum in London.

As his ill-health took its toll, some of those at the Sydney Bar came to believe that traditionalists were taking advantage of his absence to seek to wind back his promotion of alternative dispute resolution. Some lawyers still believe this cheaper and faster form of dispute resolution is a threat, while Street viewed it as an opportunity.

Serving NSW Chief Justice Tom Bathurst has described Street as one of the outstanding jurists of the 20th century.

"After a distinguished career at the Bar, as a judge of the equity division of the court and chief judge of that division, he was appointed chief justice in 1974, and served in that capacity until 1988," Bathurst said in a statement.

"He made significant contributions to jurisprudence in all fields of law, both civil and criminal. His judgments, in both the civil and criminal area, were always a model of clarity and learning and many are as relevant today as at the time they were written," Bathurst says.

"Sir Laurence was an outstanding man and jurist. He will be sorely missed. On behalf of all members of the court, I extend my deepest sympathy to all members of his family."

"It was a privilege to work with him. It was a privilege to watch a master in action and it was a privilege to be his friend."

Prof The Hon Andrew Rogers QC

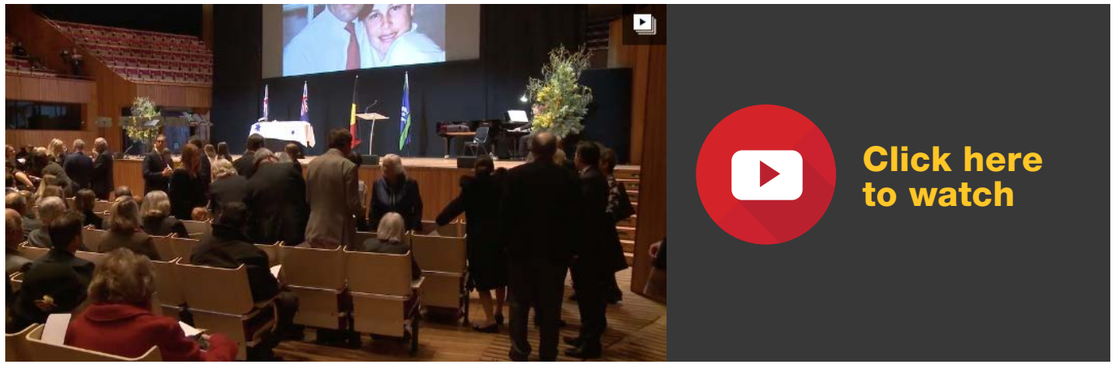
Friendship is excellence, and it is most necessary to life. For without friends, no one would choose to live, even if he possessed all other goods. Even the rich and those in high office with dominating power are thought to need friends most of all. For what is the purpose of such success without the opportunity of beneficence which is exercised chiefly and in its most laudable form towards friends?

How can prosperity be guarded and preserved without friends? And in poverty and in other misfortunes men think friends are the only refuge. Friendship helps the young too, to keep from error; it aids older people by ministering to their needs and supplementing the activities that are failing from weakness; those in the prime of life it stimulates to noble actions- "two going together" -for with friends men are more able both to think and to act.

Friendship seems too to hold states together, and lawgivers to care more for it than for justice; for unanimity seems to be something like friendship, and this they aim at most of all, and expel faction as their worst enemy. When men are friends they have no need of justice, whereas when they are just they need friendship as well.

The truest form of justice is thought to be a friendly quality.

Aristotle, Nicomachean Ethics VIII.1



"He understood that law is a social science to facilitate commerce and fair dealing, and to satisfy reasonable expectations"

The Hon Murray Gleeson AC

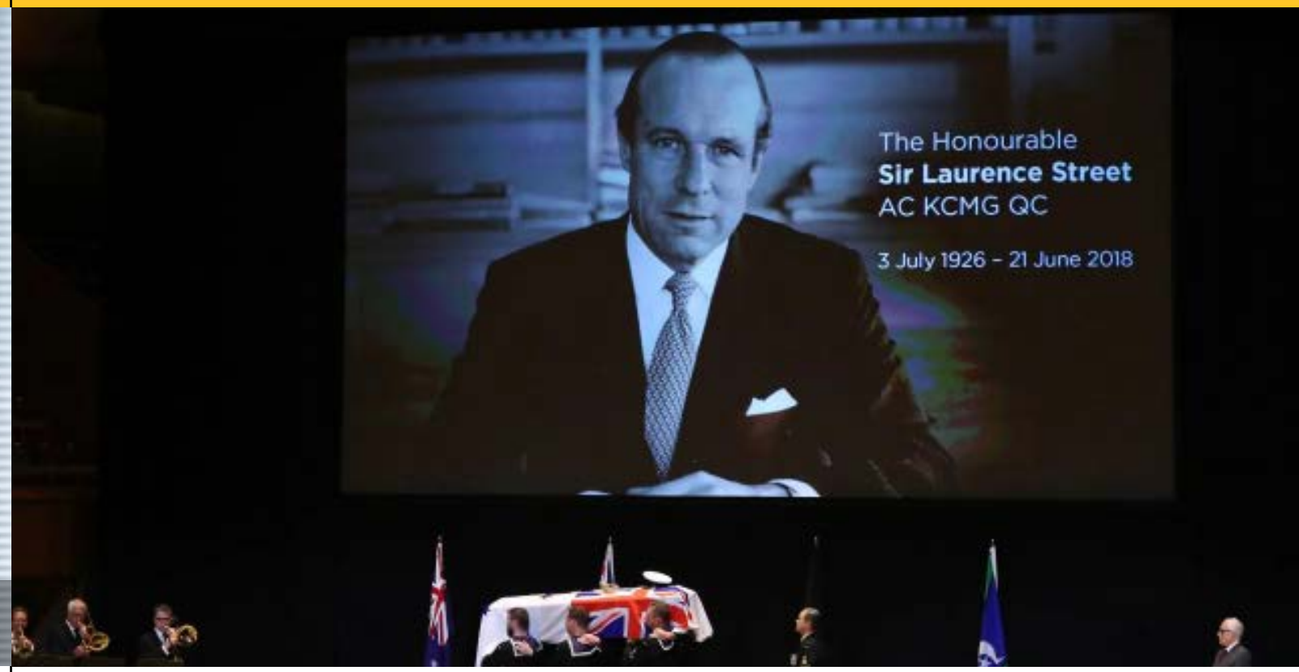
The system of compulsory pupillage, which required a newly admitted barrister to read for a year in the chambers of an established junior, worked for me in a most fortunate way. In 1963, I read with Laurence Street, who became a Queen's Counsel at the end of that year. I also joined the Seventh Floor of Wentworth Chambers, where he practised, and stayed there for my whole time at the Bar, until I left in 1988 to take over from him as Chief Justice of New South Wales.

In 1963, Laurence Street was one of the dominant figures at the Equity Bar. He had been admitted for 12 years and had developed a phenomenal practice in Equity, commercial and maritime work. Part of his routine work in the area of company law related to insolvency, and he lectured in bankruptcy at the Sydney Law School, He took his responsibilities as a pupil-master seriously, and went out of his way to involve me in his cases and introduce me to the solicitors who briefed him. He was a brilliant advocate; with a combination of extensive legal knowledge and immense personal charm. I doubt that any junior barrister has ever had a more committed following among law firms of all sizes, and yet he belonged to a generation of barristers who were convinced that if they missed a day at work their livelihood would disappear. He provided an outstanding professional service which was highly valued by solicitors and their clients.

It was a surprise, and something of a disappointment, that Laurence Street, after only 2 years as a Queen's Counsel, accepted an appointment as an Equity judge of the Supreme Court in 1965, aged 39. He had before him a career at the peak of his profession. However, he was a superb Equity judge. He understood that the law is a social science, and that its objective is to facilitate commerce and fair dealing, and to satisfy reasonable expectations; that it is not meant to be a minefield for the unwary but a method of finding just solutions to practical problems. This, I am sure, explains his later success as a mediator.

In 1974, at the age of 47, he became Chief Justice of New South Wales, like his father and grandfather before him. He retired from that office on All Saints Day 1988, but the date was only a coincidence. He took the process of handing over very seriously also. Over several days he told me the details of what would be involved, and made many helpful suggestions, and gave me his appraisal of the members of the Court individually. I now regret that I did not make written notes, although I still have a recollection of what he said for my private enjoyment.

Sir Laurence Street gave outstanding service to the State in his capacity as Chief Justice. As has been customary in this State, while he was Chief Justice he also served as Lieutenant



Governor.

There are three aspects of his work as Chief Justice that should be stressed. First, there was his work presiding in the Court of Criminal Appeal. For many, this was unexpected. Everybody expected that, as an Equity judge, he would excel in the work of that jurisdiction. That was his comfort zone. But after I took over from him, a number of Supreme and District Court judges remarked to me that they were surprised by the way he took to the administration of criminal justice. This, I think, was a function both of his ability as a lawyer but also of his personality, and in particular, his human understanding and empathy. He had a keen sense of the demands of justice and, where appropriate, mercy, and he was confident in his ability to find a resolution that would meet those demands.

Second, there was his attention to judicial administration. Partly because of the much smaller size of courts, this was not a topic that was regarded as important to judicial leadership in the past. Sir John Kerr saw its significance, and devoted most of his brief time as Chief Justice to administration rather than sitting on cases, but it was Sir Laurence Street who carried it forward over his 14 years in office. The three of us who followed him – Jim Spigelman, Tom Bathurst and I – may each have employed different methods, but he put the matter on the agenda.

Third, there was his role in the establishment of the Judicial Commission of New South Wales. As head of the State's judiciary he had the responsibility of overseeing the formation of this new body and, importantly, of mediating it to the judges and magistrates. The latter proved to be a difficult, and in some respects thankless, task. The response of some judges was negative. They said the Commission was a threat to their independence. The Commission combined two unrelated functions which were both novel at the time – one a formal process for dealing with complaints against judicial officers; the other of providing educational and related services to judicial officers. Both functions were, at the time, peculiar to New South Wales. Having them performed by the one body was counter-intuitive. This combination, which is unique, reflected Laurence Street's aptitude for constructive compromise. In his advocacy to the judiciary, the educational services became the sugar coating on the pill of the complaints process.

He became the first President of the Judicial Commission, which was launched in early 1987. The stresses leading to, and associated with, its formation have now largely been forgotten and it is an established feature of the legal landscape, but his retirement from office in 1988, at the comparatively young age of 62, following a stage of his professional career that he must have found demanding. The State's judiciary owes him a great deal for the skill and perseverance with which he discharged his duties of office at a difficult time.

Sir Laurence Street's widow, and children, and grandchildren have suffered deep personal loss, but lawyers in general, and judges in particular, will remember his great contribution to the profession and to the administration of justice.

EUGENIA LEVINE
BARRISTER
View Profile

Member Profile: Eugenia Levine

I was born in Moscow and grew up in Melbourne. After finishing my law degree at Monash University, I worked at a commercial law firm in Melbourne and then spent some time overseas doing a Masters' degree in New York and then working in international litigation and arbitration in London. I really enjoyed the experience of living and working overseas but, at some point, home beckoned. Since 2013, I have been practising as a barrister at the Victorian Bar, focusing primarily on the resolution of commercial disputes through litigation and arbitration.

Read more

What/Who inspired your interest in arbitration?

I first became interested in arbitration while participating in the Vis Moot at university. I loved the idea that arbitration is really about resolving disputes in a transnational justice system, as well as the sheer diversity of disputes that are capable of being resolved through arbitration.

What traits make a good arbitrator?

Excellent legal skills and impartiality are of course a given. Aside from that, a good arbitrator is flexible, efficient and a strong communicator.

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

The American Civil Rights Movement because of its impact on securing equality that remains pertinent today.

What is your idea of perfect happiness?

Travelling and exploring new places with my family.

What is your favourite journey?

Any winding bus ride through the Andean Mountains between Chile and Argentina.

CIArb Australia In Conversation Seminar Series 2014: Albert Monichino QC, Dr Gavan Griffith AO QC and Eugenia Levine held at the Melbourne Commercial Arbitration and Mediation (MCAM) Centre

What is your greatest extravagance?

Catching too many taxis.

What do you consider to be most over-rated virtue?

Individuality – no one achieves things on their own without the support of the people around them.

Which living person do you most admire?

Ruth Bader Ginsburg, US Supreme Court Justice,for her unique story of dedication, resilience and leadership.

What is your favourite piece of music?

Bohemian Rhapsody, Queen

What is your greatest fear?

Being bitten by a snake.

What is your favourite film?

Strictly Ballroom, Baz Lurhmann

What is your favourite piece of literature?

The Master and Margarita by Russian writer, Mikhail Afanasyevich Bulgakov.

2004: All dressed up and plenty to say. The Monash Jessup team at a moot dinner in Washington, from left: Brian Mason, Eugenia Levine, law lecturer Rowena Cantley-Smith, Matthew Fielden, Evan Mentiplay and Fleur Ward.

What credo/ maxim/motto inspires you?

"Success is not final, failure is not fatal: it is the courage to continue that counts." - Winston Churchill.

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The CIArb Australia News

The CIArb Australia News is the flagship publication of the Chartered Institute of Arbitrators (Australia) Limited.

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Casenotes and opinion pieces are reviewed by *The CIArb Australia News* Peer Review Panel.

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