Quarterly Update - March 2011 Vol 2 No 1 ISSN 1837-8994

THE ACICA NEWS
Australian Centre for International Commercial Arbitration

President's Report

Doug Jones AM
ACICA President

On 2 March 2011, the Australian Government confirmed ACICA as the sole default appointing authority competent to perform the arbitrator appointment functions under the International Arbitration Act. This means ACICA will from time to time be asked to appoint arbitrators to international arbitrations seated in Australia, where the parties have not agreed an appointment procedure or where their appointment procedure fails.

The landmark action removes the requirement for parties to commence proceedings in one of the State or Territory Supreme Courts or in the Federal Court to have an arbitrator appointed under the Act.

ACICA's appointment signals the final piece of legislative reform along with the establishment of the Australian International Disputes Centre (www.disputescentre.com.au) to position Australia as an attractive neutral venue to resolve international commercial disputes.

I wish to publicly extend our gratitude to the Attorney General of Australia, the Hon Robert McClelland for his leadership and support.

In supporting these reforms, ACICA have put in place significant and innovative mechanisms to ensure efficiency, transparency and expediency.

The ACICA Appointment of Arbitrators Rules 2011

The ACICA Appointment of Arbitrators Rules 2011 (the Appointment Rules), adopted by ACICA on 2 March 2011, establish a streamlined process through which a party can apply to have an arbitrator appointed to a dispute seated in Australia.

A board comprising representatives of the Attorney-General, the Chief Justices of the High Court and Federal Court, the President of the Australian Bar Association, the President of the Law Council of Australia and other industry representatives will oversee the appointment process.

ACICA has ensured that the process can happen efficiently and that a nomination can be made without delay. Applications will be able to be made online via the ACICA website with further assistance from ACICA Secretary General, Michelle Sindler.

New Provisions for Application for Emergency Interim Measures of Protection and Appointment of Emergency Arbitrator

There are times when a party to a dispute will want to ensure that the other party takes or refrains from taking certain actions before the dispute has been heard. For instance, the party may wish to prevent the other party from doing certain things, like dissipating its assets or destroying evidence, or it may seek to ensure that the other party continues to do certain things, like performing its obligations under an ongoing contract.

These measures may be necessary to ensure that the other party does not take actions that prejudice or render ineffective the final outcome of the dispute process.

In those cases the party can seek interim measures of protection from a court or tribunal.

In international arbitrations, arbitral panels are generally empowered to grant such interim measures of protection. However there are times when parties to an arbitration require interim measures on an urgent basis, before the arbitrators have been appointed to the arbitral panel. The constitution of an arbitral panel can sometimes take a month or more, so to date in cases such as this, parties would have had no choice but to seek these protective measures from a local court.

This can be expensive and time consuming, especially where the court is in a foreign jurisdiction.

In response to this need, the ACICA has updated its Arbitration Rules to include a set of "Emergency Arbitrator" provisions. These new provisions enable the appointment of an "Emergency Arbitrator" in arbitrations that have commenced under the ACICA Rules but have not yet had a tribunal appointed.

The Emergency Arbitrator will usually be appointed within one business day and the decision will generally be made within five business days of the application. Once the arbitral tribunal has been appointed, it will be empowered to modify or vacate the interim measure as it sees fit.

These provisions were drafted by ACICA's Rules Subcommittee which include: Malcolm Holmes (Queen's Counsel and Committee Chair), Jonathon DeBoos (Clayton Utz), Richard Garnett (University of Melbourne), Bjorn Gehle (Clayton Utz), Chris Kee (Jerrard & Stuk), Khory McCormick (Minter Ellison), Luke Nottage (University of Sydney) and Danielle Sirmai (Freehills).

These legislative and institutional reforms herald a vibrant resurgence for international arbitration in Australia and from a legal and business perspective, Australia is a desirable venue, if not more desirable, than anywhere else in our region.

Professor Doug Jones AM is the Head of the International Arbitration and Major Projects Groups of Clayton Utz.

Report from the Secretary General

Michelle Sindler
ACICA Secretary General

This is my first report since being appointed Secretary General of ACICA. I am delighted to have the opportunity to be so closely involved with ACICA and more generally in dispute resolution in this very exciting time for both arbitration and mediation in Australia as evidenced by the legislative reforms to our international and domestic arbitration regimes, new or amended legislation in NSW and Victoria and federally dealing with civil procedure and particularly ADR, and the establishment of the Australian International Disputes Centre. All these initiatives have been aimed at promoting alternative dispute resolution and further enhance the resolution of disputes in Australia in a just, timely and cost effective manner which is so vital for business. These initiatives have all focused attention on creating and promoting a local arbitration culture and increasing our attractiveness to international users, helping to also establish Australia as a key regional centre in the arbitration and mediation fields.

This work is on-going and there is still much to be done, but it has been wonderful to witness the enthusiasm at all levels of government and the legal profession and elsewhere for these developments and it is even more exciting to already see results in the increase in ACICA cases and the use of ACICA clauses in contracts. We are always at your disposal here at the ACICA Secretariat to assist in any way we can with queries about clauses, use of the Rules or more generally regarding arbitration and mediation.

Australian International Disputes Centre

We are delighted that so many people have already taken advantage of the magnificent AIDC rooms and facilities for their arbitrations and mediations. Since it opened in August 2010, AIDC has successfully hosted over 50 international and local arbitrations and mediations and various other ADR hearings in addition to a number of courses, training sessions and events of general interest. I encourage you to come and visit the Centre if you are in Sydney, and of course for those of you who need a venue for your matters in Sydney, AIDC is ideally placed not just to provide you with rooms but also to assist with whatever other support you might need.

On 13 April, the Centre will host the launch of a new publication *International Commercial Arbitration* (Thomson Reuters). Authored by one of ACICA's

BOOST FOR ARBITRATION

Samantha Bowers
The Australian Financial Review
4 March 2011

Australia is a step closer to competing with major global financial centre, with the announcement of legislation to streamline international dispute resolution. The International Arbitration Regulations vest the power to appoint arbitrators in a national peak body – the Australian Centre for International Commercial Arbitration – instead of in state and territory Supreme Courts . Arbitration is a binding form of alternative dispute resolution, common in international disputes because it does not involve either party's courts. ACICA president and Clayton Utz partner Doug Jones said the legislation would save thousands of dollars and weeks of delay, making Australia more attractive to international parties as a "seat" for their arbitrations. ACICA charges $1000 to appoint an arbitrator, while arbitrators appointed by courts could cost "maybe $20,000 depending on whether it's contested or not," Mr Jones said. Encouraging Australia as a region for international arbitrations would benefit the economy and "increase the attractiveness of the Australian legal market for global legal

Attorney General of Australia, the Hon Robert McClelland announces his recommendation that ACICA be appointed nominating authority for arbitration appointments.

firms", he said. "It's said, at least anecdotally, that international dispute resolution in London is worth hundreds of millions of dollars to the UK," he said. "It's going to be worth tens of millions of dollars to us at the very least." It would also develop international expertise in Australian lawyers, making the country "an increasingly attractive place for the practice of international law", he said.
The change had been four years coming and was "the last steps in what has been a comprehensive process of legislative reform of both the international and domestic arbitration", Mr Jones said.

AUSTRALIA SELLS ITSELF AS INTERNATIONAL REFEREE

The Sydney Morning Herald
7 March 2011

Australia has joined a select group of nations that conduct international commercial dispute hearings, with the potential to inject billions of dollars into the economy.
The final piece of the jigsaw was put in place on March 2 when legislation was passed appointing the Australian Centre for International Arbitration (ACICA) as the dispute hearing authority
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AUSTRALIA TO TAKE ON GLOBAL DISPUTE BODIES

Lawyers Weekly
7 March 2011

Recent legislative changes will see Australia challenge regional arbitration powerhouses such as Singapore and Hong Kong. Commonwealth legislation passed last week (2 March) has
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CHANGES TO APPOINTING PROCESS IN AUSTRALIA

Tom Toulson
Global Arbitration Review
17 March 2011

Report from the Secretary General

Board members, Rashda Rana together with Michelle Sanson, this book is expected to be a significant contribution to the education process in arbitration in Australia and the region, and greatly assist the promotion of Australia as a venue for international arbitration. If you would like to attend the launch please RSVP by 11 April 2011 to Rashda Rana at Rashda.Rana@lendlease.com.au On the domestic arbitration front, *Commercial Arbitration in Australia* by our President Doug Jones AM has also recently been released. This book provides an essential and timely guide to domestic commercial arbitration in Australia and the new arbitration landscape and regime following the 2010 decision by the Standing Committee of Attorneys-General (SCAG) to enact new uniform commercial arbitration legislation in each jurisdiction.

ACICA Membership and Board Appointments

I am pleased to report ACICA membership is trending up. We are very keen for our members to be actively involved in ACICA activities. Anyone who is interested in being more involved, please get in touch with me. We are particularly looking for ways to actively involve our increasing overseas membership and there again, any thoughts or suggestions will be very welcome. I have no doubt that all our members have a vital role to play in the continuing development of arbitration in Australia and in the region at this exciting time and they can bring a wealth of experience and dynamism to what we are doing, particularly in educating users of arbitration about the value and advantages of the process domestically and internationally and the advantages an Australian seat can have in an international arbitration.
The Victorian Bar has become the first bar association to join our corporate membership ranks and former Victorian Bar Council President and ACICA Fellow John Digby QC has been appointed the VicBar's Board representative.
Welcome to our new Associates: Dalma Demeter (Australia) and James Morrison (Korea), and our new Fellows: Benjamin Hughes (Korea), John Rundell (Australia and Hong Kong), Charles O'Neil (Germany), Michael Cover (UK), Ron Salter (Australia) and the Hon Peter Heerey QC (Australia). A number of our new fellows have also been appointed to the ACICA Mediation Panel: the Hon Peter Heerey QC (Australia), Charles O'Neil (Germany), Michael Cover (UK) and John Rundell (Australia and Hong Kong).
Let me congratulate all concerned and I am looking forward to your active involvement.

CIArb Asia Pacific Conference 26 – 28 May 2011

Congratulations to Doug Jones AM who has been elected global President of the Chartered Institute of Arbitrators. He will mark his presidential term with a series of initiatives and global events. They include a regional conference on Investment and Innovation: International Dispute Resolution in the Asia Pacific which will be held in Sydney (26 – 28 May).
Following the ACICA conference held in October last year, this event marks the first major regional conference in Australia since the enactment of the long-awaited reform to Australia's international and domestic arbitration regimes. The conference is being jointly organised by the Australian, North American, East Asia, Thai, Indian, Malaysian, and Singapore Branches of the Chartered Institute of Arbitrators with support from major arbitral bodies and global professional associations, including ACICA and AIDC.
As a co-sponsor, ACICA members can register for the conference at the significantly discounted CIArb Member rate. Full details can be found on pages 20 and 21. Book online to reserve your place for this prestigious event:
www.ciarb.org/conferences/asia-pacific

Vis Moots 2011 (Hong Kong and Vienna)

ACICA is once again supporting both the Eighth Annual Vis (East) Moot, 4 – 8 April 2011 Hong Kong and the Eighteenth Annual Willem C Vis Moot, 15 – 21 April 2011 Vienna.
Last year's events signalled a significant milestone for ACICA as the moot problem was "arbitrated" under ACICA's Arbitration Rules. These prestigious events are not only educational for all involved, but in particular the arbitrators of the future from the hundreds of university teams from around the world who participate in the moots, but the events also encourage the resolution of business disputes by arbitration and bring together future and current leaders and users of international arbitration. For further details visit: http://www.cisg.law.pace.edu/vis.html

BOOST FOR SYDNEY ARBITRATION HUB

Alex Boxsell
The Australian Financial Review
11 February 2011

A high-level government and legal industry delegation visited Korea last month in the latest bid to make Australia a regional hub for international arbitration. Korean company executives, in house lawyers, law firms and arbitration specialists met with NSW Attorney General John Hatzistergos, Australian Centre for International Commercial Arbitration (ACICA) prdisent Doug Jones, and Austrade on January 20 to discuss the benefits of Sydney-based arbitration over popular regional alternatives Hong Kong and Singapore.

Along with cementing ties with Korea, ACICA plans to enter talks with arbitration groups in the Indian cities of Delhi and Mumbai this year, followed by China and Japan.

Professor Jones, who met with Austrade officials in India this week, hopes Sydney will be specified in new Korean arbitration agreements.

"The objective of this was to reach out to leading Korean companies and their in-house counsel who are involved in international trade, so that when they are negotiating their arbitration agreements in deals with companies from countries other than Australia, they consider Australia, and in particular Sydney, as a neutral venue for their arbitrations," he said.

Professor Jones told a 100-strong audience at the January 20 meeting, hosted by large Korean law firm Bae, Kim & Lee, that Sydney was a prime arbitration venue as it had "sympathetic courts, supportive laws, professional capability, superb facilities and is world-renowned for its distinctive character".

Mr Hatzistergos told the audience there was a supportive political and legal environment in NSW and Australia for international arbitration. NSW was the first state to pass laws agreed to by federal and state attorneys in 2010 based on the world's best

The ACICA Korea Initiative

UNCITRAL model for commercial arbitration, he said.
The head of Bae's internatonal arbitration and litigation group, Kevin Kim, said Korea had become a "major international arbitration player in Asia." The Korean Commercial Arbitration Board received more than 200 arbitration cases and 500 mediation cases a year, its website said. Mr Kim said it was not common for Korean parties to arbitrate international disputes in places other than Korea, Singapore, Hong Kong and Europe. But he said the Australian delegation gave Koreans "clear and compelling reasons why Australia and ACICA are viable options for companies in Korea who use international arbitration as a means of resolving disputes".
ACICA works in tandem with the Australian chapter of the Chartered Institute of Arbitrators and the Australian International Disputes Centre (AIDC). It is based in Sydney, with extra registries in Perth and Melbourne. AIDC, set up in August to compete with other international dispute centres, such as in Singapore, is partly funded by the federal and NSW governments.

ACICA President Professor Doug Jones AM.

The Hon John Hatzistergos, NSW Attorney General.

AUSTRALIA STANDS FORWARD AS DISPUTE RESOLUTION CENTRE

The New Lawyer
11 February 2011

AUSTRALIA has strengthened its position in the expanding market for international dispute resolution in the Asia Pacific region following an international forum in Seoul, Korea.
An Australian delegation that included NSW Attorney General, John Hatzsistergos, and other leading lawyers, met with Korea's leading corporate in-house counsel, corporate executives and law firm legal directors who specialise in international arbitration. This comes as Sydney has been positioning itself as a competitor to the established seats for international arbitration in Hong Kong and Singapore, and follows the opening of a new dispute resolution venue in the city last year.
"This is why Australia is beginning to attract strong interest from

Corporate in-house counsel, corporate executives and legal directors of major law firms in Korea.

corporations in the Asia Pacific region and beyond who are increasingly looking to avoid the uncertainty of litigation in foreign courts," Hatzsistergos said.
Australian delegates at the forum, Navigating Choices in International Arbitration: Options for Korea in the Asia-Pacific Region, also included Australian Centre for International Commercial Arbitration (ACICA) president and Clayton Utz partner Professor Doug Jones AM, ACICA vice president and Holman Fenwick & Willan partner Alex Baykitch. Head of Korean law firm Bae Kim & Lee's international arbitration and litigation group, Kevin Kim said: "We were provided with clear and compelling reasons why Australia and ACICA are viable options for companies in Korea who use international arbitration as a means of resolving disputes, particularly those involving other companies based in Asia, but also from the Middle East, Europe and the Americas. The event was very successful and a fantastic opportunity for Korean companies and lawyers to meet with a distinguished Australian politician, Australian arbitrators and lawyers."
Kim is also the executive director of the Korean Arbitrators Association and the secretary general of the International Council for Commercial Arbitration. He is a senior advisor to the Korean Commercial Arbitration Board (KCAB), the only official arbitration institution in the Republic of Korea.
More than 200 arbitration cases and 500 mediation cases are referred to KCAB per year in matters concerning trade, joint investment, construction and maritime. "International arbitration has emerged as the process of choice for businesses in the global economy as it delivers many benefits: expediency, efficiency, enforceability and commercial privacy," Clayton Utz' Jones said.
As Asia's fourth largest economy, Korea has risen to prominence as a major international arbitration player in Asia, with a significant volume of disputes involving Korean parties now featuring in most of the major institutions around the world.
Alex Baykitch, Sydney-based partner of global firm Holman

Kevin Kim (Bae Kim and Lee), Robert Wachter (Yulchon), The Hon John Hatzistergos and Young Seok (Yulcon).

Ben Hughes (Shin & Kim), The Hon John Hatzistergos, John Bang (Bae Kim Lee), Kevin Kim (Bae Kim Lee), Alex Baykitch, James Morrison (Bae Kim Lee), Professor Doug Jones AM, David Macarthur (Bae Kim Lee) and Sungo Cho (Austrade).

Fenwick Willan who has arbitrated commercial disputes in Seoul said Korea is an important trading partner for Australia.
"This event provided ACICA with an opportunity to highlight to key decision makers from major Korean corporations why Australia is an attractive venue for international arbitrations and is a credible and viable alternative to the more traditional centres in the Northern Hemisphere and within the Asian region."
Commonwealth Attorney General, Robert McClelland, said of the forum: "Governments have a role to play in creating a legal regime that respects and fosters arbitration."
Hatzistergos said Australia has stable and supportive political and legal environments that position it well to capitalise on the booming global market for international dispute resolution.
"We enjoy very close ties to Asia and Europe, we have stable economic, political and legal systems and we boast some of the best legal practitioners in the world," he said.
The Australian Federal Parliament last year passed reforms to ensure federal laws reflect the Model Law accepted as the world standard for arbitrating international commercial disputes by the United Nations Commission on International Trade Law.

ACICA Vice President Alex Baykitch taking questions from the floor.

AUSTRALIA SEES MARKET IN WORLD DISPUTES

News.ninemsn.com.au
14 February 2011

Australia is attempting to strengthen its position in the market for international dispute resolution. NSW Attorney-General John Hatzistergos has headed a delegation to a high-level Asia Pacific forum in Seoul, partnering Australian Centre for International Commercial Arbitration president Doug Jones in meetings with South Korea's leading corporates and law firms specialising in international arbitration.
Their aim was to encourage Korean companies who are involved in international trade to look at Australia as a neutral venue when arbitrating disputes.

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With Professor Doug Jones AM are Matthew Christensen (Bae Kim and Lee), Michael Won-Min Suh (Sumin) and Juergen O Woehler (Secretary General & CEO of the Korean-German Chamber of Commerce and Industry).

Mary Boulos Ayad

Global View: The Future of New Egypt

On 20 March, after mass protests ended the 30 year rule of Egypt's President Hosni Mubarak, a set of constitutional amendments that pave the way for elections was overwhelmingly approved in a referendum that drew record numbers of voters. So what now for the Middle East's largest country? Mary Boulos Ayad provides an in-depth and exclusive briefing on Egypt risk assessment based on empirical data for investors, legal counsel and arbitration practitioners.

"This unique system effectively and fairly adjudicated foreign investment claims and functioned in the words of its last Judge, an American, His Honour Judge Jasper Yeates Brinton, as a 'prototype for the international world courts of today', for example, the International Criminal Court, the European Court of Justice, and even the International Centre for the Settlement of Investment Disputes. Indeed, such a description is most apt."

The implications of the Egyptian Revolution of 2011 in light of the overall climate in North Africa and the Middle East have created a lacunae in knowledge that media speculation has attempted to fill with fear particularly in light of rising oil prices. Three significant facts about Egypt will be discussed in depth to demonstrate why investors and arbitration counsel and practitioners are facing a New Egypt based on legitimate democratic principles necessary for mitigating legal, adjudicatory, political, country [country risk includes economic, political and financial risk] and therefore, over all investment risks. These three elements are (1) Egypt's full legal history and legal framework including the Mixed Courts and the Constitution (2) the current Interim Government and (3) Egypt's economic strength.

(1) Egypt's Legal History and Framework

Few people, both within and outside of Egypt, aside from highly specialised lawyers and judges, are familiar with Egypt's legacy of the Mixed Courts of Egypt, founded in 1875 by the Khedive Ismail and designed by the then Prime Minister, Nubar Pasha. The Mixed Courts were based on Civil Codes that were primarily Civil law with local principles that harmonised with, rather than contradicted Islamic principles, whilst also drawing on national and international precedent, hence also harmonising with the Common law tradition. The Mixed Courts dealt with complex disputes that arose that were excluded from being heard in the sharia, consular or criminal courts at the time (including special courts that dealt with personal status of non-sharia matters, for example in the case of the Copts or other non-Muslim minorities who did not have foreign status under the Capitulatory framework of the time - or dual citizenship.) Cases dealing with sovereign immunity, dual or foreign citizens with permanent residence in Egypt concerning financial and investment matters, international banking, sequestration of property of a foreigner (a German at a time when Germany and Egypt were considered to be at war) - formed the majority of cases heard before the Mixed Courts, which, notwithstanding an internationally composed judiciary from a number of different countries- were exclusively Egyptian Courts with the judges being considered as Egyptian. This unique system effectively and fairly adjudicated foreign investment claims and functioned in the words of its last Judge, an American, His Honour Judge Jasper Yeates Brinton, as a 'prototype for the international world courts of today', for example, the International Criminal Court, the European Court of Justice, and even the International Centre for the Settlement of Investment Disputes. Indeed, such a description is most apt.

The Bar, largely Egyptian lawyers, were of the highest calibre and excellence. This legacy of the Mixed Courts of Egypt must be brought to mind particularly in light of the regional uncertainty in the Middle East and North Africa. At the time of writing, Libya is on the forefront of the headlines and it is important to advise that the Middle East and North Africa are a vast region with highly distinctive systems; Egypt must be understood to be distinct from Libya and this point cannot be repeated enough, particularly in light of the media's sweeping generalisations. In addition to the Mixed Courts of Egypt, the Egyptian Constitution is one of the most progressive in the entire world.

The Egyptian Constitution contains within it enshrined provisions that state in express language the protection of all known Human Rights as found in the international Human Rights instruments. Included in the Egyptian Constitution are two Articles, notably Articles 34 and 35 that deal explicitly with protection of private ownership, investments, nationalisation, expropriation and compensation for it.

The Mixed Courts gave birth to Egypt's Civil Code, which deals with investment matters. The Egyptian civil codes requires in Article 1 that in the absence of a lacunae that the judge decide first according to custom, and in the absence of custom, according to sharia principles and in the absence of that, according to principles of natural justice and the rules of equity. Article 5 of the Civil Code prohibits unlawful benefits. This means that in light of the Civil Code, when unlawful expropriation occurs, both the Constitution and the Civil Code prohibit it. Expropriation is unlawful without compensation. Article 11 of the Civil Code deals with the legal capacity and legal rights of foreign persons and the applications of Egyptian law.

Article 18 dealing with property and Article 19 dealing with contractual obligations also refer to the law of the place and the law of the domicile and may apply to investors by invoking Egyptian Constitutional provisions to protect investors. Article 24 refers to the general principles of private international law applying in the absence of conflict of laws not addressed in preceding articles. Beyond the Constitution and the Egyptian Civil Code, are recent legislation created to protect investors.

A number of laws exist to protect not only investors (under the general definition of 'investment' as found in ICSID cases): Law of Investment Guarantees and Incentives, the 1997-008 Investment Incentives Law and its Executive Regulation, which sets up a complete legal framework to govern the physical infrastructure of Egyptian resources and other materials relevant to investments including but not limited to land, industrial, transport, petroleum and gas drilling and exploration. The law also provides for different types of investors from sole proprietorships to joint stock companies (Articles

12-14), and the establishment of Free Zones and conditions related thereof (Articles 28-58). Another important law is the1994-027 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, amended in 1997, which incorporates many UNCITRAL provisions and replaces Articles 501-513 of the Egyptian Code of Civil and Commercial Procedure (Law no. 13 of 1968), further making administrative contracts (i.e., such as contacts with government entities) arbitrable.

Article 22 allows the Tribunal to rule on its own competence. Article 34(2) allows for proceedings to continue even if the respondent fails to write a defense. Article 42 provides for interlocutory awards. Article 52 states that Arbitral Awards issued in accordance with the provisions of this law may not be challenged. Article 53 sets forth 7 conditions that limit nullifying the award. Further more, Article 55 of this law states that Arbitral Awards rendered in accordance with the provisions of said law have the authority of *res judicata* provided it does not contradict with three reasonable conditions.

Additionally, the Cairo Regional Centre for International Commercial Arbitration has adopted the 1976 UNCITRAL Rules. Given the importance of arbitration to international investment and commercial disputes, Egyptian arbitration and investment laws serve as a solid legal framework. Further, all commercial dealings within the country and amongst trading partners are protected by law: Labour Law no. 12 of 2003, Sales Tax Law no. 11 of 1991, Banking Law no. 162 of 1957, Companies Law no. 159 of 1981, Financial Leasing Law no. 95 of 1995, Capital Market Law no. 95 of 1992, Foreign Currency Law no. 38 of 1994, Rules & Procedures of Civil Workers and Incentives, Central Securities Depository and Registry Law no. 93 of 2000, Law 2006-067 Consumer Protection Law. This legal system clearly demonstrates an existing legal framework that mitigates legal and adjudicatory uncertainty.

Further laws that establish legal, political and financial system regulation and transparency in general are: Law 1956-073 on the Exercise of Political Rights, Law 80-2002 Anti-Money Laundering Law, Anti-Money Laundering Regulations for Banks, Executive Regulations of the CBE (Central Bank of Egypt,) Banking Sector and Money Law, Decree No. 465 of 2005 in Amendment of Provisions of the Executive Regulations of the Mortgage Finance Law, Law 2003-88 on The Central Bank, The Banking Sector and Money with its Amendments, Law 2009-010 Regulating Non-Banking Financial Markets and Instruments, Presidential Decree no. 4 of 2003 on the Regulation of Guarantee and Subsidy of Real Estate Fund Activities, and Presidential Decree Issuing the Statutes of the Central Bank of Egypt and Presidential Decree No. 187 of 1993 Issuing the Executive Regulations of the Banks and Credit Law, inter alia. Moreover, any necessary reforms needed to any of the provisions herein will be addressed by the reforms to further economic growth, transparency, and efficiency of the Egyptian financial system.

(2) The Current Interim Government

It is important to remember that Egypt without a President is not the same as Egypt without a proper Government. The Egyptian Government is composed of a Parliament, (much like many Western democracies), and is lead by a Prime Minister, and assisted by a Cabinet. The People's Assembly (Parliament) consists of 450 members, 10 of whom are appointed by the President. The Shura Council (Consultative Assembly) consists of 264 members, 50 percent which are to be elected or re-appointed after three year terms. To claim, as the media does, that the absence of a President is the same as 'unrest', 'upheaval', 'lack of government' and 'a military junta' is to conflate facts in grave disproportions. Given that for the last thirty years, the role of President which is to ensure the sovereignty of the law and constitution, was not carried out, it is a moot point whether Egypt has no president or a dictator, given that the Prime Minister as head of the Cabinet is authorised by the Constitution to manage all of the State's affairs.

The newly appointed Egyptian Prime Minister has been sworn in and has the legitimacy of a democratically elected leader, within the executive branch of the Egyptian government. His first priority is to get the Egyptian economy to its best ability to function. The directly proportional relationship of a legitimate democratic government to economic growth and prosperity has long been established. The current Egyptian Prime Minster has publically vowed to leave office if the legitimate and democratic requests of those he represents are not honoured by the government. This is certainly distinguished attitude from the past regime as well as from the events in Egypt's neighbouring countries.

An accurate assessment of political risk for investors clearly demonstrates that political risk in Egypt has

"An accurate assessment of political risk for investors clearly demonstrates that political risk in Egypt has declined far below what the media speculated even a week ago. In the past, Egyptian judges were not given their free right to maintain impartiality."

"The current interim government is actively taking in the concerns of protestors and working towards democratic reforms at all levels of Egyptian society. The interim government has also clearly stated it will honour all of Egypt's international agreements. Egypt's role as a regional leader of moderation and mediator will remain stable. It is again highly important to distinguish Egypt from other neighbouring countries."

declined far below what the media speculated even a week ago. In the past, Egyptian judges were not given their free right to maintain impartiality. Given that the push for reform in the New Egypt was lead by prominent members of the Egyptian Judiciary and the Bar, and that those members form the coalition interim government and are acting as active advisors, the reality that the rule of law will continue to be the primary priority amongst the judiciary and throughout all levels of Egyptian society, adjudicatory risk is largely minimised in the future because the legal framework and the rule of law will be what governs judicial thinking and not external pressures from the executive. That, and the reality that investment and transparency are necessary for the Egyptian economy and Egypt's future will guide Egyptian policy makers to minimise adjudicatory, legal and political risk for investors in Egypt.

The Prime Minister's Office has created an open line of communication between the general public and the newly elected Egyptian Cabinet by setting up an email address: pm@cabinet.gov.eg. Other briefings and media fear mongering that the military is not guaranteed to ensure fair and free elections or that it will keep a strong hand in politics are wrong. The Egyptian government is controlled by the Prime Minister, a new Cabinet, and the Parliament with the three branches of government, Executive, Judiciary and Legislative in full control and in harmony, and a guarantee that fair and free Presidential elections drawing a legitimate candidate from one of Egypt's many modern and secular political parties, are

Mary Boulos Ayad with Mariana Krsticevic (Wotton + Kearney) and John Selby (Macquarie University) at the AFR ACICA International Dispute Resolution conference 2010.

"Given that Egypt's assets in value and natural resources far exceed liabilities in terms of debt, the overall prognosis for Egyptian economic strength is reliable. Indeed, Citibank has recently reported that Egypt is set to emerge as the third-best global economy in terms of growth with a forecasted rising growth rate at 5% per annum for the next forty years. It is arguably realistic in light of Egypt's natural resources, labour force and human capital that this growth rate is a highly conservative estimate."

around the corner.
The current interim government is actively taking in the concerns of protestors and working towards democratic reforms at all levels of Egyptian society. The interim government has also clearly stated it will honour all of Egypt's international agreements. Egypt's role as a regional leader of moderation and mediator will remain stable. It is again highly important to distinguish Egypt from other neighbouring countries.

(3) Egypt's Economic Strengths

Egypt is backed by a strong central bank, governed by Farouk El-Okda, which has promised to support the Egyptian pound, citing reserves of $36 billion in foreign if necessary, but given the facts this will not be necessary. With a strong Central Bank, Egypt has a population of 80 million people and a considerably highly skilled and motivated workforce. Egypt is also a democratic and secular State, rare in the region, but as such, a stabilising force.
It is significant to note that even under previous rule, Egypt was stable and did experience economic growth, remarkable as that may seem, even as a developing nation and even in light of the Global Financial Crisis. Prior to the GFC, in 2005- 2007, for three years Egypt experienced 7 percent growth rates. Again, the direct relationship of a democratic and legitimate government with economic growth is well established, elsewhere.
Prime Minister Essam Sharaf has promised that the economy will come back stronger than it was before and all evidence supports his affirmation. Well over 50 percent of Egypt's GDP is based on tourism, and given the stability of Egypt, tourism will continue and possibly increase in light of Egypt's new changes for the better. Egypt also has the assistance of Saudi businessmen, who will establish a development bank in Egypt to finance investment projects therein with a capital of $170 million, giving jobs to Egyptians through long-term investment projects. Saudi assets in Egypt were unaffected by the recent political events. Furthermore, Egypt's Orascom Construction Industries (OCI) has signed construction contracts with Tecnimont SpA/Samsung Engineering Company Ltd joint venture with the Abu Dhabi Bourge 3 company valued at $146million.
In 2009, 18.4 % of Egyptian GDP was derived from investment. At the end of 2009, Egypt's market value of publically traded shares was $89.95 billion. At the end of 2010, Egypt's stock, inter alia, of broad money was $166.2 billion. In the same year, Egypt exported 89,300 barrels of oil a day with 4.3 billion barrels in reserve as of January of 2010.
Egypt produces 62.7 billion cu m of natural gas, (2009) and exports 8.55 billion cu m, with reserves of 1.656 trillion cu m. Egypt's reserves of foreign exchange and gold as of the end of 2010 are $35.72 billion with a stock of $72.41 billion in direct foreign investment at home at the end of 2010 and $4.9 billion abroad in the same year.
Given that Egypt's assets in value and natural resources far exceed liabilities in terms of debt, the overall prognosis for Egyptian economic strength is reliable. Indeed, Citibank has recently reported that Egypt is set to emerge as the third-best global economy in terms of growth with a forecasted rising growth rate at 5% per annum for the next forty years. It is arguably realistic in light of Egypt's natural resources, labour force and human capital that this growth rate is a highly conservative estimate. Barclay's Bank has reported that foreigners hold $13 billion in Egyptian shares which account for 25% of trading. At the time of writing the Egyptian Bourse has been closed for 32 days. As long as it opens within the next 8 days, before it reaches 40 days of closure, it will not be removed from the MSCI Index. The media has also reported that many of the stockholders that traded in the early days of the revolution now want to reverse their trades. What the media did not report, and what can be logically surmised is that if this is indeed the case, then those were the people who sold stocks when they thought the stock market would plummet due to a worse outcome in Egypt's political situation. But after a peaceful transition to democratic government has been established, it is logical that the stock values will only increase and those who sold their stocks when they thought the price would get lower have realised the value of what they lost. In light of this, the Ministry of Finance is distributing 250 million Egyptian pounds in interest free loans to brokerages to mitigate stocks sold that were bought on margin and boost finances. The Bourse Chairman will suspend trading if the stock value goes below a certain value - at 5% and 10% margins.
In terms of Investor-State Arbitrations in Egypt, in the past, Egypt either objected to the jurisdiction of the arbitral tribunal in all of the following cases, *Helnan International Hotels, Joy Mining Machinery Limited, Champion Trading Company/Ameritrade International, Inc., Middle East Cement Shipping and*

"Stability in government, in society in terms of political rights, in the region and transparency in the legal system are amongst the criteria for assessing country risk and Egypt has clearly demonstrated within the past month, that these particular areas of stability and transparency are reliable given the highly significant changes that occurred in Egypt in such a relatively short time, indeed, overnight, with the resignation of former President Mubarak. Egypt should be in the Country Risk Tier-2, given that there are now far more opportunities, rather than risks, for investors in the New Egypt."

Handling Co. S.A., Wena Hotels Ltd., and Southern Pacific Properties, or on a regular basis, severed, frustrated or nullified contracts, expropriated without compensation, objected to tribunal jurisdiction to frustrate the proceedings and when that failed, plead sovereign immunity as a defense to the aforementioned. However, given the new realities in terms of an entirely new government, it is highly unlikely that investors will face what happened in the past. The New Egypt is democratic, secular and in line with the Rule of Law at all levels. Based on the above facts, the merits for the case that Egypt is a sound market for growth are valid.

Egypt's country risk assessment prior to the New Egypt was based on relatively unpredictable and nontransparent political, legal and business environments with underdeveloped capital markets and an inadequate regulatory structure. However, Egypt's recent events have created a quantum change in which the legal environment and system in light of the improved political situation, have created the transparency and predictability that is required for a lower country risk rating. Political risk for insurers based on fundamental weaknesses in an economy, or government inefficiencies, or inadequate legal frameworks in terms of overall instability, no longer apply in the case of Egypt, as the above analysis of empirical data has demonstrated. Stability in government, in society in terms of political rights, in the region and transparency in the legal system are amongst the criteria for assessing country risk and Egypt has clearly demonstrated within the past month, that these particular areas of stability and transparency are reliable given the highly significant changes that occurred in Egypt in such a relatively short time, indeed, overnight, with the resignation of former President Mubarak. Egypt should be in the Country Risk Tier-2, given that there are now far more opportunities, rather than risks, for investors in the New Egypt. The existing legal, political and economic strengths of Egypt were clouded over in the past by a corrupt regime. The success of the democratic revolution has shown the world that democracy, transparency and the rule of law were the missing element in Egypt, and are now a part of the New Egypt. The combination of democracy with a country that prides itself for being 'the mother of civilisation' together with its existing legal framework, guarantees far more legal and adjudicatory certainty and transparency than in the past.

Mary Boulos Ayad is an American Phd Candidate at Macquarie University, writing a dissertation on International Commercial Arbitration and International Investment Arbitration Law. Miss Ayad's family background is Egyptian and she has lived and researched extensively in Europe and the Middle East and North Africa, working for the United Nations UNHCR Field Office in Cairo and doing research for her first Master's Degree through the School for International Training in Vermont in Intercultural Relations in International Management as an American University in Cairo Research Fellow. She also did pre-doctoral research at Georgetown University's Library in the Doha, Qatar Campus before coming to Australia. Miss Ayad also holds a Master's degree in International Human Rights Law and Democratisation in the Mediterranean from the University of Malta and a Bachelor's of Political Science from the University of Colorado and she has recently co-authored an op - ed, published in the Queensland Courier-Mail, with Stephen J.Keim, President of Australian Human Rights Lawyers (AHRL) regarding the Egyptian Constitution in light of the Egyptian Revolution. Miss Ayad recently won the highly distinguished II International Commercial Arbitration Law award for best technical ICA paper, sponsored by the Madrid ICA Center (CIAMEN) and KPMG. The award will be given at the Hugo Groitus Lecture in Spain, in June 2011 by the President of the Permanent Court of Arbitration. Miss Ayad has written over ten articles in the area of International Law, from Human Rights to Arbitration Law and Practise.

Postscript:

Dateline 31 March 2011. As per predictions written early March, the Egyptian stock market indeed re-opened well before the 40 day deadline and Egyptian stocks have gained in value since the early days of the revolution prior to the stock market close. The United Arab Emirates, on the first day of the re-opening of the stock market, through its Abu Dhabi owned Invest AD's asset management arm, has bought Egyptian stocks last week which it describes as having reached 'attractive' levels. AD Asset Management has several hundred million dollars under its management in several African and Middle Eastern countries. AD Asset Manages also invests for its owner, sovereign wealth fund Abu Dhabi Investment Council. Clearly, investment in Egyptian stocks by Arab neighbors such as the UAE and Saudi Arabi attest to the strength of the Egyptian bourse, whilst the elements discussed in this report attest to the strength of the Egyptian economy which will outshine positive predictions in the long term.

Peter McQueen
AMTAC Chairman

Australian Maritime and Transport Arbitration Commission

The 12th International Maritime Law Arbitration Moot Competition [IMLAM 2011] will be held in Singapore between 1 and 5 July 2011.It is organised by Murdoch University School of Law and hosted this year by the National University of Singapore.

Over 20 teams representing law schools from universities in Australia, Asia, Europe and North America have registered for IMLAM 2011.

The competition is open to both undergraduate and graduate law students who have not been admitted to practise.

The moot problem, which will involve a dispute relating to commercial maritime law, will be determined before an arbitral tribunal pursuant to the AMTAC Arbitration Rules.

In previous years members of the legal, arbitration and maritime profession have given their support and sponsorship to the moot and are invite to do again this year.

In past years AMTAC has been , and continues to be, a supporter of IMLAM, sponsoring the Spirit of the Moot award and providing arbitrators and coaches. It has also convened seminars relating to maritime arbitration for all attending the moot.

AMTAC is honoured that at IMLAM 2011 the AMTAC Arbitration Rules are being used as the applicable procedural rules.

Further information of the competition, sponsorship and arbitration registration can be found at www.law.murdoch.edu.au/maritimemoot/index.html

Commercial Perspective on International Mediation

Oscar Shub
ACICA Director

Through an ACICA Korea initiative, Australia has strengthened its position in the expanding market for international dispute resolution in the Asia Pacific following a successful international forum in Seoul, Korea. 'Navigating Choices in International Arbitration: Options for Korea in the Asia-Pacific Region" provided an opportunity for the Australian delegation which included the NSW Attorney General, John Hatzsistergos, ACICA President Professor Doug Jones AM, and ACICA Vice President Alex Baykitch to meet with Korea's leading corporate in-house counsel, corporate executives and legal directors of major law firms who specialise in international arbitration. Head of Bae Kim & Lee's International Arbitration and Litigation Group, Mr Kevin Kim said: "We were provided with clear and compelling reasons why Australia and ACICA are viable options for companies in Korea who use international arbitration as a means of resolving disputes, particularly those involving other companies based in Asia, but also from the Middle East, Europe and the Americas. The event was very successful and a fantastic opportunity for Korean companies and lawyers to meet with a distinguished Australian politician, Australian arbitrators and lawyers."

Introduction

Allegations have been levelled against international arbitration that it has become too formal a process and that the advantages of cost and time are fast diminishing. There have been many suggestions as to how to redress this.[1] Nevertheless, international mediation can be seen as a viable cheaper alternative to arbitration.

Mediation is an informal process that is aimed at enabling parties to a dispute to discuss their differences on a confidential basis with the assistance of a neutral third party. Mediations can be conducted ad hoc or they can be conducted through institutions such as IAMA, SIAC, HKIAC, CIETAC or the ICC.

This paper considers the reasons that parties choose to mediate before exploring some of the limitations to mediation: in particular, the problems in enforcing an agreement to mediate and a settlement agreement reached through mediation. It then considers the integration of mediation within the arbitration process.

Why mediate?

The major advantage of mediation to arbitration is the lower transaction cost. Preparation for a mediation does not need to be as extensive as for a trial or a formal arbitration as there are usually no witnesses or lengthy submissions. A mediation is not about litigating the factual and legal issues but about enabling the parties to reach a commercial settlement. The corresponding time saving is clear. An international arbitration may reasonably take up to 2 years to complete. Contrast this to a multi-million dollar mediation which with the input of the right executives can be settled in one to three days, with a much shorter lead up time.

Mediation by its commercial nature lends itself to being less confrontational. The parties may preserve or in some cases rebuild a working relationship through the dispute resolution process. The mediator is not a judge or arbitrator so the parties will always retain control over the decision-making process. The parties are able to adopt more flexible and innovative solutions. It is difficult for either party to come away from a mediation feeling that the result was unfair given that settlement can only occur if the parties agree.

Mediations are private and confidential in most circumstances. The parties may include a clause to this effect in the mediation agreement or may agree on confidentiality at the commencement of the mediation. Commercial sensitivity can be maintained at all times.

These advantages are not lost if the mediation proves unsuccessful in resolving the dispute. Cost savings will result because the parties will have a clearer idea of the issues in the case or may even have settled at least some of the issues. The parties also have the opportunity to assess the strengths and weaknesses of their case and that of the other side. As the entire mediation process is without prejudice the negotiations and documents prepared in connection with the mediation cannot be used in court proceedings.

1. Limitations of mediation

Mediation of course has some limitations, particularly in the international context.

At the outset parties are likely to come from different cultural backgrounds. The potential for misunderstanding through cross-cultural communications can be a significant impediment to a successful outcome in a mediation. This is further emphasised by the different attitudes to mediation – which is less widely used in European countries than in China where mediation has a long and well-established history.[2]

More importantly, the difficulty is that in many jurisdictions mediations and other forms of alternative dispute resolution are not protected by a legislative framework in the way that arbitration is. Parties with an agreement to mediate in Australia, for example, cannot rely on the many benefits in the International Arbitration Act 1974 (Cth). The consequence of this is two-fold: first, where parties are reluctant to participate in a mediation process, it can be very difficult to enforce the agreement to mediate; second, where a mediation has occurred it can be very difficult to enforce the settlement agreement.

1.1 Enforceability of mediation clauses

Until recently it was not clear that the Australian

[1] See International Chamber of Commerce, Techniques for Controlling Time and Costs in Arbitration (2007) at http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf
[2] See Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25(4) Journal of International Arbitration 479.
[3] (1992) 28 NSWLR 194.

courts would be willing to enforce agreements to mediate or other forms of ADR. In many jurisdictions the issue is still not settled. There are several domestic cases worth mentioning on this point.

The high watermark of enforcing agreements to conciliate was *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*, [3]a decision of the New South Wales Court of Appeal. Hooper Bailie sub-contracted Australian company Natcon for construction work on the new Parliament House in Canberra. A dispute arose which was submitted to arbitration. However, before the arbitration took place, the parties agreed to conciliate certain issues with a view to narrowing the areas of dispute. A detailed process was agreed upon including attendance before a particular conciliator, the giving of evidence, the making of submissions, and the rulings and determinations of the conciliator. Despite this, Natcon sought to proceed with the arbitration while part way through the conciliation process.

Hooper Bailie successfully sought a stay of the arbitration proceedings for as long as Natcon refused to conciliate. Giles J held that the agreement to conciliate was enforceable. His Honour said that an agreement to conciliate or mediate could not be likened to an 'agreement to agree', which has been the traditional reason the Australian and English courts have refused to enforce mediation clauses. His Honour said:

What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come.[4]

Accordingly, an agreement to mediate is enforceable if the conduct required of parties for participation in the process is sufficiently certain. Additionally, the remedy the courts will grant in such a case is a stay of proceedings. The courts have to date been reluctant to impose specific performance of a mediation agreement as supervision would be too difficult.[5]

To demonstrate that difficulty of having mediation clauses enforced, in two subsequent cases, the Supreme Court of New South Wales refused a stay of proceedings on the grounds that the dispute resolution procedure was too uncertain to be enforceable.

In *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,[6] the mediation clause provided that the parties would settle disputes "by mediation administered by the Australian Commercial Disputes Centre" without agreeing on the procedures that would apply. Additionally, the clause provided that parties would enter into mediations with a "commitment to attempt in good faith to negotiate towards achieving a settlement of the dispute". In such circumstances, Giles J held that the mediation clause was sufficiently uncertain as to be unenforceable.

In *Aiton Australia Pty Ltd v Transfield Pty Ltd*,[7] Einstein J reaffirmed that an agreement to conciliate or mediate would be enforceable if it was expressed with sufficient certainty. However, the mediation clause in that case was unenforceable as the clause inadequately addressed the method of appointing the mediator. As that clause was not severable from the negotiation clause, the negotiation clause was also struck out. His Honour considered:

… the focus ought properly be on the process provided by the dispute resolution procedure. Provided that no stage of the dispute resolution mechanism is itself an "agreement to agree" and therefore void for uncertainty, there is no reason why, in principle, an agreement to attempt to negotiate a dispute may not itself constitute a stage in the process.[8]

In the most recent case on this topic, *United Group Rail Services Limited v Rail Corporation New South Wales*,[9] the parties agreed that a clause referring disputes to mediation at the Australian Dispute Centre was unenforceable. The Australian Dispute Centre does not exist which made the clause particularly uncertain. Notwithstanding this, that decision is important for enforcing an agreement to negotiate in good faith.

It is clear from the above cases that great care must be taken in drafting agreements to mediate. It is only where the relevant clauses are sufficiently precise that they will be found to be enforceable. Attention should also be had to the jurisdiction in which you may need to enforce your agreement to mediate and what requirements the courts in that jurisdiction have.

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[4] (1992) 28 NSWLR 194 at 206.
[5] See Robert Angyal SC, 'Enforceability of agreements to mediate: Seventeen years after Hooper Bailie' (2009) 83 Australian Law Journal 299.
[6] (1995) 36 NSWLR 709.
[7] (1999) 153 FLR 236.
[8] (1999) 153 FLR 236 at 250.
[9] (2009) 74 NSWLR 618.
[10] Albania, Canada, Croatia, Honduras, Hungary, Nicaragua and Slovenia: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html at 29 September 2010.

1.2 Enforceability of settlement agreement

Similar troubles ensue with the enforceability of settlement agreements. Unlike arbitrations there is generally no legislative basis upon which a mediated settlement agreement can be enforced. There is certainly no *New York Convention* on which one can rely. The settlement agreement is a creature of contract and therefore the ability of a party to enforce it is dependent on its terms. While in a domestic mediation a party could bring an action for breach of contract for failure to comply with the settlement agreement this is a much more complicated process for international mediations. Depending on the location of the assets of the parties, the parties are dependent on the assistance of national courts in multiple jurisdictions for enforcement with all the complexities that arise from this.

The UNCITRAL Model Law on Conciliation was adopted in 2002 in an effort to remedy these problems. It is disappointing that the Model Law has so far been taken up by only 7 countries[10] and to a lesser extent by some US states. However, it is unlikely that the Model Law would contribute to the certainty required in the enforcement of settlement agreements. The Model Law does not mandate any method of enforcing settlement agreements but rather the UNCITRAL Working Group noted that the diversity of practices in various jurisdictions.[11] The result of this is that it can be more difficult enforcing a settlement agreement reached through mediation than an award made in an arbitration.

2. Mediation and arbitration integrated

There has been much discussion about the integration of mediation into arbitral proceedings.[12] This involves the same individual acting as mediator and arbitrator in the dispute. There are a number of ways this can be done.

The most common method is *med-arb* where a dispute is first mediated. If agreement is reached in mediation, the parties sign a binding settlement agreement or by consent may convert it to an arbitral award. However, if agreement is not reached, the mediator becomes the arbitrator and hears and determines unresolved issues.

A modification of this is *arb-med* where the parties arbitrate first. At the conclusion of the arbitration proceeding, the arbitrator conducts a mediation phase seeking mutual agreement. If the mediation is successful, the arbitral award will record the terms of the settlement agreement. If the mediation is unsuccessful, the arbitrator delivers an arbitral award based on the facts and evidence from the arbitration proceedings. It is possible for the arbitrator to seal his or her draft award prior to the mediation for propriety.

Finally a hybrid of med-arb and arb-med can be adopted. This is the practice in China where mediations have been used within the arbitral process from as early as the 1950s following the work of CIETAC.[13] The unique feature of the Chinese approach is that mediation is ongoing in the arbitral process such that a mediation can be conducted at the outset as well as at any time during the arbitral process when the parties or the arbitrator consider that it would be helpful to have a mediation.[14]

Serious concerns have been expressed about *med-arb* and its variants. If the mediation fails the impartiality of a mediator-turned-arbitrator, who has received confidential information in the course of mediation, may be called into question. The possibility of the mediator later arbitrating the dispute may result in parties being less forthcoming in the mediation. Additionally, parties will place greater importance on statements made by the mediator to encourage a settlement on the basis that this might be indicative of the result that would be attained if the dispute continued to arbitration.

In spite of these concerns there are numerous advantages. The parties are only required to apprise one independent person of the facts and any technical information involved in the dispute rather than educating both a mediator and arbitrator. The mediation may result in agreement on a number of issues which will reduce the time and cost of the subsequent arbitration. If the settlement from *med-arb* is recorded as an arbitral award the parties are more likely to have recourse to the *New York Convention*.

If the parties are accepting of the risks inherent in *med-arb* or its variants this can be a cheaper and quicker dispute resolution process than the traditional multi-tier dispute resolution clause of mediation followed by arbitration. Parties would be well advised to consider the legislative environment in which their dispute may occur.

The new *Commercial Arbitration Act 2010* (NSW) which entered into force in New South Wales on 1 October 2010 expressly permits *med-arb* for domestic arbitrations[15]. It is anticipated that a similar position will be adopted by other Australian states. In contrast, the *International Arbitration Act 1974* (Cth) does not recognise *med-arb*. Curiously the UNCITRAL Model Law does not permit med-arb but allows parties to agree otherwise.[16]

Conclusion

International arbitration can be a lengthy and costly process. The reason that many parties agree to international arbitration is to enjoy the benefits of the New York Convention. The benefits of limiting jurisdictional disputes and the inevitable forum shopping, and of knowing that the arbitral award will be more easily enforced than a foreign judgment should not be understated. Mediation is one alternative to international arbitration that may avoid the expense and time of a full-blown arbitration. However, it has its limitations as described above. The challenge for parties entering into contractual relations is to foresee the possible disputes that may arise and agree on an dispute resolution clause appropriate to the resolution of those disputes.

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[11] UNICTRAL, UNCITRAL Model Law on International Commercial Conciliations with Guide to Enactment (2002) at p. 55 ff.

[12] See Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25(4) Journal of International Arbitration 479; The Beijing Arbitration Commission, The Straus Institute for Dispute Resolution, 'East Meets West: an International Dialogue on Mediation and Med-Arb in the United States and China' (2009) Pepperdine Dispute Resolution Law Journal 379.

[13] See Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25(4) Journal of International Arbitration 479.

[14] Gabrielle Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China' (2008) 25(4) Journal of International Arbitration 479 at 487.

[15] Section 27D.

[16] Article 52.

Alex Baykitch
ACICA Vice President

Book Review International Commercial Arbitration: An Asia-Pacific Perspective

International Commercial Arbitration: An Asia Pacific Perspective

Cambridge University Press
Simon Greenberg
ICC International Court of Arbitration

Christopher Kee
City University of Hong Kong

J. Romesh Weeramantry
City University of Hong Kong

The last decade of the new millennium has seen a dramatic increase in Asian based international commercial arbitration. Arbitration centres within the Asia Pacific region have seen a steady increase in the number of international cases submitted to them for their administration. In this context, the authors Greenberg, Kee Weeramantry of *"International Commercial Arbitration – an Asia Pacific Perspective"* are to be congratulated on the publication of their excellent text, which is an outstanding introduction to the field of international commercial arbitration.

The text provides a practical perspective on the national legal systems in the Asia Pacific area in relation to international arbitration and is filled with a good cross-section of cases decided by courts within the region. Text books such as this, are of great assistance in the harmonisation and facilitation of international economic co-operation by reducing the risks of cross-border economic ventures.

The book is divided into 10 chapters commencing with an introduction on international arbitration and its place in the Asia Pacific region. It covers issues relating to the lex arbitri, the arbitration agreement, jurisdiction in arbitration, and the arbitral tribunal. The authors set out useful points to bear in mind when considering procedure and evidence in international arbitration including a useful summary of the 2010 IBA Rules of Evidence and concludes with chapters on the award, one relating to content and the other dealing with challenge and enforcement.

In addition, the authors give an invaluable insight into individual state treatment relating to everyday practical issues faced by the arbitration practitioner for example, the approach taken to the essential ingredients for an effective arbitration agreement and the attitude of courts to arbitration generally and the lengths which some courts will go to, for example, *Insigama Technology Co Ltd v Alstom Technology Co* - in order to hold the parties to their agreement to arbitrate.

Despite the economic downturn, cross-border investment throughout Asia has remained strong. Interestingly, intra-regional investment, particularly investment from Hong Kong and mainland China, has grown significantly. In these circumstances, the final chapter in the book on investment treaty arbitration provides an excellent introduction to this unique area of international arbitration. It will be a useful reference point.

The book also annexes some useful appendices including one that provides an overview of some of the arbitral institutions established in or relevant to the Asia Pacific region, including ACICA, as well as a list of the major arbitral institutions and other organisations in the Asia Pacific and other regions including some institutions that predominantly administer domestic arbitrations.

In summary, the book is ideal for students and as a quick reference point for practitioners and in-house counsel engaged in international commercial arbitration. It is comprehensive, adopts a global outlook, with a particular focus on the unique features arising in the Asia Pacific region. Readers are introduced to the subject in an easy and straightforward way and then are gently immersed into the detail. It goes without saying, anyone who is interested in or practises in the area, should have a copy in their library.

For an extra chapter of the book, click here:
www.cambridge.edu.au/extractica

Alex Baykitch is a Sydney-based Partner with global firm, Holman Fenwick Willan.

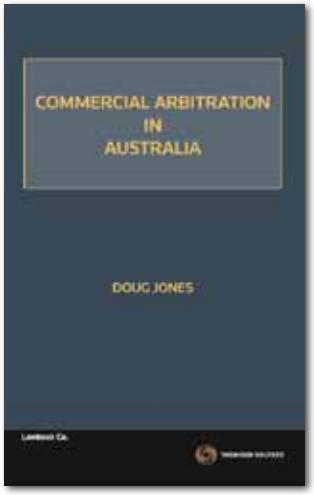
Book Launch Commercial Arbitration in Australia

CLAYTON UTZ

THOMSON REUTERS

invitation

You are invited to attend the official launch of
'Commercial Arbitration in Australia'
written by
Professor Doug Jones AM
to be launched by
The Hon. Robert McClelland MP
Federal Attorney-General.



Commercial Arbitration in Australia provides an essential and timely guide to domestic commercial arbitration in Australia following the 2010 decision by the Standing Committee of Attorneys-General to enact new uniform commercial arbitration legislation in each jurisdiction.

Professor Doug Jones AM
Author

The Hon. Robert McClelland MP,
Federal Attorney-General

Event Details

Date: **Wednesday, 4 May 2011**

Time: 6.00pm

Venue: Clayton Utz Boardroom
Level 34
No 1 O'Connell Street, Sydney

RSVP: Friday, 22 April 2011
Danielle Tedder on 02 9353 4815
dtedder@claytonutz.com

Book Launch International Commercial Arbitration

The Chartered Institute of Arbitrators, Australia
and
The Australian International Disputes Centre

invite you to the launch of

INTERNATIONAL COMMERCIAL ARBITRATION

This book is expected to be a significant contribution to the promotion of Australia as a venue for international arbitration so please join us to celebrate its launch

Date: **Wednesday 13 April 2011 from 5.30pm till 7.30pm**
Venue: **AIDC, L 16, 1 Castlereagh Street, Sydney, NSW 2000**
To assist catering **RSVP by 11 April 2011** to Rashda Rana at
Rashda.Rana@lendlease.com.au

NATIONAL TREASURES

Susannah Moran
The Australian
28 January 2011

JANUARY is often a quiet time for lawyers, but this year was different. ....
CONGRATULATIONS to Simon McKeon, the 2011 Australian of the Year. Better known for his work in investment banking and charity work, McKeon started his career as a lawyer in Blake Dawson's Sydney office in the early 1980s. Another Blake Dawson alumnus, Ron McCallum AO, was named Senior Australian of the Year. This week is also a celebration for Clayton Utz partner Doug Jones AM, who has become the first Australian to be elected president of the Chartered Institute of Arbitrators. Jones said he saw the appointment as an "opportunity to advance Australia's position as a major player in the lucrative cross-border dispute resolution market". Retired chief justice of the High Court Murray Gleeson and retired High Court judge Michael Kirby, who are both involved in arbitration and mediation, praised Jones's work. Kirby, who sits on the arbitration panel of the International Centre for Settlement of Investment Disputes for the World Bank, said: "No one has worked harder or more successfully over many years to put Australia on the map of international commercial arbitration."

AUSTRALIAN TO HEAD INTERNATIONAL ARBITRATION BODY

Alex Boxsell
The Australian Financial Review
28 January 2011

Clayton Utz's infrastructure and dispute resolution guru Doug Jones has become the first Australian president of the Chartered Institute of Arbitrators.
The Institute is a global

Event: CIArb Asia Pacific Conference

Investment & Innovation: International Dispute Resolution in the Asia Pacific
26 May - 28 May 2011 - Sydney Sofitel Wentworth, Australia

About the Conference

For multinational companies and industry groups, international dispute resolution is an integral part of good business practice. As the world emerges from the global financial crisis, investment and innovation are key to reshaping and rebuilding. With the rapid growth of international trade, progressive legislative reform and technological innovation in dispute resolution, all eyes focus on the Asia Pacific region.

The Chartered Institute of Arbitrators Conference 2011 is a dynamic two day forum which will consider challenges and opportunities for international dispute resolution practices driven by reform and regional investment.

Delegates will hear from leading members of government, industry, business and arbitration specialists, who will draw upon their wealth of knowledge and experience.

Topics

- Innovations in international arbitration: recent changes to legislation and practice in the Asia Pacific region
- Technical innovation in arbitration
- Regional challenges to and opportunities for international arbitration
- International arbitration and the courts - the Australian approach
- How to draft an arbitration clause and its effect on enforcement
- The growth of international mediation in the region
- Arbitration - a commercial client perspective

Who Should Attend?

- Judges and arbitrators
- Practitioners in international commercial arbitration and mediation
- Corporate counsel and Legal Directors of corporations engaged in international trade
- Lawyers advising corporations engaged in international trade
- Practising lawyers
- Policy Makers
- Regional Regulators
- Investors
- Financiers
- Chief Executives and Senior Managers

Why You Should Attend?

- Hear from global arbitration leaders and decision makers
- Gain up to date insights on leading edge issues
- Engage in high level and wide ranging networking opportunities
- Attendance will earn Continuing Professional
- Development (CPD) points
- Receive special delegate offers and discounts

body that offers training and accreditation in alternative dispute resolution.
Professor Jones, who is also president of the Australian Centre for International Commercial Arbitration, a director of the Australian International Disputes Centre and member of the London Court of International Arbitration, said his appointment would allow him to "advance Australia's position as a major player in the lucrative cross border dispute resolution market".

SYDNEY LAWYER HEADS ARBITRATION GROUP

The Sydney Morning Herald and Australian Associated Press
26 January 2011

A Sydney-based partner of law firm Clayton Utz, Doug Jones, has been elected president of the Chartered Institute of Arbitrators in London, a global organisation focused on alternative dispute resolution. Professor Jones, an internationally recognised commercial dispute resolution specialist, said demand for arbitration services was growing around the world, particularly in the Asia-Pacific region. "International arbitration has

Read More

CLAYTON UTZ PARTNER ELECTED HEAD OF GLOBAL ARBITRATION BODY

Australasian Legal Business
25 January 2011

CLAYTON UTZ PARTNER TO HEAD GLOBAL ARBITRATION BODY

The New Lawyer
25 January 2011

CLUTZ PARTNER TO HEAD GLOBAL BODY

Lawyers Weekly
24 January 2011

Event: CIArb Asia Pacific Conference

Investment & Innovation: International Dispute Resolution in the Asia Pacific
26 May - 28 May 2011 - Sydney Sofitel Wentworth, Australia

Speakers

Our dynamic line up of world class speakers will include:

- **The Hon. Justice James Allsop**, President, New South Wales Court of Appeal, Australia
- Chiann Bao MCIArb, Secretary General, Hong Kong International Arbitration Centre, Hong Kong
- Hop Dang, Senior Associate, Allens Arthur Robinson, Vietnam
- Lord Peter Goldsmith QC, Former Attorney, England, Wales and Northern Ireland & Head of European Litigation Practice, Debevoise & Plimpton, United Kingdom
- **The Hon. Murray Gleeson** AC, Patron CIArb Australian Branch, former Chief Justice of Australia (Gala Dinner Speaker)
- Alastair Henderson MCIArb, Managing Partner, Herbert Smith and Joint Head of the Dispute Resolution Practice in Southeast Asia, Thailand
- Malcolm Holmes QC FCIArb, Senior Counsel, New South Wales & Adjunct Professor, University of New South Wales & University of Sydney, Australia
- Philip Jeyaretnam SC, Managing Partner, Rodyk & Davidson LLP and Chairman, Maxwell Chambers, Singapore
- **Yu Jianlong**, Vice Chairman & Secretary-General China International Economic and Trade Arbitration Commission (CIETAC), People's Republic of China
- Doug Jones AM FCIArb, Partner, Clayton Utz & International President of CIArb 2011, Australia
- Christopher Lau SC FCIArb, Full Time Arbitrator, Singapore
- Alan Limbury, Mediator and Arbitrator, Strategic Resolution, Australia
- **Damian Lovell**, General Counsel, BHP Billiton, Australia
- **The Hon Robert McClelland** MP, Attorney General of Australia
- Peter Megens FCIArb, Partner, Mallesons Stephen Jaques', Australia
- Nancy Milne AM, Partner, Clayton Utz, Australia
- Albert Monichino SC FCIArb, Australia
- Vikram Nankani FCIArb, India
- **Suzanne Nusbaum** FCIArb, Former US Administrative Law Judge, USA
- **Colin Ong** FCIArb, Managing Partner, Dr Colin Ong Legal Services, Advocates & Solicitors, Brunei
- Vinayak Pradhan FCIarb, Vice-President CIArb, Skrine, Malaysia
- Rashda Rana FCIArb, General Counsel Australia & Project Management & Construction, Bovis Lend Lease
- Peter J Rees QC FCIArb, Legal Director of Royal Dutch Shell plc, The Netherlands
- **Damian Sturzaker**, Partner Marque Lawyers, Australia
- John Wakefield FCIArb, Partner Holman Webb Lawyers & President CIArb Australian Branch, Australia

Member Q&A: Rashda Rana

Rana Rashda
Lawyer

> "What is your favourite book of literature? *To Kill a Mockingbird* by Harper Lee – it enlivened my sense of justice when I read it, aged 9. Although I loved Atticus Finch, his character did not actually inspire me to become a lawyer but rather gave me the awareness of how injustice can come about; the need for fairness in society and thinking always of what is the right thing to do. Rather perversely, it is those characteristics which probably lead me to read philosophy at university."

Profession
Lawyer

Bio
Rashda Rana is currently the General Counsel for the project management & construction business of Lend Lease, which is one of the world's leading project management, design and construction companies operating in more than 30 countries worldwide and employing over 7,500 employees.
She is a former barrister who worked extensively at the Bar in London, Australia and Asia for the past 20 years. Her work has included advising on and conducting major commercial, maritime and construction & mining/infrastructure litigation, arbitration and mediation involving wide ranging issues.
Rashda is Adjunct Professor teaching international commercial arbitration at Sydney University Law School. She devised the course and it is the first of its kind in Australia. She has recently published a text book to complement the course.
Rashda is an active member of a number of significant industry associations, including the Founding Member and the current Secretary of the newly formed Society of Construction Law Australia, a Fellow and Director of the Australian Centre for International Commercial Arbitration (ACICA), Fellow of Institute of Arbitrators & Mediators Australia (IAMA), Fellow of Chartered Institute of Arbitrators (CIArb), Fellow of Commercial Law Association of Australia (CLAA) and Treasurer of ArbitralWomen.
Rashda is a trained mediator and has been appointed as arbitrator in a number of arbitrations.

Who/What inspired your interest in arbitration?
It grew from early experience in dispute resolution at the Construction Bar in England. When I arrived in Australia, my English solicitors continued briefing me in arbitration as there wasn't much happening in Australia at the time. Doug Jones, Phillip Capper, Arthur Marriott and Louise Barrington have all been instrumental (and inspirational) in their encouragement of me in this area.

What traits makes a good arbitrator?
Good listener; someone who is across a range of areas of law, rational thinker, robust, brave and organised.

Refer to an historical conflict you wish you could have participated in and why?
The Yalta Conference – a point at which the world order started to change; the results of which have contributed to the continuing conflicts experienced today.

What is your idea of perfect happiness?
A good book, under the shade of a tree, a glass of red, at a lazy picnic with my family.

What is your greatest fear?
Losing my children.

What is your greatest extravagance?
It's pathetic but handbags, shoes, and ice cream.

What do you consider the most over-rated virtue?
They are all good. They are only over-rated when abused or misused. For instance, a megalomaniac feigning modesty, a spiteful mean person claiming to be kind and generous - that sort of thing.

Which living person do you most admire?
There are very many people I admire but mostly I admire a type of person: a modern Renaissance Person - someone who is bright, well read, true, honest, upfront (you get what you see), fun, funny, hard working, vivacious with at least a tinge of altruism, generous, kind, supportive, good company and brave.

What is your favourite journey?
The journey I have enjoyed and am enjoying with my husband, children and close friends. It is filled with surprises, lots of joy, a little sorrow but, always, endless possibilities and hope.

What is your favourite piece of music?
My musical tastes are too eclectic to name one! They include: Mozart (anything), Black Eyed Peas, Neil Young (especially *Harvest Moon*), Schubert's *Lieder*; Puccini's *Madama Butterfly*, Crowded House, Canteloube's *Songs from the Auvergne*, Ella Fitzgerald, Edith Piaf. You get the picture ….

What is your favourite book of literature?
To Kill A Mockingbird by Harper Lee – it enlivened my sense of justice when I read it, aged 9. Although I loved Atticus Finch, his character did not actually inspire me to become a lawyer but rather gave me the awareness of how injustice can come about; the need for fairness in society and thinking always of what is the right thing to do. Rather perversely, it is those characteristics which probably lead me to read philosophy at university.

What is your favourite film?
I'm a 'fair weather friend' when it comes to movies – I like British comedies; thrillers which are clever as opposed to just filled with 'action'; indie flicks (there is usually more depth in them); foreign language films especially French. Presently loving *The King's Speech* for all its beauty (Colin Firth), truth (there are unloved children at all levels of society and how such treatment can manifest itself including in a debilitating stutter) and irreverence (only an Australian would deign to speak to Royalty in that way!!).

What credo/maxim/motto inspires you?
Just do it; have a go; nothing is impossible.

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