



# Recent Developments in Arbitration: at Home and Abroad\*

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## Introduction

Today, I wish to highlight a number of developments which have occurred in arbitration, both in Australia and overseas. Most notably, after 7 years, uniformity in domestic commercial arbitration legislation has been achieved across Australia. With the first of the Commercial Arbitration Acts being introduced in NSW in 2010,<sup>1</sup> I think the features of the Model Law,<sup>2</sup> or at least the principal ones, have been well covered, so I shall focus on other issues which I believe are of continuing interest.

Before turning to specific developments, I would like to distinguish the arbitral environments of Australia, on the one hand, and those of busy arbitration jurisdictions across the world. As a country with such a strong legal framework, it might be thought that Australia should be at the forefront of international arbitration, particularly in our region, yet it is not. While Australia's geographic isolation may well impose a limit on its attractiveness as a venue for arbitration, Australia's challenges in attracting international arbitration business go further. Domestic arbitration remains comparatively rare in Australia, in no small part due to the reliability and efficiency of the courts; and, particularly,

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<sup>1</sup> *Commercial Arbitration Act 2010* (NSW).

<sup>2</sup> United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* (UN Docs A/40/17, Annex I and A/61/17, Annex I) as amended on 7 July 2006 ("the Model Law").



the commercial courts. Consequently, the business which is crucial for the development of the financial, jurisprudential and professional base necessary for the success of arbitral centres, which is a significant factor in attracting international arbitration, is simply absent. This, combined with Australia's historic isolationism, when compared to European states where arbitration has flourished, has hamstrung our development as a centre for arbitration, whether domestic or international. Thus, while there are a number of areas that we must continue to improve on — from both a judicial and infrastructural point of view — if Australia is to truly establish itself as a leading destination for international arbitration, our success will undoubtedly be limited in the absence of serious public investment or a significant change in business and corporate attitudes. Bearing this in mind, I shall speak on a number of changes that have occurred.

### **Introduction of uniform legislation in the Australian Capital Territory**

In May 2010, the Standing Committee of Attorneys-General agreed to implement the new Commercial Arbitration Acts to provide a uniform legislative framework, based on the Model Law, for domestic commercial arbitration across Australia.<sup>3</sup> On 4 April 2017, the last of the uniform acts came into effect in the Australian Capital Territory.<sup>4</sup> This ended the peculiar situation which had previously, at least theoretically, allowed parties to make mischievous use of the lack of uniformity between state and territory arbitration legislation. For example, were substantive proceedings to be commenced in the ACT courts in breach of an arbitration agreement, a test other than that set out under article 8 of the Model Law would apply. Thus the achievement of uniformity in the domestic arbitration regime facilitates domestic arbitration and promotes arbitration more broadly.

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<sup>3</sup> Standing Committee of Attorneys-General, *Communique* (16–17 April 2009) 2, 6.

<sup>4</sup> *Commercial Arbitration Act 2017* (ACT).



## A Shift Against Investment Treaties

Interesting developments have occurred in attitudes towards investment treaties, and in particular towards the arbitrations for which they provide. The introduction of bilateral and multi-lateral investment treaties constituted a fundamental shift in the balance of power between sovereign states and corporations, especially as these treaties included dispute resolution clauses. The wisdom of treaties of this kind has increasingly been called into question.<sup>5</sup> The policy on which these treaties were based does not sit well with the effects of these treaties and arbitrations conducted under their provisions.

Investment treaties which provide for the settlement of disputes via independent arbitration may be thought to guard against sovereign risk and allow transnational corporations to trade with greater confidence that business will be free from unwarranted governmental interference. And while they may have this effect, unsavoury consequences flow with this too. The first investor state arbitration against Australia was that brought by Philip Morris in relation to the plain packaging of tobacco products.<sup>6</sup> The proceeding commenced in June 2011 and the Final Award regarding costs was published in March 2017, after Australia succeeded on a preliminary objection regarding abuse of rights in December 2015.<sup>7</sup> Despite Australia's conclusive success on a preliminary matter, the arbitration likely cost Australia tens of millions of dollars.<sup>8</sup> Even though Australia successfully

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<sup>5</sup> See e.g. Chief Justice RS French, 'Investor State Disputes – A Cut Above the Courts?' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014); Gus van Harten, 'A Critique of Investment Treaties' in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both Ends, 2016) 41.

<sup>6</sup> Commonwealth Attorney-General's Department, *Tobacco Plain Packaging – Investor-State Arbitration* (accessed 10 October 2017) <<https://www.ag.gov.au/tobaccoplainpackaging>>; see also discussion in Chief Justice RS French, 'Investor State Disputes – A Cut Above the Courts?' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014) 4–6.

<sup>7</sup> *Philip Morris Asia Limited (Hong Kong) v Australia (Jurisdiction and Admissibility)* (Permanent Court of Arbitration), PCA 2012-12, (17 December 2015) [588].

<sup>8</sup> See *Philip Morris Asia Limited (Hong Kong) v Australia (Costs)* (Permanent Court of Arbitration), PCA 2012-12, (8 July 2017); and see media reports including Adam Gartrell, 'Phillip Morris ordered to pay Australia



obtained a significant portion of its costs,<sup>9</sup> the prospect of similar proceedings could well discourage other countries from pursuing worthwhile legislative and other measures. Moreover, as Chief Justice French noted, had that arbitration proceeded to a hearing on the merits, the tribunal would then have determined a question which was significantly similar to that which fell for determination before the High Court.<sup>10</sup>

Another issue with investment treaty arbitration is that it enables an aggrieved or potentially aggrieved investor to forum shop.<sup>11</sup> For example, an American investor may transfer the rights or ownership in question to a Hong Kong company to take advantage of a treaty between Hong Kong and a third country. While this may constitute an abuse of rights if it occurs after the dispute has arisen, as was the case in the plain packaging arbitration, it may be acceptable to an international tribunal if it is done to ensure the benefit of the treaty before the dispute has arisen. In this way, an investment treaty may empower a foreign investor to invest on more advantageous terms, but it may not be the case that any additional investment is enjoyed by the contracting state. This is especially so when such treaties seldom impose obligations on the relevant investing states to prevent foreign investors piggybacking on the treaty.<sup>12</sup> And this is particularly troubling when there is a questionable

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millions in costs for plain packaging case' *The Sydney Morning Herald* (9 July 2017) <<http://www.smh.com.au/federal-politics/political-news/philip-morris-ordered-to-pay-australia-millions-in-costs-for-plain-packaging-case-20170709-gx7mv5.html>>.

<sup>9</sup> *Philip Morris Asia Limited (Hong Kong) v Australia (Costs)* (Permanent Court of Arbitration), PCA 2012-12, (8 July 2017) [103]–[105].

<sup>10</sup> Chief Justice RS French, 'Investor State Disputes – A Cut Above the Courts?' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014) 6.

<sup>11</sup> Chief Justice RS French, 'Investor State Disputes – A Cut Above the Courts?' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014), 4-5; Gus van Harten, 'A Critique of Investment Treaties' in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both Ends, 2016) 41, 42.

<sup>12</sup> Gus van Harten, 'A Critique of Investment Treaties' in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both Ends, 2016) 41, 42–3.



empirical basis for the oft repeated assumption that investment treaties do encourage investment.<sup>13</sup>

On the other hand, investment treaty arbitrations may be flawed from an investor's perspective due to the limited ability of tribunals to restrict the exercise of criminal jurisdiction by a State party.<sup>14</sup> In *Albania v Becchetti* an ICSID tribunal provisionally ordered the Government of Albania to "take all actions necessary to suspend the extradition proceedings currently pending" against parties to the arbitration.<sup>15</sup> On the basis of this position, the English Westminster Magistrates' Court found that the extradition proceedings could not proceed as a result of the tribunal's order. This is to be compared to *Romania v Bogdan-Alexander Adamescu*,<sup>16</sup> where the arbitral proceedings were commenced after the extradition proceedings. Again, the ICSID tribunal granted the provisional measures sought against the state seeking extradition, but in this case the Westminster Magistrates' Court found that the extradition proceedings should continue. The reasoning of the two cases has been criticised as lacking consistency, and this reveals a tension inherent in investor state arbitration: while tribunals must be able to protect the integrity of the arbitration, states must not be unnecessarily prevented from enforcing their criminal laws as they see fit.

International commercial courts, being courts that specialise in transnational commercial disputes, may reduce, though not eliminate, the need for investor-state arbitration by providing an impartial and reliable venue for the determination of such disputes. These courts provide the expertise which

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<sup>13</sup> Gus van Harten, 'A Critique of Investment Treaties' in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (Both Ends, 2016) 41, 43.

<sup>14</sup> See Emilie Gonin, 'How Effective are ICSID Provisional Measures at Suspending Criminal Proceedings before Domestic Courts: The English Example?' on Wolters Kluwer, *Kluwer Arbitration Blog* (30 September 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/09/30/effective-icsid-provisional-measures-suspending-criminal-proceedings-domestic-courts-english-example/>>.

<sup>15</sup> *Albania v Becchetti* (Unreported, Westminster Magistrates' Court, Tempia DCJ, 20 May 2016).

<sup>16</sup> Unreported, as referred to in Emilie Gonin, 'How Effective are ICSID Provisional Measures at Suspending Criminal Proceedings before Domestic Courts: The English Example?' on Wolters Kluwer, *Kluwer Arbitration Blog* (30 September 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/09/30/effective-icsid->



is often lauded as a benefit of commercial arbitration, while also allowing the continued operation of the doctrine of precedent.<sup>17</sup> Since the entry into force of the *Hague Convention on Choice of Court Agreements* on 1 October 2015, the judgment of the chosen court may be enforced in member states in a similar manner to an arbitral award,<sup>18</sup> though it is still far from being as widely accepted as the *New York Convention*.<sup>19</sup> There are clearly issues with the *Hague Convention*,<sup>20</sup> such as the width of the consumer transaction exclusion,<sup>21</sup> but it is clear that the convention may facilitate the creation of successful international commercial courts which combine the expertise and flexibility of international arbitration with the certainty and potential efficiency of courts.

#### **Developments under the CAA: reasonableness requirement for the issue of subpoenas**

Recently, an application was made before me in *Aurecon Australasia Pty Ltd v BMD Constructions Pty Ltd* [2017] VSC 382 for the issue of a subpoena to attend to give evidence before an arbitral tribunal, and it fell for consideration whether an element of reasonableness must be established before such an application should be granted. The answer, in my view, derives from the juristic nature of the powers of courts and tribunals respectively. An arbitration is conducted by a tribunal

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[provisional-measures-suspending-criminal-proceedings-domestic-courts-english-example/>](#).

<sup>17</sup> Steven Rares, 'The Modern Place of Arbitration – Celebration of the Centenary of the Chartered Institute of Arbitrators' (Speech delivered at the Chartered Institute of Arbitrators, Sydney, 22 April 2015) [12]; Doug Jones, 'Investor-State Arbitration: the Problem of Inconsistency and Conflicting Awards' (Speech delivered at German-American Lawyers' Associate Practice Group Day, Frankfurt, 26 March 2011); Jerome Squires, 'Do International Commercial Courts Represent a Real Challenge to International Arbitration' (24 November 2015) <<https://www.ciarb.net.au/resources/international-arbitration/do-international-commercial-courts-represent-a-challenge-to-international-arbitration/>>.

<sup>18</sup> *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, (entered into force 1 October 2015) ('*Hague Convention*').

<sup>19</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*'); see Hague Conference on Private International Law, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements* (5 October 2017) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>>.

<sup>20</sup> See J J Spigelman, 'The Hague Choice of Court Convention and International Commercial Litigation' (2009) 83 *Australian Law Journal* 386.

<sup>21</sup> J J Spigelman, 'The Hague Choice of Court Convention and International Commercial Litigation' (2009) 83



which derives its power from the agreement of parties.<sup>22</sup> On the other hand, courts are organs of the State and variously derive their power from legislation, constitutions and the common law. The natural consequence of this distinction is that there are many things which courts can do which arbitral tribunals cannot. In this case, the two parties to the arbitration sought, under section 27A of the *Commercial Arbitration Act* 2011, by consent, the issue of a subpoena to a former employee of Aurecon Australasia. Importantly, and in contrast to the *International Arbitration Act* 1974 (Cth), the CAA does not expressly require that the Court find that it is reasonable in all the circumstances to issue a subpoena to a person who is not a party to the arbitral proceedings before issuing such a subpoena. Nonetheless, in light of the serious consequences of failing to answer a subpoena, and the potential for the court's processes to be misused, I found that it was necessary that the court be independently satisfied that the issue of the subpoena is reasonable. This is because the parties sought the exercise of the State's coercive power against a stranger to the arbitration agreement and, if courts did not consider the appropriateness of the issue of subpoenas in such circumstances, this would amount to an unacceptable delegation of a public and coercive power to a private tribunal.

### **Ethics in international arbitration**

The relative paucity of arbitration in Australia has, to an extent, saved us from recent concerns about ethical issues peculiar to this area of practice. In public debate about the Trans-Pacific Partnership and other international trade agreements, concerns have been aired about "secret courts and secretive arbitrators acting in cahoots with corporations to asset-strip democracies", as the summer issue of CIARB's *Resolver* reported it.<sup>23</sup> And while such concerns are exaggerated,

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*Australian Law Journal* 386, 391-2.

<sup>22</sup> But note the observation in *Brazis v Rosati* [2014] VSC 385, [74] and the authorities therein that this may include empowering the arbitrator to exercise statutory powers.

<sup>23</sup> Chris Wilford, 'Action Stations!' (Summer 2017) *The Resolver* 12, 13.





there is a worry that leading practitioners in some areas of the world are continually appearing as counsel before an arbitrator or arbitrators who will appear before them or oppose them in another matter in due course.<sup>24</sup> Thus there is a potential for significant conflicts of interest, apparent, if not actual. This issue, which is peculiar to arbitration, is exacerbated by the absence of a court or similar body to supervise the conduct of practitioners.

Unlike courts, arbitral institutions are primarily service providers and have a very limited capacity to regulate the conduct of practitioners who participate in arbitrations before them, or cultivate particular ethical cultures. While institutions such as the Resolution Institute and the Chartered Institute of Arbitrators are invaluable in this respect, they are subject to obvious inherent limits. Additionally, courts will only refuse recognition and enforcement of awards in narrowly proscribed circumstances, and arbitration generally occurs in private away from the supervision of professional regulators. Thus in terms of ensuring the ethical conduct of arbitral proceedings and that of the practice of arbitration more broadly, the burden falls on parties and free market forces.

This is particularly problematic when an arbitral tribunal is faced with corruption in which the parties are complicit.<sup>25</sup> The tribunal has a “selfish” interest not to antagonise its customers, and may be left in an invidious position by its competing obligations to render an enforceable award, to avoid being party to corruption and to maintain the confidentiality of information disclosed in the course of the arbitration. A tribunal might seek to investigate apparent corruption on the basis of a need to ensure that its jurisdiction is sound,<sup>26</sup> but practical issues abound with this approach. Of course, arbitration is often seen as and often is a tool to facilitate commercial dealings in jurisdictions where the

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<sup>24</sup> Cf. Sundaresh Menon, ‘Some Cautionary Notes for an Age of Opportunity’ (Speech delivered at the Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013), [4].

<sup>25</sup> Mathew Rea, ‘Criminality in ADR: Power, Corruption and Lies’ (Summer 2017) *The Resolver* 16.

<sup>26</sup> Mathew Rea, ‘Criminality in ADR: Power, Corruption and Lies’ (Summer 2017) *The Resolver* 16, 18.





independence of courts is questionable. Yet in an arbitration, judicial oversight is largely dependent on at least one party agitating issues before a court and is thus less resistant to corruption than a sound court system where judges can act swiftly to tackle corruption.

The lack of an ethical support structure has also caused problems insofar as reliance by parties and practitioners on guerrilla tactics has become prevalent,<sup>27</sup> guerrilla tactics being various techniques employed to gain advantage otherwise than through the ordinary prosecution of a claim on its merits, which are, at the very least, on the ethical borderline.<sup>28</sup> At the extreme, guerrilla tactics involve violence and fraud. However their more common manifestation is in the late filing of documents, *ex parte* communications with the tribunal, baseless court actions seeking to impede the tribunal, and so on. Of course, such tactics are not peculiar to arbitration. As a Judge of the Commercial Court, I am confronted by guerrilla tactics on a regular basis, albeit generally those less extreme in nature. The issue with arbitration is that tribunals lack the powers on which courts rely, either directly or indirectly, to reduce less egregious guerrilla tactics and punish more egregious guerrilla tactics. And these tactics are exacerbated in their consequences, in terms of costs and otherwise, because of the now “industrial” scale of much international and domestic arbitration.

These structural weaknesses are further aggravated by the diversity in opinion in the international arbitration community as to what is acceptable conduct. As Menon CJ noted, conduct which is outrageous in one jurisdiction may be common practice in another.<sup>29</sup> Yet steps have been taken to create ethical structures to support arbitration. The *2013 IBA Guidelines on Party Representation in*

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<sup>27</sup> Sundaresh Menon, ‘Some Cautionary Notes for an Age of Opportunity’ (Speech delivered at the Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013), [5].

<sup>28</sup> See Günther J Horvath and Amanda Neil, ‘Guerrilla Tactics in International Arbitration’ (July 2017) *Asian Dispute Review* 131.

<sup>29</sup> Sundaresh Menon, ‘Some Cautionary Notes for an Age of Opportunity’ (Speech delivered at the Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013), [5]–[7].



*International Arbitration*, where they apply, permit the arbitral tribunal when faced with guerrilla tactics to *inter alia* take “appropriate measure[s] necessary to preserve the fairness and integrity of the proceedings”.<sup>30</sup> In a similar vein, the *London Court of International Arbitration Annex*,<sup>31</sup> which forms part of that institution’s rules, empowers the tribunal to respond to guerrilla tactics by taking any measures against legal representatives necessary to ensure the arbitral tribunal fulfils its duties to act fairly and impartially as between all parties and to adopt procedures suitable to the circumstances of the arbitration so as to provide a fair, efficient and expeditious means for the final resolution of the dispute.<sup>32</sup> The creation of ethical standards will not only promote ethics, but reduce the incidence of bona fide but misguided allegations of ethical breaches.<sup>33</sup>

While I do think it plain that this lack of structural support for arbitration will not prevent the continued success of arbitration, it does mean that it will continue to be difficult to reach desired ethical standards across arbitral practice. The choice of a confident, experienced and competent tribunal is one of the best defences against unscrupulous practitioners. It also bears recalling, in the domestic context, that the *Australian Solicitor Conduct Rules* and the *Uniform Conduct (Barristers) Rules* apply to arbitration with the same force that they do to court proceedings,<sup>34</sup> and the obligations under the *Civil Procedure Act 2010* may also apply.<sup>35</sup>

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<sup>30</sup> International Bar Association, *IBA Guidelines on Party Representation in International Arbitration* (25 May 2013) Art 26(d).

<sup>31</sup> London Court of International Arbitration, *LCIA Arbitration Rules* (effective 1 October 2014), Annex.

<sup>32</sup> London Court of International Arbitration, *LCIA Arbitration Rules* (effective 1 October 2014), r 18.6(iii).

<sup>33</sup> Sundaresh Menon, ‘Some Cautionary Notes for an Age of Opportunity’ (Speech delivered at the Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013), [20] et seq.

<sup>34</sup> See the definition of “court” in *Legal Profession Uniform Law Australian Solicitor Conduct Rules 2015* s 6 and *Legal Profession Uniform Conduct (Barristers) Rules 2015* s 125.

<sup>35</sup> See *Civil Procedure Act 2010* s 11(c).



### **Efficiency in arbitration: no discovery**

Another issue that has received recent attention is the failure of practitioners to make full use of the potential benefits of arbitration. Two advantages traditionally ascribed to arbitration are flexibility and efficiency, yet it is questionable whether these are achieved in the day to day practice of arbitration. In a recent article in the *Asian Dispute Review*, Peter Rees QC recounts the all too familiar procedural narrative of the constitution of the tribunal; the issuance of Procedural Order No 1; the exchange of expert reports, witness statements and submissions; document production and related objections; and so on.<sup>36</sup> Thus while arbitration is flexible, and gives parties and the tribunal the latitude to implement bespoke procedures, it falls prey to a risk environment which is antithetical to innovation. Simply put, successful innovation in arbitration receives little reward, especially where the revenue of legal practitioners is time-based,<sup>37</sup> while unsuccessful attempts at efficiency can be hugely detrimental to the relevant practitioner's career.

This often plays out in the context of discovery, where, even in jurisdictions where the parole evidence rule applies strictly, extensive documents relating to conduct before and after the conclusion of the contract are sought and produced.<sup>38</sup> Of course, once a dispute has arisen it is unlikely to be possible to agree on the exclusion of discovery, but such a specification could be included in a dispute resolution clause at the time of contracting.<sup>39</sup> Alternatively, reference could be made to institutional rules which, absent a contrary indication from parties, do not allow for any document production at all.<sup>40</sup> Were this the case, contracting parties would simply structure their dealings to ensure that they at all times retained the documents necessary for the vindication of their

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<sup>36</sup> Peter Rees, 'Arbitration – Elastic or Arthritic?' (July 2017) *Asian Dispute Review* 104, 105–6.

<sup>37</sup> See also Sundaresh Menon, 'Some Cautionary Notes for an Age of Opportunity' (Speech delivered at the Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013), [16].

<sup>38</sup> Peter Rees, 'Arbitration – Elastic or Arthritic?' (July 2017) *Asian Dispute Review* 104, 106–7.

<sup>39</sup> Peter Rees, 'Arbitration – Elastic or Arthritic?' (July 2017) *Asian Dispute Review* 104, 108.



respective rights, and consequently both reduce the costs of the arbitration and prevent the possibility of such costs from being used in an extortionate manner. That said, it may, depending on the circumstances, raise issues in terms of a party's right under the Model Law to "be given a full opportunity of presenting [its] case".<sup>41</sup>

### **Arbitrability: Jessel MR in *Russell v Russell***

While uniformity in arbitral legislation and practice continues to rise both within Australia and across the world, domesticity will inevitably be present in determining issues of arbitrability and public policy, and appropriately so. For example, in a matter in the arbitration list to which the new CAA did not apply, I denied an application for the matter to be referred to arbitration pursuant an arbitration agreement in the partnership agreement, on the basis of Jessel MR's finding in *Russell v Russell* that a person accused of fraud or the like should not be forced to have the allegation resolved in private arbitration.<sup>42</sup> While the scope of what is arbitrable may have been expanded by the CAA, the principle in question, whether there is a sufficient element of legitimate public interest in the subject matter of the dispute to make its private resolution outside the national court system inappropriate,<sup>43</sup> remains the same. While some matters are obviously inappropriate for arbitration, such as parenting disputes regarding children, there are other more borderline cases, such as trusts (of which the Court has a supervisory jurisdiction which may never be ousted in its entirety),<sup>44</sup> which may well turn on their facts and be of commercial interest.

Also arising in the context of domesticity is the "public policy" ground for resisting the enforcement of

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<sup>40</sup> Peter Rees, 'Arbitration – Elastic or Arthritic?' (July 2017) *Asian Dispute Review* 104, 107–8.

<sup>41</sup> Model Law, Art 18.

<sup>42</sup> *Russell v Russell* (1880) 14 Ch D 471.

<sup>43</sup> See *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772 at 782 [63].

<sup>44</sup> See *Rinehart v Welker* [2012] NSWCA 95.



an award.<sup>45</sup> It is now well accepted that public policy is, as stated by the Full Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*,<sup>46</sup> “limited to the fundamental principles of justice and morality of the state”.<sup>47</sup> Yet this is not to say that this ground will never apply: in *Indian Farmers Fertiliser Cooperative Ltd v Gutnick*,<sup>48</sup> I found that where an award allowed for double recovery it would likely be contrary to public policy.<sup>49</sup> Importantly, it is double recovery *qua* double recovery which would be offensive to public policy — any legal or factual error, while perhaps assisting in the identification of double recovery, has no direct relevance in evaluating whether an award is contrary to public policy. Importantly, double recovery was not established in *Gutnick*, and it was not necessary to determine if double recovery would be contrary to public policy. It may well be, depending on all the circumstances, that it is not. One might think that, for example, in the context of a bad faith breach of contract, such as where the contract is breached in pursuit of a profit greater than the aggrieved party’s recoverable loss, the disgorgement of profits in addition to compensation for loss might not reach the high bar of being contrary to public policy.

### **Arbitrability: consumer contracts**

Another issue in relation to arbitrability which has not yet caused issues on our shores is forced arbitration clauses in consumer contracts.<sup>50</sup> By contrast, in the US several senators wrote to the chair of the Federal Communications Commission complaining of the injustice worked by the inclusion of arbitration clauses in consumer contracts. While some suggest that these clauses are

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<sup>45</sup> *Commercial Arbitration Act 2011* (Vic) ss 34(2)(b)(ii), 36(1)(b)(ii); *International Arbitration Act 1974* (Cth) s 8(7)(b); Model Law, Arts 34(2)(b)(ii), 36(1)(b)(ii).

<sup>46</sup> (2014) 311 ALR 387.

<sup>47</sup> *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 311 ALR 387 at 406 [76].

<sup>48</sup> (2015) 304 FLR 199.

<sup>49</sup> *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 229–32 [99]–[107].

<sup>50</sup> See e.g. Letter to Chairman of the Federal Communications Commission (USA) from Senators Baldwin, Blumenthal, Booker, Brown, Durbin, Franken, Hirono, Markey, Merkley, Sanders, Udall, Warren, Whitehouse and Wyden (28 April 2016).



not inherently undesirable,<sup>51</sup> the purpose of an arbitration clause may well bear on its effectiveness. There is much to be said for the notion that the apparent use of arbitration to deny one party access to substantive justice is the harbinger of non-arbitrability. Thus, one might think that in the case of consumer contracts, the purpose of the inclusion of arbitration clauses may be to prevent group proceedings or make pursuit of a claim uncommercial, and thus deny deserving consumers substantive relief. On the other hand, while the international and domestic arbitration acts do not dictate what is and is not arbitrable, they may be seen to create a pro-arbitration bias which could affect the common law. Whichever path the case law takes, it may have a dramatic effect on the role and nature of arbitration in Australia.

This issue arose in *Subway Systems Australia v Ireland*,<sup>52</sup> where upon appeal by the franchisor I upheld the decision of VCAT not to stay proceedings under section 8 of the *Commercial Arbitration Act*, finding:<sup>53</sup>

... [I]nsofar as Parliament might be thought to have good reason to seek to preserve access to the “speedy and expensive”<sup>54</sup> dispute resolution procedures of VCAT the present circumstances are illustrative of a situation where parties, the [Franchisees] as retail food outlet operators in a Melbourne suburb, find themselves having to resolve this dispute in a quite different environment. As discussed, they find themselves in an environment which raises complexities and potential delays and expense in dealing with what is, essentially, an international arbitral regime and, possibly, having to deal with both the Permanent Court of Arbitration in The Hague and also the American Arbitration Association; which on [the

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<sup>51</sup> Chris Wilford, ‘Action Stations!’ (Summer 2017) *The Resolver* 14.

<sup>52</sup> *Subway Systems Australia v Ireland* [2013] VSC 550; reversed by the Court of Appeal (*Subway Systems Australia Pty Ltd v Ireland* (2014) 46 VR 49) on other bases.

<sup>53</sup> *Subway Systems Australia v Ireland* [2013] VSC 550, [59].

<sup>54</sup> *Subway Systems Australia v Ireland* [2013] VSC 550, [37]-[39].



Franchisor's] construction of the arbitration agreement it could choose to nominate under its provisions. On the material before me I would have to infer that it is more probable than not that such an excursion for the purpose of resolving, what is essentially a shop dispute, was never dreamed of by the [Franchisee].

Thus it can be seen, both from the extract above and the judgment in *Subway Systems Australia v Ireland* more generally, that Australian courts will hesitate to find that the legislature intended that arbitration would be a means of denying substantive justice.

#### **Enforcement of awards which have been set aside**

There have been some interesting developments in Hong Kong regarding the enforcement of awards which have been set aside by supervisory courts. Under Art V(1)(e) of the New York Convention, recognition and enforcement of an award may be refused where the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, [the] award was made". In *Dana Shipping and Trading SA v Sino Channel Asia Ltd*,<sup>55</sup> an English award was recognised upon application by the award creditor to the Hong Kong Court of First Instance and was to be enforced as a judgment subject to any application by the award debtor for enforcement to be denied. The award debtor made this application on the basis that it was not given proper notice of the appointment of the arbitral proceedings or was otherwise unable to present its case, and simultaneously applied to the English High Court for the award to be set aside on the ground that the award was made without jurisdiction. As the English High Court set aside the award before the Hong Kong court heard the application before it, the award debtor was able to successfully rely in Hong Kong on the effect of Art V(1)(e) of the New York Convention. In reaching this decision, the Hong Kong court approved the statement of Justice Kaplan that "even if a ground

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<sup>55</sup> [2016] HKCFI 440.





of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless... although I accept that in many cases where a ground of opposition is established, the discretion is unlikely to be exercised in favour of enforcement”.<sup>56</sup>

This approach is to be compared to that taken by the Hong Kong Court of Appeal in *Astro Nusantara International BV v PT Ayunda Prima Mitra*,<sup>57</sup> where the award creditor had the award registered as judgments in Hong Kong and Singapore, the latter being the seat of the arbitration. While enforcement was resisted by the award debtor in Singapore, no steps were taken in Hong Kong as it was believed that there were no relevant assets there. Thus when the award was successfully set aside in Singapore, and assets in Hong Kong were discovered, the award debtor sought to have the enforcement of the award in Hong Kong set aside. However, by this time the award debtor was 14 months out of time, and the Hong Kong Court of Appeal found that having regard to the need for quick and final enforcement of arbitral awards and after considering the decision of the Singaporean supervisory court, it would not disturb the enforcement of the award.

The principle which I believe can be distilled from these two cases is that while foreign courts will give significant weight to the decision of a supervisory court, the residual discretion in Article V ensures that this does not exclude the consideration of other principles of arbitration. As is so often the case in judicial supervision of the arbitral process, the deference shown by a court to another decision maker, generally the arbitral tribunal but in this case the supervisory court, is not an abdication of the powers which are by their nature exclusive to the court. The enforcement of an award being an exercise of public sovereign power, and the exercise of such power being the exclusive function of the relevant domestic court, this is another instance in which courts are obliged

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<sup>56</sup> *China Nanhai Oil Joined Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215, [49].

<sup>57</sup> [2015] HKCFI 274; see also Alfred Wu and Daniel Ng, ‘The Hong Kong Court’s Approach to the



to decline to mechanically enforce an external decision.

### **Combined Effort**

One last point I would like to make is the importance of remembering that the reinvigoration of international and domestic arbitration in Australia cannot be achieved by governments or courts acting alone. Governments have now made a crucial contribution to the process by procuring the enactment of substantially enhanced international arbitration legislation and ground-breaking domestic arbitration legislation. Rather, responsibility for this reinvigoration falls on all the various commercial arbitration stakeholders – commercial parties, lawyers (whether they be corporate, in-house lawyers, barrister or solicitors), arbitrators, arbitral institutions (particularly as educators and the custodians of ethical standards), the Commonwealth, State and Territory governments and the courts, to ensure Australia is seen as an attractive venue in the arbitration world. A failure to position itself in this way carries a very real risk that the country will become marginalised in this globalised world. This will have significant adverse consequences, particularly in terms of the development of our international legal expertise and the involvement of Australia's legal and other professionals in international trade and commerce. With responsibility for this task falling to a range of parties, close collaboration is essential to ensure Australia reaches its potential in international arbitration.

### ***The Melbourne Commercial Arbitration and Mediation Centre***

One such example of the benefits that this collaboration can bring is the establishment in Melbourne of the Melbourne Commercial Arbitration and Mediation Centre. While the Centre is still very much in its infancy, its establishment has brought to Melbourne a world-class facility in which to conduct arbitrations – and also mediations. This has only been possible by the close cooperation of representatives from a number of the major arbitral institutions, the State government, the Victorian



Bar, the Law Institute of Victoria, and the Supreme and County courts. It is only by everyone involved working together will Australia be able to establish itself – with its “grid” of arbitration centres - as a major centre for international arbitrations.