Justice James Allsop: International Arbitration and the Courts - the Australian approach

Justice James Allsop, President, NSW Court of Appeal. Photo: Rick Stevens
This intensive residential course in International Commercial Arbitration is offered over nine days. Participants will be taught the practice of international commercial arbitration, including all major forms of international arbitration and related dispute settling mechanisms such as WIPO, WTO and Investment Treaty Arbitration. Participants will gain the ability to appear in or act as an arbitrator in such arbitrations in different contexts.

In the first half, a series of lectures cover the fundamentals of international commercial arbitration. They follow and analyse legal concepts and issues arising during the course of an arbitration. In the second half, the lectures will examine Trade Law disputes and arbitration under Bilateral Investment Treaties and Free Trade Agreements and other specialist areas such as construction arbitration.

Meanwhile in the afternoon sessions, participants take part in practical group workshops, under the guidance of experienced arbitrators. Students will be given practical training in the conduct of an international arbitration and will discuss a range of problems which may arise in the course of conducting an international arbitration.

Successful completion of the course assessment will enable students to gain advanced standing in postgraduate programs offered by the Faculty of Law UNSW. Please contact student services to discuss admission to a postgraduate program before undertaking the course. Current UNSW students should contact student services to obtain information about units of credit available to your degree. A maximum of 12 units of credit advanced standing is available.

Places are strictly limited
Cost: A$7,500 includes tuition, course notes, meals (except evening dinner), course banquet, accommodation and ground transport

The above cost is for non-Malaysian students only and includes the cost of the Practice and Procedure exam but NOT the Award Writing exam which is subject to an additional fee.

For further information and registration details please contact:

Ms. Michelle Sindler
Chartered Institute of Arbitrators (Australia) Limited
Level 16,
1 Castlereagh Street
Sydney, NSW, 2000, Australia
Tel: + 61 2 9230 0677; Fax: +61 2 9223 7053
Email: info@ciarb.net.au
URL: www.ciarb.net.au

Noor Alia Mohd Anif
Kuala Lumpur Regional Centre for Arbitration
12, Jalan Conlay
50450 Kuala Lumpur, Malaysia
Tel : +603 2142 0103; Fax: +603 2142 4513
Email: events@klrca.org.my
nooralia@klrca.org.my
URL : www.klrca.org.my
Editorial
4 Holmes Brown Book Launch
Murray Gleeson’s ‘Nuggets of Gold’

NewsReview
5 Fast Track to Fellowship Course
Amanda Lees resigns Annual General Meeting
DRBA Conference in Sydney
6 Essam Al Tamimi speaks at Clayton Utz/University of Sydney International Arbitration Lecture
7 Events
Diploma Course 2012 to be held in Malaysia
12-13 The Class of 2011
Diploma Course Class of 2011-Photograph

Comment & Opinion
18 International Arbitration and the Courts - the Australian Approach
James Allsop
30 Watch out ADR and Arbitration - DAPs are moving in !!
Paula Gerber and Brennan Ong
38 Dispute Adjudication Boards in Mauritius
Kailash Dabeesingh
38 From The Economist
Foreign Investment Disputes - Come and get me
Argentina and International Arbitration

Books
9 “The International Arbitration Act 1974 - a Commentary”
Michael Sanig reviews new book by Malcolm Holmes and Chester Brown

Legal Viewpoint
41 Is this the end for Expert Witness immunity ?
Saloni Kantaria reports on a case from the UK Supreme Court
42 International Arbitration
Uganda Telecom and the grounds for resisting enforcement of foreign awards
44 High Court Appeal
Appeal of arbitral awards and the decision in Westport Insurance Corp and Gordian Runoff Limited
46 Expert Determination
High Court clarifies standard expected of expert reasoning

Columnists
10 From the President
John Wakefield presents his Annual Report
14 Doug Jones Travelogue
Despatches from a wandering President - Doug Jones concludes his diary of the year of his CIArb Presidency.

The Diary
26 March - Board Meeting
7-15 April - Diploma Course in International Commercial Arbitration, Kuala Lumpur and Malacca
30 April - Board Meeting
3-5 May - Dispute Resolution Board Australasia Conference at Dockside Convention Centre, Sydney
6-8 May - Society of Construction Law Conference, Sofitel Hotel, Melbourne
www.scl.org.au
21 May - CIArb Australia Annual General Meeting
28 May - Board Meeting
25 June - Board Meeting
30 July - Board Meeting

Directory
48 Who is who in CIArb Australia
The Australian ADR Reporter
Those of us who were present at the launch of Malcolm Holmes’s and Chester Brown’s new commentary on the *International Arbitration Act* were more than entertained by some very insightful remarks from the former chief justice of Australia’s High Court, Murray Gleeson, who launched the book.

Mr Gleeson noted that the first arbitration he was involved in took place in 1965, where he appeared as a very junior barrister. “There were senior and junior counsel on both sides,” he said, “it was a dispute, about an engineering contract, between a Government instrumentality and a company that was formed as a joint venture vehicle for two United States corporations.”

He observed that the directors of the company were all nominees of the American corporations; the shares in the companies were owned by the two American corporations and the senior employees of the company were American nationals.

This dispute involved a large sum of money and occupied a substantial hearing time. It was a domestic arbitration. That seemed to him to illustrate the fact that there was no bright line between domestic and international arbitrations.

In substance, it was an arbitration with a strong international flavour. The other interesting thing to note was that the arbitrator was not a lawyer. He was a distinguished retired engineer.

Today we tend to assume, said Mr Gleeson, that arbitrators in commercial arbitrations will be lawyers. But when he was a junior barrister most arbitrations that he had anything to do with were conducted by builders, or architects, or engineers.

How it came to be assumed that arbitrations, including international arbitrations, would be before lawyers he was not entirely sure.

Mr Gleeson almost certainly answered his own question.

He noted that the provisions of sections 16 and 21 of the *International Arbitration Act*, as amended, aim to achieve a level of finality for arbitral awards, consistent with that given by the Model Law. One of the respects in which the State acts are “uniformish” rather than uniform is that one will find there a recognition engineer.

In that case there were some issues of construction of a contract argued. In the event, the findings of fact made by the arbitrator meant that those issues were not determinative.

However, it was not self evident that it would have been the intention of the parties that the distinguished engineer’s decision on issues of construction in the contract would necessarily have attached to them absolute finality.

He did not assume that in all circumstances judicial review was a bad thing, but then he may be biased by his own background. It is said that parties to arbitration agreements want finality. Murray Gleeson thought that it was more correct to say that winners wanted finality. His experience of litigation and arbitration has been that there are not many good losers.

What people agree to, what they sign up to, when they enter into an arbitration agreement is a system that brings more finality than the system of litigation where many people regard a trial as the first round in a contest that will go through a succession of phases until somebody runs out of resources or further avenues of appeal.

Although the parties sign up to a regime that involves finality when they enter into the arbitration agreement, when they lose the arbitration proceedings, finality may be the last thing they want, said Mr Gleeson.

And that is the reason why arbitration is in such decline domestically. The ‘olden days’ when parties agreed to be bound by one of their peers, acting as the arbitrator, are dead and buried and unless we can get back to the situation where appropriate experts are conducting arbitrations, without legal challenges from every conceivable direction, there is little chance of resurrecting a process which has served us so well in the past. Whether the new legislation will address the problem is the million dollar question.

Michael Sanig
In late November 2011 I joined the CIArb’s Fast Track to Fellowship course conducted in Sydney by Albert Monichino and Damian Sturzaker.

To say the course was supercharged is an understatement. All participants were given USBs containing every imaginably useful international or domestic arbitration statute.

Over the course of two extremely intensive nine hour days (with a lunch-over-the-desk emphasis) Albert and Damian examined in detail the hypothetical scenario of an international arbitration which threw up issues such as seat of arbitration, pathological clauses, med/arb issues, questions concerning the hearing itself, enforcement in various global locations, challenges, and dubious arbitral behaviour.

The course participants were mature and experienced commercial legal practitioners – barristers, solicitors and corporate counsel – each with histories in international arbitrations or domestic commercial arbitrations.

On two occasions on each of the two days of the course each participant was required to write, email and discuss under tutorial conditions his or her paper written earlier about discrete issues. This was on top of a pre-course paper and a post-course essay.

Albert’s and Damian’s style was nurturing, encouraging and thought-provoking. All in all, it was an extremely valuable course.

During our discussions over the two days of the course, Albert described Professor Gabrielle Kaufman-Kohler, a Swiss international arbitrator in high demand, as a Formula One arbitrator in international arbitration.

Based on the quality of this course I have no doubt that Professor Kaufman-Kohler’s place in pole position on the Formula One grid is under serious threat by the Australian international arbitrators who were educated on this arbitration course.

Josh Wilson

Amanda Lees moves to Singapore

Amanda Lees has resigned from the Board of CIArb Australia and her position of Company Secretary following her move to the Singapore office of Blake Dawson which became Ashurst on 1 March.

Michael Sanig has taken over the role of Company Secretary as well as Honorary Treasurer and will act in both roles until after the Annual General Meeting.

Annual General Meeting to be held on 21 May

This year’s Annual General Meeting will be held on Monday, 21 May at 5.30pm at the Australian International Disputes Centre, Level 16, 1 Castlereagh Street, Sydney.

A formal notice together with nomination forms will be sent out in the second half of March.

Should an election be required, ballot papers will be distributed before 21 April.

DBRA Conference in Sydney

The Dispute Resolution Board Australasia is hosting a conference in Sydney from 3-5 May, 2012 at the Dockside Convention Centre in Darling Harbour.

There are a number of very interesting topics being discussed. More information at www.drba.com.au/conference.
Essam Al Tamimi was this year's guest speaker at the Clayton Utz/University of Sydney International Arbitration Lecture on Sharia Law and Arbitration. The full transcript of what he said can be found at www.claytonutz.com/ialecture/2011/transcript_2011.html
The next Diploma Course in International Commercial Arbitration will be held in Malaysia from 7-15 April 2012. The Australian Branch of the Chartered Institute will co-present the course with the Kuala Lumpur Centre for Regional Arbitration (KLRCA). The first seven days of the Course will take place in Kuala Lumpur with the final weekend taking place in Malacca, south of KL.

The Course Directors are Malcolm Holmes, former President of the Australian Branch, and Trustee of the Chartered Institute; and Rashda Rana, a Director of CIArb Australia.

They are supported by the Malaysian Branch of CIArb, the Australian Centre for International Commercial Arbitration (ACICA), the Australian Commercial Disputes Centre (ACDC), the Law Society of New South Wales and Continuing Legal Education Centre, Faculty of Law, University of New South Wales (UNSW).

More than twenty presenters and tutors – experts in their own fields - have been lined up for the course and will be travelling to Malaysia from Singapore, Indonesia, Hong Kong, Australia, UK and USA.

This intensive residential course in International Commercial Arbitration is offered over nine days. Participants will be taught the practice of international commercial arbitration, including all major forms of international arbitration and related dispute settling mechanisms such as WIPO, WTO and Investment Treaty Arbitration.

Participants will gain the ability to appear in or act as an arbitrator in such arbitrations in different contexts.

Successful completion of the course assessment will enable students to gain advanced standing in postgraduate programs offered by the Faculty of Law UNSW. Intending participants should contact student services to obtain information about units of credit available to their degree. A maximum of 12 units of credit advanced standing is available.

In the first half of the course, a series of lectures cover the fundamentals of international commercial arbitration. They follow and analyse legal concepts and issues arising during the course of an arbitration.

In the second half, the lectures will examine Trade Law disputes and arbitration under Bilateral Investment Treaties and Free Trade Agreements and other specialist areas such as construction arbitration.

Meanwhile in the afternoon sessions, participants take part in practical group workshops, under the guidance of experienced arbitrators. Students will be given practical training in the conduct of an international arbitration and will discuss a range of problems which may arise in the course of conducting an international arbitration.

The cost of the course is A$7,500 which includes tuition fees, course materials, accommodation and all meals (except evening dinner) in five star hotels in both Kuala Lumpur and Malacca. The cost also includes the course banquet, which will be held on the last night of the course, and ground transportation between Kuala Lumpur and Malacca.

Places are limited and further information and registration details can be obtained from: Ms. Michelle Sindler Chartered Institute of Arbitrators (Australia) Limited Level 16, 1 Castlereagh Street, Sydney, NSW, 2000, Australia Tel: +61 2 9230 0677; Fax: +61 2 9223 7053 Email: info@ciarb.net.au URL: www.ciarb.net.au; or Noor Alia Mohd Anif Kuala Lumpur Regional Centre for Arbitration 12, Jalan Conlay 50450 Kuala Lumpur, Malaysia Tel: +603 2142 0103; Fax: +603 2142 4513 Email: events@klrca.org.my nooralia@klrca.org.my URL: www.klrca.org.my
The International Arbitration Act 1974: A Commentary

Malcolm Holmes and Chester Brown

Extensive provision-by-provision commentary on key international arbitration legislation

About the Book

Authoritative and up-to-date, The International Arbitration Act 1974: A Commentary, is a detailed, analytical text providing guidance on the interpretation of key international arbitration legislation.

This text is the result of a fruitful collaboration between the co-authors, a leading practitioner and an academic, who are both experts in this area of law. The commentary follows the structure of the International Arbitration Act 1974 (Cth), making this an easy reference tool for practitioners and researchers.

An extensive provision-by-provision commentary on the Act is provided, with references to both relevant Australian case law and important judicial consideration from foreign jurisdictions. The legislative history of each provision is clearly set out, enabling readers to develop an in-depth understanding of the law. This extends to include a detailed treatment of Schedule 2 of the Act, the UNCITRAL Model Law on International Commercial Arbitration, and Schedule 3 of the Act, the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

About the Authors

Malcolm Holmes QC is a Senior Counsel in practice at the NSW Bar and a Chartered Arbitrator with chambers at Eleven Wentworth Chambers, Sydney and 20 Essex St, London. He also teaches international arbitration at the University of Sydney, the University of NSW and the University of Queensland. He is a former President of the Australian Branch of the Chartered Institute of Arbitrators.

Chester Brown is Associate Professor in the Faculty of Law at the University of Sydney and a Barrister at 7 Selborne Chambers, Sydney. He is also a door tenant at Essex Court Chambers, London, and Maxwell Chambers, Singapore. He teaches, researches and practices in the fields of international arbitration, international investment law, and public international law.

ISBN (softcover): 9780409327472
RRP incl. GST (softcover): $120
ISBN (ebook): 9780409329605
RRP incl. GST (ebook): $120
ISBN (bundle): 9780000733986
RRP incl. GST (softcover & ebook): $150
*Prices subject to change

To make a purchase please visit www.lexisnexis.com.au/store, contact your Relationship Manager, or call Customer Service toll free 1800 772 772.
Books: The International Arbitration Act 1974 - A Commentary

Holmes and Brown add new book to the mix

In the past year there have been two books published in Australia devoted to International Commercial Arbitration - the excellent textbook by Rashda Rana and Michelle Sanson and the scholarly treatise by Professors Luke Nottage and Richard Garnett. The latest one, by Malcolm Holmes and Chester Brown is a very useful addition to the collection and will appeal to those who require a good working knowledge of the Australian International Arbitration Act in its current form.

The International Arbitration Act 1974 - A Commentary follows the style of other similar commentaries on Acts that have been produced by LexisNexis and comprehensively covers the IAA dealing with each clause and subclause in considerable detail backed up with the case law including, where relevant, that of overseas jurisdictions.

The book is as up-to-date as the Victorian Court of Appeal judgment in IMC Aviation Solutions v Altain Khuder (2011) VSCA 248 which was delivered on 22 August 2011 and the High Court of Australia’s judgment in Westport Insurance Corporation and Gordian Runoff Limited [2011] HCA 37 which was delivered on 5 October 2011.

In addition to the extensive commentary on the Act, the authors have also provided commentary on the three Schedules - Sch 1 - the New York Convention; Sch 2 the UNCITRAL Model Law and Sch 3 the ICSID Convention.

There is a particularly interesting and lengthy discourse on the “nature and extent of reasons required” (Art 31-3 of the Model Law) with commentary on both Oil Basins and the NSW Court of Appeal hearing in Gordian Runoff Limited which is neatly tied together by the High Court judgment in the Gordian Runoff case. It might well have been interesting if Oil Basins had also gone to the High Court.

Malcolm and Chester have also provided an excellent background to the legislation charting its genesis from the 1958 UN Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention) and the role played by UNCITRAL prior to Australia acceding to the Convention in 1974.

This is a book which will, no doubt, require regular updating as more cases emerge.

That said, it is a book which most definitely should be in the library of anyone in Australia who deals with International Commercial Arbitration.

The authors are to be congratulated on bringing out a worthy and valuable tome which adds to our growing knowledge on an ever increasingly important area of the law.

Malcolm Holmes (seated) signs a copy of the new book for CIArb Australia President John Wakefield (right) whilst Chester Brown looks on.

The Branch has maintained its focus this year on strategic policy objectives including:
(a) To ensure that membership of the Institute is recognised as a qualification which is of value domestically and internationally;
(b) To provide leadership and accreditation, policy development and domestic and international commercial dispute resolution;
(c) To raise awareness of the advantages of arbitration and mediation as processes for resolving disputes;
(d) To increase our membership at each level of the Institute.

Australian International Dispute Centre (AIDC) and CIArb Co-operation Agreement
Further to the Agreement entered into in September 2010, the Branch has maintained a strong working relationship with AIDC and the Australian Centre for International Commercial Arbitration (ACICA).

Branch Council meetings are held at the Centre as are other Branch events including book launches and the International Commercial Arbitration Moot. The Branch has co-operated with ACICA in the roll out of a series of seminars in each state introducing the Domestic Commercial Arbitration Acts as they are enacted.

New South Wales ADR Initiative
Further to the introduction of the Uniform Commercial Arbitration Act in New South Wales in October 2010, the Branch has made submissions to the Attorneys’-General in the states of Victoria and Western Australia upon the form and enactment of the uniform bill in those states.
These submissions were prepared with the assistance of Albert Monichino, Peter Megens, John Wakefield and Simon Davis. Further submissions are being considered in respect of the introduction of the legislation in Queensland with the assistance of Queensland Council member, Bob Holt SC.

CIArb Courses
On 26 May 2011, the Branch held an afternoon mediation seminar and workshop prior to the commencement of the International Arbitration Conference. The seminar was prepared and conducted by Damian Sturzaker, Albert Monichino, Rashda Rana and Michelle Sindler and Chaired by John Wakefield. It was attended by over 30 delegates including overseas delegates to the conference. Our thanks go to Blake Dawson for providing the venue.
In August 2011, Damian Sturzaker and John Wakefield conducted a 3 hour seminar on International Commercial Arbitration and ADR at the Australian Business School at the University of NSW for students in the Economics Faculty.
The Diploma of International Arbitration Course was run between 8 October 2011 and 16 October 2011 in Sydney. This was a joint initiative of the Australian Branch with the University of New South Wales and AIDC.
The Course attracted 14 candidates from Australia, Japan, Malaysia, the United Arab Emirates and the People’s Republic of China. The Course convenors were Malcolm Holmes QC (a trustee of the Chartered Institute of Arbitrators) and Rashda Rana (a Council member) with the assistance of various members of Council and included as faculty members, members of the judiciary of Australia and prominent arbitration practitioners from Australia, France, India, Hong Kong, Malaysia, Vietnam, Mauritius and the United Kingdom.
Our thanks go to the following law firms who provided facilities for the seminar and workshops: Blake Dawson; Clayton Utz; Mallesons; Norton Rose; Freethills.

The Practice and Procedure Exam was held in Sydney, Melbourne and Dubai on 26 November 2011 and Tokyo on 3 December 2011.
The Fast Track to Fellowship Course was conducted on 19 and 20 November 2011 for 7 candidates from Sydney. Council members Damian Sturzaker and Albert Monichino prepared and presented the Course.
In co-operation with ACICA and the Law Society of New South Wales, on 13 December 2011 the Branch organised and held a seminar on the operation of the Commercial Arbitration Act recently enacted in New South Wales and based upon the Model Law.
The seminar was attended by over 80 people and papers were given by Branch trustee, Malcolm Holmes QC, CIArb President Doug Jones AM and Rashda Rana. Commentary was provided by the Honourable J J Spigelman AC, former Chief Justice of New South Wales.

International Arbitration Moot
On 10 to 13 September 2011 the Branch in co-operation with New South Wales Young Lawyers conducted the International Arbitration Moot in Sydney. The moot questions were prepared by Council member, Rashda Rana. 8 teams participated and presentations were adjudicated by members of the Council and other eminent arbitration practitioners. The final was judged by Council members Rashda Rana, Rob Buchanan and John Wakefield. The prize for the best orator...
was a place in the Diploma of International Commercial Arbitration Course for 2012 worth AUD$7,700. Other prizes for winning team, best written submissions in the spirit of the arbitration moot were generously donated by Federation Press, Oxford University Press, Cambridge University Press, Kluwer and Thomson Reuters.

Because of the high standard this year the Branch determined to award a further prize for the running up team being a $200 book voucher for each member.

CIArb Asia Pacific Conference

The Australian Branch in co-operation with CIArb Secretariat held the International Arbitration Asia Pacific Conference on May 27, 28, 2011 in Sydney.

The Conference was organised by a Local Organising Committee chaired by John Wakefield and comprising members from branches in North America, East Asia, Singapore, Malaysia, Thailand and India.

The conference attracted over 200 delegates and speakers including the then Commonwealth Attorney General, Robert McClelland MP, the then Chief Justice of New South Wales, the Honourable J J Spigelman AC, Lord Peter Goldsmith PC QC and other eminent arbitration practitioners. The conference dinner was addressed by CIArb Companion, the Honourable Murray Gleeson AC, former Chief Justice of Australia.

The Conference provided an opportunity for regional branches to work together in terms of content, sponsorship and promotion to build relationships between those branches in the furtherance of International Commercial Arbitration in the Asia Pacific region.

Branch Functions

On 25 March 2011, CIArb held a dinner for Jim Creer the co-founder of the Australian Branch which was kindly hosted by Messrs Blake Dawson. Our thanks go to Georgia Quick for organising this dinner.

On 13 April 2011, the Branch sponsored the launch of the Thomson Reuters publication International Commercial Arbitration by Council member Rashda Rana and Michelle Sanson.

On 4 August 2011, the Branch co-sponsored with the University of Sydney Law School a seminar on investor state arbitration which was held at the University of Sydney Law School. This was presented by Branch members, Associate Professor Chester Brown and Max Bonnell.

On 13 October 2011, there was a chapter meeting in Queensland and on 25 November 2011 a chapter meeting in Western Australia.

On 28 November 2011, the Branch together with the New South Wales Young Lawyers organised a forum on drafting an effective arbitration clause which was given by CIArb trustee, Malcolm Holmes QC. Our thanks go to Council member Georgia Quick for undertaking the growth of young members within the Branch and liaising with New South Wales Young Lawyers to continue the development of the Branch’s relationship with that body.

The Law Society of New South Wales hosted the annual Diploma of International Commercial Arbitration dinner in Sydney on 8 December 2011. The function was attended by over 60 people including the then Federal Attorney General the Honourable Robert McClelland MP, the New South Wales Chief Judge in Equity Justice Patricia Bergen, members of the Course faculty, past and present students from the Course and leading arbitration practitioners.

The dinner was addressed by Doug Jones AM, the outgoing President of CIArb. The dinner has become an annual event in the Australian arbitration calendar and the Branch very much appreciates the significant support which it received from the Law Society of New South Wales in this and other initiatives.

On 14 December 2011, Mallesons sponsored a lunchtime seminar in Melbourne.

Branch Newsletter

The Branch continues to issue the ADR Reporter. As well as providing members with information about upcoming events the newsletter has provided updates on cases relevant to the practice of arbitration in Australia, proposed legislative changes and general comment on possible improvements in the practice of arbitration and other forms of dispute resolution. The Branch’s thanks go to Treasurer, Michael Sanig, for his significant efforts in preparing the issues of the Reporter for publication.

I would lastly like to thank the members of Council whose contributions to the continuing functioning of the Branch and its initiatives in their various capacities have been committed and substantial.

John Wakefield FCIArb
THE CLASS OF 2011: The Diploma Course in International Commercial Arbitration was held in Sydney from 8 to 16 October 2011 at both the University of New South Wales and the offices of major law firms in the Sydney CBD.
In 2011, Doug Jones was the first Australian to hold the office of President of the Chartered Institute. During his year as President, he kept a travelogue of his journeys around the globe. Here are Doug’s despatches for the last three months of 2011.
phase in the UK and Europe, particularly with the increasing emphasis on mediation, and in the construction industry with compulsory dispute resolution being dominated by adjudication, the Chartered Institute needs to work hard to ensure its relevance to UK and European members.

We are fortunate that the Institute has a significant role to play in the accreditation and training of mediators and it is indeed encouraging to see the level of involvement of accredited Chartered Institute Mediators in ADR in the UK and Europe.

This involvement in ADR does not just concern commercial dispute resolution but extends into community and family issues as well. Although there are now more of the 12,000 + members of the Chartered Institute residing outside the UK, it is critical for the Institute to establish its relevance to its membership in the UK involved in both domestic and international dispute resolution.

The Branch Chairs’ meeting provided a useful focus for discussing how this can be more effectively done.

In my capacity as President of the Institute, I attended the function held by the Bar Council of England and Wales with the Law Society of England and Wales marking the opening of the Legal Year in London.

This event was truly an international one. I had the opportunity of meeting colleagues from Australia including the President of the Law Council of Australia and the Presidents of the Law Society of New South Wales and the Law Institute of Victoria.

Also among the guests were the Presidents of the Canadian and Malaysian Bars. The opening of the Law Year in London had been the occasion for showcasing the opening of the new Rolls Building Courts and demonstrating the common law world (and others) the capacity of London Courts to be a centre for commercial dispute resolution worldwide. Well done London!

My next stops were New York and Beijing where, wearing my hat as President of the Australian Centre for International Commercial Arbitration, we showcased the capacity of Australia to be a neutral seat for commercial arbitrations in the Asia-Pacific region.

The New York event was attended by the Australian Consul General in New York, ACICA Vice President Alex Baykitch, a partner of Holman Willan & Fenwick from Sydney, and Justice Lindsay Foster the Sydney Arbitration Judge of the Federal Court of Australia.

The Beijing event was chaired by Richard Hill of Fulbright & Jaworski and addressed by myself and the President of the New South Wales Court of Appeal Justice James Allsop. The purpose of these events was to bring to the attention to US practitioners, and to Chinese companies, the capacity of Australia to serve as a neutral venue for international arbitrations in the Asia-Pacific region.

Its modern arbitration law, sophisticated practitioners, economical accommodation and facilities, and a judiciary familiar with and supportive of international commercial arbitration, establishes Australia as an attractive neutral venue for parties trading in the Asia-Pacific region.

Since the establishment of the International Arbitration Centre in Sydney in September 2010 there have been close to 100 matters that have used the Centre’s facilities including ACICA, ICC, and ad hoc arbitrations together with international mediations.

Other Australian cities such as Melbourne and Perth continue to attract international arbitration hearings. With the increasing trend for disputes arising from trade in the Asia-Pacific region to be decided in the region, Australia is establishing itself along with Hong Kong and Singapore as a recognised neutral venue for the resolution of these disputes.

During my trip to Beijing I also spoke at the Fulbright & Jaworski Third China Arbitration Conference which was an exceptionally well attended event involving Chinese users of international arbitration.

The level of use of arbitration in China continues to be very significant indeed. At this Conference there was a discussion, amongst other things, about the new CIETAC Rules about to be launched and which will be used for the problem for the Willem C Vis Moot in 2012.

Among key features of the new Rules will be a change to Beijing being the default seat where the parties have not agreed upon a seat and instead a determination by CIETAC of an appropriate seat depending upon the circumstances of the arbitration and of the parties. It is also understood that plans are well advanced by CIETAC for opening an office in Hong Kong.

I returned to Sydney from Beijing before travelling to the UAE. There I addressed a well attended CIArb function in Abu Dhabi which was organised by the United Arab Emirates Branch of the Chartered Institute. The UAE Branch is the third largest branch of the Institute and very active in the region.

This function was the precursor of the establishment of a Chapter in Abu Dhabi which, from the level of interest and attendance at the function at which I spoke has the (Continued on page 15)
It was then on to the IBA Conference in Dubai at the end of October, said to be the best attended of all IBA Annual Conferences. Over 5,500 lawyers from around the world descended on Dubai for this event. I am pleased to report with some relief that I survived the endurance test constituted by the social events surrounding the IBA (including an extremely well attended Reception of the CIArb hosted by the UAE Branch at which I spoke) and a busy program for the International Arbitration Committee of the IBA.

The IBA was preceded by an LCIA Symposium in the desert, and a meeting of the ICC Commission. With the economic downturn there has been a very significant increase in arbitrations in the UAE and in particular in Dubai.

The Dubai International Arbitration Centre has had a very substantial increase in its case load. The IBA Conference provided an opportunity for the DIAC to host a discussion forum on Arbitration in the Region and for delegates to meet the newly appointed Director of the DIAC Nassib Ziadé who has joined the DIAC following a successful career as Deputy Secretary General of the ICSID.

There are certainly challenges for arbitration in the UAE particularly given its inadequate International Arbitration Law which forms part of the UAE Civil Code. It is hoped that a new modern International Arbitration Law, perhaps modelled on the DIFC Arbitration Law will soon be promulgated in the UAE. In the meantime those involved in arbitration in the UAE need to take particular care to ensure that the existing legal prerequisites for a valid and enforceable Award are carefully followed.

November commenced with the Annual Clayton Utz/Sydney University International Arbitration Lecture held in the Ceremonial Court, Federal Court in Sydney on 8 November. For the first time the lecture was presented by live video link to the Federal Courts in Melbourne, Brisbane and Perth, and streamed live over the internet.

In this 10th year of the Lecture the subject of Islamic Influences on International Arbitration was addressed by Essam Al Tamimi of Al Tamimi & Company. Essam arrived in Sydney fresh from the success of the Annual Conference of the IBA in Dubai of which he was the Organising Committee Chair. Details of Essam’s lecture can be viewed live on the lecture website http://www.claytonutz.com/lecture/#previous.

After the Lecture it was off to Dublin for the Inaugural International Conference of the CIArb’s Young Members’ Group and the Annual Dinner of the Irish Branch of the Institute. There was also a Seminar on Mediation.

I spoke at the YMG International Conference on the challenges and opportunities facing young practitioners in the domestic and international ADR space. I sought to identify the pathways which young practitioners can follow to a successful career in ADR. The attendance at the Conference was very encouraging for this inaugural event and the enthusiasm of the Young Members Group of the Chartered Institute bodes well for the future of the Institute.

The Seminar on Mediation was held in the shadow of impending legislation in the Republic of Ireland to deal with mediation. My impression from three busy days in Dublin was that both the Court resolution of commercial disputes and the resolution of those disputes by Arbitration were flourishing.

Discussions with Mr Justice Kelly, the Judge in charge of the Irish High Court’s Commercial List indicated that that list was averaging 22 months from filing to judgment of commercial matters in the List which must
(Continued from page 16)

be some sort of record by world standards.

The interest in the practise of Mediation in the context of the impending legislation is high and bodes well for the continued efficient resolution of disputes in the Republic.

There is a concerted effort in Ireland for the establishment of a Centre for International Arbitration based upon the enactment of the new International and Domestic Arbitration Act which is state of the art. It is to be hoped that the efforts of the Irish in this respect will be rewarded.

I then returned to the UK for a number of Branch visits from which it was interesting to observe that the process of construction adjudication is becoming more complex as time passes.

The costs involved in adjudication, reflected by adjudicators’ awards for costs to successful parties, are escalating. This led me to wonder whether the process of adjudication, introduced to provide expedited and cheap interim decisions for the construction industry, will develop characteristics inconsistent with these objectives encouraging the development of expedited arbitration in its stead.

Certainly the UK Branches of the Chartered Institute have a real opportunity to lead the debate in this area of domestic dispute resolution.

The week commencing 14 November was a significant one for the Institute - the first meeting of the reconstituted Board of Trustees of the Institute was held during this week, and Lord Phillips, the President of the UK Supreme Court gave the Institute’s Annual Alexander Lecture.

Lord Phillips spoke on the subject of “Dallah at Home and Away” and in a very detailed address examined and agreed with the conclusions reached by the Supreme Court in this case (in which he did not sit). The Institute is privileged both to have Lord Phillips as its Patron and him providing such a detailed commentary in its Annual Lecture on a subject so relevant to International Arbitration.

The first meeting of the Institute’s Board of Trustees since the election of new Trustees from the UK, Europe, and North America established in my mind that the governance issues which had been the subject of some difficulties are now well and truly behind the Institute.

The new Trustees are all eminent practitioners and it was very encouraging indeed to see the collegiality and energy of the Trustees at this meeting. It was also the last Trustees Meeting to be attended by the Institute’s Director General, Michael Forbes Smith who is standing down in the New Year.

The Board took the opportunity of thanking Michael for his contribution to the Institute over the last six years. I would like to add my personal thanks to Michael whose contribution has indeed been significant. His support to me while Chairman of the Board of Trustees, and during my year as President has been greatly appreciated.

At this meeting the trustees entrusted me with the responsibility of chairing a planning committee for the Institute’s Centenary in 2015, a task which I will embrace with enthusiasm.

December saw me back in Australia for quite a busy month. The CIArb participated in Seminars around Australia seeking to reform the process of Domestic Arbitration in Australia, taking advantage of the new Uniform Domestic Arbitration Legislation based on the Model Law.

I spoke at Seminars in Victoria and Sydney at which this has been the focus of discussion. There is strong support for reform of Domestic Arbitration practice, both politically and judicially, and hopefully momentum on this will build in 2012.

For the last six years the Australian Branch of the Chartered Institute has run a Diploma in International Commercial Arbitration, the brainchild of Professor Malcolm Holmes QC, former President of the Australian Branch and now a Trustee of the Institute.

An Annual Dinner for past and current course students and faculty is held and it was my privilege to give the after dinner speech at the 2011 dinner. I took the opportunity to overview the developments in the promotion of Australia as a venue for International Arbitrations in our region.

The year closed with a Commonwealth Government Ministerial reshuffle which included the appointment of Australia’s first female Attorney General, The Honourable Nicola Roxon MP. She had previously been the Minister for Health and instrumental in the passage of the plain packaging of cigarettes legislation now the subject of Australian High Court and Investor State Arbitration proceedings by tobacco companies.

Her interest in the outcome of this Legislation was duly noted by the press following her appointment. The Chartered Institute and other arbitral institutions in Australia have taken the opportunity of thanking the outgoing Attorney General, the Honourable Rob McClelland MP for the very significant contribution he has made to the reform of Arbitration Legislation in Australia, both international and domestic, and for his strong support for the establishment of the Australian International Dispute Centre premises in Sydney.

I would like to take this opportunity of welcoming the new Chartered Institute President for 2012, Jeffrey Elkinson of Bermuda, and wish him every success during his year of office.

My year as President of the Chartered Institute has been an exceptionally rewarding one, it has been a privilege to serve in the role.

For me 2012 promises to be a busy year both from a professional point of view generally including in the domestic and international arbitration arenas. I wish all readers of the Australian ADR Reporter, a very happy 2012.
Justice James Allsop¹:
International Arbitration and the Courts - the Australian approach
This paper has sought to show the clear trend in judicial thinking about arbitration in Australia - from suspicion, to respect and support. I have sought to do this by reference to four areas where courts are given a margin of operation in judicial technique enabling them to choose a strict and limiting, or liberal and expansive, role for arbitration: construction of arbitration clauses; arbitrability; public policy; and separability and competence.

I have not sought to analyse exhaustively all relevant Australian authority on international commercial arbitration. To do so within the confines of a paper such as this would have been an unrealistic task. If I have been selective in my coverage it is because I have chosen to focus on topics which bear most that trend.

I begin this paper with a general overview of the structure of arbitration in Australia and the issues which it has faced in terms of its relationship with the courts, before turning to the jurisprudence on the areas previously mentioned.

The formal structure of arbitration in Australia

Before one can appreciate the issues arising from the relationship between arbitration and the courts, some explanation of the general landscape of arbitration in Australia is necessary.

Australia has a federal political system with federal and state legislatures, executives and court systems. The legislation applicable to arbitrations in Australia distinguishes between arbitrations concerning both domestic and international disputes.

Broadly, the former are the domain of the States and Territories and the latter of the Commonwealth.

There is a single Commonwealth statute, the International Arbitration Act 1974 ("the IAA") for international arbitration; domestic arbitrations are governed by the Acts in force in the various States and Territories. In order to prevent inconsistencies between jurisdictions in respect of domestic arbitrations, the legislation enacted at the state level is or is at least intended to be uniform. Should a dispute fall within the scope of both the domestic and international regimes, the IAA will be the governing Act by virtue of s 21 which states that the Model Law covers the field.

Both the state and federal laws have been the subject of recent inquiry and reform.

On 21 November 2008, the Commonwealth Attorney-General, the Hon Robert McClelland, announced a review of the international legislative regime and, subsequently, the then New South Wales Attorney-General, the Hon John Hatzistergos, undertook a similar project, on behalf of the Standing Committee of Attorneys-General ("SCAG").

The products of those initiatives are the amendments to the IAA and the new proposed uniform state laws, agreed to in principle by SCAG but currently in force only in New South Wales: the Commercial Arbitration Act 2010 (NSW) ("the CAA"). The reforms seek to implement a regime that is substantially similar for domestic and international arbitrations.


The broad principles and objectives which underpin the Model Law and New York Convention (expressly and implicitly) are also contained in Australia’s national laws, albeit that both legislative regimes contain substantive additions and departures from those instruments.

Foremost of the broad international principles is the principle of the sanctity of contract or pacta sunt servanda and party autonomy. Arbitration is the process by which a dispute is resolved (decided) by a person or persons to whom the parties have entrusted that task.

The foundation of arbitration is contractual; the agreement between the parties is the source of the position of arbitrator and of his or her powers; it also defines the scope of those powers.

The first necessary adjunct to the contractual foundation of arbitration is the freedom of the parties to choose the applicable procedure. Procedural flexibility is particularly important in an international or multinational context in accommodating parties who may come from very different legal systems.

This principle is reflected in the legislation in a number of ways. Subject to certain procedural safeguards and minimum standards of fairness, the parties may decide the manner in which the arbitration is to be conducted. There are also a number of provisions that the parties may exclude by agreement, or which will only apply if the parties agree expressly to be bound by them.

By enabling parties to choose the procedure to govern the arbitration, the Acts allow the parties to harness the advantages of arbitration over litigation; this being one of arbitration’s most distinguishing features.

The second aspect of pacta sunt servanda is the obligation on domestic courts to enforce foreign arbitration agreements and recognise and enforce foreign arbitral awards. Those duties are contained in Arts II and V of the New York Convention, Arts 8 and 36 of the Model Law and are expressed in ss 7 and 8 of the IAA and now apply in respect of domestic awards in New South Wales according to the CAA, ss 8 and 36 respectively.

The rationale for these provisions and one of the defined objects of the IAA, taken from the New York Convention, is to uphold contractual arrangements between parties entered into in the course of international trade.

This is to recognise that arbitration may not be the optimally preferred method of dispute resolution for each party, but it is the contractually bargain for method. An efficient dispute resolution process culminating in an enforceable award is an essential underpinning of commerce.

Parties should be held to arbitration agreements, awards should be final and readily enforceable.

However, these statements are not without appropriate qualification, including for (Continued on page 20)
The role of the courts

The most recent round of legislative reform and the motivations for it have refocused attention on the question of the legitimate function of the courts in respect of arbitral proceedings and the appropriate balance to be struck between curial resolution and arbitration.

The reforms have redefined this relationship. The boundaries have been moved, perhaps modestly, or perhaps not, but certainly towards less intervention.

However, the principles which the reforms affirm are hardly nascent. The original enactment of the IAA in 1974 was to give effect to Australia’s core obligations under the New York Convention to recognise and enforce arbitral agreements and awards.15

The amendments to the IAA in 1984 incorporated the Model Law, including the provisions regarding flexibility of procedure. Procedural flexibility was expressly contained in the prior uniform domestic regime16 and the grounds for judicial review of awards were intended to be limited.17

However, notwithstanding the introduction of legislative regimes supportive of arbitration in Australia, the impetus for the introduction of the IAA and the former uniform regime at the state level was the same as that which led to calls for its reform. Arbitration in Australia has at times not functioned consistently with the principles upon which it is founded. When the Hon Robert McClelland announced the inquiry into amending the IAA, he cited the need to ensure arbitral proceedings would be “just and efficient” and “fair and economical”.18

The emphasis is his own. At the opening of law term dinner in 2009, Chief Justice Spigelman said of the domestic regime: “[t]he focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost effective mode of resolution of disputes”.19 This begs the question why, if the tools are there and have been there to enable a robust arbitration practice and are and have been at the disposal of arbitrators, that potential has not always been realised. In an article published in 2009 titled “What Has Gone Wrong with Arbitration and How Can We Repair it?” P Megens and B Cubitt identified the intervention of the courts as being an impediment to the ability of arbitrators to distinguish the process from litigation. They remarked:

- “The extent to which a Court will intervene in the arbitral process depends on how widely or narrowly the Courts interpret these provisions and it is in the interpretation, rather than the provisions themselves, that the problem lies.”20

Although the provisions to which the authors referred have been amended, the sentiment is still pertinent. The central concepts that affect the success of arbitration procedures and the degree to which courts will assist or impede arbitration are open to a significant degree of interpretation. Depending upon the courts’ intellectual predisposition or predilection widely different approaches are possible to the same problem at hand.

I do not suggest that arbitration should be completely independent of the judicial system.21 That view is not universally accepted. Nevertheless, the place of the courts and their role in preserving minimum standards form an essential agreed guarantee under the Model Law and New York Convention. Courts can strengthen a jurisdiction’s attraction as an arbitral venue by helping to promote probity as well as efficiency. This role was incorporated after an extensive consultative process between representatives of many countries and reports of the Working Group established by the United Nations. Observance of the agreed upon international standards of fairness is not only for the benefit of the parties to the arbitration, but also for the benefit of the institution of arbitration more generally. The courts’ supervisory role is expressly defined and circumscribed in the conventions and legislation but its scope is subject to the courts’ interpretation of the conventions and the legislative provisions and their approach to interpreting the agreement between the parties.

In terms of intervention, restraint is essential. Arbitration depends for its success on the informed and sympathetic attitude of the courts to concepts such as the construction of arbitration agreements; arbitrability; public policy; and separability. These concepts, depending on their interpretation can see arbitration flourish or suffocate.

The attitude of the Australian courts to arbitration can be seen in the jurisprudence on these topics.

Construction of an arbitration clause

The first topic in respect of which a practical judicial approach is necessary in order to give effect to the reasonable commercial expectations of the parties is in the construction of arbitration agreements.

Sometimes referred to as “subjective arbitrability”,22 the construction of the arbitration agreement is a question of contractual interpretation concerned with the matters which the parties intended to be governed by the agreement, having regard to the form of words adopted in the context of the contract as a whole.23 The importance of the construction of an arbitration clause is perhaps self-evident. It need always be remembered, however, that an express ground for review of an award or for refusal of enforcement of it is
Virgin Atlantic Airways Ltd\textsuperscript{23} exhorting a broad and liberal approach based on the assumption that the parties to the clause in all likelihood intended one, not two, possible venues for the resolution of any disputes, did not hold the field. Other courts tended to adopt a more precise textual (and often narrower) approach.\textsuperscript{26} The wider approach was adopted by the Full Court in the Federal Court in Comandate Marine Corp v Pan Australia Shipping Pty Ltd\textsuperscript{22} Francis Travel and Comandate Marine must be followed by other intermediate appellate courts in Australia unless considered plainly wrong.\textsuperscript{28}

According to these cases, the courts should adopt a liberal approach to the construction of an arbitration agreement, aligned with the sensible commercial presumption that the parties did not intend the inconvenience (or expense) of having possible disputes arising out of the same transaction being heard in different places. That may not amount to a legal presumption that all matters fall within the scope of the arbitration clause unless otherwise proven,\textsuperscript{29} being the expression of the matter in the United States.\textsuperscript{30} However, in Fiona Trust & Holding Corp v Privalov,\textsuperscript{31} Lord Hoffmann, having referred to the conflicting authorities on the construction of arbitration clauses in England stated it was time to “draw a line under the authorities to date and make a fresh start.”\textsuperscript{32} He held:

"...the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.”\textsuperscript{33}

Lord Hope of Craighead referred to foreign decisions including Comandate Marine and decisions of the United States Supreme Court and the Second Circuit Court of Appeals,\textsuperscript{34} and held:

"This approach to the issue of construction is now firmly embedded as part of the law of international commerce. I agree with the Court of Appeal that it must now be accepted as part of our law too.”\textsuperscript{35}

Now is not the time to say something about Lord Hope’s (no doubt carefully chosen) words, “law of international commerce”. Lord Hoffmann also referred to sections of the English legislation intended to give effect to the reasonable commercial expectations of the parties and the need to ensure those expectations were not defeated.\textsuperscript{36} The same may be said of an approach to construction under the IAA and CAA in conformance with the stated objectives of the legislation to encourage the use of arbitration (per the IAA, s 2D) and facilitate the “fair and final” resolution of disputes without unnecessary delay or expense (per the CAA, s 1C).

Whilst it is trite to recall the basal principle of contractual interpretation that the precise scope of the agreement will turn on the words used in the context of the particular contract as a whole, many different kinds of contracts have their own particular features, including context and purpose, and there is much to be said for the approach of Lord Hope and Lord Hoffmann in Fiona Trust which places no emphasis on fine distinctions or shades of meaning between particular prepositional phrases, preferring an approach that accords with commercial practicality. This is especially so when, in many cases, standard forms are used regularly between parties whose first language is not English. It is also desirable, given the removal of the discretion to refuse an application to stay judicial proceedings under the IAA, s 7 and CAA, s 8 such that where parts of a controversy are not covered by an arbitration clause the parties would be placed in the invidious position of having to arbitrate a claim based on breach of contract whilst having to litigate a claim arising under statute.

Arbitrability

The second aspect of whether a claim is arbitrable concerns “objective arbitrability”, that is the matters which the parties are permitted by law to refer to arbitration. Irrespective of how widely an arbitration clause is drafted, the parties are not competent to entrust an arbitrator to decide some disputes.

This is reflected in the New York Convention,\textsuperscript{37} the Model Law\textsuperscript{38} and provisions of the IAA.\textsuperscript{39} Given the nature of arbitration as the private resolution of private disputes by private agreement between the parties, it can be understood why arbitration is not an appropriate forum for all matters.\textsuperscript{40} Arbitrators are not repositories of administrative or judicial powers. They cannot commit a person for contempt, impose a fine or prison term, or otherwise exercise punitive jurisdiction.\textsuperscript{41} Such matters are reserved for determination through the system of justice administered by the arm of the state: the judiciary (or in some cases a specialist body or tribunal).

Even within the commercial sphere, there are necessary policy considerations which may make some disputes incapable of settlement by arbitration.\textsuperscript{42} As the source of an arbitrator’s powers is contractual, an arbitrator cannot render a decision binding on any person not party to the agreement. Arbitral proceedings are not subject to principles of open justice.\textsuperscript{43} Proceedings are conducted in private and the reasons of the arbitrator do not become publicly available when an award is rendered.

Areas in respect of which this issue has arisen or may arise are competition law, claims arising under the Corporations Act 2001 (Cth) (where such claims concern the winding up of a company or in rem relief),\textsuperscript{44} disputes concerning taxation,\textsuperscript{45} the grant of patents and trade marks,\textsuperscript{46} determinations of insolvency and workplace disputes.\textsuperscript{47}

The common element to the notion of non-arbitrability is the legitimate public interest in the resolution of such matters in the judicial system (as an arm of the state) and the identification and control of them being within the purview of the courts or national legislatures.\textsuperscript{48} Of course the possibility of these matters being wide or narrow depends on the relevant legal and social system and its values.

This is an area in respect of which the recent (Continued on page 22)
(Continued from page 21)
trend in judicial reasoning supports arbitration. The courts may be called upon to determine the suitability of the substance of a dispute for arbitration. They may do so in the course of an application to stay judicial proceedings and refer the parties to arbitration (the means by which an arbitration agreement is enforced) or the issue may arise in an appeal against an arbitrator’s ruling on jurisdiction or in an application to set aside or resist the enforcement of an arbitral award as contrary to public policy.

If the courts were to take a broad approach to this topic, disputes concerning those areas of commercial law previously mentioned might be viewed as, by their nature, incapable of settlement by arbitration. This would significantly reduce the types of disputes which could be arbitrated, particularly in light of the frequency of claims for misleading and deceptive conduct, which fall within the legislative regime governing competition disputes. However, the body of recent Australian jurisprudence demonstrates that the courts will approach the task by reference to the particular dispute at hand. This approach to the arbitrability of statutory claims generally is also reflective of a more liberal construction of the arbitration clause as previously discussed.

The attitude towards determining arbitrability may be seen in two recent Australian decisions, one of the Federal Court concerning competition law and another of the New South Wales Supreme Court concerning patents.

In Nicola v Ideal Image Development Corp Inc, Perram J held that it was not contrary to public policy to arbitrate disputes for misleading and deceptive conduct under s 51AC of the Trade Practices Act 1974 (Cth) or claims for unconscionable conduct under s 51AC. The non-arbitrability of competition law has a long history internationally, particularly in the United States. Some competition disputes are not capable of settlement by arbitration as the determination of them affects more than the interests of the private parties to the dispute. If they concern claims of anti-competitive behaviour, a plaintiff who asserts his or her rights under the legislation may be likened to a private Attorney-General protecting the interests of the public at large.

However, the breadth of matters governed by the competition and consumer legislation is such that not all disputes will be competition disputes in the relevant sense and not all will involve the interests of the public or of others in the public. Even though some provisions of the Trade Practices Act and its successor, the Australian Consumer Legislation are directed to protecting consumers, much of the litigation under them concerns the rights between private parties and will not possess the sufficient element of public interest to militate in favour of curial resolution. These were the approaches taken by Perram J who acknowledged that Pt IV A and V of the Trade Practices Act served the public interest by fostering competition, but went on to say:

“There is absent from such suits the element of broad public interest in the outcome to warrant the conclusion that only the local national courts should be involved in their resolution. In the case of Pt V of the TPA, the standards which are imposed are clearly set; the arbitrator will not be called upon to assess the nature of the public interest thereby protected nor is it likely that any determination by the arbitrator is likely to have an impact beyond the parties to the arbitration. The same may be said of the claim under Pt IV A.”

In Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd, Hammerschlag J considered the arbitrability of a dispute arising under the Patents Act 1990 (Cth). The questions contained in the notice of dispute in the arbitral proceedings included whether the defendant was required to make the plaintiff the owner of certain patents in a form of renewable energy. The argument against such claims being arbitrable is that patents are monopoly rights which only the Commonwealth may grant. Under the Commonwealth legislation, the Commissioner of Patents exercises this function. Citing the modern trend to facilitate and promote the use of arbitration, to an area of (commercial) law at a high level of abstraction and assert it is, ipso facto, “off limits” to arbitrators.

It is important at this point to recognise that the phrase used to express arbitrability, “not capable of settlement by arbitration” does not refer to the non-resolution of a basis of an issue by the arbitration which would be resolved by a national court. In Comandate Marine the argument was put that the claim under the statute of the forum (the Trade Practices Act, s 52) would not be resolved by the arbitration in London applying the chosen proper law, English law. Thus, it was said, this issue was “not capable of settlement by arbitration”. The Court refused to accept that meaning for the phrase treating the phrase as “arbitrability” in the sense discussed above. There the dispute was quintessentially arbitrable, being a time charter dispute.

Public policy
The interpretation of the public policy (Continued on page 23)
exception to the principle of finality of awards probably provides the greatest scope for difference in judicial approaches to the meaning of that term. This exception, the genesis of which is Art V(2)(b) of the New York Convention, grants a discretionary power to the court to set aside an award or refuse recognition or enforcement of it if it is contrary to public policy. The difficulty in defining the amorphous expression is well known.

There is significant academic and judicial support for a construction of the term “public policy” in the context of international arbitrations as constituting only international public policy. This is a more limited term which includes “only matters which are essential to the forum state’s legal system, and considered mandatory even in international or transnational settings.”

A narrow reading of public policy, underpinned by international comity is to recognise that laws may differ between jurisdictions, but finality should prevail unless these basic norms are contravened.

This method is contained in the French New Code of Civil Procedure, which refers specifically to international public policy as the relevant exception, as does the Portuguese Code. Some other jurisdictions adopt a deliberately narrow approach to the term, including the United States. In the oft-cited decision of Parsons & Whittome Overseas Co, Inc v Société Générale De L’Industrie Du Papier the Second Circuit Court of Appeals concluded:

“... the [New York] Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.”

A similar interpretation was made by the Supreme Court of Ontario in United Mexican States v Marvin Roy Feldman Karpa which stated that the award had to be contrary to the “essential morality” of the state.

A restrictive reading of public policy has not been universally adopted internationally. Debate over whether a contravention of public policy should be limited to the award so that the exception will only operate where the award is itself a contravention of the laws of the state or, alternatively, whether public policy may be infringed by reference to the substance of the action underlying the award has tended to favour the broader inquiry.

Reservations to this approach, in the absence of fresh evidence, were expressed by Mantell LJ in Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd.

Soleimany v Soleimany was considered in the New South Wales Supreme Court in Corvetina Technology Ltd v Clough Engineering Ltd, in which McDougall J held that it was, in principle, open to a party to raise the defence of illegality at the stage of enforcement, even if the facts were argued before and the matter decided by the arbitrator. His Honour stated the need to ensure the New York Convention was not frustrated but that it was necessary “for the court to be master of its own processes and to apply its own public policy”.

A liberal interpretation of public policy was also adopted by Lee J in the Supreme Court of Queensland decision of Re Resort Condominiums International Inc. There his Honour found an award to violate public policy where the orders were not orders which a Queensland court would make. These cases raise important questions about the standard of public policy to be applied. Corvetina and the English authorities considered also raise concerns about the ability of a court to review a finding of fact by an arbitrator if the arbitrator has found the contract not to be illegal.

A narrower approach to the concept of “public policy” was taken by Foster J in the Federal Court in Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd. In response to submissions that the arbitrator had committed an error of law in assessing the quantum of damages awarded, Foster J held:

“Section 8(5) of the Act does not permit a party to a foreign award to resist enforcement of that award on such a ground. Nor is it against public policy for a foreign award to be enforced by this Court without examining the correctness of the reasoning or the result reflected in the award. The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.”

Foster J further held that whilst the public policy exception:

(Continued on page 24)
... has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases. The principles articulated in those cases sit more comfortably with the purposes of the Convention and the objects of the Act. To the extent that McDougall J might be thought to have taken a different approach, I would respectfully disagree with him.83

There thus appears to be room for appellate resolution of this matter in Australia.

Kompetenz-Kompetenz and separability

A discrete but related consideration to the matters which may be arbitrated as a matter of law is the reception of the concept that an arbitration clause is severable and distinct from the contract of which it forms a part.

This doctrine, known as separability,84 operates to prevent an arbitrator from being denied jurisdiction to decide a dispute in circumstances where the validity of the contract containing the arbitration clause is challenged.85 Were the arbitration clause not severable, but held to stand or fall with the main agreement, a claim that the contract was avoided, if successful, would mean the arbitration clause was also void.

If this were the case, the potential for a finding by the arbitrator the consequence of which would be to nullify his or her jurisdiction could logically bar the arbitrator from deciding the claim and require it to be referred to a court.

The doctrine of separability, in its widest form, preserves the jurisdiction of the arbitrator by positing that the invalidity of the principal agreement (even ab initio) will not necessarily spell the death of the arbitration clause.

Each constitutes, in principle, a separately executed, self-sufficient whole.86 Some have called this a “fiction”87 but though not self-evidently syllogistically logical, it is a sound legal rule.88 However, the separate or auxiliary nature of the arbitration clause is not itself sufficient to empower the arbitrator to determine the validity of the principal contract and/or the arbitration clause. Separability operates alongside the doctrine of “kompetenz-kompetenz” which states that an arbitrator is competent to make a ruling as to his or her jurisdiction.89

The reason kompetenz-kompetenz and separability have evolved to become elementary doctrines of international arbitration is expediency.90 If an arbitrator were not capable of ruling on his or her jurisdiction and a jurisdictional challenge were made, the proceedings would be delayed pending the decision of the relevant court. If the arbitration clause were not treated as a separate agreement to the contract containing it, a party could avoid arbitration by claiming the contract to be avoided. However, even accepting the doctrines of kompetenz-kompetenz and separability, it does not follow that an arbitrator is competent to determine a dispute which falls outside the scope of the submission, nor will an arbitrator’s jurisdiction survive a successful challenge...

The classic statement of principle rejecting separability is the decision of the Judicial Committee in Hirji Mulji v Cheong Yue Steamship Co Ltd,91 in which Lord Summer found that the frustration of a charterparty containing an arbitration clause brought to an end the entire agreement, including the submission to arbitration. In the course of his reasons, his Lordship stated that the arbitration clause “is but part of the contract and, unless it is couched in such terms as will except it out of the results, which follow from frustration, generally, it will come to an end too”.92 As in Hirji Mulji performance was executory at the time of frustration, Lord Summer found that the arbitrator had no jurisdiction to decide the dispute. That decision was not followed by Viscount Simon LC in Heyman v Darwins,93 who held that there was no reason why an arbitration clause, if widely drawn, should not cover the question of frustration, “whether the time for performance has already arrived or not”.94 He distinguished frustration from two other situations, first a dispute as to whether the contract containing the arbitration clause had been entered into at all, stating this to be incapable of resolution by an arbitrator “for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission”.95 Secondly, Viscount Simon LC distinguished the situation where one party contended the contract was void ab initio “for on this view the clause itself also is void”.96

From that decision developed the English position of separability in a narrower form, such that an arbitrator could not determine the
essential validity of the substantive contract but could determine a dispute if the contract, acknowledged to be binding at inception, was discharged by subsequent events. However, in 1993, the English Court of Appeal held this distinction did not form part of the ratio decidendi of Heyman v Darwins, and should not be followed. In Harbour Assurance Co (UK) Ltd v Kansas General International Insurance Co Ltd the Court of Appeal upheld the expression of view of Steyn J at first instance that separability extends to questions of the initial validity of the contract even in the absence of express words to that effect in the arbitration clause. Steyn J stated this proposition to be “sound in legal theory” and in line with the public interest in making arbitration effective. In Harcourt v Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales the New South Wales Court of Appeal Clarke JA stated even in the absence of express words to that effect in the arbitration clause. 

The argument against the acceptance of the doctrine of separability and in favour of the “orthodox” view in Heyman v Darwins is, or is presented as being, one of logic. If the agreement never existed, neither did the arbitration clause it contained. Nothing can come from nothing. Ex nihilo nil fit. However, as Kaplan J has stated “commercial reality is to be preferred to logical purity”. In Comandate Marine I described separability as “an approach by the law to accommodating commercial practicality and common sense to the operation of legal rules” applied better to give effect to the intentions of the parties. The approach of the Federal Court and the New South Wales Court of Appeal are now aligned, although the doctrine of separability has not been considered by the High Court. However, the words of Art 16(1) Model Law, as adopted by the IAA, and reflected in substance in s 16 of the CAA are clear. That is: “The arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.” Some questions regarding separability remain for consideration, in Australia at least. The limits of the principle are yet to be articulated. Clearly, some challenges to the principal contract may apply equally to the arbitration clause. Examples of these were considered by Lord Hoffmann in the House of Lords decision of Fiona Trust & Holding Corp v Privalov. The appellants’ case was that the contract containing the arbitration clause was procured by bribery, giving rise to a right of rescission. They argued that this claim had to be determined by a court. Accepting the principle of severability, Lord Hoffmann held the arbitration clause could only be void or voidable on grounds which related to it directly. There was no such relationship between the alleged bribery and the arbitration clause. That is it could not be shown that the appellants were bribed to enter into the arbitration clause as opposed to the main agreement. His Lordship gave examples of when the clause would be invalid, including a claim that the signature to the principal contract was forged. Such a ground would also attach to the arbitration clause, whether the clause were considered a separately executed agreement or not. However, as his Lordship stated “the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a ‘distinct agreement’, was forged.” Further his Lordship said: “On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on… (Continued on page 26)
(Continued from page 26)

the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.”

The argument that, but for the bribery, the owners would not have entered into any contract and therefore would not have entered into the arbitration clause was rejected by his Lordship as “exactly the kind of argument” which section 7 of the Arbitration Act 1996 (UK) containing the principle of separability was intended to prevent. Lord Hope of Craighead said that the appellants’ argument was one of causation and they contended no distinction needed to be drawn between the various situations in which consent to the principal contract would be lacking. His Lordship rejected that argument and stated that allegations “parasitical to a challenge to the validity to the main agreement will not do.”

There may indeed be instances where a lack of voluntary assent invalidates all provisions of an agreement, including an arbitration clause. In such cases, the arbitrator, absent some fresh agreement between the parties, will be deprived of jurisdiction. There are also other issues which the doctrine of separability enlivens, including the relationship between the ability of the courts to determine the validity of an arbitration clause on an application to stay curial proceedings and the power of an arbitrator to determine his or her own jurisdiction in the first instance. The resolution of these issues waits another day. However, the approach to the question of the limits of severability in Fiona Trust requiring “direct impeachment” of the arbitration clause addresses the objects of the legislation and the general considerations previously discussed regarding the presumed intention of the parties to deal with all disputes in one place at one time.

Conclusions

It is necessary at this point to say something about the coverage of this paper. There are other recent and relevant decisions to which I have not adverted, primarily because they do not fall neatly within the topics I have chosen to discuss.

However, it would be remiss of me not to mention the recent case of Altain Khuder LLC v IMC Mining Inc before the Hon Justice Croft. His Honour’s judgment affirmed that the grounds for the refusal of recognition and enforcement in the IAA, s 8 are exhaustive and will require strict proof, and are not to be used as a means to re-agitate issues which were put before and decided by the arbitrator. A nother significant decision is that of Ward J in Cargill International SA v Peabody Australia Mining Ltd in which her Honour held that the adoption of institutional rules does not constitute an implied exclusion of the Model Law.

In that regard, her Honour expressed the view that the decision in Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH was plainly wrong. Given the amendments to the IAA, s 21, this may be a point no longer to arise, but Ward J’s argument regarding the distinction between procedural rules and lex arbitri is well made. There is also a body of authority on appeals against an error of law in respect of domestic awards.

In this regard, there are a number of recent decisions, including Gordian Runoff Ltd v Westport Insurance Corporation and the decision of Croft J in Thoroughvision Pty Ltd v Sky Channel Pty Ltd which affirm the limited circumstances in which leave to appeal may be granted and consider the standard of reasons required of an arbitrator. The different views on these issues (in particular the extent of reasons required by arbitrators) are currently before the High Court of Australia in an appeal from Gordian Runoff. I have not included discussion of them in this paper.

It is evident from the body of more recent jurisprudence that judicial attitudes to arbitration have changed.

There has been a palpable shift from suspicion to support. The Chief Justice of the High Court of Australia, the Hon Robert French, commented extra-curially in an address in 1992 (when a judge of the Federal Court):

“In times not so far in the past, the arbitrator was seen in some circles as a dubious, below stairs figure, requiring close curial supervision, a quasi-judicial equivalent of Uriah Heap. He operated what was regarded by legal elites as a second rate system of backyard justice.”

He contrasted that unfavourable portrait with the modern arbitrator “clothed in the armour of enhanced arbitral autonomy.”

In 1856, Lord Campbell (perhaps somewhat unfairly) identified the genesis of the longstanding distrust of arbitration by the judiciary as being the competition between the institutions for revenue. That competition dates to an era in which judges’ salaries were not fixed but derived from fees payable for resolving individual disputes and therefore proportionate to the number of disputes they determined.

The desire to keep as many disputes as possible within the pool from which the spoils could be obtained may have been the reason, prior to the historic decision in Scott v Avery, that contractual clauses making arbitration a precondition to litigation were held to an ouster of the courts’ jurisdiction and therefore impermissible.

Lord Campbell’s comment was noted by Spigelman CJ and Mason P in Raguz v Sullivan. They compared that statement with the revised version of his Lordship’s reasons that appeared in later reports, omitting the pecuniary justification as indicative of the stir it must have generated at the time.

However, their Honours went on to note that the legislatures and (afterwards) the judiciary had since, “sat up and listened” to the commercial community by offering renewed support for arbitration. A number of cases bear out that proposition, including those discussed herein.

Notwithstanding the commendable headway which has been made, there is still a way to go. There is a need for greater coherency and uniformity. To date, only New South Wales has enacted the reforms agreed upon for domestic arbitrations.

(Continued on page 27)
Domestic arbitrations in the remaining jurisdictions continue to be governed by the prior uniform regime, which provides considerably greater scope for judicial intervention both in terms of supervision of the conduct of the arbitration and in the means by which an award may be challenged. The domestic as well as the international legislative regimes need to function smoothly if arbitration in Australia is to succeed. This is not only to ensure a consistent approach for all disputes resolved by this method but also because “domestic” disputes may arise between subsidiaries of multinational companies and have international economic repercussions.

In order to achieve consistency education of the judiciary is important. For that purpose, a Judicial Liaison Committee has been established comprised of judges of each jurisdiction and chaired by the Hon Murray Gleeson AC to meet, report on and promote uniform procedure.

This initiative should encourage understanding in the judicial community of the vital and widespread role of commercial arbitration and the role that a competent and knowledgeable court system plays.

Through education the courts will be better placed to strike the appropriate balance between expedition and economy and the preservation of the necessary standards of fairness.

Justice James Allsop is the President of the New South Wales Supreme Court of Appeal.

Endnotes:
1. I express my debt and thanks to my tipstaff, Ms Louise Dargan, for her assistance in the research for, and drafting of, this paper.
4. See e.g. Departmental Advisory Committee on Arbitration Law Report on The Arbitration Bill, February 1998. Chaired by the Hon Lord Justice Saville at [19]: “[n] in some cases, of course, the public interest will make inroads on complete party autonomy, in much the same way as there are limitations on freedom of contract” at [19].

There are, therefore, a legitimate place for some inroads on complete party autonomy, but also the result of policy considerations geared to international practice.”

10. The law in some instances will allow the parties to agree on a procedure but provide a fall-back or default position or procedure where no agreement is reached as is the case regarding the composition of the arbitral tribunal: Model Law, Art 10 and CAA, s 10. In terms of the IAA, most of the additional provisions in Pt III, Div III are optional and are divided between those which must be expressly excluded and those which must be expressed to apply. For example, the confidentiality provisions of the IAA, ss 23C-23G, will only apply if the parties agree to be bound by them but under the CAA, ss 27E-27I will apply unless the parties agree to exclude them. The IAA, s 23, which allows the parties to apply to a court to issue a subpoena, will apply unless the parties agree otherwise. The provisions dealing with default of a party may also be excluded by agreement: IAA, s 23B and CAA, s 25. Under the CAA, s 34A, the

(Continued on page 28)

39. Sections 7 and 8.

40. The question whether a dispute is "capable of settlement by arbitration" has its origins in the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (signed 26 September 1927).

41. "Arbitrability includes criminal prosecutions, determination of status such as bankruptcy, divorce, and the winding up of corporations in insolvency, and certain types of dispute concerning intellectual property. There is also a risk that a tribunal not agreement may not have a patent or trade mark status. All these matters are plainly for the public authorities of the state. Patients and trade marks are monopoly rights which only the state may grant."

Other discussions of arbitrability may be seen in N Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd [2006] FCAFC 192; (2006) 157 FCR 45 at 97 [197].


49. If the IAA, s 7(b)(b) applies and see Comanade Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCACF 192; (2006) 157 FCR 45 at 113 [126].


52. [2008] 1 Lloyd's Rep 254 at 260 [31].


54. Originally, the position of the United States Supreme Court was that set out in American Safety Equipment Corp v JP Maguire & Co Inc 391 F 2d 821 at 827 (2nd Cir. 1968) that claims under the Sherman Act were not arbitrable. This position was altered by Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc 473 US 514 (1985). The United States Courts have also been considering the matter by the European Court of Justice in Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-1155, which held that Art 61 of the EU Treaty was a matter of public policy. See M Bonnell, "Arbitrability of Competition Disputes in Australia" (2005) 79 Australian Law Journal 585-591.

60. [2011] FCA 131 at [126] (emphasis added).


86. Also known as severability or the autonomy of the arbitration clause.


90. See Departmental Advisory Committee on (Continued on page 29)
Section 7 Separability of an arbitration agreement
Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing and whether or not notarised) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence, or has become ineffective, and it shall not for that purpose be treated as a distinct agreement.

127. (2011) VSC 1 at 89.
130. (2010) NSWCSSC 887 at [37].
131. Eisenwerk was distinguished by the Queensland Court of Appeal in Wagner’s Nouvelle Caledonie Sarl v Vale Inco Nouvelle Caledonie SAS [2010] QCA 219, their Honours finding it “inappropriate” to make a finding as to the correctness of the decision.
133. (2010) VSC 139; see also Winter v Equuscop Ltd [2010] VSC 419.
136. Scott v Avery (1856) 5 HLC 811; 10 ER 1121.
137. (1856) 5 HLC 811; 10 ER 1121.
Watch out ADR and Arbitration:

DAPs are moving in !!
Introduction

The Australian construction industry continues to be characterised by adversarial attitudes that create an “us versus them” environment that is conducive to costly and drawn-out disputes.

Indeed, it has recently been estimated that the direct costs of resolving construction disputes in Australia amounts to between $560-840 million per year, and when this is added to the avoidable costs of disputes (such as delay and opportunity costs), total waste exceeds $7 billion annually.1

Obviously, a large part of this money is spent in the arbitration of construction disputes. The focus of dispute resolution after the project is complete is in favour of dispute avoidance during the life of the project. The result is a dramatic fall in the need for ADR and arbitration services.

While Australia has been slow to embrace DAPs, there are signs that this is changing. Indeed, like key international jurisdictions that saw fit to include DAPs provisions in their standard form contracts, there are now calls for Australia to follow suit and incorporate DAPs into standard form contracts.2

This should not come as a surprise given that there have now been 25 major projects in Australia that have used a DRB, and all of the DRB projects that have reached completion (21) have done so without any outstanding disputes, i.e. a 100% success rate in keeping the parties out of any form of post-project dispute resolution.3

This article analyses how DAPs work, considers how provisions relating to DAPs have been incorporated into standard form contracts in other jurisdictions, and concludes with a discussion of whether it is now time for Australia to incorporate DAPs provisions into standard form contracts.

What are DAPs?

‘DAPs’ is the umbrella term encompassing a myriad of dispute prevention mechanisms that are being used successfully on a wide variety of construction projects around the world.4 DAPs are proactive measures that are put in place at the commencement of a project, and stay in place through to project completion. As Figure 1 illustrates, they act as a circuit breaker, assisting the parties to manage and resolve conflicts before they escalate into disputes.

Thus, DAPs are materially different from Appropriate/Alternative Dispute Resolution (ADR), as well as arbitration and litigation; philosophy underpinning various models of Dispute Avoidance Processes (DAPs), such as Dispute Review Boards (DRBs), Dispute Adjudication Boards (DABs) and Dispute Resolution Advisors (DRAs), is that if construction disputes can be avoided, or if not avoided, resolved during the course of the construction project, then construction projects will become more profitable for all involved.

The fact that a number of international standard form contracts now include DAPs provisions is evidence of the important role that DAPs play,2 and marks a radical departure from the construction industry’s traditional processes that are only ever invoked after the contracting parties are embroiled in a dispute, and generally only once the project has reached completion, by which time each party’s position is generally firmly entrenched.

At this point in time, the resolution of disputes becomes more difficult, more costly, and more damaging to commercial relationships.3

The Dispute Review Board (DRB) was the first DAP and has informed all subsequent models. It was developed in the United States in 1975, in response to the high incidence of disputes plaguing tunnelling and dam

Figure 1 – Interrupting the Conflict-Dispute-Litigation Continuum5

DRB projects that have reached completion (21) have done so without any outstanding disputes, i.e. a 100% success rate in keeping the parties out of any form of post-project dispute resolution.

This article analyses how DAPs work, considers how provisions relating to DAPs have been incorporated into standard form contracts in other jurisdictions, and concludes with a discussion of whether it is now time for Australia to incorporate DAPs provisions into standard form contracts.

(Continued on page 33)
DAPs are moving in!

(Continued from page 31) projects. In the intervening three decades, over 2,000 projects around the world have used a DRB, of which an impressive 98% were completed with no outstanding disputes. Subsequent DAPs models, all of which are broadly based on the DRB’s philosophy of dispute avoidance, have been developed to suit a variety of different circumstances. These include Dispute Adjudication Boards (DABs), developed in Europe in the late 1990s, and Dispute Resolution Advisors (DRAs) developed in Hong Kong in the mid-1990s. In more recent times, and as a sign of the construction industry’s increasing familiarity with, and acceptance of, DAPs, hybrid models have emerged. For example, the Independent Dispute Avoidance Panel (IDAP) was developed to help avoid disputes during works to deliver the venues and infrastructure for the London 2012 Olympics.

Of all DAPs models, Australia has only experimented with the DRB, and it seems that DRBs will continue to lead the way in Australia when it comes to the use of dispute avoidance processes.

Dispute Review Boards
A DRB is comprised of a panel of three independent third-party experts who are appointed by the contracting parties at the commencement of the project. The DRB should ideally be made up of members from a mixture of backgrounds, including those with extensive experience in the type of construction being performed, e.g. a senior engineer, and those experienced in resolving issues of contractual interpretation, e.g. a construction lawyer. By remaining up-to-date with project developments, through regular site visits and meetings with key project personnel, the DRB is able to use its technical knowledge regarding the type of construction being performed, and its expertise in resolving issues of contractual interpretation and dispute resolution, to assist the parties to stop conflicts from escalating into disputes. Therefore, the DRB plays a proactive role in the early identification and resolution of potential problems.

In the event that a conflict cannot be resolved, and a dispute ensues, the DRB arranges a hearing that is conducted expeditiously so as to resolve the dispute in ‘real-time’ i.e. before either party’s position becomes hardened. Given that the DRB members are already very familiar with the project and have been privy to the circumstances leading up to the dispute, the DRB is able to provide a well-informed, quick, non-binding recommendation that, more often than not, leads to settlement of the dispute. Indeed, the DRB’s ability to promptly resolve disputes as they arise throughout construction ensures that hostilities are kept to an absolute minimum and positive working relations between the contracting parties preserved.

In contrast, other dispute resolution methods such as expert determination, arbitration, and litigation, require the parties to educate third-party fact finders about the project and dispute, long after construction has been completed, often involving significant time and expense.

The very presence of a DRB encourages all project personnel to maintain harmonious working relations so as not to appear foolish and lose credibility in front of the DRB. Albert Einstein famously said that ‘a country cannot simultaneously prepare and prevent war’. The same can be said for construction projects; development with DAPs is the inclusion of provisions relating to their use in various international standard form contracts. Although standard form contracts continue to be heavily amended, they invariably form the base document for most contracts used in construction projects both in Australia and abroad.

With this in mind, the inclusion of DAPs provisions in standard form contracts will likely increase familiarity and generate DAPs, with a corresponding increase in their use. Indeed, such marked levels of familiarity and increased usage of ADR by the Australian construction industry can, to some extent, be attributed to the inclusion of ADR provisions in Australian standard form contracts.

This section explores how DAPs have been included in two specific standard form contracts, namely, FIDIC and ConsensusDOCS, in order to shed light on how Australia might go about incorporating DAPs into a standard form contract.

1. FIDIC
The International Federation of Consulting Engineers (FIDIC) first provided for the use of DABs in the 1999 version of its Red, Yellow and Silver books.

The development of the DAB was a response to criticism of the dual role being performed by the engineer as both the employer’s agent and independent certifier/decision-maker, and the view that arbitration could “no longer serve as a primary form of dispute resolution in the construction industry”.

Both owners and contractors became disenchanted with the FIDIC contracts due to the need to regularly resort to arbitration in order to resolve disputes. Of course, most Australian standard form contracts still require that the superintendent, perform dual roles similar to the engineer under FIDIC, and this system attracts similar criticism.

The 1999 release of FIDIC’s Red, Yellow and Silver Books sought to overcome the abovementioned problems by introducing the DAB, which was envisioned as offering an efficient and cost effective method of dispute resolution. The DAB was intended to be the first port of call (after executive negotiation) for parties in dispute, and a pre-condition to arbitration. Clause 20.4 of FIDIC’s Red Book provides that:

*If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any...”* (Continued on page 33)
DAPs are moving in!

(Continued from page 32)

certificate, determination, instruction, opinion or valuation of the Engineer; either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer.

Thus, the parties empower the DAB to make decisions with which they will comply, as opposed to a non-binding recommendation issued by a DRB. This approach stems from FIDIC’s view that a binding determination is required in order not to disrupt the construction process.27 Because of the binding nature of the DAB’s determination, FIDIC has chosen to regulate the operation of DABs in considerable detail. Including that:

• a party must issue a formal notice of dispute in order to trigger a DAB hearing;
• the DAB has 84 days to make its investigations, conduct a hearing (if required) and provide a reasoned decision;
• if either party is dissatisfied with the decision, it may give notice of dissatisfaction within 28 days;
• if no notice is served, the DAB’s decision becomes final and binding; and
• where a notice of dissatisfaction is served, parties must attempt to settle the dispute amicably before the commencement of arbitration not earlier than 56 days after the notice of dissatisfaction.28

It has been observed that such “strict protocols can delay the involvement and/or decision of the DAB to the detriment of the project”.29 This increased formality has the potential to increase the hostility between the disputing parties, as the longer it takes for a dispute to be resolved, the more entrenched each party is likely to become.30

In short, the adversarial attitudes of the contracting parties may remain unchanged, which can render any form of DAP ineffective. Indeed, this may be the reason why “many FIDIC users are deleting DB [DAB] provisions or, if obliged by funding institutions to retain the DB clause, ignoring it once the contract is signed and failing to appoint the DAB”.31

Despite the DAB’s shortfalls, projects which have used DABs have experienced remarkable success with the concept. A recent study by the Dispute Board Federation (DBF) (www.dbfederation.org) – a non-profit organisation established in 2001 for the purpose of promoting the use of DABs – found that on DAB projects, 90% of issues were resolved at project level without a formal hearing, and of the 10% of disputes referred to the DAB, only 1% required further arbitral determination.32 Such results are similar to those reported by the DRBF in relation to the global use of DRBs, and suggest that a DAB is just as effective as a DRB assisting the parties to avoid disputes.

FIDIC is the only standard form contract that provides a standard DAB tripartite agreement and operating procedures for the DAB. This greatly enhances the prospects of the DAB being used successfully, not only for the contemporaneous resolution of disputes, but also for their avoidance. The tripartite agreement is executed between the principal, contractor and each member of the DAB, and covers matters such as each DAB member’s duty to be:

• impartial and independent of the principal, contractor and the engineer;
• experienced in the type of construction being performed and/or experienced in the interpretation of contract documentation;
• available for site visits and hearings; and
• willing to comply with the annexed procedural rules.33

The procedural rules cover matters such as the minimum number of site visits to be conducted by the DAB, including an explanation of the purpose of these site visits (to enable “the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims”).34

Explanations of this type are made throughout the DAB operating procedures. As a result, the parties – especially those unfamiliar with DAPs – are educated about how the extensive involvement of the DAB throughout the project (which could otherwise be perceived as invasive) can greatly assist the parties prevent the escalation of conflicts into disputes.

FIDIC contracts are one of the most heavily used and promoted standard forms for international projects.35 As it stands, FIDIC represents over 86 member associations from around the world.36 Because of the strong reputation that FIDIC contracts enjoy around the world, the DBF suggests that the best way to market DABs is to promote the use of FIDIC’s Red Book.37 However, both Australia and the United States stand apart from the rest of the world in not embracing FIDIC as a standard form contract for major infrastructure projects. In these two countries, domestic standard form contracts enjoy strong market dominance,38 the implications of which are discussed below.

2. ConsensusDOCS

For over 100 years, the American Institute of Architects’ (AIA) suite of standard form contracts have been the dominant form of construction contract used in the United States.39

From time to time, other standard form contracts released by different sectors of the industry have attempted to promote alternative standard forms, but none have been able to compete effectively with the AIA contracts.40

The latest contender, ConsensusDOCS, seeks to make greater inroads than its predecessors by promoting its standard suite of contracts as the “only standard contracts developed by a diverse coalition of 34 leading construction industry associations with members from all stakeholders in the design and the construction industry, representing the best interests of the project rather than a single party. This is a step in the right direction in addressing the perception of bias that has plagued standard form contracts for centuries. As one commentator noted: “this is one of those rare times where much of the industry came together and attempted change. If successful, the effort may go a long way to cutting down the mountain of modified standard paperwork that has bogged down many projects and choked courts, arbitrators, mediators... This has the potential of being something really big, if given a chance.”41

Like FIDIC, ConsensusDOCS has stressed to its users the importance of ensuring that arbitration is not the first port of call when parties find themselves in dispute. If negotiations to resolve a conflict are not successful, ConsensusDOCS requires that parties either refer the dispute to a Project Neutral (essentially a one person DRB), a DRB, or to mediation. When electing to use a Project Neutral or DRB, the ConsensusDOCS lump sum contract provides that:

The Neutral/Board [Project Neutral/Dispute Review Board] shall be available to either Party, upon request, throughout the course of the Project, and shall make (Continued on page 34)
DAPs are moving in!

(Continued from page 33)

regular visits to the Project so as to maintain an up-to-date understanding of the Project progress and issues and to enable the Neutral/Board to address matters in dispute between the Parties promptly and knowledgeably. The Neutral/Board shall issue non-binding findings within (5) business Days of referral of the matter to the Neutral/Board, unless good cause is shown.43

If the dispute remains unresolved after the Project Neutral/DRB has issued a non-binding recommendation, either party can refer the dispute to either arbitration or litigation.44

As already noted, one of the benefits of a DRB is that the DRB members develop a working understanding of the project and an understanding of the relationships between all key project personnel.

Therefore, in the event that the DRB is called upon to resolve a dispute, its non-binding recommendation is more likely to be accepted by the parties, since the parties recognise that it has been made by experts with extensive knowledge of the project.45 With this in mind, it is pleasing that ConsensusDOCS has incorporated a requirement that the DRB members maintain a working knowledge of the project through regular site visits.

However, ConsensusDOCS has not produced DRB operating procedures in the same way that FIDIC has, and as a result there are some deficiencies that need to be addressed in order to ensure that the DRB functions as intended, not only for the purpose of dispute resolution, but to maximise its effectiveness as a DAP.

The requirement that the DRB maintains an “up-to-date understanding of the Project progress”,46 infers that it should be established at the commencement of the project.

However, it would have been preferable for this to have been expressly articulated in the contract. Indeed, where DAPs have failed in their capacity to assist parties to avoid disputes, is where parties have established the process long after the contract commenced, or long after a dispute had already arisen.47

Another deficiency is that ConsensusDOCS fails to mention that a DRB should comprise a diverse set of skills, with members having expertise not only in the type of construction being undertaken, but also in managing and resolving construction disputes, and in interpreting contract documents. ConsensusDOCS also fails to expressly require that the selected board members be independent of the contracting parties. These are all critical factors which can directly impact upon the DRB’s ability to avoid disputes.

These issues need to be addressed, particularly since there is not yet any accreditation or certification program for DRB members, as there is for DAB members.48 ConsensusDOCS contracts seem to be gaining favour in the commercial and industrial markets, and have been ranked ahead of those produced by the AIA. In 2008, members of the American College of Construction Lawyers were asked to rank the key provisions of the AIA and ConsensusDOCS standard form contracts. The result was that ConsensusDOCS was ranked ahead of its counterpart in almost all areas, especially in the key areas of improving communication among the parties, and dispute resolution.49

One can reasonably anticipate that ConsensusDOCS’ further market penetration will see an even greater use of DRBs on construction projects in America.

Australian Standard Form Contracts

In Australia, there are three major standard form contracts used for construction only projects, namely, AS 2124, AS 4000, and ABIC MW-1.

When comparing these contracts to their international counterparts, it is clear that all three are extremely out-dated, as they ignore the latest, and proven, trend in the fight against construction disputes, namely DAPs. Not only do they fail to recognise the importance of dispute avoidance, but they fail in recognising the value of an on-site dispute resolution system that provides for real-time review of a superintendent’s decision.

This section analyses how Australian standard form contracts currently deal with conflicts and disputes, before recommending improvements to the existing situation.

Dispute Resolution

Figure 2 below sets out the dispute resolution processes used by the Australia’s three major standard form contracts.

This figure reveals that Australia’s most popular standard form contracts for commercial building work (AS 2124 and AS 4000) contain no real circuit breakers to stop a conflict escalating into a dispute, or a dispute quickly escalating to arbitration or litigation.

While FIDIC and ConsensusDOCS have introduced a third-party mechanism to review and resolve disputes as they occur throughout construction as a mandatory procedure prior to the dispute being referred to ADR, arbitration or litigation, the AS forms do not even incorporate ADR as an option.

Indeed, when AS2124 was released in 1993, it was criticised for not having a structure that would “encourage the parties to attempt alternative dispute resolution prior to resorting to either arbitration or litigation”.50 It is therefore somewhat surprising that its successor, AS 4000, retains this deficiency.

It was the “failure of existing dispute resolution mechanisms to provide inexpensive, fair and quick resolution of disputes” that provoked the development of the ABIC 2003 suite of standard form contracts, produced jointly by Master Builders Australia (MBA) and the Royal Australian Institute of Architects.

<table>
<thead>
<tr>
<th>Process</th>
<th>AS 2124</th>
<th>AS 4000</th>
<th>ABIC MW-1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive negotiation/Compulsory conference</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Mediation</td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Expert Determination</td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Arbitration</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Litigation</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Figure 2 – Summary of Dispute Resolution Processes used in standard form contracts in Australia.50
DAPs are moving in!

(Continued from page 34)

March 2012

COMMENT & OPINION

In light of the DAPs successes around the world, adopting option one would be nothing short of ignorant. As the Dalai Lama has said, “where ignorance is our master, there is no real possibility of real peace”.50

The Australian construction industry can no longer ignore DAPs and, like its international counterparts, it must strive to achieve peaceful projects, i.e. ones that are devoid of adversarial attitudes, conflicts and disputes. If Australia were to adopt the second option, the most logical standard form to initially adapt would be the AS suite of contracts. Just as FIDIC and AIA forms have dominated the international and American markets respectively, the AS suite of standard form contracts have been the market leader in Australia for close to a century.51

However, the authors do not see amending existing standard form contracts to incorporate DAPs as the best option. While such action would be a step in the right direction, it is in reality, nothing more than a ‘Band-Aid’ solution.

This is because the provisions of most standard form contracts encourage self-interest and the protection of individual positions, which tend to promote the adoption of adversarial attitudes by the parties.

Therefore, merely including DAPs provisions in the existing AS forms would not be conducive to transforming our adversarial contracting environment. With this in mind, the authors recommend the adoption of the third option, namely the drafting of an entirely new suite of contracts, built on a solid foundation of dispute avoidance and early resolution.62 How this can be achieved is explored below.

A Contractual Focus on Dispute Avoidance

While DAPs provisions provide a good stimulus towards the creation of a culture focused on dispute avoidance, they are not a panacea, because: the success and benefits that are derived from any DAP model depend on the attitude of the parties, and whether they are willing to move from an adversarial environment to one of mutual trust and confidence.63

Therefore, developing a new standard form contract requires more than the incorporation of DAPs clauses. It requires a complete reconceptualisation of the role that the contract plays in managing the project and the relationship of the parties throughout the works.

It needs to incorporate clauses that seek to facilitate open lines of communication and positive working relations between the contracting parties. A good example of such an approach in a standard form contract is the English NEC3 Engineering and Construction Contract, which was first developed in 1991 with the objective of “stimulate[ing] good management of the relationship between the parties to a contract and, hence, of the work in the contract”.64

One of the most notable features of NEC3 is the early warning procedures, which require the contractor to give the project manager warning of relevant matters.65 A relevant matter is defined as any matter that could increase the total cost, or delay completion, or impair the performance of the finished works. Upon issuance of the warning, a meeting is arranged for the purpose of encouraging the parties to cooperate and discuss how the problem can best be avoided or reduced.66

As Gould notes: Co-operation between the parties at an early stage of any issue identified by the contractor or project manager provides an opportunity for the parties to discuss and resolve the matter in the most efficient manner.67

Thus, NEC3 makes a concerted effort to encourage parties to communicate openly and resolve issues early; a key factor in dispute avoidance. NEC3 has enjoyed wide success and is enthusiastically embraced by the UK construction industry, having been used on over 45,000 projects up until 2005.68 Furthermore, it is the only “suite of contracts endorsed by the UK Office of Government Commerce for public sector procurement”.69

When the NEC was first published, one commentator noted that: The challenge to the construction industry and its advisers is not so much the NEC’s suitability as a contract... but rather how effectively existing practices can mould to
DAPs are moving in!

(Continued from page 35)

the change of attitude and openness to new approaches that the NEC demands.26

Indeed, the introduction of a new Australian standard form contract, with unfamiliar processes such as DAPs, would represent a radical change to the contracting landscape. Widespread and comprehensive education and training would need to accompany such an initiative. This would require a significant investment of resources, but the experience of our international counterparts suggests that this would be a worthwhile investment. It has been observed that “if you think education is expensive, try ignorance”.71

The Australian construction industry has already paid a significant price for its ignorance of DAPs, in the form of excessive legal fees that flow from unresolved construction disputes. This makes the price of embedding DAPs into the Australian construction psyche seem eminently reasonable.

Conclusion
David Byrne, former Justice of the Victorian Supreme Court, recently noted that in moving forward, the challenge for the Australian construction industry is to find innovative ways to address construction disputes, “but at the same time respecting but not being bound by traditional ways”.72

While this challenge has historically proven difficult, DAPs have emerged as an innovative and proven means to prevent construction conflicts from escalating into disputes, and thus radically departs from the traditional focus of dispute resolution. The increasing use of DRBs on Australian construction projects suggests that this nation is on the verge of fully embracing DAPs.

Therefore, and in light of the success of DRBs at both the local (100%) and international levels (98%), one can realistically envisage a dramatic reduction in the number of construction disputes that end up in either ADR or arbitration, and thus radically departs from the traditional focus of dispute resolution. The increasing use of DRBs on Australian construction projects suggests that this nation is on the verge of fully embracing DAPs.

It is time for Australia to embrace the philosophy of dispute avoidance and leave behind the baggage of current adversarial standard form contracts. The experience of our international counterparts teaches us that such change is both possible and worthwhile.

Authors.
Paula Gerber LLB (QUT), M.Sc(Distinction) (King’s College, London), LLM (Monash) and PhD (Melb) is an Associate Professor at Monash University Law School in Melbourne.

Brennan Ong LLB, BCom (Monash), is a Research Assistant at the Monash University Law School.

Endnotes:
2. See, for example, FIDIC, Conditions of Contract for Construction 1999; ConsensusDOCS, 200 Standard Agreement (LS) [lump sum].
5. Gerber and Ong, above n 4 at 8.
7. Ibid at 13.
8. Ibid at 8.
12. Ibid at 7.
14. Ibid.
18. DRBF Manual, above n 15 at [1.3].
22. Ndekguri and Smith and Hughes, above n 22 at 791.
DAPs are moving in!

(Continued from page 36)

24. Ibid at 151.
26. Seifart, above n 24 at 150.
27. Jaynes, above n 22.
29. Gerber and Ong, above n 4 at 14.
30. Ibid.
31. FIDIC has established an Update Task Group charged with reviewing the three main FIDIC contracts (Red, Yellow and Silver Book) with a view of addressing the problems identified by many FIDIC users with a view to issuing a new edition sometime 2011. See Edward Corbett, ‘Moment of Decision? The Future of Dispute Boards Under the FIDIC Forms and Beyond’ (2009) 4 Construction Law International 20.
32. Results are based on a study of 500 global DAB projects conducted by the DBF. See Gerber and Ong, n 4 at 15.
34. Ibid, Rule 2.
35. Seifart, above n 24 at 151.
37. Gerber and Ong, n 4 at 21.
38. Ibid, Sweet, above n 19 at 114.
40. Stein and Wietecha, above n 40 at 11.
43. See ConsensusDOCS, 200 Standard Agreement (LS) [lump sum], cl 12.3.1.
44. Ibid, cl 12.3.2.
46. See ConsensusDOCS, 200 Standard Agreement (LS) [lump sum], cl 12.3.1. 47. For example, the DBF has reported that many projects are establishing Dispute Adjudication Boards (DABs) between 6-12 months after a contract had commenced, or long after a dispute between the parties had already arisen. See, Peer Dalland, Dispute Boards – Do they always work – if not, why not? (2011), <www.dbfedederation.org/newsletters.asp> at 15 August 2011.
48. In 2011, the DBF, in collaboration with the Royal Institution of Chartered Surveyors (RICS) released a comprehensive training and assessment program to certify and accredit DAB members. The DBF and RICS are jointly maintaining a register of accredited members which parties can access in order to select a suitable member for a DAB. See, The Dispute Board Federation, The Joint RICS/DBF Accreditation and Certification Programme for Dispute Board Members. <http://www.dbfedederation.org/documents/RICS-DBF-brochure.pdf> at 15 August 2011.
52. This contract replaced the JCC series of contracts (produced by the Joint Contracts Committee (JCC) which included BOMA, now the Property Council), the SBW-1 and 2 and NPWC3.
53. See, ABIC MW-1, cl P3. While ABIC MW-1 has since been succeeded by ABIC MW-2008, many of the key features of the 2003 edition remain unchanged, including dispute resolution processes.
55. No Dispute was a report produced by the joint working party of the National Public Works Committee and the NBCC, which produced a model for risk allocation which was accepted by all industry sectors as the method by which all construction contracts should allocate risk. See, John Tyrrell, ‘NPWC/NBCC ‘No Dispute’ Report’ (1990) 14 Australian Construction Law Newsletter 5.
56. Booth, above n 55 at 11.
57. Bell, n 19 at 80.
58. Booth, above n 55 at 3.
59. Gerber and Ong, above n 3.
61. The origins of AS forms date back to the mid 1920s to a contract developed by the Australian Institution of Engineers. In 1952 Australian Standards took over the production of the contract and renamed it CA24-1952. It was first produced as the AS 2124 contract in 1978. There were several revisions after that, and it was rewritten as AS 4000 in 1997. See, John Pilley and Harley Coombes, ‘Standard Conditions of Contract’ (2001) 4 Building Dispute Practitioners’ Society Inc. Newsletter 1.
62. Gerber and Ong, n 3.
63. Gerber and Ong, n 4 at 29.
65. See, NEC3 Engineering and Construction Contract, cl 16.
66. Ibid.
Dispute Adjudication Boards in Mauritius: A subtle art for the prevention of conflict and dispute resolution in the construction industry

Kailash Dabeesingh describes how DABs are becoming more prevalent in the Mauritian construction industry

Introduction

Mauritius is one of the most competitive and successful economies in the region. It is recognised for its stable and democratic government, a well-diversified and dynamic economy, a vibrant private sector, well educated population and a strong legal environment.

As in most emerging economies, in recent years, all aspects of construction projects in the country have become more complex, technically, legally, financially, both in speed and in size. The involvement of many different parties and the onerous programming are all features that conspire against a harmonious life in the construction industry. It is a recognised fact of life that construction has become a contentious sector of business. Disputes are common and increasing.

It requires little convincing that the role of a competent dispute resolution service is vital to deal with the dispute-riddled construction industry in Mauritius.

Legal framework – practice, law and policy

The dispute resolution regime in a country cannot be isolated from its judicial system. It would be useful to first set out the background as to the changing trends in the dispute resolution landscape in Mauritius.

Besides being new, dispute adjudication in Mauritius is essentially a creature of contract. Virtually all is derived from standard contracts in use in the country. The FIDIC family of contracts occupies an important position in the construction industry in Mauritius. It contains a dispute resolution clause and provides for a Dispute Adjudication Board (DAB).

In Mauritius, the legal system that governs contracts and ultimately DABs is a hybrid legal system which draws its inspiration from France and England. The duality of concepts which characterised the law is rooted in the very history of the island.

The French Civil Code, re-enacted under the name of Code Napoléon, was imported to Mauritius, known as Isle de France in 1808. Two years later, Isle de France, fell to the English. The English Governor, Sir Robert Farquhar, at that time proclaimed that the Code Napoléon would remain in force in Mauritius under the terms of the Capitulation Treaty. Over time, the Code that was originally imported from France has undergone many changes, some inspired by French reforms and some to adapt it to the specific circumstances of Mauritius.

Codification is not the only difference between civil and common law. More importantly, it is the methodological approach to codes and statutes. In civil law jurisdiction, legislation is seen as the primary source of law and the courts base their judgments on the provisions of codes.

The English colonisation period in Mauritius introduced further layers of complexity. It has a system of English-style courts with the introduction of Districts Courts, an Intermediate Court and a Supreme Court. There are two degrees of appeal: a Court of Appeal consisting of Mauritian judges drawn from the Supreme Court and a Privy council consisting of British Law Lords.

The French Code de Procédure Civile further co-exists with the English Civil Procedure Rules. The latter falls in the gap in the absence of specific Mauritian rules of procedure.

As for substantive law, the English colonists introduced over the years a number of Anglo-Saxon concepts. There is a predominantly Anglo-Saxon legal culture in the country. In terms of everyday Court practice, lawyers and judges in Mauritius routinely draw from English and French jurisprudence and doctrine in their arguments and judgments.

(Continued on page 39)
DAB is viewed as a mechanism to overcome the deficiencies of arbitration and litigation in large civil construction projects.

From a practical perspective, it has been warmly embraced by domestic employers. In a sense, there is a recognition that DAB provides a real-time, quick and cost-effective procedure in resolving disputes, one at a time while the evidence is still fresh.

The abiding goal of establishing a DAB is that it has ‘real time’ value. By real time dispute resolution, it is meant that there is a defined mechanism for resolving disputes during the currency of the project.

Here, the parties are able to take advantage of the pragmatic advice of someone not only with construction experience but also with formal training and rigorous professionalism.

Both the World Bank and the FIDIC family of contracts encourage one-person boards for small and medium size contracts. A panel of three is not usual but this composition is not mandatory. But, to use the modern jargon, DABs are highly proactive. Sitting as a sole DAB member, ‘the atmosphere and the DAB functions are predominantly conciliatory’. One cannot overlook that the DAB member is chosen by the parties themselves to decide the particular dispute in question.

Disadvantage of early appointment

It must be pointed out that the early appointment of the DAB has its disadvantage. At the beginning of the project, it is not clear what kind of disputes will arise. It is therefore not possible for the parties to appoint a DAB member who is a specialist in the very field of the dispute.

It must be recognised that a DAB member is generally chosen for the very reason that he has formal knowledge of the subject-matter of the dispute which he is expected to use in resolving a dispute.

“No one ever chooses a dispute resolver for his inexperience.” Of greater significance is that many in the construction industry view a standing DAB to be costly.

DAB - A test for good faith?

As a civil law jurisdiction, there is the recognition of an overriding contract law principle “that in making and carrying out contracts parties should act in good faith”.

Additionally, when disputes arise, there is a disintegration of the initial relationship of mutual trust and confidence upon which good faith provisions are predicated. Accordingly, good faith obligations are unlikely to be of practical significance when disputes arise in the course of construction projects.

In practice, however, there is a tension between the good faith provision and the right of a party to refer a dispute to adjudication.

This is of questionable significance since a court is unlikely to conclude that a party acted in bad faith by exercising its right to refer a dispute to adjudication. The application of good faith provisions to restrict a party’s recourse to the contractual dispute resolution machinery is also counterintuitive, since any reliance upon these procedures is inherently self-serving and seemingly incompatible with good faith considerations.

Even if an objective of those provisions is to prevent the abuse of a construction contract’s dispute resolution arrangements, the DAB that have already been adopted will be considerably more effective.

(Continued on page 47)
Foreign-investment disputes

Come and get me

Argentina is putting international arbitration to the test

WEN Carlos Menem wanted to lure foreign companies to Argentina during his presidency in 1989-99, one of his favoured tactics was the bilateral investment treaty. In 1991 he signed deals with the United States and France, among others. They required Argentina to protect foreign firms’ property rights, and to let companies with grievances present claims at the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank body that conducts arbitration between businesses and governments. Thanks in part to these treaties, foreign investment soared.

In 2001 Argentina’s economy collapsed. Both foreign and domestic companies suffered huge losses. Unlike local firms, however, foreigners could turn to ICSID for compensation. Dozens filed cases.

Argentina has done well at ICSID, winning six of the ten resolved cases. A dozen more claims have been withdrawn. But the awards it has lost amount to $400m. A typical award involved CMS Energy, an American natural-gas company. Its operating agreement with Argentina stipulated that tariffs should be in dollars, adjusted for inflation in the United States and converted to pesos at the market exchange rate. In 1999 Argentina froze the tariffs in pesos, which were later devalued. It never increased them again.

The other cases involved Azurix, a water company; Continental Casualty, an insurer; and a water-provision subsidiary of France’s Vivendi. Argentina has not yet paid a cent to any of them.

Argentina sees ICSID as too business-friendly, with some justification. According to Jürgen Kurtz, a law professor at the University of Melbourne, its tribunal members often come from commercial arbitration, where disputes are resolved narrowly, on the basis of firm contracts rather than treaties. But many ICSID claims involve investment treaties, which grant governments exceptions for broad interests such as public health or the environment. The arbitrators must determine whether a state’s actions meet those criteria.

Two of Argentina’s leftist counterparts, Bolivia and Ecuador, have already withdrawn from ICSID entirely. A third, Venezuela, has said it will pull out. Even rich countries are starting to question arbitration. Last year Australia said it would not include investor-state arbitration in future trade agreements. The government is facing a claim by Philip Morris, a tobacco company, at a tribunal in Singapore over a law standardising cigarette packaging.

Argentina has never threatened to quit ICSID. Its government insists it is open to honouring the awards. The only delay, it says, is that the claimants have not brought their rulings to a local court for collection.

The companies, however, are wary of the Argentine judiciary. They say that ICSID was set up to enable firms to avoid local courts, and that their awards are binding even without Argentine judicial approval - a position that ICSID’s arbitrators have backed. And they are not eager to pay the fee, worth 3% of the claim, that Argentina courts charge to process such awards, especially if there is a risk that they will be overturned. Moreover, in the past the Argentine government has paid judgments in bonds rather than cash.

Azurix and Blue Ridge Investments - a Bank of America subsidiary that bought CMS Energy’s claim - are trying to turn up the heat. They have requested that the United States Trade Representative ask President Barack Obama to revoke the trade preferences Argentina now enjoys, and are lobbying to block its access to World Bank loans. They can pursue Argentine state assets in any ICSID member country—although most of Argentina’s foreign assets have already been grabbed by holders of its defaulted sovereign bonds. America could also conceivably sue Argentina at the International Court of Justice. But in the meantime, the claims remain unpaid.

Whether that will cause a big decline in foreign investment is unclear. Multinationals had written off Ecuador, Bolivia and Venezuela long before they left ICSID.

Even without arbitration, they will stay in Australia, which has reliable local courts and rich natural resources. Brazil has become a top investment destination without ratifying a single investment treaty.

But medium-sized countries with middling political risk - such as Argentina - benefit most from arbitration. The country that has chosen to test the system is among the most likely to miss it if it falls apart.

Reprinted from the 18 February 2012 issue of The Economist.
The majority of the Supreme Court was of the view that immunity from suit for breach of duty that expert witnesses have enjoyed in relation to their participation in legal proceedings should be abolished. This article will consider the potential ramifications of this decision for parties and experts who use international arbitration as their mechanism of resolving disputes.

Background
The case arose out of a traffic accident in which the appellant, Mr Jones, was knocked off his motorcycle by a car driven by Mr Bennett. Mr Jones brought a personal injury claim against Mr Bennett on the basis that he had suffered from significant physical injuries arising from the accident. Since Mr Bennett’s insurer, Fortis, admitted liability, the only issue before the district court was quantum. Mr Jones’ lawyers briefed a clinical psychologist, Dr Kaney, to prepare a report on Mr Jones’ psychiatric condition. Dr Kaney came to the view that Mr Jones was suffering from a post-traumatic stress disorder as a result of the accident.

Fortis also retained a psychologist who opined that Mr Jones was exaggerating his physical symptoms. The court ordered that the psychologists retained by Mr Jones and Fortis prepare a joint expert statement. Accordingly, the psychologists had a telephone discussion to discuss the matter. Subsequent to this discussion, Fortis’ psychiatrist prepared a joint expert statement, which expressed views which were damaging to Mr Jones’ case. The joint expert statement was sent to Dr Kaney to review. Dr Kaney signed the joint statement without making any amendments or corrections despite the opinion expressed in the joint statement conflicting with her earlier opinion. Mr Jones contended that as a result of the joint expert statement he settled his claim for significantly less than would have been appropriate. Mr Jones brought a professional negligence claim against Dr Kaney.

At first instance, this claim was struck out on the basis of a long-standing rule that witnesses, including expert witnesses, are immune from suit in relation to evidence given in UK civil proceedings. The issue before the UK Supreme Court was whether the district court erred in striking out Mr Jones’ claim on this basis.

Supreme Court’s basis for its decision
The majority of the UK Supreme Court held that the long standing rule that expert witnesses are immune from suit arising from their participation in civil proceedings be abolished. The basis for the majority's decision was:

- there is no justification for the assumption

(Continued on page 43)
International Arbitration

Resistance is futile - Uganda Telecom and the grounds for resisting enforcement of foreign awards

Parties have only very limited scope to resist enforcement of foreign awards in the wake of the 2010 amendments to the International Arbitration Act

writes Mark Gillard

Following the 2010 amendments to the International Arbitration Act 1974 (Cth), courts have been reticent to impugn the substance of an award, or the procedure adopted by the arbitral tribunal, in the course of an application to enforce an award.

A recent case demonstrates once again that there are very limited grounds upon which parties may be able to resist enforcement of an award. In Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd [2011] FCA 131, the Federal Court held that:

- there is no general discretion to refuse enforcement; and
- the public policy ground for refusing enforcement under the Act should be interpreted narrowly and should not give rise to any sort of residual discretion.

The 2010 amendments to the Act

The International Arbitration Amendment Act 2010 introduced some important changes to promote the objectives of international arbitration as an efficient, impartial, enforceable and timely method by which to resolve international commercial disputes.

In respect of the enforcement of foreign arbitral awards, section 8 of the new Act has undergone important changes. Firstly, the requirement for the court to grant leave for enforcement under section 8(3) of the Act was removed.

Further, a new section 8(3A) was added which expressly limits the grounds for refusing enforcement to the narrow grounds set out in sections 8(5)-(7) of the Act, which mirror the grounds for the refusal of enforcing an award under section 5 of the New York Convention:

- (a) a party to the arbitration agreement in pursuance of which the award was made, was under some incapacity at the time when the agreement was made;
- (b) the arbitration agreement is not valid under the law applicable to it;
- (c) a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;
- (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, where applicable, the law of the country where the arbitration took place;
- (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority;
- (g) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
- (h) to enforce the award would be contrary to public policy.

In addition to these amendments, the new Act introduced other changes aimed to support the efficient enforcement of foreign awards. For example, a new section 39 set out matters which a court must take into consideration when enforcing a foreign award under section 8 of the Act.

In particular, section 39(2) states that a court or authority must have regard to the objects of the Act. The objects of the Act are set out in a new section 2D and include:

- (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes;
- (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
- (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce.

Under section 39(2), a court must also have regard to the fact that:

- (a) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
- (b) awards are intended to provide certainty and finality.

These types of considerations are clearly intended to weigh in favour of the ability of successful parties to enforce awards. They also have the effect of allowing arbitrators more latitude in dealing with parties in hearings (for example, limiting time for submissions or declining to hear submissions on certain points). This is because claims of procedural deficiencies in an arbitral hearing (such as breach of natural justice) are much less likely to risk providing the aggrieved party with a ground for resisting enforcement of the award ultimately made by the arbitral tribunal. Prior to the insertion of these new provisions, parties had more scope to argue that they had been unable to present their case as a result of some procedural decision or direction by the arbitral tribunal.

The grounds for resisting enforcement in Uganda Telecom

In the Uganda Telecom case, the applicant, Uganda Telecom Ltd, sought to enforce in Australia an award dated 29 April 2009. The award was made in 2009 by the arbitrator, Mr R Kafuko Ntuyo, who was appointed by the Centre for Arbitration and Dispute Resolution in Kampala, Uganda to arbitrate certain disputes which had arisen between Uganda Telecom Ltd and the respondent, Hi-Tech Telecom Pty Ltd. The arbitration took place in Uganda and the award was made in Uganda.

High-Tech sought to resist the enforcement of the award in the Federal Court and alleged that it did not appear before the arbitrator or

(Continued on page 43)
Uganda Telecom

(continued from page 42)
participate in any way in the arbitration. It claimed that it never became aware that the arbitrator was purporting to embark upon an arbitration of the dispute. Hi-Tech also contended that that arbitration was never validly constituted.
The court noted that the onus of establishing these grounds fell upon Hi-Tech, as the party resisting enforcement. Following consideration of the facts, the court rejected all of Hi-Tech’s grounds for refusing enforcement.

No general discretion to refuse to enforce an award
In Uganda Telecom, Justice Foster considered whether, following the new Act, the Court had any general discretion to refuse to enforce the award. He concluded that:

“Whether or not, in 2004, there was a general discretion in the court to refuse to enforce a foreign award which was brought to the court for enforcement, the amendments effected by the 2010 Act make clear that no such discretion remains.”

Prior to the 2010 amendments, Australian courts faced with a party seeking enforcement of an award had indicated that there was a general discretion available to a court to refuse to enforce an award (see, for example, Corvetina Technology Ltd v Clough Engineering Ltd (2004) 183 FLR 317 and Resort Condominiums International Inc v Bolwell (1995) 1 Qd R406).
The Court also indicated that parties should not attempt to identify a discretion to refuse enforcement in the oft-cited ground that enforcement would be contrary to public policy. Justice Foster observed that:

“Section 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. Whilst the exception in s8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted.”

This narrow approach to interpreting the public policy exception to the enforcement of foreign awards is also consistent with international jurisprudence on this issue.

A good example is United States jurisprudence relating to the public policy ground, such as Parsons & Whitmores Overseas Co, Inc v Société Générale De L’Industrie Du Papier 508 F 2d 969 (2d Cir 1974). It has also been observed in the United States that there is a “pro-enforcement bias” informing the New York Convention (see, for example, Karaha Bodas Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara 364 F 3d 274 at 306 (2004)).

Other recent decisions on enforcement under section 8
The Uganda Telecom case is consistent with the findings in other cases under section 8 of the Act which are consistent with the pro-enforcement policy introduced by the New York Convention and reflected in the Amendment, both of which demonstrate a concern with protecting the finality of awards.

For example, in Altain Khuder LLC v IMC Mining Inc (2011) 246 FLR 47, Justice Croft in the Victorian Supreme Court observed that it would be:

“intolerable if the law was that an award creditor could be required to relitigate matters which were the subject of the arbitration; possibly many times and in a multiplicity of courts, and with the possibility of inconsistent findings … Consequently, a party seeking to resist the enforcement of an award is entitled to rely on the grounds provided for in the Convention, and in the legislation applying its provisions, but is not entitled to venture further towards reconsideration of the findings, substantive or procedural, of the arbitral tribunal”.

Both of these decisions demonstrate that there is only very limited scope for parties to resist enforcement of foreign awards in the wake of the 2010 amendments to the Act.

This article first appeared in the June 2011 edition of Clayton Utz International Arbitration Insights and is reprinted with permission.

Expert witness immunity

(continued from page 41)
that, if expert witnesses are liable to be sued for breach of duty, they will be discouraged from providing their services at all. Professional indemnity insurance is available. Professional persons engage in many activities where the possibility of being sued is more realistic than it is in relation to undertaking the role of an expert in litigation:

• expert witness immunity is not necessary to ensure that expert witnesses give full and frank evidence to the court;
• there is unlikely to be a multiplicity of suits against an expert witness if expert witness immunity from suit is removed;
• the consequence of denying expert witnesses the immunity accorded to them will be sharpened awareness of the risks of pitching their initial views of the merits of their client’s case too high such that these views come to expose and embarrass them at a later date. The abolition of expert witness immunity would be a healthy development in the approach of expert witnesses to their ultimate task of assisting the court to a fair outcome of the dispute; and
• the proposition that the removal of expert witness immunity would have a potentially unsatisfactory chilling effect on expert witnesses is inconsistent with the liability to a prosecution for perjury for untruthful evidence and with liability to disciplinary proceedings for unprofessional conduct in the preparation or presentation of expert evidence.

The possible ramification of Jones v Kaney in international arbitration
Experts can play a crucial role in international arbitration. Parties may often decide whether to pursue or defend an arbitration claim purely based on its expert’s views on the merits of the claim. Experts can be the key to the success or failure of the claim.

The effect of the decision in Jones v Kaney is that experts based in the UK may think twice about whether they wish to become involved in arbitration proceedings as there they are no longer protected by a veil of immunity from suit in the UK.

However, for a party wishing to retain an expert based in the UK who is willing to participate in arbitration proceedings, the party will need to ensure that its agreement with the expert is governed by UK law. The reason for this is so that if a party is unsuccessful in arbitration proceedings and believes the failure is solely attributable to the negligence of its expert, it wishes to bring a negligence claim against its expert in a UK court, it is at the very least assured that the expert cannot plead a defence of expert immunity from suit since this form of immunity has now been abolished.

For UK experts who are willing to take part in arbitration proceedings, they will need to ensure that from the outset they are entirely comfortable with the opinions they provide and do not get pressured into providing an opinion solely because it fits the client’s purpose.

If UK experts are required to provide a joint report with another expert, they should take particular care to ensure that if they are departing from the opinion originally provided to the client, they provide through reasons to the client for doing so to avoid any allegation that they were breaching their duty of care to the client.

This article first appeared in the June 2011 edition of Clayton Utz International Arbitration Insights and is reprinted with permission.
High Court appeal

Appeal of arbitral awards and the decision in *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 281 ALR 593; [2011] HCA 37, which has provided guidance on the process of appealing domestic arbitral awards under s 38 of the *Commercial Arbitration Act 1984* (NSW) (the Arbitration Act) and the equivalent Acts in other states and territories. The decision may also influence the interpretation of the new Model Commercial Arbitration Acts.

**Background**

In 1999 Gordian Runoff Ltd (*Gordian*) wrote a seven year directors’ and officers’ runoff policy for FAI Insurance Ltd (*the FAI Policy*) and it entered into reinsurance treaties with several reinsurers.

In 2001 claims were made under the FAI Policy and Gordian made a claim on its reinsurers. The reinsurers refused to cover the claim on the basis that their treaties only covered underlying policies with a term not exceeding three years and the FAI Policy, being cover for a seven year term, was outside the protection of the treaties.

**Arbitration**

The terms of the reinsurance treaties required the dispute to be arbitrated. In the arbitration, Gordian responded to the reinsurers’ denial of liability by relying on s 18B of the *Insurance Act 1902* (NSW) (*the Insurance Act*).

That section provides that if an insurer excludes or limits liability, the insured shall not be disentitled to be indemnified if the loss was not caused by or contributed to by the excluded or limited events or circumstances, unless in all the circumstances it is not reasonable for the insurer to be bound to indemnify the insured.1

The arbitrators agreed with the reinsurers that the treaties only covered underlying policies with a maximum duration of three years. However, they found that s 18B operated to cover claims made within three years even where the underlying policy had been written for a longer term.

**Supreme Court**

The reinsurers sought leave to appeal to the Supreme Court. Under s 38(5) of the Arbitration Act, in order to grant leave the Supreme Court had to be satisfied that:

- "(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement, and"

- "(b) there is:
  - (i) a manifest error of law on the face of the award, or
  - (ii) strong evidence that the arbitrator ... made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law."

Einstein J granted the reinsurers leave to appeal on the basis that both s 38(5)(b)(i) and (ii) had been satisfied.2 He ultimately set aside the arbitral award on the basis that an agreement to extend cover to include policies issued for up to three years was not a ‘limitation’ or ‘exclusion’ in the sense contemplated by s 18B of the Insurance Act.

**Court of Appeal**

The Court of Appeal found for Gordian and allowed the appeal.3 While Allsop P (with whom Spigelman CJ and Macfarlan JA agreed) found that if he were to determine whether s 18B of the Insurance Act applied, he would have agreed with Einstein J and disagreed with the arbitrators, he held that the arbitrators’ interpretation of s 18B was not an error of law that fell within s 38(5)(b)(i) or (ii).

Consequently the Court of Appeal concluded that leave to appeal the award should not have been granted.

**High Court**

The High Court found for the reinsurers and allowed the appeal.4 French CJ, Gummow, Crennan and Bell JJ delivered a joint judgment while Kiefel J allowed the appeal on similar grounds and Heydon J dissented.

The majority found that the words ‘manifest error on the face of the award’ in the Arbitration Act mean that the existence of the error must be apparent to a reader of the award. The Court rejected previous approaches in which the word ‘manifest’ had been treated as requiring the error to be very quickly identifiable.5 That approach required errors to have a particular quality or character so it included facile errors and excluded complex errors. Instead, the High Court found that an error (Continued on page 45)
in the construction of a complex law such as s 18B of the Insurance Act could be ‘manifest’. The Court also emphasised that failure to provide a statement of the reasons for the making of the award may itself amount to a ‘manifest error’. The Court noted that what is required to satisfy the requirement to give reasons for the making of an arbitral award will depend on the nature and circumstances of the dispute, and that reasons of a judicial standard will not necessarily be required.5

In this case, the Court found that by relying on s 18B as a critical element in reaching their decision, the arbitrators were obliged to explain succinctly why each of the elements of that provision was satisfied, and that they had not done so.

Most importantly the arbitrators had failed to explain how it could be reasonable for the reinsurers to indemnify Gordian for a claim made on a policy which the arbitrators found was not covered by the reinsurance treaties. This constituted a manifest error.

The Court also found that the arbitrators’ interpretation of s 18B of the Insurance Act involved a manifest error. The Court emphasised the distinction between a term defining the scope of cover and a term limiting or excluding cover upon the happening of an event or circumstance.

As the FAI Policy was outside the scope of the reinsurance treaties, s 18B could not operate to require the reinsurers to meet a claim made on that policy. The treaties did not cover all claims made within three years on any policies issued by Gordian but only claims made on policies which were within the treaties.

The Model Commercial Arbitration Bill 2010

Since the arbitration the subject of this case, New South Wales, Victoria, South Australia, the Northern Territory and Tasmania have adopted the Model Commercial Arbitration Bill agreed to by the Standing Committee of Attorneys-General.7 The Bill has been introduced into parliaments in Queensland and Western Australia but is yet to be passed. The Bill is yet to be introduced into the ACT parliament.

Arbitrations under the old regime

For arbitrations in Queensland, Western Australia and the Australian Capital Territory, as the Model Bill has not been enacted, the decision in Gordian is extremely important as it clarifies when it is possible to appeal an arbitrator’s award.

By finding that a ‘manifest’ error is one which is merely apparent to a reader of the award, rather than an error of a particular character or quality, the High Court extended the scope of appeal of arbitral awards made under the pre-Model Bill Arbitration Acts.

Errors in complex questions of statutory interpretation and the failure of an arbitrator to provide an adequate statement of reasons for an award are now firmly classified as ‘manifest’ errors.

For arbitrations in New South Wales, Victoria, South Australia, the Northern Territory and Tasmania that were commenced before the commencement of the Model Commercial Arbitration Act in that state, the old Commercial Arbitration Act continues to apply and Gordian is relevant to determining when an appeal might be available.

Arbitrations under the Model Acts

The right to appeal is much more restricted under the new Model Commercial Arbitration Acts than under the old Commercial Arbitration Acts. Under the Model Acts appeals are only available if the parties agree that an appeal may be made under the Act and the Court grants leave to appeal.8

The Court may only grant leave to appeal if it is satisfied of certain matters including that the decision of an arbitrator on a question of law is ‘obviously wrong’ or that the question of law is one of ‘general public importance and the decision of the tribunal is at least open to serious doubt’.9

This replaces the requirement of ‘manifest error’ or ‘strong evidence’ of error contained in the old Commercial Arbitration Acts. The Court must also be satisfied that it is just and proper in all the circumstances for the Court to determine the question despite the agreement of the parties to resolve the matter by arbitration.10

This may go some way to ameliorating the concerns expressed by the dissenting judge, Heydon J:

“The appeal comes to a close seven years later. The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy ... A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely the arbitrators had any greater relevant expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three.”

Nevertheless, it remains to be seen whether courts will interpret ‘obviously wrong’ in the same way as ‘manifest error’. On the one hand, the right to appeal must be interpreted in the light of the paramount object of the Act, which is ‘to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense’.11

On the other hand, it must be recognised that the Standing Committee of Attorneys General chose to include the right of appeal in the Model Bill despite its general objective of adopting the UNCITRAL Model Law for International Commercial Arbitration, under which there is no right of appeal. As a result the right of appeal must be given some application by courts.

It will be interesting to see whether the Standing Committee of Attorneys General or the state governments seek to amend the new arbitration legislation as a consequence of the decision and, if not, how the decision is applied to the new legislation.

Michael Quinlan is a Partner, Mitch Riley is a Lawyer and Ashleigh Shand is a Paralegal in the Sydney office of Allens Arthur Robinson.

Endnotes

5. Natoli v Walker (1994) 217 ALR 201 is an example of such a case.
7. Commercial Arbitration Act 2010 (NSW); Commercial Arbitration Act 2011 (Vic); Commercial Arbitration Act 2011 (SA); Commercial Arbitration Act 2011 (NT); Commercial Arbitration Act 2011 (Tas). As at 23 November 2011 the Act has commenced in NSW and Victoria only.
8. Section 34A(1) of the Model Commercial Arbitration Acts.
10. Section 34A(3)(d) of the Model Commercial Arbitration Acts.
Expert Determination
High Court clarifies standard expected of expert reasoning

The High Court has unanimously held that an expert determination, made in accordance with a contract between parties in dispute, is binding upon the parties - even if the determination contains an error.

The judgment in *Shoalhaven City Council v Firedam Civil Engineering Pty Limited* [2011] HCA 38 emphasises that contracting parties can control how disputes are to be determined. Accordingly, it is important that careful consideration is given to dispute resolution provisions when drafting contracts as the provisions will determine whether disputes are to be determined by an expert, arbitrator or a court.

Furthermore, in circumstances where the parties agree that disputes are to be determined by an expert, the parties’ contractual agreement will define the terms of the expert’s engagement, including the level of detail in any reasoning that is required in an expert determination.

**Background**
On 18 October 2005, Shoalhaven City Council (the council) and Firedam Civil Engineering Pty Ltd (Firedam) entered into a contract for the design and construction of a wastewater collection and transportation system.

The contract incorporated the widely utilised NSW Government GC21 (Edition 1) General Conditions of Contract (see box).

When disputes arose between the parties in 2008, they appointed an expert to determine their respective monetary claims. As is clear from clause 4, the expert was instructed to act as an expert and not an arbitrator; to make his determination based on the parties’ submissions and his own expertise; and to issue a certificate “stating the Expert’s determination and giving reasons”.

On 6 February 2009, the expert determined the issues in dispute. The expert determination was generally in favour of the council and the award made was below the contractual threshold set for judicial review.

Relevantly, the expert found that Firedam had failed to discharge its onus of establishing that it was entitled to extensions of time in respect of certain claims.

However, when determining the council’s cross-claim (seeking damages for late completion), the expert found that the council’s claim for damages was affected by the fact that it had caused or contributed to certain delays, but resolved this situation by granting an extension of time “for the benefit of the principal” in order to reduce the council’s entitlement to damages by the extent of that delay.

**Supreme Court judgment**
On 15 May 2009, Firedam filed a summons in the NSW Supreme Court seeking declaratory relief, including a declaration that the expert determination was not binding upon the parties because the determination was affected by errors (namely, inconsistencies in the expert’s findings in terms of the extensions of time claims) so that it was not in accordance with the contract.

It was also alleged that the expert had failed to give proper reasons for his determination in that no reasons were given for the alleged inconsistencies in his findings regarding extensions of time and delays.

At first instance, Tamberlin AJ held that the expert determination was binding and that there was no inconsistency in the expert’s findings - noting that Firedam and the council had made “distinct claims based on different criteria”. His Honour also found that there was no inadequacy in the expert’s reasoning.

Firedam appealed.

**Court of Appeal judgment**
The Court of Appeal unanimously allowed Firedam’s appeal and declared the expert determination not to be binding on the parties.

In its 19 April 2010 decision, the Appeal Court held that there was an inconsistency in the expert’s findings in terms of his determination of the extension of time and delay claims. Further, the Appeal Court found that this inconsistency in the expert’s reasoning meant that the contractor was not told why it was not entitled to delay costs and this amounted to a failure to give reasons.

**High Court judgment**
On 5 October 2011, the High Court unanimously held that the expert’s determination was adequately explained and contained no relevant inconsistencies.

Chief Justice French and Justices Crennan and Kiefel held that the expert’s decision to grant an extension of time “for the benefit of the principal” was adequately explained and was not inconsistent with his refusal to allow Firedam’s extension of time claims. Their Honours also took the opportunity to confirm the following important legal principles:

(Continued on page 47)
(continued from page 46)
about the reasoning that is required in expert determinations:

(a) Caution must be used when applying case law about the requirement to give reasons in matters of this sort because cases involving an expert’s obligation to give reasons will likely be determined on the basis of their own individual facts and the specific contractual terms relating to the expert’s engagement.

(b) The role of an expert differs from that of an arbitrator or judicial officer and, in general terms, the standard of reasoning that is required from an expert is lower than that required of an arbitrator or judicial officer. This is because an agreement that provides that an expert is to determine any disputes that arise between the parties to a contract is a private contractual arrangement that is not governed by a statutory regime.

(c) As a general proposition, mistake or error in an expert’s reasoning will not automatically cause the determination to lose its binding force unless the expert failed to do what was required by the contract between the parties. In this regard their Honours observed at [27]: “A deficiency or error in the reasons given by an expert may affect the validity of the determination in two ways:

• The deficiency or error may disclose that the expert has not made a determination in accordance with the contract and that the purported determination is therefore not binding.

• The deficiency or error may be such that the purported reasons are not within the meaning of the contract and, if it be the case that the provision of reasons is a necessary condition of the binding operation of the determination, the deficiency or error will have the result that the determination is not binding.”

The judgments of Gummow, Heydon and Bell JJ do not consider the level of reasoning that is required from experts when providing expert determinations. This is because they found that there were no inconsistencies in the expert determination.

Conclusion
This case is important because it is the first time that the High Court has analysed the circumstances in which an expert determination may or may not be binding. The court confirmed that an expert is generally not expected to achieve the standard of reasoning that is required from an arbitrator or a judicial officer, but did not take the opportunity to lay down any general principles about the level of reasoning that is required to be given by experts.

Instead, the court emphasised the need for experts to ensure that they have complied with the terms of their engagement and the expert determination mechanism agreed upon by the parties. The High Court also reiterated the established legal principle that a mistake in an expert’s reasoning will not automatically render the determination ineffective.

Alistair Little is a Partner and Nina Morgan, a Senior Associate, in the Sydney office of TressCox Lawyers. This article was first published in the December 2011 issue of the New South Wales Law Society Journal.

---

DABs in Mauritius
(Continued from page 39)
Informal Assistance- Advisory Opinions
The provision of informal assistance in the form of advisory opinions by the DAB is at the heart of its intervention in terms of efficiency.

Frequently advisory opinions will deal with questions of principle. Such opinions are requested by the parties when they are unable to agree as to the interpretation of specific provisions of the contract.

Before issues crystallise into disputes, disagreements between the parties will generally find their solutions thanks to informal assistance. Such opinions may be given orally or in writing.

Those involved in the dispute resolution business have extolled the virtues of dispute avoidance as a better alternative to the uncertainty that invariably follows the consequence of the emergence and crystallisation of a dispute.

This is recognised as the single biggest advantage as that the procedure gives focus and directions in the avoidance of disputes and conflict management. Above all, prevention of dispute is the best insurance for safeguarding personal and business relationships throughout a project.

Education and training
When appointing a DAB member, the contracting parties recognise that complete objectivity, impartiality and freedom from conflict of interest for the duration of the contract are necessary attributes.

It is also important that the prospective Board member has the appropriate construction experience, including experience of claims and dispute resolution, knowledge of contract interpretation and knowledge of dispute resolution procedures.

An impediment to the development of this type of dispute resolution is the paucity of expertise available in the country. Our legal education is not geared to this particular specialism.

We must find ways to encourage new generations of young and able professionals in the construction industry as well as lawyers to promote this process of dispute resolution. Undoubtedly, there needs to be much more education and training in this field.

More efforts should be made to set up a proper infrastructure in terms of educated, trained and experienced professionals in the field.

In Mauritius, the overall picture, in the context of big projects, is of a high proportion of disputes being dealt with without recourse to arbitration or litigation because of the introduction of DABs. It provides a valuable opportunity for the parties to arrive at a resolution of disputes before proceeding to a costly formal determination through arbitration.

The mutual functions of the parties and the DAB tend to be complementary and co-operative. The parties and the DAB are all conscious of the fact that they will have to work together along with each other in a forensic process in which they are all engaged until the project has run its course.

The DAB is viewed as a dynamic and proactive method of dispute resolution. Its use is growing apace in the country. It is currently known to be in operation for the construction of a new hospital and the construction of the New Airport of Mauritius.

DABs are undoubtedly set to grow in popularity and frequency of use in Mauritius. I believe that in the not too distant future DAB will play as large a part in dispute resolution as any other method in Mauritius.

After all justice within the construction industry is only as good as that which is understood by those affected by it whether they are construction judges or a contractor who carries out the work on site.

Kailash Dabeesingh CEng FRICS FCIArb is a Chartered Arbitrator and Chartered Surveyor practising in Mauritius.
The Australian
ADR Reporter

Editor:
Michael Sanig

Editorial correspondence, articles etc for publication should be sent to:-

PO Box 57, OURIMBAH, NSW, 2258
Tel: (02) 9415 1600 (office)
Mobile: 0404 023 006
E: msanig@skymesh.com.au

Articles can be submitted in Word or RTF format. Please submit photographs or images as JPEG files 300dpi or greater.

Please do not use double spacing within paragraphs. Please use endnotes not footnotes.

All opinions expressed in The Australian ADR Reporter are those of the contributor and publication of same does not imply endorsement by The Chartered Institute of Arbitrators (Australia) Limited or any of its officers.

Published four times per year.

Copy Dates:

Jun 2012 - 15 May
Sep 2012 - 15 Aug
Dec 2012 - 15 Nov
Mar 2013 - 15 Feb

All articles © 2012 The Chartered Institute of Arbitrators (Australia) Limited - Permission to reproduce any item should be obtained by writing to the Editor at the address stated above.