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The Panel of Editorial Consultants

Ruth Charlton*

After many years of service, **Linda Fisher, Babette Smith and Maureen Garwood** have stepped down from the Editorial Panel. We have also lost touch with **Dr Greg Tillett**[1] who was last reported in Northern Ireland. We thank them for their past contributions and generous time given to this Journal.

We are grateful that **Dr Tom Altobelli**, a Judge of the Federal Circuit Court, and **Mr Paul Lewis**, Family Law Partner of Gadens Lawyers Sydney, continue on the Panel of Editorial Consultants. The head of the Panel, as Chief Editorial Consultant, is **Professor David Spencer** who was introduced in Part 2 of this Volume 29.

We now are very pleased to welcome to the Board of Editorial Consultants, **Dr Lola Akin Ojelabi, Mr Alex Fawke, Dr Katherine Johnson and Professor Joel Lee Tye Beng**. Let me introduce them in alphabetical order:

Lola Akin Ojelabi is a Senior Lecturer and Director of Programs (LLB) in the School of Law, La Trobe University, Australia. She is admitted to legal practice in Nigeria and Australia and a nationally accredited mediator (Australia). Her academic writings can be found in high-quality journals and she is co-author of *Ethics and Justice in Mediation* (2018) and *Dispute Resolution in Australia: Cases, Commentary and Materials* (2018).

Lola has researched extensively in the field of conflict resolution, particularly focusing on culture and alternative dispute resolution (ADR) processes, alternative dispute resolution and access to justice, ethics and justice in mediation and conflict resolution and international law. Her research projects have included evaluation of the Broadmeadows Family Relationship Centre focusing on cultural appropriateness and family violence issues, the use of ADR by Community Legal Centres as a means of improving access to justice, justice quality and accountability in mediation practice, ethics and justice in mediation. Lola is also interested in the role of international law in promoting global peace and justice particularly, how underlying values of the United Nations' Charter may assist with resolution or management of seemingly intractable conflicts.

Alex Fawke is a Managing Associate in the Dispute Resolution Department at Linklaters LLP in London, where his work focuses on international commercial arbitration, investment treaty disputes and international trade law. Alex's arbitration experience includes proceedings conducted under the LCIA, ICC, DIAC, UNCITRAL and LMAA rules. For most of 2018 and 2019, he has been advising the United Kingdom (UK) Government on its new trade law regime. He has also represented several government and private clients in public law litigation in the United Kingdom, as well as Visa Europe in long-running litigation before the English High Court, Court of Appeal and UK Supreme Court in relation to alleged breaches of competition law. He is qualified to practise in both Australia and England and Wales.

Prior to joining Linklaters in 2013, Alex worked on the staff of various Members of Parliament in Australia, as a researcher in international arbitration at Monash University, and at the International Court of Arbitration at the ICC in Paris. Alex has published numerous journal articles on international arbitration and has served as Deputy Secretary of the Asia-Pacific Forum for International Arbitration. He speaks English, French, German and Spanish and holds a Bachelor of Arts and Bachelor of Laws (with first class honours) from Monash University.

Katherine Johnson, Barrister and Mediator, PhD (Law) Majoring in Dispute Resolution, LLM, BA (Psychology & Education), MA (School Counselling), BLegS. Accredited Mediator (NMAS), PNG and IMI

Katherine was admitted as a barrister in 1993. She has 40 years of experience assisting peace development programs and preventing conflict on an individual and societal basis. She has been training mediators

* General Editor, Australasian Dispute Resolution Journal (ADRJ).

[1] Greg is attributed with the saying "the only neutral mediator is a dead one".

since the year 2000 for National Accreditation. During her time as President of the Australian Dispute Resolution Association, Katherine was instrumental in establishing a complaints mechanism that has been nationally accepted as a template for complaints handling. She has recently published her thesis on the development of a new mediation model called the "*Re-Constructionist Model*", which focuses on dealing effectively with the impact of loss on the decision-making process from a psychological and societal viewpoint.

Katherine has worked as a counselling and organisational psychologist for 40 years and as a family dispute resolution practitioner for over 20 years. She has been a specialist workplace mediator for over 20 years and brings the knowledge from psychology into the mediation field to develop an organic model of mediation that focuses not only on the individual's need to make sense of their loss, but also acts as an agent for social change that can enhance the democratic process.

Joel Lee is a Professor at the Faculty of Law, the National University of Singapore. Joel co-pioneered the teaching of Negotiation and Mediation in the Singapore Universities and has played a significant role in furthering the development of mediation in Singapore, not just in education but in practice. A graduate of Victoria University of Wellington and Harvard Law Schools, Joel is an associate partner with CMPartners (United States) and a principal mediator with and the Training Director of the Singapore Mediation Centre.

Joel is an adjudicator with the Financial Industry Disputes Resolution Centre and was a member of the International Mediation Institute's Independent Standards Commission and Intercultural Taskforce. He was also a key member of the Ministry of Law's Working Group on International Commercial Mediation. Joel is presently the founding Chair of the Board of the Singapore International Mediation Institute.

Joel has taught overseas at the University of Copenhagen (Denmark), University of Law, Economics and Science of Aix-Marseille (Aix-en-Provence France) and Anglia Law School (United Kingdom) and is the co-editor and co-author of the book "*An Asian Perspective on Mediation*" and the General Editor for the Asian Journal on Mediation. In 2011, Joel was awarded the Outstanding Educator Award which is the National University of Singapore's highest teaching award.

CALL FOR SUBMISSIONS

After 30 years of this Journal's publication, innovation and research still continues to expand our knowledge in the broad field of dispute resolution. Thus the Journal would welcome the receipt of unpublished topical articles (up to 5,000 words) and book reviews (up to 1,000 words). All articles are peer reviewed.

Contributions should be emailed to the Thomson Reuters Editor at lta.adrj@thomsonreuters.com.

Case Notes

David Spencer*

NEW ZEALAND EDITION – ORDERING SPECIFIC PERFORMANCE OF A MEDIATED SETTLEMENT AGREEMENT; MEDIATED SETTLEMENT AGREEMENT NOT PRIVILEGED; AND MEDIATION MEDIA WATCH NZ EDITION

New Zealand has been in our minds recently for the wrong reason, after a terrorist attack on innocent worshipers at a Mosque in Christchurch – our hearts go out to all those affected. The right reason is that the New Zealand legal system has a fine reputation for promoting dispute resolution and this edition's case notes provide some recent thinking on the enforceability and use of mediated settlement agreements.

LINWOOD V RANCHHOD

In *Linwood v Ranchhod* (*Linwood*),[1] the plaintiff husband and defendant wife were a married couple separated some three years prior. Upon separation and with the assistance of their solicitors, the couple executed an agreement (the initial agreement) to put in place certain arrangements for their separation. In particular, that the defendant would have exclusive possession of the family home. When the parties were unable to resolve all issues surrounding their separation, their solicitors arranged for mediation.

Both solicitors attended mediation and at its conclusion the parties executed a comprehensive settlement agreement (the agreement). The agreement recited that the family home would be sold as soon as practicable. Further, clause 4.2 of the agreement stated that the parties would reach agreement with respect to: the appointment of a real estate agent; the sale price; the method of sale; and any other matter incidental to the sale. Significantly, it also provided that where the parties could not agree on any matter pertaining to the sale of the home

> any such differences shall be referred to an independent and senior property lawyer in the Wellington region agreed upon by the lawyers of the parties and failing agreement to such appointment to such an independent solicitor by the President of the New Zealand Law Society or his [sic] nominee with the costs of any such appointment to be shared equally.[2]

Further, the agreement recited that the appellant would continue to pay the mortgage and other related costs and the defendant would meet the cost of outgoings on the property. It provided specific payments on the proceeds of the sale and that both parties will execute all necessary documents to ensure the mediated agreement could be implemented.

Five months later, the home remained unsold because the parties could not agree on a method of sale and the plaintiff invoked the default provisions of the agreement. The parties were unable to agree on a suitable senior property lawyer to determine the method of sale and pursuant to the agreement, the President of the New Zealand Law Society appointed Mr Richard Caughley of Morrison Kent. In consultation with the parties and their solicitors, Mr Caughley developed a comprehensive protocol for the sale of the property. Subsequently the parties disagreed about Mr Caughley's protocol and as a result of this, the plaintiff sought summary judgment that the agreement, together with Mr Caughley's determination in relation to the sale of the home, were enforceable. The defendant resisted the proceedings on the basis that Mr Caughley had exceeded the jurisdiction conferred on him by the parties to the agreement.

* BA (Macq), LLB (Syd), GDLP (UTS), LLM (Hons) (UTS), AIAMA; Solicitor and Senior Lecturer-in-Law, Thomas More Law School, Australian Catholic University.

[1] *Linwood v Ranchhod* [2018] NZHC 2532.

[2] *Linwood v Ranchhod* [2018] NZHC 2532, [8] (Johnston AsJ).

Despite Johnston AsJ preferring a New Zealand authority, his Honour noted defence counsel's reference to *Barclays Bank plc v Nylon Capital LLP*,[3] which provided authority for the proposition that where parties engage an expert to determine an issue between them, the jurisdiction of the matter sounds in contract. Therefore, what is required by the Court is an "analysis of the words that the parties used in recording their joint intention having regard to the factual background and assisted by any relevant and admissible parole evidence".[4]

His Honour noted the plaintiff's submission that the parties had chosen to confer jurisdiction on an expert to determine all matters incidental to the sale of the home and that those words were wide enough to include all matters referred to in the Auckland District Law Society standard agreement for the sale of land. This would include: the real estate agent's commission; marketing budget; and dressing of the property. Alternatively, the plaintiff submitted that even if the Court found the words in the agreement were not wide enough to include the aforementioned matters, the defendant had not objected to Mr Caughley dealing with those matters.

The defendant submitted, that the Court should take a family law approach to adjudicating the matter as opposed to a commercial approach. Johnston AsJ was not convinced by this submission given the matter had been commenced in the High Court of New Zealand and in this respect must deal with the matter like any other case.[5]

Second, the initial agreement precluded Mr Caughley from making any determination regarding the right of the defendant to occupy the family home. The determination stated that the defendant should vacate the family home so it can be "dressed for sale" (a reference to moving existing furniture and possessions out of the home and dressing it for sale with modern minimalist decor making it more appealing to prospective buyers). Therefore, his determination on the defendant discontinuing her occupation of the family home was unlawful and unenforceable. His Honour rejected counsel's submission, stating:

> The pre-settlement agreement was plainly intended by the parties to establish a holding position so that they could separate and begin the process of disentangling their lives. That is why they expressly acknowledged that it was not intended to settle all differences between them concerning relationship property. On its face it was not an agreement which complied with the requirements of s 21 of the Property (Relationships) Act 1976. In my view, it was clearly open to the parties subsequently to enter into a comprehensive settlement agreement relating to relationship property which contradicted the pre-settlement agreement.[6]

Finally, the defendant submitted that the agreement did not expressly provide that the parties would be bound by the expert's determination. Johnston AsJ rejected that submission too, preferring the view that while the agreement did not expressly bind the parties to the expert's determination, it implied a binding obligation. His Honour found that the agreement to engage an expert was to unlock an impasse that they may reach in the sale of the home. His Honour opined:

> In my view, it goes without saying that the parties agreed that they would be bound by the outcome of any expert determination. In the absence of any such implied term not only would the clause itself be of no practical value to the parties, it would have the effect of rendering the mediated settlement agreement a mere "agreement to agree" and therefore practically unenforceable.[7]

The defendant submitted that the Court read down the scope of the expert's jurisdiction in relation to: the appointment of a real estate agent; the appointment of solicitors to act on the conveyance; and the defendant leaving the home so it could be "dressed for sale" by the real estate agent up to the value of $2,500 plus goods and services tax.

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[3] *Barclays Bank Plc v Nylon Capital LLP* [2012] 1 All ER (Comm) 912; [2011] EWCA Civ 826.

[4] *Linwood v Ranchhod* [2018] NZHC 2532, [19] (Johnston AsJ).

[5] Note: The High Court of New Zealand is the approximate equivalent to an Australian State Supreme Court. The High Court was established in December 1841 and was known until 1980 as the Supreme Court. Appeals from the High Court are heard in the New Zealand Court of Appeal leaving the Supreme Court of New Zealand as the final court of appeal (the equivalent of the High Court of Australia).

[6] *Linwood v Ranchhod* [2018] NZHC 2532, [27] (Johnston AsJ).

[7] *Linwood v Ranchhod* [2018] NZHC 2532, [29] (Johnston AsJ).

Johnston AsJ found that Cl 4.2 of the agreement did not confer jurisdiction on Mr Caughley to determine that the defendant should vacate the family home. His Honour was influenced by the background – largely the initial agreement – against which the agreement was entered into, namely: the right conferred on the defendant to occupy the family home prior to its sale; the lack of express contradiction in the agreement to the defendant's right to occupy the family home; the responsibility of the defendant to pay outgoings on the family home despite having to vacate it; and the responsibility of the defendant to provide day-to-day care of the couple's child.

His Honour found that part of the expert's determination relating to the defendant vacating the property to "dress it" was outside the jurisdiction of the expert which the parties had conferred on him. Further, there was no evidence that the defendant had acquiesced to Mr Caughley's determination for her to vacate the property. Pursuant to the Court's power to sever repugnant elements of any agreement, his Honour ordered specific performance of the agreement and the expert determination save for two sections of the expert determination providing for the dressing of the property and the dressing of the property necessitating the defendant to vacate the family home.

Linwood's case provides us with a comparative law example of the Court's desire to promote the mediation of disputes by enforcing mediated settlement agreements. It also reminds us of the limits of jurisdiction conferred on experts by the mediated settlement agreement. In this respect, like all agreements, we must be specific in relation to the express powers granted to an expert determiner especially when their existence is purely to assist parties to unlock an impasse. The job of such a document to direct the impasse breaker should not give rise to further disputes – in other words, mediation agreements should "do no harm".

McKay v Commissioner of Inland Revenue

In *McKay v Commissioner of Inland Revenue* (*McKay*),[8] the appellant had what the judgment described as a "brief liaison" with A (an unnamed woman) which allegedly produced a male child B (an unnamed child). The judgment noted that, "a DNA diagnostic report based on testing commissioned by Mr McKay very strongly supported Mr McKay being B's biological father."[9] The appellant wanted to enter family dispute resolution (FDR) with the view of discussing paternity, citizenship, guardianship and custody. The agreement to mediate, executed by the parties prior to mediation, contained the following clauses:

> Confidentiality of the mediation process
>
> 8. The mediator and the parties will treat as confidential all written and oral communications as well as documents presented at or before mediation.
>
> ...
>
> 10. Any information, whether written or spoken, about what occurred in the mediation is privileged. It shall not be used by any party in any Court unless all parties agree.
>
> Agreement to keep confidentiality of the mediation process
>
> 20. People who attend the mediation in a support role, will treat as confidential all written and oral communications as well as documents presented at or before mediation.
> 21. Any information, whether written or spoken, about what occurred in mediation is privileged and shall not be used for or against any party unless all parties agree.[10]

At mediation the parties reached agreement on all parenting and guardianship matters in dispute and signed a settlement agreement (agreement) that included an acknowledgment that the appellant was the father of B. Pursuant to s 12(6) of the *Family Dispute Resolution Act 2013* (NZ) (*FDRA*), the mediator provided each party with a form recording the outcome of mediation. The appellant attempted to give effect to the mediated agreement but to no avail. Party A made application to the respondent for the appellant to pay child support and attached to the application, the DNA test results and the

[8] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477; [2018] NZCA 138.

[9] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 479 [4] (Toogood J); [2018] NZCA 138.

[10] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 482–483 [21]–[22] (Toogood J); [2018] NZCA 138.

agreement. The appellant challenged the child support application and among other things, asserted that the agreement was privileged and confidential. The respondent disallowed the appellant's challenge and sought judicial review in the New Zealand High Court who found that the agreement was neither privileged nor confidential. McKay appealed to the Court of Appeal.[11]

In delivering the judgment for the Court, Toogood J noted the submissions made by the appellant to the court of original jurisdiction in relation to the confidential nature of the agreement referring to s 14 of the *FDRA* which states:

> 14 Privilege
>
> (1) This section applies to a statement that a party to a family dispute makes to an FDR provider for the purpose of enabling the FDR provider to deal with the dispute.
> (2) No evidence of the statement is admissible in any court or before any person acting judicially, unless the statement is recorded in a family dispute resolution form.[12]

The appellant submitted to the court of original jurisdiction that in making her decision, the Commissioner relied on a document that was not lawfully provided to her and therefore, had no lawful basis on which to conclude that he was the father of the child. He sought orders for the Commissioner to be directed not to rely on the agreement, to return the agreement and destroy any copies of it and set aside the Commissioner's decision.

His Honour respectfully reduced the appellant's detailed submission to the Court to the following points:

(a) Submitting to the mediation process was effectively compulsory for Mr McKay if, in the absence of agreement with A, he wished to obtain any order under the COCA[13] involving him in the parenting or guardianship of B.
(b) The agreement to mediate included a term providing that the mediation was a confidential and privileged process and outcome.
(c) Legal representation is not encouraged in FDR[14] and legal aid is not available to participants in mediation under the FDRA. A mediated agreement is a private agreement signed without any legal representation or advice and is not legally enforceable in itself.
(d) By analogy with settlement conferences conducted under s 46Q of the COCA, a written mediated agreement is both privileged and confidential, and because it is a "statement" covered by s 14(1) and (2) of the FDRA.
(e) Section 57(3) of the Evidence Act 2006 [*sic*] does not apply.
(f) There is a distinction between the FDR form which is signed by the mediator or FDR provider rather than the parties, and a written mediated agreement which is signed by the parties.
(g) The FDR form generated by the FDR provider under s 12(8) of the FDRA, recording the matters agreed at mediation, is not privileged but is not enforceable in itself.
(h) Written mediated agreements remain privileged and confidential when not attached to the FDR form and cannot be used for the purposes of obtaining an order of the Family Court unless both parties consent.
(i) The parties to FDR are vulnerable in that they are forced into the process if they want resolution of a family dispute concerning emotionally charged matters; are unrepresented by lawyers; and may agree on matters or make concessions which have far-reaching implications. Attaching privilege to an agreement which records the outcome of FDR provides protection from the very real possibility of injustice through an imbalance of power or ignorance or duress.
(j) The protection of privilege and confidentiality in respect of a mediated agreement is waived only when the parties apply to the Family Court for consent orders based on the agreement.

[11] Note: The High Court of New Zealand is the approximate equivalent to an Australian State Supreme Court. The High Court was established in December 1841 and was known until 1980 as the Supreme Court. Appeals from the High Court are heard in the New Zealand Court of Appeal leaving the Supreme Court of New Zealand as the final court of appeal (the equivalent of the High Court of Australia).

[12] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 480 [11] (Toogood J); [2018] NZCA 138.

[13] *Care of Children Act 2004* (NZ).

[14] The abbreviation "FDR" stands for "Family Dispute Resolution".

(k) Although the parties to a mediation do not have access to legal advice at the mediation, an application for a consent order under the COCA will allow that opportunity before the agreement becomes enforceable, and provides a degree of judicial oversight.
(l) Only consent orders made by the Family Court are not privileged.
(m) Because a written mediated agreement is confidential and privileged under s 14(2), it cannot be used by the Commissioner under the CSA. Under that Act, the Commissioner is a "person acting judicially" for the purposes of s 14(2) of the FDRA because the Commissioner has "authority to hear, receive, and examine evidence".[15]

Toogood J accepted the appellant's submission to the court of original jurisdiction that, "at the time he signed the mediated agreement he understood that the document containing his admission of paternity was privileged and confidential and that it could not be used against him in any way without his consent".[16] The appellant based this submission on having signed the agreement to mediate which provided for confidentiality and privilege over oral and written communications at or before mediation. He submitted that he was further advised by the mediator of the prohibition of disclosure regarding said communications.

In commencing the substantive part of his Honour's judgment, Toogood J opined that the court of original jurisdiction reached the correct conclusion in relation to s 14 of the *FDRA* not conferring privilege on the agreement. His Honour reasoned that, "The agreement, which reflects the outcome of the dispute resolution process in which they had engaged under the FDRA, must be distinguished from the process by which it was reached."[17] Toogood J stated that the duty of the FDR provider is to help the parties identify the issues, facilitate discussion and help them find a resolution. His Honour noted that s 12 of the *FDRA* recognises that not all disputes will be settled by mediation and that on occasions where a settlement is reached, the FDR provider is required to give each party a form stating those matters where agreement has been reached. The agreement was not attached to that form but contained a summary of the agreement. Therefore:

> Section 14(1) of the FDRA must be construed in the light of the procedure referred to in the sections preceding it. Statements made to an FDR provider for the purposes of enabling the provider to deal with the dispute will include statements made prior to the commencement of the mediation and statements made in the course of it. Such statements may have included admissions about paternity or other matters.[18]

His Honour noted the comments of the court of original jurisdiction when it stated that the purpose of privilege is to allow parties to speak freely with the aim of resolving the dispute without the fear of those frank discussions being used against parties in subsequent proceedings. In particular the overall objective of this public policy approach to confidentiality and privilege "is to facilitate out of court resolution, and reduce the necessity for litigation".[19]

Toogood J found that given the different potential outcomes of mediation, the recording of the resolution of matters in a written agreement is a step taken after the FDR provider has dealt with the dispute. Further, "Unless the parties to the dispute are then able to use the written mediated agreement unilaterally, the FDR procedure and the result of it have little or no purpose."[20] His Honour also explained that the unilateral lifting of privilege in order to obtain a Family Court order, while counter to the appellant's public policy argument, was necessary to protect the vulnerable or unwary party to family law proceedings.

His Honour found that the *Child Support Act 1991* (NZ) contemplated that in making decisions about child support payments, the Commissioner must rely on any agreement struck between the parties

[15] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 483–484 [25] (Toogood J); [2018] NZCA 138.

[16] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 484 [26] (Toogood J); [2018] NZCA 138.

[17] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 485 [29] (Toogood J); [2018] NZCA 138.

[18] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 485 [32] (Toogood J); [2018] NZCA 138.

[19] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 486 [32] (Toogood J); [2018] NZCA 138. His Honour also noted the same public policy rationale in common law "without prejudice privilege" and *Evidence Act 2006* (NZ) s 57(3).

[20] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 486 [34] (Toogood J); [2018] NZCA 138.

relating to ongoing care of a child. Such an assessment directly relates to the amount of child support is payable in any given circumstance. Toogood J found that the agreement is not a "statement" for the purpose of the application of s 14 of the *FDRA* and therefore is not privileged.

Similarly, in relation to the claim that the agreement was confidential, his Honour found that the agreement did not state that it was confidential and there is nothing in the statutory scheme that infers that such agreements are confidential. Toogood J stated:

> To the contrary, the fact that the contents of the agreement may be included in the FDR form prepared by the FDR provider and subsequently given to the Family Court under s 13 of the FDRA provides clear indication that the document is not confidential to the parties.[21]

The Court was satisfied that the decision of the court of original jurisdiction had been correctly decided as to the whether the agreement was privileged or confidential and dismissed the appeal.

McKay's case is a reminder that when drafting settlement agreements, we need to be precise in our language as to the confidential nature of the agreement notwithstanding the statutory and common law exceptions to confidentiality. In the instant case it is likely that the statutory scheme of FDR in New Zealand would have overtaken any such term of a settlement agreement given the nature of the provider report and the Court's power to make orders based on a unilateral application to embody a court-annexed mediation agreement in orders of the Court. Nevertheless, precision in drafting is still an important element to dispute resolution procedures and our duty to the Court requires us to not only know what is permissible in terms of the jurisdiction we operate within but also to keep informed our clients as to their rights pursuant to such processes.

[21] *McKay v Commissioner of Inland Revenue* [2018] NZFLR 477, 488 [44] (Toogood J); [2018] NZCA 138.

MEDIATION MEDIA WATCH – NEW ZEALAND EDITION

MEDICAL MAYHEM MEDIATED

Radio New Zealand's online platform reported in an article entitled "Junior doctors back on strike and in mediation today" that mediation offered a potential glimmer of hope in a dispute between doctors and their respective district health boards (DHB).[22] Health Correspondent for Radio NZ (RNZ), Karen Brown, reported that members of the Resident Doctors' Association (RDA) will be off work at all public hospitals except West Coast for one day and their employment deal with the 20 DHBs had expired.

The article stated:

> After this [*mediation*], if there's still no agreement, DHBs could offer any Resident Doctors' Association (RDA) member who changes employment as part of their training an individual employment contract with new conditions.[23]

Brown quoted RDA senior advocate, David Munro, as stating, "We're a bit closer, but no less determined." The article confirmed that both sides of the dispute had agreed they will participate in mediator-assisted bargaining in Auckland to try and resolve the dispute.

The report cites Dr Kathryn Foster, who works at Auckland DHB, who is going on strike and who stated that doctors just want protections in place to work safety. The article quotes her as saying:

> We've engaged in a negotiation in which we've systematically given up protection after protection in our attempts to endeavour to get the settlement with the DHBs and they have systematically refused to engage with us on any of our issues.[24]

The article reports that the strike came six weeks after the first 48-hour strike by the resident medical officers, or junior doctors, over proposed changes by their employers to their complex employment agreement. It also noted that, "It is necessarily not the longest strike experienced by DHBs. RNZ understands junior doctors went on strike for six weeks in Southland 20 years ago."

Brown reported that the DHBs asked the Employment Relations Authority (ERA) to intervene accusing the RDA of "breaching its legal obligation to act in good faith by making statements in public and/or to its members that are inaccurate and therefore misleading and/or deceptive". The article also stated:

> DHBs also said the RDA had undermined bargaining by "passing inaccurate information about the bargaining to a third party which is publicly criticising the applicants' bargaining position".[25]

POSTSCRIPT

In a media release from the RDA, the Senior Advocate stated:

> (NZRDA) have voted to strike for a fifth time this year. The fifth strike will take place for four days, from Monday 15th April – Thursday 18th April 2019.
>
> This strike notice follows the hardening of the DHBs bargaining position when the parties last met on 7 March.
>
> The four-day strike will not take place in Canterbury DHB following the atrocity in Christchurch.
>
> "Yet again, our members have voted overwhelmingly in favour of strike action. However, we must emphasise that the four-day strike will not take place in Canterbury following the recent tragedy in Christchurch", says David Munro, Senior Advocate, NZRDA.
>
> "Our delegates both in Canterbury and across New Zealand have advised that they believe strike action is appropriate throughout the rest of the country. The significance of this four-day strike reflects the unity,

[22] Radio NZ, "Junior Doctors Back on Strike and in Mediation Today", 26 February 2019 (Karen Brown) <https://www.radionz.co.nz/news/national/383358/junior-doctors-back-on-strike-and-in-mediation-today>.

[23] Radio NZ, n 22.

[24] Radio NZ, n 22.

[25] Radio NZ, n 22.

strength and commitment of the resident doctors. It's a clear message to the DHBs that they are not backing down in their ongoing battle for a fair deal."

In the interim, the ERA has directed both parties to another session of mediated bargaining on Friday 5th April.

"We will again attend mediated bargaining in good faith and with an open-mind to finding a solution to the impasse," says Mr Munro. "We trust that the DHBs will also approach mediation next week with an open-mind to compromise or this dispute will continue into winter when hospitals are busier than ever."[26]

[26] Resident Doctors' Association, *Resident Doctors Issue Notice of Four-day Strike* (29 March 2019) <https://www.nzrda.org.nz/wp-content/uploads/Resident-Doctors-Issue-Notice-of-Four-Day-Strike-Final-29-03-2019.pdf>.

International Arbitration in Australia: 2017/2018 in Review

Albert Monichino QC and Alex Fawke*

This annual article updates readers on the most important developments in international arbitration in Australia in the past year. It surveys legislative, case law and other developments between 1 September 2017 and 31 December 2018.

I. Introduction

In 2018, Australia hosted the largest arbitration event in its history: the International Council for Commercial Arbitration (ICCA) Congress. There was no shortage of talking points. Across the world, arbitration continues to grapple with criticism as to its legitimacy and to develop a coherent international body of law. In Australia, there have been important developments over the past year which clarify Australian courts' approach to key legal issues, including court subpoenas in support of foreign arbitrations, anti-arbitration injunctions and the relationship between the summary judgment procedure and enforcement of arbitral awards. Moreover, the stage is set for a High Court decision on the proper approach to interpretation of arbitration agreements under Australian law. This article examines the most important of these developments.

II. Legislative Developments

At the time of writing last year's review article, certain minor amendments to the *International Arbitration Act 1974* (Cth) (the *IAA*) were before the Senate. The *Civil Law and Justice Amendment Bill 2017* (Cth) had been introduced into Parliament in March 2017 and, after some delay, it received Royal Assent on 17 October 2018.

The four amendments to the *IAA* are:

(1) Clarification that, under s 8, the persons who are bound by a foreign award are the parties to the *award*, rather than the parties to the *arbitration agreement*. This addresses the difficulty which led to the Victorian Court of Appeal refusing to enforce a foreign award in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*.[1]

(2) A definition of "competent court" under s 18 to expressly name the Federal Court of Australia and the Supreme Courts of the States and Territories. This avoids any confusion as to the competent court for the purpose of enforcing an international arbitration award made in Australia, granting interim measures and seeking procedural assistance from a court.

(3) Implementation of new transparency measures in investor-state arbitration. This amendment excludes the operation of the confidentiality provisions in ss 23C–23G in investment arbitrations within the scope of the *UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration* (known as the *Mauritius Convention*).

(4) Modernisation of the language on arbitrators' powers to award costs. This removes the archaic reference to "taxation" of costs, leaving in place the broad discretion for arbitrators to determine costs.

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[1] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303; [2011] VSCA 248.

III. Case Law Developments

Since 1 September 2017, there have been 36 arbitration-related judgments in Australian courts. Eighteen concerned international arbitration,[2] fifteen concerned domestic arbitrations under the new *Commercial Arbitration Acts* (the *CAAs*)[3] and three concerned domestic arbitration under the old *CAAs*.[4] Of the international arbitration cases, seven were heard in the Federal Court, six in the Supreme Court of New South Wales, three in the Supreme Court of Western Australia, two in the Supreme Court of Victoria and one in the Supreme Court of South Australia. This part discusses a selection of those cases.

A. International Commercial Arbitration

Hyundai Engineering & Steel Industries Co Ltd v Alfasi Steel Constructions (NSW) Pty Ltd [2018] FCA 1054

Facts

Hyundai, a Korean company, entered into a contract to manufacture steel for Alfasi, an Australian company, to use in a construction project in Darling Harbour, Sydney. The contract was governed by the laws of New South Wales and included an arbitration agreement referring disputes to arbitration in Singapore in accordance with the Singapore International Arbitration Centre Arbitration Rules.

After a dispute arose over delays, Alfasi commenced arbitration in Singapore seeking AUD 19 million in liquidated damages. Hyundai counter-claimed, alleging that Alfasi was responsible for the delays which entitled Hyundai to extensions of time and delay-related costs. The arbitrator found against Alfasi and made a net award in favour of Hyundai for AUD 5 million, including pre-award interest and costs. Hyundai filed an application with the Federal Court of Australia to enforce the award in Australia.

Shortly afterwards, Alfasi filed an originating application in the High Court of Singapore seeking to set aside the award, in part, under Arts 34(2)(a)(iii) and 34(2)(b)(ii) of the *UNCITRAL Model Law on International Commercial Arbitration* (*Model Law*) as applied in Singapore.

Alfasi then made application to the Federal Court to adjourn the enforcement application pursuant to s 8(8) of the *IAA*, which provides the Court with a discretion to adjourn proceedings to enforce a foreign

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[2] *Re Samsung C&T Corporation* [2017] FCA 1169; *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223; *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd* (2018) 130 IPR 527; [2018] NSWCA 81; *Kennedy Miller Mitchell Films Pty Ltd v Warner Bros Feature Productions Pty Ltd* [2017] NSWSC 1526; *Kraft Foods Group Brands LCC v Bega Cheese Ltd* (2018) 358 ALR 1; [2018] FCA 549; *Trans Global Projects Pty Ltd (in liq) v Duro Felguera Australia Pty Ltd* [2018] WASC 136; *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)* (2018) 53 WAR 201; [2018] WASCA 174; *Eriez Magnetics Pty Ltd v Duro Felguera Australia Pty Ltd* [2017] WASC 304; *Hyundai Engineering Steel Industries Co Ltd v Two Ways Constructions Pty Ltd (No 2)* [2018] FCA 1551; *Hyundai Engineering Steel Industries Co Ltd v Two Ways Constructions Pty Ltd* [2018] FCA 1427; *Hyundai Engineering & Steel Industries Co Ltd v Alfasi Steel Constructions (NSW) Pty Ltd* [2018] FCA 1054; *CPB Contractors Pty Ltd v Rizzani de Eccher Australia Pty Ltd* [2017] NSWSC 1798; *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* [2018] VSC 316; *Hurdsman v Ekactrm Solutions Pty Ltd* [2018] SASC 112; *Ye v Zeng (No 7)* [2018] FCA 1478; *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2)* [2018] VSC 741; *Joban Kosan Co Ltd v Flame SA* [2018] NSWSC 1754; *Kawasaki Heavy Industries Ltd v Laing O'Rourke Australia Construction Pty Ltd* (2017) 96 NSWLR 329; [2017] NSWCA 291.

[3] *Jemena Gas Works (NSW) Ltd v AGL Energy Ltd* [2017] NSWSCA 266; *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170; *CPB Contractors Pty Ltd v Celsus Pty Ltd* (2017) 257 FCR 442; [2017] FCA 1620; *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39; *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610; *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* [2018] VSC 221; *Broken Hill City Council v Unique Urban Built Pty Ltd* [2018] NSWSC 825; *Eastern Goldfields Ltd v GR Engineering Services Ltd* [2018] WASC 224; *Mitchell Water Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2018] VSC 753; *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206; *Downer EDI Rail Pty Ltd v John Holland Pty Ltd v QBE Insurance (Australia) Ltd (No 6)*; *Kellogg Brown & Root Pty Ltd v John Holland Pty Ltd (No 5)*; *John Holland Pty Limited v Kellogg Brown & Pty Ltd v QBE Insurance (Australia) Ltd* [2018] NSWSC 581; *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No 9)* [2018] WASC 122; *GR Engineering Services Ltd v Eastern Goldfields Ltd* [2018] WASC 19; *ASC AWD Shipbuilder Pty Ltd v Ottoway Engineering Pty Ltd* (2017) 129 SASR 12; [2017] SASCFC 150; *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442; [2017] FCAFC 170.

[4] *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2017] WASC 379; *Wolfe v Sydney Bush Walkers Inc* [2018] NSWSC 1032; *Li v Mi (No 2)* [2017] ACTSC 318.

arbitral award. It also empowers the Court to make any adjournment conditional "on the [party seeking the adjournment] giv[ing] suitable security", upon application by the party seeking to enforce the award. Hyundai made such an application.

Alfasi argued that the enforcement application should be adjourned without it having to provide security. Hyundai opposed the adjournment but submitted that, if an adjournment were granted, it should only be on the condition that Alfasi provide suitable security equivalent to the entire amount of the award (including post-award interest up to the date of the enforcement application).

Thus, there were three issues before O'Callaghan J: (1) should the enforcement application be adjourned; (2) if so, should Alfasi be required to provide security; and (3) if so, the quantum of that security.

Decision

His Honour considered the principles that guide the exercise of the discretion to order security under s 8(8) of the *IAA*, observing that:

> I agree, with [Foster J's reasoning and approach in *Esco Corporation v Bradken Resources Pty Ltd*], and I also propose to follow the UK authorities relied upon by [Foster J, namely *Soleh Boneh International Ltd v Government of the Republic of Uganda* and *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation*].

In particular, his Honour endorsed and applied Foster J's observation that what constitutes "suitable security in any given case will depend on all the circfumstances under consideration" including, inter alia, the prospects of the award debtor setting aside the award at the arbitral seat and whether enforcement may be rendered more difficult (eg, by reason of movement of assets out of the jurisdiction) if enforcement is delayed.

In assessing "suitability" of security, O'Callaghan J considered that "a notional sliding scale is of help in determining where the justice of the matter lies", whereby (at opposite ends of a spectrum) a court that finds an award to be "manifestly invalid" should adjourn the enforcement application without security, but where it finds the award to be "manifestly valid" any adjournment should be conditional on the provision of appropriate security.

His Honour acknowledged that, when a court is asked to adjourn an enforcement proceeding under s 8(8) of the *IAA*, its assessment will "ordinarily be undertaken on incomplete material and in circumstances where only the briefest consideration of the arguments [to be raised before the supervisory court] would be appropriate".

Hyundai conceded that Alfasi's application in Singapore was bona fide and arguable, albeit "weak" and "most unlikely to succeed". Hyundai submitted that the evidence Alfasi adduced about its financial position was "opaque" and that "the only way to secure Hyundai's position was to require Alfasi, as a condition of the adjournment, to provide security in the full amount of the Award".

O'Callaghan J noted that the discretion in s 8(8) of the *IAA* was a wide one, to be exercised against the obligation of the Court to pay due regard to the objects of the *IAA* as well as the spirit and intention of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention*). In exercising his discretion, his Honour proceeded on the basis that Alfasi's setting aside application was made bona fide and was arguable.

His Honour held that "the case for security here is overwhelming". He was particularly influenced by the fact that, even if Alfasi succeeded in the Singapore proceedings, it would still owe Hyundai around AUD 5 million on the award (including costs and post award interest) and still be "largely successful".

In circumstances where the Court was asked to accept no more than that Alfasi's case in Singapore was "arguable", his Honour rejected the notion that partial security should be ordered and instead ordered security in the amount of the entire award plus post award interest.

Comment

The purpose of security is to ensure that an award creditor is not disadvantaged by the adjournment of the enforcement application. The decision demonstrates that, for an enforcement proceeding to be adjourned

without security, the award debtor must demonstrate that the arguments for setting aside the award are "strong" (ie that the award is manifestly invalid) and not merely "arguable".

Notably, Alfasi subsequently failed to provide the required security. The matter came back before the Court on two separate occasions, with the award being enforced on the latter occasion.[5] The setting aside application had not been heard or determined when the award was enforced.

A difficult question will arise if Alfasi is successful in its setting aside application. In those circumstances, Alfasi could apply to the Federal Court to vacate or vary the judgment enforcing the award. However, his Honour expressed the view that the Court would not vacate or vary its previous enforcement judgment, fundamentally resting this obiter view on the "finality" of judgments.[6]

Thus, even if the award is in future varied downwards by the supervisory court in Singapore, Hyundai will nevertheless receive the benefit of the higher award. It is respectfully submitted that this obiter view is questionable.

Kraft Foods Group Brand LLC v Bega Cheese Ltd [2018] FCA 549

Facts

Kraft Foods Group Brand LLC (Kraft), commenced related proceedings in both the United States and Australia against Bega Cheese Limited (Bega), an Australian foodstuffs company, regarding Bega's use of "trade-dress" on its peanut butter jars. Kraft had previously granted Mondelez, another conglomerate, a limited licence to use Kraft's peanut butter branding in Australia. The licence was contained in a master agreement executed by Mondelez and Kraft. It included an arbitration agreement that provided for arbitration in New York of "[a]ny controversy or claim arising out of or relating to [the master agreement], or the breach thereof". The clause further provided: "[E]ach party agrees … that the procedures set forth [in the clause] shall be the exclusive means for the resolution of any Dispute." When Bega purchased Mondelez's Australian operations in 2017, Bega also acquired that licence.

Bega began marketing its peanut butter using the Bega label. In September 2017, Kraft complained to Bega that its trade-dress was not permissible under the master agreement. It contended that Bega's advertisements were likely to mislead consumers into believing that Kraft peanut butter had been replaced by Bega peanut butter. It sought to arbitrate the dispute. Bega responded that it was not a party to, or bound by, the master agreement. In October 2017, Kraft commenced proceedings before the District Court of the Southern District of New York seeking to compel Bega to submit to arbitration.

In November 2017, Kraft brought proceedings in the Federal Court of Australia alleging that three of Bega's advertisements contravened s 18 of the *Australian Consumer Law* (*ACL*), forming Sch 2 of the *Competition and Consumer Act 2010* (Cth). Section 18 provides that "[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

In February 2018, Kraft commenced an arbitration against Bega in New York. Bega immediately made an ex parte application to the Federal Court of Australia for an interim anti-arbitration injunction, precluding Kraft from continuing the arbitration.[7] O'Callaghan J granted the interim injunction.

When the matter returned before the Federal Court, the primary issue was whether a permanent anti-arbitration injunction should be ordered.[8]

Decision

In determining the matter, the trial judge took the opportunity to clarify the Australian approach to anti-arbitration injunctions in respect of foreign arbitral proceedings.

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[5] On 13 September 2018 (*Hyundai Engineering Steel Industries Co Ltd v Two Ways Constructions Pty Ltd* [2018] FCA 1427) and on 2 October 2018 (*Hyundai Engineering Steel Industries Co Ltd v Two Ways Constructions Pty Ltd (No 2)* [2018] FCA 1551).

[6] *Hyundai Engineering Steel Industries Co Ltd v Two Ways Constructions Pty Ltd (No 2)* [2018] FCA 1551, [18].

[7] See Gary B Born, *International Commercial Arbitration* (Kluwer, 2nd ed, 2014) 1306 on anti-arbitration injunctions.

[8] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [103]; [2018] FCA 549.

Bega relied on two alternative grounds for the grant of an anti-arbitration injunction:

(1) first, if allowed to proceed, the arbitration in the United States would potentially interfere with the Australian court proceeding. This is because the Australian proceeding substantially overlapped with the proposed arbitration in New York and, therefore, raised the possibility of inconsistent findings in respect of the dispute between the parties;[9] and
(2) second, requiring Bega to defend substantially the same claim in two separate jurisdictions would be oppressive and, as such, the Court should grant an injunction in its equitable jurisdiction.

After reviewing the claims in the Court proceedings and the arbitration, O'Callaghan J concluded that "there was a substantial degree of overlap between the two proceedings" since the "question of the ownership of the packaging" was central to both proceedings.

His Honour turned to the question of whether an anti-arbitration injunction should be awarded. He conceptualised anti-arbitration injunctions as being closely akin to anti-suit injunctions. As such, the Federal Court's power to grant such an injunction arises from two separate sources: from its inherent power to prevent its processes being abused and, separately, its equitable jurisdiction. These are separate grounds, and only one needs to be satisfied for an injunction to be issued.[10] This characterisation – endorsed by the High Court in *CSR Ltd v Cigna Insurance Australia Ltd* (*Cigna Insurance*)[11] – was accepted by the parties.[12]

His Honour proceeded to consider the Court's inherent power to award an anti-arbitration injunction. In resisting the injunction, Kraft relied on *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato Kft*[13] and submitted that anti-arbitration injunctions "fall to be applied through a different prism **and with extra caution**" than anti-suit injunctions.[14] As such, anti-arbitration injunctions to restrain foreign arbitration should only be made in "exceptional" circumstances because "such matters are best left to the relevant supervisory courts" at the arbitral seat.[15]

His Honour found this submission unconvincing. O'Callaghan J pointed out that the "exceptional circumstances" criteria beg the question of "what comprises exceptional circumstances". In his Honour's view, an exceptional circumstance would include a court issuing an injunction to protect its own processes.[16]

His Honour also rejected the contention that anti-arbitration injunctions should be approached with "extra caution". Instead, whether to issue an anti-arbitration injunction should be determined "consistently with the principles enunciated by the High Court in [Cigna Insurance]",[17] adding that "[n]o part of the exercise of the Court's discretion on an application for an anti-arbitration injunction involves … whether the relief claimed is 'exceptional'".[18]

Regarding the relevance of supervisory courts at the arbitral seat, his Honour considered this to be capable of displacement where, as in the case at hand, granting an injunction was based on interference with the processes of an Australian court.[19]

O'Callaghan J concluded that a permanent anti-arbitration injunction should be awarded because of the risk (or possibility) of inconsistent findings about the ownership of the packaging in the Australian court proceedings and the arbitration, as well as the potential costs and inconvenience to the parties

[9] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [8 –[14]; [2018] FCA 549.

[10] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [61]–[66]; [2018] FCA 549.

[11] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

[12] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [98]; [2018] FCA 549.

[13] *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato Kft* [2011] 2 All ER (Comm) 128; [2011] EWHC 345 (Comm).

[14] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [98]; [2018] FCA 549 (emphasis added).

[15] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [98]; [2018] FCA 549.

[16] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [99]; [2018] FCA 549.

[17] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [100]; [2018] FCA 549.

[18] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [100]; [2018] FCA 549.

[19] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [102]; [2018] FCA 549.

of concurrent proceedings.[20] In this regard, he noted that inconsistent curial findings are a "potential disaster".[21]

His Honour addressed the parties remaining arguments, including whether the Court's equitable jurisdiction was enlivened, by way of obiter.

Comment

The judgment clarifies that the Australian position regarding the court's inherent power to order anti-arbitration injunctions in respect of foreign arbitral proceedings is broader than that found in other common law jurisdictions, like the United Kingdom,[22] and civil law jurisdictions, like France.[23]

The upshot of this decision is that provided that the Australian court's processes are threatened – which, under O'Callaghan J's reasoning may occur where there is significant overlap between the issues in dispute before the court and the arbitration – an anti-arbitration injunction is likely to be awarded.

With respect, this case is best limited to its unusual facts; that is, where a party initiates arbitration in one jurisdiction and then subsequently brings court proceedings in another jurisdiction in relation to claims that are substantially similar to the issues raised in the arbitration. It is unusual for a party to commence and pursue concurrent arbitral and court proceedings raising similar issues, as it raises the prospect that the party has waived its right to arbitrate.[24]

Moreover and with respect, the statement of principle as to when an Australian court should grant an anti-arbitration injunction in respect of foreign arbitral proceedings is too broad and parochial.

First, the mere risk of inconsistent findings should not be a sufficient (sole) basis for the grant of such an injunction. To proceed on this basis is to potentially reward a party for flagrantly breaching an arbitration agreement by bringing court proceedings in relation to a dispute that the parties had agreed to arbitrate.

Second, it is inappropriate to assimilate anti-arbitration injunctions and anti-suit injunctions. It is to be remembered that *Cigna Insurance* did not deal with anti-arbitration injunctions – indeed, arbitration is not even mentioned in that judgment. Furthermore, the enforcement of foreign arbitration agreements and foreign arbitral awards in 159 jurisdictions is governed by the *New York Convention*. There is no comparable governing structure for foreign litigation. Whether to grant an anti-arbitration injunction needs to be considered in light of this international regime for arbitral processes and awards. Widening the instances in which anti-arbitration injunctions are granted threatens to upset this established international order.

Even if there is a controversy about the validity of the arbitration agreement, or whether the dispute falls within the scope of the arbitration agreement, that controversy is best be left to the arbitral tribunal to determine, subject to review of that ruling by the supervisory court at the putative arbitral seat. The prospect of an Australian court injecting itself into that dispute based on potential abuse of its own processes – based solely on the risk of inconsistent determinations – should be avoided except in the most extreme cases.

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[20] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [104], [107]; [2018] FCA 549.

[21] *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [108]; [2018] FCA 549, quoting *El Amria, The and El Minia* [1982] 2 Lloyd's Rep 28, 128 (Brandon LJ).

[22] See, eg, *Cetelem SA v Roust Holdings Ltd* [2005] 2 Lloyd's Rep 494; [2005] EWCA Civ 618; *Excalibur Ventures LLC v Texas Keystone Inc* [2012] 1 All ER (Comm) 933; [2011] EWHC 1624 (Comm); *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato Kft* [2011] 2 All ER (Comm) 128; [2011] EWHC 345 (Comm).

[23] See generally Born, n 6, 1311.

[24] Kraft denied that it had waived its right to arbitration and, in any event, submitted that the question of waiver was to be decided by the arbitrators or the supervisory court at the arbitral seat. O'Callaghan J accepted Kraft's submissions on waiver. See *Kraft Foods Group Brands LLC v Bega Cheese Ltd* (2018) 358 ALR 1, [121]–[126]; [2018] FCA 549. Contrast *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* [2019] 1 Lloyd's Rep 113; [2018] SGCA 63 where the Singapore Court of Appeal held that the commencement of court proceedings in the face of a binding arbitration agreement may constitute a prima facie repudiation of the arbitration agreement.

Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd

Facts

Liaoning Zhongwang Group Co Ltd (Liaoning), a Chinese company, entered into a distribution agreement (the Agreement) with its Australian-registered branch company, Alfield Group Pty Ltd (Alfield).[25] The Agreement permitted Alfield to sell Liaoning-produced aluminium extrusions in Australia in return for making certain repayments to Liaoning. Clause 12 of the Agreement provided for arbitration before China International Economic and Trade Arbitration Commission (CIETAC) in Beijing according to the CIETAC Rules.

In October 2010, Liaoning brought an arbitration against Alfield under the Agreement seeking restitution for extrusions it had provided. Alfield initially participated in the arbitration process – including appointing an arbitrator, making written submissions to the arbitral tribunal and lodging counterclaims. When Alfield failed to appear at the first oral hearing, CIETAC requested that Alfield notify CIETAC of any objections or intention to apply for a second oral hearing. Alfield failed to respond; the arbitral tribunal then made an arbitral award in favour of Liaoning in August 2011.[26]

After Alfield refused to comply with the award, Liaoning applied to the Federal Court of Australia for enforcement pursuant to s 8(3) of the *IAA* and sought summary judgment of its application pursuant to s 31A of the *Federal Court of Australia Act 1976* (Cth).

Alfield argued that the award should not be enforced on alternate grounds under ss 8(5) and 8(7) of the *IAA*, that: (1) there was not a valid arbitration between the parties because the arrangement was a sham or had been superseded by another agreement; (2) Alfield was unable to present its case at arbitration; and (c) enforcement of the award would be contrary to public policy.

Decision

Gleeson J granted Liaoning's application for summary judgment. For her Honour, the enforcement of foreign arbitral awards should involve only a summary procedure, "in all but the most unusual cases".[27] Since Liaoning had produced an authenticated award and arbitration agreement (as required by s 9(1) of the *IAA*) it had a prima facie entitlement to enforce the award via s 8(3) of the *IAA* and Alfield could only resist enforcement on ss 8(5)–8(7) grounds.[28] Therefore, to avoid summary judgment, Alfield needed to demonstrate that a ground for resisting enforcement had a reasonable prospect of success.

In this respect, the primary focus of the judgment was the operation of s 8(5)(b) of the *IAA*. The provision allows a court to refuse to enforce a foreign award if satisfied that the "arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is expressed to be applicable, under the law of the country where the award was made". Liaoning and Alfield accepted that the provision would only be enlivened if the arbitration agreement was not valid under Chinese law since that was the law of the country where the award was made.[29] However, they disagreed on (1) the applicability to the enforcement of foreign awards of the private international law presumption that foreign law is the same as the law of the forum, absent evidence to the contrary, and (2) who bore the onus of proving the content of foreign law.

Citing the decision of Heydon JA (as his Honour was then) in *Damberg v Damberg*,[30] Alfield submitted "that the presumption is most often made in areas of broad principles" and, since the presumption had been applied to many types of contractual agreements, it should also apply to arbitration agreements.[31]

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[25] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223.

[26] The arbitral tribunal awarded sums of AUD 2.256 million, USD 463,653 and the arbitration fee of RMB 278,033.

[27] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [11], quoting *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303, [3] (Warren CJ); [2011] VSCA 248.

[28] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [66].

[29] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [76].

[30] *Damberg v Damberg* (2001) 52 NSWLR 492; [2001] NSWCA 87.

[31] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [86]–[92].

Therefore, the argument went, since Alfield did not adduce evidence of Chinese law, whether the arbitration agreement was a sham or was superseded by a later agreement was to be determined by Australian law.

In rejecting that argument, Gleeson J held that the law governing an arbitration agreement and the arbitration procedure is not an area of broad principle, as demonstrated by ongoing controversy over the proper law of the arbitration. As such, her Honour considered that it was not reasonable to assume that the Australian law and Chinese law were broadly the same regarding the validity of an arbitration agreement.[32] Moreover, to hold otherwise risks undermining the international harmony in approach to international commercial arbitration that the *IAA* seeks to promote.[33]

Further, as a matter of statutory interpretation, s 8(5)(b) of the *IAA* requires that the party seeking to invoke the provision to prove the content of the law of the award. For Gleeson J, placing the burden on the party seeking to enforce the award would be inconsistent with the *IAA*'s scheme for enforcing foreign awards.[34] Thus, Alfield had the onus of proving the content of foreign law.

Turning to Alfield's specific arguments, her Honour rejected Alfield's claim that there was not a valid arbitration agreement because it was a sham. Here, Alfield's failure to lead evidence of Chinese law proved fatal. Since her Honour had held that Australian law would not apply in the absence of evidence of Chinese law, Gleeson J found that Alfield had no reasonable prospects of demonstrating that the arbitration agreement was a sham or was superseded. Therefore, in the absence of any applicable law supporting its contention Alfield had no reasonable prospects of success of resisting enforcement under s 8(5) of the *IAA*.[35] Nor, for the same reasons, did its public policy argument have a reasonable prospect of success since that argument was based on the Agreement being a sham.[36]

Her Honour also concluded that, on the facts, Alfield had not been prevented from presenting its case before the arbitral tribunal.[37]

Comment

Two elements of Gleeson J's decision are of particular importance. First, her Honour displayed a preference for determining applications for the enforcement of foreign awards through summary judgment. With respect, her Honour's extension of "summary procedures" as referred to in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (*Altain Khuder*)[38] to summary judgment requires caution. It is, of course, the case that the enforcement of a foreign award may be "mechanistic".[39] Further, summary judgment can obviously promote the timely enforcement of awards by providing an attenuated process for enforcement. Notably, the decision suggests that award creditors may be well placed to seek summary judgment of applications for the enforcement of foreign awards. Meanwhile, Australian courts have held that award debtors bear a heavy onus in demonstrating that the grounds for resisting enforcement are made out. As such, Gleeson J's decision may encourage award creditors to seek summary judgment as a preferred remedy.

However, it is submitted that summary judgment should not be a default position in enforcing foreign awards. It should be recalled that *Altain Khuder* did not involve an application for summary judgment. Indeed, other Australian courts have held that summary judgment should only be awarded where it

[32] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [96].

[33] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [96].

[34] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [97].

[35] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [110], [114].

[36] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [111], [115].

[37] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [118].

[38] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303; [2011] VSCA 248.

[39] *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* [2006] HKC 287. Contrast *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303, [141]; [2011] VSCA 248.

is clear that there is no real question to be tried.[40] In cases like *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd*, where the award debtor raises untenable arguments, it may well be appropriate to pursue summary judgment. However, cases are easily imagined where summary judgment would be inappropriate.

Second, her Honour also clarified the operation of foreign law under s 8(5)(b) of the *IAA*. It is submitted that Gleeson J correctly concluded that the provision requires proof of the content of the foreign law "expressed in the arbitration agreement" or "where the award was made" and that the provision makes no allowance for the private international law presumption that Australian law applies in the absence of foreign law to the contrary. This is evident from a plain reading of the *IAA*. The upshot is two-fold. Award debtors are now on notice of the requirement to plead the content of foreign law if they seek to resist a foreign arbitral award based on an arbitral agreement governed by foreign law or made abroad. Moreover, her Honour's reading also promotes harmony between jurisdictions in respect to foreign arbitral awards. Australian law will no longer be substituted for foreign law under s 8(5)(b), reducing the likelihood of the enforcement court and court at the arbitral seat coming to divergent conclusions regarding the enforceability of an international arbitral award.

Re Samsung C&T Corporation [2017] FCA 1169

Facts

Samsung C&T Corporation (Samsung) sought leave from the Federal Court of Australia, under s 23 of the *IAA*, to issue subpoenas for the production of documents for use in an arbitration between it and Duro Felguera Australia Pty Ltd (Duro) seated in Singapore and governed by the law of Western Australia. Both companies had places of business in Australia.

Two applications were made. Gilmour J granted leave to issue subpoenas on the first application. On the second application, his Honour controversially decided that he had been wrong in granting leave on the first application and refused to grant leave to issue further subpoenas on the second application.

Under s 23 of the *IAA*, a party is empowered to make application to a State Supreme Court,[41] and/or the Federal Court of Australia,[42] for leave to issue a subpoena in aid of an international arbitration, requiring a person to attend for examination before the arbitral tribunal, or to produce specified documents to the arbitral tribunal. It is important to note that s 23 of the *IAA* empowers the aforementioned Courts to issue subpoenas to persons who are not a party to arbitral proceedings, provided that the court is satisfied it is reasonable to do so.[43]

The Court was concerned with two issues (1) whether it had jurisdiction to issue subpoenas in aid of a foreign-seated arbitration and, if so, (2) whether it was satisfied that issuing them was reasonable.

Decision

Gilmour J concluded that he did not have jurisdiction to grant the relief sought. In arriving at this conclusion his Honour undertook a narrow interpretation of s 23 of the *IAA*, holding that it related to arbitral proceedings seated in Australia, and did not extend to foreign-seated arbitral proceedings, such as the present arbitration in Singapore.[44]

In support of this narrow interpretation, his Honour referenced the fact that Part II of the *IAA* (of which s 23 is not part) catered specifically for the recognition of *foreign* awards in Australia. According to his Honour, this pointed against a presumed intention that s 23 applied to foreign-seated arbitral proceedings.[45] Furthermore, his Honour made reference to the Explanatory Memorandum to the amending Act which

[40] *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27; [2013] VSCA 158.

[41] *International Arbitration Act 1974* (Cth) s 22A (b)(i).

[42] *International Arbitration Act 1974* (Cth) s 22A (c).

[43] *International Arbitration Act 1974* (Cth) s 23 (5).

[44] *Re Samsung C&T Corporation* [2017] FCA 1169, [14].

[45] *Re Samsung C&T Corporation* [2017] FCA 1169, [42].

conferred powers on the Federal Court under the *IAA*, which stated that the *Model Law*[46] was the primary arbitral law governing arbitrations *conducted in Australia*.[47] This provided support for the view that the power to issue subpoenas under s 23 applied *only* to arbitral proceedings seated in Australia.[48]

Accordingly, it was not necessary for the Court to consider the second issue arising for determination.

Comment

While this judgment has been criticised in some quarters,[49] it is submitted that the decision is correct.

Article 17J of the *Model Law* provides that the court may issue an interim measure in relation to arbitration proceedings, "irrespective of whether [the place of arbitration is in Australia]".[50] No such similar wording appears in s 23 of the *IAA*. This further supports the view that the power to order subpoenas is limited to arbitrations seated in Australia.

Yet there are circumstances where an Australian-based witness might be usefully required to produce evidence (oral or documentary) in a foreign-seated arbitration. At the present time, an Australian court may not directly assist in those circumstances, except by reference to the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (*Hague Evidence Convention*). Gilmour J made reference to this in *obiter*. In the arbitration at hand, as both Singapore and Australia are contracting parties to the Convention, under Art 1, the central authority of the requesting state (being Singapore) could have sent a letter to the judicial authority of the requested state (being the Supreme Court of Western Australia) requesting evidence from persons outside the seat of arbitration.[51]

Application under the *Hague Evidence Convention* is somewhat cumbersome and time-consuming. In the circumstances, there is a case to be made for the Federal Parliament to amend s 23 of the *IAA* to expressly allow Australian courts to issue subpoenas in aid of a foreign seated arbitration, in the same way that Australian courts may grant interim measures under Art 17J of the *Model Law*.[52]

B. Domestic Commercial Arbitration

Hancock Prospecting Pty Ltd v Rinehart [2017] FCAFC 170

Facts

The facts of this dispute are complex. In essence, Bianca Rinehart and her brother, John Hancock,[53] (the "Applicants") commenced proceedings in the Federal Court of Australia against their mother (Mrs Rinehart) and a number of other companies controlled by her (collectively, the "Respondents"), including Hancock Prospecting Pty Ltd (HPPL). Following the death of her father, Langley Hancock (Lang), Mrs Rinehart controlled all of the entities comprising the Respondents.

The siblings alleged that Mrs Rinehart breached her fiduciary duties and her trustee duties with HPPL by, in particular:

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[46] Forming *International Arbitration Act 1974* (Cth) Sch 2.

[47] *International Arbitration Amendment Bill 2009* (Cth), [59].

[48] *Re Samsung C&T Corporation* [2017] FCA 1169, [48].

[49] See Luscombe and Mallis, *No Requirement to Provide Evidence or Documents in Foreign-seated Arbitration* (9 November 2017) International Law Office <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Australia/Clifford-Chance-LLP/No-requirement-to-provide-evidence-or-documents-in-foreign-seated-arbitration#>.

[50] Specifically, *International Arbitration Amendment Bill 2009* (Cth) Art 17J states: "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, **irrespective of whether their place is in the territory of this State**, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration" (emphasis added).

[51] *Re Samsung C&T Corporation* [2017] FCA 1169, [51].

[52] See *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)* (2018) 53 WAR 201; [2018] WASCA 174 where the Western Australia Court of Appeal recently considered the scope of Art 17J.

[53] Mr Hancock changed his name by deed poll.

(1) removing valuable mining assets from Hancock Family Memorial Foundation Limited and transferring them to HPPL; and
(2) giving her children a 23.45% shareholding interest in HPPL, instead of a 49% interest as contemplated in a 1988 agreement reached between Mrs Rinehart and Lang.

The siblings also alleged that certain deeds entered into by them and the Respondents, which contained arbitration agreements, were procured by misleading or deceptive conduct, duress, and breach of trust by Mrs Rinehart and HPPL.

The siblings sought declarations that the deeds, and the arbitration agreements contained within them, were void. This was a crucial hurdle for the siblings to overcome as those deeds contained releases, bars to action and covenants not to sue that precluded the claims which the Applicants sought to agitate. Notably, the arbitration clauses were drafted in relatively narrow terms and, in particular, referred to arbitration of "disputes under the deed".

HPPL made an application under s 8(1) of the *Commercial Arbitration Act 2000* (NSW) (*CAA*) for an order that the proceeding be stayed and for the parties to be referred to arbitration, pursuant to the arbitration agreements contained in the deeds. It argued that the matters before the Court fell within the scope of the arbitration agreements.

The Applicants resisted the stay application, contending that the arbitration agreements were "null and void, inoperative or incapable of being performed", due to the Respondents' wrongful conduct which induced them to enter into the deeds.

At first instance Gleeson J held that there were prima facie arbitration agreements and that some of the disputes fell within the scope of those arbitration agreements. Her Honour directed a trial of the question of whether the arbitration agreements contained within the deeds were "null and void, inoperative or incapable of being performed". The Respondents were granted leave to appeal.

Jurisprudentially, this judgment is important in several respects. In particular, it elucidates the proper approach to the interpretation of arbitration agreements as well as the appropriate standard of review by a court when entertaining a stay application under Art 8 of the *Model Law* as reflected in s 8 of the *CAA* and s 7 of the *IAA*.

Decision

Approach to interpretation of arbitration agreements

The trial judge, adopting a narrow interpretation of the arbitration agreements, accepted that several (but not all) of the matters that the Applicants sought to agitate fell within the scope of apparently valid arbitration agreements contained in the various deeds. In particular, her Honour found that the claims that the deeds should be set aside because of the alleged misconduct (validity claims) did not fall within the scope of the arbitration clauses.

Her Honour applied the approach to constructing arbitration agreements adopted by Bathurst CJ in the New South Wales Court of Appeal (NSWCA),[54] which in turn referenced the English decision of *Fiona Trust & Holding Corporation v Privalov* (*Fiona Trust*).[55] According to Gleeson J, the question of the deed's validity did not fall within the proper construction of the narrow expression "*under this deed*". Accordingly, she concluded that none of the validity disputes were "matters" that fell within the reference to arbitration.

On appeal, the Full Court of the Federal Court of Australia (FCFCA) (Allsop CJ, Besanko and O'Callaghan JJ) expressly disagreed with the NSWCA majority's characterisation of Lord Hoffman's comments in *Fiona Trust*.[56] Instead, the FCFCA considered that, properly understood, Lord Hoffman

[54] *Rinehart v Rinehart (No 3)* (2016) 257 FCR 310, [99]–[102]; [2016] FCA 539; see also *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, [161]; [2017] FCAFC 170.

[55] *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254.

[56] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, [193]; [2017] FCAFC 170; *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254.

had advocated for a liberal interpretation of arbitration clauses, where the words allowed, so as to give effect to the underlying presumption that parties to an arbitration agreement intend to avoid bifurcation of their disputes.

While conceding that their views differed from those of the NSWCA, the FCFCA was "persuaded to the necessary point of clarity that [the NCWCA] construction [was] not correct".[57] It was a very serious matter for the FCFCA to depart from the earlier decision of the NSWCA, particularly as both cases concerned the interpretation of the very same arbitration clause.

Standard of review on stay application

Gleeson J identified two competing approaches to the question of the appropriate standard of review on an application for a stay of court proceedings in favour of arbitration:

(1) first, the prima face review approach – by which a court adopts a prima facie review of the existence and scope of the arbitration agreement. Provided the court is satisfied, on a prima facie basis, that the matter sought to be ventilated by the plaintiff arguably falls within the scope of an apparently valid arbitration agreement, it will stay the court proceeding and allow the arbitral tribunal to resolve (in the first instance) any challenge to the existence and scope of the putative arbitration agreement;
(2) second, the full review approach – by which a court on a stay application determines, on the balance of probabilities, the existence and scope of the arbitration agreement.

Her Honour noted that the prima face review approach had recently been adopted by the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd*[58] but that the English courts preferred the full review approach.[59]

Gleeson J applied a prima facie review approach to the question of the existence of the arbitration agreement, but (curiously) a full review approach to the question of the scope of the arbitration agreement. As to the third question (ie applicability of the s 8 exceptions), her Honour recognised that a court on a stay application had a discretion to determine the question (either on a summary basis or, alternatively, upon the setting down for trial of that question), as opposed to leaving that question for the determination of the arbitral tribunal. In doing so, her Honour, in effect, adopted a hybrid approach to the standard of review in respect of this question. That is, sometimes a prima facie approach is to be applied and sometimes a full review approach is appropriate, depending on the circumstances.

The Full Court acknowledged the existence of two broad approaches to the standard of review on stay applications. It noted that the "prima facie" approach was largely taken by courts in *Model Law* jurisdictions, including Singapore, Hong Kong, New Zealand and Canada: [141].

With less than full enthusiasm, the Full Court embraced the prima facie approach: (at [145])

> We think that any rigid taxonomy of approach is unhelpful, as are the labels "*prima facie*" and "merits" approach. How a judge deals with an application under s 8 of the [*CAA*] will depend significantly upon the issues and the context. Broadly speaking, however, and with some qualification, aspects of the *prima facie* approach have much to commend them as an approach that gives support to the jurisdiction of the arbitrator and his or her competence, as recognised by the common law and by s 16 of the *CA Act*, whilst preserving the role of the Court as the ultimate arbiter on questions of jurisdiction conferred by ss 16(9) and (10), 34(2)(a)(iii) and 36(1)(a)(iii) of the *CA Act*. Broadly, the approach is consonant with the structure of the [*CAA*] and the Model Law.

The Full Court held that the matters sought to be agitated in Court (including the "validity claims") fell within the scope of the arbitration agreements[60] and that, except to a very limited extent, the Respondents had not engaged the proviso to s 8(1) by a relevant attack on the arbitration agreements.

In particular, the "validity claims" were parasitical to the validity of the main agreement and did not constitute a separate attack on the arbitration agreements. The only matters capable of constituting a

[57] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, [205]; [2017] FCAFC 170.

[58] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57.

[59] See *Aeroflot - Russian Airlines v Berezovsky* [2013] 2 Lloyd's Rep. 242; [2013] EWCA CIV 784.

[60] Taking a broader approach to the interpretation of the arbitration agreements.

separate attack were the allegations that the Respondents had misled the Applicants by not telling them that the arbitration process would be private and would have to be paid for: [386]. The Full Court considered this attack to be of narrow compass: [389]. Moreover, it was ill-formulated and lacked apparent strength: [393].

Next, the Full Court held that a court entertaining a stay application was not mandated to hear and determine any proviso issues.[61] Rather, it had a discretion whether or not to do so: [367].

In exercising the discretion afresh,[62] the Full Court considered the following factors (at [393]):

(1) the attack on the arbitration agreements was in narrow compass;
(2) it was conceivable that those matters would become entangled with the "validity claims" which fell within the scope of the arbitration agreement and therefore were to be determined by the arbitrator;
(3) given the history of the proceeding, it was unlikely that any court hearing on the proviso issues would be of short duration.

Accordingly, the Full Court held that it was preferable to allow the proviso question to be determined by the arbitrator.

The end result was that the proceeding was stayed. Thus, the attack on the validity of the arbitration agreement will fall to be determined by the arbitrator in the first instance (subject to review by the supervisory court under s 16 of the *CAA*).

Comment

On 13 and 14 November 2018, the High Court of Australia heard oral argument[63] in an appeal from the Federal Court of Australia – Full Court decision.[64] The central issue on appeal was the proper approach towards the interpretation of arbitration agreements.[65] Accordingly, the High Court now has the opportunity to clarify the Australian approach towards the interpretation of arbitration clauses.[66] As the interpretation of arbitration clauses is a fundamental issue, the High Court judgment – expected in early 2019 – is eagerly awaited. One would hope that the High Court endorses the *Fiona Trust* liberal approach to the construction of arbitration clauses, particularly as *Fiona Trust* has been followed in both Singapore[67] and in Hong Kong.[68] To hold otherwise would put Australia out of step with its neighbours in the Asia-Pacific region.

Separately, both Singapore and Hong Kong, the leading arbitration jurisdictions in the Asia-Pacific, adopt the prima facie standard of review on stay applications. Both jurisdictions are *Model Law* jurisdictions. In contrast, the English *Arbitration Act 1996*, is not based on, and contains several important departures from, the *Model Law*. It would be out of step for Australia to adopt a different standard of review as it undermines the development of regional coherence in the interpretation and application of the *Model Law*. Moreover, one learned commentator has suggested that the adoption of the "full review" approach was "a wrong turn in English law".[69] In this regard, the Full Court's decision is welcome.

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[61] That is, whether the putative arbitration agreement is null and void, inoperative or incapable of being performed.

[62] The Full Court had to exercise the discretion afresh as the trial judge had wrongly concluded that any trial of the proviso question would involve a trial of the validity claims.

[63] *Rinehart v Hancock Prospecting Pty Ltd* [2018] HCATrans 234; *Rinehart v Hancock Prospecting Pty Ltd* [2018] HCATrans 236.

[64] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442; [2017] FCAFC 170.

[65] *Rinehart v Hancock Prospecting Pty Ltd* [2018] HCATrans 234, [6].

[66] Appreciating the importance of the case, ACICA, Australia's leading arbitration institution, sought and obtained leave to intervene as amicus curiae.

[67] *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414, [12]–[19].

[68] *Z v A* [2015] HKCFI 228, [38]–[41]; [2015] 2 HKC 272; *L v M* [2016] HKCFI 1368, [52]–[53].

[69] David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2nd ed, 2010) 339.

Postscript

On 8 May 2019, in *Rinehart v Hancock Prospecting Pty Ltd*; *Rinehart v Rinehart* [2019] HCA 13 the High Court unanimously dismissed the appeals from the Full Federal Court decisions, holding that disputes as to the validity of the deeds were subject to the arbitral clauses contained in those deeds.

Mango Boulevard Pty Ltd v Mio Art Pty Ltd [2018] QCA 39

Facts

The appellant, Mango Boulevard Pty Ltd (Mango), and the respondents, Mio Art Pty Ltd (and another) (Mio), entered into a joint venture for the development of land. The joint venture comprised a number of agreements including a share sale agreement (SSA). Under the SSA, Mio agreed to sell a parcel of land to the special purpose vehicle (SPV) for $22 million, as well as half of its shares in the SPV to Mango. Clauses 4.3 and 4.4 of the SSA prescribed a formula and process by which the price for the shares was to be determined. The SSA also provided for the parties to submit to arbitration if agreement could not be reached on the price. Relevantly, cl 8.3 required the arbitrator to use the valuation methodology prescribed in cl 4.4, including the assumption that the project would return a profit percentage of 25%.

When a dispute arose, the parties went to arbitration. However, in determining the price for the shares, the arbitrator (a former Justice of the High Court of Australia) used his own valuation methodology which was not in accordance with the parties' submissions or with the expert evidence led by the parties.

Mango sought to set aside the award relying on ss 34(2)(a)(ii) and 34(2)(b)(ii) of the *CAA*. In particular, Mango complained that the arbitrator had prevented it from presenting its case because Mango was not advised that the arbitrator was considering departing from the prescribed valuation methodology and, as such, had no opportunity to direct its evidence to the arbitrator's preferred valuation. Further, enforcing the judgment would conflict with Australian public policy.

Decision

Jackson J at first instance dismissed the application to set aside, holding that the arbitrator did not abandon the prescribed valuation method inasmuch as the arbitrator was not obliged to approach the valuation "with his eyes closed".[70] Essentially, his Honour concluded that even if the arbitrator's approach was ill-advised, it did not rise to the level that would enliven s 34(2) of the *CAA*.[71]

On appeal to the Queensland Court of Appeal, the majority (McMurdo and Fraser JJA) held that the arbitrator – not the parties – developed the methodology used to value the shares, that the arbitrator's approach came to light only *after* evidence was closed, and that the arbitrator's reasoning was *not* put to any of the relevant expert witnesses.

However, the majority applied the Full Court of the Federal Court's holding in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [72] that an award should not be set aside under Art 34 of the *Model Law* (which is fundamentally the same as s 34 of the *CAA*) *unless* there was:

> real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness.

With "real unfairness" and "real practical injustice" as the touchstone for determining whether the award should be set aside, the majority considered that the arbitrator had clearly raised the possibility of his reasoning during final addresses. As such, "it could not be said that ultimately, the appellant was denied an opportunity to argue a case in response to it".[73] Moreover, the majority held that it was open to Mango to seek to recall its witnesses, but that it chose not to, and that the relevant issue had, in fact, been

[70] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [11] (Morrison JA), citing *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2017] 1 Qd R 245, [76]–[77] (Jackson J); [2017] QSC 87.

[71] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2017] 1 Qd R 245, [107]; [2017] QSC 87.

[72] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361; [2014] FCAFC 83.

[73] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [106].

addressed by Mango (ie it was given an opportunity to be heard) "by submissions which were made some weeks after the subject was first raised by the arbitrator".[74]

In separate reasons, Morrison JA took a similar view to the majority in agreeing that the appeal should be dismissed.

Ultimately, the Court of Appeal found that the appellant was able to present its case and, thus, there was no real unfairness or real practical injustice in how the arbitration was conducted, nor was there any breach of public policy. Accordingly, the appeal was dismissed.

Comment

The decision is consistent with recent cases in Australia in which courts have taken a narrow (or restrictive) approach to applications to set aside arbitral awards under s 34 of the *CAA*.

By upholding arbitral awards, even in circumstances where arbitrators could be said to have made technical missteps along the way, Australian courts have furthered the objects of the *CAA*,[75] including the paramount object "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense".

In this case, the arbitrator came to his own view of the appropriate approach to valuing the shares, which was not the approach of any of the expert witnesses. Whatever the merits of the arbitrator's approach in the particular facts of this case,[76] such approach is unlikely to be permitted in an Australian court.[77]

The Queensland Court of Appeal appears to grant arbitrators greater leeway in identifying and applying grounds for arbitral decisions so long as the parties are at least aware that another basis may be on foot.[78]

One of the practical issues that this raises is the clarity with which the arbitrator must alert the parties that he (or she) may adopt a methodology to resolve the dispute that the parties have not pleaded. The Court of Appeal was of the opinion that indirect comments by the arbitrator to Mango's expert witness and during final addresses sufficiently alerted Mango to the fact that the arbitrator had issues with the valuation methodology advanced by evidence and submissions. But it is of some concern that the arbitrator in this case never clearly told the parties that he was considering using a different valuation methodology. Of course, the arbitrator did make known his displeasure with the prescribed methodology. However, as a practical matter it should not be for the parties to "read the tea leaves" of an arbitrator's comments to divine the basis on which the arbitrator will make their determination.

Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd [2018] VSC 221

Facts

A builder entered into two subcontracts with a sub-contractor for the latter to perform plastering and related works on two domestic building projects. Each subcontract contained an arbitration clause. A dispute arose and the builder commenced arbitration proceedings. The sub-contractor objected to the jurisdiction of the arbitrator, contending that by reason of the *Domestic Building Contracts Act 1995* (Vic) (*DBCA*), VCAT[79] had exclusive jurisdiction to hear and determine the dispute and, therefore, the dispute was not arbitrable.

In a preliminary ruling on jurisdiction, the arbitrator found that he had jurisdiction to hear and determine the dispute. The sub-contractor applied to the Supreme Court of Victoria for review of the preliminary ruling on jurisdiction under s 16(9) of the *CAA*, which provides:

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[74] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [106].

[75] Which operates in each of the States and Territories of Australia by way of mirror legislation.

[76] The arbitrator suggested in questioning of one of the expert witnesses that the prescribed valuation methodology resulted in the land having a negative value – a commercial absurdity; see *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [42].

[77] See *Masters Home Improvement Pty Ltd v North East Solution Pty Ltd* (2017) V ConvR 54-890, [420]; [2017] VSCA 88.

[78] A similar approach has recently been endorsed in the United Kingdom; see *Navigator Spirit SA v Five Oceans Salvage SA* [2018] 2 Lloyd's Rep 391; [2018] EWHC 1108 (Comm).

[79] The Victorian Civil and Administrative Tribunal (VCAT) is a statutory tribunal established in Victoria in 1998.

> If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter.

Croft J identified two dispositive issues:

(1) first, what was the nature of the power of the Court under s 16(9) of the *CAA*; and
(2) second, did the subcontractor carry out "domestic building works" under the subcontracts, such that the *DBCA* was engaged with the consequence that the dispute was not arbitrable?

The first question is of present interest.

Decision

Croft J noted at [25] that there was a lack of Australian authority on the nature of the review by a court under Art 16 of the *Model Law* or s 16(9) of the *CAAs*, and that the *Model Law* neither prescribes nor expressly resolves the question of the standard of judicial review of jurisdictional rulings.[80]

His Honour then surveyed the law in Singapore, Hong Kong, England and New Zealand, and the views expressed in the major commentaries.[81]

Two approaches are available. The "de novo" review approach involves the court (at the arbitral seat) determining the jurisdictional question afresh based on the evidence before the arbitral tribunal.[82] Alternately, "appellate-type" review involves finding some fault in the arbitral tribunal's approach or conclusion in its ruling on jurisdiction.

His Honour noted that the de novo review approach was generally adopted in the common law jurisdictions surveyed by him and, moreover, that to allow the arbitral tribunal to be the final arbiter of its own jurisdiction is a "classic case of pulling oneself up by one's own bootstraps".[83]

His Honour concluded (at [40]):

> On the basis of these authorities and commentaries, the position is, in my view, that a hearing de novo is the correct standard of review to be applied under s 16(9) of the CAA. Deference should duly be given to the cogent reasoning of the arbitral tribunal but the Court is the final "arbiter" on the question of jurisdiction. As has been observed, this is an aspect of court assistance and support of arbitral processes and is not at odds with the policy of minimal court intervention or "interference".

Ultimately, the decision of the Court for the purposes of s 16(9) of the *CAA* was whether "the arbitral tribunal had correctly determined in favour of its own jurisdiction and therefore should proceed to discharge its arbitral mandate": [48].

Comment

There has been a surprising lack of authority in Australia regarding the standard of review to be adopted by a court when reviewing a preliminary ruling on jurisdiction by an arbitral tribunal. The issue has now been considered by Croft J in the context of s 16 of the *CAA*. The decision is a valuable addition to Australia's arbitration jurisprudence. It enhances regional coherence towards the interpretation of the *Model Law*.

It is interesting that while Croft J noted (at [32]) that there was debate in Singapore as to the admissibility of evidence on a court review where that evidence was not adduced in the arbitration,[84] his Honour (without explanation) permitted the parties to adduce fresh evidence before him. It is not clear whether this was done by consent. Generally, a review of jurisdiction before the Court should take place on the evidence adduced before the arbitral tribunal. Otherwise, there is a danger that the preliminary hearing

[80] Citing Born, n 7, 1108.

[81] Including Born, n 7; HM Holtzman and JE Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 2015); P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Thomson Reuters, 3rd ed, 2010); DAR Williams and A Kawharu, *Williams & Kawharu on Arbitration* (LexisNexis, 2011).

[82] Or even, perhaps, with additional evidence that was not adduced in the arbitration.

[83] Citing *Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 AC 763, [159] (Lord Saville); [2010] UKSC 46.

[84] Referring to *AQZ v ARA* [2015] SGHC 49 (Prakash J).

on jurisdiction before the arbitral tribunal will be a dress-rehearsal with parties potentially holding relevant evidence up their sleeve.

While Art 16(3) of the *Model Law* provides that the court's decision "shall be subject to no appeal", s 16(10) of the *CAA* provides that "a decision of the court under subsection (9) that is within the limits of the authority of the court is final". Whatever may be the substantive difference in the wording of the two provisions (if any), it is tolerably clear that a single judge's decision under Art 16(9) on an arbitrator's jurisdiction is generally final.

IV. Investor-State Arbitration

A. International Agreements

A flurry of activity over the past year has seen Australia sign, or substantially conclude, trade and investment agreements with Hong Kong, Indonesia and Peru, in addition to entering into the revamped Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the CPTPP) (sometimes referred to as the "TPP minus one" following President Trump's rejection of the original Trans-Pacific Partnership, which led to its renegotiation among the remaining parties). For investment arbitration practitioners, the agreements provide insights into Australia's evolving and increasingly nuanced approach to investor-state dispute settlement (ISDS). This appears to remain influenced by Australia's first ISDS case, which concerned its plain-packaging legislation.[85]

At the time of writing, the texts of the Indonesian and Hong Kong agreements have not been made public. However, the texts of the other agreements, and the Australian Government's public statements on each of the deals, demonstrate two developments. First, ISDS appears to remain Australia's preference in agreements with developing countries. Following the plain-packaging dispute, Australia announced that it would consider accepting ISDS provisions on a "case-by-case basis". The apparent result of this approach is the inclusion of ISDS provisions in both CPTPP and Peru-Australia Free Trade Agreement (PAFTA), and there are media reports that Australia would like ISDS provisions in the Indonesia Free Trade Agreement.[86] By contrast, Australia has entered into a side letter with New Zealand which will exclude CPTPP's ISDS provisions as between Australia and New Zealand.

The second development is that Australia seems to be an increasingly sophisticated negotiator of ISDS provisions. It appears to have insisted on various provisions which clarify and, in the language of some commentators, "modernise", ISDS. It seeks to avoid a repeat of the plain-packaging case through exemptions for the regulation of public health, the environment and "other regulatory objectives". It also tries to give greater content to obligations which are sometimes criticised as too vague and imprecise. The "fair and equal treatment" provision in PAFTA, for example, specifies that that obligation is not breached by conduct which fails to meet an investor's expectations, which is no doubt an attempt to limit the doctrine of legitimate expectations. Nor is the obligation breached by the mere removal or reduction of a subsidy or grant (a contentious issue in the numerous ISDS cases arising out of Spain's removal of renewable energy subsidies). Both are presumably designed to deter spurious investor claims and avoid the "regulatory chill" which vaguely worded investment treaty obligations may generate.

B. Investor-state Arbitration Cases

Churchill Mining Plc and Planet Mining Pty Ltd v Indonesia

As reported in last year's article, an Australian mining company and its United Kingdom (UK) parent have been pursuing claims against Indonesia in relation to the cancellation of a mining licence. The Tribunal determined that the claims were inadmissible because they were based on documents which had been forged.[87]

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[85] *Philip Morris Asia Ltd v Commonwealth of Australia* (Unreported, PCA, Case No 2012-12, 8 July 2017).

[86] John Kehoe and Ronald Mizen, "Miners Want ISDS in Indonesia Free Trade Agreement", *The Australian Financial Review*, 16 October 2018 <https://www.afr.com/news/economy/trade/miners-want-isds-in-indonesia-free-trade-agreement-20181016-h16ozb>.

[87] See A Monichino QC and A Fawke, "International Arbitration in Australia: 2016/2017 in Review" (2018) 28 ADRJ 215, 230–232.

The claimants' application for annulment of that decision has continued throughout the course of this year. A hearing apparently took place in July 2018,[88] but there is not yet any public indication of a decision.

Cortec Mining Kenya Ltd v Kenya

This case concerns the revocation of mining licences in Kenya, which the claimants alleged was a direct expropriation, in breach of the UK-Kenya bilateral investment treaty (the "UK-Kenya BIT"). The facts are complicated but, in short, the dispute concerned centred on whether the investment complied with the relevant requirements under Kenyan law. The Tribunal dismissed the claim at the jurisdictional stage on the basis that the UK-Kenya BIT only protects lawful investments, and that the claimants had failed to demonstrate that their investment was lawfully made under Kenyan law.[89]

The case deserves mentioning here, because it is an example of Australian investors apparently structuring an investment in a manner that allowed them to maximise their protection under investment treaties. The investors ultimately behind the project subject to dispute were an Australian national, a South African national and a Canadian company.[90] None of these could rely on the UK-Kenya BIT, but the UK company in which they had invested could do so. While parties are not permitted to restructure their investment after a dispute has arisen,[91] as it constitutes an abuse of right, nothing prevents them from structuring the initial investment with treaty protection in mind. Increasingly, transactional lawyers seek advice from investment arbitration practitioners to assist them in doing this.

V. Institutional and Other Developments

ICCA Sydney 2018

In April 2018, Australia hosted the world's largest arbitration conference: the 24th ICCA Congress, attracting thousands of international arbitration practitioners from around the world. The conference focused on the future evolution of international arbitration. Numerous addresses and plenary sessions were held, but three merit particular attention.

First, in the opening address of the conference, Allsop CJ weighed into the debate as to whether commercial arbitration is, by virtue of it typically being confidential, inhibiting the development of important principles of commercial law. His Honour expressed concern that it does, echoing the sentiments of the former Lord Chief Justice of England and Wales, Lord Thomas.[92] Since many of the largest and most complex legal disputes are heard by way of arbitration, important questions of law are regularly decided in private. Courts, academics and the wider public are blind to certain developments which might be useful in litigation, law reform and broader commercial arrangements. Allsop CJ supported the idea of arbitration awards being published in redacted form as a means to address this.[93] While the International Chamber of Commerce (ICC) has historically published extracts of selected awards, and publication of awards is widespread in maritime arbitration, it remains to be seen whether arbitral institutions will embrace this (and, for that matter, whether the courts will in turn give weight to published arbitral awards).

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[88] *Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Arbitral Tribunal, Case No ARB/12/14 and 12/40, Annulment Proceeding, Procedural Order No 2 on the Organization of the Hearing, 6 December 2016).

[89] *Cortec Mining Kenya Ltd v Republic of Kenya (Award)* (ICSID Arbitral Tribunal, Case No ARB/15/29, 22 October 2018) [9].

[90] *Cortec Mining Kenya Ltd v Republic of Kenya (Award)* (ICSID Arbitral Tribunal, Case No ARB/15/29, 22 October 2018) [269]–[273].

[91] It was for this reason that the investor's claim failed in *Philip Morris Asia Ltd v Commonwealth of Australia* (PCA, Case No 2012-12, 8 July 2017).

[92] Lord Thomas of Cwmgiedd, "Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration" (The Bailii Lecture 2016, 9 March 2016).

[93] James Allsop, "Commercial and Investor-state Arbitration: The Importance of Recognising Their Differences", ICCA Congress 2018, Sydney <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20180416>.

Relatedly, a recurrent theme throughout the conference (reflected in many such recent conferences) was concern for the legitimacy of international arbitration, especially investment arbitration. Numerous sessions reflected on well-known critiques of arbitration, namely that there is insufficient transparency and accountability; that party appointments compromise the integrity of the system; and that, in an attempt to encourage foreign investments, some states inappropriately limited their own sovereignty. While these objections are longstanding, the conference discussions demonstrate that, despite efforts at reform, they are not going away. If anything, these concerns may be on the rise, in line with a perception of a spread in "anti-globalist" sentiment more broadly.

Third, the ICCA conference saw the launch of a new draft protocol on cybersecurity in international arbitration. It is designed to be a framework for parties and tribunals to decide on appropriate cybersecurity measures in a given case. The protocol does not set out fixed rules or even template orders, but rather explains the relevant factors which parties may consider, and potentially appropriate measures (from basic account management and access controls, to full disk encryption and encryption of cloud-stored information).[94] The draft was put out for consultation throughout 2018, and a final form is expected in 2019.

ACICA 45

In October 2018, the Australian Centre for International Commercial Arbitration (ACICA) announced the formation of a new group for young practitioners: ACICA 45. The group aims to promote arbitration education and networking among young arbitration practitioners in Australia, in a manner similar to the successful and well-established ICC's Young Arbitrators Forum and the London Court of International Arbitration's Young International Arbitration Group.

VI. Conclusion

The past year has seen further elucidation of important principles of arbitration law in Australia. It may be said that, generally speaking, the trajectory is in the right direction, consolidating the new, enlightened Australian judicial approach to arbitration.

[94] Working Group on Cybersecurity in Arbitration, "Draft Cybersecurity Protocol for International Arbitration", *Consultation Draft* <http://res.cloudinary.com/lbresearch/image/upload/v1523962394/draft_cybersecurity_protocol_final_10_april_1_173118_1153.pdf>.

Australia and Singapore – Differences in Applications to Set Aside an Arbitral Award?

Craig Edwards*

Both Singapore and Australia (referred to as States under the UNCITRAL Model Law on International Commercial Arbitration) have adopted the Model Law. However, there are subtle differences in the local legislation implemented by each State supplementing the Model Law in relation to the grounds for setting aside arbitral awards. The purpose of this article is to review the key cases on applications to set aside arbitral awards and critically analyse whether there are any legal or practical differences of significance between Singapore and Australia on which arbitral awards may be set aside under the Model Law. It is argued that while there are legal differences in terms of the legislative content, there are no practical differences of significance in interpretation by the Courts of the States.

I. Introduction

The purpose of this article is to review the key cases on applications to set aside arbitral awards and critically analyse whether there are any legal or practical differences of significance between Singapore and Australia on which arbitral awards may be set aside under the UNCITRAL[1] Model Law on International Commercial Arbitration (Model Law).[2]

Both Singapore[3] and Australia[4] (referred to as States under the Model Law)[5] have adopted the Model Law. However, there are subtle differences in the local legislation implemented by each State supplementing the Model Law in relation to the grounds for setting aside arbitral awards. In this article, the author will first identify the subtle differences in the way each State has added local legislation supplementing the Model Law. The author will then analyse the overarching approach of each state to interpretation of the Model Law. The author will then review the key cases of each State interpreting the grounds to set aside an arbitral award, with a focus on the areas of controversy between the States, namely, the grounds of natural justice and public policy. Finally, the author will analyse whether the manner in which the law has been interpreted has resulted in any differences of legal or practical significance. The ultimate goal of this article is to provide a review of the key cases together with a meaningful analysis of the differences and the similarities in interpretation of the relevant law by the two States.

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[1] United Nations Commission on International Trade Law (UNCITRAL) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

[2] UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006)* <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (Model Law), Legislation based on the Model Law has been adopted in 80 States in a total of 111 jurisdictions.

[3] *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 3 Sch 1.

[4] *International Arbitration Act 1974* (Cth) s 16(1) Sch 2.

[5] *International Arbitration Act 1974* (Cth) s 16(2) "State" means Australia (including the external Territories) and any foreign country; *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 3(2): In the Model Law – "State" means Singapore and any country other than Singapore; "this State" means Singapore.

II. Implementation of the Model Law in Relation to Setting Aside Arbitral Awards by the States

Holmes and Brown note that:

> The different approaches found in national arbitration laws relating to appeals from, and challenges to, awards and the national arbitration process were seen as presenting a major difficulty in harmonising international arbitration legislation. … Article 34 was introduced to provide uniform grounds upon which … recourse against an arbitral award may be made.[6]

Article 34 of the Model Law is entitled: "Application for setting aside as exclusive recourse against arbitral award". Article 34 contains six separate grounds upon which an arbitral award may be set aside and it was wholly adopted by both States.[7] Article 34(2) of the Model Law provides that an arbitral award may be set aside only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in Art 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

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

Article 34 may only be utilised to seek to set aside an award made in an arbitration that took place in the same State.[8] In other words, if an arbitration takes place in Singapore any party seeking recourse needs to proceed via the Singaporean Courts.

Both States have added legislation supplementing Art 34. To examine Australia first, on 15 May 1989, a new s 19[9] of the *International Arbitration Act 1974* (Cth) (*IAA*) was added as an aid in interpretation of certain articles of the Model Law, including Art 34(2)(b)(ii). Initially, the section provided in part "it is hereby declared, for the avoidance of doubt, that, an award is in conflict with the public policy of Australia if the making of the interim measure or award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the interim measure or award'. On 6 July 2010, s 19 of the *IAA* was repealed and replaced in similar terms,[10] albeit extended to another article and the words "or is contrary to" were added after "is in conflict with", which potentially broadened the interpretation of a breach of public policy. On the face of it, in Australia, a breach of natural justice also constitutes a breach of public policy.

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[6] Malcolm Holmes and Chester Brown, *The International Arbitration Act 1974 A Commentary* (Lexis Nexis, Butterworths, Australia, 2nd ed, 2015) 265.

[7] Australia: *International Arbitration Act 1974* (Cth) s 16 Sch 2 Art 34; Singapore: *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 3 Sch 1 Art 34.

[8] Model Law, n 2, Art 1(2); see also Gary Born, *International Arbitration: Law and Practice* (Kluwer Arbitration, 2016) 115–116.

[9] *International Arbitration Amendment Act 1989* (Cth) Item 7.

[10] *International Arbitration Amendment Act 2010* (Cth) Item 15.

In contrast, the Singaporean legislature added additional grounds for a court to set aside an arbitral award under the *International Arbitration Act (Singapore, cap 143A, 2002 rev ed)* (*SIAA*). Section 24 of the *SIAA* provides in part that the High Court "may, in **addition** [emphasis added] to the grounds set out in Art 34(2) of the Model Law, set aside the award of the arbitral tribunal if the making of the award was induced or affected by fraud or corruption or a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced".[11] To constitute a breach of the rules of natural justice a party must have been prejudiced. In the *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (TCL Case)*[12] the Full Court of the Federal Court of Australia considered that by using the words "in addition" in s 24 that "the Singapore Parliament did not see a breach of the rules of natural justice as necessarily contrary to public policy".[13] However, the Full Court went on to note that the Singapore legislative committee "identified s 19 of the *IAA* as a source of law for what became s 24"[14] of the *SIAA*.

As such, s 19 of the *IAA* and s 24 of the *SIAA* are in extremely similar terms, but due to the differences in implementation have the potential to result in different interpretation by the courts in an application to set aside an arbitral award, particularly in the interpretation of the potential broader application of public policy in the case of Australia and the additional ground of natural justice in the case of Singapore. However, before analysing the subtle differences in implementation, the author first proposes to explore the overarching approach to interpretation of the Model Law by each State.

III. Overarching Approach of the States to the Model Law

Members of the judiciary in both States have emphasised the desirability of uniformity in interpretation of the Model Law. Justice Croft of the Supreme Court of Victoria has a special interest in arbitration[15] having delivered judgment on some of the key Australian cases[16] that will be explored later in this article. Justice Croft has stated that:

> Consistency of interpretation is important, but only if the interpretation is both consistent and in accordance with accepted international jurisprudence with respect to the Model Law. … In a practical sense, this means that Australian courts should have regard to decisions of overseas courts applying and interpreting the Model Law.[17]

Justice Croft also went on to discuss the notion of comity and the desirability of uniformity in interpreting the Model Law.[18] Recently, in dismissing an application to set aside an arbitral award, Justice Croft stressed the importance of having regard to the international nature of the Model Law in applying the principles.[19] Similarly, it has been noted that the Singaporean Courts will have regard to international jurisprudence when interpreting the Model Law.[20] In the Singaporean case of *Front Row Investment*

[11] *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 24.

[12] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361; [2014] FCAFC 83.

[13] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [125]; [2014] FCAFC 83.

[14] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [128]; [2014] FCAFC 83.

[15] See Justice Clyde Croft, "The Development of Australia as an Arbitral Seat – A Victorian Supreme Court Perspective" (Paper prepared for the ICCA 50th Anniversary Conference, Geneva, 19–20 May 2011) <http://www5.austlii.edu.au/au/journals/VicJSchol/2011/57.html>; Justice Clyde Croft, "Judicial Intervention in the Asia-Pacific Region" (Paper presented at the UNCITRAL-MOJ-KCAB Joint Conference: Arbitration Reform in the Asia Pacific Region: Opportunities and Challenges, Seoul, Republic of Korea, 11–12 November 2013) <https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/af/2095198bc/judicial%2Bintervention%2Bin%2Bthe%2Basia-pacific%2Bregion.pdf> for example.

[16] See *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163; *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326; *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2)* [2018] VSC 741 (7 December 2018) for example.

[17] Croft, The Development of Australia as an Arbitral Seat, n 15, 29–30.

[18] Croft, The Development of Australia as an Arbitral Seat, n 15, 30; see also *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [24] (Croft J).

[19] *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2)* [2018] VSC 741 (7 December 2018) [18].

[20] See *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, cited in John K Arthur, "Setting aside or Non-enforcement of Arbitral Awards in International Arbitration on the Public Policy Ground – A Regional Perspective" (2015) *Australian Dispute Resolution Law Bulletin* 115, 115.

Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd (*Front Row Case*),[21] Ang J, referred to various Australian decisions when considering the concept of natural justice. On the whole, both States are pro-arbitration and supportive of the Model Law.[22] Additionally, both States have an overarching policy of minimal court intervention[23] consistent with a policy of the autonomy of arbitration and Art 5[24] of the Model Law.

IV. Review of the Relevant Cases of Each State Interpreting the Grounds to Set Aside an Arbitral Award

Natural Justice and Public Policy Ground in Australia

In 2014, the Full Court of the Federal Court considered the rules of natural justice in the *TCL Case*.[25] The *TCL Case* concerned an application by TCL to set aside an award on various grounds including breaching the rules of natural justice. It was alleged that three findings of fact made by the arbitrator in the award were in conflict with public policy.[26] TCL lost at first instance and appealed to the Full Court of the Federal Court. The Full Court embarked on a lengthy discussion on the NY Convention leading to implementation of the Model Law and the concept of public policy.[27] Their Honours concluded:

> This history demonstrates that there was no evident purpose in the introduction of ss 19 and 8(7A) [of the *IAA*] of amending the meaning of public policy to incorporate any idiosyncratic national approach. In Australia, the introduction of a reference to natural justice was expressly for the avoidance of doubt: "to avoid doubt" (s 8(7A)); "for the avoidance of any doubt" (s 19). The rules of natural justice can thus be seen to fall within the conception of a fundamental principle of justice (that is within the conception of public policy), being, as they are, equated with, and based on, the notion of fairness.[28]

Their Honours went on to note that this approach to public policy had widespread international support including from countries such as Singapore.[29] Against that background the Full Court considered that the content of the natural justice rules (as a part of the public policy), are broadly as follows:

- no evidence rule (the decision must be based on evidence);[30]
- bias or hearing rule "a person may not be a judge in his or her own cause; and that a person should be given a fair hearing";[31]

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[21] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [36]–[44].

[22] *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57, [33]; Croft, Judicial Intervention in the Asia-Pacific Region, n 15, 14, 33; see also Albert Monichino QC and Alex Fawke, "International Arbitration in Australia: 2014/2015" (2015) 26 ADRJ 192, 199.

[23] *AKN v ALC* [2015] SGCA 18, [37]; Croft, Judicial Intervention in the Asia-Pacific Region, n 15, 1.

[24] Model Law, n 2, Art 5: "In matters governed by this Law, no court shall intervene except where so provided in this Law".

[25] *International Arbitration Act 1974* (Cth) s 19 Sch 2 Art 34(2)(b)(ii).

[26] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [7]; [2014] FCAFC 83.

[27] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [55]–[72]; [2014] FCAFC 83.

[28] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [73]; [2014] FCAFC 83.

[29] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [75]; [2014] FCAFC 83; see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186; *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57; *AJU v AJT* [2011] SGCA 41; *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86; *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 all considered in the *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361; [2014] FCAFC 83.

[30] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [31]; [2014] FCAFC 83.

[31] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [84]; [2014] FCAFC 83; see also *International Arbitration Act 1974* (Cth) ss 15–16 Sch 2 Art 34(2)(a)(ii).

- equal treatment;[32]
- full opportunity to present case and test and rebut opponent's case.[33]

Notwithstanding the content of the rules of natural justice, an award will not be set aside for breach of natural justice unless there is "real unfairness or real injustice" in the way the arbitration was conducted.[34] Mere errors of fact or law, without more, are not grounds for court intervention.[35] Additionally, attacks by parties on findings of fact disguised as a breach of natural justice will not be entertained.[36] There is no merits review.[37] Importantly, their Honours stated "real prejudice, actual or potential, would be a consideration in the evaluation of any unfairness or practical injustice".[38] On the facts, their Honours considered that TCL received a scrupulously fair hearing.[39]

In 2016 Justice Croft heard and dismissed another application to set aside an arbitral award on grounds of public policy in the *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd*.[40] The Amasya parties argued that they were unable to present their case as the arbitrator made an award on the basis of a claim not put in the notice of dispute.[41] Croft J, noted that fairness was a part of the concept of public policy. Specifically, his Honour stated that "there is no practical difference between these two grounds in the way in which they relate to natural justice and procedural fairness … The 'public policy' ground is directed towards contraventions of fundamental principles of justice and morality".[42] His Honour considered both the public policy and natural justice grounds together.[43]

The relatively recent case of *Mango Boulevard Pty Ltd v Mio Art Pty Ltd*[44] confirmed the principles in Australia. In that case, the applicant complained of not having an opportunity to present its case after the evidence closed. The Court confirmed that a party must show "real unfairness or real injustice" to have an award set aside on grounds of public policy.[45] The Court found that the applicant did have the opportunity to present its case and made its own forensic choices.[46] Therefore, there was no "real unfairness or real injustice" constituting a breach of natural justice or public policy.[47] The author now examines the grounds of public policy and natural justice in Singapore.

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[32] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [73]; [2014] FCAFC 83; Model Law, n 2, Art 18.

[33] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [67], [84]; [2014] FCAFC 83 and further *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [45], citing *Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452.

[34] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [54]–[55], [111], [146]; [2014] FCAFC 83 referred to in *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735, [45]; *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [48]–[49]; *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287, [183]–[185]; [2017] FCA 648.

[35] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [105]; [2014] FCAFC 83.

[36] See *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786; [2015] VSCA 37, cited in *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163, [22].

[37] *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [23].

[38] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [111]; [2014] FCAFC 83.

[39] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [167]; [2014] FCAFC 83.

[40] *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326.

[41] *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [27].

[42] *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [26] in affirming the *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [26]; [2014] FCAFC 83.

[43] *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [26].

[44] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39.

[45] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [103] referring to the *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361; [2014] FCAFC 83.

[46] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [82].

[47] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [109].

Public Policy and Natural Justice Ground in Singapore

Article 34(2)(a)(ii) has a natural justice element in that it provides that a party should have the opportunity to present his case. However, as has been noted Singapore has added additional grounds of fraud, corruption and a breach of the rules of natural justice as grounds to set aside an arbitral award.[48] The public policy ground under Art 34(2)(b)(ii) of the Model Law is generally interpreted separately, although fraud and corruption have also been considered under the public policy ground.[49] It is proposed to briefly explore how the ground of public policy is interpreted in Singapore then to proceed to examine the ground of natural justice.

Public Policy

Shetty has noted that the Courts in Singapore have "avoided providing a single, comprehensive definition as to what the concept [of public policy] entails".[50] The concept was explored by the Court of Appeal in 2006.[51] The case concerned an application to set aside an award for being in breach of public policy and the rules of natural justice. The applicant was aggrieved with findings of fact emanating from the failure of the applicant to participate in the first arbitration and an estoppel finding. It was further argued that the findings were illegal and contrary to the public policy of Singapore.[52] The Court found that there was an error of law in the award on jurisdiction. In dismissing the application, the Court stated:

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" … or where it violates the forum's most basic notion of morality and justice … In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice … It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside [citations omitted].[53]

It was further stated "[t]he enforcement of award with an error of that nature [containing an error of law] would certainly not shock the conscience".[54] Consequently, the public policy ground does not apply to errors of fact or law unless they are outside the scope of the arbitration.[55] The case of *AJU v AJT*[56] also concerned the public policy ground. The parties entered into an agreement alleged to be illegal under Thai law in that its object was alleged to stifle the prosecution of an offence in that country. However, the agreement was that a sum of money would be paid on evidence of withdrawal or discontinuation of the criminal proceedings.[57] After carefully examining the agreement entered into the Court concluded that the agreement itself did not disclose any illegality, as only the Thai authorities could discontinue or

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[48] *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 24.

[49] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, [59].

[50] Nish Shetty, "Memorandum to Members of the IBA Recognition and Enforcement of Awards Sub-committee" (Clifford Chance, Singapore, 25 March 2015), 1 <https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiU3-zD2rPdAhWJd94KHdHOD3YQFjAAegQIAxAC&url=https%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3DB179BAF0-63E1-46C5-B1D3-3834DEF95AE2&usg=AOvVaw0YurNggvOntGuARYVf_ZQZ>.

[51] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41.

[52] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, [23].

[53] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, [59] followed in *Re Landau, Toby Thomas QC* [2016] SGHC 258, [36]; *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76, [60].

[54] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, [58].

[55] *AJU v AJT* [2011] SGCA 41, [66].

[56] *AJU v AJT* [2011] SGCA 41.

[57] *AJU v AJT* [2011] SGCA 41, [6].

withdraw the charges.[58] As such, an award may only be set aside on grounds of public policy if to enforce the award would "shock the conscience".[59]

The Court noted that the ground is concerned with the most "serious forms of transgression".[60] The Court concluded that the agreement did not disclose any illegality. The Court reasoned that a narrow approach should be adopted to public policy and stated "[u]nless its decision or decision-making process is tainted by fraud, breach of natural justice or any other vitiating factor, any errors made by an arbitral tribunal are not per se contrary to public policy".[61] This arguably opened the door for natural justice to be considered with public policy, however the two concepts have generally been considered separately in Singapore.[62]

Breach of Natural Justice in Singapore

In 2007, the Court of Appeal considered an application to set aside an award for an alleged breach of natural justice.[63] It was contended that the arbitrator had dealt with an issue outside the scope of the arbitration, and second, that the applicant was denied the opportunity to be heard on a critical issue ultimately relied upon to resolve the matter. As a starting point, the Full Court considered a party seeking to set aside an award for breach of the rules of natural justice must identify the breach, how it was breached and how it was connected with the award and demonstrate prejudice.[64] The content of the natural justice ground in Singapore is broadly:

- the arbitrator "must be disinterested and unbiased";[65]
- the "right to be heard"[66] and "in general a right to be heard effectively on every issue that may be relevant to the resolution of the dispute".[67]

The Court also stated that only "meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied".[68] The principles stated in the *Soh Beng Case* represent the approach to an alleged natural justice breach in Singapore.[69] To satisfy the test in Singapore, a party must show that the breach altered the outcome of the arbitration.[70] A technical or procedural breach would not be sufficient to set aside an award.[71] The court examined the concept again in *Front Row Case*.[72] It was an unusual case in that it was alleged that "the Arbitrator had inexplicably concluded that Front Row relied upon only one of three misrepresentations when there was no basis on which he could have

[58] *AJU v AJT* [2011] SGCA 41, [63]–[64], [69].

[59] *AJU v AJT* [2011] SGCA 41, [29] where the Court referred to the principle as enunciated in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, [59] and recently in *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76, [60].

[60] *AJU v AJT* [2011] SGCA 41, [36].

[61] *AJU v AJT* [2011] SGCA 41, [66]; see also *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Ltd* [2018] SGHC 78, [92].

[62] *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 24(b).

[63] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [1].

[64] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [29], approving *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 2 SLR 262; endorsed recently in *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76, [30].

[65] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [43].

[66] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [42]–[43], [65].

[67] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [65].

[68] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [65].

[69] See, eg, *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [20]; *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57, [48].

[70] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [91].

[71] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [91].

[72] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80.

concluded that Front Row had abandoned reliance on the rest".[73] This appeal was allowed because the arbitrator was found to have failed to give the applicant a fair hearing.[74] In this regard the Court referred to Australian cases on the issue of giving a party a fair hearing where an arbitrator does not understand or attempt to understand an argument of a party.[75] The arbitrator disregarded an argument as he thought it was abandoned. The Court found that it was a breach of natural justice[76] and further it caused prejudice.[77]

V. Comparison of Interpretation between Australia and Singapore of the Key Grounds to Set Aside an Arbitral Award

Public Policy in Singapore and Australia

As is noted above, both States adopt a narrow approach to the meaning of public policy.[78] In Australia, the natural justice ground is considered within the conceptions of public policy and therefore has potentially broader application. It covers both principles of substantive justice (eg, fraud and bribery) as well as procedural justice.[79] To set aside an award for breach of public policy in Australia it must offend fundamental principles of justice and morality.[80] That is to say that real unfairness or real practical injustice must be demonstrated.[81]

In Singapore, an arbitral award will not be set aside on grounds of breach of public policy unless upholding the arbitral award would "shock the conscience".[82] The effect of errors of law in an arbitral award have been considered in Singapore and Australia under the public policy ground, and without more, will generally not constitute a breach of public policy.[83] Additionally, although fraud and corruption are separate grounds under the Singaporean legislation,[84] they have been considered by the Singaporean Courts in public policy arguments.[85] The author has not been able to locate a case in either Australia (putting aside cases involving alleged procedural breaches) or Singapore where an award was set aside for breach of public policy. In *AJU v AJT*[86] the Singaporean Court of Appeal overturned a decision setting aside an award alleged to be tainted with illegality (as has been noted fraud arguments were a part of that case). Similar to Australia, the focus of the public policy ground in Singapore appears to be on substantive justice and fundamental principles of justice and morality,[87] but not also on procedural justice in contrast to Australia. As such, the only practical difference in interpretation of the public policy ground between the States is that the public policy and natural justice ground are generally interpreted separately in Singapore.

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[73] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [2].

[74] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [29].

[75] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [36]–[44].

[76] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [45]–[46].

[77] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [53].

[78] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [77]–[78], [143]; [2014] FCAFC 83 affirmed recently in *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [103]; in Singapore see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, [59]; *AJU v AJT* [2011] SGCA 41, [36], [65].

[79] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [72]; [2014] FCAFC 83, citing the Explanatory Memorandum, *International Arbitration Amendment Bill 1988* (Cth).

[80] *Emerald Grain Australia Pty Ltd v Agrocorp International Pte Ltd* (2014) 314 ALR 299, [13].

[81] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [54]–[55]; [2014] FCAFC 83.

[82] *AJU v AJT* [2011] SGCA 41, [27].

[83] Australia, eg, *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [105]; [2014] FCAFC 83; Singapore, eg, *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, [57]; *AJU v AJT* [2011] SGCA 41, [66].

[84] *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 24(a).

[85] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, [65]; *AJU v AJT* [2011] SGCA 41, [44].

[86] *AJU v AJT* [2011] SGCA 41.

[87] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, [59].

Natural Justice in Singapore and Australia

In Australia, the rules of natural justice are considered within the bounds of the public policy ground. The rules of natural justice embrace the concept of fairness and equality (no bias and the right to be heard).[88] For an award to be set aside for breach of natural justice in Australia an applicant must show "real unfairness or real practical injustice".[89] In Singapore the two rules at the heart of natural justice also stem from fairness and equality. The arbitrator "must be disinterested and unbiased",[90] and the parties have a "right to be heard".[91] As has been noted in relation to public policy, mere errors of fact or law without more are not grounds for court intervention in either State.[92] This equally applies under the natural justice ground.[93] Merits reviews of an arbitral award are impermissible in both States.[94] In Singapore only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.[95] The potential different interpretation in Singapore arises from use of the word "prejudice" in s 24 of the *SIAA*.

The author has only been able to locate three cases where a party has successfully applied to set aside an arbitral award for breach of natural justice; two Singaporean cases[96] and one Australian case.[97] All three cases were unusual. In the first Singaporean case, *Front Row Case*,[98] the arbitrator wrongly assumed that a party had abandoned part of its claim. The assumption caused prejudice and the award was set aside. In the course of the judgment, the Court referred to Australian cases[99] on similar issues. The second Singaporean case, *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* (*LW Infrastructure*),[100] concerned a failure by the arbitrator to give a party an opportunity to make submissions on an additional award. The Court reasoned that the breach must cause actual or real prejudice. In this case it was a clear breach and it caused actual prejudice to the applicant being deprived of the opportunity to be heard.[101]

In the Australian case, the arbitrator had agreed to hear part of the claim on a preliminary basis only and despite that proceeded to consider substantive questions such as set-offs and defences contrary the agreed approach.[102] The Court explored the concept of prejudice in assessing whether the applicant was denied the opportunity to present its case. The Court considered the *TCL Case* which referred to a discussion

[88] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [73]–[75]; [2014] FCAFC 83.

[89] *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [153]; [2014] FCAFC 83.

[90] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [43].

[91] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [42]–[43], [65].

[92] *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd (No 2)* [2018] VSC 741 (7 December 2018) [19] referring to a Singaporean case; *BLC v BLB* [2014] SGCA 40, [52]–[53].

[93] Justice Judith Prakash, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice" (Speech delivered CIArb to the 2013 International Arbitration Conference in Penang, Malaysia, 24 August 2013) [3] <https://www.supremecourt.gov.sg/Data/Editor/Documents/Judith%20Prakash%20J%20speech%20delivered%20at%20%20CIArb%20International%20Arbitration%20Conference%202013.pdf>; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [95]; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [105]; [2014] FCAFC 83.

[94] *AKN v ALC* [2015] SGCA 18, [31], cited in the *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [22].

[95] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [65] which accords with "real unfairness or real practical injustice" in Australia; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [153]; [2014] FCAFC 83.

[96] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80; *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57.

[97] *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287; [2017] FCA 648.

[98] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [53]–[54].

[99] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [36]–[44].

[100] *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57.

[101] *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57, [91].

[102] *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287, [228], [247]; [2017] FCA 648.

in the Singaporean case of *LW Infrastructure* in assessing prejudice or unfairness or injustice.[103] The Court concluded that the applicants were denied an opportunity to present part of their case, and lost a "valuable opportunity".[104] That is to say there was a "realistic rather than fanciful possibility"[105] of a different outcome to the arbitration as a result of the breach. This approach is consistent with the additional requirement of prejudice to warrant setting aside an award for breach of natural justice in Singapore.[106] While there are legal differences in terms of the wording, there is no practical difference of significance in interpretation of the rules of natural justice between Australia and Singapore.

VI. Conclusion

In conclusion it has been noted that both Singapore[107] and Australia[108] have adopted the Model Law. Article 34 concerns the grounds upon which an arbitral award may be set aside and it was wholly adopted by both States.[109]

A direct comparison of the differences in interpretation of Art 34 between the States indicates that in Australia, the natural justice rules engage the public policy ground, whereas they generally do not in Singapore. However, as has been noted, Australian cases on the Model Law on setting aside arbitral awards have been referred to in the Courts of Singapore[110] and likewise Singaporean cases have been referred to in the Courts of Australia.[111] Despite the subtle differences in local legislation supplementing Art 34, the author has not identified any practical differences of significance in application of Art 34 by the Courts of the respective States.

Chief Justice Menon sitting in the Court of Appeal at Singapore has forthrightly stated that "[t]he courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases".[112] Accordingly, to successfully set aside an arbitral award is a tall order in both States.

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[103] *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287, [119]; [2017] FCA 648, citing the *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361; [2014] FCAFC 83 where the Court referred to *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [111]; [2014] FCAFC 83 on the relevance of prejudice.

[104] *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287, [227]; [2017] FCA 648.

[105] *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287, [184]; [2017] FCA 648.

[106] See also *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [111], [153]–[154]; [2014] FCAFC 83 noting the similarities in interpretation between the two States.

[107] *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 3 Sch 1.

[108] *International Arbitration Act 1974* (Cth) s 16(1) Sch 2.

[109] Australia: *International Arbitration Act 1974* (Cth) s 16 Sch 2 Art 34; Singapore: *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) s 3 Sch 1 Art 34.

[110] See *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, [36]–[44] for example.

[111] *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186; *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57; *AJU v AJT* [2011] SGCA 41; *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86; *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 all considered in the *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [76], [147], [152]–[153]; [2014] FCAFC 83.

[112] *AKN v ALC* [2015] SGCA [37], quoted with approval in Australia by Croft J in the *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [23]–[24].

Comparative Study of Asian Arbitration Centres vis-a-vis Public Interest and Transparency Measures

Aayushi Singh*

Undeniably impending public interest in publication of awards and transparency of proceedings is worthy of attention, however till what extent should this right be strained remains contentious. The seemingly overwhelming benefits of transparency need to be weighed against the legitimate interest of parties in having disputes settled swiftly and confidentially.[1] To make the analysis more detailed, attention has been devoted to institutional transparency in Asian arbitration centres (Singapore International Arbitration Centre, Asian International Arbitration Centre (erstwhile Kuala Lumpur Regional Centre for Arbitration), Hong Kong International Arbitration Centre and China International Economic and Trade Arbitration Commission) vis-à-vis public interest. Measures that may be adopted by arbitral institutions during terms of pre-award and post-award transparency have been suggested.

Introduction – Impact of Public Interest on Arbitration

Even though arbitration mostly concerns private parties and corporations have vested interests in discretely resolving disputes and safeguarding trade secrets, arbitration may often involve the State, an entity representing the State or a State instrumentality.[2] Keeping aside Investor-State arbitrations, issues of bribery, corruption and money laundering may also be deliberated in commercial arbitration and the outcome of the same would significantly form a public policy concern.[3] Public interest is triggered in disputes concerning parties in the demesne of health, environment, anti-trust, medical health and pharmaceuticals.[4] At the same time, confidentiality is revered as one of the implied obligations of arbitration and parties may often not wish to comprise on it, thus making it challenging to strike a balance between transparency and confidentiality.

With respect to public policy concerns, the same threshold as investor-state arbitration must be imposed on commercial arbitration since the concerns raised in both are comparable and equivalent in measure. Commercial arbitrations involving the State or its instrumentalities must have stipulations of transparency inserted into the arbitral processes along with an opt-in and out basis and arbitral institutions can greatly assist in the same. An analysis of transparency measures taken up by arbitral institutions has been made under the following heads: (a) publication of awards (b) higher accountability (c) selection of arbitrators (d) challenge to arbitrator appointments and (e) public access to proceedings.

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[1] Victoria Pernt, "How Much Transparency Does International Commercial Arbitration Really Need?", *Kluwer Arbitration Blog* (4 March 2017) <http://arbitrationblog.kluwerarbitration.com/2017/03/04/how-much-more-transparency-does-commercial-arbitration-really-need/?print=pdf>.

[2] Gabriele Ruscalla, "Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?" (2015) 3 *Groningen Journal of International Law* 1, 8.

[3] Elina Zlantaska, "To Publish, or not to Publish Arbitral Awards – That is the Question" (2015) 81 *International Journal of Arbitration* 25, 27–33.

[4] Roger Argen, "Ending Blind Spot Justice" (2014) 40 *Brooklyn Journal of International Law* 226.

A. Publication of Awards

A dynamic role needs to be followed by arbitral institutions in all three forms of transparency which may subsist: organisational transparency, legal transparency and transparency in proceedings.[5] Arbitral institutions are gradually moving towards increasing publication of awards and few institutions have even moved to a presumption in favour of redacted awards, if not opposed by either of the parties.[6] According to the SIAC Practice Note for Administered Cases, the Singapore International Arbitration Centre redacts party identification and other sensitive information and also consults the parties and the Tribunal prior to such publication.[7] This is in remarkable contrast to the previous SIAC Rules of 2013 which allowed SIAC to publish redacted versions of the award without express consent of the disputing parties or the Tribunal.[8] Other institutions publish anonymised summaries and extracts of awards, unless the parties object.[9] Several specialised sectors like maritime arbitration provide for express publication of awards, unless agreed to the contrary by the parties.[10] Investor-state awards made in treaty-based arbitrations are also frequently published by the International Centre for Settlement of Investment Disputes.[11] There are also extreme stances taken by institutions where the German Arbitration Institute has stated that "under no circumstances" must there be publication of party names, arbitrators or even legal representatives.[12] The generally accepted view is of publishing awards in redacted form, only with the consent of the parties.[13]

The Working Group on the Model Arbitration Law formulated by the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") avoided the insertion of a specific provision on award publication.[14] Even though publication has remained fairly controversial, there are arguments tended for and against it fairly frequently, thus leaving it as an open question for the parties or the arbitral rules themselves.

Even though no strict rule of *stare decisis* is followed in international arbitration, a creation of a de facto body of law will encourage consistency in decision making across Tribunals while deciding similar issues.[15] Across many traditional sectors of commercial law, there is a dearth of a body of law and highly contradictory stances on contentious issues due to non-publication of awards and summaries of decided cases. However, there may also be a contradictory stance taken on redacted publication of awards as an incomplete analysis of the case law in a redacted form without providing the factual matrix is often delusional and misleading and does not always suffice in forming the basis for an accurate or consistent judgment or award in the future. A middle path suggested would be to publish two versions of the award, one with all the confidential information which would be made available only to the parties and the other would be the redacted form of the award which could later be published with the consent of the parties.[16] This will accord the parties suitable autonomy and will reassure them by allowing them to review and object to the text of the final award.

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[5] See Pernt, n 1.

[6] American Arbitration Association, International Dispute Resolution Procedures, Art 27(8).

[7] *SIAC Practice Note for Administered Cases*, 2 January 2014, para 32.

[8] *Singapore International Arbitration Centre Rules 2013* r 28.1.

[9] *Vienna International Arbitration Centre Rules 2018* Art 41.

[10] *AMAC Procedural Rules 2014* Art 28.

[11] *ICSID Convention 1966* Art 48(5); *ICSID Rules 2002* r 48(4).

[12] *German Arbitration Institute Rules 2018* Art 42.

[13] *London Court of International Arbitration Rules 2014* Art 30(3); *Swiss Rules 2012* Art 44(3).

[14] United National Commission on International Trade Law, 14th session, Secretariat Note A/CN.9/207 (19–26 June 1981).

[15] João Ribeiro and Michael Douglas, "Transparency in Investor-state Arbitration: The Way Forward" (2015) 11 *Asian International Arbitration Journal* 49.

[16] Andrew Stephenson and Astrid Andersson, "Arbitration: Can It Assist in Developing Common Law – An Australian Point of View" (2016) 33 *International Construction Law Review* 414.

Institutions naturally require great incentives to amplify publication of awards and since there is no common clause provided by the UNCITRAL with respect to privacy or confidentiality, an initiation of a common protocol between institutions should be reflected upon. Alternatively, the task of sanitising and publishing awards may also be given to an independent body which could later act as a depository of awards and could also include ad hoc tribunals within its realm.[17]

B. Higher Accountability

The element of the "state" which is now becoming increasingly typical to public arbitration has succeeded in fluctuating the emphasis from traditional private opaqueness of the arbitral process to a fairly heightened level of transparency and civic accountability.[18] Publicity creates higher accountability and improves the quality of decision making[19] as an international scrutiny of a rendered award will automatically motivate the Tribunal to make awards bereft of errors. Publicity also allows parties to fathom the depth of knowledge and insight of arbitrators entrusted with the responsibility of dispute resolution, which would automatically ensure better selection of arbitrators for future disputes.

The real beneficiary of publication is actually the arbitrator herself or himself because supervision, constant assessment and scrutiny naturally heighten the accountability of the arbitrator. The handling of the arbitral process is seminal and the arbitrator's analysis of witnesses and their testimony is integral, however the arbitrator's acid test is the final award and the enforceability of the same. Further, there is lack of availability of information regarding arbitrators and previously handled cases which would allow a litigant insight into the case management style or rationale behind awards. Organizations as Arbitrator Intelligence and Global Arbitration Review's Arbitrator Researcher Tool have worked towards this however most arbitral institutions have not compiled a comprehensive list of previously appointed arbitrators and their expertise available in the public domain.

Another element that challenges the accountability of arbitrators is the confidentiality of deliberations of the Tribunal members. The London Court of International Arbitration in Art 30.2 of its recent Rules states that the Tribunal's deliberations shall remain confidential to its members. Right from the UNCITRAL to the domestic laws of Hong Kong, Switzerland, United States and the United Kingdom, none of the legislations place a specific obligation of confidentiality to be undertaken in the deliberations by the Tribunal. French law is an exception and specifically provides for the deliberation of the arbitral tribunal to be confidential.[20] German law also makes a similar exception.[21] Even though confidentiality of deliberations is highly favourable to protect Tribunal members from outside elements of bias, there must be a strict method of scrutiny of awards imposed by arbitral institutions, which do not just provide insight into the procedural lacunae in the same but also aim to eliminate bias that could have crept into the rationale behind the making of the award. Scrutiny of awards additionally makes sure that awards remain free from implicit bias and the procedure adopted is genuinely transparent. The scrutiny procedure allows institutions to regulate the quality of a rendered award and at the same time also substantially build the prestige of the arbitral institution.

Additionally, besides inculcating higher accountability in arbitrators, a critique of the existing body of case laws and slicing the nuances of the same will encourage future arbitrators, counsels and academics in making arbitration a more well-functioning and reliable form of dispute resolution itself as there

[17] Joshua Karton, "A Conflict of Interests: Seeking the Way Forward on Publication of International Arbitral Awards" (2012) 28 *Arbitration International* 447, 479.

[18] Barton Legum, "The Definitions of 'Precedent' in International Arbitration" in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration*, *IAI Series on International Arbitration No 5* (Juris Publishing, 2008) 5.

[19] Compare Thomas Walde, "Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication" in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration*, *IAI Series on International Arbitration No 5* (Juris Publishing, 2008) 113, 115.

[20] *French Code of Civil Procedure 1981* Art 1479.

[21] *ZPO, Code of Civil Procedure 2013* s 383(1).

will be a gradual growth of a body of international commercial law which will serve as a guide to both arbitrators and parties in the future.[22]

C. Selection of Arbitrators

Most parties need an external counsel to make an informed choice about the selection of the arbitrator. In the normal course of selection of an arbitrator, a party may usually draw a prospective list of arbitrators and this list may include information regarding their background, qualifications and expertise however information regarding their past appointments, rendered awards and case-management styles will rarely be available in the public domain. This leads to the appointment of the same arbitrators again and again and this often leads to formations of clubs or cartels and a lack of diversity in creation of Tribunals. There exists a publicly accessible domain maintained by the Hong Kong International Arbitration Centre (HKIAC) which enlists its Panel and List of Arbitrators and the search criterion may be variegated on expertise, language, alternative dispute resolution (ADR) skills, qualifications etc. The Asian International Arbitration Centre (hereinafter "AIAC") also provides a similar database. China International Economic and Trade Arbitration Commission (hereinafter "CIETAC") provides a compiled list of its Panel of Arbitrators divided according to Chinese, China Macau, Hong Kong, Taiwan and Foreign Arbitrators however no search tool is provided which may allow refining the scope of research. Even organisations like the International Chamber of Commerce (ICC) which draw aid from national committees for appointment of arbitrators, do not provide express reasons behind the reasons for appointment of certain arbitrators by such committees.

The rather famous "Puppies or Kittens?" test was a rather unique initiative suggested by co-authors in which arbitrators would publicly disclose their preferences and inclinations with respect to certain issues with respect to the procedural matters which may arise in the course of the arbitration.[23] The test was in the form of a short questionnaire which would not address substantive issues of law and their stand on it (which is already discussed under "issue conflict" in arbitration) but would rather draw information regarding their style of case management and level of delegation to tribunal secretaries, among other such procedural matters. ArbCheck is also one such unique project which allows a refined search of up to 35 arbitrators and the continuing pattern in their line of judgment. Such tools help disputing parties in making a more refined choice of arbitrators.

D. Challenge to Arbitrator Appointments

The Queen Mary University of London International Arbitration Survey[24] depicted how parties were discontent with the lack of insight into the arbitral institution's decision making regarding challenges to arbitrator appointments and the broadening of transparency would be a rather welcome move. HKIAC's practice note clearly states that the decision pertaining to arbitrator's challenge of appointment would be communicated to the parties, challenged arbitrators in writing. However, it specifically excludes the HKIAC from any obligation to provide reasoned basis for its determination.[25] Rule 16.4 of *SIAC Rules 2016* states that challenges to appointment of arbitrators shall be "reasoned, unless otherwise agreed by the parties." While no such provisions are found in CIETAC or AIAC, the ICC has created a benchmark in this realm by publishing information regarding appointment of their Tribunals and subsequent changes to the same.[26] The provision however remains silent on the reason for alterations

[22] Martin Hunter, "Publication of Arbitration Awards" (1987) 3 *Lloyd's Maritime* 129, 142.

[23] Michael McIlwrath, Lucy Greenwood and Ema Vidak-Gojkovic, "The Arbitrator and the Arbitration Procedure, Puppies or Kittens? How to Better Match Arbitrators to Party Expectations" in *Austrian Yearbook on International Arbitration* (MANZ Verlag Wien, 2016) 62.

[24] QMUL School of International Arbitration, *International Arbitration Survey: Choices in International Arbitration* (2010) 29.

[25] Hong Kong International Arbitration Centre, *New Practice Note of HKIAC on Challenge of Arbitrator* (27 October 2018) <http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/4_Practice%20Note_2014.pdf>.

[26] International Chamber of Commerce, "ICC Begins Publishing Arbitrator Information in Drive for Improved Transparency" (27 June 2016) <https://iccwbo.org/media-wall/news-speeches/icc-begins-publishing-arbitrator-information-in-drive-fo>.

or changes to the tribunal or reasoned deliberations on challenges to arbitrator appointments. Back in China, Art 32.6 of the *CIETAC Rules 2015* states that the Chairman of the CIETAC will make the final ruling on the challenge to an arbitrator's appointment and he may do so with or without stating reasons for the same. Several standards of disclosure have rather vague criterion and even though arbitral institutions have the exclusive interpretation to these rules, most institutions often conceal the reasons for the Court's decisions.[27]

This may be considered as institutional autonomy however lack of publication of pertinent information regarding challenges and the removal of arbitrators often leaves the clientele of such institutions with no past point of reference regarding the arbitrators. A mere communication of the decision on challenge of appointment to the parties and members of the Tribunal is highly insufficient and the ICC norm may definitely be upheld by arbitral institutions as the ideal standard. Challenges to arbitrators are of course fact-specific however publication of such information may still be useful to understand parameters and trends across arbitration institutions.

E. Public Access to Proceedings

Article 9.23(2) of the Trans-Pacific Partnership mandates public hearings and barring protected information, only allows temporary closing of the public hearings. Besides proposing public hearings in the *Eli Lilly*[28] case, International Centre for Settlement of Investment Disputes (ICSID) also accepted six out nine non-disputing party briefs alongside full publication of procedural orders (POs) and pleadings on the official website. Public hearings have been incorporated under Art 6 of the 2014 UNCITRAL Rules on Transparency as well. In this realm however, a balance needs to be maintained as the State or any of its agents should not be compelled to disclose information pertaining to diplomatic relations or domestic security in public. This norm however has remained conspicuously absent in international commercial arbitration.

With respect to most commercial hearings, there is a presumption raised in favour of confidential hearings with "persons not involved in the proceedings" not being allowed admission.[29] This is commonly done more so for privacy rather than confidentiality concerns. Since most commercial arbitrations concern private parties with vested interests in protecting trade secrets and sensitive information, not allowing admission of third parties does not seem highly unreasonable. However, provisions of amicus briefs as found in the UNCITRAL Transparency Rules[30] may also be incorporated into commercial arbitrations as third parties with a sufficient interest in the arbitration may often provide valuable insight which may have been overlooked during the making of an award. Allowing non-parties to be involved as amici curiae requires burdensome debate over more material, which naturally needs more time and incurs significant costs however non-party submissions may be limited and only non-parties with significant interest in the issue must be involved.[31]

Where does Asia Stand on Confidentiality?

Confidentiality is often acknowledged to encourage efficient and rather dispassionate dispute resolution, in contrast to a dramatic or highly emotive "trial by press release" which naturally reduces the risks of disclosures which may damage the reputation of commercial entities vying for swift settlement of disputes and a minimal role of public posturing or appealing to the "court of the public."[32] Confidentiality is often

[27] *Hong Kong International Arbitration Centre Rules 2018* Art 2.2.

[28] *Eli Lilly and Company and the Government of Canada* (ICSID Case No UNCT/14/2).

[29] *International Chamber of Commerce Rules 2012* Art 26(3); *Hong Kong International Arbitration Centre Rules 2013* Art 36(1); *Singapore International Arbitration Centre Rules 2013* Art 22(7).

[30] *UNCITRAL Transparency Rules 2013* Art 4(1), 4(3).

[31] Sherlin Tung and Brian Lin, "The Arbitrator and the Arbitration Procedure, More Transparency in International Commercial Arbitration: To Have or not to Have?" in Christian Klausegger et al (eds), *Austrian Yearbook on International Arbitration 2018* (MANZ Verlag Wien, 2018).

[32] Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd ed, 2014) Ch 20, 2779–2831.

considered an implied obligation in arbitration. Article 42.3(a) of the *HKIAC Rules 2018*, Rule 16(1) of the *KLRCA Arbitration Rules 2017* and Rule 39 of the *SIAC Rules 2016* states that unless there is an impending enforcement or challenge of the award issue or a need to "pursue a legal right or interest of the party", there must be no publication or disclosure of information related to arbitration. Even courts in Singapore have presumed confidentiality in arbitral matters by the very nature of commercial arbitration.[33] Article 36 of *CIETAC Rules 2015* addresses in camera proceedings and disallows any discussion by the Tribunal with a third party on procedural or substantive matters pertaining to the dispute in issue. It can clearly be inferred that blanket confidentiality is taken as a default provision in the four mentioned centres in remarkable contrast to Stockholm Chamber of Commerce[34] or ICC Rules[35] which state that confidentiality could be catered to on a case-by-case pretext or at the request of the parties. Even in countries as the United States, no such presumption regarding confidentiality being inherent in arbitration has been made[36] and similarly in Australia[37] and Sweden[38] confidentiality has not been deemed as an "essential attribute" nor an implied duty in arbitration.

Transparency in Investor-state Arbitrations

AIAC Arbitration Rules 2018 in Pt II of their revised rules explicitly referred to the UNCITRAL Rules on Transparency drawn pursuant to the Mauritius Convention. In furtherance of its One Belt One Road initiative and strengthening People's Republic of China as a stronghold for investment arbitration, the *CIETAC Investment Arbitration Rules 2017* were introduced providing public hearings unless decided otherwise by the Tribunal under Art 32 and public disclosure of information related to the investment arbitration by agreement of the parties by virtue of Art 55. The nature and identity of funders with respect to any third-party funding received must also be revealed.[39] One of the most unique features of the CIETAC Investment Arbitration Rules is exhibited in Art 43(1) which allows the Tribunal to mediate the case confidentially during the arbitration's pendency. This is held in contrast to Malaysia and China's position against the Mauritius Convention. China's report to the UNCITRAL Secretariat stated that considering the confidential and rather private nature of arbitration, they did not consider it legitimate to impose publicity provisions on treaty-based settlement or investor-state dispute settlement[40] however this is contradicted by China's continuous commitment to transparency as is exhibited in the Canada-China BIT[41]and the Explanatory Note attached to the *CIETAC IA Rules 2017*.

Rule 38 of the *SIAC Investment Arbitration Rules 2017* also addresses publication of the nationality of the parties, identity and nationality of Tribunal members, invoked treaty or statute and in other cases, redacted excerpts on the Tribunal's reasoning and the Courts' decisions on challenges to arbitrator appointments. With respect to the challenge to arbitrator appointments, SIAC may also publish redacted information about the same.[42] One of the most unique features of the SIAC IA rule is the scrutiny procedure by the Registrar on any points of substance,[43] which is fairly practiced in commercial arbitrations but is notably not performed by either ICSID or ICC. SIAC awards are not subject to annulment proceedings either, as

[33] *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] 2 SLR 547.

[34] *Stockholm Chamber of Commerce Arbitration Rules 2017* Art 3.

[35] *International Chamber of Commerce Rules 2017* Art 23(2).

[36] *United States v Panhandle Eastern Corp*, 118 FRD (D Del, 1988).

[37] *Esso Australia Resource Ltd v Plowman* (1995) 183 CLR 10.

[38] *Bulgarian Trade Bank Ltd v AI Trade Finance Inc*, T 1881-99 (27 October 2000).

[39] *CIETAC Investment Arbitration Rules 2017* Art 27.

[40] UNCITRAL Working Group II, *Settlement of Commercial Disputes: Transparency in Treaty-based Investor-state Arbitration – Compilation of Comments by Governments*, 53rd session, UN Doc A/CN-9/Working Group II/WP.159/Add.1/19 (4–8 October 2010).

[41] Canada-China Bilateral Investment Treaty, 2012, Art 28.

[42] *SIAC Investment Arbitration Rules 2017* r 38.2.

[43] *SIAC Investment Arbitration Rules 2017* r 30.3.

is the case with ICSID awards.[44] Notably, third-party submissions have been undertaken in both SIAC[45] and CIETAC IA Rules.[46]

The concerned parties are of course free to place stipulations regarding transparency or confidentiality in the relevant BIT and there does not always persist an impending public interest in all investor-state arbitrations which should make transparency a compelling need. Investment arbitrations may often involve smaller monetary amounts and concern narrow "public" constituencies, while commercial arbitrations which pertain to states may often have rather dramatic impacts on the state economy. Thus, there need not always be a higher threshold for transparency imposed on investor-state arbitrations.

CONCLUSION

If a party favours confidentiality in arbitration to safeguard its reputation or conceal trade secrets, this should not hinder award publication since party identity and sensitive information pertaining to the nature of trade, unpublished price-sensitive information, intellectual property etc would anyway be retracted. Even though transparency is the zeitgeist right now, confidentiality needs to be maintained in close balance. Whether or not institutional investment arbitration rules as CIETAC and SIAC IA Rules will be able to form a better and more viable alternative to ICSID remain open to debate. Even though China and Singapore both enjoy reputation, infrastructure and the adequacy to handle high-end investment arbitration cases, the questions posed to the legitimacy of investor-state disputes by the public and a growing demand for investment courts places several questions on the international investment arbitration regime at large.

The argument that the public is only a stakeholder in investment arbitration and thus a more advanced threshold for transparency must be imposed is poorly discerned since even in commercial arbitrations, the public retains substantial interest in state-owned entities and corporate bodies and would continually be at the receiving end. Confidential information may pertain to the dispute, proceedings or the award itself and unless there is an express agreement by the parties which binds them to absolute confidentiality, sufficient departures from this norm can be made and publication of awards, information pertaining to challenge of arbitrators, transparent procedure of selection of arbitrators, public access to hearings, third-party brief submissions etc can be incorporated into the legal framework of arbitration institutions in varying measures. The widespread usage of arbitration requires creation of a sense of trust among its users with speed, confidentiality, efficiency and transparency in equal measure and the latter two can only be dealt with optimally by control mechanisms undertaken by arbitral institutions.

[44] *ICSID Convention 1966* Art 52.

[45] *SIAC Investment Arbitration Rules 2017* r 29.

[46] *CIETAC Investment Arbitration Rules 2017* Art 44.

Final Offer as a First Choice? Police Arbitration: A New Zealand Case Study

Giuseppe Carabetta*

Arbitration has become the chosen method of resolving disputes over wages and conditions for police and other emergency workers in Australia, Canada, the United States, Europe, and elsewhere. This is because emergency workers, by virtue of their essential status, cannot necessarily engage in industrial action such as strikes. In the police sector, New Zealand takes a unique approach to resolving such disputes by utilising a blend of mediation and "final-offer arbitration". As this article shows, New Zealand has seen more mutually acceptable negotiated outcomes and ensured the reliable provision of police services under this model. Ultimately though, as explained by interviews with leading practitioners, broader structural and environmental factors may in part explain New Zealand's success, suggesting it may not entirely be repeatable by police forces overseas.

I. Introduction

This article examines and evaluates approaches to the resolution of police collective bargaining disputes in New Zealand. In recent decades, New Zealand has experienced a shift from compulsory arbitration to a market-based bargaining system.[1] However, since 1990 separate arrangements have been in place for police bargaining and dispute resolution. Indeed police have been the only sector in New Zealand to retain an arbitration system.[2] This system is similar to other jurisdictions in the existence of a dedicated no-strike regime culminating in binding interest arbitration. However, the type of arbitration is a unique form of final-offer arbitration (FOA). What also makes the New Zealand (NZ) approach unusual is that it involves a "blended" or integrated mediation-arbitration (med-arb) model;[3] arbitration is *combined* with mediation and other features designed to maximise the prospects for negotiated outcomes. Another unique feature is that not only are police the only sector to operate under this model – with all other employees operating under standard bargaining laws – but the dispute resolution system was developed by the parties themselves.[4]

This article first examines the statutory foundations of the current model. Then, it considers the nature of the FOA process, the med-arb process, and the "intersections" between these and other mechanisms.

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[1] In New Zealand, the shift to formalised collective bargaining for private sector workers occurred in the mid-1980s. Since this time New Zealand has moved through a range of markedly different systems, and much of the public service has been brought into line with the private sector: See generally, Gordon Anderson, "Transplanting and Growing Good Faith in New Zealand Labour Law" (2006) 19 *Australian Journal of Labour Law* 1, 26; Gordon Anderson and Michael Quinlan, "The Changing Role of the State: Regulating Work in Australia and New Zealand 1788-2007" (2008) 95 *Labour History* 111, 114; Rolf Driver, "Industrial Relations Past and Present: The Role of the Federal Magistrates Court of Australia" (2012) 3 WR 143, 143; Grant Morris, "Towards a History of Mediation in New Zealand's Legal System" (2013) 24 ADRJ 86, 86.

[2] Ian McAndrew, "Final-offer Arbitration: A New Zealand Variation" (2003) 42(4) *Industrial Relations* 736.

[3] Customarily in "standard" dispute resolution models processes such as conciliation, mediation and arbitration are sequential, with little interaction between them: McAndrew, n 2.

[4] McAndrew, n 2; Ian McAndrew, "Collective Bargaining Interventions: Contemporary New Zealand Experiments" (2012) 23(2) *The International Journal of Human Resource Management* 495; Police Act Review Team (New Zealand), *Issues Paper 3: Employment Arrangements* (August 2006) 75.

The discussion also offers an assessment of the current system, based on a range of established evaluation criteria. Throughout, results from confidential semi-structured interviews with key informants are applied.[5] These interviews centred on accounts of collective bargaining negotiation processes; of mediation and arbitration processes (including experimentation with these processes); and of participants' own assessment of the current dispute resolution system and alternative proposals.[6]

Utilising these interviews and data from the past 30 years, the success of the med-arb and FOA model is assessed with reference to four criteria. First, the ability to ensure provision of police services, arguably the most important standard from the public (and government) standpoint. Second, whether the model promotes voluntary, mutually acceptable settlement of disputes without reliance on intervention by the arbitrator or another third party. Third, how the parties perceive the system and each other after resolving disputes under the model for three decades, especially in terms of achieving outcomes which are sustainable and allow officers to do their jobs safely and happily. Finally, whether the system is efficient in terms of the time and cost of engaging with it.

In light of these criteria, this article argues that the NZ model is a worthwhile one. It has achieved results in avoiding breakdowns in the provision of police services and preventing long, fruitless bargaining periods. These objective successes are reflected in the favourable subjective views practitioners on the employer and employee side have of the system. Although other emergency workers in New Zealand utilise different models, experts interviewed for this article are cynical of how those models would work for police – and query whether workers in other sectors would be better off if they followed the police model. Ultimately though, this article does question how repeatable this success is. When viewed in light of the dominance of the New Zealand Police Association when representing employees, and the long-term positive relationship they have with the employer, it is likely negotiations would be successful in New Zealand under any model. Further, there are significant delays and expenses associated with employing multiple arbitrators and mediators under the blended model, such that its efficiency has been readily criticised even when it achieves success.

II. The New Zealand Police Negotiation System

A. Statutory Foundation and Final-offer Arbitration

The current system is provided for by the *Policing Act 2008* (NZ) which, together with the parties' "police negotiations framework" (discussed below), establishes a complex med-arb model. The *Act* provides that disputes concerning the terms and conditions of employment for constables must be dealt with via a specified FOA procedure.[7] The FOA procedure can only be invoked after negotiations have reached an impasse and the Employment Authority makes a recommendation that the process be followed; or the mediator deems that no action short of that procedure will settle the dispute.[8]

As with other police regimes, under the NZ model FOA acts as a substitute for the right to strike.[9] Industrial action is seen by the parties themselves (the New Zealand Police Association and New Zealand

[5] The interviews, held in February–April 2017, were conducted with key informants who had experience in collective bargaining negotiations in the police and emergency services – either as independents or as representatives of the police organisations or unions. They have been anonymised, but will be referred to as follows: E1, Human Resources, New Zealand Police; E2, consultant to New Zealand Police Management; U1, New Zealand Police Association; U2, New Zealand Police; R1, researcher and advisor in New Zealand police labour relations; A1, former arbitrator and mediator in New Zealand police pay disputes; A2, former arbitrator and mediator in New Zealand police pay disputes; A3, Chief of the New Zealand Employment Relations Authority. In addition, the analysis will on occasion refer to interview data from earlier studies; where this is done, it will so specify.

[6] The interviews covered participants' experiences with bargaining from 2000, when the negotiation and dispute resolution framework was last significantly modified: see Part II(B).

[7] *Policing Act 2008* (NZ) s 67 Sch 2.

[8] *Policing Act 2008* (NZ) ss 67(2)(a)–(b), 50H. Under the previous regime, the impasse procedure could be initiated by either party (the union or police management), by giving notice to the relevant government department, which department then designated a mediator and arbitrator.

[9] The FOA provision (s 67) was introduced via the *Police Amendment Act 1989* (NZ), amending the former *Police Act 1958* (NZ) to bring clarity to the prohibition on police strikes and lock-outs. The *Policing Act 2008* (NZ) expressly limits strikes by, or lock-outs

Police) as generally "inappropriate and potentially damaging" relative to arbitration.[10] FOA is designed to deal with the problem that conventional arbitration might create a "chilling effect" on the parties' willingness to engage in good faith bargaining. That is, unlike conventional arbitration, where the parties may be reluctant to change original position or make concessions lest this produces a less favourable award (since the arbitrator is prone to "split the difference" between them), FOA aims to bring the negotiating parties together as the arbitrator must choose the most reasonable of the two offers. The idea is that the risk of losing outright under FOA (particularly "package-based" FOA) will encourage the parties to retreat from their original position. At the same time, as with traditional arbitration, FOA provides a guaranteed closure mechanism and finality in bargaining disputes.[11]

The *Act* requires that the arbitrating body consist of up to two panel members appointed by both the Association and the Commissioner of Police. The Chair of the panel is to be appointed by mutual agreement or by the Chief Executive Officer of the Department of Labour.[12] If the parties fail to nominate partisan members for the panel, the chief executive of the Department of Labour must appoint members.[13] As will be discussed further below, this tripartite structure is one feature of the NZ model designed to combine arbitration and mediation and encourage settlements, the idea being that deliberations within the panel allow the Chair further opportunity to mediate unanimous outcomes. Indeed the arbitrator has at times ordered the parties to return to mediation – providing a "grace period" as it were – following the formal arbitration hearing.[14]

The arbitration method under the *Act* is "package-based" FOA.[15] The parties are required to provide the arbitrating body with a formal statement as to their final position on all of the issues in dispute, and the arbitrating body must accept either final offer in full.[16] Presumably the rationale for the use of entire packages as distinct from issue-by-issue FOA or other variations[17] is that the incentive to converge on issues is greater (given that the risk of losing on a package-basis is far greater). Further, the parties must present their final offers prior to the arbitration hearing, but the arbitrating body must at the conclusion of the hearing give each of them an opportunity to restate their final offer before making a final determination.[18] The aim here is to encourage the parties to focus on how their positions measure up against the statutory criteria (see below), rather than focus solely on comparing their own position with that of the other party.[19]

The *Act* prescribes seven criteria to be applied by the arbitration body in hearing and determining a dispute.[20] Many of these are common to other police regimes: recruitment and retention of officers,

of, police officers: s 69. It also limits industrial action by others where it affects police officers' ability to ensure public safety and emergency response services: see *Policing Act 2008* Sch 3.

[10] Peter Harvey and Jo Stevenson, *Review of the Police Negotiation Framework* (Unpublished Paper, 2000) 5. As noted in Part IV, in a review of the *Police Act 1958* (NZ) in 2008, the Labour government floated the idea of withdrawing the right to arbitration and substituting a limited right to take industrial action; however, that the proposal was rejected by the Association and was only ever put to the parties informally: Interview with R1 (Email, 28 February 2017).

[11] See Giuseppe Carabetta, "Police Bargaining Disputes and Third-party Intervention in Australia: Which Way Forward?" (2013) 18(1) *Deakin Law Review* 67 and the US studies referred to therein.

[12] *Policing Act 2008* (NZ) Sch 2 cl 1(2)(a)(i)–(iii).

[13] *Policing Act 2008* (NZ) Sch 2 cl 1(2)(b).

[14] Ian McAndrew, "'Med-Arb' in the New Zealand Police" in William K Roche, Paul Teague and Alexander JS Colvin (eds), *Oxford Handbook of Conflict Management in Organizations* (OUP, 2014) 329.

[15] Package-based FOA is considered the "standard" form of FOA, but the variations are several. For example, some US jurisdictions use FOA (or "final-offer selection" arbitration) for economic matters, together with conventional arbitration for non-economic matters; while others apply FOA on an issue-by-issue basis.

[16] *Policing Act 2008* (NZ) Sch 2 cl 7.

[17] See, eg, the variations noted in n 15.

[18] *Policing Act 2008* (NZ) Sch 2 cl 1(3).

[19] McAndrew, n 14, 329.

[20] *Policing Act 2008* (NZ) Sch 2 cl 5.

fairness and equity, productivity and technology, and relativities within the proposed agreement and between it and other agreements.[21] Of note are criteria mandating consideration of the "special conditions applicable to employment in the Police, including the prohibition on strikes by constables" and "any other matters that the Commissioner, the appropriate service organisation [the Police Association] or the arbitrating body … considers relevant".[22] Also of note however is that while the arbitrator can consider any matter thought relevant, the arbitral criteria make no explicit reference to "ability to pay" although, as will be noted presently, this issue has been subject of significant debate between the parties. Lastly, in applying the criteria, the arbitrating body is not bound by any previous decisions or practices.[23]

Importantly, the Act also authorises the parties to agree on alternative dispute resolution arrangements to those set out above.[24] As McAndrew observes, the parties have indeed adjusted their arrangements within a broad "med-arb" approach on a number of occasions but without departing from the above framework.[25] The most formal example of this has been via the development of the *Police Negotiations Framework* (PNF).

B. The Police Negotiation Framework

The PNF is a joint development by the New Zealand Police and the Police Association. It was first introduced in 1995 to address concerns that the legislative scheme outline above did not promote negotiated outcomes.[26] In particular, while the parties accepted that arbitration was necessary in a policing context absent a right to strike, there was a shared perception that access to FOA had limited bargaining. There were also concerns that the bargaining climate in the early 1990s had been "confrontational" and arbitration was seen as contributing to this.[27] On the other hand, mediation was seen as a key strength of the model and as having been fundamental to achieving negotiated outcomes. Ultimately, major initiatives adopted in 1995 included a more central and more active role for the mediator; and allowing the arbitrator to observe all formal negotiation processes.[28]

A formal review of the PNF took place in 2000.[29] The review followed what was described as a "watershed" round of bargaining in 1997–1998 involving years of work on complex police remuneration and pay-fixing issues.[30] Outside this negotiation round, bargaining issues have included, among others, remuneration items, performance pay, allowances (including supervisors' allowances and shift payments), overtime, superannuation subsidies, and bargaining fees. As will be noted below, the 1997–1998 round was one of the few occasions where arbitration has been required under the PNF. Despite this, the presence of the arbitrator during formal negotiations was generally seen as positively impacting the parties' behaviour and bargaining climate, "with no suggestion that this had been a factor leading to arbitration".[31] The need for arbitration was considered to have arisen from the complex and novel nature of the issues involved, and the arbitrator's role as an observer during formal negotiations was seen as allowing them to reach a fuller understanding of the issues.[32]

[21] *Policing Act 2008* (NZ).

[22] *Policing Act 2008* (NZ) Sch 2 cl 5(f)–(g). As will be noted below, a previous criterion gave the Commissioner exclusive power to nominate additional considers for the arbitrating body: Police Act Review Team (New Zealand), n 4.

[23] *Policing Act 2008* (NZ) Sch 2 cl 6.

[24] *Policing Act 2008* (NZ) Sch 2 cl 8.

[25] McAndrew, n 14.

[26] Via a *Working party on Aspects of Salaries* established after a major bargaining round in 1993–1994. For details on the PNF and its development, see Harvey and Stevenson, n 10; McAndrew, n 2; McAndrew, n 14.

[27] McAndrew, n 14, 318.

[28] McAndrew, n 2, 738–739; McAndrew, n 14.

[29] As reported in Harvey and Stevenson, n 10. The authors report on a review of the PNF conducted jointly by the Police Service and the New Zealand Police Association.

[30] Harvey and Stevenson, n 10, 2.

[31] Harvey and Stevenson, n 10, 2–3.

[32] Harvey and Stevenson, n 10, 3.

There was also some concern about a "chilling" effect on the parties' openness and bargaining strategies in later stages of the negotiations, as they became more aware of the likelihood of arbitration. In particular, as discussed below, the parties may be reluctant to make concessions lest they end up setting the framework for the arbitrator's award. However, some "chilling" was seen as generally inevitable in any system of compulsory arbitration, especially FOA where the role of the arbitrator is so pivotal, rather than having to do with the presence of the arbitrator during formal negotiations.[33] The arbitrator's practice of making interim decisions was another feature that came under review, with additional concerns about "chilling" of negotiations prior to the interim decision.[34] Specifically the Police Association felt the lead negotiators inevitably "held their hand" on key issues until after the interim decision was issued. Both parties thought that giving the arbitrator opportunities to provide feedback was important to the success of the process, but the Association believed the interim decision took the emphasis away from negotiation and that a less formal process was preferred.[35]

The current PNF is set out in a joint policy document entitled *Review of the Police Negotiation Framework.*[36] It consists of three phases. The first phase provides for "information gathering and informal negotiation", where the parties normally meet without the mediator or arbitrator, though a mediator may be arranged by agreement. Failing settlement at this level, the parties move to the second "formal negotiations" phase attended by both a mediator and arbitrator.[37] The mediator is required to manage the process from the outset, but also to actively engage with the parties to get keep the negotiations on track, identify potential solutions, and encourage the parties to reach settlement.[38] It is expected that the parties will use the agreed "information base" from the informal negotiation stage in formulating claims and counterclaims during this phase.

While the arbitrator's role in this second phase is essentially to observe the negotiations, at any stage during the process either or both parties may ask the arbitrator to indicate their thinking on any or all aspects of their position should FOA be invoked. The arbitrator may refuse a request but is expected to provide a reasonable level of feedback to assist the parties towards settlement.

In the event that the above processes are exhausted and the dispute is referred by the mediator or relevant government authority, the third and final phase involves establishing a tripartite panel chaired by the arbitrator for the "FOA Phase".[39] The arbitrator, in accordance with the statutory scheme, hears submissions from each party as to their position on the issues and their final offers. However, given the extensive negotiation background and provision for the parties to make written submissions, the arbitral proceedings will normally be relatively informal. Following the hearings, the panel makes its final, binding determination.

III. A Blended Mediation-Arbitration Model

The New Zealand police regime borrows ideas from a range of approaches to managing collective bargaining disputes in public and emergency services, but with the aim of combining arbitration with mediation and other processes to maximise the prospects for negotiated outcomes. In this respect

[33] Harvey and Stevenson, n 10; McAndrew, n 2, 740.

[34] McAndrew, n 2, 740; Harvey and Stevenson, n 10, 3–4.

[35] Harvey and Stevenson, n 10, 3–4; McAndrew, n 2, 740.

[36] Harvey and Stevenson, n 10. Again, the policy document was developed jointly by the Police Service and the New Zealand Police Association.

[37] To commence this phase, one of both parties seeks the appointment via the relevant employment tribunal of a mediator to manage the process and an arbitrator to observe the proceedings and arbitrator if required. The policy also provides for a mix of formal "plenary" sessions, involving the full negotiation teams, and informal "line outs" to address specific matters initiated either by the parties or by the mediator.

[38] McAndrew, n 2, 741.

[39] The policy makes the parties' preference for negotiated outcomes clear by referring to FOA as a "drastic measure, which remains a last resort and will arise only in the event of the failure of negotiation and mediation efforts": Harvey and Stevenson, n 10, 4.

the model differs from conventional models where processes such as mediation and arbitration are "sequential", with little interaction between them.[40]

This "blended" approach is seen in the adoption of med-arb, a "hybrid" technique that seeks to combine the advantages of the two processes.[41] Med-arb normally involves utilising a single neutral as mediator and arbitrator. The main criticism to using the same individual in both roles is its likely "chilling" effect; that is, the parties will be reluctant to disclose their final position or make concessions lest they may set the framework for the arbitrator's award. The NZ model however allows for two separate neutrals, but with the latter observing only "formal negotiations". Attempts at deal-making, including with the assistance of the mediator, occur without the arbitrator, so that proposals aimed at settlement through compromise do not risk impacting a party's position in arbitration.[42]

As noted earlier the parties may ask the arbitrator to indicate their "leaning" on any aspect of their position.[43] An example highlighted by one union negotiator was where during the course of the negotiations the parties asked the arbitrator what weighting he would place on "ability to pay".[44] As mentioned it is clear that the parties continue to endorse such informal assistance as conducive to constructive bargaining.[45] As well as allowing the arbitrator to develop a better understanding of the issues and environment, it is seen as clearing stumbling blocks to progress and encouraging negotiation, in a manner similar to a "consensus arbitration" approach.[46] This involves the arbitrator conciliating negotiations and issuing "incomplete preliminary decisions", essentially pegging points along the way and thereby disposing of those points and setting a foundation for further negotiations on points still in play.[47] The present study also found that allowing the arbitrator to observe the negotiations and provide feedback on the parties' positions (and ask about the basis of those positions) can "betterfocus" the negotiations, with attendant efficiency benefits.[48] These findings are further examined in Part V.

In addition to its deliberate med-arb (or "med-FOA") approach, the New Zealand police model also favours a proactive form of mediation in encouraging the parties to reach settlement, or a more directive "conciliation-style" approach in the NZ sense.[49] The original PNF recognised that a proactive approach to mediation could enhance the med-arb model's capacity to achieve more complex and far-reaching changes. McAndrew observes it has assisted the parties with such matters as the complex remuneration review[50] referred to earlier and revisions to the PNF itself, in addition to more routine bargaining challenges.[51] The current PNF encourages the same proactive approach, and, as will be seen

[40] A point highlighted by leading New Zealand police labour relations academic Ian McAndrew, through his extensive work on the NZ model: see, in particular, McAndrew, n 14 and the various papers referred to herein. McAndrew has observed that "whatever else might be said about it, the New Zealand [police model] is unique": Ian McAndrew, *An Examination of Police Pay Setting Systems with Particular Consideration of the Right to Strike and of Models of Arbitration* (Unpublished Briefing Paper Prepared for the New Zealand Police Association, NZ Mediators, 2006) 7.

[41] Med-arb or conciliation-arbitration is more commonly used in respect of "rights" disputes and not bargaining "interests" disputes; however, as noted in the United States and Canada especially, it is often used in relation to public sector bargaining disputes.

[42] McAndrew, n 14, 330.

[43] Again, the arbitrator's practice in earlier years of the PNF of making a formal "interim decision" was seen as having a chilling effect on negotiations and was removed from the model.

[44] Interview with U1 (Wellington, 25 February 2017). While ability to pay was not at the time part of the statutory criteria for FOA, the Act allowed the arbitrator and/or the Police Service to introduce additional criteria. The response from the arbitrator on this occasion, according to the same interviewee, was that "[the arbitrator] came back with an answer that probably scared both parties away from relying on ability to pay, by saying well, you know, it depends."

[45] Harvey and Stevenson, n 10.

[46] McAndrew, n 14, 329; Harvey and Stevenson, n 10, 5.

[47] McAndrew, n 14, 316.

[48] Interview with U1, n 44; Interview with A1 (Wellington, 25 February 2017). This finding echoes the results of previous research on the NZ model.

[49] Traditionally in New Zealand, as in Australia, the term conciliation has been used to denote a more directive involvement in negotiations by the intermediary than would normally be the case in mediation: McAndrew, n 14.

[50] See text accompanying nn 30–33.

[51] McAndrew, n 14, 330.

below, this aligns with other features designed to encourage negotiated agreements, such as, the use of tripartite panels and "mediation windows". In more recent times, the central role of mediation is said to have retreated somewhat.[52] However, experience suggests that its influence depends on the particular bargaining climate including the nature and complexity of the issues involved.[53]

The use of tripartite arbitration panels is another feature of the New Zealand police model that seeks to combine the persuasive advantages of mediation with binding arbitration. As noted, the *Act* requires that the arbitrating body consist of up to two panel nominees appointed by each of the parties, with the Chair of the panel to be appointed by mutual agreement or by the Department of Labour.[54] The idea is that deliberations within the panel allow the neutral further opportunity to mediate a unanimous outcome. The neutral gives indications of their leanings to stimulate compromise however should efforts at settlement prove unsuccessful, they decide the dispute with the support of one or the other party's nominee(s). Tripartite panels are also said to allow for a more balanced approach; this is on the basis of the old adage that "two [heads] (and in this case three) being better than one".[55]

According to the PNF policy, the panel nominees, on the basis of their specialist knowledge and non-involvement in the negotiation process, should be able to provide valuable information to the arbitrator on the implications of different proposals.[56] In other words, it is thought the complexity and uniqueness of police service requires industry knowledge and experience. In the words of one former arbitrator, "industry expertise and know-how is particularly useful where you are thinking this is how I am thinking, what do you [as the parties' expert representatives] think about that?".[57]

IV. Alternative Proposals

The New Zealand police FOA scheme flows from the fact that police are prohibited from striking. This is in line with many overseas regimes where police officers' right to collectively bargain is supported by compulsory arbitration as a counterbalance to the loss of the right to strike. It is also consistent with the longstanding position of the International Labour Organization allowing for exclusions on the right to strike.[58]

The PNF Review raised the question whether alternative pay determination approaches may be appropriate for police negotiation structures, particularly limited rights to industrial action.[59] The prospect of police taking industrial action been raised on previous occasions in the context of police salary claims.[60] Another option involved processes that apply to other statutory office-holders such as determination by a pay-fixing body like the Higher Salaries Commission; but this represented a major departure from the existing approach.[61] The Review acknowledged that "festering disputes" were to be avoided in a policing context, and that "some means of achieving a timely resolution is essential."[62]

[52] McAndrew, n 14, 329.

[53] Interview with A2 (Wellington, 25 February 2017); Interview with A1, n 48. Interestingly another factor influencing the nature of mediation noted by both union and management-side interviewees was the individual style of the mediator, echoing other research. See also Giuseppe Carabetta, "Alternative Dispute Resolution in Public Essential and Emergency Services" (2017) 45 ABLR 243.

[54] *Policing Act 2008* (NZ) Sch 2 cl 1(2)(a)(i)–(iii). In other police regimes, the variations on arbitration panels are many; but commonly include a single arbitrator or a panel, either tripartite or wholly neutral.

[55] Michael Pineau, in *Greater Toronto Airports Authority (Re)* CIRBD [2005] No 16 (QL), highlighting further that the presence of appropriate nominees is also likely to add credibility to the process from the perspective of the parties.

[56] Harvey and Stevenson, n 10, 5.

[57] Interview with A2, n 53.

[58] Bernard Gernigon, Alberto Odero and Horacio Guido, *ILO Principles Concerning the Right to Strike* (International Labour Organization, 1998) 55.

[59] Harvey and Stevenson, n 10, 4–5.

[60] See Police Act Review Team (New Zealand), n 4, 18. See also the discussion below regarding the 2006–2008 review of the *Police Act 1958* (NZ) in 2008.

[61] This alternative was not finally explored by all parties and was therefore discounted by the Review: Harvey and Stevenson, n 10, 5.

[62] Harvey and Stevenson, n 10.

Internal and external parties surveyed for the Review agreed that binding arbitration in some form was the most appropriate mechanism for achieving this; and both management and the Association endorsed the existing med-arb approach (this point is explored further in Part VI). In addition, given the unique character of police employment and bargaining relationships, industrial action was generally seen as inappropriate.[63]

In a comprehensive review of the *Police Act 1958* (NZ) in 2006–2008 the government itself raised the idea of withdrawing the right to arbitration and substituting a limited right to take industrial action.[64] In considering what such a scheme might look like the review team pointed to the code of good faith for NZ health care workers and the "broadly similar approach" under Australia's "essential services" framework, each of which imposes public health and safety limitations on the right to industrial action in these sectors.[65] The idea behind such a model was said to be to bring police officers into line with other NZ workers by providing them with rights to industrial action, but reconciling this with the public interest in the continuity of police services.[66] McAndrew believes such a proposal could only have been floated by a Labour government accepting of collective bargaining, but that it was more of an effort to regain control of the police pay budget rather than have pay disputes determined by a third party (on the assumption that there would be limited or indeed no access to arbitration).[67] The proposal ultimately prompted the Police Association to commission its own independent review into pay setting models[68] and, in the event, the Association rejected the government's proposal.[69]

But while successive governments have apparently accepted the view that it is intolerable on public policy grounds to have police engaging in any form of industrial action, other NZ emergency services workers including firefighters and ambulance officers operate under essentially the same collective bargaining regime as mainstream employees.[70] They all have rights to take industrial action in support of bargaining subject only to requirements as to notice periods and mediation (etc), but without access to binding arbitration.[71] Occasional industrial action by these employees has to date been managed without raising public safety concerns.[72] This is said to be due to informal agreements between the parties to maintain essential services and, also, because such employees are less inclined to engage in industrial action. Another factor is that there has been so little disputation in these sectors.[73]

In response to the question whether a right to industrial action would be an appropriate policy setting for police, two interviewees in the current study agreed police could "make it work" in the same way other emergency services workers had done.[74] Some however expressed doubts as to what such a model might

[63] See further, Select Committee, Parliament of New Zealand, *Employment Relations Bill* (2000) where the Association voiced the same view.

[64] Police Act Review Team (New Zealand), *Policing Directions in New Zealand for the 21st Century* (May 2007) 57.

[65] See *Employment Relations Act 2000* (NZ) Sch 1B; *Fair Work Act 2009* (Cth) s 424; Police Act Review Team (New Zealand), n 4, 18. The review team also pointed to examples in Australian jurisdictions where police officers have traditionally engaged in limited forms of industrial action such as working to rule and refusing to issue traffic infringement notices.

[66] Police Act Review Team (New Zealand), n 4, 18.

[67] Interview with R1, n 10. The same point was made by a number of interviewees in the current study. In its report, the Review team also drew an analogy with other emergency services, eg ambulance officers and firefighters; and as noted shortly, these workers have no access to arbitration.

[68] McAndrew, n 40. The purpose of McAndrew's review was to provide a survey on police pay-setting models in relevant overseas jurisdictions, "focusing in particular on the question of the right to strike and the role, if any, that it plays in police pay-setting elsewhere": 5.

[69] Interview with R1, n 10. It is understood from informal discussions with interviewees that the proposal was only ever put to the parties informally.

[70] See *Employment Relations Act 2000* (NZ); McAndrew, n 4.

[71] These workers also have access to other processes such as facilitation. However, it is understood that facilitation has been limited.

[72] Police Act Review Team (New Zealand), n 4, 18.

[73] Interview with A2, n 53; Interview with A3 (Wellington, 16 February 2017).

[74] Interview with U1, n 44; Interview with E2 (Email, 24 February 2017), noting this could be achieved via inter alia notice periods; mediation prior to industrial action; and agreements as to which key areas were exempt from industrial action.

look like, and whether it would be of benefit to police, management and politicians; particularly in any transitional phase.[75] Others noted that police professional obligations would limit their capacity to take industrial action, while a union-side respondent stressed that some officers (eg those who enforce traffic laws) may feel conflicted in not being able to exercise their functions fully.[76] A majority of respondents saw no reason for replacing the current model (see further, Part V C), and the Head of the Employment Relations Authority, while acknowledging there had been no apparent harm in giving emergency services rights to industrial action, went so far as to say that "the better view would be why not put the other emergency workers into the same framework as Police".[77]

V. Discussion and Assessment

This final section evaluates the impact of the New Zealand police med-arb system against the following assessment criteria:[78]

(1) *Ability to ensure provision of police services*. As noted throughout this work, this is the first priority of any police dispute resolution system. Does the dispute resolution system safeguard public health and safety? Does it allow for the resolution of bargaining disputes with no or minimal disruption to essential police services?
(2) *Ability to foster voluntary settlement of bargaining disputes.* One of the central measures for evaluating the effectiveness of a collective bargaining system is the extent to the parties are able to resolve their differences without dependence on third parties. Accordingly, this measure asks: does the system facilitate negotiated outcomes; or, does it encourage reliance on arbitration or other forms of third-party determination or assistance?
(3) *Relationship between the parties and acceptability of outcomes.* To what extent do employees and employers accept the legitimacy of the system (to what extent, over time, has it delivered agreements which are generally acceptable to them)? To what extent is the system acceptable to those who manage public finances? Do all the parties have confidence in the system?
(4) *Efficiency and resource use.* How efficient is the system, whether increasing or decreasing time, cost, and so forth? Does it require the commitment of substantial staff time and resources? Does it add to the overall complexity of the collective bargaining process?

A. Ability to Ensure Provision of Police Services

Again, this criterion examines the degree of success of a dispute resolution system in ensuring the provision of police services and thus in protecting the safety of the public. In theory, given that the New Zealand *Policing Act* prohibits police strikes and lock-outs, it must ensure the highest levels of police service. The FOA mechanism was first introduced to bring clarity to the prohibition on police strikes (and lock-outs).[79] Ultimately however the model's effectiveness in ensuring services have been maintained without disruption for over two and half decades must be seen in the parties' acceptance of the existing model – one where they have played a significant role in its design and where both continue to endorse arbitration as a necessary substitute for industrial action.[80] Even then however – combined

[75] Interview with R1, n 10; Interview with E2, n 74; however the interviewee felt there were ways to manage this through an appropriately designed model.

[76] Interview with U1, n 44. This issue further discussed in Part V A.

[77] Interview with A3, n 73. This was on the basis that it would remove altogether the prospect of either or stoppage or lockout for these workers, although it was acknowledged that there was not "a huge policy demand to do that because there seems to be little disputation".

[78] The measures have been adapted from: Bernard Adell, Michel Grant and Allen Ponak, *Strikes in Essential Services* (IRC Press, 2001); Thomas Kochan et al, *Dispute Resolution under Factfinding and Arbitration: An Empirical Analysis* (American Arbitration Association, 1978). The International Labour Organization favours similar measures for determining the effectiveness of a dispute resolution system: see, eg, ILO, *Manual on Collective Bargaining and Dispute Resolution in the Public Service* (International Labour Organization, 2011) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/instructionalmaterial/wcms_180600.pdf>.

[79] Interview with U2 (Wellington, 25 February 2017).

[80] See further the discussion in Part IV regarding debates on alternative models.

with low levels of industrial disputation in New Zealand generally[81] – police have historically taken a firm position against strikes and other forms of industrial action, something that is also likely due to their professional obligations as law-enforcement officers.[82] This makes it difficult to assess the model on this first criterion alone.

B. Ability to Foster Voluntary Settlement of Bargaining Disputes

The New Zealand police experience shows no evidence of a "narcotic" reliance on arbitration, in the sense of preferring to defer difficult issues to the arbitrator. Since the introduction of the med-arb system in 1990, only three disputes have been determined by arbitration.[83] McAndrew's review of 13 bargaining rounds over 1990 to 2015 shows that this compares with the parties having reached 10 voluntary settlements, with arbitration awards having governed pay and conditions for only four and a half years in this period.[84]

While this outcome is likely to be motivated by the parties' strong preference for negotiated agreements generally (as discussed earlier), several interviewees emphasised the risk of losing outright under FOA or gambling on a "package" win or loss as the main reason for its non-use.[85] An example cited was a 2012 dispute where an important consideration in the employer's decision to settle was the anticipated potential difficulty of persuading an arbitrator to choose a complex and far reaching pay restructure proposal over the Police Association's more conventional and conservative proposal involving standard "across-the-board" pay increases.[86] This "deterrence" element of FOA is consistent with US research[87] denying an inevitable narcotic dependence on arbitration, and demonstrating that access to a well-structured arbitration model can encourage negotiated or at least mediated outcomes in most circumstances.[88]

In addition, although structural and environmental factors must play a part (see below), the NZ experience also supports the theory that the availability of arbitration can have a moderating influence on the parties' bargaining behaviour. The sheer number of negotiated agreements over time suggests that the New Zealand police model fosters negotiation a majority of the time, and that there is no debilitating "chilling" effect on negotiations. Furthermore, consistent with the theoretical arguments on FOA, interviewees repeatedly stated that (particularly when compared with conventional arbitration) the "threat" of FOA not only positively influenced the parties' behaviour during bargaining, but brought them closer together and encouraged settlements:

> [Under FOA] you've got a situation where you have a defined outcome which the parties know in advance they will – if they craft a decent package that is moderately consistent, then they have got a statistically good chance. And the more rational their proposal, the better chance they have got of getting it across the line. It mandates good behaviour. … It's much better than [conventional arbitration] where you and I are arguing and the bloke sitting in that chair says "Bugger you pricks, I'm splitting it down the middle". The problem with that is that that is absolutely arbitrary. And with final offer, it's you are going to win and I am going to lose. And then the [demoralising] impact on the people that I represent, or my side, you know, we've lost.[89]

[81] A point highlighted by various respondents, with some noting that even in the fire and ambulance services, where limited forms of industrial action are allowable, there has been ("surprisingly") little disputation and little industrial action: Interview with A3, n 73; Interview with A1, n 48.

[82] Interview with U1, n 44; Interview with A2, n 53.

[83] McAndrew, n 14, 328, reviewing all bargaining disputes for the period 1990 to 2012; Interview with R1, n 10.

[84] McAndrew, n 14, 328.

[85] Interview with U1, n 44; Interview with A2, n 53; Interview with A3, n 73; Interview with A1, n 48.

[86] See McAndrew, n 14, 18–19.

[87] FOA has been described by a US scholar as "the hydrogen bomb posed above the bargaining table whose very terror should assure its non-use": Elissa Meth cited in Daniel Weiss, "The Bomb Keeps the Lights on: The Use of Final-offer Arbitration in Failed Retransmission Consent Negotiations" (2015) 16 *Cardozo Journal of Conflict Resolution* 685.

[88] As noted below, there is also a sense that other forms of "built in" uncertainty – for example, over the arbitration criteria that may be applied – may be important additional drivers to settling disputes.

[89] Interview with A3, n 73.

> Under conventional [arbitration] … the arbitrator is trying to please both of us and we both walk away and go, okay. But we don't own it … so let's claim eight per cent and if the employer is claiming two or three per cent, maybe we'll get five. Whereas [in FOA] it's a case of, the arbitrator is going to choose all of ours or all of the Police. And if we conclude, we're not sure if we can live with all of the Police position [so] let's try and get closer together. And you tend to move closer together [over time] and then you look at it the next day and say, well actually there's stuff all between us, we might as well settle, rather than going through all the work of preparing papers and arbitration.[90]

As noted earlier, whether or not the arbitrator should be present during formal negotiations had been the subject of debate in the development of the PNF. In particular, there was some concern about openness with information and the tenor of discussions in later stages of the negotiations, as the parties became more aware of the likelihood of arbitration.[91] However, the potential for at least some chilling effect on negotiations was seen as an inevitable trade-off in any system supported by arbitration, rather than having to do with the presence of the arbitrator during formal negotiations.[92] (It was further emphasised that the likelihood of an informed decision would be significantly reduced without the arbitrator having been an observer during formal negotiations.)

The arbitrator's practice in earlier times of making a formal "interim decision" was also recognised as having had a chilling effect on negotiations.[93] It was felt that this occurred because the lead negotiators inevitably held their hand on key issues until after the interim decision was issued. In this way the interim decision phase assumed particular significance and so took the emphasis away from constructive negotiation.[94] However, as noted, the interim decision mechanism has now been eliminated from the model. In contrast, informal feedback from the arbitrator as to his or her "leanings" is seen as clearing potential stumbling blocks to progress and encouraging negotiation.[95] This finding was echoed in comments from interviewees that allowing the arbitrator to observe the negotiations and provide feedback can "better-focus" the negotiations both early and late in the process, with additional efficiency benefits as well.[96]

C. Relationships Between the Parties and Acceptability of Outcomes

A key priority of any dispute resolution system is whether it promotes, or at least does not detract from, harmonious relations. Further, a model with which the parties are satisfied is preferred, because greater satisfaction generally means a greater willingness to make it work.[97] Assessing these elements is challenging, particularly in highly political settings as policing where contextual factors must play a part; nonetheless, there are certain factors to indicate whether the parties accept the legitimacy of the system and have confidence in its outcomes.

It was clear in the course of interviews that the parties view their relationship as generally positive. Unsurprisingly most if not all respondents (union, employer and neutral) viewed this as assisting the bargaining process also.[98] This was seen for example in positive approaches to information exchange

[90] Interview with U1, n 44.

[91] Harvey and Stevenson, n 10, 3.

[92] Harvey and Stevenson, n 10.

[93] Harvey and Stevenson, n 10, 3–4.

[94] McAndrew, n 2, 741; Harvey and Stevenson, n 10.

[95] McAndrew, n 14, 329; Harvey and Stevenson, n 10, 5. As noted earlier, an example was where during the course of the negotiations the parties asked the arbitrator what weighting he would place on "ability to pay": Interview with U1, n 44. McAndrew argues this process akin to "consensus arbitration" with the arbitrator conciliating negotiations and issuing "incomplete preliminary decisions", essentially pegging points along the way and thereby disposing of those points and setting a foundation for further negotiations on points still in play: McAndrew, n 14, 316.

[96] Interview with U1, n 44; Interview with A1, n 48.

[97] Adell, Grant and Ponak, n 78, 16.

[98] Interview with U1, n 44; Interview with A2, n 53; Interview with R1, n 10.

during bargaining.[99] It was also clear, in line with earlier research, that the parties perceive that they have moved from a "distrustful and confrontational" climate to a generally more "principles-based" approach;[100] although, as will be noted below, this has at times been constrained by certain "external" factors, such as changes to government policy. In addition, there was a real sense from internal and external parties alike that the med-arb system as a whole had been effective in managing bargaining disputes:

> I think that the police bargaining climate in NZ is quite a healthy one, and I think that there are two major reasons. First, the police association (NZPA) is a very strong and effective organisation, probably the strongest and most effective in NZ. Collective bargaining works best when the parties are roughly equal in bargaining power and respect one another. … Second, the unique FOA dispute resolution process is designed to head off potential industrial trouble and redirect problems into procedures that both offer an opportunity to resolve disputes through mediation assistance or manage them with finality through arbitration, thus effectively corralling bargaining problems inside the FOA model.[101]

As noted previously, party consensus and co-operation was also the basis for the PNF, introduced to address a common concern that the process provided by the *Policing Act* did not promote negotiated outcomes and a "more considered and less divisive approach" was required.[102] Notably, while the PNF has been revised since, the parties continue to endorse the current arbitral regime as the most appropriate mechanism for achieving these aims.[103] Further, as noted, both internal and external parties have expressed general satisfaction with the existing model, while at the same time rejecting alternatives.[104] The current study made similar findings, with a number of respondents highlighting as critical the guaranteed "closure mechanism" provided by FOA.[105] This was distinguished from the position of other essential services sectors (health services, for example) where without guaranteed access to binding arbitration "bargaining can go on for months and months and months".[106]

There were very few concerns about system outcomes, which have generally been moderate (eg since 1990, annual remuneration adjustments have ranged from 0% to 4%). Moderate outcomes have occurred not only under arbitration, but even in most years when bargained outcomes are reached.[107] A notable exception however was the 2012 dispute (referred to earlier) where police management was said to be "conspicuously frustrated"[108] by its inability to effect fundamental change in police remuneration structures. Some saw this as a reflection of the conservative nature of FOA, particularly package-based FOA.[109] A combination of package-based and issue-by-issue FOA or a multiple final-offer scheme (as exists under certain North American models) was thought to allow for greater flexibility/creativity.[110] On the other hand, a shift to issue-by-issue FOA or a mixed approach would introduce additional procedural requirements to what is already a complex, multi-dimensional model.

Further, while the parties are generally content with the current model, one area of concern has been the criteria the arbitrating body must consider in determining disputes.[111] The arbitrating body is given

[99] Interview with A2, n 53; Harvey and Stephenson, n 10.

[100] McAndrew, n 2, 743. It has been suggested that two major contributing factors here may be a change in negotiation teams, bringing a more experienced and principled approach, as well as the major restructuring of police pay and conditions referred to earlier: Interview with A2, n 53; Harvey and Stephenson, n 10.

[101] Interview with R1, n 10.

[102] Harvey and Stevenson, n 10, 1.

[103] These findings resulted from surveys conducted by the Review: Harvey and Stevenson, n 10.

[104] See Part IV.

[105] Interview with U1, n 44; Interview with A2, n 53; Interview with R1, n 10.

[106] Interview with A2, n 53.

[107] McAndrew, n 14, 330.

[108] McAndrew, n 14.

[109] Interview with U1, n 44; Interview with A2, n 53; compare McAndrew, n 14, 330.

[110] Interview with A2, n 53.

[111] See, eg, Police Act Review Team (New Zealand), n 4, 16–18.

significant discretion, with no requirements on the weighting of each criterion or what needs to be considered under each criterion.[112] "Ability to pay" has at times been especially contentious. The *Act* gives no guidance on how – if at all – this is to be determined. This may be because of difficulties in defining the role of ability to pay in a public sector context ("you can mount an argument that the government can pay anything they want").[113] There may also be an argument that the uncertainty over the arbitral criteria including ability to pay is a key driver to settling disputes under FOA.[114] However, an earlier proposal[115] sought to require arbitrators to have regard to the Commissioner's ability to fund any resulting police expenditure, "as determined by Vote: Police appropriations". The clear intention was for the government to regain control over police pay, and the Police Association successfully opposed the amendment arguing it was too closely tied to politics.[116] However, ability to pay appears to have remained a live issue.[117] Advice taken by the Association has been that a change in the form contemplated would be contrary to international labour standards requiring "strictly impartial" arbitration.[118] Such a change would potentially also conflict with the arbitral criterion for "fairness and equity in the rate of pay and conditions".[119] Likewise, in a practical sense, if the parties' confidence in the system is to be maintained its impartiality must be preserved. A change of the type proposed would likely place this in jeopardy.[120]

D. Efficiency and Use of Resources

For all its strengths the New Zealand police med-arb model is a complex, resource-intensive model. The main resource concern relates to demands on the time and services of tribunal members. This was noted "with some concern" by the external parties[121] surveyed in the PNF Review: "the arbitrator attended negotiations on 18 days and spent considerable additional time considering submissions. The mediator attended on most of these occasions and in addition at a number of other meetings."[122]

From the Association's perspective the previous practice of having the arbitrator issue an "interim decision", in particular, was seen as unnecessarily lengthening the bargaining process, and creating a lack of urgency and willingness to compromise during negotiations.[123] While that process has now been replaced by alternative feedback mechanisms (see above), the same general concerns have remained:

[112] *Policing Act 2008* (NZ) Sch 2 cl 5.

[113] Interview with E2, n 74; Interview with A1, n 48; Interview with E1 (Wellington, 10 February 2017); Interview with A2, n 53.

[114] Interview with U1, n 44, citing an example from the 2000 bargaining round where uncertainty over ability to pay appeared to steer the parties towards settlement. When asked by the parties during negotiations to give an indication as to the appropriateness of the employer arguing ability to pay, the arbitrator responded this could be argued, but that it was not entitled to "trump" status: McAndrew, n 2, 742.

[115] *Police Act (Police Amendment No 2) Bill 2001* (NZ).

[116] Ruth Berry, "Govt Does U-turn on Changes to Police Legislation", *Evening Post (Wellington)*, 20 November 2001; James Albrecht and Dilip Das, *Effective Crime Reduction Strategies: International Perspectives* (CRC Press, 2008) 526. There is an argument that the arbitrator's independent function in determining police employment conditions ought to be kept separate from political questions such as what services the government should provide.

[117] It became clear from informal discussions with respondents that some within police management (and government) believe ability to pay should be part of the arbitral criteria; but that such a proposal would likely only be considered by a conservative government.

[118] Gordon Anderson, "Proposed Changes to the Arbitration Regime under the Police Act (Police Amendment No 2) Bill 2001)", Advice Prepared for the New Zealand Police Association, 28 August 2001, [4] concurring with an earlier advice. Professor Anderson's advice also highlighted that at the time, a number of matters were already excluded from the scope of bargaining and arbitration.

[119] *Policing Act 2008* (NZ) Sch 2 cl 5(b); Anderson, n 118, [35].

[120] Interview with A1, n 48; Interview with A2, n 53. Compare Carabetta, n 53.

[121] The individuals consulted were the Chief of the Employment, Alistair Dumbleton, Paul Stapp a tribunal adjudicator/mediator, John Rapley from the State Services Commission and Ralph Stockdill Manager of the Industrial Relations Service. Mr Dumbleton and Mr Stapp respectively were the arbitrator and mediator for the 1997 pay dispute, which was ultimately determined by arbitration.

[122] Harvey and Stevenson, n 10, 2.

[123] Harvey and Stevenson, n 10, 4.

> I think the idea of having a Mediator and the Arbitrator sitting there endlessly, particularly when the Arbitrator is new, but sitting in is very wasteful of time and expense and everything. … It impacts on our Mediation Service. Especially when they say, you know, we want you for Wednesday and Thursday of this week and Thursday and Friday of next week and then you go down there and it's only Wednesday but they still think they will want you Thursday, Friday so you are all booked out. You can't mediate with other stuff and you are sitting there waiting for them [and they can still say] oh no, no, we don't want you after all. … [124]

> And I think it does throw a shadow over what the parties are doing. It might be better just to have them in for the opening statements and perhaps the opening stanzas of it and if they have got any questions on the way through, or anything that arises that they think it might be useful for them to come back for a particular session.[125]

The use of tripartite panels (versus single neutrals or multiple neutrals) also adds to the lengthiness of the bargaining process. As noted the *Act* requires that the arbitrating body consist of the arbitrator and two additional panel representatives – one from each party. Interviewees explained that the process has at times also involved considerable input from various outside agencies, for example, economists and consultants.[126] Further, as indicated earlier, the arbitrator has on occasion allowed for an additional "grace period" following the arbitral hearing. However, there was a clear sense from interviewees that the expertise panel nominees bring to the process far outweighs any procedural inefficiencies.[127] Many acknowledged procedural costs, but felt that the complexity of police operations requires industry-specific knowledge and expertise.[128] It is also clear from the PNF that the parties themselves view the use of a tripartite structure within FOA as encouraging both negotiated outcomes and party engagement.[129]

Another concern however is that of costs and the fact that all neutrals are funded from the public purse. This issue, too, had been raised in the PNF Review, the review team noting that while the arbitrator must come from the Employment Relations Authority the parties could nominate their own mediator instead of seeking a nomination from the publicly funded Mediation Service.[130] However it is understood that there has been no change in this regard; and the present study revealed similar concerns:

> I am still being paid [as the arbitrator] even if I am not required. So it is wasteful in terms of public funding. … The other thing is I think they have to think very carefully about using someone like myself as a public servant, because of that perceived interest difficulty because, you know, I could be a member of the Public Service Association. So overall I think I would change using someone who is employed by the Government in the role [formerly, arbitrators were statutory office holders]. So you could for example use a retired judge. … Ideally someone from a background in Police. Maybe a member of the Employment Relations Authority or an ex-member of the Employment Relations Authority.[131]

VI. Conclusion

The NZ model of FOA has proved to be an effective, but expensive model. During its use, police services have suffered little disruption (though arguably other factors may have influenced that, such as the general disinclination of dedicated law enforcement officers to engage in industrial action); voluntary settlements have been frequent; and the parties themselves manifest a high level of satisfaction with and acceptance of the system. Costliness, particularly in unproductive use of tribunal members' time as they stand on the sidelines waiting to be called in, has been the main factor attracting criticism.

[124] Interview with A2, n 53.

[125] Interview with A2, n 53.

[126] Interview with A1, n 48; Interview with A2, n 53.

[127] Interview with A1, n 48; Interview with A2, n 53; Interview with U1, n 44.

[128] Interview with A1, n 48; Interview with A2, n 53; Interview with U1, n 44.

[129] Harvey and Stevenson, n 10.

[130] Harvey and Stevenson, n 10, 6.

[131] Interview with A2, n 53. See further, Harvey and Stevenson, n 10.

The short-lived proposal to allow industrial action by police in New Zealand epitomises the importance of achieving the right balance when designing dispute resolution mechanisms in the emergency services. Without the right to strike, police need reliable, mandatory systems to encourage the employer to come to the table. There are two key reasons to conclude that the NZ blending of med-arb and FOA achieves that. First, the high ratio of negotiated settlements. This reflects that the parties have an understanding of how the arbitral mechanism will work, and are therefore induced to find a mutually beneficial solution. This is the same way, in theory, that the fear of a strike is intended to draw an employer to negotiate. Second, the positive responses from participants – on both sides – detailed here, reflect that even when FOA arbitration must be resorted to, it is seen as a fair mechanism (although there remain doubts about its predictability).

However, there remain ongoing concerns with the model, and these will stand as a barrier to its adoption elsewhere. New Zealand is, in some ways, a unique study. The "bargaining climate" is particularly conducive to negotiated solutions, because the Police Association is able to speak for all members of the police force nation-wide, and because the model's ongoing success has left neither side wanting to "rock the boat". These are cultural and historic factors which cannot easily be replicated. Further, the expense of the model, due to its reliance on three-member tribunals and the involvement of mediators throughout the entire process, has not yet been able to be resolved. Policymakers overseas looking to New Zealand will pause with these circumstances in mind when trying to design their own "efficient" dispute resolution mechanisms. A model which effectively encourages negotiation by having robust and reliable arbitration standing as the last resort will remain the best goal for dispute resolution in the emergency services. New Zealand's model is a good place to start.

The Arbitrator as Mediator: Ku-ring-gai Council v Ichor Constructions Pty Ltd [2018] NSWSC 610

George Pasas*

It can be tempting, as a party engaged in a lengthy arbitration, to seek to leverage the arbitrator's knowledge of the dispute to facilitate the process of settlement. Such a process is allowed, with strings attached, by s 27D of the Uniform Commercial Arbitration Acts. For the first time, Australian parties have guidance as to just how tangled those strings can become, with the recent Ku-ring-gai Council v Ichor Constructions proceedings revealing the dangers for parties seeking to have their arbitrator wear the hat of a mediator.

I. Introduction

Section 27D of the Uniform *Commercial Arbitration Acts* provides that an arbitrator can, with the agreement of the parties, act as a mediator.[1] This can be beneficial: the arbitrator is (presumably) well-appraised of the legal and factual issues in dispute, and can more easily help prioritise and narrow them. Of course, there are self-evident dangers, including that if the mediation fails, an arbitrator having potentially received inadmissible or one-sided information will later pass judgment. Against those competing interests, s 27D provides that no party is forced to return to the arbitration after the mediation absent its subsequent written consent.

The 2018 decision of McDougall J in *Ku-ring-gai Council v Ichor Constructions Pty Ltd*[2] marks the first judicial consideration of this section in Australia. Through emphasising that the requirement for subsequent written consent goes to the heart of the arbitrator's continuing mandate, the judgment sounds a note of caution to parties who seek to mingle arbitration with mediation. Its conclusion, being to prohibit an arbitrator from finalising a 12-day hearing simply by his suggesting a settlement proposal under the "cloak of mediation", is a jarring and disproportional one. This is not to suggest that the judgment is wrong; to the contrary, the NSW Court of Appeal very recently dismissed an appeal from the judgment, noting that the appellant's arguments had "little merit".[3] Instead, *Ku-ring-gai Council* exposes an ill-considered legislative framework regarding the mediation-arbitration intersection which almost entirely undermines the utility of having an arbitrator act as mediator. The better approach, to which we will return at some length towards the conclusion of this note, is a more flexible one which preserves the mutual autonomy of the parties.

There is more. As is well known, s 4 of the Act provides that a party waives its right to object to its counterparty's non-compliance with the Act[4] if it "knows" of the non-compliance and does not promptly object. This provision is not only reflected in the arbitration law of many related nations (by virtue of

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[1] See *Commercial Arbitration Act 2010* (NSW) s 27D; *Commercial Arbitration Act 2017* (ACT); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2011* (Tas).

[2] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610.

[3] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2019] NSWCA 2, [79]–[85] (Bathurst CJ, Beazley P and Ward JA agreeing). It should be noted that the appeal was not dismissed on those substantive grounds, however, but rather as being incompetent because s 14(3) of the Act operated to make McDougall J's decision "final". As the Court of Appeal agreed that McDougall J was "plainly correct" on the substantive questions, this note will focus on the considerably more detailed first instance judgment.

[4] Or, indeed, with the arbitration agreement.

the UNCITRAL Model Law),[5] but is also substantially mirrored in Art 36 of the *ACICA Rules*. Rather surprisingly, according to Senior Counsel for both parties, *Ku-ring-gai Council* is the first case in any Model Law country to consider the knowledge requirement contained in the statutory waiver provision.[6] This clarity is clearly welcomed.

II. Facts

The arbitration proceedings between Ku-ring-gai Council and Ichor Constructions involved the considerable delay in building the West Pymble Pool. On the twelfth (and final) day of the hearing:[7]

(1) the Arbitrator (who is also an experienced mediator) asked whether the Parties would be open to him putting a settlement proposal to them "under the cloak of mediation";
(2) the Parties and the Arbitrator then moved from the hearing room to a separate, "less formal", room where they could conduct the "mediation";
(3) during the course of 20-minute "mediation", the Arbitrator put his settlement proposal to both Parties together, being that each party simply drop its respective claim; and
(4) the Parties rejected this proposal, and immediately returned to the main hearing room where they completed their oral closing submissions.

Importantly, at no point did the Arbitrator meet with either party separately, or proceed further with the mediation. A week later, Ichor wrote to the Council and asserted that, by virtue of subss (4) and (6) of the Act, the Arbitrator's mandate to determine the arbitration had been terminated.

III. Legal Analysis

The Council commenced proceedings in the NSW Supreme Court seeking a declaration that the Arbitrator's mandate had not been so terminated. This question turns on the proper construction and application of the relevant provisions of s 27D:

> **27D Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary**
>
> (1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement (mediation proceedings) if:
>
> …
>
> (b) each party has consented in writing to the arbitrator so acting.
>
> …
>
> (4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.
>
> …
>
> (6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.
>
> …
>
> (8) In this section, a reference to a mediator includes a reference to a conciliator or other non-arbitral intermediary between parties.

The clear effect of subss (4) and (6) is that once the mediation is terminated, the Arbitrator's ability to continue conducting the "arbitration proceedings" is likewise terminated *unless* the parties consent to its continuation. The problem for the Council was that there was no executed document which consented to the Arbitrator continuing to hear the dispute. To circumvent this difficulty, the Council made four alternative submissions:

(1) first, the limited nature of the Arbitrator's conduct meant that he never "acted as mediator", and thus never engaged the prohibition in s 27D(4);

[5] See, eg, *International Arbitration Act 1994* (Singapore) s 3.

[6] Transcript of Oral Submissions, 8 May 2018, 1.47–2.08.

[7] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [6]–[15].

(2) second, even if the Arbitrator did so act, the Parties subsequently consented in writing to the continuation of the proceedings through their implied consent recorded in the transcript;
(3) third, even if there were no such consent, Ichor waived its right to insist on written consent under s 4 by not objecting without undue delay; and
(4) fourth, even if the statutory waiver did not apply, Ichor is estopped from insisting on the requirement of written consent.

It is instructive to consider each of these issues in turn, not only because *Ku-ring-gai Council* marks the first consideration of ss 4 and 27D of the Uniform *Commercial Arbitration Acts*, but also because his Honour's judgment is a model example of construe those statutes with reference to their underlying objectives of certainty.

A. Issue One: Acting as Mediator – "Crossing the Line"

The starting point is that although the Parties agreed that the Arbitrator could act as mediator, the provisions of s 27D draw a distinction between that consent, and *actually* acting as mediator.[8] It is the latter, not the former, which subss (4) and (6) target.

Does that distinction mean that an arbitrator must first "cross [a] line" which demarcates mediation and arbitration before the statutory consequences are enlivened?[9] In order words, is a court required to examine what took place in the mediation or the discussions in order to ascertain whether the arbitrator did, in fact, act as mediator.

The Council suggested that the answer to both of those questions is yes: it submitted that an arbitrator only acts as mediator when some core feature of mediation takes place, such as holding sessions alone with one party (and thus obtaining information without the knowledge of the other party). This is because it is only at those points that concerns arise regarding arbitral due process and procedural fairness. Ultimately, the Council's position was that by only recommending that the parties drop their respective claims, the Arbitrator in this case ventured no further than a judge might in open court.[10]

McDougall J disagreed. The central plank of his Honour's conclusion is that "[t]he Act, like any legislation, is to be construed so far as possible so as to promote simplicity and certainty of operation".[11] The Council's approach was rejected as "being unclear to the point of opacity" because:[12]

> no one will know whether consent under s 27D(4) is required, to avoid the arbitrator's losing his or her mandate, until something happens in an extra-arbitral (to use, for the moment, a neutral term) session that crosses a line, nowhere defined expressly in the Act, that marks the start of mediation.

Consequently, his Honour rejected defining a substantive test around any of the traditional characteristics of mediation.[13]

Further supporting that conclusion is the fact that subss (2) and (7) contemplate that the mediator can, *but will not necessarily*, meet with the parties separately and obtain confidential information.[14] This indicates that it would be erroneous to require those features before s 27D is engaged. Instead, effect must be given to the broader language of the statute, which simply makes reference to an intermediary acting in a "non-arbitral" capacity.[15] As attempting to bring about the resolution of a dispute by settlement involves acting

[8] Compare Uniform *Commercial Arbitration Acts* subss (1), (4).

[9] See particularly Transcript of Oral Submissions, 8 May 2018,, 36.14-34.

[10] Although it was orally conceded that it may be an imprudent judge who said this: Transcript of Oral Submissions, 8 May 2018, 34.21-22.

[11] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [45]. Note that certainty is particularly important as one of the Act's primary objectives is the *final* resolution of disputes: s 1C(1).

[12] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [45].

[13] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [25]–[30].

[14] Transcript of Oral Submissions, 8 May 2018, 35.5-13. Subsection (2) contemplates that the arbitrator/mediator can meet the parties collectively or separately, while subs (7) provides that *if* the arbitrator/mediator receives confidential information during the mediation, that information must be disclosed before the arbitration re-commences.

[15] Uniform *Commercial Arbitration Acts* s 27D(8).

in a non-arbitral role,[16] it follows that the Arbitrator acted as mediator by putting his specific settlement proposal to the parties.

Implicitly, the judgment suggests that the signing of the consent to enter mediation (as required by s 27D(1)), and the taking of *almost any* action in furtherance of that consent, is sufficient to engage subss (4) and (6). Such an approach is the only one which provides sufficient certainty to the parties in knowing whether or not the mandate of their selected arbitrator will be terminated. Of course, the rationale for such a strict approach is that, by acting upon a consent they have executed, the parties themselves consider that mediation is occurring. As McDougall J put it:[17]

> Why should the court come to a different view to the parties, by poring over the minutiae of the Arbitrator's and the parties' conduct in the breakout room?

B. Issue Two: Written Consent – Reading between the Lines?

Having thus determined that the Arbitrator had acted as mediator, the effect of subss (4) and (6) is that his mandate was terminated unless the parties subsequently gave their "written consent" for its continuation.

The Council submitted that such consent can be implied from the fact that the arbitration was completed without objection, and that implied consent was recorded in the writing of the transcript. Necessarily, this argument relied on the fact that s 27D(4) does not specify that the written consent must take a specific form nor must be signed.

Again, McDougall J disagreed. As Ichor submitted, the purpose of requiring written consent is to produce certainty (as writing can be unequivocally verified), while having consent implied from the written transcript is antithetical to this objective. Consequently, McDougall J reasoned that:[18]

> [w]here written consent is required for something to happen, what is needed to satisfy that requirement is a written expression of consent signed for or by, or otherwise attributable to, the party whose written consent is required. The writing must make clear that the party consents to whatever it is that cannot happen without written consent.

Thus, the flaw in the Council's case was not transcript-related: there seems no reason why such a record could not constitute consent in writing so long as the consent was clearly attributable to both parties and took place before the arbitration resumed (eg if both parties unequivocally orally consented in response to a targeted question). That conclusion is reflected in the Court of Appeal's judgment where it noted that "[a] statement by counsel recorded in a transcript and *not directed to the requirements of s 27D(4) of the Act* does not amount to such consent" (emphasis added).[19] Instead, the flaw is the attempt to undermine the certainty promoted in the statutory formulation of written consent with an opaque notion of implied consent.

McDougall J also considered it significant, in reaching that conclusion, that an arbitrator is prohibited from continuing with the arbitration *unless and until* the parties subsequently consent in writing.[20] The Council's approach did not engage with this jurisdictional nature of s 27D(4) as its approach:[21]

> requires an examination of something that happened whilst there was no mandate for its happening, to see whether consent can be inferred or presumed from what happened. If consent can be inferred or presumed then … that which initially was done without a mandate is, apparently, retrospectively transformed.

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[16] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [28]. Of course, this is not to say that it is impermissible to recommend the virtues of settlement, but rather that an arbitrator should not, consistently with his/her arbitral capacity, put forward *specific* proposals for settlement (see *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [29]–[30]).

[17] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [35].

[18] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [56].

[19] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2019] NSWCA 2, [81] (Bathurst CJ, Beazley P and Ward JA agreeing).

[20] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [60].

[21] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [62].

C. Issue Three: Statutory Waiver – The Power of Knowledge

With the first two issues having been determined adversely to the Council, it became necessary to consider the so-called "statutory waiver provision" in s 4, which provides that:

> A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating the party's objection to such non-compliance without undue delay or, if a time-limit is provided for stating the party's objection, within such period of time, is taken to have waived the party's right to object.

As already noted, this provision is mirrored in many parts of the arbitration world, and its interpretation in *Ku-ring-gai Council* is thus welcomed.

Can s 27D(4) Be Derogated from?

The first pre-condition to engaging s 4 is that the provision is one "from which the parties may derogate". Unfortunately the Act, unlike its English counterpart,[22] does not neatly designate which provisions are mandatory. Nevertheless, the Council submitted that s 27D(4) was such a non-mandatory provision as it simply granted a private right to "refuse submission to a continuation of the arbitration". The Council relied on the common law rule which permits the waiver of statutory rights which do not serve a public interest.

Although McDougall J did not consider it necessary to formally decide this point in light of his conclusions on the knowledge issue, his Honour's tentative view was that s 27D(4) is a mandatory provision. This is because the Act contains a number of provisions which, in their terms, allow the parties to modify their provisions.[23] His Honour then observed that:[24]

> [w]here the Act [allows the parties to depart from the provisions of the Act], it says nothing specific about the form that such agreement should take. By contrast, s 27D(4) (and, for that matter, s 27D(1)) do not say in terms that the parties may derogate from their provisions, and they do say in terms how the parties are to record their agreement to the courses of action contemplated. The legislature had available to it a very easy way of indicating how parties could derogate from a provision of the Act. It did not do so in relation to s 27D(4).

It is suggested that this tentative view, being that s 27D(4) is a mandatory provision of law, is the correct one. The effect of subs (6) is to terminate the mandate of the arbitrator, with the consent of the parties being available under subs (4) to revive it.[25] It would be inconsistent with that legislative scheme to allow the passage of an undefined period of "undue delay" to grant jurisdiction to an arbitrator which he/she would otherwise only obtain through the positive act of written consent. In effect, such an approach would supplant the jurisdiction-providing power of consent with that of inaction, which would be "an extraordinary construction".[26]

Knowledge

Turning to the issue of knowledge, McDougall J concluded that *actual* knowledge of the relevant provision itself is required to establish the statutory waiver.[27] That conclusion followed from a reference to the drafting history of the equivalent provision in the UNCITRAL Model Law, which shows that Art 4 of the *Model Law* originally contained the "time-hallowed phrase 'knows or ought to know'". However, after discussion at the 18th Session of UNCITRAL, the phrase "ought to know" was deliberately deleted. The deletion of the phrase, which was carried through to s 4 of the Act, was given effect.

As the evidence showed, perhaps surprisingly, that neither party was aware of the terms of subss (4) and (6), his Honour disposed of the statutory waiver argument.

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[22] *Arbitration Act 1996* (UK) s 4.

[23] Some, such as the ability to grant interim relief (s 17(1)) and the requirement to give reasons (s 31(3)) allow parties to opt out of their operation, while others, such as the procedure for the arbitration (s 19(1)) of challenging an arbitrator (s 13(1)) grant freedom in the first instance but create a "back-up" position if agreement is not reached.

[24] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [80].

[25] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [81].

[26] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [81].

[27] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [68]–[72].

D. Issue Four: Estoppel

The final issue for determination was whether Ichor was estopped from insisting on written consent by reference to conventional and equitable principles of estoppel. The Council's case was that it was the common understanding of the parties that if the mediation did not succeed, the arbitration would resume. Alternatively, it submitted that Ichor had made a representation to the effect that the arbitration would continue after the mediation, and that the Council had relied upon this. McDougall J disagreed.

Besides observing that there was "some force" in the position that an estoppel could not lie at all in the face of the statute, his Honour did not consider that question further.[28] This was because, with regards to so-called conventional estoppel, such a common understanding could not have existed absent knowledge of the provisions of s 27D and, with regards to estoppel by representation, there was no evidentiary foundation to support the alleged representation.

Consequently, as each of the Council's separate arguments were rejected, it followed that the summons was dismissed.

IV. Comment

The decision in *Ku-ring-gai Council* provides the arbitral world with welcome guidance on the operation of the statutory waiver provision. Through emphasising that a party must have actual knowledge of the relevant provision, practitioners should note that they must bring that provision to the attention of the other party before relying upon statutory waiver. This is appropriate as it also promotes the use of good faith in arbitration.[29]

The mediation-arbitration intersection detailed in the judgment is more problematic. As *Ku-ring-gai Council* shows, the requirement of subsequent consent operates at the jurisdictional level[30] which determines the future validity or otherwise of the arbitration. This means that practitioners should approach the prospect of having their arbitrator act as mediator with considerable caution. Indeed, from a practical perspective, parties should entirely circumvent the s 27D process, and instead use an external mediator in order to avoid the risk of being subsequently held "hostage".

Consider, for example, the situation where both parties agree to their arbitrator acting as mediator. One party realises, during the mediation, that its prospects of success are lower than previously considered. That party then chooses to withhold its consent to re-commence the arbitration, not for any reason referable to the purpose of underlying protective purposes of s 27D(4) (eg due process), but rather to frustrate the proceedings and extract a commercial concession. Such an approach would effectively allow the statutory power to be used as a weapon to empower ulterior motives. That consideration suggests that the legislative framework requires attention, a conclusion which is supported by the disproportional outcome in the case: a 20-minute settlement proposal presented to both parties together, and without any immediate objection from either, had the consequence of negating a 12-day arbitration hearing.

There are three short proposals to be made for reforming this position.

First, s 27D(4) should not prohibit an arbitrator from continuing in his/her role absent the *positive* act of written consent, but rather provide that he/she can continue after the mediation is completed unless and until there is the *negative* act of objection.[31] This inversion of the statutory default position has a significant legal effect: it transforms s 27D(4) from a mandatory provision which provides the jurisdiction for an arbitrator into a provision which provides the parties with a right of objection (and which can therefore be waived).

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[28] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610, [96]. The better view is that an estoppel could not so lie in light of the earlier analysis that s 27D(4) is a mandatory provision.

[29] *Commercial Arbitration Acts* s 2A(1).

[30] So much follows from, inter alia, the references to the termination of the Arbitrator's mandate absent consent (at [60], [81]), the fact that consent cannot be implied from what occurs when there is no mandate for it to occur (at [62]–[63]), and the mandatory position of s 27D(4) (at [79]–[80] and the argument advanced above).

[31] This is also the practical effect of the equivalent provisions in Singapore: *Arbitration Act 2001* (Singapore) s 63(1), (4).

Making the subsequent written consent non-mandatory (or non-jurisdictional), and thus allowing it to be waived, carries the clear benefit of preventing a party from being able to:[32]

> stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment [on the ground that there was no mandate for the arbitrator].

Further, this approach avoids the bizarre situation where an arbitrator's mandate does not exist, and then is somehow revived by the consent of the parties, as well as circumvents difficult questions of retrospective legitimacy in circumstances where the consent is received at a later time after the arbitration has re-commenced.

Second, in permitting the waiver of s 27D(4), that waiver should be enacted with a specified temporal limit. The question of how much time to allow is a difficult one. A blanket time span, such as the 15-day limit for challenging an arbitrator,[33] is too rigid as much depends upon the progression of the arbitration. The better position is to require an objection, or at least a reservation of rights, before that party takes another substantive step in the arbitration. Implicit in this approach is that knowledge of the provisions of s 27D should be irrelevant. Indeed, if a party, upon completion of a mediation (regardless of how long or short it lasted), is satisfied to re-commence the arbitration without comment, why should it later complain that the entire arbitration is fundamentally flawed as a result? Of course, if a party does not object but rather reserves its rights, then that party must make an objection without undue delay to avoid falling foul of the statutory waiver provisions in s 4 (as it must clearly have actual knowledge of the provision in order to be able to reserve its rights). In either scenario, the objective of certainty is promoted. Further, and importantly, a time-based waiver would avoid the calamitous outcome which would have resulted if Ichor had only discovered s 27D(4), and thus only indicated its lack of consent, immediately before the final award was published.

Third, there seems no reason why only the subsequent consent of the parties is acceptable. Of course, the Parliamentary intent behind such a limitation is clear: as it cannot be known in advance how a mediation will develop, Parliament wished to avoid the situation whereby a party was "locked-in" to an earlier agreement. That much follows from both the Hansard[34] as well as the fact that the predecessor of s 27D did not require subsequent consent.[35]

The difficulty, however, is that in ensuring that parties cannot be "locked-in" to an earlier agreement, the potential is now for parties to be "locked-out" of the arbitration by the other party (the "hostage" problem earlier adverted to). On the assumption that the parties consent to mediate and subsequently arbitrate knowingly, and perhaps wisely attaching conditions to that consent,[36] it is by no means clear why the courts should refuse to uphold that agreement.

It is suggested that that approach to s 27D is also commercially sensible. If a party is concerned about the potential development of the mediation, they are not required to sign the prior consent. This, however, then places the other party squarely on notice, who may decide that it is too risky to proceed with the mediation, and would prefer to have an external mediator. Indeed, implicit in the Council's submissions in the present case is that, had it known that by entering the mediation discussions it was committing to terminate the arbitration unless if Ichor consented to its continuing, it would never have entered those mediation discussions in the first place.

If each of the above recommendations were adopted, the result would be that Ichor waived its right to object through completing its closing submissions without any comment or objection. The arbitration would have proceeded to completion, and the Arbitrator would by now have delivered his final Award. It is suggested that this is a considerably fairer outcome for both parties than what eventuated.

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[32] *Vakauta v Kelly* (1989) 167 CLR 568, 572.

[33] See Uniform *Commercial Arbitration Acts* s 13.

[34] *Parliamentary Debates*, Legislative Council, 9 June 2010, 24035.

[35] *Commercial Arbitration Act 1984* (NSW) s 27.

[36] To give an example, in the present case it could have been agreed that both parties would hear the Arbitrator's proposal together. After that point, the parties would be bound to re-commence the arbitration but, of course, could decide to engage in *further* mediation.

The Empty Idea of Mediator Impartiality

Jonathan Crowe* and Rachael Field*

Mediator neutrality has attracted significant criticism in recent decades. Some authors, such as Laurence Boulle, have suggested that these criticisms can be avoided by focusing instead on mediator impartiality. This shift is now enshrined in mediator codes of conduct in several jurisdictions, including Australia. This article argues that mediator impartiality fails to provide a tenable foundation for mediation ethics. The concept either reproduces the traditional problems of mediator neutrality or offers mediators and parties little practical guidance in understanding the mediator's ethical role. In either case, the notion of mediator impartiality itself is effectively empty, meaning it cannot supply a solid foundation for ethical practice.

INTRODUCTION

Mediation ethics has traditionally given a central role to the notion of mediator neutrality. The idea that mediators are ethically obliged to be neutral, however, has come under increasing attack in recent decades. Numerous scholars have argued that traditional views of mediator neutrality are unrealistic and unhelpful for mediation practice.[1] This is because they overlook the humanity of the mediator and ignore the reality of power imbalances in the mediation process. It is unrealistic for mediators to be wholly neutral, because they are human beings with their own perspectives and biases. Mediator neutrality is also unhelpful to the parties, because it robs the mediator of the ability to intervene actively in the process where needed and ensure that all parties achieve meaningful self-determination.

Our aim in this article is not to repeat these critiques of mediator neutrality, which have been covered in detail elsewhere. Rather, we wish to consider whether these critiques can be avoided, as some authors suggest, by adopting a focus on mediator impartiality. The notion of mediator impartiality has now been enshrined in mediator codes of conduct in several jurisdictions, including Australia, in preference to the traditional idea of neutrality. This shift is seen by some commentators as ameliorating or even solving the challenges posed by the notion of neutrality. It may not be realistic, the argument goes, for mediators to be entirely neutral, but they can and should aspire to be impartial between the parties. Any critique of mediator neutrality must therefore take account of this shift in terminology and consider whether it effectively addresses the problems with the traditional paradigm.

The precise distinction between neutrality and impartiality is often not clearly articulated. One of the clearer statements of the distinction is that provided by Laurence Boulle in his work spanning multiple editions, *Mediation: Principles, Process, Practice*, which has been particularly influential in Australia.[2]

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[1] See, eg, Rachael Field, "Mediation and the Art of Power (Im)balancing" (1996) 12 *Queensland University of Technology Law Journal* 26; Hilary Astor, "Rethinking Neutrality: A Theory to Inform Practice – Part I" (2000) 11 ADRJ 73; Rachael Field, "The Theory and Practice of Neutrality in Mediation" (2003) 22(1) *Arbitrator and Mediator* 79; Bernard Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution* (Jossey-Bass, 2004); Hilary Astor, "Mediator Neutrality: Making Sense of Theory and Practice" (2007) 16(2) *Social and Legal Studies* 221; Rachael Field and Jonathan Crowe, "The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis" (2007) 27 *Australian Feminist Law Journal* 97; Carol Izumi, "Implicit Bias and the Illusion of Mediator Neutrality" (2010) 34 *Washington University Journal of Law and Policy* 71; Ronit Zamir, "The Disempowering Relationship between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic" (2011) 11(3) *Pepperdine Dispute Resolution Law Journal* 1; Bernard Mayer et al, "Panel Discussion: Core Values of Dispute Resolution: Is Neutrality Necessary?" (2011) 95 *Marquette Law Review* 805; Susan Douglas, "Neutrality, Self-determination, Fairness and Differing Models of Mediation" (2012) 19 *James Cook University Law Review* 19; Susan Douglas, "Constructions of Neutrality in Mediation" (2012) 23 ADRJ 80; Rachael Field, "Mediation Ethics in Australia: A Case for Rethinking the Foundational Paradigm" (2012) 19 *James Cook University Law Review* 41.

[2] See generally Laurence Boulle, *Mediation: Principles, Process, Practice* (Butterworths, 1996) 19–21; Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, 2nd ed, 2005) 30–36; Laurence Boulle, *Mediation: Principles, Process,*

Boulle uses the term "neutrality" to describe "a mediator's sense of disinterest in the dispute and its outcome" and "impartiality" to refer to "an even-handedness, objectivity and fairness towards the parties during the mediation process".[3] In this way, he argues, the terms can be said to have "a different significance".[4] Impartiality is seen as a core ethical tenet on the premise that "it is inconceivable that the parties could waive the requirement that the mediator act fairly".[5] Neutrality, on the other hand, can be said to be a less absolute requirement,[6] because it can "be waived without prejudicing the integrity of the mediation process, for example in relation to a mediator's prior contact with one of the parties or his or her previous knowledge about the dispute".[7] Drawing a distinction between neutrality and impartiality makes it possible, at least in principle, to justify mediator interventions or actions that might strictly contradict the notion of neutrality, but could nevertheless still satisfy the concept of impartiality.

In Australia, Boulle's position has been widely accepted. For example, it was taken up in the work of the National Alternative Dispute Resolution Council (NADRAC). NADRAC's *Framework for ADR Standards* adopts Boulle's approach by stating that neutrality refers to questions of interest, and impartiality refers to behaviour. The two terms are seen as working in an integrated way to allow a practitioner "to demonstrate independence and lack of personal interest in the outcome" as well as "an open mind, free of any preconceptions or predisposition towards either of the parties".[8] Boulle's stance has also been embraced by experienced practitioners seeking a nuanced explanation of their experience of the complexities of practice.[9] Further, the Australian National Mediator Accreditation System of 2015, which defines mediation with a distinct focus on party self-determination,[10] includes mediator impartiality (not neutrality) as a practice standard[11] and ethical principle[12] of mediation practice. Concurrently, definitions of the mediation process have developed in other jurisdictions that refer to the mediator as impartial rather than neutral, while similar shifts have occurred in the content of ethical standards and codes of conduct.[13]

Boulle argues that emphasising mediator impartiality, rather than neutrality, more accurately accounts for the realities of mediation practice. On this view, a mediator's impartiality must always be maintained, but neutrality is a variable feature of the process.[14] This approach ostensibly provides a way of accommodating different levels of mediator intervention within the range of mediation models.[15] Boulle

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Practice (LexisNexis, 3rd ed, 2011) 71–80. Subsequent references are to the first edition of Boulle's book, where the distinction was originally articulated, and his influence began. The substance of the distinction has remained the same in later editions.

[3] Boulle (1st ed), n 2, 19.

[4] Boulle (1st ed), n 2, 20.

[5] Boulle (1st ed), n 2, 20.

[6] Boulle (1st ed), n 2, 20.

[7] Boulle (1st ed), n 2, 20.

[8] National Alternative Dispute Resolution Advisory Council (NADRAC), *A Framework for ADR Standards* (Commonwealth of Australia, 2001) 112.

[9] Personal communications with, for example, senior practitioners Mieke Brandon and Micheline Dewdney.

[10] Mediator Standards Board, *National Mediator Accreditation System: Approval Standards* (2015) 2.

[11] Mediator Standards Board, n 10, cll 7, 11.

[12] Mediator Standards Board, n 10, cll 10(1)(c)(vi), 14.

[13] For discussion of these developments, see CM Currie, "Breaking the Definition Deadlock: A New Definition of Mediation That Focuses on the Fundamentals" (2000) 24 *SPIDR News* 5; Maureen E Laflin, "Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-mediators" (2000) 14 *Notre Dame Law, Ethics and Public Policy* 479, 483–484; Leonard L Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" [1996] 1 *Harvard Negotiation Law Review* 7, 8; James H Laue, "Ethical Considerations in Choosing Intervention Roles" (1982) 8 *Peace and Change: A Journal of Peace Research* 29.

[14] Boulle (1st ed), n 2, 20; see also Leda M Cooks and Claudia L Hale, "The Construction of Ethics in Mediation" (1994) 12(1) *Mediation Quarterly* 55, 63; Alison Taylor, "Concepts of Neutrality in Family Mediation" (1997) 14(3) *Mediation Quarterly* 215, 221.

[15] Boulle (1st ed), n 2, 20, 23–26.

originally identified four models of mediation: settlement, facilitative, therapeutic and evaluative.[16] Bobette Wolski has noted, however, that such analytical frameworks "can disguise the extent to which all mediators influence the course and outcome of mediations".[17] In Marian Roberts's view, this approach to differentiating neutrality and impartiality "is not merely a terminological distinction", since it recognises that mediators inevitably bring their "own values, views, feelings, prejudices and interests" into the mediation process.[18]

However, the distinction also has its critics. Hilary Astor's view, for example, is that distinguishing neutrality and impartiality "is far from the complete answer",[19] and that the distinction can in fact create further contradictions and problems for mediation theory and practice, rather than resolving them.[20] We agree with Astor that separating these notions is unconvincing and lacks practical efficacy. There are two main reasons, in our view, why the shift from neutrality to impartiality does not solve the problems confronting the traditional paradigm of mediator ethics. The first is that the distinction is too technical to make a real difference in how the mediation process is understood in practice. The distinction speaks perhaps to people who are steeped in the details of mediation terminology, but not to the ordinary party who comes to mediation for assistance with managing or resolving their dispute, seeking a transparent, fair and ethical process. Indeed, for most people, neutrality and impartiality mean the same thing, with the terms often used interchangeably.[21]

The second problem with the distinction between neutrality and impartiality is that the notion of impartiality, as defined by authors such as Boulle, still encounters many (if not all) of the challenges that beset the traditional concept of neutrality. Boulle's identification of impartiality with fairness, we would argue, is too simplistic. Treating parties with different and complex power dynamics between them in a way that prioritises "even-handedness [and] objectivity",[22] as those terms are usually understood, will favour the more powerful party, in a way that would not be allowed by a genuinely fair process. This is because such an approach will generally entail giving the parties identical or similar treatment, even where they are differently situated or face distinct challenges. The notion of impartiality, in this respect, invites a similar critique to the more traditional idea of neutrality.

It would be possible to avoid this objection to mediator impartiality by interpreting the ideas of even-handedness and objectivity in a more creative and non-traditional way. This would involve saying that mediators can be even-handed and objective even if they treat the parties differently, provided that they do this in an ethically appropriate manner. However, this way of understanding mediator impartiality is of little assistance to mediators and parties in grasping the ethical framework for the process, unless it is supplemented with a more detailed account of when mediator interventions are ethically appropriate. The basis for such an account, we suggest, has to come from some more fundamental ethical notion, such as party self-determination or contextual ethics, rather than from impartiality itself. The idea of mediator impartiality is therefore empty: it either reproduces the traditional problems of mediator neutrality or offers little guidance on the mediator's ethical role. The key elements of our argument are elaborated further below.

A Distinction without a Difference

The terms neutrality and impartiality, as used in common parlance, are more or less synonymous.[23] The two concepts are also often used interchangeably in the mediation literature. Examples include Jonathan

[16] Boulle (1st ed), n 2, 28–30.

[17] Bobette Wolski, "Mediator Settlement Strategies: Winning Friends and Influencing People" (2001) 12(4) ADRJ 248, 249.

[18] Marian Roberts, *Developing the Craft of Mediation: Reflections on Theory and Practice* (Jessica Kingsley Publishers, 2007) 98.

[19] Astor, "Rethinking Neutrality", n 1, 77.

[20] See also Cooks and Hale, n 14, 63.

[21] See, eg, Australian Law Reform Commission (ALRC), "Review of the Adversarial System of Litigation – ADR – Its Role in Federal Dispute Resolution" (Issues Paper No 25, Commonwealth of Australia, 1998) 113; Astor, "Mediator Neutrality", n 1, 223.

[22] Boulle (1st ed), n 2, 19.

[23] ALRC, n 21, 113.

Shailor's reference to "impartiality" and "objectivity" as neutrality's "associated terms"[24] and Judith Maute's statement that "classic neutrality maintains that the mediator is both impartial and uncommitted as to outcome".[25] The entry for "Neutrality" in the index of Omer Shapira's 2016 work, *A Theory of Mediators' Ethics*, states "See also Impartiality".[26] Some writers simply assert that neutrality means "being impartial",[27] while others say that "neutrality, by its very nature, must include impartiality".[28] Even when distinguished, both terms have been considered as providing "an index" for actions in practice that allow a mediator to successfully maintain their role.[29] It is, as such, very challenging to separate the notions in both theory and practice.

The closely related, if not identical, meanings of neutrality and impartiality in common usage pose a challenge for those who wish to clearly distinguish the concepts for the purposes of mediation ethics. An efficacious ethical paradigm for fair and appropriate mediation practice cannot realistically be based on a language distinction that is not usually made and which is also not readily understood.[30] It is therefore incumbent upon defenders of the distinction to clearly explain the difference and show how it can be consistently maintained. So far, however, they have failed to do so. Boulle suggests, as we saw above, that neutrality requires a disinterested and detached attitude by mediators, while impartiality represents "even-handedness, objectivity and fairness".[31] However, this way of putting things does not greatly assist mediators or parties in distinguishing the concepts.

The concept of mediator neutrality has, indeed, traditionally been interpreted as requiring a degree of detachment or disinterest on the part of the mediator. This sits uneasily with the mediator's practical role and the complex dynamics of the process. If the distinction between neutrality and impartiality is to succeed in resolving these problems, then impartiality must mean something other than neutrality. Boulle's suggestion is that it means "even-handedness, objectivity and fairness",[32] but this immediately raises the further question of what it means for mediators to be even-handed, objective and fair. There are at least two ways one might approach this question. The first would be to say that a mediator can be said to be even-handed, objective and fair only if they refrain from treating the parties differently from each other. However, this approach effectively draws on the traditional notion of mediator neutrality to flesh out what impartiality means. It therefore robs the distinction of any genuine theoretical or practical significance.

A second possible approach would be to say that a mediator is even-handed, objective and fair if they refrain from treating the parties differently *unless this is ethically appropriate*. This would, indeed, represent a more nuanced approach than the traditional notion of neutrality. A conception of impartiality along these lines could potentially accommodate a more context-sensitive ethical framework. However, such an approach is of little value to mediators in working out how to act, unless supplemented by an account of when it is *appropriate* (or fair) to treat the parties differently. Simply repeating the mantra that mediators must be even-handed, objective and fair is of little practical assistance in the mediation room. Indeed, there is a kind of sleight of hand in an insistence that impartiality and fairness are effectively synonymous, since it is hard to dispute an ethical value that is defined as coextensive with the requirement

[24] Jonathan G Shailor, *Empowerment in Dispute Mediation: A Critical Analysis of Communication* (Praeger, 1994) 8.

[25] Judith L Maute, "Mediator Accountability: Responding to Fairness Concerns" [1990] *Journal of Dispute Resolution* 347, 349.

[26] Omer Shapira, *A Theory of Mediators' Ethics* (CUP, 2018) 455; see also Ruth Charlton and Micheline Dewdney, *The Mediators' Handbook: Skills and Strategies for Practitioners* (LBC Information Service, 1995) 351, 356.

[27] Howard Gadlin and Elizabeth W Pino, "Neutrality: A Guide for the Organisation Ombudsperson" (1997) 13 *Negotiation Journal* 17, 18; Cooks and Hale, n 14, 62.

[28] M Feer, "Toward a New Discourse for Mediation: A Critique of Neutrality – Commentary" (1992) 10(2) *Mediation Quarterly* 173, 174.

[29] Shailor, n 24, 9.

[30] Astor, "Mediator Neutrality", n 1, 227.

[31] Boulle (1st ed), n 2, 19.

[32] Boulle (1st ed), n 2, 19.

to act fairly. However, conflating the two concepts accomplishes little without a detailed account of what fairness means in this context.

The credibility of the mediation community is brought into question if distinctions are drawn about critical ethical concepts that are not consistently made or readily understood by actors in the process.[33] Notwithstanding the increasing uptake of the distinction between neutrality and impartiality in mediator codes of conduct, it remains far from clear how a consistent and helpful distinction between the concepts can be maintained. An ethical framework cannot be credible if it makes distinctions without any real difference, or if it relies upon motherhood concepts such as even-handedness, objectivity and fairness without clearly explaining how these principles can and should be applied. The concept of mediator impartiality, understood in this way, is effectively empty, since it is incapable of playing either a substantive explanatory role in a theory of mediator ethics and/or a meaningful action-guiding role in mediation practice. It needs to be supplemented with a detailed and contextual ethical framework (of the kind we elaborate upon elsewhere).[34]

Even if commentators were able to articulate a clear and consistent distinction between neutrality and impartiality, a further problem would arise for implementing the distinction in practice. Given that the concepts are often used synonymously in popular discourse, theoretical distinctions between them would not necessarily be meaningful for either mediators or parties. The closeness between the concepts means that mediators are unlikely to internalise the distinction in a way that makes a real difference to how they understand their ethical choices. It follows that an ethical paradigm based on mediator impartiality is likely to confront similar problems to the traditional paradigm of neutrality, as we explore in more detail below. Furthermore, as far as the parties are concerned, the distinction can only really make sense if it is explored and discussed with them in detail in the preparation, intake and introductory stages of the mediation process. This simply does not occur in practice, and to suggest that it should would lead to potentially complicating and confusing definitional discourse in the early stages, which is unlikely to aid the parties' understanding, and may disrupt the efficacy of the process.

The Unrealistic Nature of Mediator Impartiality

We suggested in the previous section that the concepts of mediator neutrality and impartiality have yet to be clearly and consistently distinguished in a way that gives them independent content. The concept of mediator impartiality is effectively empty, since it draws its content from either the traditional view of mediator neutrality or the broader concept of fairness, which remains undefined. The distinction is therefore of little practical use to mediators and parties. However, even if we take the distinction at face value and accept that mediators can consistently be impartial, in the sense of even-handed and objective, without necessarily being neutral, in the sense of detached and disinterested, a further problem arises. The concept of impartiality, understood in this way, still encounters many of the ethical issues that bedevil the traditional notion of neutrality. In particular, an impartial mediator is likely to find themselves ill-equipped to address power imbalances that arise between the parties or to make the kinds of party-focused directives and interventions that are commonplace in many mediation contexts in support of party self-determination.

There are some respects in which the concept of mediator impartiality could offer advantages over the traditional view of neutrality. We mentioned previously, for example, that mediator neutrality has been

[33] Astor, "Mediator Neutrality", n 1, 227.

[34] Rachael Field and Jonathan Crowe, *Mediation Ethics: From Theory to Practice* (Edward Elgar, forthcoming); see also Rachael Field, "Exploring the Potential of Contextual Ethics in Mediation" in F Bartlett, R Mortensen and K Tranter (eds), *Alternative Perspectives on Legal Ethics* (Routledge, 2010); Rachael Field, "Rethinking Mediation Ethics: A Contextual Method to Support Party Self-determination" (2011) 22(1) ADRJ 8; Field, "Mediation Ethics in Australia", n 1; Rachael Field, "Proposing a System of Contextual Ethics for Mediation for a Range of Mediation Models and in Both Ad Hoc and Institutional Environments" (2017) 10(2) *Contemporary Asia Arbitration Journal* 293; Jonathan Crowe, "Two Models of Mediation Ethics" (2017) 39 *Sydney Law Review* 147; Jonathan Crowe, "Mediation Ethics and the Challenge of Professionalisation" (2017) 29 *Bond Law Review* 5; Rachael Field and Jonathan Crowe, "Playing the Language Game of Family Mediation: Implications for Mediator Ethics" (2017) 35 *Law in Context* 84.

critiqued for ignoring the humanity of the mediator.[35] The expectation of pure detachment and disinterest in the concept of neutrality is innately unrealistic, because mediators are human beings with emotions, feelings, preferences, desires, biases, cultures and ideologies. Each of these factors will inevitably influence the mediator's viewpoint, either consciously or at an intuitive level. It is therefore neither realistic nor helpful to treat mediators as if they were neutral in the sense of being purely detached and disinterested. Rather, mediators should strive to be aware of their perspectives and biases, taking these into account when shaping their interactions, and incorporating them into the process of reflecting upon their choices and wider approach to practice. Mediator impartiality is an improvement over neutrality insofar as it acknowledges the humanity of the mediator by not including a requirement for mediators to be detached or disinterested, requiring rather that they are merely even-handed and objective.

However, the notion of mediator impartiality fails to dispel the other serious criticisms that have been levelled at the idea of neutrality. Impartiality, like neutrality, fails to take adequate account of the fact that mediators hold power over the process and can exercise (or fail to exercise) this power in ways that undermine party self-determination.[36] This is perhaps best seen by considering the implications of impartiality for power imbalances. It is useful, in this context, to distinguish two ways that a mediator might respond to power imbalances that they encounter.[37] The first way, which seems to be mandated by the traditional approach to mediator neutrality, would be to remain detached and refrain from intervening in the process in a way that treats the parties differently from one another. This would effectively mean the mediator lets the power imbalance play out, either ignoring it entirely or trusting that the process itself will level the playing field. The most likely outcome of this approach, as we have argued previously,[38] is that the unequal dynamic between the parties will result in an unbalanced process and an inequitable outcome. A purely detached approach by the mediator is therefore not a fair approach, at least when there is a significant imbalance between the parties.

The second way a mediator might respond to power imbalances is through targeted interventions that are meant to assist the parties in achieving a mutually self-determined outcome. The precise form these interventions take will depend on the circumstances of the case. Consider, for example, the following hypothetical case study involving a family mediation:

> *Josh and Lauren*: Josh and Lauren have recently separated after an eight-year marriage. They have two young children and are in dispute over residence and care issues. Josh is very assertive and prone to long, aggrieved speeches. Lauren barely speaks. When she does speak, Josh often talks over her, despite you reminding him not to do so. Lauren seems afraid to assert herself in Josh's presence. You suspect there is a history of spousal abuse, although neither party has disclosed this.

An experienced mediator who becomes aware of this dynamic may take steps to ensure that both parties enjoy self-determination. This might involve, for example, reiterating the ground rules so that Josh is aware he needs to give Lauren an opportunity to speak; making use of active listening and reframing to ensure that both parties' perspectives are recognised and heard; utilising separate sessions to enable Lauren to raise issues and concerns that she might not feel comfortable articulating in Josh's presence; or referring Lauren to other sources of specialised advice or support to enable her to understand her options and advocate for her interests. These strategies, we suggest, are all common and legitimate parts of the mediator's toolkit. However, they are not, strictly speaking, in keeping with mediator neutrality, since they involve active interventions that treat the parties differently.

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[35] See, eg, Mayer, n 1, 30; Astor, "Rethinking Neutrality", n 1, 80; Orna Cohen, Naomi Dattner and Ahron Luxenburg, "The Limits of the Mediator's Neutrality" (1999) 16 *Mediation Quarterly* 341; Linda Fisher, "What Mediators Bring to Practice: Process, Philosophy, Prejudice, Personality" (2000) 5(4) *ADR Bulletin* 60, 63.

[36] See, eg, Field, "Mediation and the Art of Power (Im)balancing", n 1; Field, "The Theory and Practice of Neutrality in Mediation", n 1; Field and Crowe, n 1; Bernard Mayer, "The Dynamics of Power in Mediation and Negotiation" (1987) 16 *Mediation Quarterly* 75; Dale Bagshaw, "Language, Power and Mediation" (2003) 14 ADRJ 130; Hilary Astor, "Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner" (2005) 16 ADRJ 30; Jamila Ahmed Chowdhury, "Gender, Power and Mediation" (2008) 15(2) *Pakistan Journal of Women's Studies* 101.

[37] See generally Jonathan Crowe, "Reinterpreting Government Neutrality" (2004) 29 *Australian Journal of Legal Philosophy* 118.

[38] See, eg, Field, "Mediation and the Art of Power (Im)balancing", n 1; Field, "The Theory and Practice of Neutrality in Mediation", n 1; Field and Crowe, n 1, 110–14. For a more general discussion of the same point, see Crowe, n 37.

The latter approach, we would contend, is both what mediators commonly do and also what they ought ethically to do in response to such scenarios. Where, then, does this leave the notion of mediator impartiality? Boulle argues that an impartial mediator must be even-handed and objective, although not necessarily detached and disinterested.[39] However, if even-handedness and objectivity means treating both parties the same – and therefore avoiding selective interventions that take account of their different positions and skill sets – then this effectively replicates the demands of mediator neutrality in the kind of scenario outlined above. Mediator impartiality, thus conceived, therefore fails to be fair in these kinds of cases, just as mediator neutrality fails to be fair. The challenges posed by power imbalances therefore reveal a tension in a definition of impartiality as even-handedness, objectivity and fairness. If even-handedness and objectivity mean treating parties the same, then they are inconsistent with fairness, for the reasons given above.

The other option open to a defender of impartiality is to say that an impartial mediator need not treat the parties identically, but may actively intervene in the process to support one or both parties where needed. It seems odd, however, to describe this approach using the term "impartiality", given its closeness to "neutrality" in common usage. A mediator who supports a less powerful party in order to help them achieve self-determination is not being impartial, as the term is commonly understood. The terms "even-handed" and "objective" do not help to clarify the meaning of "impartiality" in this respect; if anything, they suggest an interpretation of the term that mirrors the traditional notion of neutrality. A mediator who takes the approach we advocate is, however, being substantively fair, and is also honouring the fundamental mediation value of party self-determination.

This observation leads us to a final criticism that commentators have raised in relation to mediator neutrality: namely, that neutrality is not expected or desired by the parties. The parties have typically come to mediation because they think the mediator has expert skills that can help them resolve their dispute; these skills involve the ability to intervene and direct the process as needed.[40] The parties therefore do not want a purely detached mediator, but one who exercises professional and ethical judgment. A similar point applies to mediator impartiality. The parties do not want a mediator who is biased or takes sides in the dispute, but they do want a mediator who will manage the process in a fair and professional way, utilising ethical judgment and professional expertise. If a tension arises between the notions of even-handedness (in the sense of formal equality) and the exercise of professional judgment in pursuit of a fair resolution, then the parties may well prefer the latter over the former. The more dynamic ethical approach advocated above is therefore more reflective of the needs of the parties than any view that emphasises impartiality without placing the notion within a wider contextual and relational ethical framework.

Conclusion

We have argued in this article that mediator impartiality is an unrealistic and unhelpful ethical goal for mediation practice. It either replicates the core problems of mediator neutrality, particularly in relation to power imbalances, or creates confusion in the ethical framework by using terms that mirror the language of neutrality while really aiming at substantive fairness. This problem besets the notion of mediator impartiality at both a terminological and a substantive level. At a terminological level, the fact that neutrality and impartiality are often used synonymously makes it difficult to draw a clear and practical distinction between them. At a substantive level, impartiality is either parasitic on the concept of neutrality, in which case it simply replicates many of the shortcomings of the more traditional notion, or in need of creative reinterpretation, in which case it must be supplemented with a more substantive ethical framework. In either case, the notion of mediator impartiality itself is empty, meaning it cannot supply a solid foundation for ethical practice.

[39] Boulle (1st ed), n 2, 19.

[40] See, eg, Astor, "Rethinking Neutrality", n 1, 75; Robert Dingwall, "Empowerment or Enforcement? Some Questions about Power and Control in Divorce Mediation" in Robert Dingwall and John Eekelaar (eds), *Divorce Mediation and the Legal Process* (OUP, 1988) 166.

We suggest that the better approach is to cease to treat mediator neutrality or impartiality as a guiding value of mediation practice, instead emphasising the concept of party self-determination. This framework recognises and legitimises the ethical choices mediators routinely make in cases like the one discussed above, rather than seeking to shoehorn them into a modified version of the traditional paradigm. The notion of party self-determination, of course, needs careful elaboration in order to play this ethical role. It also needs to be placed within a broader account of how mediators form and develop their capacity for contextual ethical judgment in the process. There is no scope in the present article to develop this new framework in detail, although we attempt to do so elsewhere.[41] Our point, for present purposes, is that merely shifting the emphasis to mediator impartiality fails to solve the dilemmas posed by the concept of neutrality. A more fundamental rethinking of mediation ethics is needed if we are to avoid the shortcomings of the traditional paradigm.

[41] See the sources cited at n 34.

Will the Creation of AFCA Be of Benefit to the Parties That Come Before It?

Andrew Greenhalgh*

External dispute resolution (EDR) schemes have become a popular method of providing a low-cost, expedient and procedurally fair forum for eligible parties to attempt to resolve their disputes, particularly in the financial industry. The Financial Ombudsman Service, Credit and Investments Ombudsman and Superannuation Complaints Tribunal were among the most used EDR services in the financial and superannuation industries, but were found wanting in a recent report by a panel reviewing the financial system's EDR and complaints frameworks. These EDR bodies have now been replaced by the Australian Financial Complaints Authority (AFCA), a move which has been heavily criticised. This article argues that in spite of the limitations of the AFCA, if it is effectively managed such that the problems of its predecessor schemes can be overcome, complainants that come before it should be generally better off than they otherwise would have been.

INTRODUCTION

As the financial industry has a tremendous impact on the lives and living standards of everyday Australians, it is perhaps inevitable that a massive number of disputes, arising from a growing level of interactions between consumers, providers/financiers and other interested parties crop up every year. With more than 40,000 financial disputes falling on three major external dispute resolution (EDR) bodies each year,[1] it is crucial that the associated EDR structures/frameworks and processes are able to effectively aid in the attempts to resolve such disputes quickly, inexpensively and fairly, in what is a rapidly changing and dynamic industry. This is especially important for small claims and vulnerable/isolated claimants, who, as shown by the Financial Services Royal Commission,[2] are the most susceptible to abuses which provide the foundation for such complaints and the most limited in their ability to pursue them through the courts, if at all.[3]

Until 30 October 2018, the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT) addressed new financial disputes arising under their own, somewhat discrete jurisdictions. The FOS, a member-funded Ombudsman service for the financial services industry was established in 2008 by amalgamating a number of existing financial EDR bodies, and typically handled the majority of complaints each year,[4] provided they are between financial services businesses and consumers (including small business) and the dispute is under the monetary limit of $500,000.[5] The CIO, another industry funded EDR company limited by guarantee,

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[1] Ian Ramsay "Improving Dispute Resolution in the Financial System" (2017) 28 ADRJ 191.

[2] Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (2018) Vols 1, 2.

[3] Bryant G Garth and Mauro Cappelletti, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 *Buffalo Law Review* 181, 195.

[4] I Ramsay, J Abramson and A Kirkland, *Final Report – Review of the Financial System External Dispute Resolution and Complaints Framework* (April 2017) 8; Financial Ombudsman Service, *Annual Review 2017-18* (2018).

[5] Ramsay, Abramson and Kirkland, n 4.

was founded in 2003 to assist in settling disputes between consumers and financial credit providers,[6] provided the dispute fell within its half-million dollar monetary limit. Unlike the other financial EDR bodies described above, the SCT, a statutory tribunal founded in 1992, dealt with complaints relating to superannuation, specifically in relation to Australian Prudential Regulatory Authority regulated funds, annuities and retirement savings accounts[7] (as opposed to Self-managed Superannuation Funds).

However, as the nature of the industry has changed dramatically since the creation of these EDR bodies, a number of problems relating to EDR bodies in the financial system were identified by Ian Ramsay and colleagues in their review of the financial system, EDR and complaints framework, which was finalised in April 2017.[8] Problems included an overlapping jurisdiction for the three EDR bodies which led to inconsistent outcomes and created jurisdictional confusion for applicants,[9] antiquated/outdated monetary limits, and, in the case of the SCT, exceptionally lengthy delays in resolving complaints.[10]

On the back of the identified problems, Ramsay and colleagues primarily recommended creating a singular EDR body for all financial disputes including superannuation in lieu of the existing EDR bodies. The federal government accepted all recommendations in May 2017, and announced the creation of the recommended body, the Australian Financial Complaints Authority (AFCA), set up as a company limited by guarantee, to handle disputes for the three EDR bodies.

Although AFCA looks good on paper, there have been a number of criticisms and concerns raised about it, some of which question whether it will be capable of overcoming the existing EDR bodies' shortcomings,[11] while others question its structure. Accordingly, this article will examine whether the creation of AFCA will be of benefit to the parties that come before it, as compared with the previous schemes, by examining whether the creation of AFCA will simplify/nullify the jurisdictional issues, creating more consistent, less expensive outcomes for both complainant and respondent; and analysing whether AFCA will improve complainants access to justice, in terms of scope to hear complaints and provision of a procedurally fair and expedient process.

A Simplification of Jurisdiction

As described above, although each of the three predecessor EDRs had largely discrete jurisdictions, there were a number of jurisdictional overlaps which created inconsistent results for complainants. For instance, if the dispute was over life insurance where the insurer was a member of FOS, the FOS could hear the dispute. However, if the insurance was tied to a superannuation account, the SCT could also hear the dispute, but would have been capable of doing so far less expediently. Equally, where a credit provider was a member of both the CIO and FOS, a dispute involving a mortgage broker, but relating to a home loan could be heard by either the FOS or CIO. In 2015–2016, 70% of the total number of disputes heard by the FOS and CIO related to disputes that could have been brought to either EDR body.[12]

Where such jurisdictional overlaps existed, this had been shown to cause uncertainty for consumers in terms of where to take their dispute and the certainty of the outcome, increase the costs for service/finance providers through a duplication of membership fees and reduce the efficacy in which the EDR

[6] Credit and Investments Ombudsman, *About Us* (1 October 2018) <https://www.cio.org.au/about-us.html>.

[7] Superannuation Complaints Tribunal, *About the Superannuation Complaints Tribunal* (1 October 2018) <http://www.sct.gov.au/pages/about-us>.

[8] Ramsay, Abramson and Kirkland, n 4.

[9] Ramsay, Abramson and Kirkland, n 4.

[10] Ramsay, Abramson and Kirkland, n 4.

[11] Pam McAlister and Michael Mathieson, "Benefits of a Statutory Scheme for Superannuation Dispute Resolution" (2017) 29(2) *Australian Superannuation Law Bulletin* 23; Jocelyn Furlan, "Trustee Decisions & Discretions, Complaints Handling, the Superannuation Complaints Tribunal (SCT) and the Australian Financial Complaints Authority (AFCA)" (Speech delivered at the Melbourne Law School Superannuation Masters Seminar, University of Melbourne, 8 March 2018); Institute of Mercantile Agents, "Australian Financial Complaints Authority" (2018) 5(6) *AGENT* 12.

[12] Ramsay, Abramson and Kirkland, n 4, 103.

bodies all operated, owing to this overlap.[13] It had also been possible for more unscrupulous service/finance providers to deliberately select the most advantageous forum for themselves,[14] otherwise known as forum shopping,[15] particularly where the EDR bodies have differing definitions and styles of resolution procedures (ie: inquisitorial versus adversarial) and are not as rigorous in approaching/handling/managing complaints.[16] Additionally, competition among Ombudsman services has been said to be contrary to their guiding principles, particularly those of independence and fairness,[17] which may dilute the value of EDR schemes as a source of information[18] and erode public confidence and trust in them.

Equally absurdly, where a dispute could be heard by multiple EDR bodies, a complainant may have been required to pursue the dispute through multiple forums,[19] such as both the CIO and FOS, which is the antithesis of treating consumers fairly and allowing for access to an effective dispute resolution framework. This is even more problematic where consumers have relatively low financial literacy and are presented with complex and technical documents,[20] which inherently reduces their ability to effectively select the appropriate product for them. Equally, when looking at this issue pragmatically, how many people would choose a particular product on the basis of the EDR scheme that attaches to it?

Accordingly, by effectively combining the functions, processes and jurisdictions of all three EDRs into a singular body, it may well be possible to address, or at the very least reduce, the abovementioned problems, much in the same way the creation of the FOS from three (followed by two more in the following year) ASIC-approved Ombudsman schemes in 2008 did.[21]

When considering that the fundamental traits for an EDR body include impartiality, independence and confidentiality[22] among other features such as expedient, cost-effective resolution and wide-reaching access, the shift to a singular EDR scheme/body is a positive change. As mentioned above, competition among EDR schemes has a tendency to undermine their guiding principles of independence and fairness, as product/service providers will, in much the same way as a forum shopping complainant, choose the forum that best suits them, encouraging a lack of rigorousness in handling complaints on the part of the preferred EDR body. Accordingly, where there is no competition/choice of forum, and an increase in (even if only short term) scrutiny towards AFCA following its creation by both industry and legal experts, the change to AFCA could address these problems.

Equally, by having only a single EDR scheme/body to investigate complaints, the doubling of membership costs to the financial industry will be neutralised, as only one membership will be required. This would also eliminate the issue of inconsistent outcomes between EDR bodies with overlapping jurisdictions. This is crucial for consumers, as public confidence/trust in the EDR body is crucial for its success and is something that has eroded as a result of the changing dispute resolution landscape.[23]

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[13] Ramsay, Abramson and Kirkland, n 4, 103; Australian Securities and Investments Commission, *Submission to the EDR Review Interim Report*, (1 February 2017) 6.

[14] Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (OUP, 2003).

[15] Adam Reynolds, "The UDRP and auDRP – Arbitration or Arbitrariness?" (2003) 14 ADRJ 40.

[16] Australian and New Zealand Ombudsman Association, Submission to the EDR Review Issues Paper, 1–2.

[17] Australian and New Zealand Ombudsman Association, *Competition among Ombudsman Offices* (September 2011) <http://www.anzoa.com.au/assets/anzoa-policy-statement_competition-among-ombudsman-offices.pdf>.

[18] Ramsay, Abramson and Kirkland, n 4, 112.

[19] Ramsay, Abramson and Kirkland, n 4, 106.

[20] Commonwealth of Australia, *Financial System Inquiry Final Report* (2014) 199.

[21] Cameronralph Navigator, *Report to Board of Financial Ombudsman Service: 2013 Independent Review* (26 February 2014) Financial Ombudsman Service Australia <https://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf>.

[22] Charles L Howard, *The Organizational Ombudsman: Origins, Roles, and Operations – A Legal Guide* (ABA Section of Dispute Resolution, 2010) 51.

[23] Anita Stuhmcke, "Australian Ombudsmen: Drafting a Blueprint for Reform" (2017) 24 *Australian Journal of Administrative Law* 43, 43, 46.

Finally, utilising a single EDR body/scheme, as opposed to multiple bodies ought to reduce the difficulties faced by complainants in navigating the previous, multi-scheme EDR framework, as there should be no difficulty in knowing which body/scheme to take their dispute to. This ought to reduce the delays faced by complainants as well, by removing the delay associated with having to move their complaint from one EDR body to another, having initially taken it to the wrong body/scheme, thus improving the complainant's access to justice.

Accordingly, there would appear to be a number of valid reasons and advantages in simplifying the jurisdiction in which complainants can bring their grievances to, by replacing the SCT, FOS and CIO with AFCA.

AN IMPROVEMENT TO COMPLAINANTS' ACCESS TO JUSTICE?

Although simplifying the number of EDR bodies by replacing them with AFCA will address jurisdictional issues, the existing EDR framework contained a variety of other problems which further limited complainants' access to justice.

The first of these problems was financial limitation. Under the provisions relating to the FOS and CIO, complaints falling above a monetary limit of $500,000 (or $2,000,000 in the case of credit facilities relating to small businesses) could not be heard by either body. Further, for disputes that could be heard by either of these EDR bodies, the compensation cap of $309,000 was clearly outdated and not fit for the purpose of providing sufficient compensation.[24] These limits clearly prevented claimants from being able to access these schemes, simply because these limits/caps had not kept pace with the times, denying many people (ie: mortgage holders) access to inexpensive and effective EDR schemes.

This limitation severely hindered small businesses, defined as those with less than 20 staff, or less than 100 if the business is manufacturing, which covers 98% of all small businesses in Australia.[25] Although such businesses also have access to state-based small business commissions and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), most of these types of EDRs are not fit for purpose, as ASBFEO cannot make binding determinations and fails to meet the Australian and New Zealand Ombudsman Association's definition of Ombudsman,[26] while the state-based small business commissions have been said to be ineffective.[27]

Further, in relation to superannuation disputes, although there was no monetary limit for complaints, including in relation to life insurance disputes, claimants could expect to be able to progress their disputes after waiting at least 12 months from lodging their complaint with the SCT. To progress a complaint all the way through the SCT's process, complainants may spend up to four years[28] in going through the SCT prior to the dispute being resolved/settled, with such disputes being resolved, on average, in 796 days.[29] By comparison, the FOS and CIO were able to resolve most of the disputes that come before them within 62 and 107 days respectively.[30] This was clearly a massive limitation on a complainant's access to justice (and compensation), as for instance, where a complainant is fighting their superannuation fund over the payment of a total and permanent disability benefit, having to wait for somewhere between one to four years can have a massively debilitating influence on the complainant and their family.

In theory, AFCA will be able to address most of these limitations fairly easily. Following the recommendations made by the Ramsay report, AFCA commenced operations with a monetary limit of $1,000,000 for most claims, which is double the limit of the FOS and CIO, and has a compensation cap

[24] Ramsay, n 1, 2.

[25] Australian Bureau of Statistics 2018, 8165.0 – Counts of Australian Businesses, including Entries and Exits, June 2013 to June 2017, ABS, Canberra.

[26] Ramsay, Abramson and Kirkland, n 4, 161.

[27] Ramsay, Abramson and Kirkland, n 4, 161.

[28] Ramsay, Abramson and Kirkland, n 4, 93.

[29] Ramsay, Abramson and Kirkland, n 4, 80.

[30] Ramsay, n 1, 192.

no less than $500,000.[31] This compensation cap may also be increased to $1,000,000, particularly in relation to disputes concerning mortgages and general insurance produces, though this will depend on consultation between AFCA and industry members/other stakeholders and the results of the discussions on the potentially adverse impacts of doing so.[32] Further, to help provide small businesses with reasonable access to an effective EDR alternative to litigation, the cap on the size of a dispute relating to a small business credit facility under AFCA has been raised to $5 million, with a compensation cap of $1 million.[33]

Addressing the delay factor in bringing complaints to what was the SCT will be more difficult, however. By design, this tribunal was staffed by professional, expert staff (and chairperson) to address what have been increasingly complex disputes (ie: the increasingly blurred lines regarding who qualifies as a dependent)[34] in a highly regulated financial industry. Although stakeholders all agree that the SCT was chronically underfunded and limited by an inflexible governance and funding structure,[35] the flexibility of AFCA to remedy these limitations through its terms of reference/guiding principles and the ability to directly levy funding from its financial industry members may still be insufficient. As the SCT is scheduled to run until at least 2020 in order to clear the massive backlog of disputes before it,[36] the current expertise of the tribunal will not be able to migrate to AFCA for some years, if at all. The impact of this is that it will be difficult to even hire an equivalent number of staff with an equal level of expertise as compared with the SCT, much less to hire additional staff to meet the increasing demand for this type of dispute resolution service and provide complainants with expedient/timely access to justice from the outset. The proposed improvements in terms of flexibility of governance (through more easily amendable terms of reference and guiding principles) and accordingly funding/resource allocation should still be an improvement over the existing framework used by the SCT, while the retention of the tribunal-esque powers originally vested in the SCT (ie: powers to obtain documents, compel attendance at conciliation, et cetera) will be of continued benefit to complainants and aid in accessing justice through obtaining socially just results.

The prevailing concern, and indeed criticism of AFCA by industry groups has been orientated around the volume of complaints and ability of a singular body to handle them in an expedient manner that allows effective access to justice. The major criticism is the prevailing concern that in creating a singular, "super-tribunal", AFCA will be overwhelmed by the volume of complaints, in much the same way as the SCT has been.[37] This argument is however lacking in two regards. First, when examining the statistics published in the Ramsay report, it is clear that although the SCT's disputes are more complex and time consuming in terms of attempting to resolve them, the FOS and CIO receive and resolve far more disputes,[38] in a more timely way, though this has as much to do with the complexity of the dispute as the structural factors associated with the tribunal's delays. Second, unlike the SCT, AFCA will have the ability to more effectively control its funding and regulate its resources, such that, in spite of the limitations previously mentioned, it will be better able to allocate resources to satisfy the volume of complaints, provided it can hire enough suitably skilled staff. This will also depend on senior management and directors remaining appraised of the number of complaints and allocate/raise resources to meet them appropriately.

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[31] Ramsay, n 1, 193; Ramsay, Abramson and Kirkland, n 4, 149.

[32] Ramsay, Abramson and Kirkland, n 4, 149.

[33] Ramsay, Abramson and Kirkland, n 4, 172.

[34] Eva Scheerlinck, "New Complaints Body Must Not Be a Rush Job", *Super Review*, 8 April 2018 <https://www.superreview.com.au/features-analysis/expert-analysis/new-complaints-body-must-not-be-rushed-job>.

[35] Ramsay, Abramson and Kirkland, n 4, 9.

[36] Furlan, n 11; Superannuation Complaints Tribunal, *SCT Quarterly – Q1 2018* (2018) <https://www.sct.gov.au/public/news/newsletters/sct-quarterly-q1-2018>.

[37] Institute of Mercantile Agents, n 11.

[38] Ramsay, Abramson and Kirkland, n 4, 36.

Equally, as membership to AFCA is required by law or as a condition of a financial firm's licence to operate, consumers/customers of financial firms will be essentially assured (provided they meet the monetary thresholds/small business criteria, time limits, have a sufficient connection to Australia, and satisfy all other relevant criteria) to have free access to AFCA to attempt to resolve their complaints.[39]

Industry groups have criticised the monopolistic nature of AFCA, as Australian organisations which operate as a monopoly have historically operated in a manner consistent with the avoidance of transparency and accountability, seeking to exploit their circumstances, such monopolies normally result in higher/unreasonable fees/prices.[40] This criticism, although it appears to be reasonable prima facie, is unreasonable, as competition in the EDR space, as discussed above, can lead to worse outcomes for complainants and compromises the independence of the (EDR) body.[41] Further, when considering that the Australian Securities and Investments Commission (ASIC) has regulatory oversight, the power to issue directions and undertake its own actions, this concern is likely unfounded, in spite of ASIC's recent bad publicity arising out of the Financial Services Royal Commission. Equally, there will be a high degree of public, professional and political scrutiny of AFCA for some time to come, such that any such moves to abuse/take advantage of its power will be noticed and acted upon.

Accordingly, in terms of access, the shift from the three EDR bodies to AFCA can be generally seen to allow a greater level of access to a wide array of complainants, providing them with affordable (free) access to what the Federal Government and associated regulatory agencies hope will be expedient and procedurally fair justice.

Procedural Fairness and Expedience

It has long been considered that access to justice must lead to outcomes that are just, both at an individual and societal level.[42] In terms of EDR bodies and alternative dispute resolution processes, the conception of a just outcome hinges on procedural fairness.[43] As part of this procedural fairness in relation to Ombudsmen and similar EDR bodies, impartiality and independence are crucial.[44]

In forcing a measure of efficiency into the framework for financial and superannuation disputes, with the federal government accepting the Ramsay report's recommendations and replacing the three existing EDR bodies into AFCA, the issues with independence, as discussed previously, should be addressed.

Although AFCA is legislatively enshrined in the *Corporations Act 2001* (Cth)[45] via the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill* 2017 (Cth)[46] as a not-for-profit company limited by guarantee, its operation is governed by its terms of reference. At current, the terms of reference details the process for complaints resolution, which is stated to be underpinned by the principles of doing what is fair in all the circumstances, being as transparent as possible, handling complaints in a way that is independent, impartial, fair and in a manner which provides procedural fairness to the parties.[47]

This fairness should be exemplified in AFCA's complaint resolution approach, whereby AFCA should try to resolve complaints informally via negotiations or conciliation, and only then proceed to determine

[39] Australian Financial Complaints Authority, "Rules of Complaint Resolution Scheme", *Terms of Reference* (1 June 2018) 2.

[40] Institute of Mercantile Agents, n 11.

[41] Foundation for Effective Markets and Governance, *Financial Services Complaints Ltd – Independent Review* (2015) 11–12 <http://www.fscl.org.nz/sites/all/files/FSCL%20Report%20%28June%202015%29.pdf>.

[42] Garth and Cappelletti, n 3, 182.

[43] Resolution Institute, *National Mediator Accreditation System* (2015) 1 [7].

[44] Stuhmcke, n 23, 47.

[45] *Corporations Act 2001* (Cth).

[46] *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill* 2017 (Cth).

[47] Australian Financial Complaints Authority, n 39, 6.

the complaint after providing a preliminary assessment.[48] Where determinations are made, they must be made in a way that is fair in all of the circumstances (on the merits of the application), having regard to the applicable legal principles, applicable industry codes/guidance, good industry practice and previous decisions of AFCA/the applicable predecessor scheme. This process follows that which was established by AFCA's predecessors, the FOS and CIO, by adopting facilitative, advisory and determinative processes, taking an essentially mediation-arbitration model,[49] in line with the classifications defined by the National Alternative Dispute Resolution Advisory Council.[50] Such processes have historically received favourable reference.[51] AFCA must also share information provided by a party to a complaint with the other parties and ensure that both parties have an opportunity to make submissions.[52]

A comparison of this procedure to the procedural fairness guidelines that apply to mediators[53] reveals a significant overlap in regard to the underlying aspects of procedural fairness. This is crucial, as Boulle[54] and others[55] have confirmed that participants to procedurally fair dispute resolution processes are highly satisfied by the procedure, regardless of whether the substantive outcomes are sometimes unfair, as determinations by the SCT (and now AFCA) can often be.[56] Furthermore, where the participants perceive the process is procedurally fair, there is a greater likelihood that the outcomes will be accepted, particularly if they have a voice in the proceedings, they believe the authority/EDR body is neutral and treats them with dignity/respect and they can understand the intentions and character of the authority.[57] Acceptance, which leads to trust in the system, is crucial for the success of any EDR framework, particularly as it has been eroded by the rapidly evolving EDR landscape in Australia.[58]

This is just as important for the financial service/product provider as it is for the complainant/consumer, as AFCA's determinations, where it is necessary to make them, are not binding in law per se, but under the contract the provider has with AFCA. Accordingly, the EDR framework for AFCA will operate more efficiently if both parties accept the outcome negotiated/conciliated/mediated/determined, as it will remove the necessity for AFCA to refer the non-compliance (of the provider) to ASIC, which would otherwise create delays and cause further dissatisfaction for the other parties. Note that where determinations are required to be made, they will be published and treated as precedent by AFCA moving forward.

However, a major departure from the rights and procedures that complainants enjoyed as part of the SCT has to do with appealing the decisions of AFCA. As AFCA is not a statutory tribunal, its decisions cannot be judicially reviewed as it is not a statutory body/tribunal, such that the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[59] does not apply, as made clear in the amending legislation.[60] This means that decisions made by AFCA regarding, for instance, whether to withdraw a complaint for lacking substance cannot be reviewed under this scheme, which is a substantial limitation of complainants' rights.

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[48] Australian Financial Complaints Authority, n 39, 11.

[49] Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 5th ed, 2016) 213.

[50] NADRAC, "Alternative Dispute Resolution Definitions" (Paper, AGPS, 1997).

[51] Ramsay, Abramson and Kirkland, n 4; Ramsay, n 1.

[52] Ramsay, Abramson and Kirkland, n 4.

[53] Resolution Institute, n 43.

[54] Laurence Boulle, *Mediation: Principles, Process, Practice* (Reed International Books Australia, 3rd ed, 2011) 194.

[55] AJ Orchard, "Towards a Practical Model to Improve Outcome Acceptance in Dispute Resolution" (2017) 28 ADRJ 181, 186.

[56] Furlan, n 11.

[57] Orchard, n 55, 187; Naomi Creutzfeldt, *Project Report; Trusting the Middle-man: Impact and Legitimacy of Ombudsmen in Europe* (University of Westminster, 2016) 66.

[58] Stuhmcke, n 23, 45.

[59] *Administrative Decisions (Judicial Review) Act 1977* (Cth).

[60] *Corporations Act 2001* (Cth) Sch 2 Pt 1.

Regardless of this limitation, as compared to the SCT, whose operation is controlled exclusively by legislation, the ability for AFCA to easily change its terms of reference is both a major strength and a potential weakness. In operating as a private company which conducts what is essentially privatised regulation, AFCA's board of directors can vote to amend AFCA's terms of reference. This will allow AFCA to more easily change the monetary thresholds and criteria for claimants to bring disputes to AFCA, so as to be able to responsively keep pace with the changing economic circumstances and nature of disputes. Equally, this will allow AFCA to be able to effectively regulate its funding and deployment of resources to be able to effectively handle a potential influx of disputes in the expedient, efficient manner that it is required to under its terms of reference,[61] something the SCT was less able to do. However, as AFCA is more separated from government oversight and direct control, as compared to a pure Ombudsman scheme (ie: the FOS) or a tribunal, there exists the potential for the board of directors to change the terms of reference without public consultation/input, where to do the same thing for a tribunal requires legislative change (and by default, public/political consultation). ASIC's directions powers, as well as the independent review provisions contained in the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill* 2017[62] may be sufficient to limit such potential abuses, though ASIC and the independent reviewer will need to be vigilant to such a possibility, lest AFCA change its guidelines, such as those relating to the time limits in which to bring claims or the associated procedures, to the severe disadvantage of complainants.

Conclusion

On paper, it is clear that AFCA should be capable of providing increased access to expedient, low-cost, procedurally fair justice to complainants, while decreasing the costs incurred by financial services/products providers. By concentrating the dispute resolution functions and jurisdictions of its predecessor EDR bodies, the FOS, CIO and SCT, AFCA ought to reduce the complexity and confusion associated with bringing a complaint to the correct forum, and remove the issue of inconsistency between forums, which should significantly improve the outcomes for complainants. By simplifying the jurisdictional issues and maintaining procedural fairness as a core guiding principle in AFCA's terms of reference, consumer satisfaction and trust in AFCA should be strengthened, which may in turn increase AFCA's efficacy, as participants should be more willing to engage, and potentially resolve their disputes more expediently.

In being the "one-stop shop" for financial disputes within AFCA's terms of reference and requiring all such financial firms/service and/or product providers to be members of it by law or under licence condition, the consolidated membership base should provide AFCA with the resources to be capable of resolving complaints in the manner it is intended. Further, by having the ability to expediently update its terms of reference, AFCA ought to be better able to remain an effective and relevant EDR body for such complaints.

However, its directors will need to stay abreast of the demands on their resources and nature of the complaints in order to effectively manage the resources necessary to live up to its function, and not abuse their power by changing the terms of reference in ways that reduce consumer's access to justice, or otherwise impinge on their rights. Additionally, one of the early challenges for AFCA will be the recruitment of a sufficient number of staff with skills equal to those held by the staff of the SCT, so as to be able to resolve the influx of superannuation disputes in an expedient and procedurally fair way.

However, in not being able to appeal AFCAs administrative decisions, superannuation complainants will have fewer natural justice rights as compared to what they enjoyed under the SCT.

Ultimately, provided that AFCA is suitably staffed and managed by its board of directors, it is entirely possible that the transition from the existing EDR bodies to AFCA will be of benefit to the parties that come before it, provided that it is able to suitably respond to its challenges.

[61] Australian Financial Complaints Authority, n 39, 6.

[62] *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill* 2017 (Cth).

A Comparative Analysis of the Mediation in Kazakhstan and States of Victoria and New South Wales

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Alternative dispute resolution is a popular means for resolving disputes in many countries, including Australia. Parties to a dispute in Australia try to avoid the lengthy litigation and prefer to mediate. Therefore, Australian experience of the development of mediation may serve as a good example for Kazakhstan, a country in Central Asia, which shares many similarities with Australia. This article discusses history of the use of mediation in Australia and Kazakhstan and provides an overview of legislation governing mediation in Kazakhstan and the Australian States of Victoria and New South Wales. In addition, authors of the article propose several recommendations the implementation of which may help Kazakhstan develop mediation in the country. This, in turn, may help the parties to a dispute save their time and find the win-win solution, as well as reduce the workload of public courts and save budget money.

I. Introduction

Over the last few decades, the use of alternative dispute resolution (ADR) in Australia has increased dramatically.[1] ADR today is considered an effective means for the resolution of disputes without going to the court, and is defined by the National Alternative Dispute Resolution Advisory Council as "an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them".[2] The most known ADR processes are arbitration and mediation. The main difference between them is that in arbitration the arbitrator or the tribunal makes a decision with which the parties are not always happy.[3] In contradistinction to arbitration, a mediator, a neutral and impartial party, "assists the parties to reach their own agreement".[4]

Mediation in Australia has many advantages. The list of such benefits includes, but are not limited to, the following: mediation "preserves good business relations, saves time and money, allows for parties to resolve their dispute on commercial terms".[5] In addition, mediation is "confidential, final, and within the control of the parties".[6] Also, it "[may] be conducted at any place, at any time' and 'involves without prejudice discussions".[7]

Another advantage of mediation is a very high "success rate" of settlement of disputes. For example, approximately 83% of commercial lease disputes from 1996 to 2013 in New South Wales were mediated

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[1] Tom Altobelli, "Mediation in the Nineties: The Promise of the Past" [2000] *Macarthur Law Review* 103.

[2] NADRAC Paper, *Dispute Resolution Terms* (September 2003) 9 <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>.

[3] Mark Addison, "10 Reasons Why Financiers Should Consider ADR" (2016) 32(9) *Australian Banking and Finance Law Bulletin* 188, 189.

[4] Victorian Bar, *Mediation* (10 May 2017) <https://www.vicbar.com.au/public/brief-barrister/alternative-dispute-resolution/mediation>.

[5] Michael Redfern, "Mediation Is Good Business Practice" (2010) 21 ADRJ 53, 54

[6] Redfern, n 5, 54.

[7] Redfern, n 5, 54.

successfully while the success rate of the disputes under farm debt mediation was around 93%.[8] For these reasons, instead of bringing a lawsuit in court, parties to a dispute in Australia try to avoid the lengthy litigations and prefer to mediate.

In comparison to Australia, Kazakhstan does not have such long history and successful traditions in mediation. The first statute in this area was enacted there only in 2011, and there are still major barriers that prevent its wide application. Therefore, Kazakhstan needs to find a model country whose experience may help develop mediation in the country.

The purpose of this article is to compare legislation of Kazakhstan with laws of Victoria and New South Wales, identify major obstacles that prevent a greater use of mediation in Kazakhstan, and make suggestions that may help improve the current situation.

The article will discuss the history of mediation in Australia and Kazakhstan, main distinctions related to mediation in Kazakhstan and States of Victoria and New South Wales, as well as provide recommendations to Kazakhstan to increase the use of mediation on the basis of Australian experience.

II. History of Mediation in Kazakhstan and Australia

A. History of Mediation in Kazakhstan

The Republic of Kazakhstan is a former republic of the USSR and the largest landlocked country in the world. The country is located in Central Asia and neighbouring with Russia, China, Kyrgyzstan, Turkmenistan, and Uzbekistan.[9] Historically, the territory of the country was occupied by various nomadic tribes. Modern history of Kazakhstan began in 1465–1466 when the Kazakh Khanate was established by Janybek Khan and Kerey Khan[10] (a title "Khan" was given to rulers in Central Asia countries).[11]

During the XV–XVIII centuries, the main judicial power in the Kazakh society was possessed by the "court of biys".[12] This legal institution was very respected among the folks before its abolition due to the legal reforms conducted by the Russian Empire. Some experts in Kazakhstan, including the former[13] and current[14] Chairmen of the Supreme Court, consider the "court of biys" as a prototype of the mediation[15] as biys helped people settle their dispute and conciliated parties.

It should be noted that parties preferred to resolve their disputes before litigation since in this case they could avoid paying biylik.[16] Biylik was a compensation for the biy's legal services and depended on the

[8] John McGruther, "Mediation Developments in the Australia/Pacific Region" (2014) 25 ADRJ 73, 74.

[9] Denis Sinor and Edward Allworth, *Kazakhstan* (10 May 2017) Encyclopaedia Britannica <https://www.britannica.com/place/Kazakhstan>.

[10] National Digital History of Kazakhstan, *The Trail of Statehood* (10 February 2015) <http://e-history.kz/en/project/view/3?type=publications&material_id=954>.

[11] Editors of Encyclopaedia Britannica, *Khan* (10 May 2017) Encyclopaedia Britannica <https://www.britannica.com/topic/khan-title>.

[12] Sabyr Ibrayev, *The Institution of Biys as a Source on the History of Court Proceedings in Kazakhstan* (18 October 2016) National Digital History of Kazakhstan <http://e-history.kz/ru/contents/view/1612> [trans of: Сабыр Ибраев, *Институт биев как источник по истории судебного делопроизводства в Казахстане* (18 октября 2016) Национальная Цифровая История Казахстана].

[13] Bektas Beknazarov, *The Institution of Mediation Is Similar to the Court of Biys* (30 November 2012) Zakon.kz Information portal <https://www.zakon.kz/4528026-institut-mediacii-skhozh-s-sudom-biev.html> [trans of: Бектас Бекназаров, *Институт медиации схож с судом биев* (30 ноября 2012) Закон.Кз Информационный портал].

[14] Kairat Mami, *Biy's Court* (10 May 2017) Supreme Court of the Republic of Kazakhstan <http://sud.gov.kz/eng/content/biys-court>.

[15] Zeynebike Madybayeva, *Mediation as One of the Ways of Alternative Dispute Resolution* (10 May 2017) Grata International Law Firm <http://www.gratanet.com/up_files/Statya_po_mediatsii_Madyba.pdf> [trans of: Зейнебике Мадыбаева, *Медиация, как один из способов альтернативного разрешения споров* (10 мая 2017) Юридическая Фирма Grata International].

[16] Virginia Martin, *Law and Custom in the Steppe: The Kazakhs of the Middle Horde and Russian Colonialism in the Nineteenth Century* (Routledge, 1st ed, 2001) 105.

seriousness of the offence and the amount of a claim.[17] Indeed, biys helped the parties to resolve the conflict issues relatively quickly and help the parties keep good relationships.[18] They were prominent public figures, whose influence, decisions, and assistance were able to conciliate not only the individuals, but also the conflicting tribes.[19]

Biys in the Kazakh society were elected judges and administrators in the Kazakh Steppe.[20] At the same time, one of the main objectives of the biys was "reconciliation of conflicting parties".[21] The most famous and influential biys were Tole Bi, Kazybek Bi, and Ayteke Bi. The meaning of the word "biy" is still argued by linguists and historians.[22] Some experts say that this word came from the word "biik", which means "the highest one".[23] On the other hand, there are opponents who are of the opinion that the origins of this word came from the Kazakh verb "bileu",[24] which means "to manage".

The title "Biy" was not easy to deserve. It could only be achieved through the respect of other people. Therefore, biys were great orators and knew customary law. It is important to note that this law was codified, and the most famous codified law, used by biys, was "Jety Jargy".[25] At the same time, Islam also influenced the development of Kazakh society. For example, some norms of Sharia, the Islamic law, were also applied by the biys.[26]

Another important quality that biys should have possessed was impartiality.[27] Therefore, biys had to be honest and fair. If they had not been honest and fair, people would have never sought their advice, judgment, or help resolve a dispute.[28]

As can be seen, the medieval Kazakh judicial system included elements of the modern mediation:

(i) a mediator, that is, a biy, was an impartial and independent party;
(ii) a biy helped the parties resolve their dispute and keep good relationships between arguing parties; and
(iii) conflicting parties tried to resolve their dispute before the commencement of litigation.

Due to the Russian Empire's reforms, the court of biys was eliminated in the 19th century, but left its mark in the history of Kazakhstan as a fair and quick tool to resolve various civil and criminal disputes.[29]

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[17] Virginia Martin, *Law and Custom in the Steppe: Middle Horde Kazakh Judicial Practices and Russian Colonial Rule, 1868-1898* (PhD Thesis, University of Southern California, 1996) 53.

[18] Guzal Galiakbarova and Sholpan Saimova, "Mediation of Labour Disputes in Kazakhstan in Comparative Context" (2016) 4 *Russian Law Journal* 96, 97.

[19] Salyk Zimanov, "The Kazakh Court of Biy's in the Memory of Generations", *Zakon Journal*, 1 January 2008 <https://journal.zakon.kz/203439-kazakhskijj-sud-biev-v-pamjati.html> [trans of: Салык Зиманов, Казахский суд биев в памяти поколений (1 января 2008) Журнал Закон].

[20] Abdumalik Nysanbayev, Civilizational Traditions and the Advocacy of Rights and Liberties in Kazakhstan (2 November 2006) Wayback Machine <https://web.archive.org/web/20061102123051/http://www.crvp.org/book/Series03/IIIC-2/chap-2.htm>.

[21] Vladimir Furman and Yuliya Petrenko, *Mediation as a Modern Mean for Settlement of Conflicts* (10 May 2017) BMF Partners Law Firm <http://bmf.kz/en-us/publications/articleid/30>.

[22] Karlygash Useinova, *The Role and Place of the Biy's Institution in the Traditional Society of Kazakhs* (10 May 2017) <http://nblib.library.kz/elib/library.kz/journal/Useinova051122.pdf> [trans of: Карлыгаш Усеинова, *Роль и место института биев в традиционном обществе казахов* (10 мая 2017)].

[23] Useinova, n 22.

[24] Useinova, n 22.

[25] Aigul Abdildabekova and Elmira Teleuova, *The Direct Path of Kassym Khan and Jety Jargy of Tauke Khan* (10 May 2017) <http://www.rusnauka.com/2_KAND_2015/Pravo/1_184271.doc.htm>.

[26] Altaiy Orazbayeva, *Fundamental Provisions of the Biy's Institution in the Kazakh Society* (10 May 2017) Kazakhstan's Centre for Mediation <http://kazmediation.kz/mediation-in-the-world-and-kazakhstan/95-institute-of-fundamental-biy-in-kazakh-society.html> [trans of: Алтайы Оразбаева, Основополагающие положения института биев в казахском обществе (10 мая 2017) Казахстанский Центр Медиации].

[27] Gaukhar Kurganbekova, *The Role of the Biy's Institute in a Legal Reform of Kazakhstan* (10 May 2017) Research Articles of Kazakhstan <https://articlekz.com/article/12164> [trans of: Гаухар Курганбекова, *Роль института биев в проведении правовой реформы в Казахстане* (10 мая 2017) Научные статьи Казахстана].

[28] Kurganbekova, n 27.

[29] Zhanar Tolepbergen, *The Court of Biys* (3 September 2015) Aktyubinskiy Vestnik <http://avestnik.kz/?p=29632> [trans of: Жанар Толепберген, *Суд биев* (3 сентября 2015) Актюбинский Вестник].

The modern development of mediation in Kazakhstan began in 2011 by enactment of the *Statute "On Mediation"*.[30] The Law was adopted in order to reduce the workload of the courts and litigation costs. To conform with the Law, the *Civil Procedure, Criminal*, and *Criminal Procedure Codes* of Kazakhstan were also amended. According to the statistics of the Supreme Court of Kazakhstan,[31] mediators participated in 5,090 civil and 5,521 criminal cases in 2014. In 2015, mediation was conducted in 6,750 civil and 4,524 criminal cases.

B. History of Mediation in Australia

It is known that before the settlement of Europeans, Aboriginal and Torres Strait Islander communities in Australia not only had had their customary law for around 40,000 years, but also had had their own dispute resolution system.[32] In this regard, Bauman and Pope wrote the following:

> The ability of Indigenous communities to deal with conflict in ways that reflect their local practice and reinforce local community authority not only help make communities safer and more enjoyable places to live, they also go some way to addressing the sources of dysfunction and systemic conflict.[33]

As a result, the National Alternative Dispute Resolution Advisory Council (NADRAC) found such a traditional way of the dispute settlement effective and did not prevent its use where communities would like to apply it and there are no contradictions with the Australian legal system.[34]

Because of the diversity of Aboriginal cultures, the methods and techniques of resolving conflicts may vary.[35] Despite this fact, it is fair to say that the dispute resolution process, which existed within Indigenous communities, operated in a similar way to the Kazakh counterpart. For example, in case of any disputes arising, the parties referred to the respected Elders. The Elders (men and women) were trustworthy and honest people, who were also concerned for the whole community's future.[36] Therefore, it is fair to say that the prototype of mediation also existed among the Indigenous people of Australia.

Although little research has been done on Aboriginal dispute resolution mechanisms,[37] it is clear that this tool still plays an important role in the contemporary life of Aboriginal communities. It should be noted that in the recent years there were launched several projects[38] that aimed at developing mediation within the Indigenous communities.

Contemporary development of ADR in Australia "had its origins in 1979, with the establishment of a coordinating committee to test the notion that many disputes which had been unresponsive to court

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[30] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[31] Supreme Court of the Republic of Kazakhstan, *The Judicial System of the Republic of Kazakhstan. Mediation*, Infographics <http://sud.gov.kz/rus/content/sudebnaya-sistema-rk-mediaciya>.

[32] Harry Croft, *The Use of Alternative Dispute Resolution Methods within Aboriginal and Torres Strait Islander Communities* (2015) <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1036&context=access>.

[33] Toni Bauman and Juanita Pope, "Solid Work You Mob Are Doing – Case Studies in Indigenous Dispute Resolution and Conflict Management in Australia" (Report to the National Alternative Dispute Resolution Advisory Council, FCA Indigenous Dispute Resolution & Conflict Management Case Study Project, ACT, 2009) 115.

[34] National Alternative Dispute Resolution Advisory Council, Parliament of Australia, *Indigenous Dispute Resolution and Conflict Management* (January 2006) Attorney-General's Department <https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Indigenous%20Dispute%20Resolution%20and%20Conflict%20Management.PDF>.

[35] Peter Grose, "An Indigenous Imperative: The Rationale for the Recognition of Aboriginal Dispute Resolution Mechanisms" (1995) 12(4) *Mediation Quarterly* 327, 333.

[36] Helen Bishop, "Aboriginal Decision Making, Problem Solving and Alternative Dispute Resolution – Challenging the Status Quo" (Paper presented at the Alternative Dispute Resolution in Indigenous Communities (ADRIC) Symposium, Melbourne, 27 July 2015) 4.

[37] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* Report No 31 (1986) [692].

[38] See, eg, Sue Duncombe, "The NSW Youth Koori Court: A New Pilot Program" (2015) 10 *Law Society of NSW Journal* 80, 80–81.

processes could be resolved quickly and inexpensively by using mediation".[39] In the same year "NSW propos[ed] to use mediation for the resolution of minor civil and criminal disputes".[40]

Now it is difficult to imagine but "just over 30 years ago, mediation [in Australia] could be found only in Community Justice Centres, or in specific contexts such as family or environmental and planning disputes".[41] However, today there are many Acts, Rules, and Regulations, which refer to mediation at both the federal and state levels.[42]

III. Overview of The Legislation on Mediation in Kazakhstan and States of New South Wales and Victoria

A. Mediation in the Republic of Kazakhstan

In this part, the authors suggest making a comparative analysis of legislation of the three jurisdictions to identify the main differences and similarities. It is believed that identifying such areas may be helpful for local governments to use foreign experience and improve the mediation process.

As it was noted in Part II, mediation in Kazakhstan is governed by the *Statute "On Mediation"*. It also "defines principles and procedure [of mediation] as well as the status of a mediator".[43]

The Law consists of 4 Chapters and 28 Articles. Chapter 1 provides an overview of general provisions. According to Art 1 of the Law, mediation in Kazakhstan is applied to "disputes (conflicts) arising from civil, labour, family and other relations with participation of individuals and (or) legal entities, as well those considered during criminal proceeding in cases of minor and medium gravity crimes".

Article 2, which includes some basic definitions used in the Law, defines a mediator as "an independent individual engaged by the parties for conducting mediation on professional and non-professional basis in accordance with the requirements of this Law".[44] However, Art 9 also sets out additional requirements to a mediator, requiring them to "be an independent, impartial, not interested in the outcome of a case individual, chosen by a mutual consent of the parties to mediation, listed in the register of mediators and who has agreed to perform the functions of mediator".[45]

Article 4 of the Law outlines the following five principles on a basis of which mediators need to conduct mediation: voluntariness; equal rights of the parties to mediation; independence and impartiality of mediator; inadmissibility of intervention in mediation procedure; and confidentiality.

Chapter 2 of the Law provides an overview of the legal status of mediators and organisations conducting mediation. It is interesting to note that the Law divides mediators into professional and non-professionals mediators. Professional mediators are those who are not younger than 25 years, listed in the register of professional mediators, and have higher education and a certificate confirming the completion of the mediators training program. Retired judges can also conduct activity of a mediator on a professional basis.[46] According to cl 3 of Art 9, persons who have reached the age of 40 and are listed in the register

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[39] Wendy Faulkes, "The Modern Development of Dispute Resolution in Australia" (1990) 1(2) ADRJ 61, 61.

[40] Wendy Faulkes, "Linking ADR Practitioners President's Welcome" (1987) 1(1) *Alternative Dispute Resolution Association of Australia* 1, 1.

[41] Justice Patricia Bergin, "The Objectives, Scope and Focus of Mediation Legislation in Australia" (2013) 2(2) *Journal of Civil Litigation and Practice* 49, 49.

[42] Bergin, n 41, 50–54.

[43] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[44] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[45] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[46] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

of non-professional mediators are eligible to conduct activity of a mediator on a non-professional basis.[47] In addition, current judges may also act as non-professional mediators when they conduct conciliation procedures in accordance with the *Civil Procedure Code of the Republic of Kazakhstan*. It is worth mentioning that cl 4 of Art 66 of the *Civil Procedure Code of Kazakhstan*,[48] which provides a list of inadmissible evidences, says that in case of non-settlement of the dispute, the judge who acted as a mediator cannot present any information obtained during mediation in the future trial.

Although Art 9(5) of the Law states that activity of a mediator "is not an entrepreneurial activity", cl 7 of Art 9 does not allow public servants and persons equal to conduct mediations.[49] In addition to them, the following persons cannot conduct mediation:

- incapable or partially incapable;
- in respect of whom there is a criminal prosecution;
- having outstanding conviction or conviction that is not expunged according to the procedure provided for by the law.[50]

Chapter 3 of the Law describes how the mediation in Kazakhstan is conducted. For instance, these provisions govern issues related to the mediation procedure, place, time, and language of mediation may be found in this Chapter. It is worth mentioning Arts 24 and 25 that govern mediation conducted during criminal proceedings and mediation in family relations.[51]

B. Mediation in New South Wales

Besides the court-ordered mediation, there is, of course, an opportunity for the parties in New South Wales to refer their dispute to ADR, including mediation.

Currently, there are 37 Acts and 18 Regulations that refer to mediation in the State of New South Wales. At the same time, reference to "dispute resolution" can be found in 69 Acts and 22 statutory rules and regulations of the State. It is also worthwhile to mention that only the *Farm Debt Mediation Act 1994* (NSW) contains the word "mediation" in its title. As for the explanation of the terms, only the *Civil Procedure Act 2005* (NSW) provides the meaning of "mediation", "mediation session", and "mediator".[52]

Section 23 of the *Community Justice Centres Act 1983* (NSW) states that "attendance at and participation in mediation sessions are voluntary".[53] However, there is an exception, which relates to a court-ordered mediation where "the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties".[54] In case of a court-ordered mediation, registrars often act as mediators. It should be noted that there exist the Australian National Mediator Standards[55] for registrars. Thus, it means that registrars who act as mediators have the required skills, knowledge, and qualifications for conducting mediation sessions.[56]

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[47] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[48] *Гражданский процессуальный кодекс Республики Казахстан* [Civil Procedure Act of the Republic of Kazakhstan] [authors' trans] <http://adilet.zan.kz/rus/docs/K1500000377>.

[49] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[50] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[51] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[52] *Civil Procedure Act 2005* (NSW) s 25.

[53] *Community Justice Centres Act 1983* (NSW) s 23.

[54] *Community Justice Centres Act 1983* (NSW) s 26.

[55] Mediator Standards Board, *Australian National Mediator Standards* (September 2007) Federal Court of Australia <http://www.fedcourt.gov.au/services/ADR/mediation/mediation_standards.pdf>.

[56] Campbell Bridge, "Comparative ADR in the Asia-Pacific – Developments in Mediation in Australia" (Paper presented at the Alternative Dispute Resolution Conference, Singapore, 4–5 October 2012) 11.

It is also interesting to note that the *Civil Procedure Act 2005* requires the parties referred to mediation to participate in it in good faith. Although the Act does not define the parameters of "good faith", there are some cases where judges considered this issue.[57] For example, in *United Group Rail Services Ltd v Rail Corp* the Court of Appeal decided that parties mediate or negotiate in good faith if their approach to settling the dispute is honest and genuine.[58]

In case of court-ordered mediation, the court may make an order, which specifies the amounts that are needed to be paid by one or more of the parties. If there is no such an order, costs are usually shared between the parties if there is no any agreement among them that indicates any payable proportion.[59]

Other sections of the *Civil Procedure Act 2005* regulate matters related to privilege, confidentiality, agreements and arrangements arising from mediation sessions, as well as directions by the mediator and its protection from liability. As for the latter aspect, it should be noted that mediators have "the same protection and immunity as a judicial officer".[60]

It is fair to say that mediation is used in New South Wales widely. For example, according to statistics, only the Supreme Court of New South Wales referred 1,092 disputes to mediation in 2012. One year later 1,088 cases were referred to mediation by the Supreme Court. The slight decrease in the number of cases referred to mediation (only 839) in 2014 was impacted by the pilot of informal settlement conferences.[61]

Considering the importance of mediation, there are provisions in New South Wales that oblige barristers and solicitors to "inform the client or the instructing solicitor about the alternatives to fully contested adjudication".[62]

C. Mediation in Victoria

In general, Victorian legislation is similar to its New South Wales counterpart. The use of alternative dispute resolution in Victoria is supported by the State's government. It is noticeable if we take a glance at Victorian legislation where one may find 79 Acts and 17 Regulations, which refer to "dispute resolution". Furthermore, there are 30 Acts and 17 Regulations that refer to "mediation". It should be noted that, like in New South Wales, there is only the *Farm Debt Mediation Act 2011* (Vic), whose title includes the word "mediation".

Under the Victorian legislation,[63] mediation, whether referred by the court or not, is considered as a form of the alternative dispute resolution. ADR, in turn, is defined as "a process attended, or participated in, by a party for the purposes of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute".[64]

In Victoria, there are three courts, which may refer a proceeding or any part of it for mediation: the Supreme Court,[65] the County Court,[66] and the Magistrates' Court.[67] However, if a party fails to partake

[57] See, eg, *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; [1999] NSWSC 996.

[58] *United Group Rail Services Ltd v Rail Corp* [2009] NSWSCA 177.

[59] Bridge, n 56, 12.

[60] *Civil Procedure Act 2005* (NSW) s 33.

[61] Supreme Court of New South Wales, *Provisional statistics* (27 January 2015) Supreme Court of New South Wales <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca256880000c25d7/6bd219cf5f0333b6ca257ddc000d00a1/$FILE/Annual_Review_2014_Provisional_statistical_data.pdf>.

[62] See, eg, *Legal Profession Uniform Conduct (Barristers) Rules* 2015 (NSW) s 36; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) s 7

[63] *Civil Procedure Act 2010* (Vic) s 3.

[64] *Civil Procedure Act 2010* (Vic) .

[65] *Victorian Civil and Administrative Tribunal Act 1988* (Vic) s 88.

[66] *County Court Act 1958* (Vic) s 78(1)(hca).

[67] *Magistrates' Court Act 1989* (Vic) s 108(1).

in a court-ordered mediation, it may be ordered by the court to pay another party's wasted costs. For example, such a decision was taken in *Smith v Queensland*.[68]

It is worthwhile to mention that if the conflicting parties are unable to resolve their dispute through discussions, they can try to settle their dispute through the mediation service of the Dispute Settlement Centre of Victoria that provides this confidential service on a free basis.[69]

Another important law that needs special attention is the *Farm Debt Mediation Act 2011*. Its purpose, just like in New South Wales, is to assist farmers in resolving their farm debt disputes by providing them with the option to mediate before a creditor takes any enforcement actions.[70] Such a measure protects farmers, assisting them to resolve their disputes related to financial matters.

D. Differences in Legislations on Mediation of Kazakhstan and States of Victoria and New South Wales

One may say that the overall use of ADR in Australia is patchy and idiosyncratic.[71] At the same time, it is impossible to deny the fact that mediation in Australia is used more widely in comparison with Kazakhstan.

Legislation governing mediation in Kazakhstan and States of Victoria and New South Wales have many similarities since the Kazakhstani law-makers considered the Australian experience. For example, referral to Australia may be found in the Concept of the Draft of Statute "On Mediation".[72] It is also likely that Kazakhstani members of the Parliament familiarised themselves with the Australian experience and tried to implement similar provisions. Despite this, there are, of course, several differences. It is suggested to take a glance at the major ones below.

- Court-ordered mediation

On the contrary to Australia,[73] judges in Kazakhstan cannot refer disputes for mediation or arbitration without a written consent of the parties.[74] Furthermore, Art 20(3) of the *Statute "On Mediation"* states that "judges and officials that carry out criminal prosecution shall not force parties in any form to mediate".[75] However, it should be noted that the Supreme Court of Kazakhstan began a pilot program at the beginning of 2017, the aim of which is to implement a mandatory pre-trial mediation for the certain categories of disputes (hereditary, divorce, division of property, eviction, certain labour issues, insurance, etc).[76] It means that if plaintiff fails to prove that they tried to settle one of the abovementioned disputes through mediation, the lawsuit will be dismissed by the court.

- Participation of State bodies in the mediation

Unlike in Australia, government agencies and departments of Kazakhstan cannot take part in mediation. According to some views,[77] there are several barriers. One of the main reasons to prohibit State bodies

[68] *Smith v Queensland* [2014] FCA 691.

[69] Dispute Settlement Centre of Victoria, *Mediation* (12 May 2017) <https://www.disputes.vic.gov.au/about-us/mediation-0>.

[70] *Farm Debt Mediation Act 2011* (Vic) s 1.

[71] National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, Report to the Attorney-General (September 2009) 1.

[72] *Концепция проекта Закона Республики Казахстан «О примирительных процедурах (медиации)»* [Concept of the Draft of Law of the Republic of Kazakhstan "On Conciliation Procedures (Mediation)"] s 9 [authors' trans] <http://www.adilet.gov.kz/sites/default/files/Kontsieptsiia_PZRK_o_Miediatsii.doc>.

[73] Krista Mahoney, "Mandatory Mediation: A Positive Development in Most Cases" (2014) 25(2) ADRJ 120.

[74] *Civil Procedure Act 2015* (Kazakhstan) Art 24.

[75] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011, Art 20(3) [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[76] Supreme Court of the Republic of Kazakhstan, *The Supreme Court Has Launched a Pilot Project to Implement Mandatory Pre-trial Settlement of Disputes (Conflicts) in Certain Categories of Disputes in Order of Mediation* (6 February 2017) <http://sud.gov.kz/rus/news/verhovnyy-sud-zapustil-pilotnyy-proekt-po-vnedreniyu-obyazatelnogo-dosudebnogo-uregulirovaniya>.

[77] Marat Zhumagulov, *Perspectives of the Application of Judicial Mediation in Administrative Proceedings* (11 May 2017) The Supreme Court of the Republic of Kazakhstan <http://sud.gov.kz/rus/content/perspektivy-primeneniya-instituta-sudebnoy-

from participating in mediation in Kazakhstan is related to conformity with Art 6 of the *Statute "On Mediation"*, which states that "the parties to mediation shall enjoy equal rights … and shall incur equal duties".[78] It is believed that government bodies, in performing their functions use tools of force and coercion, and it is not possible to ensure equal opportunities for the parties not only in the court, but also in mediation. Another obstacle is related to the fact that public servants are restricted in deciding the issues as they must act within limits permitted by law and cannot represent the government agencies.[79] More precisely, they must follow the written instructions even if they think that their actions or the ultimate result would be wrong or absurd. In addition, there is an opinion that it is difficult to settle a dispute or reach a compromise with the state bodies because of the legal restrictions.[80]

We believe that the abovementioned differences influence the development of mediation in the three jurisdictions. From the authors' point of view, the first two differences prevent the dynamic development of mediation in Kazakhstan.

IV. Current Situation and Prospects of Development of Mediation in Kazakhstan

A. Criticisms of Mediation in Kazakhstan

Mediation in Kazakhstan is a relatively new field that is still in the formation process. However, it is largely criticised by local attorneys, who are experienced in court proceedings and familiar with the litigation peculiarities in the country. Some of the criticisms are as follows:

(1) Mediation is a voluntary process and it is not recommended to a court to refer the parties, which are angry at each other, for a mediation before or at the beginning of the proceedings.
(2) If one party does not fulfil its obligations taken during mediation, another party will in any case be forced to go to the court. Therefore, litigation is inevitable.
(3) Mediation services are not cheap. If there are certain disputes in which the parties are obliged to refer to mediator, they should be rendered on a free basis. Otherwise, the parties will bear unforced expenses. Therefore, it was suggested to the Government to approve the tariffs for mediation services.
(4) Only a person with a law degree should be eligible to become a mediator. Therefore, it was advised to amend this provision in the *Statute "On Mediation"*.[81]

After thorough analysis of the abovementioned critique, the authors deem it necessary to give their opinion on them:

(1) Although the authors support the view that judges should refer the parties for mediation only when it is appropriate ("ripe time"), statistical data[82] show the necessity of referral parties for mediation at the preliminary stage. Therefore, it is wrong to think that judges should refer parties only in the middle or at the end of the court proceedings, instead of doing this at the early stages.
(2) Usually parties to mediation reach their own agreement. It means that they voluntarily agree to do or not to do certain actions. In this regard, it is believed that the number of mediation attendees who then reject to fulfil their obligations is insignificant.

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mediacii-v-administrativnom-sudoproizvodstve> [trans of: Марат Жумагулов, *Перспективы применения института судебной медиации в административном судопроизводстве* (11 мая 2017) Верховный Суд Республики Казахстан] [authors' trans].

[78] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011, Art 6 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[79] Zhumagulov, n 77.

[80] Zhumagulov, n 77.

[81] Raziya Abdykadyrova, *A Kind Word Without a Gun: Do We Need a Mandatory Mediation? Rezonans* (online) (28 March 2017) <http://rezonans.kz/obshchestvo/item/2074-dobroe-slovo-bez-pistoleta-nuzhna-li-obyazatelnaya-mediatsiya> [trans of: Разия Абдыкадырова, *Доброе слово без пистолета: нужна ли обязательная медиация? Резонанс* (онлайн) 28 марта 2017] [authors' trans].

[82] Bergin, n 41, 55–56.

(3) The suggested recommendation, however, contradicts principles of the market economy. Mediators are not public servants, and therefore it is not appropriate for the Government to set the minimum and/or maximum price for mediation services.
(4) There are many successful mediators who did not graduate from law schools but possess the required skills to conduct mediation. Moreover, in-depth knowledge of the law is not required if the mediation is not evaluative.[83]

Based on our arguments that mediation is a valuable tool, in the next part we recommend considering the changes that may improve the use of mediation in Kazakhstan.

B. Recommendations Based on the Australian Experience

After having carefully analysed the Victorian and New South Wales experience, the authors believe that the following recommendations may help Kazakhstan's Government and non-governmental organisations develop mediation in the country.

1. Broader Application of Mediation in Commercial Disputes

It is recommended to increase awareness of availability of ADR tools to businessmen to resolve their disputes. One such a step may be the establishment of the Kazakhstani Disputes Centre like the Australian Disputes Centre.[84] Taking into account the creation of the Astana International Arbitration Centre,[85] the purpose of which is to resolve investors' disputes, it will be worth it to consider the opportunity to accommodate the Disputes Centre there with branches across major cities of Kazakhstan. Thus, encouraging the greater use of ADR will save states' and litigants' time and money.

2. Participation of State Bodies in Mediation

Currently, due to the restrictions imposed by the legislation,[86] state bodies cannot attend mediation. However, in the authors' view, there is a need to eliminate these provisions and follow the Australian experience.[87] Although the use of ADR, including mediation, is not a panacea,[88] its application may reduce the workload of the courts and save time and costs for the parties. Therefore, if the Government is interested to encourage greater application of mediation, it should initiate such changes. This step may be crucial as it will show the Kazakhstani citizens that the Government actively uses this tool for resolving its disputes.

In addition, the need to allow state bodies to attend mediation is related to the need of the quick resolution of issues that may arise between government agencies themselves.

3. Mediation between Taxpayers and Tax Bodies

From the authors' experience of working with local and foreign investors and government authorities, it is recommended to introduce mediation between taxpayers and tax bodies (ie the State Revenue Committee of the Ministry of Finance of Kazakhstan). It is no secret that many disputes arise from tax-related issues. Although it is expected that from 1 July 2017 there will be implemented some provisions regarding the Appellate Commission,[89] which will consider taxpayers' complaints, the authors advise to

[83] Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative* (22 June 2016) Mediate.com <http://www.mediate.com/people/personprofile.cfm?auid=217>.

[84] Australian Disputes Centre <https://disputescentre.com.au>.

[85] Astana International Financial Centre <http://www.aifc.kz>.

[86] *Statute "On Mediation"* (Kazakhstan) No 401-IV of 28 January 2011 [Ministry of Justice (Kazakhstan) trans <http://adilet.zan.kz/eng/docs/Z1100000401>].

[87] Brian Preston, "The Use of Alternative Dispute Resolution in Administrative Disputes" (2011) 22(3) ADRJ 144.

[88] Preston, n 87, 158.

[89] Kanat Skakov and Stanislav Lechshak, *Changes in Tax and Customs Legislation: Novelties in the Appeals Procedure and Certain Administrative Matters* (18 January 2017) Dentons Law Firm <https://www.dentons.com/en/insights/alerts/2017/january/18/changes-in-tax-and-customs-legislation-in-kazakhstan>.

implement such mediation, based on the Australian experience.[90] The main advantage of mediation in comparison with the settlement of the dispute under the Appellate Commission is equality of the parties.

4. Online Mediation

Due to the development of new technologies, it is now possible to conduct mediations electronically. The use of email and video calling applications save a significant amount of time and money. The parties are no longer required to be physically present at mediation, and spend money on travelling and renting facilities. Online mediation may be convenient to use in cases where the parties "are disabled, live in remote areas or are prisoners".[91] It is believed that such a mediation may be used widely in a family, "where the parties have a history of domestic violence",[92] and consumer-related matters.

5. Costs

The matter of costs is of paramount importance to the parties to mediation since some of them are not always able to afford it. This, in turn, contradicts cl 3 of Art 13 of the *Constitution of Kazakhstan*. This provision states that "[e]veryone shall have the right to qualified legal assistance. In cases stipulated by law, legal assistance shall be provided free of charge".[93] One may say that mediation, if it fails, just delays the party's access to justice. However, it is not always true. Therefore, if a pilot project of the Supreme Court of Kazakhstan[94] succeeds and a pre-trial mediation will be mandatory, it is recommended for mediation expenses to be funded by the Government. At least, it is believed that mandatory mediation should be rendered on a free basis for the vulnerable people. This view is supported by the local judges,[95] who refer to Arts 67 and 68 of the *Criminal Procedure Code of Kazakhstan*.[96] For example, cl 5 of Art 68 states that:

> Work remuneration of an advocate shall be carried out in accordance with current legislation. The body that conducts the criminal procedure, when there are reasons for it, shall have the right to indemnify the suspect, the accused, the person on trial, the convict, and the acquitted person fully or partially from payments for legal assistance. In this case, remuneration for the work shall be carried out at the expense of the State.[97]

6. New Subject in Law Schools

"Implications of not including ADR in the law curriculum and the disadvantages faced by law graduates who have not completed ADR training" were explained in the article by Tania Sourdin.[98] The introduction of such a subject in law schools in Kazakhstan will be valuable in terms of promotion of non-adversarial practice.[99]

As it was noted above, the provision concerning the *non-professional mediators* was criticised before the Bill became a law. The main argument was related to the fact that non-professional mediators are usually not familiar with techniques and methods applied by the professional mediators, and therefore

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[90] Christopher Budd, "Will ADR Improve the Australian Taxation Office's Dispute Resolution Processes?" (2016) 27(2) ADRJ 76.

[91] Anthony Sissian, "Online Dispute Resolution: The Advantages, Disadvantages, and the Way Forward" (2014) 42(6) ABLR 445, 446.

[92] Shoshanna Zohar, "Online Mediation in Family Law – The Advantages and Disadvantages of Technology" (2016) 19(7) *Internet Law Bulletin* 386, 387.

[93] *Constitution 1995* (Kazakhstan) Art 13(3).

[94] Supreme Court of the Republic of Kazakhstan, n 76.

[95] Assem Ramazanova, *Mediation in Criminal Proceedings*, Zakon.kz <https://online.zakon.kz/Document/?doc_id=31619647>.

[96] *Criminal Procedure Code* (Kazakhstan) 2014 [Ministry of Justice (Kazakhstan) trans].

[97] *Criminal Procedure Code* (Kazakhstan) 2014, Art 68(5) [Ministry of Justice (Kazakhstan) trans].

[98] Tania Sourdin, "Not Teaching ADRin Law Schools? Implications for Law Students, Clients and the ADR Field" (2012) 23(3) ADRJ 148.

[99] Kathy Douglas, "The Teaching of ADR in Australian Law Schools: Promoting Non-adversarial Practice in Law" (2011) 22(1) ADRJ 49.

they may discredit the mediation process.[100] Therefore, it is believed that they must undergo trainings before being granted the right to conduct the mediation sessions. Also, it is worthwhile to consider the adoption Regulations by the Government. For example, Australia has the Australian National Mediator Standards[101] that determine standards and requirements for mediators.

7. Farm Debt Mediation

Kazakhstan, like Australia, has a large territory and a small population. Therefore, the Government is actively trying to develop agribusiness in the country.[102] From the authors' point of view, the adoption of a similar law or provisions, requiring a creditor to mediate with a farmer before the commencement of the enforcement actions, may help the Kazakhstani Government to improve this area of economy. Farmers will have a chance to settle their dispute with the assistance of a mediator. Such a step will enable farmers, experiencing financial problems, to renegotiate the terms and conditions of their agreements or consider debt restructuring options with creditors. This will, in turn, lead to a stable situation in the agriculture and motivate investors to enter the local market.

8. Improvement of Enforceability of Settlement Agreements Reached during Mediation in Kazakhstan

According to Kazakhstani judges,[103] there are some issues with the enforcement of settlement agreements in Kazakhstan. The current legislation does not contain a precise regulation of the procedure for the enforcement of settlement agreements. The absence of a clear procedure for the enforcement seems to be a stumbling block that creates certain difficulties in practice and prevents the development of mediation in Kazakhstan.[104] Therefore, there is an urgent need to develop clear regulations on the enforcement of settlement agreements in Kazakhstan.

V. Conclusion

Kazakhstan and Australia have many similarities: both countries have a huge territory and a small population, as well as "large economic resources[105] of many mineral commodities".[106] That is why Australia[107] is considered as a model country for Kazakhstan. However, there is one more thing that Kazakhstan may copy and use as a template – mediation.

This article discussed the history of the use of mediation in Australia and Kazakhstan, and provided an overview of legislation governing it in Kazakhstan and the Australian States of Victoria and New South Wales. During a comparative research, it was known that the abovementioned jurisdictions have three major distinctions. The first one relates to a court-ordered mediation, which cannot be exercised by the judges in Kazakhstan. The second distinction is concerned with the participation in mediation

[100] Lyubov Ulbasheva, *There Are No Losers in Mediation* (2 October 2013) Abiyev (online) <http://www.abiyev.kz/8601-v-mediacii-proigravshih-storon-ne-byvaet.html> [trans of: Любовь Ульбашева, «В медиации проигравших сторон не бывает», *Abiyev* (онлайн) 2 октября 2013] [authors' trans].

[101] Mediator Standards Board, n 55.

[102] Prime Minister of Kazakhstan, Government of Kazakhstan, *Kazakh Prime Minister Gives Instructions on Development of Agricultural Sector* (13 August 2013) <https://primeminister.kz/en/news/selskoe_hozyaistvo/premer-ministr-serik-ahmetov-dal-rjad-poruchenij-po-dalnejshemu-razvitiju-agropromyshlennogo-kompleksa-strany>.

[103] Olzhas Shalabayev, *Mediation Practice on the Consideration and Resolution of Specific Cases in Kazakhstan*, Infozakon (7 November 2017) <http://infozakon.kz/courts/5416-mediativnaya-praktika-po-rassmotreniyu-i-razresheniya-konkretnyh-del-v-kazahstane.html> [trans of: Олжас Шалабаев, *Медиативная практика по рассмотрению и разрешения конкретных дел в Казахстане* (7 ноября 2017) Infozakon] [authors' trans].

[104] Shalabayev, n 103.

[105] US Geological Survey, US Department of the Interior, *Kazakhstan* <https://minerals.usgs.gov/minerals/pubs/country/2013/myb3-2013-kz.pdf>.

[106] Geoscience Australia, Australian Government, *Australia's Identified Mineral Resources* <https://www.ga.gov.au/scientific-topics/minerals/mineral-resources-and-advice/aimr>.

[107] Australasian Institute of Mining and Metallurgy, *Country Snapshot: Mining in Kazakhstan* <https://www.ausimmbulletin.com/feature/country-snapshot-kazakhstan/>.

of state bodies. On the contrary to the Australian counterparts, Kazakhstan's government agencies and departments cannot attend mediation. The third major difference is related to the existence in Kazakhstan of non-professional mediators. Analysis of legislation of Victoria and New South Wales showed that there were no such mediators in these states.

Considering the importance of the issue, the authors made recommendations aimed at increasing the use of mediation in Kazakhstan and improving its quality based on the Australian experience. It was proposed by the authors to:

(1) increase awareness of availability of ADR tools to businessmen;
(2) allow state bodies to attend mediation;
(3) introduce mandatory mediation between taxpayers and tax authorities;
(4) implement online mediation;
(5) render mediation services on a free basis for vulnerable people by funding them from the state budget;
(6) introduce a new subject (Fundamentals of ADR) in law schools;
(7) develop National Standards for non-professional mediators;
(8) adopt a new law or provisions that will aim at protecting a farmer from the enforcement measures from the creditor's side by requiring the latter to suggest preliminary mediation; and
(9) develop clear regulations aimed at improving the enforcement of settlement agreements.

The authors believe that implementation of the abovementioned recommendations will enable Kazakhstan to develop ADR mechanisms, save the significant amount of money, and reduce the courts' workload.

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