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Russell Thirgood, Editor[1]

Welcome to the September 2020 edition of *the arbitrator & mediator*

This edition of the journal begins with a fascinating interview by Anthony Lo Surdo SC, entitled 'The Future of Alternative Dispute Resolution in Sport: The National Sports Tribunal,' between the author and John Boultbee AM, the CEO of the newly formed National Sports Tribunal. The interview is a deep dive not only into the jurisdiction and powers of the new tribunal, but the role of dispute resolution processes in sport more generally and how they have adapted to meet the needs of the industry. In an area with so many recent, high profile arbitrations and mediations, this interview provides an invaluable look at the future and potential growth of dispute resolution in this sector.

Following on from this, Paul Obo Idornigie, Enuma U Moneke and Ogochukwu Juliet Mgbakogu have written the next article, entitled 'Due Process Paranoia in Arbitral Proceedings: Myth or Reality?' The article looks at some of the difficulties associated with providing enforceable awards in arbitration and the ensuing 'paranoia' that can instil in arbitrators. The authors examine the difficulties brought about by the flexibility of the arbitration process, which is also one of its greatest strengths. Since arbitration derives its legitimacy and rules by consent of both parties, the authors contend that arbitrators must delicately balance these parties' interests, to ensure that their awards are protected from challenge. The article then provides a deep insight into some of the responses to this problem, examining laws, rules, and case law to synthesise nine recommendations to reduce due process paranoia, making the entire arbitral process smoother and less prone to challenge.

Sabrine Malki-Butcher's contribution, entitled 'Lawyers' Participation in Mediation: Facilitation Tool or Obstacle to Conflict Resolution?' continues the exploration into the mindset of dispute resolvers and their

[1] BA, LLB (Hons), LLM (Hons), G Dip Constr Law, FCIArb, FACICA, FRI, Grade 1 Arbitrator, NMAS Accredited Mediator.

interaction with both the parties and their legal counsel. The article itself is a useful window into the attitudes of some lawyers towards dispute resolution. The article explains how a lawyer can be both an obstacle and aid to the mediation process. Special attention is paid to the effect of the adversarial legal system on inculcating a 'winning' mindset, which is antithetical to the spirit and efficient function of the mediation process. On the other hand, the lawyer's role as an advisor and counsel is also portrayed as a powerful tool for helping clients reach informed, binding outcomes to their disputes, feeling listened to and, ideally, ending in a win-win scenario. Helpful attitudes and recommended actions towards mediators by lawyers are also explored. In all, this is an important piece which should encourage honest reflection for all lawyers.

The next article, by Blake Primrose and Lewis Whitehurst is entitled 'Comments on the test for leave to appeal an award under the Australian Domestic Uniform Commercial Arbitration Acts.' As the title suggests, the article focuses mainly on the avenues by which parties can appeal (as opposed to setting aside) arbitration awards with a special focus on s 34A of the uniform Acts. The article begins with a detailed examination of the history and forces that shaped the modern uniform Commercial Arbitration Acts. From there, the article closely analyses s 34A, comparing it closely with its UK counterpart, s 69 of the *Arbitration Act 1996* (UK), both in terms of its form and the case law which has been handed down. The article concludes by arguing that the current method of seeking appeal is in line with the goals of the Act, to facilitate 'fair and final resolution' without 'unnecessary delay or expense.

The next article by Richard Dening is entitled 'Conflict Coaching Skills for Lawyers: A Response to the Evolving Demands of Legal Service Provision.' The article begins by articulating the fundamentals of Conflict Coaching, and the skills it may provide lawyers, with a focus on the *REAL* model of conflict coaching. This skillset is then contrasted against several major criticisms of the legal system and the role and practice of lawyers. A clear set of improvements and new skills for lawyers is then presented and real-world examples of their implementation in everyday practice are provided.

The next contribution, 'Love Thy Neighbour? A Review of the Duty of Care in Construction and Property in NSW' comes from Pamela Jack, Jennifer Cohen, and Emily Miers of Minter Ellison. This article provides an insightful guide into the history of the duty of care in law, against the backdrop of the newly passed *Design and Building Practitioners Act 2020* (NSW). Starting from Lord Atkin's famous decree that we should 'love thy neighbour' in *Donoghue v Stevenson*, the article traces the major landmarks of the case law, bringing clarity to what some regard as a confusing area of law. The article discusses the potential impacts of the *Design and Building Practitioners Act 2020* (NSW), a legislatively instituted duty of care, on not just the building industry but the wider law and whether it could help repair the aforementioned

issues in the law of negligence. The building industry has attracted much attention in the dispute resolution community and so staying abreast of such a great change is vital for dispute resolution practitioners.

Inigo Kwan-Parsons gives us our next contribution, entitled 'Helping Hands: Australian Courts and Facilitating the Taking of Evidence in Foreign-Seated Arbitrations'. Using the recent UK case *A & B v C & Ors* [2020] EWCA Civ 409 as a starting point, Kwan-Parsons examines the ways in which Australian law can be amended to make international arbitrations smoother. The article focuses on the facts of the *A & B v C* case, in which an English court granted leave to a foreign-seated arbitration to compel the taking of evidence from an English citizen. This is compared to the status quo in Australia, in which both case law and legislation are examined and concluding that Australian law remains unclear about the circumstances in which evidence could be compelled. Finally, Kwan-Parsons examines some amendments to Australian law that would both clear up the status of international evidence compulsion and smooth the course of international arbitration.

Dr Philip Evans rounds out the articles with his paper, entitled 'The Reception of Medical Evidence under the *Workers Compensation and Injury Management Act 1981* (WA) Arbitration Service.' This very article deals with the legislation under which workers receive compensation for being injured on three fronts. The first is the role of arbitrations under the Act, which, unlike their commercial counterparts, may be conducted in public if that is what is decided by the arbitrator as being the best way to proceed. The second is the question of how to define an 'injury' under the Act, and how COVID-19's impact on the collective mental health of Western Australians feeds into this definition. Finally, questions of how expert medical evidence is admitted, and how COVID-19 has impacted on the manner in which it is both collected and presented are explored. In all, the article is an expert look at an important piece of legislation, especially during these trying times, succinctly explaining its nature and shortcomings while presenting achievable and common-sense solutions.

As usual, this edition of the journal also includes case notes and book reviews. I thank Greg Steinepres, Hon David Byrne QC, Albert Monichino QC, Peter Mathie, Donna Ross, Mieke Brandon and Elizabeth Rosa for their contributions.

The Future of Alternative Dispute Resolution in Sport: The National Sports Tribunal

Anthony Lo Surdo SC[1]

Abstract

Sport's governing bodies are leading exponents of alternative dispute resolution ('ADR') in the resolution of disputes in organised sports. However, given the breadth of sporting interests which range from amateur, to semi-professional and professional, not all sports are well-equipped to determine the types of disputes that frequently arise between participants. The National Sports Tribunal was established to level the playing field in the area of sports dispute resolution by providing for an effective, efficient, independent, transparent and specialist tribunal for the fair hearing and resolution of sporting disputes. It does so by employing a full suite of ADR processes and encouraging the use of processes which optimise the prospects of a successful resolution of a dispute. It will likely make a lasting and significant contribution to the dispute resolution landscape in Australia.

Introduction

Sport's governing bodies ('SGB') the world over prescribe the rules of the games which they administer, organise competitions and establish anti-doping, disciplinary, and grievance resolution machinery that applies to participants. Sport's governing bodies are leading exponents of the use of ADR in the resolution of disputes in organised sports. The sole source of ADR in sport is the contract between SGB and the participant. For participants in amateur sport, the contract relies on the participant agreeing upon registration to be bound by the rules, regulations, and policies of the sport. In the case of semi-professional and professional athletes, individual contracts provide a further layer of obligations including as to the manner in which disputes arising from the performance of the contract are to be determined.

The rules of SGB typically include disciplinary or grievance regulations whose objectives are to provide for an independent, fair, and effective system governing the administration and determination of all

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grievances, incidents, disciplinary disputes and conduct matters involving participants.

The constitution, rules and regulations of the larger, well-funded professional sporting codes such as the members of the Australian Coalition of Major Professional and Participation Sports ('COMPPS'), often provide for the establishment of in-house committees and tribunals (sometimes referred to as 'judicial bodies') which arbitrate disputes between participants, prescribe the jurisdiction of those judicial bodies including any avenues of appeal from them and in the case of 'grievances' or non-disciplinary matters, will usually contain a definition in broad terms with the intention of casting the net as far as possible so that all disputes are determined confidentially and without resort to courts or other public forums. Some SGBs will also offer means of dispute resolution such as mediation or conciliation.

On 19 March 2020, the National Sports Tribunal ('NST') was established pursuant to the *National Sports Tribunal Act 2019.* It was created with the aim of providing for '… an effective, efficient, independent, transparent and specialist tribunal for the fair hearing and resolution of sporting disputes' for the Australian sporting community, especially across the smaller sports which, unlike the COMPPS, do not have the resources or the capacity to establish in-house dispute resolution tribunals. It provides an opt-in system for the resolution of certain sports and sports-related disputes by arbitration, mediation, conciliation, and case appraisal.

The CEO of the NST is Mr John Boultbee AM, an experienced sports administrator.

In this article, Anthony Lo Surdo SC (a Fellow of Resolution Institute, Grade 1 Arbitrator and inaugural Member of the NST) ('ALS'), interviews John Boultbee (**JB**) about the NST, his vision for the organisation and the contribution that it will make to the sports dispute resolution landscape in Australia and for the promotion of ADR more broadly.

Structure and Jurisdiction of the National Sports Tribunal

ALS: The NST is a one-stop centre for the resolution of sports-related disputes by means of arbitration, mediation, conciliation, and case-appraisal but there are some limits to disputes that it can resolve. What is the structure of the NST?

JB: The NST consists of its Registry, and its Members – the 40 individuals appointed by the Minister to arbitrate, mediate, and conciliate sporting disputes. They are mostly lawyers, but others are medical professionals, mainly for their expertise in doping matters, sports administrators, and former elite athletes. The Tribunal has three Divisions – the Anti-Doping Division, the General Division, and the Appeals Division, although all Members are available to sit in all divisions. Some of

the Members are listed in the Alternative Dispute Resolution List, being lawyers who are specialists in mediation and conciliation, and who can conduct case appraisals where appropriate.

ALS: What is the jurisdiction of the NST?

JB: It's a consensual jurisdiction – the parties have to agree to bring a dispute to the Tribunal. That agreement is normally affected by the constitution and rules of the SGB which the members have 'agreed to' by the fact of their membership. The jurisdiction also requires that disputes have a national element, rather than dealing with disputes at lower levels of sport; although if a lower level dispute has been elevated to the national body on account of its seriousness or the inability to resolve it at the lower level, it can thereby attract the jurisdiction of the NST. Under our legislation, the NST can hear disputes consisting of anti-doping infractions, selection and eligibility appeals, disciplinary breaches, and disputes around bullying, discrimination, or harassment. The CEO also has the power to approve other disputes for resolution by the NST.

ALS: Are there some disputes that the NST will not be able to determine?

JB: The NST is precluded from hearing 'on the field' matters – they are best left to SGB themselves to resolve, with specialist expertise in each sport. Also, employment disputes, disputes relating to remuneration or payment for contracts for services (other than where they involve a breach of a disciplinary rule), and claims for damages, are left to the civil courts to resolve.

ALS: What do you perceive to be the main types of disputes that will make their way to the Tribunal?

JB: In the early days, we are seeing quite a lot of disciplinary matters coming before us, and also 'member protection' matters where members have been subject to bullying, discrimination or the like, but I expect that there will be anti-doping and selection cases taking up a lot of our time in the future.

ALS: The Tribunal has the power to make arbitral determinations that are binding on parties, but it also has jurisdiction to assist parties in achieving a consensus-based resolution of their disputes by mediation, conciliation and case appraisal. Have there been early indications of any preference being shown by disputants between these various forms of dispute resolution?

JB: Again, the early cases have shown a clear preference for mediation or conciliation, and conciliation in particular. This is a welcome recognition that those methods are best able to retain a workable relationship between the individuals and the bodies involved, whilst getting through the disagreement that has arisen, and a resolution they can live with. Several parties have proposed mediation or conciliation, rather than having it proposed to them as an alternative to arbitration, which is an interesting development.

ALS: Unlike most sporting tribunals, the NST has a wide-range of legislative-backed coercive powers enabling it to require parties by written notice to, eg appear and give evidence and provide information or produce documents and things. A failure to comply may expose a person to a term of imprisonment or the imposition of a civil penalty. The power to issue those notices lies with the CEO. Do you anticipate that those powers will only be exercised where parties and or witnesses are not sufficiently engaging in or co-operating with the Tribunal?

JB: I do think these powers will be exercised sparingly. The most likely usage of the coercive powers will be in the anti-doping area, where many of the cases will involve the identification of anti-doping rule violations by means other than standard drug testing, so that extracting information from parties or other persons may be necessary to prove the violation – and especially cases where a third party is alleged to have been involved in such a violation eg trafficking cases, complicity cases and the like. In the more private disputes, these quite powerful tools will be less likely to be appropriate.

ALS: The Tribunal has only been operational since March 2020; what have been the largest challenges that it has faced in its first few months and how has it responded to them? Has COVID-19 added to those challenges? If so, how has the Tribunal responded?

JB: The initial challenge is making it known that for the first time, Australia possesses a full-time sports resolution body. So the first few months (being months where sport was in COVID shut down) have been an opportunity to ensure that all the national sports bodies are aware that this facility is open to them, rather than attempting to set up tribunals themselves, and even more important, to let athletes, and other participants in sport know that they can bring matters to the NST and have them dealt with relatively quickly and cost-effectively, as well as fairly and independently. It has been hard for athletes to raise these matters where the sport complained about was often the body that would manage the process to have the dispute resolved. The COVID situation has forced us to do all or our hearings by virtual means, and this has proved quite successful, and is likely to be an important part of how we will work in the future.

Arbitration

ALS: One of the criticisms made of arbitration generally and, occasionally of international sports arbitration, is that it is costly, procedurally complex, and too slow. What measures, if any, has the NST adopted to address these concerns?

JB: I feel those criticisms could have a certain amount of validity in complicated matters. But the same can be said of adversarial court proceedings. Sporting disputes tend often to be less multi-dimensional than other matters (I think) and therefore are amenable to fairly simple procedures, which are what is applied in our legislative framework. The availability of mediation, conciliation and case appraisal is an important means of dealing with not too complex disputes relatively quickly and

efficiently. Other than that, the process of holding a 'Preliminary Conference' with the parties in every NST matter where procedural steps are dealt with, and often the issues are defined and contained, has in the early days of the NST been very effective. The legislative admonition to members to conduct arbitrations 'with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit' should also lead to efficiency and timeliness.

ALS: Does the NST have procedures in place to 'fast-track' the determination of disputes and, if required, to order interim measures? If so, what are they?

JB: In sport, a speedy resolution of matters is very often a major concern. For example, in a selection appeal relating to an event which is due to happen very shortly after selection, there is an absolute necessity to resolve the dispute quickly. To that end our procedures include a provision for expedition, which is expressed very broadly 'the CEO and the Tribunal member or members are to take all steps necessary to deal with the dispute as expeditiously as the case requires'. It also provides for an early Preliminary Conference, early appointment of the member(s) to hear the dispute, and waiving compliance with procedural requirements.

In any case, there is a requirement that the determination is issued as soon as practicable but, in any case, within three months after final submissions and evidence have been lodged.

There are no specifications about taking interim measures beyond the general principle that the procedure of the Tribunal is within the discretion of the Tribunal.

ALS: What do you perceive to be the barriers, if any, for an increase in the use of the NST's arbitration facilities in the resolution of sports disputes in Australia?

JB: Cost and accessibility will not be limiting factors for the NST. On the contrary, the advent of the NST is seen as a significant improvement in the options open to SGB and athletes alike. There are no practical barriers to its successfully carrying out its tasks. The only concern is that some SGB may prefer to maintain their in-house tribunals, which they can appoint and to at least a limited extent, control. Most of them, however, see the need for independence of the dispute resolution body and the transparency of that independence as being of greater importance.

Mediation

ALS: The international sports community has a number of limitations on the adoption and use of mediation. Perhaps foremost is cultural; mediation is not fully understood nor is there any systemic encouragement of mediation by sports organisations. Further, it is not viewed the same way as arbitration in international sport and in many civil jurisdictions. Domestically in Australia, mediation

has formed part of the fabric of civil dispute resolution but is not embraced uniformly by SGB. Mediation is, of course, one of the tools available in the NST.

First, would you like to comment on my observations and secondly, do you consider that there is room for SGB in Australia to make greater use of mediation?

JB: I thought I would encounter the same reluctance to embrace mediation, but the experience to date has been to the contrary. Our preliminary discussions with SGB also showed a great deal of interest on their parts, even if their experience with mediation was limited. The fact that the model Member Protection Policy published by Sport Australia (formerly the Australian Sports Commission) placed mediation as a step that sports were encouraged to undertake in dealing with grievances and complaints may have led to a level of comfort with this medium in dealing with many of the disputes that came their way. In any case, the first few cases which the NST has dealt with have all been either mediation or conciliation, with conciliation being marginally preferred over mediation. I do think this is a practice that will continue, as the efficiency and effectiveness of mediation in many disputes becomes realised.

ALS: There is a perception that mediation may not be suitable for the resolution of anti-doping, disciplinary and governance disputes. Do you have a view?

JB: The World Anti-Doping Code which governs the policies which all sports in Australia (and elsewhere) have adopted, does not allow for any formal mediation process, but disciplinary disputes are very often open to being resolved by mediation – where there is a range of sanctions open in the case of possible breaches. Likewise, where there is a dispute between different governing bodies (eg a state and a national body) an independent mediator has a good chance of successfully steering these two custodians of their sport to a good place.

ALS: I understand that at a preliminary conference held shortly after an application is filed with the NST, parties can expect a discussion with registry staff as to whether mediation or other forms of ADR may best complement arbitration as a means of resolving their dispute. Is that correct?

JB: Yes, that is correct. The NST Practice and Procedure Determination specifically empowers the CEO upon receiving an application for arbitration to consider and provide advice to the parties as to the availability of ADR and this is certainly discussed at the Preliminary Conference as well as highlighted on the NST's website, where the different forms of ADR are explained.

ALS: To what extent have parties shown an interest in mediation at those preliminary meetings?

JB: To date it has been considerable, and often the interest has even been expressed at the time of application, then confirmed at the Preliminary Conference.

ALS: Of the alternatives to arbitration, which have proved more popular than others? Are you able to proffer an opinion as to why?

JB: Early signs are that conciliation is the preferred process. I expect this is because parties welcome the slightly more directive approach the conciliator takes towards a conclusion, whereas mediation may be seen more as facilitating a discussion with the parties which may lead to resolution.

ALS: At the Sport Dispute Resolution Centre of Canada, the increased use of mediation and facilitation processes has more than tripled settlement rates from 14% to almost 50%, often within days or weeks of claims being filed. In light of these kinds of statistics, do you see a greater role for mediation in the resolution of disputes in the NST?

JB: I would expect to achieve similar numbers or better from the indications so far.

ALS: What do you perceive to be the hurdles, if any, for an increase in the use of mediation more generally in the resolution of sports disputes in Australia?

JB: I think that the NST's clear embracing of mediation in appropriate cases will lead to its more general use, and the hurdle would be, in my view, a reluctance of SGB to refer matters to the NST. In-house tribunals are traditionally bodies which expect to hear evidence and make a decision, without the same emphasis at looking at other methods of resolution of disputes. In particular, sport disciplinary tribunals do not generally have an ADR function.

The Future

ALS: If you were granted three wishes for the NST, what would they be and why?

JB: The government has set us up on a two-year trial basis. My wish would be that it becomes so obvious that we are filling a significant need well that the government will need little time or effort to decide that the trial has been successful. I would also wish that within the space of a year our caseload will justify the appointment of additional members. Lastly, I would wish that the NST be recognised and celebrated as the predominant forum if not the only forum in the country for sports disputes, and that the limits of our jurisdiction be expanded to take in a number of areas which to date are not specified in our rules.

ALS: What should SGB do if they want to avail themselves of the benefits of the NST?

JB: The NST, Sport Australia and Sport Integrity Australia (formerly the Australians Sports Anti-Doping Agency) are all ready to assist SGB in adjusting their current policies (Disciplinary, Anti-Doping, Selection, Member Protection etc) to legislate for matters arising under them to come to the NST. In the meantime, they are able to bring their matters to the NST if all parties to the matter agree

– and generally there seems to be a strong willingness amongst athletes and SGB, as well as Sport Integrity Australia, to agree to such matters coming to the NST for speedy and effective resolution.

ALS: Is the NST able to provide SGB with assistance? If so, what assistance can it offer and how?

JB: As mentioned, we can provide some assistance in the adjustment of policies. Also, we can assist SGB (and athletes) in situations of financial hardship with the waiver of fees in appropriate circumstances, as well as referral to our panel of legal practitioners who are available to provide pro bono assistance.

Due Process Paranoia in Arbitral Proceedings: Myth or Reality?

Paul Obo Idornigie, Enuma U Moneke and Ogochukwu Juliet Mgbakogu [1]

Abstract

Arbitration is a means of resolving disputes pursuant to an arbitration agreement. It is driven essentially by the 'principle of party autonomy' under which the parties are free to agree on how the arbitral proceedings are to be conducted subject to mandatory legal provisions. The arbitral tribunal is duty bound to maintain a delicate balance between the parties, ensure procedural fairness and publish a legally enforceable award. Any infraction of this duty may lead to applications made to court to challenge the award. This creates apprehension, anxiety and fear in the mind of the arbitrator – due process paranoia. Is the paranoia real or imaginary?

Introduction

Arbitration is a means of resolving disputes pursuant to an arbitration agreement. One main principle that drives the agreement is the 'principle of party autonomy' under which the parties are free to agree on how the arbitral proceedings are to be conducted subject to mandatory legal provisions.[2] It is also in exercise of this power that the parties constitute the arbitral tribunal

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[2] For instance, parties are at liberty to choose rules of procedure applicable to the arbitral proceedings. Also, they are free to choose the number of arbitrators that constitute the arbitral tribunal and whether there would be an umpire or chairman. Further, the parties may decide the place and language of the arbitration; see *United Kingdom Arbitration Act 1996* s 15(1) ('the *UKAA*'); *Arbitration and Conciliation Act* Cap A18; Laws of the Federation of Nigeria 2004 ss 16(1) and 18(1) ('the *ACA*'). The ACA was initially promulgated as Decree No 10 of 1988. It contains the *United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976* ('the *Arbitration Rules 1976'*); and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 ('New York Convention' or the 'Convention') in its First and Second schedules respectively; United Nations Commission on International Trade Law (UNCITRAL) Model Law

to resolve their dispute.[3] Thus, the arbitral tribunal derives its powers from law, rules, and the agreement of the parties. Where the parties belong to the same professional bodies, the rules of the bodies may also bind the parties.[4] Arbitral proceedings are guided by the principle of natural justice – hear the other side and give the parties equal opportunities to present their cases.[5] This means that the arbitral tribunal is duty bound to maintain a delicate balance between the parties in the course of the arbitral proceedings. Failure to do so may result in the award being challenged. Also, where a person who is approached to become an arbitrator knows of any circumstances that may likely give rise to any justifiable doubts as to their impartiality and independence, they must immediately disclose such circumstances.[6] Where they fail to make such disclosure and proceed with the arbitration, the ensuing award may be challenged. The duty to disclose exists before, during the course of, and sometimes beyond arbitral proceedings – up until the time that there may be request for additional award or correction of award.

Another area where an arbitral award may be challenged is in the production or discovery of documents. Under domestic arbitration, there is always the possibility of an opposing party requesting the other party to produce certain documents related to the hearing. In the case of international arbitration, there is the *International Bar Association Rules on Taking Evidence in International Arbitration*, 2010 ('*IBA Rules'*), where there are provisions for discovery and production of documents under certain circumstances.[7] Failure to disclose may be interpreted as denial of a fair hearing or that the production will be adverse to the interest of that party. Sometimes it is difficult to draw a clear line between genuine procedural violation and dilatory actions based on simple infractions.

Some of the reasons that party's resort to arbitration is informality, flexibility and speed. Although, the issue of lower costs of arbitration is debatable, it is also a reason for choosing to

1985, art 19(1) ('the UNCITRAL Model Law 1985'); *International Chamber of Commerce (ICC) Rules of Arbitration*, art 21 ('the *ICC Rules'*).

[3] See for example, *UKAA* ss 15 and 16; *Malaysian Arbitration Act 2005* s 12; *ACA* s 6; UNCITRAL Model Law 1985 art 10.

[4] *Society of Maritime Arbitration Rules 2019* s 1.

[5] *UKAA* s 33; *ACA* s 14.

[6] *ACA* s 8.

[7] *International Bar Association Rules 2010* art 3 ('the *IBA Rules*') <www.ibanet.org> accessed 24 July 2020.

arbitrate disputes.[8] Paradoxically, where parties agree to settle by arbitration, there is an implied undertaking that they will respect the final award without delay,[9] while there is a duty on the arbitrator to write and publish a legally enforceable award. For some arbitrators, this necessarily entails upholding due process by employing their best endeavours to ensure that parties can present their case how they want to.[10] Thus, in performing this duty, the arbitrator has to consider any applications by the parties, whether for adjournment to amend pleadings or extra time to respond to submission for costs, bearing in mind the requirement to treat the parties equally and afford them enough opportunity to present their individual cases. In essence, the arbitrator must be able to strike a balance between the duty to write and publish a legally enforceable award and the duty to deal fairly in the conduct of arbitral proceedings.

Unfortunately, the possibility that an award may be challenged creates fear and apprehension in the minds of arbitrators. As a result, while conducting the arbitral proceedings, the tribunal is often mindful of these obligations to the parties as well as the possibility of court action to set aside the award or remit the award or declare the award to be of no effect, in whole or in part or to refuse recognition or enforcement of the award or to challenge the jurisdiction of the arbitral tribunal. These concerns lead to baseless or excessive suspicion of the motives of the parties when they make certain applications before the arbitral tribunal – the 'due process paranoia' – fear and anxiety that arises from the belief that the tribunal may be challenged where they fail to pander to the whims and caprices of a mischievous party or parties who are abusing due process rights. This raises questions as to whether due process paranoia is a myth or a reality. Accordingly, the article will examine the phenomenon against the backdrop of national arbitration laws, arbitration rules, conventions and decided cases with a view to determining if indeed it exists. It will then proffer recommendations as appropriate.

[8] Arbitration is, however, now seen as costly and, a first step to litigation due to frequent applications to court as can be seen in the number of applications to set aside awards on the grounds of misconduct in Nigeria and serious irregularity in the UK under ss 30 and 68 and *ACA* and *UKAA* respectively. See below nn 60–61.

[9] See the *United Nations Commission on International Trade Law Arbitration Rules 2013* art 34(2) ('the *Arbitration Rules 2013*') and the *Arbitration Rules 1976* art 32(2); see also the *ICC Rules*, art 35(6).

[10] Klaus Peter Berger and J. Ole Jensen, 'Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators' (2016) 32 Arbitration International 415, 420.

Due Process Paranoia in Arbitral Proceedings

Most arbitration legislation and rules confer discretionary powers on tribunals to carry out the arbitral proceedings in the manner they consider fit.[11] This discretion, however, is subject to the due process rights of the parties.[12] As parties may have peculiar needs and varying requests in the course of proceedings, it means the tribunal may find that it constantly has to exercise this discretion.[13] Very frequently, such requests may require an interruption of the timelines drawn up for the proceedings.[14] Requests may include an application for the extension of a deadline, request to amend pleadings, late introduction of a new claim, or an application to file witness statements out of time, amongst others.[15] Whatever the request, arbitrators are often put in an awkward situation because they must ensure that they fulfil the duty to ensure efficient disposal of the proceedings while satisfying the obligation of granting the parties their due process rights.[16] This awkwardness is said to leave arbitrators confused and even apprehensive, because whichever duty they elect to sacrifice on the altar of the other, there would be consequences. This situation gives rise to due process paranoia.

The phrase, 'due process paranoia' has been aptly described as 'a reluctance by tribunals to act decisively in certain conditions for *fear* of the arbitral tribunal being challenged on the basis of a party not having had the chance to present its case fully'.[17] The operative word is 'fear'. As no arbitrator wants to render an award that will be invalidated by the court, this fear means that the tribunal is apprehensive of the extent of judicial intervention – will the court set aside or remit or refuse to enforce the award if the respondent's application for extension of time to reply to the submission on costs is denied, even though an extension has been granted twice already? Will the refusal of the respondent's third request for adjournment amount to misconduct or serious irregularity even though they may be trying to thwart the arbitral process? Where these sort of questions weigh on the mind of arbitrators, the perception is that

[11] The parties may however agree otherwise; see for instance the *ACA*; the *UKAA*; *Indian Arbitration and Conciliation Act ('IACA')* 1996; *Arbitration Rules 1976*; *Arbitration Rules 2013* and the *ICC Rules*.

[12] Berger and Jensen, (above n 10) 419.

[13] Ibid 419.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Queen Mary University and White and Case, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' 10 <http://www.arbitration.qmul.ac.uk/research/2015/> accessed 24 July 2020.

it results in excessive caution on the part of the arbitrator which could affect efficiency in the management of the proceedings, that is, speed and costs.[18] As such, the issue of due process paranoia is progressively gaining recognition.[19]

Similarly, due process paranoia is said to arise from certain concerns of the arbitrator. First, the arbitrator may be overly cautious in the conduct of arbitral proceedings because they consider it more cost efficient to grant what orders they consider fair and appropriate in the circumstances of the case and have the proceedings prolonged as a result, than have the parties re-litigate the dispute and incur additional costs because the award is set-aside or refused enforcement.[20] Second, the applicable rules mandate arbitrators to make certain orders,[21] and to avoid falling foul of these rules and risking invalidation of the ensuing award, the arbitrators comply even where it is not the reasonable thing to do in the circumstances, thereby protracting proceedings. [22] Third, there is a desire to protect the arbitrator's market reputation.[23] It goes without saying that an arbitrator whose awards are constantly set-aside or refused enforcement may struggle to get work in the future. Whatever the case, the common thread is the fear of having the award set-aside, refused enforcement, or remitted. It is against this backdrop that the next section outlines the legal basis upon which the courts may invalidate an award where parties have not been afforded their due process rights.

Legal Safeguards for Due Process and Procedural Fairness in Arbitral Proceedings

Due process is a crucial part of arbitration.[24] In the words of Lord Denning:

> So by 'due process of law' I mean the measures authorized by the law so as to keep the streams of justice pure: to see that trials and inquiries are fairly conducted; that arrests and searches are properly made, that

[18] Remy Gerbay, 'Due Process Paranoia' (6 June 2016) <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/> accessed 2 August 2020.

[19] Leon Kopecky and Victoria Pernt 'A Bid for Strong Arbitrators' (15 April 2016) <http://arbitrationblog.kluwerarbitration.com/2016/04/15/a-bid-for-strong-arbitrator/> accessed 2 August 2020.

[20] Gerbay (above n 18).

[21] Berger and Jensen (above n 10) 415.

[22] Ibid.

[23] Gerbay (above n 18).

[24] Jasmine Feng and Benjamin Teo, 'Judicial Support against Due Process Paranoia in Arbitral Proceedings' (16 June 2020) <http://arbitrationblog.kluwerarbitration.com/2020/06/16/>accessed 3 August 2020.

> lawful remedies are readily available; and that unnecessary delays are eliminated. It is in these matters that the common law has shown its undoubted genius.[25]

Due process protects the parties from unfairness, circumscribes the tribunal's exercise of jurisdiction and ensures that all parties are afforded adequate opportunity to state their case.[26] Other than the agreement of the parties, arbitration conventions, laws and rules provide safeguards to ensure that there is procedural fairness in the conduct of arbitral proceedings. These instruments require fairness and equal treatment of the parties in the conduct of arbitral proceedings and also, provide grounds for the challenge of arbitral awards where unfairness or breach of due process rights by the arbitrator is alleged. Thus, they provide the legal basis for due process and procedural fairness in arbitral proceedings. Some of these instruments are discussed below.

The Arbitration Laws and Conventions

The United Nations Commission on International Trade Law (UNCITRAL) Model Law 2006

The United Nations Commission on International Trade Law ('UNCITRAL') Model Law 2006 (Model Law) is an upgrade from the 1985 version.[27] It serves as a guide for countries in crafting their domestic arbitration law. It aims to harmonise international economic relationships between countries with varying legal, social and economic backgrounds with a view to facilitate settlement of disputes in international trade.[28] The Model Law has been adopted by many countries. Article 18 of the Model Law, imposes a duty on arbitral tribunals to treat each party equally and give them a full opportunity to present their case.[29] Such duty entails *inter alia* allowing applications and granting requests of parties as is necessary to satisfy the principles of a fair hearing and meet the justice of the case. Failure to do so may result in the set-aside of the ensuing award as provided by art 34(2)(iii) of the Model Law or refusal of recognition and enforcement under art 36(1)(ii). The duty to be fair also means disclosing any

[25] Lord Denning, *The Due Process of Law* (Butterworths 1985) (made at page v).

[26] Ibid.

[27]The UNCITRAL Model Law 1985 was revised in 2006. The revision made was with respect to the form of the arbitration agreement and interim measures. These amendments were the subject of due deliberation and extensive consultations with Governments and interested circles. The *ACA* does not incorporate these amendments as it is based on the 1985 Model Law.

[28] UNCITRAL (above n 2).

[29] Ibid art 18.

circumstances that may give rise to any justifiable doubts as to the arbitrator's impartiality or independence.[30] Under art 12 of the Model Law, the arbitrator is required to make such a disclosure at the time the offer to arbitrate is made to them.[31] The duty subsists throughout the proceedings,[32] and in some cases beyond. Failure to make such a disclosure is subject to challenge.[33]

The *Nigerian Arbitration and Conciliation Act 1988*

The *Nigerian Arbitration and Conciliation Act* ('*ACA*') 1988 is modelled after the UNCITRAL Model Law 1985 (which was amended in 2006 with slight variations). The *ACA* mandates the arbitral tribunal to observe the principles of natural justice in the conduct of proceedings by ensuring that both parties are treated equally and fairly. This obligation is captured in s 14 which provides that, '… the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.' This duty is reinforced by s 15(2) which vests in the tribunal the powers to conduct the arbitral proceedings in the way it deems appropriate to ensure fair hearing. The powers conferred on the tribunal to carry out this duty is wide as it includes the power to determine the admissibility, relevance, materiality, and weight of any evidence placed before it.[34]

The duty under s 14 means inter alia that the tribunal must not be involved in misconduct in any form as this could result in the setting aside of the ensuing award. To be precise, s 30(1) of the *ACA* states that, 'where an arbitrator has "misconducted" himself, or where the arbitral proceedings, or award, has been improperly procured, the court may on the application of a party set aside the award.' Although the *ACA* does not define the word misconduct, it has been held to include infraction of the right to fair hearing, exceeding of authority, inconsistent or ambiguous awards and irregularity in the proceedings, amongst others.[35] Thus, denying the party enough opportunity to state their case is misconduct which may result in a set aside. In international arbitration conducted pursuant to the *ACA*, the award can also be set aside under s 48(a)(iii) for the same reason. Further, a court may further to s 52(2)(a)(iii), refuse to

[30] Ibid art 12(1).

[31] Ibid.

[32], Ibid.

[33], Ibid art 12(2).

[34] *ACA*, art 15(3).

[35] *Taylor Woodrow (Nig.) Ltd v S.E. GMBH Ltd* (1993) 4 NWLR (Pt 286) 127.

recognise and enforce an award where the applicant proves that they were not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to state their case.

As part of the duty to be fair, s 8(1) of the *ACA* requires an arbitrator to ensure that they immediately disclose any circumstances likely to give rise to any justifiable doubts as to their impartiality or independence when approached to arbitrate in a matter. The duty subsists before and throughout the proceedings[36] and in some cases, beyond. Failure to make such a disclosure is subject to challenge.[37] This provision is *in pari materia* (translation) with art 12 of the Model Law.

The *United Kingdom Arbitration Act 1996*

The United Kingdom Arbitration Act 1996 (*UKAA)* also incorporates provisions to promote procedural fairness. As with the *ACA*, s 33 of the *UKAA* mandates the tribunal to be fair and afford each party the opportunity to make their arguments. Under s 68, an award may be challenged on the ground of 'serious irregularity' (misconduct) affecting the tribunal, the proceedings or the award. Such serious irregularity includes inter alia, failure by the tribunal to be fair and give each party reasonable chance of presenting their case;[38] the tribunal exceeding its powers;[39] failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties and;[40] failure by the tribunal to deal with all the issues that were put to it.[41] Where serious irregularity is proven, the court may remit the award to the tribunal, set it aside or declare the award to be of no effect.[42] It must be stated that the *UKAA* enjoins tribunals to avoid unnecessary delay or expense as part of the duty to be fair.[43]

[36] *ACA*, art 8(2).

[37] *ACA*, art 8(3)(a).

[38] *UKAA* 68(2)(a) and 33(1).

[39] Ibid 68(2)(b).

[40] Ibid 68(2)(c).

[41] Ibid 68(2)(d).

[42] Ibid 68(3).

[43] Ibid 33(1)(b).

The *Indian Arbitration and Conciliation Act 1996*

The *Indian Arbitration and Conciliation Act* ('*IACA*') 1996 makes provisions for the application of the principles of natural justice in the conduct of arbitral proceedings. As with the *Nigerian ACA*, the *IACA* is reflective of the UNCITRAL Model Law 1985. Therefore, ss 18 and 48(1)(b) of the *IACA* are *in pari materia* with ss 14 and 48(a)(iii) of the *ACA*, respectively.

The *Australian International Arbitration Act 1974*

The *Australian International Arbitration Act* ('*IAA*') 1974 (as amended in 2011) incorporates the UNCITRAL Model Law 2006 and, elaborates upon its provisions.[44] As with its counterparts, it places a duty on tribunals to observe the principles of natural justice in deciding cases. For instance, it provides in 18C that, 'for the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.' Also, further to art 12 of the Model Law which provides for disclosure in cases where there may be justifiable doubts, the *IAA* provides that, 'there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration'.[45]

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the Convention'), deals with the enforcement in the courts of one state of an award issued in another state. It provides a framework for addressing the enforcement difficulties caused by dissimilarities between different legal systems which otherwise impedes the smooth flow of international commercial transactions.[46] Like the legislation discussed above, the Convention provides safeguards to ensure that procedural fairness is applied in the conduct of arbitral

[44] The *Australian International Arbitration Act 1974*, as amended up to No. 5 of 2011; by the provisions of sch 2 to the 1974 Act, the UNCITRAL Model Law has force of law in Australia for international arbitration. However, there is a *Commercial Arbitration Act 2010* for the various states regulating domestic arbitration.

[45] *IAA* art 18A.

[46] M.B. Holmes, 'Enforcement of Annulled Arbitral Awards: Logical Fallacies and Fictional Systems' (2013) 79 *Arbitration* 244.

proceedings. Therefore, where enforcement is sought under the Convention, the courts may refuse to recognise and enforce the award under art V(1)(b) of the Convention, where it is shown that the party against whom the award is to be enforced was not given the opportunity to make their case during the proceedings giving rise to the award.

The Arbitration Rules

The *UNCITRAL Arbitration Rules 2013*

As with domestic arbitration laws and international conventions, the *UNCITRAL Arbitration Rules 2013*, require equality in the treatment of parties during arbitral proceedings. Article 17(1) of the *UNCITRAL Arbitration Rules* 2013,[47] provide that, 'the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.' Under art 17(2) the tribunal, as soon as composed, is mandated to set a provisional timetable for the arbitration. It also has powers to, 'extend or abridge any period of time prescribed under these Rules or agreed by the parties.' Essentially, the Rules confer the tribunal with wide discretion and powers in the conduct of proceedings. This includes determining what orders and grants are necessary, and within what time limits. In the exercise of this discretion, the tribunal must ensure that the principles of natural justice are not breached. Also, art 11 of the *Arbitration Rules 2013* is reflective of s 8 of the *ACA* which deals with impartiality and independence of arbitrators.

The UNCITRA*L Arbitration Rules 1976* (Arbitration Rules of the ACA)

Similarly, the UNCITRAL *Arbitration Rules 1976* highlight the duty on the arbitrator to be impartial and independent in conducting the arbitral proceedings. Under art 10(1) of the UNCITRAL *Arbitration Rules 1976*, an arbitrator may be challenged where circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

The *International Bar Association Rules 2010*

As mentioned above, the tribunal has wide powers and discretion conferred on it by the agreement, the applicable laws and rules. One such power relates to the production of documents. For instance, under art 3 of the *International Bar Association Rules* ('IBA Rules'),

[47] *Arbitration Rules 2013* art 17(1).

the tribunal has the powers to order parties to produce documents within a specified time limit. Within the deadline specified by the tribunal, parties are mandated to, 'submit to the arbitral tribunal and to the other parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another party.'[48] Also, art 9(1) empowers the tribunal, 'to determine the admissibility, relevance, materiality and weight of evidence tendered by the parties'. Further, art 9(5) provides that where a party, without satisfactory explanation and without previous objection to the production of a document requested, fails to produce the document, the tribunal may conclude that such document would be unfavourable to that party's case.[49]

The *International Chamber of Commerce Rules 2017*

To ensure fairness, the *International Chamber of Commerce 2017* ('*ICC Rules*') provide for disclosure where there are circumstances that may call into question the impartiality and independence of the arbitrator.[50] They also provide for arbitrator challenge and the procedure for same, where there is an allegation of bias. Accordingly, art 14(1) of the *ICC Rules* provides that, 'a challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.'

Also, where the *ICC Rules* are silent on the modalities for dealing with a given matter arising in the course of the proceedings, art 42 requires the ICC court and the arbitral tribunal to act in the spirit of the Rules and make every effort to ensure that the award is enforceable in law.

The *London Court of International Arbitration Rules 2014*

The London Court of International Arbitration Rules 2014 ('*LCIA Rules'*) also stress the duty on arbitrators to be impartial and independent and to make disclosure where justifiable doubts exist. A breach of this duty may lead to a challenge and subsequent revocation of the arbitrator's appointment by the court *LCIA Rules*.[51] Under art 32.2, all participants in the process, including the tribunal are to, 'act at all times in good faith, respecting the spirit of the arbitration

[48] *IBA Rules* art 3(1).

[49] Ibid art 9(5).

[50] *ICC Rule,* art 11(2) and (3).

[51] *LCIA Rules* art 10.1.

agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat'.

The *International Centre for the Settlement of Investment Disputes Arbitration Rules 2006*

In order to ensure that parties have adequate opportunity to present their case, the International Centre for the Settlement of Investment Disputes ('*ICSID Arbitration Rules 2006*') make allowances where parties comply with the tribunal's directions outside the specified time limit, unless the tribunal decides otherwise. Accordingly, r 26(3) provides that, 'any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in *special circumstances* and after giving the other party an opportunity of stating its views, decides otherwise…'[52] As with, the *IBA Rules*, the *ICSID Arbitration Rules 2006* also empower tribunals to order the production of documents. It can also order the production of witnesses and experts.[53] Under 34(3) of the *ICSID Arbitration Rules*, parties are required to cooperate with the tribunal where order for production is made. The tribunal is also required to take formal note of any failures by the parties to comply with its order to produce.

The *Singapore International Arbitration Centre Rules 2016*

Like the *ICC Rules*, r 41.2 of the *Singapore International Arbitration Centre Rules 2016* ('*SIAC Rules*') requires tribunals to act in the spirit of the *SIAC Rules* when dealing with matters arising during arbitral proceedings which are not covered by the *SIAC Rules*. Further, it stresses the tribunal's duty to ensure fairness, speed and economy in the conduct of the arbitration.[54] In

[52] Emphasis added; in *Pezold/Border Timers v Zimbabwe* (ICSID Case No. ARB/10/15, Award, 28 July 2015); the respondent raised certain jurisdictional challenges and new defences after the set time limit had elapsed and also, submitted that retaining an external counsel at a late date is sufficient to justify a finding of 'special circumstances' within this rule. The tribunal found that 'special circumstances' existed because the claimant's delay in bring ancillary claims partly caused the problem but that, 'the issue is not the respondent's right to be heard, but rather the parties equal right to due process and fair procedure, which includes respect for the time limits fixed by the tribunal for each step in the proceedings'; see also *Abaclat v Argentina* (ICSID Case No. ARB/07/05,4 February 2014), where the respondent's request to file a rejoinder was rejected by the tribunal as it was inappropriate. However, in *Glamis Gold v USA* (UNCITRAL), Award, 8 June 2009, in applying art 24 of the UNCITRAL Arbitration Rules, the tribunal extended the document production period due to the extensive nature of the document production process and the desire to have evidence available to the parties prior to their memorial submissions.

[53] *ICSID Arbitration Rules* r 34(2)(a).

[54] *SIAC Rules* r 41.2.

order to ensure that arbitrators deal fairly, the *SIAC Rules* also provide in r 14.1 for a challenge where justifiable doubts exist as to their impartiality or independence.

The *American Arbitration Association Rules 2013*

Pursuant to the duty to be fair to the parties, r 18(a) of the *American Arbitration Association Rules 2013* (*AAA Rules*) requires the arbitrator to be independent and impartial in the conduct of proceedings. Under r 18(a)(i), an arbitrator that falls short of this requirement will be disqualified.

The *Japan Commercial Arbitration Association Rules 2019*

The *Japan Commercial Arbitration Association Rules 2019* ('JCAA') also emphasise the obligation on arbitrators to be impartial and independent in the conduct of arbitral proceedings. Article 24 of the *JCAA Rules* states that a person who is not impartial and independent shall decline to accept an appointment as an arbitrator or make a disclosure and that an arbitrator shall be, and remain at all times, impartial and independent during the arbitral proceedings.

From the foregoing, it is evident that there are ample arbitral instruments that not only prescribe that there is procedural fairness in arbitral proceedings, but also attempt to ensure that tribunals and their awards are adequately protected when they seek to do justice between the parties by exercising their wide discretion. Thus, this raises the questions – why should arbitrators be apprehensive of the reaction of the parties or courts to their awards? Is there reasonable justification for such apprehension in practice? Against this backdrop, the article will look at judicial attitudes towards allegations of breach of due process rights by tribunals, with specific reference to applications for set-aside and refusal of recognition and enforcement of awards.

Judicial Approach to Allegations of Breach of Due Process Rights

Where there is an allegation that there is lack of due process in the arbitral proceedings or that any of the aforementioned instruments have been breached, the award is usually challenged stating such facts. The challenge could be an application to set aside the award in part or whole or declare it illegal and unenforceable. Under Nigerian law, the usual grounds on which a set-aside application may be based is that the arbitrator has misconducted themselves under s 30

of the *ACA*. Unfortunately, the word 'misconduct' is not defined in the *ACA*, but in case law.[55] In English law, such application is normally brought under s 68 of the *UKAA*.[56] The challenge could also come in the form of a defence to an application to the court to recognise and enforce the award. In Nigeria such a challenge is made under ss 32 and 52 of the *ACA*. In English law, challenge can be brought pursuant to s 103 of the *UKAA* in the form of a defence to an application for the court to recognise and enforce the award. Where the allegations are proven the court may set aside; refuse to recognise and enforce or remit the award depending on the applicant's prayer. In this section, the courts' attitude towards such applications is examined with a view to determining whether they (the courts) fuel 'due process paranoia' or reassure arbitrators.

Due Process as Basis for Applying to Set Aside an Award

In the United Kingdom, the courts would not normally set aside an award because the tribunal has been 'excessively robust' in taking case management decisions like refusing to accept new evidence or denying an application for extra time.[57] However, set aside applications have been upheld where arbitrators have misconducted themselves such that the principles of natural justice are breached as a result. Some examples include where arbitrators exceed their jurisdiction,[58] where they deviate from agreed procedure without prior warning to the parties,[59] or even where they fail to carry the parties along as was the case in *Fleetwood Wanderers Ltd (t/a Fleetwood Town Football Club) v AFC Fylde Ltd*.[60] In this matter, the English High Court found that the sole arbitrator's conduct in carrying out independent investigations following the substantive hearing in the arbitration, amounted to a serious irregularity under s 68 of the *UKAA*. In reaching this decision, the court reasoned that had the arbitrator notified the parties of the outcome of his investigation, the parties would have sought to make further representations which would have led to a different outcome. Thus, in failing to communicate

[55] *Taylor Woodrow (Nig) Ltd v S.E. GMBH Ltd,* (1993) 4 NWLR (Pt 286) 127; see also J Olakunle Orojo and M Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates (Nig) Limited 1990) 273, Paul Oboarenegbe Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Law Lords Publications 2015) 279.

[56] See Nigel Blackaby and Constantine Partasides QC, *Redfern and Hunter on International Arbitration* (OUP, 6th ed, 2015) 586 and David St John Sutton, Judith Gill QC and Matthew Gearing QC, *Russell on Arbitration* (Sweet & Maxwell, 24th ed, 2015) 505.

[57] Gerbay (above n 18).

[58] Ibid.

[59] Ibid

[60] [2018] EWHC 3318 (Comm).

his findings to the parties, the arbitrator breached the duty to act fairly and to allow parties the opportunity to present their case. Accordingly, the award was remitted to the arbitrator under 68(3) for reconsideration. In *K v A*[61] the English Court held that there was a serious irregularity when the GAFTA Board of Appeal found K liable based on an interpretation of a clause in the contract which had not been argued by A. A finding of serious irregularity was also made in *Oldham v QBE Insurance (Europe) Ltd,*[62] where the arbitrator rendered an award before the deadline given to the claimant to reply the respondent's submissions on costs expired. The court held that the failure to allow the claimant to respond to the case put to them on costs denied them the opportunity to present their and was thus, a serious irregularity under s 68 of the UKAA.[63]

In the courts of other countries, awards have been set aside for similar reasons. The Malaysian Court of Appeal in *Thai-Lao Lignite and Hongsa Lignite v Laos,*[64] for instance, set aside an award on the grounds that the tribunal had exceeded its jurisdiction under s 37(1)(a)(iv)(v) of the *Malaysian Arbitration Act 2005* which is akin to s 68(2)(b) of the English *Arbitration Act* and art 34(2)(iii) of the UNCITRAL Model Law. According to the court, the tribunal had mixed together claims that arose under two distinct agreements which were each governed by separate legislation. As it was unclear which portions of the award related to claims under which contract, the whole award had to be invalidated. The Nigerian courts have also set aside arbitral awards on similar grounds. For instance, in *Araka v Ejeagwu*[65] the Supreme Court held that 'if the arbitrator makes an award on a matter which the parties have not asked him to arbitrate upon, the arbitrator would be acting beyond his powers and his decision may be set aside.'[66] Also, in *United Nigeria Insurance Co v Adene*,[67] the Supreme Court of Nigeria held that an allegation that the arbitrator misconducted himself or erred in law is not ground for refusing leave to enforce an award, or a defence to an action to enforce the award. The proper course in such circumstance is to apply to set aside the award or remit it to the arbitrator.

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[61] [2019] EWHC 1118 (Comm).

[62] [2017] EWHC 3045.

[63] See also *K v P* [2019] EWHC 589 (Comm).

[64] Oral decision, Malaysian High Court, 27 December 2012.

[65] (2000) 12 S.C. (Pt I) 99.

[66] See also *Kano State Urban Development Board (1990) 4NWLR (Pt 142) 37*; *Commerce Assurance v Alli,* (1992) 3 NWLR (Pt 232) 710 *Arbico (Nig.) Ltd v Nigerian Machine Tools Limi*ted (2002) 15 NWLR (Pt 789) 7; see also *ACA*, s 29(2).

[67] (1971) NSCC 159 at 163.

The courts have, however, been known to show intolerance for meritless and frivolous 'set-aside' applications that allege lack of due process. An illustrative case is *Asset Management Corporation of Nigeria ('*AMCON*') v Qatar National Bank QNB, ('*QNB*')*[68] where the English High Court dismissed AMCON's set aside application which alleged that the arbitral tribunal had failed to address all the issues put to it. The case arose from a share purchase agreement governed by Nigerian law. Under the agreement AMCON undertook to sell preference shares in Ecobank to QNB. Subsequently, a dispute arose when the parties were unable to agree whether the Ecobank's Articles of Association required that a preference dividend had to be declared by the board of the bank before it fell due for payment. In construing the relevant provision of the articles, the tribunal found that dividends fell due for payment at the time it is declared. The Asset Management Corporation of Nigeria sought to set the application aside on the grounds that the tribunal, in reaching its decision, did not apply relevant principles of Nigerian law nor deal with the claimant's submissions on the importance of a Nigerian statute to the construction of the article under review, amongst others. In its ruling, the court found that the s 68 (*UKAA*) application was without merit and was indeed, an attempt to appeal against a finding of fact which was not allowable under the English *Arbitration Act*. As per the court, the application was 'another example of a dissatisfied party to an arbitration seeking to challenge an Award in circumstances where statute does not allow it.' [69]

Generally, where applications for set-aside have alleged that case management decisions taken by the tribunal in the course of proceedings amounted to a breach of due process, the English courts have shown reluctance to grant such applications.[70] In fact, as indicated above, the position in the United Kingdom appears to be that arbitrators should not shy away from being too robust in their case management decisions, if it is necessary to meet the justice of the case. Some examples of cases where the English courts have refused to find serious irregularity alleged to be caused by excessive case management by the tribunal include, *Konkola Copper Mines Plc v U & M Mining Zambia Ltd*,[71] where an application to adjourn a hearing was denied; *Bromley Park Garden Estate Ltd v Mallen*,[72] where the tribunal refused to substitute oral

[68] [2018] EWHC 2218.

[69] Ibid.

[70] Gerbay (above n 18).

[71] [2014] EWHC 2374 (Comm).

[72] [2009] EWHC 609 (Ch).

submissions for written-counter submissions and; *TAG Wealth Management v West,*[73] where the claimant's claim was struck out by the tribunal after the claimant unnecessarily delayed proceedings for five years.

Due Process as Basis of Refusal to Recognise and Enforce an Award

As is the case with set-aside applications, it is rare for the courts of the United Kingdom to refuse to enforce an award, whether under the New York Convention or the *UKAA*, because the tribunal has been too cautious in taking case management decisions.[74] Refusals are more common where a breach of rules of natural justice is proven, for instance where the applicant has been denied the opportunity to argue their case. [75] In *Kanoria v Guinness & Anor,*[76] the respondent sought refusal of enforcement because they did not have the opportunity to present their case due to a life threating ailment. The English court found that in denying the respondent the opportunity to state their case, the tribunal breached the principles of natural justice. Thus, the court refused enforcement under s 103(2)(c) of the *UKAA*.[77] Similarly, in *Malicorp Ltd v Egypt*,[78] where the tribunal granted remedies on grounds that did not constitute part of the pleadings, the court refused enforcement. The French courts have also refused enforcement for a similar breach. In *Societe Overseas Mining Investments Ltd v Societe Commercial Carribean Nique*,[79] the French Court of Appeal refused enforcement because the tribunal failed to invite the parties' submissions on a ground which had not been pleaded but was considered in the award.

There are also ample cases where requests for refusal of recognition and enforcement of an award on grounds of lack of due process have failed. An example is *Minmetals Germany v Ferco Steel*,[80] where the respondent requested the court to set aside the leave to enforce the award (that it had granted) on grounds that the award was based on evidence gathered through

[73] [2008] EWHC 1466 (Comm).

[74] Remy Gerbay and Bada Al Raisi, 'Due Process Paranoia (Part 2): Assessing the Enforcement Risk under the English Arbitration Act' (20 February 2017) <http://arbitrationblog.kluwerarbitration.com/2017/02/20/> accessed 2 August 2020.

[75] Ibid.

[76] [2006] EWCA Civ 222.

[77] See also *Cukurova Holding AS v Sonera Holding BV* [2014] UKPC 15.

[78] [2015] EWHC 361 (Comm).

[79] Case No. 08-23901/, Paris Cour de Cessation, Ch.1ere, 25 March 2010.

[80] (1999) XXIV YBCA 739.

the tribunal's own investigations. The respondent's request was denied on the grounds that the respondent declined the opportunity to request disclosure when it arose during the arbitral proceedings. According to the English court such a request would fail where a party, as in this case, misused the opportunity duly afforded it. The US District Court took a similar approach in *Jorf Lafar Energy Co. SCA (Morocco) v AMCI Export Corporation ('AMCI') (US)*[81] where AMCI refused the opportunity to file witness statements at the commencement of the arbitral proceedings and AMCI's later request to present oral evidence was denied.

From the cases examined, it appears that the courts would not normally set aside or refuse to enforce an award where the action (the procedural unfairness) complained of is not so serious as to deny the parties equal and adequate opportunities to argue their case. Thus, if the tribunal, in acting, has properly considered the issues and struck a balance between the duty to conduct proceedings efficiently and the duty to deal fairly between the parties then it may be difficult for the court to make a finding of breach of due process rights. Notwithstanding, due process paranoia is a reality for every arbitrator who wants to render an award that is legally enforceable.

Recommendation

In order to reduce the fear and anxiety that arises from due process paranoia, the article proffers the following recommendations:

1) The arbitral tribunal must ensure that a preliminary meeting is held for the parties to agree a timetable for the filing of processes including witness statements, expert reports and written addresses.
2) In the procedural order (or terms of reference, in the case of ICC Arbitration), the arbitral tribunal must make sure that timelines are clearly set out. Where there is possibility of delays, the defaulting party should consult with the opposing party and if an extension is agreed, the arbitral tribunal should be informed. In consequence, applications should only be made to the arbitral tribunal where there is a disagreement.
3) In the course of the hearing, case management conferences[82] should be adopted bearing in mind that there must be an end to proceedings.

[81] (2007) XXXII YBCA 713.

[82] See ICC Commission Report – Controlling Time and Costs in Arbitration <www.iccwbo.org> accessed 24 July 2020, arts 19-40.

4) Every application for amendment of pleadings, filing of additional witness statements or expert reports, extension of time, amongst others should be carefully considered and ruled upon.

5) In the final award, the tribunal must ensure that all requests for production or discovery of documents, extensions of time, challenge of arbitrators, jurisdictional challenges, among others and the rulings on them are captured in the procedural history (interlocutory procedural matters).

6) Arbitral tribunals should be guided by instruments like the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration[83] on costs and time.

7) The participants in the process, the parties and arbitrators alike, should be aware that a fair hearing does not mean an indefinite hearing.

8) Whether the arbitration is domestic or international, parties should be encouraged to adopt the *IBA Rules* to assist in the production and discovery of documents.

9) As earlier stated, art 9 of the *IBA Rules* deals with admissibility and assessment of evidence. Where a party fails without satisfactory explanation to produce any document requested in a request to produce to which it has not objected in due time or fails to produce any document ordered to be produced by the arbitral tribunal, the tribunal may infer that such document would be averse to the interests of that party. Arbitral tribunals must be firm in applying this article in order to ensure due process in arbitral proceedings.

Conclusion

It is axiomatic that every arbitrator would like to write and publish a legally enforceable award and not one that will be set aside or denied enforcement. This is an implied duty and consistent with r 42 of the *ICC Rules* which provides in part 'that the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.' Indeed art 32.2 of the *LCIA Rules* is more forceful. It provides, among others, that 'the arbitral tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement and shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat'[84] All these provisions create the paranoia. Thus, 'due process paranoia' is not merely a myth but a reality.

[83] Above n 17.

[84] See also *SIAC Rules*, r 41.2.

The advice to arbitrators, however, is that they should fear not, for the laws, rules and articles are at their disposal to use efficiently and effectively. This is probably why in terms of applications to set aside an award or refusal of enforcement, the success rate is as low as the threshold is high, and costs are potentially substantial.

Lawyers' Participation in Mediation: Facilitation Tool or Obstacle to Conflict Resolution?

Sabrine Malki-Butcher[1]

Abstract

This article undertakes a critical analysis of lawyers' participation in the mediation process to determine its impact on the performance of the mediators' mission. It postulates that lawyers can be an obstacle to mediation due to negative behaviour patterns and a winning mindset they have acquired in their practice. On the other hand, it argues that lawyers can contribute to the success of a mediation through the empowerment of their clients but also through their cooperative attitude towards the mediator. The article concludes that mediation remains a real challenge for lawyers as this process reveals the mutation that the legal profession is undergoing nowadays.

‘Look, we're big people and we can settle the darn thing, what do we need a third party for and why do our clients have to be there?`[2] said a lawyer to a proposal to settle the dispute between his or her client and another party through mediation.

This consideration summarises the state of mind of a number of lawyers who, even today, still do not understand the mediation process and therefore reject it. Undoubtedly, this rejection is the result of a certain tension between the practice of judicial dispute resolution and the philosophy on which mediation is based. Indeed, lawyers are facing an opposition between judicial resolution, which is part of a 'truth-finding' process, and mediation, which is oriented towards a 'problem-solving' process.

In such situations, lawyers may fall back on practices acquired through their experiences and training in the legal sphere, often to the great despair of mediators. Indeed, lawyers confronted with mediation are thrown into a new environment with different behavioural norms and desired outcomes.

In such situations, lawyers may fall back on practices acquired through their experiences and training in the legal sphere, often to the great despair of mediators.

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[2] Julie MacFarlane, *The new lawyer: how settlement is transforming the practice of law* (Vancouver UBC Press, 2008) ch 3.

However, mediation is increasingly a solution presented by the courts themselves. As a result, lawyers are frequently called upon to participate in mediation. In response to this phenomenon, the lawyer must learn to adapt and embrace a role that promotes the success of mediation, a role that can vary from a simple silent presence to an active participation.

The purpose of my analysis is not to give a general overview of the lawyer's role and responsibilities in the mediation process, this topic being already largely covered by many professional Standards and Guidelines.[3] Noting the opposition between the lawyer's traditional function and his or her adaptation to more 'modern' dispute resolution techniques, this analysis tends to assess the lawyer's impact during mediation in order to determine to what extent the performance of the mediator's mission may be facilitated or on the contrary, is made more challenging.

To what extent is it easier, or alternatively, more difficult for the mediator to resolve a conflict when the parties are legally represented? Are lawyers inimical to the process or can they become partners in the process?

In the first part, I will analyse the factors that make the participation of a lawyer more difficult for the mediator to manage. To this end, I will study the practices resulting from the judicial resolution of conflicts that lawyers are used to perform and that they tend to transpose to the mediation framework. I will then examine the role of the lawyer's personality traits that have been shaped by the practice of their profession over the years and that can be detrimental to mediation. In the second part, I will analyse the factors that make lawyers contribute to the success of a mediation through their intervention for their clients, but also through their cooperative attitude towards the mediator.

The Lawyer as an Obstacle to Mediation

Lawyers can be an obstacle to mediation because of the 'bad' habits and winning mindset they have acquired while practicing.

On the Professional Practice of the Lawyer

The Adversarial System Opposed to Mediation

Undoubtedly, one of the main characteristics of the judicial system lies in its adversarial system in which the lawyer must 'direct the proceedings, control the evidence and questions to witnesses, to

[3] See for example the Law Society of New South Wales' Professional Standards for Legal Representatives in a Mediation, the Law Council's Guidelines for Lawyers in Mediation; NSW Law Society's Mediation and Evaluation Kit.

paint a ‘black and white picture’ for the judge/umpire to decide which party wins and which party loses'.[4]

It is this system, which focuses on the interests of one party[5], that dominates the resolution of disputes and has left its mark on the practice of the legal profession. Thus, lawyers have learned to master the adversarial system and often don’t feel the need to challenge it. However, there is clearly an opposition between the adversarial system that guides the lawyer's professional practice and the non-adversarial system that characterises the practice of mediation.

Indeed, mediation is a non-adversarial procedure because its purpose is to find a solution that will be accepted by the parties rather than to encourage the victory of one party at the expense of another. In addition, the dispute is resolved by the parties themselves and not by a neutral third party.[6] The mediator is not a judge to be convinced, but a person who is there to help the parties communicate in order to find a solution to their dispute.[7] Moreover, adjudication and mediation are part of different social ideals, with mediation appearing to be beneficial to society as a whole, while the values of adjudication are only based on the individual benefit.[8]

It can even be argued that lawyers really experience a 'systems shock' because their professional practice is marked by the adversarial system and it is then very difficult for them to detach themselves from it, to the detriment of the effectiveness of mediation. This difficulty for the lawyer to get out of this adversarial scheme is even more pronounced when it comes to a 'court-annexed mediation' because lawyers then tend to consider mediation as a simple step in the trial.[9] Worse, mediation may be considered by the lawyer as a 'gigantic, penalty free, discovery process', or even a tactic to save time during the trial.[10]

By taking an adversarial view of mediation, the lawyer clearly creates an obstacle to the success of mediation. Indeed, the 'Zealous adversarial Advocate'[11] will only focus on promoting his or her client's interests to the detriment of the interests of the other party.

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4 Anne Bihancov, ‘Legal representation in mediation: Effective or counter-productive? Practical tips and tricks from mediators to legal representatives’ (2017) 36(1) *the arbitrator & mediator* 16–17.

5 Chiara-Marisa Caputo, ‘Lawyers' participation in mediation’ (2007) 18(2) *Australasian Dispute Resolution Journal* 84–85.

6 Jean R. Sternlight, ‘Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Non adversarial Setting’ (1999) 14(2) *Ohio State Journal On Dispute Resolution* 269–279.

7 Bihancov (above n 4).

8 Caputo (above n 5).

9 Ibid 87.

10 Ibid 84, 88.

11 Donna Cooper, ‘Lawyers behaving badly in mediations: lessons for legal educators’ 25(4) *Australasian Dispute Resolution Journal* 204, 207.

Finally, since the mediator acts in one way and the lawyer in another, the parties may find themselves confused and mediation may then appear to the parties as an unnecessary process that they cannot be satisfied with.[12]

The Difficulty in Moving Away from a Legal Argument

Case after case, the lawyer is often governed by the concern to build a legal framework around a specific situation. Indeed, it can be very difficult, if not counter-natural for a lawyer not to resolve a conflict strictly on the basis of legal arguments[13].

The superiority of rights-based conflict resolution is taught in law school and is reinforced in practice by the judicial community[14]. Therefore, the lawyer tends to think that this reasoning is the only effective way to resolve a conflict and will reject any other form of reasoning.[15] According to this model, the source of the conflict is 'objective' and cannot be compromised.[16]

It is true that in my own professional practice, I have often asked myself why I should deviate from this legal reasoning when this is what I have been trained to do and what my client expects from me. My client is waiting for me to tell them that they are right and not that we can find a solution that can accommodate everyone.

Thus, the lawyers' attachment to the search for a solution to a conflict through the presentation of legal arguments is incompatible with the philosophy of mediation, which requires the parties to show flexibility, imagination and thinking outside the box in order to find a solution.[17] Focusing on a rights-based analysis means assuming that the essential moral principle on which all conflicts are based is understood in terms of true or false rather than feasible or wise.[18]

By remaining focused on the legal arguments, the lawyer only makes the dispute even more complex for the parties. In addition, the discussion will focus on arguments that are necessarily part of the disagreement. This kind of reasoning prevents the scope of solutions from being broadened

[12] Jean Poitras, Arnaud Stimec and Jean-François Roberge, 'The negative impact of attorneys on mediation outcomes: a myth or a reality?' (2010) 26(1) *Negotiation Journal* 9, 12.
[13] Bihancov (above n 7).
[14] MacFarlane (above n 2).
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.

by excluding any solutions related to psychological and emotional needs such as apology and acknowledgments.

Inadequate Training of Lawyers

Mediation is far from the adversarial model, which is the almost exclusive model taught in law schools. Indeed, most legal trainings have remained entrenched in an outdated model that no longer corresponds to what society expects from a lawyer nowadays. A lawyer is expected to have different roles such as that of:

> collaborators (a multidisciplinary approach); evaluators (evaluating the effectiveness of legal services and being willing to develop more user-friendly services, self-help assistance); and as strategic facilitators (facilitating opportunities for non-lawyer community stakeholders to be heard and negotiating solutions to issues).[19]

This gap in the training of lawyers has the effect of extending the mediation time for the mediator.[20] This creates an additional problem for the mediator, who must therefore educate the parties and their legal representatives during the mediation on their respective roles and what is expected of them. For example, if a lawyer does not know his or her role during mediation, he or she may indirectly force the mediator to act on behalf of the client in order to restore the balance of power.[21]

A Fundamental Lack of Understanding of Mediation

The lawyer who does not understand the dynamics and more generally, the philosophy of the mediation process will contribute to its failure.[22] It is widely known that not all lawyers have yet assimilated the philosophy of mediation and the principles that follow.

Indeed, in a mediation, the mediator will always take the time during introductory remarks to introduce themselves and explain the course of the mediation procedure, the different stages, as well as the role of the different parties. However, it is not unusual for the lawyer to interrupt the mediator in the performance of their duties during this phase in order to present a draft agreement as a basis for the negotiations.[23] In my opinion, this behaviour is the consequence of lawyers not understanding the

[19] Lillian Corbin, Paula Baron and Judy Gutman, 'ADR zealots, adjudicative romantics and everything in between: lawyers in mediations' (2015) 38(2) *University of New South Wales Law Journal* 492, 501.
[20] Poitras, Stimec and Roberge (above n 12) 9, 11.
[21] Cooper (above n 11) 204, 209.
[22] Ibid 204.
[23] Cooper (above n 21) 206.

grounds justifying the respect of a particular mediation procedure, which consequently does not allow the mediator to do his or her work.

One of the practices that prevents the mediator from doing his or her work is also when the lawyer asks that the parties be separated in different rooms for fear that the discussions will be virulent and not constructive. This shows that the lawyer does not understand the benefits of the direct interaction between the parties.[24]

An example from Western Australia that illustrates this behaviour is the observation by local court staff that more than 75% of mediations take place in the presence of lawyers only, with parties not having to attend.[25] As for those who had the chance to attend, more than half complained that their lawyer had taken control of the mediation for them.[26] However, to do so is to neglect the participation of a party which is one of the pillars of mediation. It is the source of the parties' empowerment and gives strength to the future agreement. Thus, it can be seen that some lawyers do not understand the philosophy of mediation and its guiding principles, which can be an obstacle to its success.

The practice of the legal profession thus demonstrates that there is a real misunderstanding of the guiding principles of mediation by legal representatives. This misunderstanding being most often associated with a philosophy and personality which naturally rejects mediation as an effective means of resolving a dispute.

On the Lawyer's Personality

Values Different from Mediation

The lawyer's personality generally reveals values that are quite different from the qualities normally required in mediation. Certainly, there are many codes of conduct for lawyers to guide them in their relationships with other lawyers, courts, and their clients. These codes are intended to be valuable guides for lawyers to ensure that they behave appropriately in all circumstances. However, a distinction must be made between the conduct that a lawyer must engage in under these rules and the conduct that the lawyer actually engages in.[27]

Indeed, like any other individual, a lawyer's personal values are shaped by his or her education and

[24] Ibid.

[25] Jill Howieson, 'Procedural Justice in Civil Court Mediation: Exploring the Instrumental and Non-instrumental Processes' (2002) 9 (2) *Murdoch University Electronic Journal of Law,* 128.

[26] Ibid 87.

[27] MacFarlane (above n 2) ch 2.

personal experiences. However, studies have shown that law school reveals societal stereotypes attached to the lawyer's image by emphasising the knowledge of substantive law and procedure or mooting skills to the detriment of professional ethical awareness and sensitivity.[28] Having spent nearly nine years studying in various law schools, I can observe that law school aims to develop in its students a spirit of competitiveness, combativeness, extreme rigor and a strategic spirit. Qualities such as the ability to listen, and empathy are qualities that legal education does not seek to develop, even though they appear to be essential in the mediation process.

In addition to legal education, it is undeniable that our personal experiences, those faced when dealing with clients, colleagues, and family, shape our values and principles. However, in light of the experience I have had in various law firms, I realise that the values taught in law schools persist and are even exacerbated in professional practice.

An Image to Be Preserved for The Client

Lawyers are victims of a populist societal stereotype that expects them to be 'argumentative, pedantic and unyielding'.[29] Lawyers may then feel pressure to fit this stereotype, generally thinking that this is what their clients expect from them, even during mediation. This behaviour can easily make the mediation process more complicated.

Indeed, lawyers who do not want to lose face in front of their clients will be a bad negotiator, inflexible on certain points that they will consider important for their clients and will underestimate the underlying interests at stake in the mediation process.[30]

Moreover, since the lawyer/client relationship is based on a financial relationship, it is possible that lawyers may want their clients to ascertain at all costs the effectiveness of their presence in order to give the impression of a service provided.

Unfortunately, this consideration can guide behaviour in mediation. A 'rivalry' between the mediator and the lawyer may then arise, the latter wanting to prove that he or she played the main role in settling the dispute.[31] The mediator's role could then be diminished in the eyes of the parties.

[28] Ibid.
[29] MacFarlane (above n 2).
[30] Cooper (above n 11) 204, 209.
[31] Poitras, Stimec and Roberge (above n 12).

A Personality That Dominates the Client

For most lawyers, representing their clients means speaking in their place, even if it may require them to completely dominate the conversation during mediation. Indeed, a study conducted by Olivia Rundle involved 42 lawyers who practised in the mediation program attached to the Supreme Court of Tasmania showed that most lawyers consider advocacy as a fundamental part of their work and think that clients pay them to speak for them.[32]

This phenomenon has been described by Dewdney as 'the legal take-over', the lawyer who does not consult his or her client and occupies the discussion alone, without instructions from his or her client.[33] One of the concrete examples can be the case of a lawyer making the opening statement instead of allowing his or her client to perform this function.[34] He or she will then force the mediator to intervene in order to clarify the roles of everyone.

In that case, there is a risk for the lawyer to overshadow his or her client, whose voice will only be heard in accordance with the lawyer's strategy. This is especially true for a 'naïve' client for whom it is the first case. The lawyer can then give his or her client the image of an expert who will fix the problem using the law.[35]

However, a lawyer who dominates mediation to the detriment of the direct participation of the client will neglect the real interests and needs of the client.[36] This practice clearly goes against the principle of empowerment and self-determination of the parties, values that are essential to the success of mediation.[37]

An Offensive Character in the Pursuit of Victory

As we have seen previously, in professional practice, the lawyer is attached to the adversarial system. This logic is contrary to the one developed by mediation, which consists in identifying the interests of both parties in order to find an optimal solution for all. [38] However, by joining this system, the lawyer adopts a binary vision of the dispute resolution, a win-lose logic that has developed an attraction for victory.

In this sense, Daicoff finds that:

[32] Corbin, Baron and Gutman (above n 19) 492, 507.
[33] Cooper (above n 30).
[34] Ibid 210.
[35] MacFarlane (above n 2).
[36] Sternlight (above n 6) 269, 274.
[37] Caputo (above n 5).
[38] Ibid.

> [l]awyers appear to be more competitive, aggressive, and achievement-oriented, and overwhelmingly Thinkers (instead of Feelers), as compared to the general population'. Lawyers are therefore 'Thinkers' in reference to the Myers-Briggs Type Indicator ('MBIT') which makes the difference between 'thinking' ([p]ersons who prefer thinking decide impersonally on the basis of logical consequences) and 'feeling' ('Individuals who prefer feeling rely on judgments that are based on personal and social values').[39]

I think this problem is the result of the lawyer's perception of a successful mediation. For the lawyer, the success of mediation is linked to the content of the agreement, which must be more favourable for his or her client than for the other party, while for the parties, success is linked to the feeling of satisfaction they may feel.[40] Theorists have argued that because of this mentality, the presence of a lawyer at a mediation is likely to reduce settlement rates.[41]

The Lawyer, a Facilitator Tool for the Success of the Mediation Process

Lawyers may contribute to the success of a mediation through their intervention for their clients, but also through their cooperative attitude towards the mediator.

A Client Empowered and Protected

An Advised Client

Mediation is very often something new for the parties. It may then be difficult for a party to calmly initiate mediation alone, as they may be afraid to proceed blindly without knowing where to go or how to behave. This is where the lawyer's advisory role can be valuable for a successful mediation. Indeed, lawyers can give valuable advice to their clients, whether in the pre-mediation phase or during the mediation.

Thus, before mediation, they can explain the mediation process and the mediator's role, advise on the financial costs, strategic risks and legal implications of undertaking mediation.[42] They can thus inform their clients of the procedure so that he or she can prepare for the opportunity to address the mediator in private.[43] Lawyers can also assist at preliminary conferences in drafting position papers requested by mediators and in preparing clients to participate personally in mediation.[44] They can also assist clients

[39] Corbin, Baron and Gutman (above n 19) 492, 507.
[40] Olivia Rundle, 'Are we here to resolve our problem or just to reach a financial settlement?' (2017) 141 *Precedent* 12, 14.
[41] Poitras, Stimec and Roberge (above n 12) 11.
[42] Laurence Boulle, *Mediation: Principle, Process, Practice*, (LexisNexis Butterworths Australia, 3rd ed, 2011) ch 8.
[43] Michael Lang, From Advocate to Advisor : The Role of The Lawyer in Mediation, October 2010, https://www.mediate.com/articles/langlawyerrole.cfm, last accessed 10 August 2020.
[44] Boulle (above n 42).

identify needs, interests and priorities, discuss ways of achieving them and consider likely interests and tactics of the other side and how to accommodate them.[45]

Lawyers can also advise and assist their clients during mediation. A lawyer can provide clear and concise information. For example, lawyers may help to summarise the other party's arguments to their clients to show that they listened to the other party and to ensure that their clients have understood. [46] The presence of lawyers also allows the parties to make a considered and reasoned decision thanks to the advice provided by them. [47] The parties can then be satisfied and feel that the most satisfactory solution has been found.

Thanks to the presence of lawyers, it is easier for the parties to have a concrete vision of the solutions they propose and their advantages compared to a procedure before the court. [48] In the context of a complex case, it can be very useful for the parties (and the mediator) to have direct access to their legal counsel in order to move the discussion forward, not to remain blocked because of questions.[49]

Finally, the presence of lawyers allows the mediator to conduct the mediation process without being tempted to advise the parties.[50] Therefore, lawyers help the mediator to remain neutral.

A Client Encouraged to Express Themselves

Lawyers can be a communication tool for a successful exchange between the parties. Indeed, lawyers are there to ensure that their clients express themselves correctly and that everyone understands them.[51] In this way, lawyers help to clarify their clients' point of view and avoid any confusion that I believe is a major source of conflict. They can also have a positive attitude towards their clients and encourage them to discuss and participate.[52] It is even encouraged to prepare the client to speak so that they feel heard and will help to find a solution.[53]

Furthermore, the presence of the lawyer reduces the risk that a party will feel powerless or dominated and will not dare to express his or her point of view.[54] For example, it has been said that due to the

[45] Ibid.

[46] Bihancov (above n 4) 16, 21.

[47] Corbin, Baron and Gutman (above n 19) 492, 499.
[48] Caputo (above n 5) 84, 90.
[49] Jo Edwards, Amanda Sandys and Jamie Gaw, 'Working with solicitors in mediation: a mediator's perspective' (2018) 48 *Family Law* 92, 94.
[50] Kathy Douglas and Becky Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758, 777.
[51] Caputo (above n 5).
[52]Ibid.
[53] Anne (above n 4) 16, 20.

[54] Caputo above (above n 5) 84, 89.

increasing use of mandatory mediation in cases that sometimes should not be found in mediation, the imbalance between the parties is becoming more and more apparent and the lawyer makes it possible to provide this necessary balance in mediation. This is true in family cases where domestic violence has not been detected. The mediator will then find themself in a delicate situation because intervening on behalf of a party could jeopardise their neutrality. The lawyer is then of great help to the weak party who would otherwise have difficulty making his or her voice heard.[55]

Assistance in Decision-Making

Lawyers can be very supportive during the decision-making process.[56] Indeed, making a decision alone is never easy and when a client feels supported, they will have more courage to move forward. So, the lawyer can be a decisive tool to help a party reach a decision.

Indeed, in the period of pre-mediation, the lawyer can prepare their client for mediation, put them in a collaborative state of mind in order to find solutions. For this, the lawyer can prepare the client and psychologically condition them to overcome deadlocks and change their point of view.[57]

With a lawyer at their side, the client feels reassured and does not move forward blindly. They have more confidence in making proposals knowing that they will be able to discuss the risks and benefits of the proposition in private with their lawyer.[58] In fact, some mediators have expressed a positive opinion that a lawyer should be present during mediation to help the parties be more realistic in their negotiations. [59] In addition, the lawyer can also serve as an example to their client by being cooperative and supportive in the search for a solution, thus facilitating the success of a mediation. [60]

A Protection of Vulnerable Parties

The presence of the lawyer at a mediation allows the respect of the principle of fairness, especially in cases where one party to the mediation is more vulnerable than the other.

Indeed, in my experience, it is rare for two parties to a conflict to find themselves in the same position of strength. In such cases, vulnerable parties may expect the lawyer to protect their fundamental rights. I am thinking in particular of racial, gender or socio-economic differences that should not disadvantage

[55] Ibid 89-90.
[56] Michael Lang, *From Advocate to Advisor: The Role of The Lawyer in Mediation*, (October 2010) Mediate <https://www.mediate.com/articles/langlawyerrole.cfm> last accessed 10 August 2020.
[57] Elayne E Greenberg, 'Starting Here, Starting Now: Using the Lawyer as Impasse-Breaker During the Pre-Mediation Phase' Research Paper No. 1916919, St. John's Legal Studies, 1 July 2011) 10.
[58] Lang (above n 56)
[59] Boulle (above n 42).
[60] Lang (above n 56).

a party to a conflict. In this way, the lawyer can help to ensure that the universal principles of equality, non-discrimination and fairness are respected.[61]

In addition, the lawyer may protect their client who may feel compelled to give in to pressure or intimidation to accept an agreement that they would find unfair, something that the mediator can hardly detect. The Victorian Civil and Administrative Tribunal ('VCAT') mediators actually reported that it was easier for them 'to carry out their mediation mission if the parties had the help and protection of partisan advisers – the lawyers'.[62]

A Cooperative Attitude Towards the Mediator

A Transparent Information Exchange

Lawyers are usually the first point of contact to which a party turn in order to end a dispute. Therefore, lawyers have a deep knowledge of the case and know their clients. They can be very useful to the work of the mediator in that they can share information that will help them in their work. For example, lawyers of both parties may work together to produce the joint mission statement for the mediator in order to highlight the main issues in the dispute and facilitate the mediator's work.[63]

On the other hand, the mediator has the possibility to ask the lawyers for a kind of memo stating the strengths and weaknesses of their clients, the worst-case and the best-case outcome, should it proceed to trial, the cost of the dispute in case of failure of the mediation, as well as a list of the main issues in the dispute.[64]

Lawyers can also help the mediator to find their way through the documentation by systematising the documents needed for the mediation.[65] This will help the mediator to identify the paperwork in order to save time and making it to understand the ins and outs of the case.

A Constructive Attitude During Mediation

If lawyers adopt a constructive attitude during the mediation, they can help the mediator to carry out their mission and thus obtain a solution to the dispute. Indeed, research conducted in 2008 by Helen Rhoades et al has shown that lawyers can be collaborative, particularly when they share complementary

[61] MacFarlane (above n 2) ch 7.
[62] Douglas and Batagol (above n 50) 758, 783.
[63] Edwards, Sandys and Gaw (above n 49).
[64] Boulle (above n 42) ch 10.
[65] Ibid.

skills, expertise and show respect for the work of all the people involved.[66] According to one study, it is when lawyers act as an expert contributor (ie participates in mediation by sharing their expertise) that they are most appreciated by VCAT mediators.[67]

A constructive attitude from the lawyer could be exemplified by a lawyer who discusses with the mediator and the parties to move the discussion forward, whether it is on a legal or non-legal topic.[68].The lawyer can then provide expertise and add a certain value to the discussion.[69]

The lawyer's constructive attitude towards the mediator can also be illustrated by a lawyer who guides a client through the discussion so that they quickly get to the essential elements of resolving the dispute.[70] Indeed, a lawyer can more easily understand time management during mediation, while a party will be more inclined to detach him or herself from the time that passes to be heard, even if it means focusing on details that are insignificant for the progress of the mediation. The time of mediation has an impact on the productivity of a discussion, which is one of the reasons why the mediator sets an agenda. The lawyer will therefore be able to help the mediator to respect their agenda.

Help in Making the Agreement a Reality

The presence of lawyers during mediation makes it easier to reach an agreement between the parties. Indeed, the mediator can count on the collaboration of lawyers to immediately draft the consent order.[71] They can also help to draft the settlement agreement. [72]

The fact that lawyers are present also prevents the parties from having to validate the agreement after mediation, during which time a party may change its mind and no longer agree.[73]

In addition, during discussions, the lawyer will be able to clearly explain what will happen in court if an agreement is not reached at the end of the mediation.[74] I believe that this presentation can have a very significant deterrent effect and make the parties realise that it is in their interest to use mediation to find a solution to the dispute.

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[66] Douglas and Batagol (above n 50) 758, 767.
[67] Ibid 778.
[68] Bihancov (above n 4) 16, 20.
[69] Douglas and Batagol (above n 50) 758, 781.
[70] Bihancov (above n 4) 16, 24.
[71] Edwards, Sandys and Gaw (above n 49).
[72] Boulle (above n 42) ch 8.
[73] Corbin, Baron and Gutman (above n 47).
[74] Boulle (above n 42).

Finally, by sharing their experience, lawyers will also be able to ensure that the agreement is 'workable, comprehensive and enforceable'.[75]

Assisting in the Identification of Risks in Order to Anticipate Potential Obstacles

The lawyer can help the mediator to identify the parameters of the conflict that may constitute obstacles during the mediation.[76] This involves the lawyer working with the mediator to help identify and analyse dead ends in order to overcome them. The lawyer can help the mediator determine whether the conflict is at an impasse because of the values, relationships, data, interests, or structure of the conflict.[77]

Practically speaking, lawyers can help the mediator to overcome any possible deadlocks that may arise during the mediation by informing him or her via the briefing paper of their analysis of the conflict and the strategies they intend to adopt in order to overcome them.[78]

In this respect, I think that the support the lawyer provides to the mediator greatly facilitates the amicable resolution of the dispute. Indeed, the lawyer as a professional experienced in the practice of conflict resolution through the courts can provide the mediator with an analytical capacity and expertise to fight, with the mediator, against the obstacles to the success of mediation.

Conclusion

Undeniably, lawyers can be a real ally for the mediator. Thanks to the trusting relationship they can maintain with their clients, and by adopting an attitude that encourages inter-professional collaboration with the mediator, lawyers can be a real asset for the success of a mediation. However, mediation remains a real challenge for lawyers. It requires lawyers to adopt a new perception of their profession, to know how to move away from certain systems and values traditionally taught and practised that can constitute obstacles to the success of a mediation.

On the whole, mediation reveals the mutation that the legal profession is undergoing nowadays, which must open its eyes to the importance of soft skills in the resolution of disputes.

[75] Samantha Hardy and Olivia Rundle, *Mediation for Lawyers*, (CCH, 2010), Ch 8.

[76] Greenberg (above n 58) 3.

[77] Ibid.

[78] Ibid.

Comments on the Test for Leave to Appeal an Award Under the Australian Domestic Uniform Commercial Arbitration Acts

Blake Primrose and Lewis Whitehurst*

Abstract

This paper considers s 34A of the Australian Uniform Commercial Arbitration Acts. It examines the most recent approach by the Full Court of the Supreme Court of South Australia - the Ottoway Appeal – in which the Full Court construed the test for leave narrowly but, in the authors' opinion, did not take the opportunity to confirm the distinction between the application of limbs 34A(3)(c)(i) and (ii), as the English courts have done on near-identical provisions. The authors also note certain issues regarding the procedures for resolving an application for leave, an issue regarding the remedies available to an award-debtor who is faced with an award that has no or no adequate reasons, as well as whether parties can contract out of or waive the leave requirements in s 34A .

Introduction

In the authors' experience, the circumstances in which parties may want a right of appeal from an arbitration award are few.[1] That said, some parties might wish to include such right to appeal in the arbitration agreement itself, before a dispute arises, or may agree to such right during the course of the arbitration if the parties are dissatisfied or lose confidence in their tribunal. Perhaps aware that parties typically do not preference appeals in arbitration, Australian state parliaments included in the uniform *Commercial Arbitration Acts*[2] the same appeals regime that existed in s 96 of the *Arbitration Act 1996* (UK), save that the uniform CAAs adopted an 'opt-in' appeal right rather than the 'opt-out' appeal right that existed in the UK. The uniform CAAs' provisions have now been variously in force for several years. Only recently has the first wave of appeals against arbitral awards based on the uniform CAAs reached Australian courts. This paper considers the test for leave to hear such appeals.

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[1] Typically, a party is only interested in a right of appeal after they have lost the arbitration!

[2] Referred to hereafter as 'uniform CAAs'.

More particularly, this paper considers the uniform CAAs' history, particularly their English origins. This paper then considers the English courts' and the Australian courts' application of the relevant legislative provisions regarding the granting of leave to appeal arbitral awards and notes an issue regarding the remedy for a lack of reasons and as to whether the leave requirement can be contracted out of or waived. Finally, this paper observes that whilst the state parliaments largely adopted the English appeal provisions for the purpose of the uniform CAAs, the Australian courts have not yet taken the opportunity to adopt the English courts' approach to the parent provision – s 69 of the *Arbitration Act 1996* (UK).

History to the Uniform Commercial Arbitration Acts

From 1984, the Australian states and territories enacted uniform domestic commercial arbitration legislation. The goal was to encourage commercial parties to arbitrate rather than litigate.[3] To achieve this goal, the uniform legislation aimed to provide parties with the autonomy to determine the process by which their disputes would be resolved, including by minimising the procedural formality that was familiar in the litigation context.[4]

Despite those good intentions, arbitration-users (for the most part, lawyers experienced in conducting arbitrations) were generally dissatisfied with the way that practitioners and arbitrators were conducting arbitrations under the uniform acts.[5] Part of that dissatisfaction stemmed from the fact that legal practitioners were conducting arbitrations like court trials, with all the procedural expense and complexity that came with large scale disclosure, protracted procedural skirmishes, and, from time to time, appeals or other judicial challenges. This dissatisfaction came to light quite publicly when the Hon Chief Justice James Spigelman AC QC remarked at the Opening of Law Term Dinner on 2 February 2009:[6]

> Our uniform legislative scheme for domestic arbitration is now hopelessly out of date and requires a complete rewrite. The national scheme implemented in 1984 has not been adjusted in accordance with changes in international best practice. Of course, in our federation, agreement on technical matters such as this in multiple jurisdictions is always subject to delay. The delay with respect to the reform of the

[3] See the Second Reading Speech by the New South Wales Attorney-General, the Hon David Paul Landa, for the New South Wales Bill: New South Wales, *Parliamentary Debates,* Legislative Assembly, 18 October 1984, at 2160–1.

[4] Doug Jones, *Commercial Arbitration in Australia* (Lawbook Co, 2nd ed, 2012) at [1.230].

[5] For example, see Peter Megans and Beth Cubitt, Meeting disputants' needs in the current climate: 'What has gone wrong with arbitration and how can we repair it?' (October 2009) *The Arbitrator & Mediator* 115.

A copy of the opening address is available at http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2009/16.pdf , see page 52 in particular.

> Commercial Arbitration Acts is now embarrassing. This is not an area in which harmonisation based on the lowest common denominator principle is appropriate.

The Standing Committee of Attorneys General ('SCAG') met on 16 and 17 April 2009 to discuss, amongst other things, its 'harmonisation projects that are part of the drive towards a seamless national economy that is modern, responsive and consistent with international best practice'.[7] Part of those 'harmonisation projects' included the reform of the uniform domestic arbitration acts. No doubt this was prompted by Spigelman CJ's scathing remarks from earlier in that year as well as the growing frustration from within the legal community. The SCAG announced that the new uniform commercial arbitration legislation would be based on the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') 'supplemented by any additional provisions as are necessary or appropriate for the domestic scheme'.[8] The reforms took place with remarkable speed. This was likely because the draftspersons had the Model Law and other developed arbitration statutes (eg *Arbitration Act 1996* UK) at their ready disposal.

In early 2009, the Commonwealth Attorney-General's Department announced that a new domestic commercial arbitration act would be drafted on the basis of the Model Law. Then, in November, the 2009 Consultation Draft Bill, together with an issues paper, was released and various peak industry bodies and interest groups were invited to comment and make submissions by no later than 15 January 2010, which they did.[9] The Consultation Draft Bill did not include s 34A.[10] The SCAG met in April 2010 to consider those comments and submissions, and on 7 May 2010, the SCAG resolved that the Australian States and Territories should adopt the new Commercial Arbitration Act Model Bill.

One week later, on 13 May 2010, the NSW Parliament introduced the Commercial Arbitration Act Model Bill. On 28 June 2010, following debate in both houses, the NSW Parliament passed the *Commercial Arbitration Act 2010* (NSW). New South Wales was the first Australian state to pass the reformed *Commercial Arbitration Act*, with all other Australian states and territories following thereafter. The reformed legislation is collectively referred to in this paper as the 'uniform CAAs' (as mentioned above).

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[7] Standing Committee of Attorneys-General, Communique, 16–17 April 2009, available at: http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2012/5312T6242.pdf (last accessed 13 December 2017), at 2.

[8] Ibid at 5.

[9] See for example: CIArb (Australia) and IAMA, *Joint submissions in respect of the Commercial Arbitration Bill 2009* (12 February 2010), available at https://www.iama.org.au/sites/default/files/resources/publications-members-only/5.2.2.cCIArbandIAMAJointSubmissiononCAA.pdf (accessed 18 December 2017).

[10] Jones, (above n 4) at [10.360].

It may be noted that the efficiency of SCAG, the NSW Government of the day and the NSW Parliament in passing the *Commercial Arbitration Act 2010* (NSW) left little room for an extensive report as to the drafting of each provision or a detailed explanatory memorandum as to the origin of each.

The Uniform Commercial Arbitration Acts – Paramount Object, Section 34A and Origins

The uniform CAAs adopted the Model Law (with minor amendments) and supplemented it with a number of provisions that were considered appropriate for the Australian domestic market.

One example of a provision that is not found in the Model Law is s 1C, which sets out the uniform CAAs' 'paramount object'. In particular, the uniform CAAs' 'paramount object […] is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.' Justice Croft described the paramount object of the CAA (Vic) as a 'guiding star'.[11]

As a nuanced exception to the uniform CAAs' paramount object to facilitate the 'final' resolution of commercial disputes, s 34A of the uniform CAAs provides for a limited right of appeal on a question of law as is set out below. The right of appeal is provided on an 'opt-in" basis' The parties must agree, before the end of the appeal period of three months from the receipt of the award, to have a right of appeal against an arbitral award. Otherwise, in the absence of such agreement, the starting position in s 34A(1)(a) is that no such appeal on a question of law is allowed. There are various reasons for and against including a right of appeal and the choice has been left to the parties.[12] This is another example of a provision that does not feature in the Model Law (or the earlier 1984 uniform acts).[13] A comparison of s 34A of the uniform CAAs with s 69 of the United Kingdom's *Arbitration Act 1996* makes it apparent that parliament transplanted s 69 of the latter into s 34A of the uniform CAAs, save that s 69 of the *Arbitration Act 1996* (UK) provides for an opt-out right of appeal on a point of law.

[11] *Cameron Australasia Pty Ltd v AED Oil Limited* [2015] VSC 163 ('*Cameron'*) at [11].

[12] For a discussion of the pros and cons of a right to appeal, see Roy Goode, "The adaption of English law to international commercial arbitration" (1992) 8:1 *Arbitration International* 1–16, at 10.

[13] Section 38(5)(b)(i) of the 1984 uniform *Commercial Arbitration Acts* provided for an opt-out right of appeal. This provision required there to be a 'manifest error of law on the face of the award'. S 34A of the uniform CAAs replaced this language with the language in s 69 of the *Arbitration Act 1996* (UK) – 'obvious error'. The leave criteria in sub-s 34A(3) of the uniform CAAs 'are expressed in quite different and arguably more restrictive terms': *ASC AWD Shipbuilder Pty Ltd v Ottoway Engineering Pty Ltd* [2017] SASCFC 150, at [98] (Nicholson J, with Kourakis CJ and Stanley J agreeing).

In order to rely on these provisions, the parties must satisfy a number of other requirements, including that the court grants leave.[14] Sub-section (3) sets out the test for granting leave. Sub-sections (1) to (6) of the uniform CAAs is set out below next to the equivalent sub-s from s 69 of the *Arbitration Act 1996* (UK):[15]

Commercial Arbitration Act 2010 **(NSW)**	***Arbitration Act 1996*** **(UK)**
(1) An appeal lies to the Court on a question of law arising out of an award if: (a) the parties agree, before the end of the appeal period referred to in subsection (6), that an appeal may be made under this section, and (b) the Court grants leave. (2) An appeal under this section may be brought by any of the parties to an arbitration agreement. (3) The Court must not grant leave unless it is satisfied: (a) that the determination of the question will substantially affect the rights of one or more of the parties, and (b) that the question is one which the arbitral tribunal was asked to determine, and (c) that, on the basis of the findings of fact in the award: (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.	(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section. (2) An appeal shall not be brought under this section except— (a) with the agreement of all the other parties to the proceedings, or (b) with the leave of the court. The right to appeal is also subject to the restrictions in section 70(2) and (3). (3) Leave to appeal shall be given only if the court is satisfied – (a) that the determination of the question will substantially affect the rights of one or more of the parties, (b) that the question is one which the tribunal was asked to determine, (c) that, on the basis of the findings of fact in the award – (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision

[14] Although not a question considered in any detail in this paper, the authors note below the potential outstanding question as to whether the leave requirement can be contracted out of or waived.

[15] The following example is taken from the *Commercial Arbitration Act 2010* (NSW).

(4) An application for leave to appeal must identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The Court is to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required.

(6) An appeal may not be made under this section after 3 months have elapsed from the date on which the party making the appeal received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal (in this section referred to as the appeal period).

of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

In light of the near identical terms of the two provisions set out above, it is apparent that parliament adopted the text of s 69 of the *Arbitration Act 1996* (UK) when drafting s 34A of the uniform CAAs. That parliament chose to do so is not surprising though, because the *Arbitration Act 1996* (UK) is the product of many years of judicial developments and parliamentary reports (including the frequently cited, and thorough, DAC Report). It reflects a developed, tested, and mature body of arbitral law. It is surprising, however, that neither the uniform CAAs nor their accompanying explanatory memoranda expressly acknowledge that s 34A of the uniform CAAs is adopted from the *Arbitration Act 1996* (UK), given that the uniform CAAs do acknowledge those provisions that are adopted from the Model Law. However, as noted above, the haste with which the legislation was prepared may suggest why this was so.

Given s 34A's obvious English origins, it is useful to have an understanding of the way that the English courts have interpreted and applied the parent provision – s 69 – in order to gain a better understanding of s 34A's limits and application.

The English Courts' Application of the Limbs of Section 69(3)

An understanding of the English courts' approach to granting leave to appeal arbitral awards on a question of law begins with the case law concerning s 1(3)(b) of the *Arbitration Act 1979* (UK), being

the predecessor to the current *Arbitration Act 1996* (UK) which also permitted appeals to arbitral awards on questions of law.

That case law principally includes the House of Lords decision in *Pioneer Shipping Ltd v BTP Tioxide Ltd* ('*The Nema*').[16] In *The Nema*, Lord Diplock summarised the limited circumstances in which the court should grant leave pursuant s 1(3)(b) of the *Arbitration Act 1979* (UK) in respect of arbitrations concerning one-off or bespoke agreements, on the one hand, and agreements of standard form, on the other.

Regarding one-off or bespoke agreements, Lord Diplock held:[17]

> Where, as in the instant case, a question of law involved is the construction of a "one-off" clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is **obviously wrong**. But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance.

Regarding agreements of standard form, Lord Diplock held (broken up for ease of reading):[18]

> For reasons already sufficiently discussed, rather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned.
>
> That there should be as high a degree of legal certainty as it is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar transactions between other parties engaged in the same trade, is a public interest that is recognised by the Act particularly in section 4.
>
> **So, if the decision or the question of construction in the circumstances of the particular case would add significantly to the clarity and certainty of English commercial law** it would be proper to give leave in a case sufficiently substantial to escape the ban imposed by the first part of section 1(4) bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law.
>
> But leave should not be given even in such case, unless the judge considered that a **strong prima facie case** had been made out that the **arbitrator had been wrong** in his construction; and when the events to

16 *The Nema* [1982] AC 724 per Lords Diplock, Fraser, Russell, Keith, and Roskill.

17 Ibid per Lord Diplock at 742-3.

18 Ibid per Lord Diplock at 743.

> which **the standard clause** fell to be applied in the particular arbitration were themselves "one-off" events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to "one-off" clauses.

In *Antaios Cia Naviera SA v Salen Rederierna AB*,[19] the House of Lords affirmed Lord Diplock's findings in *The Nema*, whilst clarifying that leave would only be granted in respect of questions of law that were of general application where a strong prima facie case against the award was established.[20]

Following the promulgation of the *Arbitration Act 1996* (UK), the Court of Appeal held in *HMV v Propinvest* that the *Arbitration Act 1996* (UK) adopted the distinction that Lord Diplock described (and which was developed over successive decisions of the House of Lords).[21]

In particular, Lord Justice Arden held that, 'The effect of the Arbitration Act 1979 in this regard was thus … carried through into s 69 of the 1996 Act', and Lord Justice Longmore held, 'Section 69 of the Arbitration Act 1996 is largely based on the decision of the House of Lords in [*The Nema*].'[22]

Regarding one-off or bespoke agreements (ie the circumstances contemplated by s 69(3)(c)(i)), in *HMV v Propinvest*, the Court of Appeal considered an appeal from the order of Justice Warren of the High Court, in which Justice Warren refused to grant leave to appeal an arbitral award. The underlying contract was a lease that was not in standard form. Accordingly, the Court of Appeal focused on sub-s 3(c)(i) as opposed to sub-s 3(c)(ii).[23]

Lord Justice Arden summarised the then-present state of the law as regards s 69 of the *Arbitration Act 1996* (UK). Her Honour concluded that 'rights of appeal from an arbitration award are severely restricted', and that 'The matter should therefore normally be dealt with on paper.'[24] Speaking of Lord Diplock's speech, Lord Justice Arden held: 'The point, however, that I wish to emphasise at this stage is that Lord Diplock was clearly contemplating that the error is one which can be grasped simply by a perusal, that is, a study, of the award itself.'[25]

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[19] *The Antaios* [1984] 3 All ER 229 per Lords Diplock, Keith, Scarman, Roskill and Brandon.

[20] Ibid at [203]-[204].

[21] *HMV UK Ltd v Propinvest Friar Ltd Partnership* [2011] EWCA Civ 1708 per Arden, Longmore and Macfarlane LJJ ('*HMV v Propinvest*'). See also David Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (Thomson Reuters, 24th ed, 2015) ('Sutton et al') at [8–149].

[22] Ibid (*HMV v Propinvest*) at [7] (Arden LJ) and [44] (Longmore LJ), respectively. See also, DAC Report at para 286(iv). See also *Trustees of Edmond Stern Settlement v Levy* [2007] EWHC 1187 per Coulson J at [11].

[23] Ibid (*HMV v Propinvest*) (above n 21) [4] (Arden LJ).

[24] Ibid at [5] and [7] (Arden LJ).

[25] Ibid at [7] (Arden LJ).

At first instance in *HMV v Propinvest*, Warren J held that although he would have come to a different conclusion to the arbitrator, the arbitrator was not 'obviously wrong' for the purpose of s 69(3)(c)(i) of the *Arbitration Act 1996* (UK).[26] Lord Justice Arden agreed (broken up for ease of reading):[27]

> I now turn to my conclusions. As I see it, this is primarily and above all an exercise to ascertain whether the arbitrator's approach was one which could properly be described as "obviously wrong" for the purposes of s 69(3)(c)(i).
>
> The arbitrator is a specialist in the field of landlord and tenant and therefore very familiar with rent review clauses. Indeed the correspondence shows that he was chosen specifically for his expertise. Now the rent review clauses in this lease are not in standard form. However, they contain features with which specialists in the field would certainly be familiar. Moreover, when it comes to finding a hypothetical answer on a rent valuation and making assumptions, it is well known that the valuer must strictly follow the directions he is given by the document. How narrowly those directions are to be interpreted is, in my judgment, a matter on which there could well be sustained argument and on which experienced and competent lawyers might come to a different conclusion.
>
> Certainly, the conclusion in this case came, in my judgment, within that category. It was one which it was open to the arbitrator to adopt. It was open, therefore, to the arbitrator to adopt a construction which led ineluctably to a conclusion that he did not have to have regard to the difficulties over the fire escape which an actual prospective tenant would have to face and would have to allow for in assessing what he was prepared to pay to take the premises.
>
> Therefore I take the view that the interpretation to which the arbitrator came in this case was one which did not meet the test of being unarguable or making a false leap in logic or reaching a result for which there was no reasonable explanation. I am not, therefore, able to conclude that this conclusion was "obviously wrong".

The high threshold in s 69(3)(c)(i) of the *Arbitration Act 1996* (UK) (regarding decisions about bespoke or one-off agreements) that Lord Justice Arden described in *HMV v Propinvest* was similarly applied in other relatively recent English decisions. For example, in *Braes of Doune v McAlpine*, Justice Akenhead described the type of error that s 69(3)(d) of the *Arbitration Act 1996* (UK) is concerned with as 'a major intellectual aberration' – and Lord Justice Arden described this phrase as 'a useful way of bringing to mind that the error on which we are concerned, if there be an error, must be an obvious one'

[26] Ibid at [24] (Arden LJ).

[27] Ibid at [34] (Arden LJ).

(in other words, Lord Justice Arden appears to be equally applying Justice Akenhead's statement to s 69(3)(c)(i) *Arbitration Act 1996* (UK)).[28] Justice Eder described the test of 'obviously wrong' as a 'high hurdle'.[29] In *Merthyr (South Wales) Ltd v Cwmbargoed Estate Ltd*, the court considered that the type of situation envisaged was one where 'the judge looks at the award and thinks Something must have gone seriously wrong; that just cannot be right'.[30]

Speaking extra-judicially, Justice Colman described the test regarding obvious error in the following (amusing) way:[31]

> What is "obviously wrong"? Is the obviousness something which one arrives at … on first reading over a good bottle of Chablis and some pleasant smoked salmon or is "obviously wrong" the conclusion one reaches at the twelfth reason of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter."

Regarding standard-form agreements (ie the circumstances contemplated by s 69(3)(c)(ii)), in *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd* ('*The Athena*'), Justice Langley confirmed the distinction between the types of matters capable of appeal per sub-ss (3)(c)(i) and (ii), and that a lower threshold applies to the latter. His Honour held:[32]

> Sea Trade submit the decision was both "**open to serious doubt**" and, if necessary, "**obviously wrong**". Mr Bailey submitted the "lower" test was appropriate because the issue was not a "one-off" issue but involved the construction of a standard form of contract applicable (as I have held) to all members of the Association which is itself a leading provider of war risks insurance covering some 80% of the Greek fleet. I accept that submission. I therefore grant leave and determine the question as I have stated.

Further, Justice Coulson said in *Trustees of Edmond Stern Settlement v Levy*:[33] It is common ground that the true construction of this one-off form of words cannot be a matter of general or public

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[28] *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC) ('*Braes of Doune v McAlpine'*), (Akenhead J) at [31]; cited with support by Arden LJ in *HMV v Propinvest* (above n 21) at [8]. Coulson J approved of Arden LJ's application of Akenhead J's approach in *AMEC Group v Secretary of State for Defence* [2013] EWHC 110 (TCC) at [27].

[29] *Hyundai Merchant Marine Company Ltd v Americas Bulk Transport Ltd* [2013] EWHC 470 (Eder J) at [71].

[30] *Merthyr (South Wales) Ltd v Cwmbargoed Estate Ltd* [2019] EWHC 704 (Ch) per Matthews J ('*Merthyr'*) at [26].

[31] Colman J, Master's Lecture entitled '*Arbitration and Judges – how much interference should we tolerate?*' London, 14 March 2006, cited by Coulson J in *AMEC Group v Secretary of State for Defence* [2013] EWHC 110 (TCC) at [23].

[32] *The Athena* [2006] EWHC 2530 (Comm) per Langley J at [107].

[33] *The Trustees of Edmond Stern Settlement v Simon Levy* (above n 22) at [11].

importance. And, in *HMV v Propinvest*, Lord Justice Arden put a similar proposition:[34] … That provision [ie, s 69(3)(c)(ii) / limb two] is not one which can be used in the present case because the point which arises is one of interpretation of a purely private agreement contained in a lease …

At least three conclusions can be made about the English approach to applications for leave to appeal an arbitral award:

(a) first, the tests for granting leave to appeal per ss 69 of the *Arbitration Act 1996* (UK) are formulated on the basis of a rich and developed body of case law, extending from at least *The Nema* up to and now past *HMV v Propinvest*;
(b) secondly, sub-s 3(c)(i) of the *Arbitration Act 1996* (UK) should be distinguished from sub-s 3(c)(ii) with the former generally relating to bespoke or one-off agreements, and containing a very high threshold, and the latter generally relating to standard form agreements (or questions of law that, once resolved, would add to the certainty of commercial law) and containing a lower (albeit still a relatively high) threshold; and
(c) thirdly, courts should ordinarily consider whether to grant leave to appeal per s 69 of the *Arbitration Act 1996* (UK) on the papers, or if oral argument is required, it should be limited.

Having considered the way that the English courts have interpreted and applied the parent provision - s 69 of the *Arbitration Act 1996* (UK) - and having arrived at the three conclusions set out above, it is now appropriate to analyse the way that the Australian courts have interpreted and applied s 69's orphan provision – s 34A of the CAAs.

Australian Courts' Application of Section 34A of the Commercial Arbitration Acts

In *Cameron Australasia Pty Ltd v AED Oil Limited*, Croft J made some remarks regarding s 34A of the CAA's history (as obiter in a case considering challenges under s 34; ie, a different provision):[35]

> The provisions of s 34A of the Act allow for an appeal on a question of law arising out of an arbitral award, but only in limited circumstances, and only on an "opt-in" basis. Appeals against domestic arbitral awards on questions of law have a long history, both in England and in Australia.

[34] *HMV v Propinvest* (above n 21) at [4].

[35] *Cameron* (above n 11) at [16]; repeated in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326 per Croft J at [21].

Whilst Croft J was not asked to determine the specific application of s 34A of the CAA (Vic), his comments recognise his view that s 34A of the uniform CAAs have their roots in the English legislation.

With that context in mind, we turn to the only reported application of the test for leave in s 34A of the CAAs in Australia (at the time of writing): the Supreme Court of South Australia's decision in *Ottoway Engineering Pty Ltd v ASC AWD Shipbuilder Pty Ltd* ('*Ottoway*').[36] *Ottoway* should be read together with the Full Court of the Supreme Court of South Australia's decision in *ASC AWD Shipbuilder Pty Ltd v Ottoway Engineering Pty Ltd* ('*Ottoway Appeal*'),[37] which is the appeal of *Ottoway* but which contains only obiter remarks on certain issues regarding the test for leave to appeal.[38]

In *Ottoway*, ASC AWD Shipbuilder Pty Ltd ('ASC') and Ottoway Engineering Pty Ltd ('Ottoway Engineering') entered into a contract whereby Ottoway Engineering agreed to provide ASC certain pipe fabrication and assembly services. A dispute arose with claims and cross-claims. An arbitrator found in favour of ASC and issued an award to that effect. Ottoway Engineering, the award-debtor, applied to the Court for leave to appeal the award made against it.[39]

The issues that the Court considered can be categorised in two broad respects:[40]

a) first, whether the parties had 'opted in' to the appeal regime pursuant to the CAA (SA); and
b) secondly, if the parties had opted-in to the appeal regime, whether Ottoway had satisfied the test for leave to appeal.

The first issue is not relevant to the question of leave to appeal, but for completeness it may be noted that the Court found that the parties had opted-in to the appeal regime by way of an implied term.[41] ASC appealed that finding to the Full Court.

The second issue regarding the test for leave to appeal is central to the issues discussed in this paper.

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[36] *Ottoway* [2017] SASC 69 per Blue J.

[37] [2017] SASCFC 150 per Kourakis CJ, and Stanley and Nicholson JJ.

[38] There are Australian decisions in respect of the appeal provisions from the domestic commercial arbitration acts that preceded the uniform CAAs and the application of Lord Diplock's guidelines in *The Nema*. However, these cases preceded the uniform CAAs and so are not considered here, save to observe that Australian courts did not fully adopt Lord Diplock's narrow guidelines in *The Nema*. For a discussion of such cases see Jones, (above n 4) from [10.460].

[39] *Ottoway* (above n 36) at [1]-[8]. Regarding the terms of the contract in question, see further at [81]–[90].

[40] But see [12] where the Court sets out the five principal issues that it considered.

[41] *Ottoway* (above n 36) at [24]–[59].

Ottoway Engineering contended that the arbitrator erred in law by not providing reasons or sufficient reasons for key findings, citing s 31(3) of the CAA (SA) and the High Court's decision in *Westport Insurance Corporation v Gordian Runoff Limited* (2011) 244 CLR 239 in support. Further, Ottoway Engineering argued that the asserted failure to give complying reasons was obvious and hence that the arbitrator's decision on the question of law was obviously wrong. Ottoway Engineering argued, alternatively, that the arbitrator's compliance with s 31(3) was at least open to serious doubt, and hence the arbitrator's decision on the question of law was open to serious doubt, and that the question of whether the arbitrator's reasons complied with s 31(3) was a question of general public importance.[42]

ASC opposed Ottoway Engineering's arguments; though it appears that ASC agreed that the adequacy of an arbitrator's reasons is a 'question of law' for the purpose of s 34A of the CAA (SA).[43]

The Court considered whether to grant leave to appeal as follows. First, the Court made observations about the nature of the arbitrator's reasons.[44] Then, the Court considered the meaning of 'obviously wrong', 'open to serious doubt', and 'question of general public importance' (this is considered further below).[45] Next, the Court considered whether the arbitrator's reasons complied with s 31(3).[46] The Court resolved that it could not conclude whether it was 'obvious' that the arbitrator's reasons did not comply with s 31(3) because the parties had not addressed the relevant standard for such reasons.[47] However, the Court went on to find that it was at least open to serious doubt that the arbitrator's reasons complied with s 31(3) and that this question (namely, the question regarding the standard required of an arbitrator's reasons under s 31(3)) was a question of general public importance. On this basis, the Court found that the criterion in s 34A(3)(c) for leave to appeal was satisfied. Accordingly, the Court granted leave to appeal.[48]

In *Ottoway Appeal*, ASC appealed to the Full Court on two grounds:

a) first, that the primary court erred in finding that there was an implied term of the parties' contract that there was to be a statutory right to seek leave to appeal from the arbitral award (in other words, the parties had not 'opted-in' to the appeals regime); and

[42] Ibid at [9]-[11] and [66].

[43] Ibid at [123].

[44] Ibid at [113]-[117].

[45] Ibid at [118]-[122].

[46] Ibid at [123]-[133].

[47] Ibid at [134].

[48] Ibid at [136]-[137] and [142].

b) secondly, that, even if Ottoway Engineering did enjoy a statutory right to seek leave to appeal, the primary court erred in finding that the mandatory criteria for leave had been satisfied.[49]

The Full Court allowed the appeal on the first ground; that is, that the parties had not 'opted in' to the appeal regime by way of an implied term or otherwise. The Full Court held that for this reason it was not necessary to form a concluded view with respect to the second ground regarding the application of the test for leave to appeal.[50] Nonetheless, Nicholson J, in his reasons, made some limited observations regarding the test.[51]

In particular, Nicholson J expressed some doubt that the issue of whether or not an arbitrator had provided sufficient reasons was of a nature that readily lent itself to the criteria for leave prescribed under s 34A(3) – this is notwithstanding the parties' concession which is noted at para 123 of *Ottoway*. Justice Nicholson accepted that a failure to give reasons could be an error of law, but observed that it was not readily to be seen as a question of law which the arbitral tribunal was asked to determine in the sense envisioned by s 34A(3)(b).[52] In other words, the type of 'question' that s 34A is concerned with is one that the tribunal is asked to determine and which is answered based on the findings of fact in the award. The adequacy of the arbitrator's reasons was not a question that the arbitrator considered in the award, nor one that could be answered based on the findings of fact.

Justice Nicholson continued to observe that the previous arbitration legislation, the *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA), permitted an appeal 'on <u>any</u> question of law arising out of an award' provided that the criterion in either para (i) or (ii) of sub-s 38(5)(b) were met, amongst other things. A failure to provide adequate reasons, akin to *Oil Basins* or *Gordian Runoff* would seem to satisfy that criterion. However, the leave criteria in the CAA (SA) was 'expressed in quite different and arguably more restrictive terms.'

In light of the above, the following points can be made about the application of s 34A of the CAAs in Australia.

The first point, which is subject to the second point below, is that neither the Court in *Ottoway* nor the Full Court in *Ottoway Appeal* referred in their judgments to the English authority when considering the

[49] *Ottoway Appeal* (above n 37) at [34].

[50] Ibid at [35].

[51] Ibid at [84]–[98].

[52] Ibid at [90]–[91].

application of s 34A of the CAA (SA).[53] That is despite the Full Court in *Ottoway Appeal* stating that, 'The 2011 Act regime for appeals is very similar to that applicable in other jurisdictions'.[54]
In particular, rather than apply ss 34A(3)(c)(i) and (ii) by reference to the precise limbs and by reference to highly persuasive English case law, the Court in *Ottoway* construed ss 34A(3)(c)(i) and (ii) by reference to statutes and cases in other areas of civil procedure. Consequently, the Court in *Ottoway* concluded that the dichotomy between ss 34A(3)(c)(i) and (ii) was:[55]

> between a decision which on preliminary analysis can be confidently characterised as wrong on the one hand, and a decision which on preliminary analysis is open to serious doubt but whose correctness can only be determined after a full hearing on the other hand.

Having satisfied itself of the apparent dichotomy between sub-ss 34A(3)(c)(i) and (ii), the Court went on to find that: 'This is very loosely analogous to the dichotomy between the criteria for judgment on a summary judgment application and after a full trial, and the dichotomy between the criteria for leave to appeal against a civil judgment and for allowing the appeal.'[56]

There is arguably no language, however, in s 34A(3)(c)(ii) to support the Court's conclusion that the type of decisions that s 34A(3)(c)(ii) is concerned with are decisions 'whose correctness can only be determined after a full hearing.' In fact, had the Court referred to the English case law described above, the Court may have found that a dichotomy exists between ss 34A(3)(c)(i) and (ii) such that the former applies to bespoke or one-off agreements and the latter applies to agreements of standard form (or questions of law that, once resolved, could add to the certainty of commercial law).[57] And further, had the Court approached s 34A(3)(c) in accordance with the English case law, the Court might have found that it was dealing with a matter that fell to limb (i) and so should not have considered questions about general public importance, which are confined to limb (ii) matters.

If the Court made this finding, and bearing in mind that the underlying contract in *Ottoway* was a bespoke agreement for pipe fabrication and assembly (and not agreement of standard form),[58]

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[53] See in particular, *Ottoway* (above n 36) at [61]–[65], and [118]–[122].

[54] *Ottoway Appeal* (above n 37) at [84(Nicholson J).

[55] *Ottoway* (above n 36) at [119].

[56] Ibid *at* [119] (citations omitted).

[57] *The Nema* (aboven 16) (Lord Diplock) at 742–3; *HMV v Propinvest* (above n 21) at [4] (Arden LJ).

[58] *Ottoway* (above n 36) at [2].

the Court may not have proceeded, as it did, to consider whether the arbitrator's failure to give adequate reasons left its compliance with s 31(3) open to serious doubt and gave rise to a question of general public importance.[59]

The second point is that although it can be argued that the Court in *Ottoway* embarked upon an incorrect analysis of the dichotomy between sub-provisions (c)(i) and (ii), the Full Court in *Ottoway Appeal* did not address this and likely could not have done so properly without having an adequate set of reasons to consider. Rather, as summarised above, the Full Court observed that the question about adequacy of reasons likely does not lend itself to the test for leave in s 34A in any event – this observation being the 'low hanging fruit' to resolve the issue.

The third point is that there appears to be a genuine dilemma about how a court can approach the question of leave to appeal when the court does not have adequate reasons to assess whether an award is obviously wrong or open to serious doubt. One avoids this dilemma by concluding that questions about the adequacy of a tribunal's reasons do not lend themselves to the leave requirements in s 34A of the uniform CAAs, as Nicholson J observed. However, this does present a problem to an award-debtor who is considering whether there are grounds to appeal an award.

When an English court is faced with this issue, the court is empowered by s 70(4) of the *Arbitration Act 1996* (UK) to order the tribunal to state the reasons for its award in sufficient detail to allow the court to determine whether leave to appeal per s 69 should be granted.[60] If a tribunal fails to do so then its award may fail to comply with the form requirements in s 52(4). This would arguably constitute an irregularity, which, if sufficiently 'serious', may cause the award to be susceptible to challenge under s 68. Establishing that an irregularity is sufficiently serious requires one to establish a substantial injustice. That is a difficult task but if a tribunal's failure to give adequate reasons prevented a party from seeking to appeal the award, then such failure to give reasons may potentially amount to a serious irregularity.[61]

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[59] Ibid [134]–[137].

[60] See, Sutton et al (above n 21) at [6–028]: 'reasons are effectively a prerequisite for any appeal against the tribunal's decision, because in practice it will only be possible to argue that there has been an error of law if the tribunal has explained the basis of its findings by giving reasons'. See also [6–031]. Further, it arguably follows from s 70(4) of the *Arbitration Act 1996* (UK) that inadequate reasons do not constitute in and of themselves a question of general public importance, but merely permit the court to make an order for further reasons, which might, in the future, allow the court to consider whether leave to appeal should be granted.

[61] Ibid at [6–046].

In contrast, the uniform CAAs do not contain a provision that is equivalent to s 70 of the *Arbitration Act 1996* (UK). That means, absent another source of power, the court is not able to obtain further reasons to permit it to address the question of leave to appeal.[62]

Arguably, an award-debtor could apply to set the award aside pursuant to s 34(2)(a)(iv) of the uniform CAAs on the basis that the arbitral procedure was not in accordance with the parties' agreement.[63] The basis of this argument would be that the tribunal did not comply with the form requirements in s 31(3) regarding the giving of reasons. The award-debtor could then request that the court exercise its powers under s 34(4) to suspend the setting aside proceedings for a period of time to allow the tribunal an opportunity to take such action as in the tribunal's opinion would eliminate the ground for setting aside; namely, by the tribunal giving reasons for its decision. However, even if this route were open, it is a serious matter to apply to set an award aside merely to enliven the court's power to permit the tribunal to right a wrong by the giving of reasons. A free-standing provision that permits the court to require the tribunal to give reasons for its decision might be a more suitable way to address the matter.[64]

If the court cannot assess an award to determine if it is '*obviously wrong*' or '*at least open to serious doubt*' because there are no adequate reasons (and the party seeking leave to appeal has not obtained additional reasons under s 34(4) or otherwise (assuming that route is available)) then the court may have no option but to not grant leave to appeal on the basis that the party seeking leave to appeal has not made out its case. Harsh as this outcome may seem, it might encourage parties to take all available steps to obtain further reasons from the tribunal. Or, it might encourage an amendment to the uniform CAAs to introduce a free-standing provision akin to s 70 of the *Arbitration Act 1996* (UK).

The fourth point relates to the procedures that the Court in *Ottoway* adopted to determine the application for leave to appeal. In particular, the Court in *Ottoway* had regard to all of the arbitrator's reasons, the contract, and 'somewhat cryptic notes of the arbitration hearing by ASC's junior counsel made available to the arbitrator and the parties.'[65] The Court noted that: 'In determining whether there is serious doubt that there is an error of law under s 34A(3)(c), there is no limitation to consideration only on the face of the award and no reason not to have regard also to the pleadings, evidence and argument at

[62] It is not clear why this is so but it may be that the Australian lawmakers made a conscious decision to limit the way in which the appeal mechanism in s 34A worked, including by removing the courts' ability to order a tribunal to give further or better reasons.

[63] The parties' agreement necessarily incorporates the uniform CAA.

[64] It might also be argued that s 33(1)(b) permits a party to seek further reasons from a tribunal under the guise of 'interpretation of a specific point or part of the award'. However, it may be difficult to seek an interpretation of a part of an award that does not exist, and so this avenue is doubtful.

[65] *Ottoway* (above n 36) at [79].

arbitration'. Plainly, the Court wished to have regard to considerably more documents than Lord Diplock considered necessary when he stated that leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument'.[66]

Moreover, it appears that the parties in *Ottoway* made oral arguments before the Court in respect of the leave application (but apparently not in relation to the standard for the tribunal's reasons). In particular, there was a hearing on 27 February 2017 and it is apparent from the judgment that the parties made submissions on various aspects of the application (although the judgment is not conclusive on these facts).[67] Whilst, s 34A(5) of the CAA (SA) provides: 'The Court is to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required', the Court did not disclose why it considered that a hearing was required (if indeed there was a hearing). This too, it appears, contrasts with what Lord Diplock envisaged in his speech in *The Nema*, and which the Court of Appeal warned of in *HMV v Propinvest* when it stated, 'the point I wish to make is it must be rare that a court finds it necessary to call for further argument orally'.[68]

As an aside, it is noted that whilst there are no other reported Australian decisions on the granting of leave pursuant to s 34A of the CAAs (that the authors are aware of at the time of writing), the Supreme Court of New South Wales did grant leave to appeal an arbitral award in *WARU v ARU*, where the appeal was unsuccessful.[69] However, the Court did not publish reasons on the leave to appeal issue. It is apparent from the reasons (at [61]-[62]) that the Court had concern with the approach of the arbitrator to the use of evidence of the background circumstances to interpret the contract in issue there and this may have led to the grant of leave to appeal on that question of law. However, in the absence of reasons on the point the decision cannot be relied on for a point that it was unnecessary to deal with given that the language of the contract there concerned was sufficiently clear and unambiguous.

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[66] *The Nema* (above n 16) at 742–3. Cf *Murray & Roberts Australia Pty Ltd v G B Lifestyles Pty Ltd* [2013] WASC 345 per Martin CJ at [37]–[57] but noting that the Court was considering the old Act.

[67] Regarding the hearing date, see the footer on the first page of *Ottoway* (above n 36). For examples of the parties' arguments, see [24] and [45], amongst others.

[68] *HMV v Propinvest* (n 21) at [41] (Arden LJ). See also *Merthyr* (above n 30), (Matthews J) at [16].

[69] *Western Australian Rugby Union v Australian Rugby Union Ltd* [2017] NSWSC 1174 per Hammerschlag J at [1].

The fifth and final point concerns the question as to whether parties can agree in advance to dispense with the requirement to obtain leave in s 34A of the uniform CAAs (this question does not arise and was not considered in *Ottoway* or *Ottoway Appeal*, but arises under the uniform CAAs and s 34A generally).

There may be an argument under Australian law concerning illegality or public policy limitations on such a dispensation. That is, the leave requirement (rather than the right of appeal itself) has both public and private purposes, such that it may be impermissible to dispense with it by agreement[70] or by waiver.[71] The public character or dimension of the leave requirement may include, depending on what may be discerned from the uniform CAAs on their proper construction:

a) the clear mandatory language of s 34A(1)(b) for the requirement that the Court grant leave, as separate from the parties' assent to confer the appeal right in s 34A(1)(a);
b) preserving the finality and confidentiality of arbitration awards more generally, to encourage arbitration as a dispute resolution mechanism in Australia; and
c) reducing the impost on the public court system by hearing appeals, even if there is no significant question or importance in the matter.

Viewed in this way, the parties may, by purporting to pre-agree the grant of leave, be attempting to side-step the Court's express control and possible public benefits of imposing a gateway to an appeal.

Courts in England, however, have taken a different approach and this seems explicable on the salient difference in language between s 34A(1) of the uniform CAAs and s 69(1) of the UK Act. Section 69(1) of the latter provides that an appeal shall not be brought except (a) with the agreement of all of the parties to the proceedings, 'or' (b) with the leave of the court. Critically, the uniform CAAs provide a conjunctive 'and' not a disjunctive and the difference may be material.

Accordingly, in *Royal & Sunalliance Insurance Plc v BAE Systems (Operations) Ltd* [2008] EWHC 743 (Comm); [2008] 1 CLC 711, the English Court considered whether the parties had agreed to

[70] *Yango Pastoral Company Pty Ltd v First Chicago Australia Pty Ltd* (1978) 139 CLR 410, at 413, 423, 425; *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446, at 457–8 [25]; *Gnych v Polish Club Ltd* [2015] HCA 23; (2015) 255 CLR 414, at 424-5 [35]–[39], 430–5 [59]–[75].

[71] *Graham v Ingleby* [1848] EngR 92; (1848) 1 Exch 651, at 657; (1848) 154 ER 277, at 279 ('an individual cannot waive a matter in which the public have an interest;); *Brooks v Burns Philp Trustee Co Ltd* [1969] HCA 4; (1969) 121 CLR 432, at 456; *Metropolitan Health Service Board v Australian Nursing Federation* [2000] FCA 784; (2000) 99 FCR 95, at 104–5 [20]; *Wiltrading (WA) Pty Ltd v Lumley General Insurance Ltd* [2005] WASCA 106; (2005) 30 WAR 290, at 307 [53]; *Westfield Management Ltd v AMP Capital Property Nominees Ltd* [2012] HCA 54; (2012) 247 CLR 129, at 143–145 [46].

dispense with the leave requirement and found that they had (at [34]-[35]). The ability to contract out of this requirement is also identified in *Russell on Arbitration*.[72]

In light of the above, at least five conclusions can be made about the Australian approach to applications for leave to appeal an arbitral award under the uniform CAAs:

a) first, given s 34A's obvious English origins, sub-ss 3(c)(i) and 3(c)(ii) arguably should be construed in the same manner as their parent provisions in s 69 of the *Arbitration Act 1996* (UK) with the former generally relating to bespoke or one-off agreements, and containing a very high threshold, and the latter generally relating to standard form agreements (or questions of law that, once resolved, would add to the certainty of commercial law) and containing a lower (albeit still a relatively high) threshold;
b) secondly, the Australian position has only been tested in *Ottoway* and *Ottoway Appeal* which may not be the best vehicles for the court to address s 34A's English history or any potential distinction between sub-provisions (division?) (c)(i) and (ii);
c) thirdly, the uniform CAAs appear to not contain a convenient provision that empowers the court to require the tribunal to give further reasons for its award, although there is an argument that such an outcome can be reached via s 34(4), and this leaves parties with a difficult choice on how to deal with an arbitral award that contains inadequate reasons;
d) fourthly, the starting position under s 34A(5) is that the court should determine an application for leave to appeal without a hearing, but, at least in Ottoway, the court held a hearing without stating why such hearing was necessary; and
e) fifthly, it is not clear whether parties can contract out of, or waive, the leave requirements in s 34A but the better position appears to be that parties cannot do so.

Conclusion

While it has taken some time for Australian courts to be faced with the first appeals against arbitral awards under the uniform CAAs, it is apparent from the Full Court's decision in *Ottoway Appeal* that Australian courts will follow closely the prescriptive leave requirements in s 34A. However, to date, Australian courts have not expressly recognised a distinction between ss 34A(3)(c)(i) and (ii) such that the former applies to bespoke or one-off agreements and the latter applies to agreements of standard form (or questions of law that, once resolved, could add to the certainty of commercial law), as the English courts have done in respect of the parent provision – s 69 of the *Arbitration Act 1996* (UK). It

[72] Sutton et al (above n 21) at [8–134] fn 625.

remains to be seen how the Australian courts will construe s 34A going forward, assuming such an opportunity arises.

Conflict Coaching Skills for Lawyers: A Response to the Evolving Demands of Legal Service Provision

Richard Dening[1]

Abstract

Conflict Coaching may provide skills and an example of a framework for improving the client's experience of the legal system and accessing legal assistance. The article considers several major criticisms of the legal system and the role and practice of lawyers. It then considers what these movements have suggested lawyers should do to improve their services and identifies alignments between these suggestions and the skills espoused in Conflict Coaching.

Introduction

This article presents skills from the emerging practice of as a potential response to progressive change in the demands of legal service provision. The legal system has in recent decades, been subject to criticism related to the adverse effects it can have on its participants. Changes to the legal system including increasing costs and delays, a shift to settlement focus and the rise of therapeutic jurisprudence have necessitated a shift in the way in which lawyers and their clients interact. These movements and others have also proffered solutions to many of the problems of its perceived adverse effects on participants. There has been a particular focus on the up skilling of lawyers to be more responsive to their clients' needs. These, however, have not necessarily been formulated into a comprehensive model of practice.

Conflict Coaching has evolved as an approach to conflict management for situations where, for whatever reason, the other party or parties to a conflict are not directly involved. Conflict Coaching, whilst still in an early stage of development, builds on the fields of executive coaching and conflict resolution, and borrows from other therapeutic interventions. Whilst it does not answer the call for a new model of practice for lawyers, it does present a model where skills and understanding from the behavioural sciences and conflict resolution have been applied in a non-clinical one-on-one professional relationship. Conflict Coaching provides a relatively simple and easy to implement approach which can inform legal practice and respond to the demands of a changing legal service-provision environment.

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What is Conflict Coaching?

Conflict Coaching combines the fields of coaching and conflict management.[2] It is a one-on-one process involving a disputant and a facilitator who is usually a conflict resolution professional. The process involves the two communicating for the purposes of developing the disputant's understanding of the conflict and strategies for approaching it.[3] It can be used to resolve or prevent a dispute, prepare for an interaction, or to develop the person's conflict management competency and leadership skills.[4] The Conflict Coach's role is a unique one, because it is designed to 'attend solely to the client and the client's agenda.'[5] Conflict Coaching makes space for the client to explore and make sense of conflict, to make and test plans for the management of conflict, and to design specific responses for the client to enact.[6] The types of conflict-related goals are limitless but reflect a unilateral desire to manage conflict by building the skills and confidence to do so.[7] The client retains ownership of the conflict and responsibility for its management.[8]

Conflict Coaching has been proposed for a variety of settings. The process is believed to have originally emerged in 1993 at Macquarie University as an intervention employed where one party to a conflict declined mediation.[9] It is particularly useful, in this respect, because for people who are in conflict and experiencing stress or high emotion, engaging with the other person is often beyond their capacity.[10] Conflict Coaching has also been used to prepare parties to participate in mediation.[11]

Conflict Coaching is still a burgeoning field and there is still work to be done to develop a consensus around what Conflict Coaching looks like and how it should be done. This, combined with a lack of a

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[2] Cinnie Noble, 'Conflict Coaching: An Emerging Trend in the ADR World' (Paper presented at the Asia Pacific Mediation Forum Conference, Malaysia, 18-20 June 2008) 2 < https://www.cinergycoaching.com/wp-content/uls/2015/07/Conflict-Coaching-APMF-2008.pdf> accessed 18 August 2020.

[3] Ross Brinkert, 'Conflict Coaching: Advancing the Conflict Resolution Field by Developing an Individual Disputant Process' (2006) 23(4) *Conflict Resolution Quarterly* 517–528.

[4] Cinnie Noble, 'Conflict Coaching for Leaders' on *Mediate.com* (May 2003) <https://mediate.com/articles/noble3.cfm> accessed 18 August 2020; Ross Brinkert 'The ways of One and Many: Exploring the Integration of Conflict Coaching and Dialogue-Facilitation' (2013) 12 *Group Facilitation: A Research and Applications Journal* 46.

[5] Julie Starr, *The Coaching Manual* (Pearson Education, 3rd ed, 2010) 4, 8, quoted in Judith Herrmann, 'A Comparison of Conflict Coaching and Mediation as Conflict Resolution Processes in the Workplace' (2012) 23 *Australasian Dispute Resolution Journal* 47.

[6] Brinkert, (above n 3), 518.

[7] Noble, (above n 2), 3.

[8] Brinkert, (above n 3), 524.

[9] Alan Tidwell, 'Problem Solving for One' (1997) 14(4) *Mediation Quarterly* 311.

[10] Captain Helen Marks, 'Results through People' *Defence* (Canberra) August 2005, 1.

[11] Noble, (above n 2), 6.

single driver behind the development of Conflict Coaching, means that there are currently a variety of different models in existence. One model of Conflict Coaching is REAL from Conflict Coaching International. The REAL acronym reflects the model's conception of the coach's role to assist the client to:

- *reflect* – clarifying the conflict situation and understanding the needs and goals of the parties to the conflict, including their own;
- constructively *engage* with the conflict rather than avoid it, and to identify and evaluate their choices; as well as to
- *learn* new skills and develop confidence in their ability to manage conflict 'at the level of *artistry*.'[12]

The REAL model includes an intake stage which involves establishing rapport, performing a client needs analysis, assessing the clients readiness for coaching and the match between client and coach, providing information about the coaching process, and then obtaining informed consent to proceed.[13] The coaching session itself involves the client setting a goal for the interaction, before engaging in a story-telling process so the client can reflect on what happened and unpack why it matters. The coach assists the client to assess the incident through a variety of different perspectives, including that of the other disputant. The coach then facilitates the client to imagine another preferred future and then to chart the necessary steps to achieve that future. This is followed by a reflection on the learnings obtained and concluding the session.[14] Coaching utilises a specific goal or goals and occurs over a finite term. The process is concluded by reviewing the coaching, reinforcing learnings, making referrals to other services (where necessary), and finally an evaluation of the coaching process.[15] Key skills exhibited by a REAL conflict coach include rapport building, deep or intentional listening, effective summarising, reflecting and acknowledgment of emotions, using appropriate questioning and non-directive language, challenging the client's perspective, and providing feedback to encourage greater insight.[16]

Why Lawyering and the Legal System Must Change

Before examining the ways in which Conflict Coaching may assist in improving the provision of legal services, it is important to first make the case for why these services need to change. The legal system in common law jurisdictions has been the subject of considerable criticism related to increasing costs

[12] Nadja Alexander and Samantha Hardy, 'Real Conflict Coaching: Fundamental 4-day Workshop' (2013) 3 *Conflict Coaching International* 31-33 (emphasis added).

[13] Ibid 33–36.

[14] Ibid 42–65.

[15] Ibid 66–68.

[16] Ibid 69–89.

and delays.[17] It has also been criticised as being excessively formal and intimidating[18] and as making justice inaccessible to most people.[19] This has been associated with increasing rates of dissatisfaction amongst parties to legal proceedings and the general public.[20] As a result, many people no longer see a relationship between going to a lawyer and solving a problem they may have.[21] Lawyers have further alienated the general public by increasingly targeting their services at institutional clients.[22] These clients, however, demand legal services which are responsive to commercial needs, including avoiding unnecessary expense, delays and destruction of commercial relationships.[23]

The above factors have been an important impetus for the proliferation of early and informal dispute resolution processes, and an increasing focus away from trials toward settlement.[24] Notwithstanding this shift, adversarialism persists and may have become even more entrenched in the legal system due to the ultra-competitive environment which developed in the latter part of the twentieth century.[25] This has been compounded by failings in the education of our next generation of lawyers – to recognise and impart the skills which will equip them to respond to this changing environment and the changing expectations of their clients.[26] As a result, the rise of early and informal resolution hasn't had the empowering impact for disputants that had been hoped for. Indeed, many lawyers remain sceptical of allowing their clients to fully engage in mediation, motivated by a desire to retain control over the dispute resolution process.[27] Whilst lawyers have suggested that legal representation will boost parties confidence to participate in mediation, where they are acting as gatekeepers this has, in fact, undermined self-determination and client satisfaction.[28]

The therapeutic jurisprudence ('TJ') movement has been another avenue of criticism of the legal system. Therapeutic jurisprudence asserts that law is a social force which impacts upon the psychological

[17] Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* UBC press, 2008) 1.

[18] Ibid 131.

[19] Charles Owen, Ronald Staudt and Edward Pedwell 'Access to Justice: Meeting the Needs of Self-Represented Litigants' (Report, National Center for State Courts (US), Illinois Institute of Technology & Chicago-Kent College of Law, 2001) 3–4.

[20] MacFarlane, (above n 17).

[21] Ibid 132.

[22] Ibid 1.

[23] Ibid; Jill Chanen, J, 'The Heart of the Matter' (1995) 81 *The American Bar Association Journal.*

[24] MacFarlane, (above n 17), 7.

[25] Ibid 13.

[26] Ibid 15.

[27] John Campbell, 'Mediation – Don't Miss Out on the "Hidden" Benefits' (2013) June *Proctor*, 44.

[28] Alison Finch, 'Harnessing the Legal and Extralegal Benefits of Mediation: A Case for Allowing Greater Client Participating in Facilitative Mediation' (2010) 21 *Australasian Dispute Resolution Journal,* 162.

functioning of participants in the system.[29] In the civil system, the family courts have been particularly criticised by TJ as encouraging parties to have negative and unrealistic perceptions of each other, evoking shame and hostility.[30] Allan has contended that the family law system discourages problem-solving, casts help-seeking as capitulation, reduces ownership of solutions, and reduces all acts to moves in a tactical game.[31]

It has also been asserted that lawyers have exerted undue influence on the agency of their clients. This unspoken authority exerted over clients, is exercised in simple actions such as making recommendations without an explanation.[32] Lawyers have similarly propagated the image of themselves as the

> holders of knowledge' to an inaccessible legal system. This provides lawyers with control over even what their clients expectations will be,[33] and undermines their accountability for the way in which they provide their services.

Lawyers are also accused of completely misunderstanding the needs and wants of their clients. Most lawyers believe that end results are what determine client satisfaction with their services. Most clients, however, indicate that the way in which services are delivered is essential to their satisfaction with their lawyers.[34] This is further illustrated by a 2009 survey which found that most medical negligence lawyers consider their clients sued only for money. The study found that in reality their clients' main drivers were to seek an admission of responsibility and to prevent the accident from occurring again.[35]

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[29] Dennis Stolle, David Wexler and Bruce Winnick, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina University Press, 2000) cited in Dian Bryant CJ and John Faulks J, 'The "helping court" comes full circle: The application and use of therapeutic jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 94.

[30] Alfred Allan, 'Therapeutic Jurisprudence in Family Law' (Paper presented at the Family Court of Western Australia's Conference 'In the Child's Best Interest', Perth, 9 November 2001) cited in Dian Bryant CJ and John Faulks J, 'The "helping court" comes full circle: The application and use of therapeutic jurisprudence in the Family Court of Australia' (2007) 17 *Journal of Judicial Administration* 97.

[31] Ibid.

[32] Lucy Lauziere, 'Dependence and Interdependence in the Lawyer-Client Relationship' in The Law Commission of Canada (eds), *Personal Relationships of Dependence and Interdependence in Law*, (UBC Press, 2000) 71; Finch (above n 28), 159.

[33] William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 2000) cited in MacFarlane (above n 17), 127.

[34] Marcia Pennington Shannon 'Cultivating the Art of Effective Client Communications' (2011) 37 *Law Practice Magazine* cited in Campbell, (above n 24), 46.

[35] Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants and Gendered Plaintiffs* (Cambridge University Press, 2009) cited in Finch (above n 26) 160.

How Conflict Coaching Can Assist Lawyers to Respond to the Evolving Demands of Legal Service Provision

Given the criticism outlined above, it is clear that the legal profession must make some significant changes to the way it provides services in order to maintain its relevance to the business of dispute resolution. The following section describes some of the various ways the literature has suggested lawyers improve the provision of legal services and considers the ways in which Conflict Coaching can provide skills and an example of a framework that lawyers may be able to utilise to achieve this aim.

Effectively Engaging in Conflict Resolution Processes

As outlined, the decline of litigation in favour of conflict resolution processes has necessitated a change in the focus of lawyering. Conflict Coaching skills may assist lawyers to better prepare their clients for engaging in informal and early dispute resolution. Processes such as mediation provide for and often demand greater involvement from clients.[36] Lawyers can assist their clients to prepare for mediation by accurately explaining the process, assisting them to consider their interests, and by using their legal knowledge to assess the risk-profile of settlement.[37] Preparation for mediation will also assist in identifying areas requiring further clarification, can deepen a client's understanding of the legal issues, may 'reality test' areas of weakness in the client's case, may address a client's unreasonable expectations, and may assist in further developing their litigation strategy.[38] Conflict Coaching offers tools for operating in a facilitative way, and has been suggested as an ideal way to assist disputants to prepare for mediation.[39]

The influences which have resulted in a shift in the focus of clients from litigation to conflict resolution has also led to new information being important to lawyers. For example, in commercial matters, lawyers should now be concerned with the client's business relationship with the other disputant – considering its duration, what future opportunities there may be together, and whether there is an interest in maintaining the relationship long-term. This demands lawyers know a lot more than just the facts of the case and the legal rights and obligations in the dispute.[40] Conflict Coaching provides a model and a

[36] MacFarlane, (above n 17), 135.

[37] Donna Cooper and Mieke Brandon, 'How Can Family Lawyers Effectively Represent Their Clients in Mediation and Conciliation Processes?' (2007) 21(3) *Australian Journal of Family Law* cited in Finch, (above n 28), 162.

[38] Campbell, (above n 27), 45.

[39] Noble, (above n 2), 6; Alexander and Hardy, (above n 12), 23.

[40] MacFarlane, (above n 17), 140.

set of skills for seeking and obtaining this information and considering it in the design and testing of resolution strategies.[41]

Empowering Clients

Conflict coaching also provides a framework for increasing clients' sense of control over their own situation and its effective resolution. As discussed above, lawyers have a great power to influence their clients' decision-making process. As a result, they are well placed to encourage their clients' active participation in resolution processes and ownership of outcomes. This requires a shift from the role of aggressive advocate[42] to one of facilitating the client to be active in shaping and testing solutions to a problem and advocating for themselves in negotiations with the other side.[43]

In order to become what MacFarlane calls the 'New Lawyer', one must be self-aware about their personal biases, and present a variety of options to the client to ensure that these don't interfere with the client's decision-making process.[44] This requires a complex balance between performing due diligence and offering the expertise which the client is paying for, and creating space for the client to truly enact their autonomy.[45]

Conflict Coaching offers skills to assist in this endeavour, it privileges client self-determination by using a facilitative style.[46] Conflict Coaches achieve this by avoiding the provision of advice, recognising that this advice usually reflects their own believes, values, opinions, desires and flawed understandings.[47] REAL Conflict Coaches go so far as to use tentative and non-directive language, as well as avoiding questioning and other practices which might unnecessarily centre them in the process. REAL Coaches recognise clients as the experts in their own lives, and ultimately the client's responsibility for managing their own conflict.[48]

[41] Brinkert, (above n 3), 518.

[42] Finch, (above n 28), 161.

[43] Wilton Sogg 'What do we do now, coach?' (1998) 44(5) *Practical Lawyer*; MacFarlane, (above n 14) 24.

[44] MacFarlane, (above n 17), 24, 142.

[45] Ibid 144, 157–158.

[46] Brinkert, (above n 3), 524; Ross Brinkert, 'The ways of One and Many: Exploring the Integration of Conflict Coaching and Dialogue-Facilitation' (2013) 12 *Group Facilitation: A Research and Applications Journal*, 46.

[47] Noble, (above n 2), 13.

[48] Starr, (above n 5), cited in Alexander and Hardy, (above n 12), 77, 83.

Becoming the 'Therapeutic Lawyer'

Conflict coaching also potentially provides an avenue for implementing the logic and wisdom contained in the TJ movement. Whilst this article has already outlined the ways in which TJ highlights the legal system's ability to negatively impact upon participants, the main thrust of TJ is to use the legal system to achieve therapeutic goals by drawing on the tools of the behavioural sciences.[49]

Legal proceedings are often one of the most stressful life events for people, so there is an important impetus for lawyers to act in a manner which minimises negative effects on their clients and maximises the opportunities for positive growth.[50] It is important for lawyers seeking to act therapeutically to understand their client's emotions and other psychological processes related to the resolution of a legal problem.[51] Therapeutic jurisprudence suggests lawyers and clients work together to identify 'psycho-legal soft spots' – sources of anxiety, depression and hurt which may be unintended consequences of the legal process or strategy.[52] A client's inability to resolve emotional issues related to a legal problem may prevent a dispassionate assessment of the legal options available to them, potentially leading to a protracted litigation process.[53] It can also impede the client's ability to utilise the advice provided by the lawyer and even undermine their satisfaction with the outcomes.[54] Therapeutic jurisprudence suggests lawyers should encourage their clients to tell their story, being attentive to the details, showing understanding by seeking clarification and providing advice which takes their full range of concerns into account.[55] This demands high levels of self-awareness by lawyers – of their own emotions, motivations, biases and behavioural patterns to manage their reactions to clients and ensure that they are fostering therapeutic outcomes.[56]

Conflict Coaching provides a vehicle of acquiring these high levels of self-awareness which are required to avoid undermining the client's self-determination.[57] Similarly, most models of Conflict Coaching propose some kind of story-telling process and prescribe a set of skills for facilitating this. For example,

[49] Bryant and Faulks, (above n 30).

[50] Michael King, 'Therapeutic jurisprudence in Australia: New directions in courts, legal practice, research and legal education' (2006) 15 *Journal of Judicial Administration*, 137.

[51] Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review*, 1122.

[52] MacFarlane, (above n 17), 137.

[53] Ibid.

[54] Finch, (above n 28), 160; Stephanie Sogg and Wilton Sogg, 'Coping with adversity: Your clients' and your own' (2000) 46(6) *Practical Lawyer*, 28.

[55] King 2006, (above n 50), 136.

[56] Susan Daicoff, 'Growing pains: The integration vs. specialisation question for therapeutic jurisprudence and other comprehensive law approaches' (2008) 30 *Thomas Jefferson Law Review*, 557.

[57] Noble, (above n 2), 13; Brinkert, (above n 3), 524.

the REAL Conflict Coaching model provides that it is the coach's role to non-judgementally and supportively assist the client to understand their own situation, including all relevant factors and assumptions before making decisions about how to improve the situation. The coach does this by helping the client to tell their story and promote thinking which acknowledges complexity. [58] REAL encourages coaches to explore the emotional content of the dispute and examine their feelings resulting from the conflict, how those are being expressed, their impact on options for taking action, and what might need to happen to create positive emotions.[59]

But what does a lawyer do when a client chooses an option that the lawyer considers is not in the client's best interest? Therapeutic jurisprudence does not condone coercive persuasion as this does nothing to assist the client's awareness of the unfortunate consequences of the choice and to make a better one.[60] Therapeutic jurisprudence suggests that lawyers use 'motivational interviewing'[61] to overcome defence mechanisms which manifest as resistance, expressing empathy and highlighting inconsistencies between the client's behaviour and goals whilst avoiding oppositional arguments.[62] Conflict Coaching also privileges client self-determination, but provides techniques for challenging misalignments between behaviours and identified goals.[63] REAL Conflict Coaches will challenge the client's story, looking for assumptions, potential biases, and inconsistencies in the story in order to explore different interpretations of the events.[64] They do this by helping the client to explore the situation from a range of perspectives and inviting clients to examine and modify some aspect of their thinking or behaviour. Successfully applied it can lead to greater client self-awareness but must be applied sensitively to avoid damaging the relationship between coach and client.[65]

Embracing 'Counselling' Skills

Lawyers reading this article may, by this point, be saying to themselves: *But I'm not a counsellor!* Indeed, this is not what the client has come to the lawyer for. Nevertheless, some authors have supported

[58] Alexander and Hardy, (above n 12), 45-46.

[59] Ibid 55.

[60] King 2006, (above n 50), 136.

[61] 'Motivational interviewing is a collaborative conversation style for strengthening a person's own motivation and commitment to change.' William Miller Stephen Rollnick, *Motivational interviewing* (3rd ed, The Guilford Press 2013) 12.

[62] King 2006, (above n 50), 137.

[63] Noble, (above n 2), 13.

[64] Alexander and Hardy, (above n 12), 49.

[65] Richard Nelson-Jones *Lifeskills Helping: A Textbook of Practical Counselling and Helping Skills* (Holt, Rinehart and Winston 1992) cited in Alexander and Hardy, (above n 12), 85.

the use of counselling skills to assist lawyers to function more therapeutically.[66] But where does a 'therapeutic lawyer' draw the line to ensure they are not functioning dangerously out-of-scope? Conflict Coaching provides an example of a model and practice where therapeutic skills are applied within a narrow scope which does not stray into 'therapy'.

Conflict Coaching shows strong alignment with many important aspects of counselling practice. For example, Rogers suggests that there are three conditions which are necessary for therapeutic progress in a counselling relationship, these are:

- Congruence – whereby the counsellor is genuine in their interactions with the client.
- Unconditional positive regard – whereby the counsellor accepts their client regardless of client's flaws.
- Empathic understanding – listening to and understanding what is going on for a client and being able to reflect this understanding in some way.[67]

Rogers asserts that if a counsellor can express the above characteristics this will make the client feel safe, valued, free to be creative and take risks, and free from judgement.[68] This would accord with Conflict Coaching's preference for non-judgemental and supportive interactions between coaches and clients.[69]

Egan suggests that therapeutic relationships can be further strengthened by challenging clients to identify the 'blind-spots' in their stories and to gain insight. Examples of blind-spots may include a failure: to own a problem; to define a problem in a manner which is amenable to solving; to understand the consequences of their actions; or faulty interpretations of experiences, distortions and evasions.[70] Challenging the client and identifying 'holes' or 'blind-spots' in the client's story is also an essential component of most Conflict Coaching models.[71]

Brayne draws on the work of Egan who also suggests a three-stage approach for implementing counselling skills as a lawyer:

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[66] Hugh Brayne, 'Counselling Skills for the Lawyer can Lawyers Learn Anything from Counsellors?' (2010) 32(2) *The Law Teacher*, 142.

[67] Carl Rogers, *On Becoming a Person* (Houghton Mifflin, 1961) cited in Brayne, (above n 66), 143; Steven Keeva, 'Beyond the Words' (1999) 85 *American Bar Association Journal*, 63.

[68] Brayne, (above n 66); King 2008, (above n 51), 1123.

[69] Alexander and Hardy, (above n 12), 45.

[70] Gerard Egan, *The Skilled Helper* (Brookes/Cole Publishing Company, 1994) cited in Brayne, (above n 66), 147.

[71] For example, Alexander and Hardy, (above n 12), 49.

1. Review the scenario in order to help the client identify, expand and clarify their problem.
2. Develop a preferred scenario so as to assist the client to identify their goals based on this understanding of the problem.
3. Help the client to develop an action plan for getting what they want.[72]

This approach is also shared by most Conflict Coaching models.[73]

Whilst Barton concedes that many legal clients will not need psychological therapy, their problems will inevitably involve strong emotions or damage to relationships – for which the counselling skills will be particularly useful.[74] Barton encourages lawyers to be bold in implementing these strategies in their practice. To do so he suggests that lawyers must trust themselves to engage with people about their feelings and relationships. Indeed asking open-ended questions, reflecting the client's words and behaviours, identifying feelings, and prompting clients to identify and evaluate solutions are not beyond the capabilities of lawyers.[75] At the same time lawyers must trust their clients, that they are not morally inept or without the capacity for reflection.[76]

Whilst Conflict Coaching has been suggested as having its origins in brief therapy,[77] and acknowledges that its interventions may have therapeutic value, Conflict Coaching is not supported by the same training and regulatory structures which counselling is, and is also more future focused.[78] It does, however, provide a precedence and a model which may assist lawyers to implement many of the above counselling skills outside the counselling framework.

Becoming an Intentional Listener

Conflict coaching also offers a range of skills and an example of a framework for a lawyer attempting to engage in more effective listening with their clients. Keeva suggests that good listening is a way for a lawyer to distinguish themselves from other technically strong practitioners. Listening only for the facts as they relate to the legal issues denies the client the opportunity to explore how they feel about the problem, to discuss the actions of the parties to the dispute, and what kind of outcome would provide

[72] Egan cited in Brayne, (above n 66), 146.

[73] For example, Alexander and Hardy, (above n 12), 27–28.

[74] Thomas Barton, 'Therapeutic Jurisprudence, Preventive Law, and Creative Problem Solving: An Essay on Harnessing Emotion and Human Connection' (1999) 5(4) *Psychology, Public Policy, and Law*, 934.

[75] Ibid 942.

[76] Ibid.

[77] Tidwell, (above n 9), 312.

[78] Noble, (above n 2), 11.

them with satisfaction – all of which are relevant to how the lawyer proceeds.[79] Similarly, if the lawyer does not dig deeper they are likely to only hear which facts support the client's position and their desire to exact revenge on the other party. As such, deeply listening allows lawyers to piece together a more complete factual scenario.[80]

In order to achieve this style of listening, lawyers must learn a new style of questioning. Chanen suggests that lawyers use 'enlightened stupidity' to dig deeper instead of filling the gaps and metaphors of what people say with their own assumptions.[81] Chanen also suggests that lawyers treat pauses in the conversation as an important process for reflection and thought in both the client and in themselves.[82] MacFarlane conceives of this listening process as 'working from the client's own narrative, rather than imposing an external framing of the issues'.[83] She suggests that this process will also assist greatly in preparing clients to engage in non-legal processes such as mediation.[84]

Conflict Coaching models provide guidance for the use of active or intentional listening and other techniques designed to facilitate the client's exploration of what's going on in the situation.[85] REAL Conflict Coaches provide the client with a safe and attentive space to talk through their concerns, to identify gaps or inconsistencies and to notice how the client is feeling about what they're saying. This deep or 'intentional listening' process, which involves only minimal and brief verbal and non-verbal interventions, encourages further exploration and a sense of the client having the coach's overt attention.[86]

Benefits for Lawyers Using Conflict Coaching Skills

This article has outlined the ways that Conflict Coaching skills can improve client experience, however, there is also potential for significant benefits to flow for lawyers themselves. Daicoff reports significant dissatisfaction amongst lawyers with their profession, particularly for lawyers with humanistic, interpersonal orientations and whose personalities do not sit well with traditional legal practice.[87] She suggests that TJ practices allow lawyers to 'help people, prevent harm, avoid interpersonal conflict,

[79] Steven Keeva, 'Beyond the Words' (1999) 85 *American Bar Association Journal*, 61.

[80] Ibid.

[81] Jill Chanen, J, 'The Heart of the Matter' (1995) 81 *The American Bar Association Journal,* 78.

[82] Ibid.

[83] MacFarlane, (above n 17), 137.

[84] Ibid 139.

[85] Ross Brinkert, 'The ways of One and Many: Exploring the Integration of Conflict Coaching and Dialogue-Facilitation' (2013) 12 *Group Facilitation: A Research and Applications Journal*, 46; Alexander and Hardy, (n 12), 74.

[86] Alexander and Hardy, (above n 12), 72.

[87] Daicoff, (above n 56), 838, 843.

build and maintain relationships instead of tear them asunder, and become a positive force in people's lives rather than a necessary and often hated evil.'[88] On a commercial level, a lawyer utilising Conflict Coaching skills can create stronger relationships with their clients, and may in turn maximise opportunities for further business.[89] MacFarlane also suggests that by shifting the moral and practical responsibility from lawyer to client, this assuages what is a significant source of stress for lawyers.[90]

Conclusion

This article has attempted to make a case for the use of Conflict Coaching skills to assist lawyers to address criticisms of lawyering and the legal system and respond to a shift in the needs and expectations of their clients. As outlined, there are strong links between the changes to legal service provision which have been suggested by movements such as TJ and the values and skills which are espoused by Conflict Coaching. Lawyers cannot act as Conflict Coaches, whilst still being lawyers, owing to mutually exclusive positions on aspects such as the provision of advice, and clients are unlikely to attend lawyers for purely facilitative services. However, there is reason to believe that incorporating Conflict Coaching skills into the lawyer's toolkit can produce real benefits for clients and lawyers alike.

[88] Ibid.

[89] Campbell, (above n 27), 46.

[90] MacFarlane, (above n 17), 141.

Love Thy Neighbour? A Review of the Duty of Care in Construction and Property in NSW

Pamela Jack,[1] Jennifer Cohen[2] and Emily Miers[3]

Abstract

This article addresses issues which although not strictly within the realm of alternative dispute resolution raise matters which are highly relevant to all disputes lawyers who practice in property and construction. The establishment of a duty of care for economic loss in NSW pursuant to the Design and Building Practitioners Act 2020 (NSW) *marks a milestone in what has been a chaotic journey over the last 90 years. This article explores the development of this duty of care and demonstrates that the courts have left much to be desired. This reform now appears to signal an effort to achieve greater certainty, stronger consumer protection and ultimately an evolution of our values as a community towards loving thy neighbour.*

Introduction

A duty of care is particularly significant in the areas of construction and property, as it may provide relief to owners who suffer economic loss due to a building defect, when relief may not otherwise be available under a contract or statute. This is particularly relevant to owners whose rights under contract or statute have expired, or to subsequent owners where no contractual relationship with the builder exists. It is no wonder that this duty of care is in high demand. However, just like all things in demand, it has historically been scarcely available and has come at a high price as the courts have debated at length whether, and in what circumstances, the duty of care exists.

Courts have grappled with this question for the last 90 years resulting in 'confusion approaching chaos'[4] reigning over the law of negligence. Since Lord Atkin famously declared in 1932[5] that we have a duty to take care for our neighbours to prevent their physical injury, Courts have been divided about whether this duty also extends to economic loss. Accordingly, the crux of the debate is seemingly a normative

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[4] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 ('*Woolcock'*), [45] (McHugh J).

[5] *Donoghue v Stevenson* [1932] AC 562 ('*Donoghue*').

question, about the extent to which we ought to 'love thy neighbour'. It is no surprise why chaos has ensued within courts, between courts, and between common law jurisdictions.

The development of the duty of care has journeyed through many phases of expansion and contraction as courts worked to create a universally applicable approach that delicately balances public policy concerns. As different approaches have been tested, abandoned and re-iterated, legal principles have also been formulated. This has exposed various conceptual and practical challenges, including the general uncertainty about when a duty of care exists, the relevance of the distinction between residential and commercial premises and purchasers (if any), as well as the proper province of concurrent liability.

The journey has now taken a sharp turn in NSW with the introduction of a statutory duty of care pursuant to the *Design and Building Practitioners Act 2020* (NSW) ('*DBP Act'*). The effect of this new duty circumvents the need for courts in NSW to debate whether a duty of care is owed. The question now looms as to how the courts will approach this statutory duty and whether the drafting resolves any of the conceptual and practical issues.

What is immediately clear, however, is that the imperative to 'love thy neighbour' has returned, as it is no longer narrowed by the type of loss that a 'neighbour' may suffer. This perhaps indicates that the traditional distinction between economic loss and physical loss no longer needs to be maintained.
Part 1 of this article will provide an overview of the chaos that has arisen in the common law and touch on the normative nature of this question, together with the public policy concerns. Part 2 will trace the evolution of the common law duty of care. Part 3 will review the conceptual and practical side effects of this chaos. Part 4 will finally consider whether pt 4 of the *DBP Act* resolves any of these issues.

Part 1 – Chaos, Contextualised

The chaotic status of the law of negligence regarding economic loss has been observed and criticised by the judiciary. In 1999, Kirby J noted that it has been described as 'the most controversial area of our law of tort.'[6] In 2004 McHugh J declared 'confusion approaching chaos has reigned in the law of negligence'[7] and further observed that '[n]owhere has the conflict in the ultimate appellate courts in various jurisdictions been more obvious than in the law of negligence concerning defective premises.'[8]

[6] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 [230] ('*Perre*') (Kirby J) quoting Lord Steyn, Foreword to Bernstein, *Economic Loss* 2nd ed, (1998).

[7] *Woolcock* (above n 4).

[8] *Woolcock* (above n 4) [48] (McHugh J).

The chaos seems to be due to its normative nature given that, at its core is the extent to which we should 'love thy neighbour.' Indeed the court has recognised that the source of the law of negligence is in the moral imperative to 'love thy neighbour as thyself,'[9] as it reflects a 'general public sentiment of moral wrongdoing'[10] and must align with values widely held in a community.[11] Tort law has been recognised to be for corrective justice[12] and the 'sibling of crime,'[13] given that tortious duties are owed to persons generally and are imposed by law. Accordingly, whether a duty of care is owed is a value judgement about whether we value (or ought to value) the protection of our neighbour's economic interests, as much as we value their physical safety. Not only does this demonstrate that community values must be appreciated when viewing the historical development of the duty, but it also mandates that they be kept squarely in mind by law reform committees and the legislature when turning to the future.

Courts were initially reluctant to establish the duty, based on the concern that it could expose defendants to liability 'in an indeterminate amount for an indeterminate time to an indeterminate class.'[14] Courts also did not want to interfere with the marketplace,[15] as to impose a duty of this kind could burden the freedom of individuals to protect their own business interests.[16] This issue was captured by Posner J who expressed 'tort law is a superfluous and inapt tool for resolving commercial disputes. We have a body of law designed for such disputes. It is called contract law.' [17] On the other hand, courts recognised that a contractual remedy may not always be sufficient to protect purchasers.[18] Further, courts recognised that in order to prevent physical injury, costs to rectify the defect should be recoverable. .[19] These competing policy concerns demonstrate that the judiciary has been faced with a task that requires an assessment about the community's values.

Indeed, McHugh J cautioned against the ability of courts to effectively determine fair and just policies, and agreed with Lord Devlin who said:

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[9] *Harrington v Stephens* (2004) 59 NSWLR 694 [17] ('*Harrington*').

[10] *Perre* (above n 6) [232] (Kirby J), citing *Jaensch v Coffey* (1984) 155 CLR 549 and *Donoghue v Stevenson* [1932] AC 562 [580] (Lord Atkin).

[11] *Harrington* (above n 9) [20].

[12] *Perre* (above n 6) [91] (McHugh J).

[13] Lord Justice Rupert Jackson, 'Concurrent liability: Where have things gone wrong?' (2015) 23 *Torts Law Review* 3.

[14] *Ultraamares Corporation v Touche* (1931) 174 NE 441 at 444.

[15] *Perre* (above n 6) [252] (Kirby J).

[16] Ibid [101] (McHugh J).

[17] *Miller v United States Steel Corporation* 902 F 2d 573 at 574 (1990) (Posner J) quoted in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 [121] (McHugh J).

[18] *Woolcock* (above n 4) [106] (McHugh J).

[19] Ibid [132] (Kirby J); *Bryan v Maloney* (1995) 182 CLR 609 at 628 quoted in *Woolcock* (above n 4) [132] (Kirby J).

> For a judge to decide fairly and convincingly every case that comes before him in the light only of his own sense of justice, he would have to be a superman. I doubt if there ever have been more than a handful of men on the Bench who could do it, though doubtless there are slightly more who think that they could.[20]

The challenge is seemingly within the realm of the legislature, evidenced by the various calls for law reform by the courts[21] and commentators.[22] While the introduction of the *DBP Act* appears to answer this call, the balance of this article will consider whether it does in fact introduce any calm to the current state of chaos.

Part 2 – Development of the Duty of Care

Exclusionary Rule

Although Lord Atkin declared in 1932 in *Donoghue v Stevenson*[23] that each person has a duty to take care to prevent acts or omissions that would foreseeably injure their neighbours, English courts confined this duty to 'danger to life, danger to limb or danger to health.[24] This reflected the view that economic interests were protected by contract law, which later became known as the 'exclusionary rule.'[25] While this rule 'promoted a measure of certainty and predictability',[26] its rigour 'occasioned injustice'[27] and was rejected by the House of Lords[28] in 1964. Lord Devlin could find 'neither logic nor common sense'[29] in maintaining the distinction between economic loss caused directly, or as a result of physical injury. In 1976 this was adopted by the High Court of Australia.[30]

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[20] *Perre* (above n 6) [80] (McHugh J) quoting 'The Judge and Case Law' in Devlin, *The Judge* (1979) at 181.

[21] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2003) [2002] QCA 88 [34] (McMurdo P, Thomas JA, Douglas J); *Owners Corporation Strata Plan 61288 v Brookfield Multiplex Ltd* [2012] NSWSC 1219 [103] (McDougall J); *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185 [186] (Gageler J).

[22] Russel Cocks and Mandy Chilcott, 'Bryan the builder – Residential work only' (2004) 11 *Australian Property Law Journal* 71; Adrian Baron, 'Defective Buildings and Pure Economic Loss Claims: The Return to an Exclusionary Rule?' (2016) 32 *Building and Construction Law* 233; Meghan De Pinto-Smith, 'Vulnerability, tort and economic loss: protection via contract' (2016) 24 *Torts Law Review* 65; Matthew Bell and Wayne Jocic, 'Negligence claims by subsequent building owners: did the life of Bryan end too soon?' (2017) 41(1) *Melbourne University Law Review* 2.

[23] *Donoghue* (above n 5) 581 (Lord Atkin).

[24] *Old Gate Estates Ltd v Toplis* [1939] 3 All ER 209 at 217, quoted in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, [244] (Kirby J).

[25] For a historical overview of the exclusionary rule, see Kirby J's summary in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 [242].

[26] *Perre* (above n 6) [252] (Kirby J).

[27] Ibid [71] (McHugh J).

[28] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

[29] Ibid 517 (Lord Devlin).

[30] *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529.

Proximity

Building on Lord Atkin's concept of neighbourhood, the notion of proximity was initially critical to establishing a duty of care for economic loss. In 1978, a two stage test was formulated in *Anns v Merton London Borough Council.*[31] The case considered whether the local council, responsible for inspecting foundations during the construction of a block of flats, owed a duty of care to ensure that the foundations were at the correct depth. The first stage resulted in a prima facie duty of care to arise if a sufficient relationship of proximity existed. The second stage involved a consideration of whether policy reasons justified limiting or negating the duty. While this specific test to establish proximity was not followed in Australia[32] and later overturned by the House of Lords[33] it has been followed in Canada, New Zealand and Singapore.[34]

In 1990, a three stage test was formulated in *Caparo Industries PLC. v Dickman*[35] which required the damage to be reasonably foreseeable, a proximate relationship to exist, and for it to be fair, just and reasonable for the duty to be imposed. While this approach was adopted by Kirby J in 1999,[36] it was criticised by others for being 'little more than convenient labels'[37] that are of little utility.[38] Justice Kirby disagreed and explained 'negligence itself is a label…[l]abels are commonly used by lawyers. They help steer the mind through the task at hand.[39] While Kirby J eventually abandoned the approach in 2004 in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd,*[40] (*Woolcock*), he expressed that this was because he was obliged to do so, and that he hoped the court may in time come to endorse it.[41]

The relevance of proximity continued in 1995 in *Bryan v Maloney.*[42] The court found that a builder owed a duty of care towards the subsequent owner in circumstances where defects emerged in the residential property after it was sold. This was because the builder assumed a responsibility towards the first owner, and the first owner relied upon the builder. Based on this 'anterior relationship', the court decided the builder owed the same duty of care to the subsequent owner because the house connected

[31] *Anns v Merton London Borough Council* [1978] AC 728.

[32] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

[33] *Murphy v Brentwood District Council* [1991] 1 AC 398.

[34] *Perre* (above n 6) [266]–[268] (Kirby J); Gary Chan Kok Yew, 'Finding common law duty of care from statutory duties: All within the Anns framework' (2016) 24 *Torts Law Review* 14.

[35] *Caparo Industries PLC. v Dickman* [1990] 2 AC 605.

[36] *Perre* (above n 6) [229]–[306] (Kirby J).

[37] Ibid [77] (McHugh J) quoting *Caparo Industries PLC. v Dickman* [1990] 2 AC 605 at 618 (Lord Bridge).

[38] Ibid [80] (McHugh J).

[39] Ibid [283] (Kirby J).

[40] (2004) 216 CLR 515.

[41] *Woolcock* (above n 4) [158] (Kirby J).

[42] *Bryan v Maloney* (1995) 182 CLR 609.

them and established a proximity. [43] While essential in this case, the weight of an anterior relationship soon fell away.[44]

Salient Features

Whilst *Bryan v Maloney* created considerable consternation within the construction industry, its effect was soon modified by the decision of the court in *Perre v Apand Pty Ltd*[45] *('Perre').* The use of proximity was eventually abandoned in Australia[46] as it was considered not practical, and neither necessary nor sufficient to establish a duty of care.[47] Its purpose became limited to signifying a factor (or factors) of special significance.[48] What emerged from *Perre* were five factors formulated by McHugh J: reasonably foreseeability of loss, risk of indeterminate liability, autonomy of the individual, vulnerability to risk, and knowledge of risk as well as its magnitude.[49]

Although this method was applied by the majority later in *Woolcock*, it did not escape criticism from Kirby J's dissent. He was of the view that it was inappropriate for the factors to be preconditions as they were not relevant to all cases. [50] He urged the court for there to be a more 'general or conceptual methodology or approach which provides the heading to which these considerations may be assigned, when in the particular case, they are considered relevant.'[51]

Vulnerability

While vulnerability was just one of the factors formulated in *Perre*, it was nevertheless emphasised to be a 'prerequisite to imposing a duty'.[52] It emerged as the main factor considered by the court in 2004 in *Woolcock* and arguably the only factor analysed in 2014 in *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288*[53]*('Brookfield')*; perhaps indicating, as foreshadowed by Kirby J, that the five factor methodology was not universally relevant.

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[43] Ibid 171.

[44] *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185 [28] ('*Brookfield Multiplex Ltd'*) (French CJ).

[45] *Perre* (above n 6).

[46] *Sullivan v Moody* (2001) 207 CLR 562.

[47] *Perre* (above n 6) [27] (Gaudron J); [78] (McHugh J).

[48] Ibid [27] (Gaudon J).

[49] Ibid [105] (McHugh J).

[50] Ibid [286] (Kirby J). See (above n 6) [158]–[161] (Kirby J).

[51] Ibid.

[52] Ibid [118] (McHugh J).

[53] *Brookfield Multiplex Ltd* (above n 44).

Vulnerability was defined as a plaintiff's inability to protect itself from injury.[54] On this basis, the court concluded in both *Woolcock* and *Brookfield* that a duty of care was not owed to the subsequent owner as they were not considered vulnerable. In both cases, the underlying contract was central to this conclusion. A closer analysis, however, demonstrates that the reasoning slightly shifted from the *absence* of contractual protections in *Woolcock*, to the 'existence' of a contract in *Brookfield.*

In *Woolcock*, it was critical that the contract of sale between the first owner and subsequent owner did not include a warranty that the building was free from defects. The majority expressed that the plaintiff could have protected itself, such as by obtaining contractual warranties or an assignment of the first owner's rights against third parties.[55] Justice Kirby dissented and criticised the majority for not appreciating the commercial realities of negotiating,[56] which has been echoed by commentators.[57] Bell and Jocic point out that purchasers are not likely to be aware that this issue needs to be negotiated, and even if they were aware, vendors would not likely agree to provide detailed warranties. [58] Although McHugh J suggested that a plaintiff's capacity to protect themselves 'depends upon current market conditions and conveyancing practices',[59] the pleadings and facts were silent about the plaintiff's capacity to negotiate.[60] Justice McHugh therefore assumed that commercial purchasers could protect themselves, as no evidence demonstrated otherwise. What appears to emerge from this case is a presumption that the plaintiff is not vulnerable in a contractual negotiation unless evidence is led to the contrary.

Brookfield presented an opportunity for *Woolcock* to be tested, given that the contract did contain detailed contractual protections, and the subject property was serviced apartments and residential apartments. Justice Crennan et al analysed the contractual provisions and identified that the contract for sale included a defect liability period of six months following settlement[61] but concluded that the evidence did not demonstrate that the purchaser could not have bargained for a more extensive warranty.[62] Although this was justified in *Woolcock* on an assumption that commercial purchasers could ordinarily protect themselves, this was not a point of distinction in *Brookfield*. This is curious

[54] *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185.

[55] *Woolcock* (above n 4) [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ); [111] (McHugh J).

[56] Ibid [168]–[171] (Kirby J).

[57] Brett Codd, Russell Hinchy and Vernon Nase, 'An alternative view of Woolcock Street Investments v CDG Pty Ltd' (2004) 12 *Torts Law Journal* 194; Bell and Jocic, (above n 22).

[58] Bell and Jocic, (above n 22) 22.

[59] *Woolcock* (above n 4) [95] (McHugh J).

[60] Ibid [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[61] *Brookfield Multiplex Ltd* (above n 44) [88] (Crennan, Bell and Keane JJ).

[62] Ibid [148] (Crennan, Bell and Keane JJ).

particularly in light of Sydney's (typically) 'hot' property market, and what could potentially be a 'take it or leave it attitude' by off-the-plan developers.

Justices Hayne and Kiefel, however, subtly pivoted, and instead of focusing on the existence or extent of warranties, they emphasised the *existence* of the contract, noting that '[i]t is enough to observe' that 'the making of contracts' denied the plaintiff's vulnerability.[63] While seemingly subtle, the emphasis on the 'existence' of the contract is significant because it carries with it the flavour of the old exclusionary rule; albeit couched in different language. The separate judgements of French CJ and Gageler J also have this flavour, as the duty of care was denied in order to avoid altering the terms of the underlying contracts.[64] What appears to emerge from this reasoning is that a duty of care will not be imposed if it would alter the contractual risk allocation.

If the existence of a contract is critical, then it is questionable whether a consideration of specific contractual provisions within the contract continues to be relevant. Further, if the focus is on the existence of the contract, then does the question of vulnerability fall away? The existence of any concurrent rights, in both contract and tort, is further discussed in Part 3 and Part 4. De Pinto-Smith observes that a duty of care in *Brookfield* and *Woolcock* was not established in either case solely because of the contractual risk allocation, which weakens the court's argument that vulnerability is a fundamental factor in determining whether a duty of care exists. [65] De Pinto-Smith points out that this conclusion would have been reached even if vulnerability had not been considered.[66] Indeed Baron queries whether vulnerability is yet another empty label of no content.[67]

Part 3 – Side Effects of the Chaos

Local and Global Uncertainty

The discussion above in Part 2 demonstrates that courts have struggled to create a flawless method to establish a duty of care for economic loss; most notably demonstrated by the divide between McHugh J and Kirby J. While the latest fashion favours the notion of vulnerability, the precise nature of this test evidently lacks certainty. This is demonstrated by the subtle yet different emphasis on the absence of contractual protections, demonstrated in *Woolcock* and by Crennan J et al in *Brookfield*, compared with the existence of a contract, demonstrated by other judges in *Brookfield*. Indeed the weight of this uncertainty has driven Baron to query whether there should be a return to the exclusionary rule for the

[63] Ibid [55]–[58] (Hayne and Kiefel JJ).

[64] Ibid [34] (French CJ); [185] (Gageler J).

[65] De Pinto-Smith (above n 22) 73.

[66] Ibid.

[67] Baron (above n 22) 239.

sake of certainty, in order to avoid 'stumbling along' the current path.[68] If a consistent approach has not yet emerged, then perhaps Kirby J was correct to speculate in 1999 that '[p]erhaps it never will.'[69]

The approach of Australian courts is more restrictive when compared with Canada, New Zealand, Malaysia, Singapore and Fiji.[70] Justice Kirby expressed that this is not desirable 'in the global and regional economy….[where] Australian investors and civil engineers must compete…[and where] our businesses elsewhere are subject to a larger legal duty.'[71] This divide was again exposed in *Brookfield* as the Court of Appeal's decision to establish a duty supported by a Canadian authority[72] was overturned unanimously by the High Court.

Concurrent Liability

Brookfield re-engages what appears to be an ongoing debate[73] about concurrent liability in both contract law and tort law. This debate is self-evident between the Court of Appeal and the High Court as they reached opposing conclusions on this same issue. It is therefore appropriate to consider the reasoning of each in order to reflect on the ultimate decision.

The Court of Appeal relied on *Henderson v Merret Syndicates Ltd*[74] ('*Henderson'*) and *Astley v Austrust Ltd*[75] ('*Astley'*) which supported their conclusion that a duty of care is not precluded purely due to the existence of a contract.[76] The relevant question was whether the terms of the contract excluded the common law duty of care.[77] They concluded it did not, as the terms left it open for liability under the common law to arise for defects otherwise than during the contractual defects liability period.[78] What emerged was the principle that concurrent liability can exist unless the contract provides otherwise.

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[68] Ibid 240.

[69] *Perre* (above n 6) [25].

[70] *Woolcock* (above n 4) [159], [186]–[191] (Kirby J).

[71] Ibid [190] (Kirby J).

[72] *Brookfield Multiplex Ltd* (above n 44) [127].

[73] See Patrick Mead, 'The impact of contract upon tortious liability of construction professions' (1988) 6 *Torts Law Journal* 145; Lord Justice Rupert Jackson, (above n 13); Go Yihan and Man Yip 'Concurrent liability in tort and contract: An analysis of interplay, intersection and independence' (2017) 24 *Torts Law Journal* 148.

[74] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

[75] *Astley v Austrust Ltd* (1999) 197 CLR 1.

[76] *Owners-Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 ('*Owners-Strata Plan'*) [91]–[100] (Basten JA); [138] (Macfarlan JA).

[77] Ibid [97] (Basten JA), quoting *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [193].

[78] Ibid [98] (Basten JA).

It is curious that the High Court in *Brookfield* did not engage in the same analysis of *Henderson* or *Astley*. Chief Justices French, Hayne and Kiefel JJ did not address these authorities and concluded that their decision 'does not depend upon a prior assumption about the proper provinces of tort and contract.' [79] While Crennan et al extracted these authorities, they did not analyse their merits or the Court of Appeal's reasoning. Rather, they relied solely on *Woolcock* to conclude that that decision accords with the 'primacy of the law of contract'[80] and that the common law has not developed to alter allocation of economic risks between parties to a contract by duties imposed by tort. [81]

However, the High Court's reliance on *Woolcock* does not appear to capture the principles enunciated in that case. In fact, McHugh J in *Woolcock* said that various authorities[82] 'make it difficult to argue that claims in negligence should be excluded merely because such claims may outflank …the law of contract.'[83] *Woolcock* evidently does not exclude the availability of concurrent liability, but rather stands for the proposition that a person's capacity to protect themselves (such as in a contract) may militate against a finding of vulnerability, and accordingly a duty of care. It seems that the High Court's reliance on *Woolcock* to deny concurrent liability was not truly reflective of the principles that emerged from that case.

Three streams of authority evidently need to be reconciled regarding concurrent liability: *Henderson* and *Astley* allow a duty of care unless a contract excludes it; *Woolcock* allows a duty of care to arise if the plaintiff was vulnerable; *Brookfield* essentially prevents a duty of care arising if there is an underlying contract. Consider a scenario where a contract expressly excludes the common law duty of care, but where a plaintiff deduces evidence to demonstrate they were vulnerable in the negotiation. This would seemingly result in three outcomes: the duty of care would be excluded by virtue of the specific contract term (*Henderson* and *Astley*); the duty of care would be excluded by virtue of the contract existing (*Brookfield (Hayne and Kiefel JJ)*); and the duty of care would be owed by virtue of the plaintiff's demonstrated vulnerability (*Woolcock; Brookfield (Crennan J et al)*). Can these authorities be reconciled?

The tension was observed by Macfarlan JA in the Court of Appeal as he said, without commenting further, that the Court of Appeal's decision is 'not easy to reconcile…with the observations of the

[79] *Brookfield Multiplex Ltd* (above n 44) [26] (French CJ); [59] (Hayne and Kiefel JJ).

[80] Ibid [132] (Crennan, Bell and Keane JJ).

[81] Ibid.

[82] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 [92] (McHugh), discussing *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, *Donoghue v Stevenson* [1932] AC 562 at 581, *White v Jones* [1995] 2 AC 207, *Hill v Van Erp* (1997) 188 CLR 159.

[83] *Woolcock* (above n 4) [92] (McHugh J).

plurality in the earlier decision of Woolcock Street Investments.'[84] It is curious why the High Court did not seize the opportunity to reconcile them. Rather, confusion – close to chaos – now appears to also reign in the law regarding concurrent liability.

Residential v Commercial

A further issue that emerged from *Woolcock* is whether the purpose of a building is relevant to the question of vulnerability. This issue was live in *Woolcock* as the plaintiff was a corporate entity and the property was a commercial building, which was considered against the backdrop of *Bryan v Maloney* which involved an owner-occupier and residential dwelling. The court was divided between Gleeson CJ et al[85] who doubted the distinction to be relevant in contrast to McHugh J[86] who emphasised its importance. The issue was clarified, if any doubt remained, in *Brookfield* as Crennan J et al expressed that the distinction is not material as it would result in liability to 'come and go' depending on the intended use of the building.[87]

What remains uncertain is whether the *identity* of the purchaser remains relevant, compared with the *purpose* of the building. Justice McHugh assumed purchasers of commercial buildings would be 'sophisticated and often wealthy investors' armed with legal and commercial advice to bargain for contractual warranties.[88] Justice Kirby was reluctant to assume that contractual warranties would have been agreed 'simply by virtue of the commercial character of the entity (or the premises).'[89] The balance of the court did not identify or comment on the nuance between the identity of the purchaser and the purpose of the premises. The following questions remain uncertain: Can an unsophisticated corporate purchaser of a commercial property be considered vulnerable? Can a sophisticated corporate purchaser of a residential dwelling be considered vulnerable?

Part 4 – The *Design and Building Practitioners Act 2020*: Now What?

Pursuant to pt 4 of the *DBP Act* a duty of care is now owed to each owner by a person who carries out construction work.[90] This Part 4 will analyse whether the *DBP Act* addresses any of the issues identified in pt 3. An analysis of the whole *DBP Act* and all of its' provisions are beyond the scope of this article.

[84] *Owners-Strata Plan* (above n 76) [138] (Macfarlan JA).

[85] *Woolcock* (above n 4) 515 [17] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[86] Ibid [71], [96] (McHugh J).

[87] *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 254 CLR 185 [135] (Crennan, Bell and Keane JJ).

[88] *Woolcock* (above n 4) [96] (McHugh J).

[89] Ibid [171] (Kirby J).

[90] *Design and Building Practitioners Act 2020* (NSW) s 37.

Local and Global Uncertainty

The court has warned against uncertainty, explaining that obscure rules have a 'net cost to society'[91] and diminish the law as a social instrument.[92] This is because it compromises the ability of lawyers to provide certain advice, and also requires courts to review extensive materials resulting in cases to take longer and fewer to be heard. [93] Justice McHugh explained that the law needs to be 'as clear and as easy of application as possible' in order for negligence law to serve its principle purpose as an instrument of corrective justice.[94]

If pt 4 of the *DBP Act* applies, it now circumvents the need to engage in a what would evidently be a complex and uncertain analysis to prove that an owner was necessarily 'vulnerable' such that a duty of care exists. The certainty and predictability provided by the *DBP Act* is evidently beneficial to put an end to this common law debate.

However, as the *DBP Act* applies retrospectively 10 years before 11 June 2020 (being the commencement date of pt 4) this has the potential to facilitate avenues for recovery which have not previously been available. It is questionable whether this will open a flood gate to previously unavailable litigious proceedings, and whether this will expose the courts to an indeterminate number of claims. It is ironic that the courts are now confronted with this risk of indeterminacy; the same risk which underpinned their historical reluctance to impose a duty of care and establish the exclusionary rule up until 1964.

Concurrent Liability

The *DBP Ac*t restores the availability of concurrent liability, given that a duty of care will now exist despite the underlying contract. This is reinforced by s 40 that prevents parties from contracting out.

This significantly alters the common law, with respect to its application in NSW. Firstly, it casts doubt over the principle from *Henderson* and *Astley* that made it available for a contract to expressly exclude the duty of care. Secondly, it results in the 'vulnerability' test to be no longer applicable. It also rejects the courts emphasis on the terms and existence of a contract, as having any relevance in considering whether a builder owes a duty of care. Further, the tension between the three streams of common law authority seemingly falls away.

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[91] *Brookfield Multiplex Ltd (*above n 87) [177] (Gageler J).

[92] *Perre* (above n 6) [88]–[90] (McHugh J).

[93] Ibid [90] (McHugh J).

[94] Ibid.

The legislature has adopted an expansive view about the extent we ought to care for our neighbours; perhaps signalling an evolution of the values held by the wider community. It is now beyond the realm of private contract law, and squarely within the public's interest. This appears to be underpinned by goals oriented towards both corrective justice and consumer protection.

This somewhat reflects the Canadian approach, summarised by the following extract:

> As I see it, the duty to construct a building according to reasonable standards and without dangerous defects arises independently of the contractual stipulations…because it arises from a duty to create the building safely… As this duty of care arises independently of any contract there is no logical reason for allowing the contractor to rely upon a contract made with the original owner to shield him or her from liability to subsequent purchasers arising from a dangerously constructed building.[95]

However it is worth noting that while Mead describes the Canadian rationale as appealing regarding dangerous defects, he expresses that it should be cautiously applied to defects as to quality.[96] As the *DBP Act* is not qualified by the nature of the defect, it arguably leaves it open for an owner to claim economic loss for a minor aesthetic defect. It is questionable whether this outcome would accord with the community's values, and the purpose of corrective justice.

Residential v Commercial

It is noteworthy that the *DBP Act* separately addresses the *identity* of the owner and *purpose* of the building, as this nuance was not clearly addressed within the common law.

Currently, pt 4 applies to building work which includes residential building work within the meaning of the *Home Building Act 1989* (NSW) (‘*HBA’*). While this is a non-exhaustive definition, the emphasis appears to be on residential buildings given that the second reading speech[97] indicates it is envisaged for the duty to apply to buildings that are classified pursuant to the Building Code of Australia as class 1 (houses), class 2 (apartment buildings), class 3 (residential buildings other than class 1 or class 2) and class 10 (non-habitable buildings such as sheds, carports or garages). The regulations may, however, exclude the type of work, and a certain person, from the application of pt 4. If the regulations do not

[95] *Winnipeg Condomonium Corp No 36 v Bird Constructions Co* [1995] 1 SCR 85 (L Forest J) quoted in Mead, (above n 72) 166.

[96] Mead (above n 72) 167.

[97] New South Wales, *Parliamentary Debates,* Legislative Council, 19 November 2019 (Hon. Damien Tudehope).

allow commercial buildings to come within pt 4, then arguably this would be inconsistent with the court's view that the purpose of a building is not relevant to the existence of a duty.

The second reading speech also provides that 'the duty deliberately does not extend to owners who are developers or large commercial entities.'[98] However, this is not reflected in the definition of owner. If the regulations exclude corporate entities, Davey warns this ought not be premised on unrealistic assumptions about their financial resources and their capacity to protect themselves. [99] He explains small to medium enterprises may not be 'any better placed to access legal advice and negotiate contractual terms in their business capacity compared with their personal capacity'[100] given that 59% of small to medium enterprises have annual turnover of less than $200,000.[101] It is yet to be seen if, and how, the regulations exclude corporate entities from the application of pt 4.

Broader Legal Landscape

It is significant that the *DBP Ac*t now provides an avenue of relief for owners who are not covered by the *HBA* as well as a parallel avenue of relief for those who are covered. The *HBA* provides warranties over residential building work, for a period of six years for major defects and two years in any other case, which commences on completion of the work. However, if the defect emerges after this statutory period (which is likely for latent defects), the *DBP Act* now provides certainty that relief will be available under the common law. This further period of relief is limited to six years from the date the defect manifests,[102] subject to a cap of 10 years following the date of an occupation certificate.[103] This evidently supplements the protection afforded by the *HBA*, and plugs the gaps where it does not.

Consumer Confidence and Political Landscape

As early as 2004 Kirby J said that a duty of care should be established as it would 'instil proper standards of professional… conduct…sanction unsafe building practices…encourage better building design and supervision…protect life, property and investments from…unsafe conduct.'[104] Sixteen years later, the *DBP Act* now seems to appreciate these goals.

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[98] Ibid.

[99] Aiden Davey, 'Fighting chaos with chaos: an analysis of the Design and Building Practitioners Bill 2019' (2020) *Australian Construction Law Bulletin* 49.

[100] Ibid 50, citing Australian Small Business and Family Enterprise Ombudsman, Small Business Counts: Small business in the Australian economy Report (July 2019) p 8, www.asbfeo.gov.au/sites/default/files/documents/ASBFEO-small-business-counts2019.pdf. 12 August 2020

[101] Ibid.

[102] *Limitation Act 1969* (NSW) s 14.

[103] *Environmental Planning and Assessment Act 1979* (NSW) s 6.20.

[104] *Woolcock* (*above* n 4) [135] (Kirby J).

However, recent events have shaken the building sector which appears to have triggered government intervention. This includes the evacuation[105] of various residential towers due to building defects. In addition, the Building Confidence Report [106] was released in 2018 which delivered to the Australian Government 24 recommendations to strengthen the building industry.

Since then, the NSW Government has been driven to rebuild consumer confidence in the property sector. This purpose is paramount throughout the second reading speech of the *DBP Act*.[107] The importance of consumer confidence is reinforced by the observation that the building and construction industry 'is a vital contributor to the growth of the State's economy.'[108]

Conclusion

Consumers of construction services for residential purposes in NSW have the benefit of a variety of protections: their rights under the contract, the protections provided under the *HBA* and now the statutory duty of care owed pursuant to the *DBP Act*.

Whether these various protections will operate to ensure appropriate building standards and minimal defects in residential building works remains to be seen. The statutory duty of care will bring some 'order to the chaos' by relieving consumers from the formerly tortuous task of seeking to establish that such a duty existed; and will surely assist in driving standards of excellence. For the many in the industry who have consistently demonstrated that they 'love thy neighbour' and have at all times brought a standard of care to their construction work, hopefully they will experience little change.

[105] For example, Garland Lofts in Zetland were evacuated in 2018, Opal Tower was evacuated in December 2018, Mascot Towers were evacuated in June 2019.

[106] Peter Shergold AC and Bronwyn Weir, Submission to Building Ministers Forum, Department of Industry, Science Energy and Resources, *Building Confidence,* February 2018.

[107] Above n 97.

[108] Ibid.

Helping Hands: Australian Courts and Facilitating the Taking of Evidence in Foreign-Seated Arbitrations

Inigo Kwan-Parsons*

Abstract

With a recent English court decision granting parties to a foreign-seated arbitration an order to compel the taking of evidence of a witness residing in the UK, England has further showed how it is a jurisdiction which supports international arbitration. In order for Australia to do the same, its legislative regime which governs international arbitration would benefit from an amendment to allow Australian courts to facilitate foreign-seated arbitrations to take evidence from parties residing within Australia.

Introduction

A state's municipal court system plays an integral role in the implementation of international arbitrations as judiciaries supervise arbitral proceedings and can intervene in specific situations only. This state support of international arbitration was ratified in the New York Convention ('NYC'),[1] which has the overriding purpose of ensuring that international arbitration works effectively across multiple jurisdictions and results in awards which can be enforced globally.

Municipal court assistance in taking evidence for foreign-seated arbitrations is one way in which international arbitration is supported to truly be a dispute resolution procedure which seamlessly works across multiple jurisdictions. In a recent decision from the English Court of Appeal (civil division), such support was seen to have been granted to parties to a foreign-seated arbitration.

A & B v C & ORS [2020] EWCA CIV 409[2]

The central issue in this proceeding concerned an application to the High Court in England, made by parties to an arbitration seated in New York, for an order compelling a person who resided in the UK to give evidence, as this person was refusing to travel to New York to give evidence in the arbitral

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[1] *Convention on the Recognition and Enforcement of Foreign Arbitral* Awards signed 10 June 1958, 330 UNTS 4739 (entered into force 7 June 1959) ('New York Convention').

[2] *A & B v C & Ors* [2020] EWCA Civ 409.

proceeding. The factual background to *A & B* is summarised at paras [3] through [5] of the English Court of Appeal's judgment:

> The dispute being arbitrated in New York arises in the context of two settlement agreements between the appellants and the first and second respondents respectively in relation to the exploration and development of an oil field off the coast of Central Asia. Under those agreements the appellants were entitled to a percentage of the net sale proceeds if the first and second respondents sold their respective interests in the field, which they did in 2002. A central issue in the arbitration is the nature of certain payments made by the first and second respondents to the Central Asian government described as "signature bonuses" and whether those amounts are deductible as costs in calculating the sums due to the appellants.
>
> The appellants contend that the sums paid were bribes and so not properly deductible. They rely upon the fact that G, who negotiated the payment on behalf of the Central Asian government, was indicted almost 20 years ago by a US court for violations of the US Foreign Corrupt Practices Act. The third respondent, who is resident in England, was the lead negotiator for the respondents who negotiated directly with G.
>
> The third respondent was not prepared to go to New York to give evidence and, on 13 November 2019, the tribunal granted the appellants permission to make an application to the English Court to compel his testimony. The appellants seek an Order permitting them to take his evidence by deposition under CPR 34.8.

The basis for the application is found in s 44 of the *English Arbitration Act 1996* ('*English Act*'), which permits parties to a foreign-seated arbitration to seek an order from the English Court to take evidence by deposition under English *Civil Procedure Rules 1998* r 34.8. *Civil Procedure Rules* r 34.8 allows a party to apply for an order for a person to be examined before a hearing takes place (a deposition). Section 44(1) of the *English Act* provides that the court has the same powers to make orders for the purposes of and in relation to arbitral proceedings as it has in legal proceedings. Section 44(2) of the *English Act* then goes on to list various matters in which the court can exercise such powers, including the taking of the evidence of witnesses.

In dealing the application, the English court found that s 44(2)(a) of the *English Act* grants it the power to make an order for the taking of witness evidence in support of an arbitration seated outside of the United Kingdom by way of deposition from a witness who is not a party to that arbitration.

The English court noted that s 44(1) when read together with the definition of legal proceedings in s 82(1) of the *English Act*, means civil proceedings in the High Court of either England or Wales.

Accordingly, this grants an English court the same powers to make orders in relation to arbitration proceedings as it has in relation to domestic civil proceedings. When read together with s 2(3) of the *English Act*, the power conferred by s 44 is exercisable even if the seat of the arbitration is outside of the United Kingdom. Thus, the English courts have powers to make such orders in support of foreign arbitrations. Because the English court has the power to order evidence to be given by deposition in domestic civil proceedings under *Civil Procedure Rules* r 34.8, s 44(2)(a) thus allows the court to make the same order in relation to foreign arbitration proceedings.

The English court also found that the wording of s 44(2)(a) is wide enough to cover all witnesses, regardless of whether or not they are parties to the arbitral proceeding. The English court's reasoning was that it was improper to limit the definition of witnesses to mean exclusively to parties to the arbitration, as witnesses are often not parties to the dispute. The English court noted that s 44(2)(a) was principally directed against witnesses who are not under the control of parties to an arbitration.

However, the ability for the English courts to grant an order compelling evidence for a foreign seated arbitration is not completed unrestricted. The English court referred to the 'gateways' described in ss 44(1) and 44(4) which set out when the court may exercise its power. One of these restrictions is whether the English court has the same power to grant orders in domestic civil proceedings, which as described above, the court does possess under *Civil Procedure Rules* r 34.8. The other restriction is whether the application to the English court has been made with the tribunal's leave. Despite these gateways, the English court retains discretion as to whether or not to grant the order sought, as s 2(3) allows courts to decline to issue an order in aid of a foreign arbitration, when it considers the foreign seat makes it inappropriate to do so.

Such a judgment is a warm welcome to parties participating in international arbitrations, knowing that the UK's arbitration friendly legislative regime allows for evidence to be compelled to be given in support of arbitral proceedings seated elsewhere.

Australian Position

Australia's position on supporting foreign-seated arbitration in taking evidence is much different to that of England's. Australia's relevant legislation regarding international arbitration is the *International Arbitration Act 1974* (Cth) ('*IAA*'). On the topic of courts assisting arbitral parties in securing evidence for arbitral proceedings, the *IAA* provides (emphasis added):

22A Interpretation

In this Division:

court means:

(a) in relation to arbitral proceedings that are, or are to be, conducted in a State—the Supreme Court of that State; and

(b) in relation to arbitral proceedings that are, or are to be, conducted in a Territory:

(i) the Supreme Court of the Territory; or

(ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory; and

(c) in any case—the Federal Court of Australia.

23 Parties may obtain subpoenas

(1) A party to arbitral proceedings commenced in reliance on an arbitration agreement may apply to a court to issue a subpoena under subsection (3).

(2) However, this may only be done with the permission of the arbitral tribunal conducting the arbitral proceedings.

(3) The court may, for the purposes of the arbitral proceedings, issue a subpoena requiring a person to do either or both of the following:

(a) to attend for examination before the arbitral tribunal;

(b) to produce to the arbitral tribunal the documents specified in the subpoena.

(4) A person must not be compelled under a subpoena issued under subsection (3) to answer any question or produce any document which that person could not be compelled to answer or produce in a proceeding before that court.

(5) The court must not issue a subpoena under subsection (3) to a person who is not a party to the arbitral proceedings unless the court is satisfied that it is reasonable in all the circumstances to issue it to the person.

(6) Nothing in this section limits Article 27 of the Model Law.

The above provisions are found in div 3 of the *IAA* and work in addition to the provisions of the Model Law adopted in pt 5 sch of the *IAA*.

The Australian Federal Court in *Samsung C&T Corporation*,[3] commented on the application of the above provisions in circumstances similar to the UK's *A & B* proceeding, whereby Samsung sought an application from the Federal Court to issue subpoenas for the production of documents in relation to arbitral proceeding seated in Singapore. The application is summarised at para [1] of the Federal Court's judgment:

[3] *Samsung C&T Corporation* [2017] FCA 1169 *('Samsung').*

> In this application, filed on 5 September 2017, the Applicant, Samsung C&T Corporation (with Republic of Korea Registration Number 110111-0015762) (Samsung), seeks leave to issue subpoenas for production of certain documents in relation to arbitral proceedings between it and Duro Felguera Australia Pty Ltd (Duro) in Singapore International Arbitration Centre (SIAC) Case No ARB065/16/JJ (Arbitration).

The Federal Court dealt with the application by firstly considering whether or not it has jurisdiction to make the orders sought by Samsung. In ruling on the interpretation of s 22A, the Federal Court found that it did not have jurisdiction to issue the subpoenas sought by Samsung. The reasoning for its decision was based on basic principles of statutory interpretation and held that an order of the type described under s 23 can only apply to parties to an international arbitration seated in Australia due to the definition of 'court' under ss 22A(3) div 3 of the *IAA*.[4] The Federal Court's findings on the wording of s 22A are as follows:

> I am satisfied that the context and purpose of s 22A and the IAA more generally supports a construction that it applies to arbitral proceedings seated in a State or Territory of Australia. […] s 22A(c) does not proceed on the footing that there is a further category of geographical locations for arbitrations beyond those held in a State or Territory. Allowing for a third type of arbitral proceedings to be included, in the absence of clear words to that effect, would be inconsistent with the purpose of the IAA and indeed the purpose of the amendments that introduced both ss 22A and 23. The options and choices afforded under such provisions of pt III of the Act are therefore limited to parties who have commenced their arbitral proceedings in Australia.

Because the Federal Court had found it did not have jurisdiction to make the orders sought by Samsung, it did not address the remaining issue of whether or not in the current circumstances it would be reasonable to make the orders sought. The Federal Court then concluded its judgment by recommending that parties utilise the Hague Convention on Evidence to obtain the types of orders it was seeking from the Federal Court regarding s 23 of the *IAA*.[5]

[4] Ibid [48].

[5] *Samsung* (above n 4)[51].

The implications of the Federal Court's decision in *Samsung* received criticism at the time it was released,[6] and in light of the English court's arbitration friendly decision seen in *A&B*, those critiques are worth revisiting.

The first critique regards the use of the Hague Convention on Evidence as an alternative means to obtain the evidence sought. While possible, only if the relevant states in question are all parties to the Hague Convention on Evidence, this alternative is inefficient for a number of reasons. Firstly, this process is more cumbersome and time consuming than parties seeking assistance from the courts directly. When ascertaining documents is time critical (such as in support of Mareva injunctions for example), parties do not have the luxury of time and the delay to obtain critical documents can have detrimental effects for parties. As identified earlier in this article, the aspect of urgency was also noted by the English court in *A&B* as being a factor in it exercising its discretion to order the taking of evidence.

Secondly, it does not appear practical for parties to an arbitration to be forced to seek recourse through another convention, when their agreement to arbitrate their dispute is already governed by the NYC. The purpose and objective of the NYC, and by reference international arbitration, is for seamless dispute resolution which spans across different jurisdictions. This objective and purpose is disrupted by the implications of *Samsung* and the wording of ss 22A and 23 of the *IAA* by failing Australian courts to provide appropriate assistance to parties in foreign-seated arbitrations.

Thirdly, s 23(6) explicitly states that '[n]othing in this section limits Article 27 of the Model Law'. Article 27 of the Model Law[7] provides:

> The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.
>
> The court may execute the request within its competence and according to its rules on taking evidence.

Thus, the Federal Court's interpretation of s 22A appears at odds with what s 23(6) states in that the definition of ‘court’ does indeed limit the application of art 27 of the Model Law. While strictly speaking the Federal Court's interpretation was premised on s 22A and s 23(6) states that nothing in

[6] See for example: Georgia Quick et. al., 'Not so fast: The Federal Court does not have jurisdiction to issue subpoenas for foreign-seated arbitrations' (23 October 2017) https://www.ashurst.com/en/news-and-insights/legal-updates/the-federal-court-does-not-have-jurisdiction-to-issue-subpoenas-for-foreign-seated-arbitrations/, accessed 10 June 2020.

[7] United Nations Commission on International Trade Law *UNCITRAL Model Law on International Commercial Arbitration* 1985 (amended in 2006), which is annexed to the *IAA* in sch 2 and is adopted in the *IAA*.

'this section', being s 23, limits art 27, it is nonetheless an inconvenience to the smooth application of international arbitration.

After having its application refused in the Federal Court, Samsung then repeated its application in the Supreme Court of Western Australia again seeking subpoenas from the court. Chief Justice Martin in hearing the application granted Samsung's application and gave the subpoenas sought. Accordingly, the Supreme Court of Western Australia adopted a more pro-arbitration approach to the Federal Court, giving the *IAA* some credibility as to its application in such circumstances. However, these contrasting decisions have created bifurcated authorities on the interpretation of the provisions of the *IAA*. Regretfully, there is no published reasons of Martin CJ's decision, and so the Federal Court's decision is the only decision publicly available on this point, which risks deterring future parties from seeking similar relief under the provisions of the *IAA*.[8]

Accordingly, the implications of the *Samsung* decisions appear unsavoury to the international arbitration community and poses a somewhat hidden risk for parties with arbitrations seated outside of Australia. While the Federal Court's judgment was based on the interpretation of ss 22A and 23 of the *IAA*, that interpretation contrasts the ethos of the NYC and objectives of international arbitration. This calls the question to be asked, do ss 22A and 23 of the *IAA* require amendment to that Australian courts are able to consistently facilitate foreign-seated arbitrations in the same way as English courts?

Legislative Reform

Recently, the Chartered Institute of Arbitrators (CIArb) published a set of guiding principles or key characteristics that make a seat an appropriate and effective forum in which to conduct international arbitration,[9] the London Rules.[10] One of these characteristics which is of critical importance is obviously the *lex arbitri* (law of the seat) and its legislative regime which governs all aspects of the arbitral proceeding.

[8] The author would like to thank the editors of Resolution Institute and Mr Simon Bellas, partner at Jones Day, for this information.

[9] As described by Professor Doug Jones AO in a recent article: 'Arbitration in Australia – Rising to the Challenge' (March/April 2020) 191 *Australian Construction Law Newsletter* 6, 7.

[10] The London Centenary Principle Drafting Team, 'The Chartered Institute of Arbitrators London Centenary Conference' (July 2015) 81(4) *CIArb Journal* 404 ('London Principles').

In commenting on Australia's legislative framework on international arbitration, one of Australia's leading scholars and practitioners, Professor Doug Jones AO, holds Australia's *lex arbitri* in high regard:[11]

> the legislative framework within which both domestic and international arbitration occurs in Australia is as good if not better than that available in any other jurisdiction in the world, serving to enhance Australia's attractiveness as a seat for arbitration.

Yet while Australia's legislative regime makes it an attractive option as a seat for international arbitrations, its shortcoming lies in facilitating the international arbitration community where it is not the seat of the relevant arbitral proceeding. This point is exemplified in the application of ss 22A and 23 of the *IAA* in *Samsung*. Perhaps the intended purpose behind not allowing Australian courts to facilitate foreign-seated arbitrations in taking evidence is to encourage parties to choose Australia as the seat of the arbitration. Regardless of the rationale behind the wording of ss 22A and 23 of the *IAA*, the cross-jurisdictional appeal of international arbitration would increase as more countries include provisions within their legislative regimes which allow appropriate court supervision of foreign-seated arbitral proceedings.

State support of arbitration is recognised in art 2 of the NYC:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

While it may be too bold a statement to say that Australia is not adequately meeting its obligations under the NYC in failing to allow its courts to assist foreign-seated arbitral proceedings in the taking of evidence, Australia's courts' inability to do so does not further the aims and objectives of the NYC.

To address this issue, a simple amendment to the *IAA* would be required. As seen in the Federal Court's decision in *Samsung*, it is difficult to reach a conclusion that Australian courts do have jurisdiction to issue subpoenas in support of foreign seated-arbitrations due to the wording of the relevant provisions in the *IAA*. Firstly, the specific definition of court as meaning 'in relation to arbitral proceedings that are, or are to be, conducted in a State—the Supreme Court of that State' could be removed. Secondly,

[11] Jones AO (above n 10), 6, 8.

an additional provision could be added to clarify the Australian courts' jurisdiction to issue subpoenas in support of foreign seated arbitrations.

Concluding Remarks

As other jurisdictions show support for international arbitration by facilitating foreign-seated arbitral proceedings, the attractiveness of international arbitration as a whole grows. This results in all jurisdictions which significantly participate in international arbitration benefiting from increased use of it as a means of dispute resolution. The overriding purpose and ethos of the NYC, as well as the aims of international arbitration, further support states making changes to their legislative regimes to allow their municipal courts to provide appropriate support to foreign-seated arbitrations where needed

The Reception of Medical Evidence under the *Workers Compensation and Injury Management Act 1981* (WA) Arbitration Service

Dr Philip Evans[1]

Abstract

In Western Australia disputes relating to workers compensation entitlements are determined in accordance with the provisions of the Workers Compensation and Injury Management Act 1981 (WA) *using a process of conciliation and arbitration. Claims are supported using documentary expert medical opinion evidence. Increasingly disputes relate to workplace stress or psychiatric injury and it is anticipated that claims of this type will increase as a consequence of COVID-19 workplace restrictions and changes. This paper considers the arbitration procedures under the Act; the definition on an injury under the Act, and the difficulties, relating to the reception of expert medical evidence in WorkCover arbitrations.*

Introduction

In Western Australia, a Worker's Compensation and Injury Management Scheme exists to help workers return to work successfully following a work-related injury or illness. Under the scheme workers are compensated for lost wages, medical expenses and associated costs while they are unable to work. Matters in dispute relating to workers compensation are determined in accordance with the provisions of the *Workers Compensation and Injury Management Act 1981 (WA)* ('The Act').

Workplace injury claims for both physical and mental injury are determined by WorkCover in accordance with the Workers' Compensation Arbitration Service. This is done through a formal arbitration process conducted in proceedings at which evidence is led and where a legally qualified arbitrator makes binding determinations regarding worker's compensation disputes.

The Workers' Compensation Arbitration Service consists of both full time and sessional arbitrators (assisted by a team of administrative support staff, including conciliators) who determine matters in dispute in accordance with the Act and the *Workers' Compensation and Injury Management Arbitration*

[1] Professor of Law, University of Notre Dame (Australia) and WorkCover Sessional Arbitrator (2013-2016).

Rules 2011. Once a dispute is referred to arbitration, arbitrators are prohibited under the Act from attempting to resolve the dispute by conciliation.[2]

However, a dispute **must** firstly have been conciliated by the Workers' Compensation Conciliation Service (or a certificate issued by the Director of Conciliation advising the matter is not suitable for conciliation) before an application can be made to the Arbitration Service. [3]

An appeal from a determination by an arbitrator may be made to the District Court of Western Australia, where a question of law is involved and where defined financial thresholds are met; or where a question of law is involved and, in the opinion of the District Court the matter is of such importance that, in the public interest, an appeal should lie.[4] Historically the number of appeals from an arbitrator's decision is low. In 2019 there were only nine appeals.[5]

Statistically, in the period 2018–2019, the WorkCover Compensation Arbitration Service completed 2079 conciliations and 601 arbitrations. Ninety-seven per cent (97%) of the conciliations are completed within an eight-week period and eighty-four per cent (84%) of the arbitrations are completed within six months. The average cost to complete an arbitration was $8,319.00.[6]

This paper commences with a discussion of the arbitration procedures under the Act; the definition of an injury under the Act, and finally the typical issues, or rather difficulties, relating to the reception of medical evidence in WorkCover arbitrations.

WorkCover Arbitration Procedures

The arbitration procedures are set out in ss 182ZT to 225 of the Act and ss 32 to 63 of the *Workers Compensation and Injury Management Arbitration Rules 2011* ('The Rules'). They generally mirror the provisions as found in the *Uniform Commercial Arbitration Acts*. Specifically, with respect to the Act, s 188 states:

[2] Contra S27D of the Uniform Commercial Arbitration Acts

[3] See Workcover WA, *Workers' Compensation Arbitration Service* < https://www.workcover.wa.gov.au/resolving-a-dispute/workers-compensation-arbitration-service/> (16 August 2020).

[4] *Workers Compensation and Injury Management Act 1981* (WA) s 247(1).

[5] District Court of Western Australia; Civil Decisions, https://www.districtcourt.wa.gov.au/C/courtsDecisions.aspx

[6] WorkCover WA Annual Report 2018/19; https://www.workcover.wa.gov.au/wp-content/uploads/2019/09/WorkCover-WA-201819-Annual-Report-Website-V1.2.pdf.

188. Practice and procedure, generally

(1) An arbitrator is bound by rules of natural justice except to the extent that this Act authorises, whether expressly or by implication, a departure from those rules.

(2) The *Evidence Act 1906* does not apply to proceedings before an arbitrator and an arbitrator —

(a) is not bound by the rules of evidence or any practice or procedure applicable to courts of record, except to the extent that the arbitration rules make them apply; and

(b) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

(3) An arbitrator may inform himself on any matter as the arbitrator thinks fit.

(4) An arbitrator may —

(a) receive in evidence any transcript of evidence in proceedings before a court or other person or body acting judicially and draw any conclusion of fact from the transcript; and

(b) adopt, as the arbitrator thinks fit, any finding, decision, or judgment of a court or other person or body acting judicially that is relevant to the proceeding.

(5) To the extent that the practice and procedure of an arbitrator are not prescribed under this Act, they are to be as the arbitrator determines.

Unlike commercial arbitration, hearings before a WorkCover arbitrator are conducted in private unless the arbitrator conducting the hearing decides that it should be conducted in public. [7] If an arbitrator thinks it appropriate, the arbitrator may conduct all or part of a proceeding entirely on the basis of documents without the parties or their representatives or any witnesses attending or participating in a hearing. [8]

With respect to representation, a party to the proceeding may appear in person or may be represented by a legal practitioner or a registered agent. [9]

In terms of the arbitrator's decision, subject to the Act, an arbitrator may make such decisions as the arbitrator thinks fit. An arbitrator may confirm, vary or revoke a direction of a Conciliation Officer under ss 182K(2) or (4) or 182L(2).[10]

[7] *Workers Compensation and Injury Management Act 1981 (WA)* s 199.

[8] Ibid s 198 (3).

[9] Ibid s 195 (1).

[10] Ibid s 211.

With regard to the reasons for an arbitrator's decision [11] the decision:

(a) need only identify the facts that the arbitrator has accepted in coming to the decision and give the reasons for doing so;
(b) need only identify the law that the arbitrator has applied in coming to the decision and give the reasons for doing so;
(c) need not canvass all the evidence given in the case; and
(d) need not canvass all the factual and legal arguments or issues arising in the case. [12]

The arbitrator may make orders with respect to costs in accordance with pt 10 of the *Workers Compensation and Injury Management Arbitration Rules 2011.*

The Definition of 'Injury' Under the Act

The threshold issues for the arbitrator are whether the injury is compensable and if it arose out of the course of the employment. The relevant legal principles with respect to the definition of 'arising out of… the employment' and 'in the course of employment' will not be discussed in this article but have been detailed in a number of cases including *Education Department of Western Australia v Morgan* [13] and *Kavanagh v The Commonwealth.* [14]

Section 18(1) of the Act provides that if an injury to a worker occurs, the employer shall, subject to this Act, be liable to pay compensation in accordance with sch 1. The term 'injury' is defined in s 5 of the Act to mean: [15]

(a) a personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions; or
(b) a disease, because of which an injury occurs under section 32 or 33; or
(c) a disease contracted by a worker in the course of his employment at, or away from, his place of employment, and to which the employment was a contributing factor and contributed to a significant degree; or

[11] Ibid s 213 (4).

[12] The principles in relation to a workers compensation arbitrator's duty to give adequate reasons for decision have been set out in numerous cases, including *Nardi v Department of Education and Training* [2006] C22-2006 at [26] to [31].

[13] [2000] WASCA 291.

[14] (1960) 103 CLR 547.

[15] The provisions in the Act essentially mirror those found in s 5A of the Commonwealth *Safety, Rehabilitation and Compensation Act 1988.*

(d) the recurrence, aggravation, or acceleration of any pre-existing disease where the employment was a contributing factor to that recurrence, aggravation, or acceleration and contributed to a significant degree; or

(e) a loss of function that occurs in the circumstances mentioned in section 49, but does not include a disease caused by stress if the stress wholly or predominantly arises from a matter mentioned in subsection (4) unless the matter is mentioned in paragraph (a) or (b) of that subsection and is unreasonable and harsh on the part of the employer;

Section 5(4) of the Act in turn relevantly states:

(4) For purposes of the definition of *injury*, the matters are as follows —

(a) the worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment; and

(b) the worker's not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment; and

(c) the worker's expectation of —

(i) a matter; or

(ii) a decision by the employer in relation to a matter,

referred to in paragraph (a) or (b).

Section (5) further provides:

(5) In determining whether the employment contributed, or contributed to a significant degree, to the contraction, recurrence, aggravation or acceleration of a disease for purposes of the definitions of injury and relevant employment, the following shall be taken into account —

(a) the duration of the employment; and

(b) the nature of, and particular tasks involved in, the employment; and

(c) the likelihood of the contraction, recurrence, aggravation or acceleration of the disease occurring despite the employment; and

(d) the existence of any hereditary factors in relation to the contraction, recurrence, aggravation or acceleration of the disease; and

(e) matters affecting the worker's health generally; and

(f) activities of the worker not related to the employment.

As can be seen from the above, both the definition of injury and the compensable causes of injury under the Act are extremely broad. Historically the majority of workplace injury disputes related to physical injury. The medical diagnosis of a physical injury and the capacity of a worker to undertake a return to the workforce, engage in alternate work or undergo retraining in a suitable occupation is often problematic for an arbitrator with no medical background.

Further in recent years there has been an increase in the number of workers compensation disputes relating to workplace stress or psychiatric injury.[16] According to Safe Work Australia's Key Work Health and Safety Statistics 2018, the number of serious work place related claims in Australia totalled 106,260 in the 2016-2017 financial year with some 6675 claims (6%) attributable to mental stress. [17] WorkCover WA, in its Statistical Note 2016,[18] stated that in the period 2012 to 2016 the number of work-related stress claims increased by 25%. In 2015–2016 there were 547 stress related claims lodged. The top three industries involving stress related claims were: Health Care and Social Assistance (25%); Public Administration and Safety (24%); and Education and Training (16%).

In terms of the causes of stress related claims, WorkCover in its Statistical Note states that 39% of the claims are caused by work pressure; 23% by harassment and bullying, 19% by exposure to a traumatic event, 14% by exposure to workplace violence and 5% to other causes.

With respect to WA public sector stress related claims, the statistics determined from the 2018 Insurance Commission of WA Annual Report notes:

> Although mental stress claims represent 9.1% of new workers' compensation claims in 2018, the estimated cost of mental stress claims for WA public sector agencies was 23.2% of the total estimated claims cost. The average estimated cost of mental stress claims received by RiskCover in 2018 was approximately $65,882 compared to $56,319 in 2017 (2016: $50,000). The cost of mental stress claims continue[s] to increase and is well above the average cost of other workers' compensation claims due to the complexities of the injury and returning an individual to their pre-injury work environment.[19]

It is anticipated that the effect on the workplace of COVID-19 related issues will also result in an increase in workers compensation stress and psychiatric injury claims.

Research carried out by Relationships Australia in April this year in response to COVID-19 issues found that recent workplace changes have had a major impact on Australia's mental health. Data collected

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[16] Safe Work Australia, *Work-related Injury Fatalities – Key WHS Statistics Australia 2018* (31 October 2018) < https://www.safeworkaustralia.gov.au/book/work-related-injury-fatalities-key-whs-statistics-australia-2018>; Safe Work Australia, *Costs of work-related injuries and diseases - Key WHS statistics Australia 2018* (23 August 2018) < https://www.safeworkaustralia.gov.au/book/costs-work-related-injuries-and-diseases-key-whs-statistics-australia-2018>; Safe Work Australia, *Work-related injury and disease - Key WHS statistics Australia 2018* (31 October 2018) < https://www.safeworkaustralia.gov.au/book/work-related-injury-and-disease-key-whs-statistics-australia-2018> (14 August 2020).

[17] Safe Work Australia, *Key work health and safety statistics Australia 2018* (4 October 2018) < https://www.safeworkaustralia.gov.au/book/key-work-health-and-safety-statistics-australia-2018>(14 August 2020).

[18] WorkCover WA, *Stress Related Claims: Statistical Note October 2016* (October 2016). <https://www.workcover.wa.gov.au/content/uploads/2016/11/Stress-Related.pdf>. (15 August 2020)

[19] Insurance Commission of Western Australia, *Annual Report* (2018), 58 <https://www.icwa.wa.gov.au/__data/assets/pdf_file/0023/20759/2018-Insurance-Commission-of-Western-Australia-Annual-Report.pdf>

through the Relationships Australia monthly survey, indicated extensive mental health effects caused by changes to the nature of work, the working environment and people's workload. The research indicated that people from all aspects of the Australian workforce were feeling the effects of the COVID-19 workplace restrictions and changes.

The data indicated that while the mental health outcomes from COVID-19 have varied in severity, the impacts have been widespread with 87% of respondents reporting a significant change (across all industries) to their workplace since the COVID crisis began. Further, 63% agreed these changes have had an impact on their mental health. The report concluded that across every industry, workers agreed that there have been significant changes to their workplace which have affected their mental health.[20]

Medical Expert Opinion

However, an employer's liability with respect to mental illness is not strict. For a mental injury claim to be compensable, an employee must prove that the employment contributed to the injury to a significant degree. Put another way, in the case of mental injury or diseases caused by stress, the evidence must show that there was something associated with the employment which significantly contributed to the stress.[21] This is done through the tendering of expert medical opinion by each party together with the tendering of oral evidence by the parties. In WorkCover arbitrations the expert medical opinion evidence is submitted by way of an expert report, but the experts do not appear before the arbitrator.

It is **not** the expert's role to determine whether a worker has a valid claim under the *Act.* Medical opinion is restricted to whether the medical condition could have resulted from the incident reported by the worker and the consequential ability of the worker to perform their work duties. That is a full capacity for work, some capacity for work or no capacity for any work.

On occasions, an expert medical report will state that the author is aware of and has complied with the Federal Court *Expert Evidence Practice Note* (GPN-EXPT)[22] but this in not mandatory. In recent years, some assistance with respect to relevant medical information has been provided with the publishing of the WorkCover WA Guidelines for the Evaluation of Permanent Impairment Fourth Edition, (December 2016). [23]

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[20] "Have the COVID-19 workplace changes affected people's mental health?" https://www.relationships.org.au/news/media-releases/have-the-covid-19-workplace-changes-affected-peoples-mental-health (18 August 2020).
[21] *Comcare v Martin* [2016] HCA 43 at 45.

[22] https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt.
[23] Available at https://www.workcover.wa.gov.au/wp-content/uploads/2014/09/December-2017-WA-Guidelines-web-New-dual-logo.pdf (18 August 2020).

Although WorkCover arbitrators are exposed to a wide range of medical information and have a wide discretion to inform themselves as they see fit [24] it must be remembered that an arbitrator is not a medical expert nor a specialist decision maker of the kind considered in *R v Milk; Ex parte Tomkins* [25] or *Keller v Drainage Tribunal and Montague.*[26]

As noted above, arbitrators are not bound by the rules of evidence and are required to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms and to determine disputes in a manner that is 'fair, just, economical, informal and quick'[27].

However, with all workplace compensation arbitrations, arbitrators are presented with numerous medical and other reports, which together with the legal submissions constitute hundreds of pages. Some of these reports are referred to in the party's submissions and many not. It is not uncommon (but in reality, more usual) that there is a significant conflict in the medical evidence.

In one of the writer's arbitration determinations it was stated:[28]

> With respect to determining this matter quickly, as with most arbitrations of this type I have been presented with numerous medical and other reports, comprising some 250 pages in total. By way of example the Applicant's bundle of documents contains 96 pages of medical reports alone. Some of these reports are referred to in the parties' submissions but many are not. Similarly the Respondent simply states at paragraph 20 of its submission that; "He has filed medical evidence to show that he is totally unfit for work" and it has been left to me to verify this by reference to these reports.

Unfortunately, medical experts do not appreciate that medical reports are not always written for a legal 'audience' and more often than not, assessment of imprecise language is necessary to try and discern the meaning and merit of the medical evidence. This difficulty was noted in the arbitrator's comments in *Department of Education v Azmitia:* [29]

> In the medical reports tendered by both parties there is often esoteric medical terminology and without assistance from counsel I have found the interpretation of the prognosis and symptoms at times difficult.

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[24] *Workers Compensation and Injury Management Act 1981 (WA)* s 188(3).

[25] [1944] VLR 187 at 197.

[26] [1980] VR 449 at 453.

[27] *Workers Compensation and Injury Management Act 1981 (WA)* s 3 (d).

[28] The names of the parties and any identifying decisions number are confidential unless the determination is reported in an appeal decision.

[29] *Department of Education v Azmitia* [2014] WADC 85.

> At first sight from time to time the language used in the medical reports appears to be equivocal or conjectural but upon careful consideration this seems to be more the typical modes of expression used by doctors.

Additionally in considering the relevant weight to be given to medical reports, where the arbitrator is relying significantly on the information being provided by persons being assessed, it is well known that doctors sometimes receive and report subjective histories incorrectly or inaccurately.[30]
At the same time in *Pacific Industrial Company v Jakovljevic* [31] it was stated that the Act expects an arbitrator to determine the conflict in medical evidence; 'Whenever and wherever possible.' However these words do not render much assistance to arbitrators in view of the issues mentioned above.

In another of the author's WorkCover arbitration determinations the author stated

> This has been a difficult arbitration. Arbitration is not an inquisitorial process and the obligation is on the parties to provide sufficient evidence and advance the relevant arguments (See *Mayne Nickless Ltd t/as Wards Express v Mayne* (unreported, SCWA, Lib No. 960736C, 19 December 1996).

In reviewing, and upholding the arbitrator's decision, O'Neal DCJ in the Western Australian District Court noted: [32]

> Given the volume of medical and other evidence tendered and never referred to again, the illegibility of some documents, the difficulties of assessing medical evidence without any assistance from any medical expert, and limited argument addressing the evidence in real detail, the arbitrator's description of the arbitration as 'difficult' might be described as stoical.

The Essential Requirement of a Medical Expert Opinion Report

Medical experts, like any other expert proffering an opinion, must sufficiently reveal the reasoning, based on his or her expertise and experience, and the assumptions and inferences leading to the conclusions. It was held in *Makita (Australia) Pty Ltd v Sprowles* [33] that expert evidence must explain how the expert's special knowledge applies to the facts and matters assumed to produce the opinion.

[30] Ibid.
[31] Citation Number - C19-2007; Date of decision - 24 April, 2007.

[32] *Thomas v Chandler Macleod* [2015] WADC 78 at 9.3.
[33] [2001] NSWCA 305.

Specifically with respect to medical opinion evidence, in *Pollock v Wellington* [34] it was held that the process of inference by which an opinion is reached, must be expressed in a manner that permits the conclusion to be scrutinised and a judgment made about its reliability. That is:

(a) Before an expert medical opinion can be of any value, the facts upon which it is founded must be proved by admissible evidence and the opinion must be founded on those facts.
(b) A court ought not act on an opinion, the basis for which is not explained by the witness expressing it.
(c) Unless the process of inference by which an opinion is reached is expressed in a manner which permits the conclusions to be scrutinised and a judgment made as to its reliability, the opinion can carry no weight. [35]

Unfortunately, the criteria in *Pollock v Wellington* are rarely applied if at all understood.

Conclusion

The Workers Compensation Arbitration Service provides a speedy and effective resolution of workers compensation disputes. However, the interpretation and relevance of expert medical opinion evidence featuring esoteric terminology, particularly with respect to psychological injury, and the usual conflict in opinions, create significant difficulties for arbitrators. The common law principle that workers compensation arbitrators are required to determine conflicts in medical evidence 'wherever and whenever possible' is not helpful.

Those engaged in writing expert medical opinions to assist in arbitration determinations need to be informed that the reports are essentially 'medico- legal' reports which will be examined by a diverse, non-medical audience and the report is a significant (actually crucial) item of evidence in court or arbitral proceedings and will be subjected to close scrutiny. [36]

Finally it is suggested that the adoption of a mandatory requirement that the content of expert medical opinion reports comply with directions similar to those required in Administrative Appeal Tribunal review hearings relating to workers compensation claims brought under the *Safety, Rehabilitation and*

[34] (1995) 15 WAR 1.
[35] These principles are also discussed in *McKay v Commissioner of Main Roads* [No 3] [2010] WASC 232.
[36] See '*How to write a medico-legal report'*; Australian Family Physician,
Volume 43, No.11, November 2014, Pages 777–779.

Case Note

Security for Amount in Dispute Ordered by Arbitration Tribunal – When Awarded, Whose 'Property' and How to Get it Paid Out

Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia (a firm) [2020] WASC 132

Greg Steinepreis[1]

Abstract

This case provides an illustration of the use by an international arbitration tribunal of a pre-award power to direct security for the amount in dispute. The source of the power was s 12(1)(g) of the Singapore International Arbitration Act 1994 *('SIAA'). There is no equivalent power in the International Arbitration Act 1974 (Cth) ('IAA'), although such a power could be given to a tribunal by agreement. The WA Supreme Court considered the effect of a direction to give security in the exercise of that power and the terms of a trust agreement entered into by the parties to implement the direction. The court considered whether the circumstances were distinct from those applicable to a freezing order and gave rise to a security interest in the security monies under the* Personal Property Securities Act 2009 *(Cth) ('PPSA'), and whether a later insolvency of the party giving the security made any difference.*

The International Arbitration

The history of the arbitration was outlined by the court. The plaintiff ('Dalian') and the second defendant (Duro Felguera Australia Pty Ltd ('Duro')) were parties to a subcontract for the design and supply by Dalian of heavy machinery for the Roy Hill Iron Ore Project in the Pilbara, Western Australia. Dalian claimed the balance of the subcontract sum. The dispute ended up in arbitration before a distinguished arbitration panel, seated in Singapore.

[1] Partner of Squire Patton Boggs (AU), B.Juris (UWA), LLB (UWA), FACICA, Grade 1 Arbitrator.

Some months after the hearing but before any award, Dalian applied to the tribunal for interim relief. The relief sought was payment of A$27 million as security for some of the amount in dispute, or alternatively a freezing or asset preservation order, pending the award.

The application for security was made under s 12(1)(g) of the *SIAA*. Relevantly, ss 12(1)(g), (h) and (i) of the *SIAA* state:

> Without prejudice to the powers set out in any of the other provisions of this Act and in the Model Law, an arbitral tribunal shall have the powers to make orders or give directions to any party for –
> …
> (g) securing the amount in dispute;
> (h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party;
> (i) an interim injunction or any other interim measure.

The tribunal granted the order for security in the sum sought. After weighing the alternatives, it decided monetary security under s 12(1)(g) of the *SIAA* was appropriate. This was because the tribunal was about to make an award and Dalian would likely suffer irreparable harm if it could not be enforced. Duro had received a substantial sum in a related arbitration and much of that was likely to be transferred out of the jurisdiction, and other means of security might not be available to Dalian.

The order was that, on the basis of a cross undertaking as to damages from Dalian and pending further order, Duro must forthwith take all necessary steps to deposit A$27 million into a bank account in the joint names of the solicitors for each party to be dealt with in accordance with the agreement of the parties or the direction of the tribunal.

The parties entered into a Trust Agreement to give effect to this order. For commercial reasons, the money was transferred into a controlled monies account in the name of the solicitors for Duro.

The tribunal later awarded Dalian about double the amount of the security. Dalian requested payment of the security, but this was not made. Dalian then obtained a direction of the tribunal (Procedural Order 17 (PO17)) that the trust monies be paid out to it. However, the monies were not paid to Dalian.

The Court Case

Dalian commenced court proceedings to enforce the award and applied for a direction that the trustee pay the security monies to Dalian. Days afterwards, Duro went into voluntary administration and enforcement was put on hold. Duro's administrators demanded that the trustee not pay the monies to

Dalian pending the outcome of the administration and opposed the application. The trustee eventually sought a direction from the court under s 92(1) of the *Trustees Act 1962* (WA) as to how to deal with the competing demands.

Issues

The court had to decide three questions: (1) Whether the trustee was obliged to pay the A$27 million to Dalian; (2) If so, from when; (3) Did the trustee's obligation continue where voluntary administrators were appointed to Duro.

The court examined the arbitration background and the history and scope of s 12(1)(g) of the *SIAA*. The court also considered the nature of each party's interest in the trust monies, whether Dalian's interest constituted a 'security interest' for the purposes of the *PPSA* and various relevant provisions of the *Corporations Act 2001* (Cth) ('*Corporations Act'*).

Court Decision

The court noted the somewhat unique aspects of the *SIAA* which expands on the Model Law, intended to be part of an enhancement of Singapore's attractiveness as a seat, and the limited discussion of s 12(1)(g) by Singaporean courts.

The power to grant security under s 12(1)(g) was considered to be clearly distinguished from the power to grant a freezing order and of an 'ostensibly stronger and elevated character'. This power was considered to go 'well beyond' the freezing order power and was more akin to an order to pay money as a condition for leave to defend an action.

This distinction has significant implications in insolvency. As the court noted, security over a dedicated fund for the purpose of providing some assurance of recovery in the event of a successful outcome, if akin to a payment for leave to defend, would result in the party being treated as a secured creditor. On the other hand, there is long-established authority that a beneficiary of an 'in personam' freezing order would not obtain any superior interest above other unsecured creditors.

Central to the court's decision was the Trust Agreement, in which there was a term that the trust monies may only be released or paid in accordance with a direction to the Trustee by a nominated partner of both the solicitors for Dalian and Duro, or a direction of the tribunal.

The court determined that an express trust was created by the Trust Agreement in respect of the A$27 million, on the terms of that trust, and the status of those monies was similar to where a neutral stakeholder holds funds pending a property settlement. Dalian held a contingent equitable interest in the funds, contingent on winning its case in the arbitration, by reason of the trust agreement and upon receipt of the funds into the nominated account.

Crucially, it was also determined that Dalian's interest altered once the tribunal made PO17. At that point, the interest matured or was 'perfected' and was fully vested such that Dalian's interest became an absolute and unqualified beneficial entitlement in equity to receive the funds.

Duro had some degree of residual equitable interest in the funds (an interest that they be held on the terms of the trust) before PO17, but no such interest after that.

The appointment of voluntary administrators to Duro occurred about six weeks after PO17. The court examined the operation of the *PPSA* and the *Corporations Act* to determine if the position under those statutes changed the position of the parties' respective interests.

In the court's view, Duro's rights to the funds before PO17 could be classed as 'property' within the meaning of that term in the relevant provisions of the *PPSA* and the *Corporations Act*.

As well, Dalian's rights until PO17 would come within the meaning of a 'security interest' and be subject to obligations under s 12 of the *PPSA*. Until PO17, the trust funds were retained under a 'transaction', as that term is used in the definition of 'security interest', as the Trust Agreement secured payment or performance of an obligation.

The court concluded that, while Dalian's security interest could have been perfected and protected by registration under the *PPSA* before the tribunal directed PO17, the direction operated as a 'perfection' of Dalian's interest within the meaning of that term in s 21 of the *PPSA*.

In relation to the *Corporations Act*, Duro argued that the trust funds were property of Duro and should be available to all creditors under ss 437A and 437B and the funds were 'property' within the meaning of ss 9 and 437D and governed by s 440B. The court disposed of these arguments and other similar arguments[2] on the basis that the trust funds were not the property of Duro after PO17, but instead the property of Dalian.

[2] Based on ss 441AA, 441A, 441B and 441D.

In the end result, the court answered the three questions of it as follows: (1) The trust monies must be paid to Dalian; (2) This should have occurred from the time of the tribunal's direction, PO17; (3) The obligation on the trustee to pay the trust monies to Dalian continued despite the appointment of administrators to Duro (although no orders to this effect were made to allow the administrators to consider whether to seek a preservation order to keep the monies in Australia, which application was later made and dismissed[3]).

Comments

This case illustrates the exercise, by an international arbitration tribunal, of the power under s 12(1)(g) of the *SIAA* to order pre-award security for the amount in dispute. By that unique provision, the tribunal also has a broad discretion how that might be done. There is no equivalent provision under the *IAA*. However, it is possible for parties to give such a power to the tribunal by agreement.

Unlike the position in relation to a freezing order, a 'security interest' or other proprietary interest may be created for the purposes of the *PPSA* and the *Corporations Act* by an order for pre-award security, depending on the form of the order and how it is implemented.

In the court's view, the distinction between an order for pre-award security and a freezing order would also have insolvency implications; the beneficiary of a pre-award security order would have secured creditor status. For a claimant, empowering the tribunal with a power to order pre-award security is obviously attractive.

Typically, a tribunal has power to order security in connection with an interim measure.[4] It is unclear (given this was not before the court) what would be the position as regards the existence of a 'security interest' and in an insolvency where, by that power, the tribunal provides for a mechanism for the giving of monetary security and the parties agree a trust arrangement in similar terms to those in this case.

The court's determination of the rights of the parties to the security funds in the context of the *PPSA* and the insolvency provisions of the *Corporations Act* is of assistance to parties who enter into such consensual arrangements or who are the subject of a direction to secure all or some of the amount in dispute. It appears from this decision that a security interest may arise from the time of the security order or stakeholder/trust agreement in favour of the party to whom the security is provided, and that party would be well advised to consider perfecting and protecting that interest by registration under the *PPSA*.

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[3] *Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia (a Firm) [No 2]* [2020] WASC 245.

[4] For example, under Art 17E of the Model Law encapsulated in the IAA, Art 33.4 ACICA Rules 2016 and Art 28.1 ICC Arbitration Rules 2017.

Compensation Act 1988 (Cth), and particularly the use of expert conclaves, would greatly assist arbitrators. [37]

[37] Administrative Appeals Tribunal Guideline, 'Persons Giving Expert and Opinion Evidence.' Available at https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/persons-giving-expert-and-opinion-evidence-guidelines

Case note

Tayar v Feldman [2020] VSC 66

David Byrne[1]

Abstract

In this case, the plaintiff, Rabbi Corey Stephen Tayar, brought a proceeding against Rabbi Pinchus Feldman and Rabbi Josef Feldman ('the Feldmans'), pursuant to the Commercial Arbitration Act 2011 *(Vic) s 35 ('CAA') to enforce a domestic arbitration award made for the payment of sums totaling about $1.75M. The Feldmans, in response, sought interlocutory orders refusing enforcement pursuant to s 36.*

The Background

Rabbi Tayar worked at the Yeshiva Centre, Melbourne, an organisation operated by the Feldmans which provided educational and other charitable services for an orthodox Jewish community in Melbourne. He brought an arbitral proceeding against the Feldmans, seeking the determination of disputes with them, arising between 2007 and 2013, regarding transactions 'including certain loans, rents, salary payments, the ownership of properties and other matters'. These disputes were identified in the award as five claims. Rabbi Tayar sought enforcement of the award for claims 1, 2 and 4 only; claims 3 and 5 were not pursued.

Claim 1 was for sums advanced to the Feldmans for the purposes of meeting the ongoing expenses of the Centre. It was said that the repayment of these advances was secured by the Feldmans providing security over five parcels of land. Security was to be discharged when the advances were repaid. Although it was referred to as a pledge or a lien, the precise nature of this security was not disclosed; its effect on the rights of the party was much discussed in the reasons of the arbitral panel. The precise description of the security is not important, as its enforcement was not pressed. The award made in response to this claim was in these terms:

> The mentioned properties remain in the possession of the [Feldmans] and nevertheless the [Feldmans] are obliged to pay the amount of $1,635,802 to [Rabbi Tayar]. However [Rabbi Tayar] retains a lien on the properties up to the value of the aforementioned amount.[2]

1 Hon David Byrne QC, retired Judge, Supreme Court of Victoria.

2 Judgment, p 48.

Claim 2 alleged an agreement between the parties whereby the Feldmans would pay the rental payable by Rabbi Tayar for his house so long as the advance remained unpaid. It was said that this agreement was made because Rabbi Tayar had used so much of his cash resources to make the advances, that he expected to have difficulty meeting his own rental obligations. The award in respect of this claim was:

> The [Feldmans] must pay the entire amount of the rental agreement $17,815.47 pcm, as agreed between the parties initially (including all outstanding payments, which have not been paid completely yet). This obligation continues until the [Feldmans] pay the entire above mentioned amount mentioned in claim 1. Regarding the monthly payments from that time to September 2013, it depends on the details of initially made agreement and needs further clarification by the Court.[3]

Claim 4 was for unpaid salary for Rabbi Tayar's work at the Yeshiva Centre. The award for this claim was as follows: 'The [Feldmans] must pay the entire amount of the salary [that has not yet been paid] to [Rabbi Tayar] for all the time of his services at the office etc, but not for the time after he resigned from work.'[4]

The Hearing

The hearing was conducted in Hebrew, Yiddish and English before an arbitral panel comprising three rabbis, who were directed in the arbitration agreement that:

> 'they may determine any question that arises for determination in the course of the arbitration in relation to the substance of the Disputed Matters by reference to the principles of Orthodox Jewish law (i.e. the Halacha) including its references to local law and local custom'.[5]

The Disputed Matters were described in Schedule 1 to the arbitration agreement as follows:

> The matters to be determined by the Arbitral Panel are to be determined by the Statement of Claim, Statement of Defence and Cross Claim (if any) and the Reply and Defence to Cross Claim (if any) to be filed in the arbitration as directed by the Arbitral Panel.[6] [Typographical errors corrected].

No pleadings nor other written statement of the claims or the issues for determination were delivered. It appears from the award that, at the hearing, the arbitral panel identified the issues in discussion with

3 Ibid p 48.

4 Ibid.

5 Ibid at [21].

6 Ibid at [28].

those present at the commencement of the hearing. 'The contents of the decision are mainly based on the claims which were frankly stated by the Parties at the sitting of the Rabbinical Court.'[7]

Despite what might appear to have been a fairly informal hearing, his Honour observed that it was not suggested that the Feldmans were denied procedural fairness.

A Threshold Issue – A Valid and Binding Commercial Arbitration Agreement

Because the Act applies to domestic commercial arbitrations, his Honour said that he must first be satisfied, as a threshold issue, that the agreement upon which the award and the enforcement power depended, was a valid binding commercial arbitration agreement. He then set about, over a substantial portion of his judgment to consider and reject the contentions of the Feldmans that the failure of the parties to identify the matters in dispute in pleadings, or otherwise in writing, meant that the arbitration agreement was void or ineffective on the grounds of uncertainty, or that it did not comply with the requirements of s 1(3) of the *CAA*, in that it was not an agreement to refer a specific dispute to arbitration, or on the further ground that it did not comply with the requirements of s 7 that it be in writing. Given the terms of s 1(2) and the fact that ss 35 and 36 impose no such constraint, the need to determine this threshold issue may be doubted, but it is not here relevant as this note is directed to arbitrators.

His Honour, however, concluded his discussion of the suggested deficiencies of the arbitration agreement with the following important observation:

> [97] Further, there is no reason to doubt that the parties were aware of the matters that were in fact the subject of hearings and determination by the Arbitral Panel. There was no suggestion to the contrary in the evidence or in the submissions before me. The Respondents did not object about the failure to file a statement of claim at any time during the two days of hearing or before the Award was delivered.
>
> [98] That is not to say that I do not consider, in the ordinary case, that parties to an arbitration should specify in writing the subject matter of the disputes to be referred to arbitration. Such a practice avoids the problems which might arise if the nature of the subject matter of the disputes are not properly identified including allegations that there was a want of procedural fairness.

The other requirements of s 35 were satisfied.

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7 Ibid at [32].

The Feldmans' Grounds for Refusal

The Feldmans relied upon a number of grounds for refusing enforcement of which two are of present interest:

1. No reasons were given for the award in respect of claims 1, 2 and 4; and
2. The awards in respect of claims 2 and 4 did not provide for a sum certain.

The first ground raised the question of the insufficiency of the reasons for the award as required by s 31(3) of the *CAA*. It was put, and apparently accepted by his Honour, that a failure to comply with this requirement led to the conclusion that the 'arbitral procedure was not in accordance with the agreement of the parties', within the meaning of s 36(1)(a)(iv) or that the enforcement of an award without sufficient reasons was contrary to public policy, within the meaning of s 36(1)(b)(ii).

The reasons given by the arbitral tribunal on most of the claims were brief. His Honour applied the requirements for sufficient reasons adopted by the High Court in *Westport Insurance Corporation, Gordian Runoff Limited* (2011) 244 CLR 239 at [51] and [169]–[170] for the equivalent requirement in s 29(1)(c) of the repealed uniform *Commercial Arbitration Act 1984*:

> All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is.

In assessing the reasons of the arbitral panel, his Honour made due allowance for the fact that the copy of the award, the reasons and, probably, other documents, in evidence were translations of the originals written in Hebrew.

The reasons of the arbitral tribunal are not easy to follow. For example, the tribunal say nothing about claim 4. The arbitrators appear to have been concerned mainly with the question whether the transactions underlying claims 1 and 2 offended the rabbinic law prohibiting the charging of interest upon moneys lent between Jews, and the possibility that the parties had made the arrangements for providing the properties as security and for the Feldmans paying for Rabbi Tayar's rental as stratagems to avoid that prohibition. The matters that would excite the interest of a common law judge or arbitrator, namely the amount of the loan, the amount of any repayments made, the period of the unpaid rental payments appear to have been put to one side or, perhaps, they were not contentious as the case was presented to the arbitral panel.

Having examined the arbitrators' reasons, his Honour concluded that there were adequate reasons given for the conclusion that the amount of $1,635,802 was outstanding under claim 1 but that the statement of the facts upon which the conclusions in the award for claim 2 were insufficient. His Honour concluded that this was a procedural non-compliance that permitted him to exercise his discretion to refuse enforcement of claims 2 and 4.

The second ground concerned the failure of the award to identify the sums to be the subject of enforcement. The award for claim 1 identified the outstanding amount of the advances owing as $1,635,802 from which an agreed repayment of $120,400 was to be deducted leaving $1,515,402.02 as due and payable. This was a sum certain sufficient for his Honour to enforce. As for claim 2, while the monthly rental is identified in the award, it is clear that there are further matters to be resolved before the sum owing could be known. The award with respect to claim 4 suffered from a similar deficiency. For this further reason enforcement of claims 2 and 4 would be refused.

Conclusion and Comments

And so, the Feldmans' cross-application pursuant to s 36 failed. The decision of the Court was to order, pursuant to s 35, enforcement of only that part of the award in response to the monetary portion of claim 1, in the sum of $1,515,402.02.

This case did not make new law, nor did it extend the boundaries of existing jurisprudence. Its interest for arbitrators and others concerned with arbitration lies in the fact that the difficulties addressed by the court were the product of shortcomings of the arbitrators, the failure to identify the matters in dispute and the inadequacy of the reasons. This had the unhappy consequence that, although the claimant received a favourable decision for four of his five claims, only one was enforced.

Defining the Issues

A feature of this arbitration was that it was referred to a panel of scholars who were, doubtless, very familiar with rabbinic law. As good arbitrators, they doubtless focused attention on what seemed to them, and perhaps to the parties also, to be a very important issue, namely the lawfulness of the arrangement for the advances in claims 1 and 2 and the status of the securities.

It does not appear from the judgment, why the award took the form that it did. It may be that the arbitrators were asked only to determine the issues of rabbinical law, leaving to the parties the task of resolving matters such as the amounts that the Feldmans were obliged to pay.

As his Honour observed in para [98] of the judgment, the arbitrators failed to extract from the parties and to record what were the precise claims and defences they were to deal with, and those that were not in issue. These should have been identified so that the contentions of each party might be dealt with in an orderly way and, in due course, included in the reasons. This is often a difficult, but fundamentally important, step in the process of arbitration, especially where one or more of the parties are self-represented and feelings are running high.

Sufficient Reasons

It may be that the reasons suffered in the translation, but, even so, they failed to comply with the minimal standards required by the High Court. It may be, of course, that this failure was a product of the arbitral panel's initial failure to extract the parties' positions at the hearing. All that was required of the reasons to be included in the award was a finding of the facts that they found and then to apply these facts, logically to the outcome that they included in their award.

Enforceable Award

Finally, there is the failure of the arbitral panel to arrive at the amount that they found to be owing with sufficient precision for the Court to make an enforcement order.

Even if these deficiencies were the product of the manner in which the parties or their representatives presented their cases to the arbitrators, the lesson this case offers to arbitrators is that they must exercise control over the process and have regard to the requirements of the *Commercial Arbitration Act* in order to produce an award which is a final and enforceable resolution of their disputes, which is an important objective of arbitration.

CASE NOTE

Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13; 366 ALR 635

Albert Monichino QC

Abstract

On 8 May 2019, the High Court of Australia handed down its eagerly anticipated decision in Rinehart v Hancock Prospecting Pty Ltd.[1] *It was hoped that the High Court would clarify the Australian approach to the interpretation of arbitration clauses, including whether the 'presumptive liberal approach' to construction endorsed by the House of Lords in* Fiona Trust & Holding Corporation v Privalov[2] *('Fiona Trust') was good law in Australia.*

In *Fiona Trust*, the House of Lords famously declared that the time had come to make a 'fresh start' for cases arising in the international commercial arbitration context.[3] In this regard, the English Court of Appeal had remarked below that 'ordinary businessmen would be surprised at the nice distinctions drawn in their cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words'.[4] Lord Hoffman (with whom the other members of the House of Lords[5] agreed) observed that the fine semantic distinctions drawn in the old cases between relational phrases like 'under', 'in connection with', 'in relation to', 'arising out of' and the like 'reflect[ed] no credit upon English commercial law'.[6] Instead, his Lordship advocated for a liberal presumptive approach to the interpretation of arbitration agreements:

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[1] *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13 *(' Rinehart v Hancock')*.

[2] *Fiona Trust & Holding Corporation v Privalov* [2007] 1 All ER (Comm) 891; [2007] EWCA Civ 20; affirmed in *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] 4 All ER 951; [2007] UKHL 40.

[3] *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] 4 All ER 951; [2007] UKHL 40, [12] (Lord Hoffman) *('Nafta')*.

[4] *Fiona Trust & Holding Corporation v Privalov* [2007] 1 All ER (Comm) 891; [2007] EWCA Civ 20, [17] (Tuckey, Arden and Longmore LJJ).

[5] Namely, Lord Hope of Craighead, Lord Scott of Foscote, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood.

[6] *Nafta (*above n 3).

> In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.[7]

The main arbitration clause at issue, cl 20 of the Hope Downs Deed ('HD Deed'), had spawned litigation in federal and state courts in Australia, with the Full Court of the Federal Court of Australia[8] ('FCAFC') and New South Wales Court of Appeal[9] ('NSWCA') construing the very same clause in contrary ways, and adopting contrary positions as to whether *Fiona Trust* is good law in Australia.

The second aspect of the High Court judgment concerned the extended definition of "party" in s 2(1) of the *Commercial Arbitration Act 2010* (NSW) ('*CAA*'). This provision, like s 7(4) of the *International Arbitration Act 1974* (Cth) ('*IAA*'), provides that a 'party' to an arbitration agreement includes, not only a party named as such in the arbitration agreement, but also 'any person claiming through or under a party to the arbitration agreement'. There is no counterpart provision in the UNCITRAL Model Law on International Commercial Arbitration ('*Model Law*'). The 'through or under' provision has the potential to avoid the privity doctrine and increase the number of parties to an arbitration.

Facts

The labyrinthine proceedings emerged out of a long-running, bitter family dispute between, on one side, Bianca Rinehart ('Bianca') and her brother, John Hancock ('John')[10] (collectively, 'the Siblings'), and, on the other, their mother, Gina Rinehart ('Mrs Rinehart') and a number of companies controlled by her (collectively, 'Hancock Group').

Following the death of her father, Mr Lang Hancock in 1992, Mrs Rinehart became the trustee of the HMH Trust and HFMF Trust of which her four children (including the Siblings) were the sole beneficiaries. The principal assets of each trust were shares in companies within the Hancock Group, including HFMF and HPPL, which, in turn directly or indirectly owned certain valuable mining tenements in Western Australia. In the mid-1990's, HFMF transferred three mining tenements to HPPL, a Hancock Group company in which Mrs Rinehart had a majority interest and the Siblings had no

[7] *Nafta (*above n 3).

[8] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442.

[9] *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95.

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

interest. These tenements were subsequently transferred to other companies in the Hancock Group; namely, RHIO, HDIO and MDIO (collectively, 'the Third-Party Companies'). Mrs Rinehart was a director of each of the Hancock Group companies, including the Third-Party Companies.

In the early 2000's, the Siblings had commenced proceedings in the Western Australian Supreme Court challenging these transactions. At the same time Mrs Rinehart was negotiating with a mining company to exploit the tenements The parties therefore entered into a number of deeds, including the HD Deed, the purpose of which was 'to quell ongoing disputes as to title concerning mining tenements' that the Hancock Group had interests in.[11] In return for acknowledgment of title, releases of claims and undertakings not to sue, HPPL (a member of the Hancock Group) agreed to pay quarterly dividends to the Hancock Trust, which were then to be paid to the beneficiaries, including the Siblings.[12] The HD Deed contained a number of provisions, including in the recitals, requiring the parties to keep their arrangements confidential and cl 20 provided for alternative dispute resolution, including confidential arbitration, '[i]n the event that there is any dispute under this deed'.[13] Relevantly, the arbitration clause was drafted in relatively narrow terms.

Claims

Notwithstanding these releases, in 2014, the Siblings commenced litigation before the Federal Court ('FCA') against Mrs Rinehart and certain companies in the Hancock Group. They alleged that Mrs Rinehart breached her fiduciary duties as director of certain companies in the Hancock Group and her duties as a trustee of the Hancock Trust by, inter alia, transferring all the valuable mining assets from HFMF, a Hancock Group company in which she held no shares, to HPPL, a company in which she held shares.[14] The Siblings applied to remove Mrs Rinehart as trustee of the Hancock Trust and officer of the Hancock Group ('the Substantive Claims').

[11] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [76].

[12] *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174; [2016] FCA 539, [77].

[13] In the Federal Court proceedings, several other deeds with arbitration agreements were also the subject of dispute. The Court treated those deeds as subordinate to the HD Deed and considered that 'the outcome of those claims [regarding the other deeds] was governed or controlled by the [HD] Deed': *Rinehart v Rinehart (No 3)* (2016) 337 ALR 174; [2016] FCA 539, [21] (Gleeson J); *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [78] (Allsop CJ, Besanko and O'Callaghan JJ). On the other hand, the NSWCA was only concerned with the HD Deed: *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95, [8].

[14] *Hancock Prospecting* [2] (above n 11).

Moreover, the Siblings claimed that the Third-Party Companies had received the mining tenements, by way of assignment, from HPPL with knowledge of a breach of trust, and therefore held them on constructive trust for the Siblings.[15]

In the face of these claims, the Hancock Group applied under s 8(1) of the *CAA* for an order to stay the court proceedings and refer the parties to arbitration, pursuant to cl 20 of the HD Deed and similar arbitration clauses contained in the other related deeds (collectively, 'the Deeds'). They argued that the matters before the Court fell within the scope of the several arbitration agreements and, further, that the releases and bars to future action contained in the Deeds provided a complete defence to the Substantive Claims.

The Third-Party Companies, though not parties to the Deeds, also sought to stay the claims brought against them in the Federal Court, in reliance on s 8 of the *CAA*. They contended that they were entitled to claim 'through or under' HPPL (being a party to the Deeds) because an essential element of their defence was that HPPL was beneficially entitled to the mining tenements (ie there was no breach of trust).

The Siblings resisted the stay application, and sought to avoid the operation of the releases of claims and undertakings not to sue (which were raised in defence of the Substantive Claims), on the grounds that the Deeds containing the arbitration agreements and the releases/undertakings, were void (and therefore were incapable of referring the parties to arbitration pursuant to s 8(1) of the CAA) because they had been procured through wrongful conduct by Mrs Rinehart and certain companies within the Hancock Group ('the Validity Claims').[16]

Issue

A central question in the Federal Court, upon the hearing and determination of the stay applications brought by the Hancock Group and the Third-Party Companies, was whether a dispute as to the validity of the Deeds was a dispute 'under this deed' within the meaning of the relevant arbitration agreements.

[15] The FCAFC noted that Mrs Rinehart was a director and the controlling mind of the Third-Party Companies and, therefore, her knowledge was to be imputed to the Third-Party Companies. See *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, [291], [293].

[16] The Validity Claims were intertwined with the Substantive Claims, as the High Court recognised: *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [12] and [43] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

Earlier Proceedings

At first instance, Gleeson J accepted that several (but not all) of the matters sought to be agitated by the Siblings fell within the scope of the arbitration clauses contained in the various Deeds. However, she found that the Validity Claims did not fall within the proper construction of the narrow expression 'under this deed'.[17] In arriving at this conclusion, her Honour construed clause 20 of the HD Deed in the manner that it had been construed by Bathurst CJ in the NSWCA in earlier litigation between related parties.[18] In that earlier decision, the NSWCA expressed the view that the 'presumptive liberal approach' to construction endorsed by the House of Lords in *Fiona Trust* was not good law in Australia, and that an arbitration clause was to be construed in the same manner as any other contractual term.[19] Nonetheless, Gleeson J considered that the Validity Claims were available to impeach the arbitration agreements under the s 8 proviso,[20] and that the Court should determine whether the proviso had been engaged.[21]

The trial judge's decision was overturned on appeal by the FCAFC (Allsop CJ, Besanko and O'Callaghan JJ). According to the FCAFC, the relevant expression at issue was the composite phrase '*any* dispute under this deed' rather than simply the expression 'under this deed'.[22] 'Any dispute' captures any disagreement or controversy in its entirety. As such, it was improper to adopt narrow interpretations of the expression 'under this deed', resulting in the splitting of issues between the court (on the one hand) and arbitration (on the other hand).[23] It followed that the Validity Claims fell within the proper construction of the narrow expression 'under this deed'.[24]

The FCAFC expressly disagreed with the NSWCA majority's characterisation of Lord Hoffman's comments. According to the FCAFC, properly understood, Lord Hoffman 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. It considered that this approach was consistent with earlier Australian decisions as well as established common law principles of contractual interpretation. [25] The FCAFC considered that it is presumed that

[17] *Rinehart v Rinehart (No 3)* (2016) 257 FCR 310 (Gleeson J).

[18] *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95.

[19] Ibid [121]-[125].

[20] Namely, whether the arbitration agreements were null and void, inoperative or incapable of being performed.

[21] *Rinehart v Rinehart (No 3)* (2016) 257 FCR 310, 439-440 [666] (Gleeson J).

[22] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658; [2017] FCAFC 170, [201].

[23] Ibid [161] and [201].

[24] Separately, the FCFCA observed that a court entertaining a stay application was not mandated to hear and determine any proviso issues but rather had a discretion whether or not to do so: [367]. In exercising the discretion afresh, the FCFCA considered that it was preferable to allow the proviso question to be determined by the arbitral tribunal to be appointed: [393].

[25] *Hancock Prospecting (*above n 11*)* [163] – [164].

parties ordinarily intend all aspects of the defined relationship in respect of which they have agreed to submit disputes to arbitration to be determined by the same tribunal.

Australian courts are required to follow earlier decisions of intermediate appellate courts, unless the earlier decision is considered to be '*plainly wrong*'.[26] Whilst conceding that their views differed from those of the NSWCA, the FCAFC was 'persuaded to the necessary point of clarity that [the NCWCA] construction [was] not correct'.[27] This was a very serious step for the FCAFC to take.

At first instance before the Federal Court of Australia, Gleeson J rejected the contention that the Third-Party Companies could claim 'through or under' parties to the arbitration agreement (in particular, HPPL). On appeal, the FCAFC agreed with the trial judge's approach to the statutory expression 'through or under' in s 2 of the CAA. Like the trial judge, the FCAFC construed the expression narrowly. In sum, the FCAFC considered that, properly understood, 'through or under' required the Third-Party Companies to invoke a 'derivative defence'. In its view, the covenants in the Deeds did not found a derivative defence by the Third-Party Companies.

High Court of Appeal Decision

The Siblings appealed the FCFCA decision to the High Court. The Third-Party Companies (whose stay application was refused, at first instance and on appeal) cross appealed. There were thus two main issues before the High Court:

(a) first, whether the 'Validity Claims' fell within the scope of the arbitration agreements; and
(b) secondly, the extended meaning of 'party' in s 2(1) of the *CAA*.[28]

The High Court decision comprises two judgments. First, the plurality judgment of Kiefel CJ, Gageler, Nettle and Gordon JJ. Secondly, the judgment of Edelman J. All of the High Court justices were of the view that the 'Validity Claims' fell within the scope of the arbitration agreements.[29] There was a divergence of opinion, however, on the second issue. The plurality allowed the cross-appeal, embracing

[26] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22, [135].

[27] *Hancock Prospecting (*above n 11*)* [205].

[28] Which is similarly defined in s 7(4) of the *International Arbitration Act 1974* (Cth) for the purposes of enforcement of foreign arbitration agreements.

[29] *Rinehart v Hancock* (above n 1) [17] (Kiefel CJ, Gageler, Nettle and Gordon JJ); [83] (Edelman J).

an expansive view of the statutory expression 'through or under'.[30] On the other hand, in Edelman J's view, the cross-appeal should be dismissed.[31]

Proper Interpretation

According to the plurality, the appeals could be resolved by application of orthodox principles of contract interpretation, without reference to *Fiona Trust*.[32] This required consideration of the language used by the parties, the surrounding circumstances, and the purpose and objects to be secured by the deeds.[33] The plurality embraced the FCAFC observation that '[c]ontext will almost always tell one more about the objectively intended reach of [prepositional] phrases (such as 'under', 'in connection with' or 'arising out of') than textual comparison of words of a general relational character'.[34]

After tracing the history of the three deeds in question and having stated succinctly the proper approach to contractual interpretation, the plurality readily answered the dispositive question as to whether the Validity Claims fell within the scope of the arbitration agreements contained in the various deeds.[35]

In the plurality's view, having regard to several aspects of the surrounding circumstances, as well as the purposes and objects of the various deeds,[36] it could not have been understood by the parties to these deeds that any challenge to the efficacy of the deeds was to be determined in the public spotlight.[37]

The purpose and the context of the several deeds — in particular, the overwhelming desire to quell any future disputes by confidential dispute resolution — demanded an expansive interpretation of the phrase 'dispute under this deed'.[38]

[30] *Rinehart v Hancock* (above n 1) [81] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[31] Ibid [104] (Edelman J).

[32] Ibid [18] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[33] Ibid [18] and [44] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[34] Ibid [26] (Kiefel CJ, Gageler, Nettle and Gordon JJ) citing *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, 496 [193].

[35] *Rinehart v Hancock* (above n 1) [44] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[36] Ibid [27] - [49] (Kiefel CJ, Gageler, Nettle and Gordon JJ). One of the surrounding circumstances was that the Substantive Claims and the Validity Claims were intertwined. In those circumstances, it would make little sense if the Substantive Claims were to be resolved by private arbitration but the Validity Claims were not.

[37] Ibid. [44] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[38] Ibid. [27] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

Accordingly, disputes as to the validity of the several deeds (as well as substantive disputes) were held to fall within the scope of the reference to arbitration, and the appeal from the FCAFC was dismissed.[39]

In a separate, concurring judgment (on this issue), Edelman J held that consideration of context was a vital element of interpretation but did not consider it necessary to determine what amount of additional weight to place on the consideration that parties to an arbitration agreement would wish to minimise fragmentation of their disputes.[40] Thus, his Honour appears to have recognised that the considerations in *Fiona Trust* were valid.

Through or Under

Turning to the second issue, the High Court plurality adopted an expansive view of the scope of 'through or under', overturning the narrow approach applied by the FCAFC and the primary judge below. In dissent, Edelman J endorsed a narrower interpretation of the phrase, agreeing with the FCAFC.

Notably, both the plurality and Edelman J (like the FCFCA) purported to rely on Brennan and Dawson JJ's joint judgment in the seminal case of *Tanning*,[41] albeit differently.

The plurality held that, properly understood, the Brennan and Dawson JJ 'derivative test' required asking '*whether an essential element of the defence [of the Third-Party Companies] was, or is, vested in or exercisable by the party to the arbitration agreement [namely, HPPL]*'?[42] Applying a relatively broad conception of this test,[43] the plurality held that an '*alleged knowing recipient of trust property who invoke[d] as an essential element of its defence*' the allegation that the trustee was beneficially entitled to the subject property, was claiming 'through or under' the trustee, for the purposes of the arbitration legislation.[44]

The plurality emphasised the subject-matter in controversy. Their Honours were highly influenced by the fact that the Third-Party Companies' defences were closely related to the defences of HPPL and that if HPPL were found to be 'blameless', the Third-Party Companies 'would be equally blameless'.[45]

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[39] *Rinehart v Hancock* (above n 1) [50] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[40] Ibid. [83] (Edelman J).

[41] *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332.

[42] *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [66].

[43] Which mirrors the approach in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64 [65] (Nettle J). It is notable that Nettle J was a member of the plurality in the High Court decision of *Rinehart v Hancock Prospecting*)

[44] *Rinehart v Hancock* (above n 1) [66].

[45] *Rinehart v Hancock* (above n 1) [76] referring to *Roussel-Uclaf v G D Searle & Co Ltd* [1978] 1 Lloyd's Rep 225.

In contrast, Edelman J considered an expansive approach to 'through or under' would undermine fundamental notions of privity of contract and party autonomy upon which arbitration is based.[46] Thus, to claim though or under, the third-party must be agitating a right of the party to the arbitration agreement itself, and not its own right.[47] Therefore, 'through or under' should be given a limited discriminatory operation consistent with the doctrine of privity, such as in the case of agency, assignment, novation or succession by operation of law.[48]

His Honour proceeded to apply Brennan and Dawson JJ's approach more strictly than the plurality.[49] According to Edelman J, to claim 'through or under' the non-party to the arbitration agreement must stand in the same position as the party to the arbitration agreement and claim a defence or cause of action available to the party to the arbitration agreement.[50]

His Honour characterised the claims by the Siblings against the Third-Party Companies as '*assertions of* direct liability'.[51] Here (like the FCFCA), Edelman J focussed on the legal nature of the claim against the alleged knowing recipients as being a claim that was technically independent of the claim brought by the Siblings (as beneficiaries) against HPPL (as trustee).[52]

Ultimately, then, the Third-Party Companies were neither in the same position as, nor asserted any contractual right available to, HPPL.[53] Instead, in Edelman J's view, they were defending a claim independent from the claim advanced against HPPL, '*relying upon their own rights*'.[54]

Comment

It is disappointing that the High Court did not tackle the important policy question of whether *Fiona Trust*, and the presumptive liberal approach to the interpretation of arbitration agreements, is good law in Australia. This has the unfortunate effect of leaving unresolved a conflict of views between two intermediate appellate courts, with consequent uncertainty.[55] There are strong reasons for supporting a

[46] *Rinehart v Hancock* (above n 1) [94] (emphasis added).

[47] Ibid [85], [88].

[48] Ibid [96].

[49] Ibid [90], [92] – [93].

[50] Ibid [92] – [93].

[51] Ibid [98] (footnotes omitted) (emphasis added).

[52] Ibid [98].

[53] Ibid [102].

[54] Ibid [102].

[55] This is reminiscent of the conflict of views between the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346; [2007] VSCA 255 and the New South Wales Court of Appeal in *Gordian Runoff Ltd v Westport Insurance*

generous approach towards the interpretation of the scope of arbitration clauses. Such an approach has been followed among leading commercial jurisdictions, including Singapore[56] and in Hong Kong.[57] It is also strongly supported by leading academic commentators, such as Gary Born.[58] Moreover, such an approach has the salutary benefit of facilitating arbitration.

Given the majority's decision, an expansive approach to the concept of 'through and under' now prevails in Australia. Under this approach, 'through or under' is treated as a statutory exception to the privity doctrine. Thus, third parties to an arbitration agreement, may claim 'through or under' the arbitration agreement, even though not privy to the agreement to arbitrate. The effect of the High Court's decision in *Hancock* is to raise uncertainty as to which third-parties may exercise rights under an arbitration agreement. Parties other than privies (such as liquidators, trustees in bankruptcy or assignees) may now seek to take advantage of arbitration clauses. For contractual drafting purposes it may be prudent for transaction lawyers to insert a clause into the underlying contract to the effect that no third party may rely on, or is bound by, the rights and obligations contained in the contract, unless the named parties to the contract consent in writing. This may temper a court's enthusiasm for finding that a non-party may claim "through or under" in broader circumstances.

With respect, the narrower approach of Edelman J is to be preferred. This approach respects the fundamental notion of privity of contract and promotes party autonomy by enabling parties to determine who they arbitrate with and about what. It is noted that a similar procedural result could have been achieved by simply staying the proceeding against the Third-Party Companies pursuant to the Court's inherent jurisdiction upon those parties agreeing to be bound by the result in the arbitration.[59] Such an approach 'avoids any artificial construction as to the identity of the parties to the arbitration, whilst preserving an orderly resolution of the issues in one forum'.[60] However, for the moment the more expansive approach prevails in Australia.

Corp (2010) 267 ALR 74; [2010] NSWCA 57 in relation to the standard of arbitral reasons that was largely left unresolved by the High Court of Australia in *Westport Insurance Corp v Gordian Runoff Ltd* (2011) 244 CLR 239; [2011] HCA 37.

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

[57] *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (Singapore)* [2011] 3 SLR 414, [12]–[19].

[58] See eg, Gary Born, *International Arbitration Law and Practice* (Kluwer Law International, 2nd ed, 2014), [9.02].

[59] As did the FCAFC, albeit not upon any condition requiring the Third-Party Companies agreeing to be bound by the result in the arbitration: *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, [114].

[60] David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Thompson Reuters, 3rd ed, 2015) [7.50].

Case Note

Unilateral Arbitration Clauses: When a One-sided Consensus is Actually a Consensus

Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd [2017] 2 SLR 362[1]

Donna Ross, FCIArb, FRI[2]

Abstract

One of the cornerstones of arbitration is consensus. Parties must agree to arbitrate. But if the agreement to arbitrate provides only one party with an exclusive right to choose between litigation and arbitration, does that constitute consensus?

In Commonwealth and many common law countries, the answer, apparently, is yes. Wilson v Dyna-Jet *is the most recent authority that upholds the validity of unilateral arbitration clauses or UACs.*

It is the initial agreement to arbitrate that establishes consensus and the characteristic of optionality is not inconsistent with the consensual nature of an arbitration agreement.

When discussing the validity of UACs, the focus is often on mutuality and/or optionality. Of particular interest in this case is whether a dispute can still fall within the scope of the arbitration agreement once the option for litigation has been exercised.

Background

Wilson Taylor Asia Pacific Pte Ltd ('Wilson') entered into a contract with Dyna-Jet Pte Ltd ('Dyna-Jet') to install underwater anodes on the island of Diego Garcia. The contract contained a multi-tiered dispute resolution clause, which provided that if a dispute arose that could not be settled through 'mutual consultation,' then 'at the election of Dyna-Jet, the dispute may be referred to and personally settled

[1] *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 ('*Wilson v Dyna-Jet*').

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by means of arbitration proceedings … conducted under English Law; and held in Singapore' ('Arbitration Agreement').

A dispute arose between the parties, which they failed to resolve amicably. Dyna-Jet commenced legal proceedings against Wilson, electing to refer the dispute to litigation, not arbitration.

Wilson sought to stay the suit pursuant to s 6 of the *International Arbitration Act* ('*IAA*').[3]

Wilson's application for a stay was dismissed by the Assistant Registrar, as was its subsequent appeal to the High Court. Wilson then appealed \ the decision of the High Court Judge to the Court of Appeal, with no more success than in its first two attempts. The Court of Appeal affirmed the decisions of the lower courts, finding that an arbitration agreement conferring an option on only one of the parties to refer a dispute to arbitration is a valid consensual agreement as to the availability of arbitration for future disputes.

The Standard of Review

The Court of Appeal in *Wilson v Dyna-Jet* underscored the importance of the doctrine of *kompetenz-kompetenz* and the arbitral tribunal's jurisdiction to rule on its own jurisdiction, as well as on scope and arbitrability.[4] To respect the spirit of this principle in the context of an application under s 6 of the *IAA*, Singaporean courts should adopt a *prima facie* standard of review, as highlighted by Menon CJ.

In the present case, the most important issue was the timing of the review of the stay application, with respect to the choice of the mode of dispute resolution. The burden of proof to establish that the dispute - *at that time* - fell within the scope of the arbitration agreement rested with the applicant.[5]

In fact, when Wilson filed its application for a stay, Dyna-Jet had already exercised its option to litigate the matter. This led the Court of Appeal to determine that, even on a *prima facie* standard of review, the dispute could not fall within the scope of the Arbitration Agreement, as discussed below.

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

[4] *Wilson v Dyna-Jet* (above n 1) 366-7 [12]. Although the decision refers to s 21(1) of the *IAA*, it appears that this is an error and the reference is to s 21 of the (domestic) *Arbitration Act* (Singapore, cap 10, 2002 rev ed).

[5] Ibid 370 [22]. See also *Tomolugen Holdings Ltd & Another v Silica Investors Ltd & Ors* [2016] 1 SLR 373, 23 [48], 33 [64] ('*Tomolugen v Silica*').

Grounds for Granting a Stay

The grounds for granting a stay are elucidated in the *IAA* and in *Tomolugen Holdings Ltd & Another v Silica Investors Ltd & Ors* ('*Tomolugen*').[6]

Sections 6(1) and (2) *IAA* allow a party to apply for a stay of any proceedings 'in respect of any matter which is the subject of the agreement', and that the court may order a stay 'unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed'.

Tomolugen sets out a three-prong test for granting a stay of court proceedings brought in breach of an arbitration agreement, requiring:

(a) valid arbitration agreement;
(b) an arbitrable dispute or one that falls within the scope of the arbitration agreement; and
(c) an arbitration agreement that is not null and void, inoperative, or incapable of being performed.[7]

Mutuality and optionality are the bases most commonly used in determining the validity of asymmetrical or unilateral arbitration agreements.

Wilson's argument that the Arbitration Agreement was not valid due to its lack of mutuality was dismissed, as a clause 'conferring an asymmetric right' on one party 'to elect whether to arbitrate a future dispute' constitutes an agreement to arbitrate.[8]

The High Court of Australia has also provided guidance on the interpretation of mutuality in *PMT Partners v Australian National Parks*.[9] It is not a question of whether the parties share equal rights to require arbitration, but rather whether the parties arrived at a consensus as to the availability of arbitration (*i.e.*, the contractual mechanism to invoke arbitration).[10]

[6] [2016] 1 SLR 373.

[7] *Tomolugen v Silica* (above n 5), 32–3 [63]. Ultimately, the Court of Appeal dealt only with the first two prongs in *Wilson v Dyna-Jet*.

[8] *Wilson v Dyna-Jet* (above n 1), 365 [8].

[9] (1995) 184 CLR 301.

[10] Ibid 310.

Likewise, with respect to optionality, in *Wilson v Dyna-Jet* the Court of Appeal held that 'a dispute-resolution agreement which confers an asymmetric right to elect whether to arbitrate a future dispute is properly regarded as an arbitration agreement within the meaning of s 2A of the IAA'.[11]

Thus, the words 'at the election of Dyna-Jet' are to be treated as any other contractual clause that provides an option to one party and not the other.[12]

Scope

Although the Court of Appeal upheld the High Court's dismissal of the appeal, it differentiated its decision on the question of whether the dispute fell within the scope of the Arbitration Agreement.[13]

Customarily, the scope of an arbitration agreement refers to the parties' agreement as to what is arbitrable. Scope is generally determined by the wording of the arbitration agreement, primarily, whether the wording is:

(a) broad enough to encompass the matter in controversy;
(b) narrowly defines the category or type of disputes that may be subject to arbitration; or
(c) whether the subject matter of the dispute is caught in or excluded by the arbitration agreement.[14]

This was the interpretation of the High Court, which determined that the dispute 'fell within the scope of the arbitration agreement'.[15]

However, the Court of Appeal took a more novel approach. Menon CJ found that no dispute could fall within the scope of the Arbitration Agreement, since the stay application had been made after court proceedings had commenced (at Dyna-Jet's option).

By electing to litigate, Dyna-Jet foreclosed the possibility of arbitration. Therefore, according to Menon CJ, the dispute could not possibly be said to fall within the scope of the Arbitration Agreement. The only instance in which this dispute – or any dispute between the parties for that matter – would fall

[11] See above n 8.

12 While this is the position in most Commonwealth jurisdictions, such clauses may not be valid under civil law, where the concept of potestativité or similar would disallow a lack of mutuality.

[13] This was the second prong of *Tomolugen.*

[14] Alternatively, statute or public policy considerations may govern arbitrability.

[15] *Wilson v Dyna-Jet* (above n 1) 367 [14].

within the scope of the Arbitration Agreement would be 'only if and when [Dyna-Jet] elected to arbitrate', but not if the election to litigate had already been made.[16]

The Decision and its Ramifications

In its decision, the Court of Appeal held that the Dispute could only have fallen within the scope of the Arbitration Agreement if the respondent had so elected, affirming that '[i]n the absence of such an election, in the words of s 6(1) of the IAA, the Dispute in the present circumstances was not a "matter which is the subject of the agreement"'.[17]

Chief Justice Menon further opined that the lack of mutuality and the characteristic of optionality were immaterial, and that the clause constituted a valid arbitration agreement.[18]

The fact that the UAC did not create a present obligation on the parties to arbitrate a dispute, but instead enabled the respondent to elect to arbitrate a specific dispute in the future, was found to be a consequence of optionality. This optionality did not, however, preclude the Court of Appeal from holding that the Arbitration Agreement was nonetheless valid.

It is interesting to note that in some respects UACs are more analogous to submission agreements than agreements to arbitrate, as they are entirely optional – albeit with the option at the sole discretion of one party – instead of placing the parties under an immediate obligation to arbitrate their future disputes.

Wilson v Dyna-Jet offers the most recent example in a line of English and Commonwealth cases that underscore 'the weight of modern Commonwealth authority' in favour of UACs.[19] While it is now well-settled law in Singapore that asymmetric arbitration agreements are valid, this matter has yet to come squarely before courts in other jurisdictions, such as Australia. And elsewhere, such as in the United States and civil law countries, such a lack of mutuality may render such a clause invalid.

Thus, when drafting these agreements, parties should take care to ensure that they understand the implications of providing one party with the option to later choose the means of resolving the dispute, irrespective of which party holds the key to exercising that option. This should be a key consideration in both selecting a seat and anticipating in which jurisdictions an award is likely to be enforced.

[16] Ibid 371 [24].

[17] Ibid.

[18] Ibid 367 [13].

[19] Ibid.

Otherwise, parties may be surprised to learn that their agreement, although consensual, might in essence be clearly one-sided.

Book Review

'See What You Made Me Do: Power, Control and Domestic Abuse'[1]

by Jess Hill

Peter Mathie [2]

This book is hard to read. Not because it is so thoroughly researched and eloquently written, because it is, but because it is real, it shines a light on our inadequacy to notice, to respond, to trust and believe, to own our beliefs and the behaviors they routinely excuse.

It is a clarion call to action, and we all need to hear it.

Jess Hill committed four years to the painstaking investigation that underpins this book. She doesn't make wild claims, she starts from the beginning and tells each story so the reader can decide. She has done the hard work for us.

She talked to victims and perpetrators, men and women on both sides and while agreeing that men can be victims of domestic abuse, she reminds us it is an Australian woman who will die every week at the hands of an intimate partner and that domestic abuse is experienced by one in four Australian women. Domestic abuse also accounts for sixty percent of all women hospitalised for assault, is a driving force behind homelessness and a leading cause of mental health disorders and suicidal behavior.

She talked to policy makers and service providers, researched the literature and put it all together in a way that ought to change the minds and behavior of legislators, policy makers, service providers and people like me in our daily interactions and through the work we do.

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1 Black Inc 2019,.ISBN: 9781760641405 available as an eBook as well; https://www.blackincbooks.com.au/books/see-what-you-made-me-do accessed 28/8/20.

2 Peter Mathie is a nationally accredited mediator and registered family dispute resolution practitioner. He is a practicing mediator at Perth Mediation Centre in Western Australia and is a regular coach in mediation and FDR at the Resolution Institute and College of Law.

She explored the mythology of the Stockholm Syndrome and how it feeds the unconscious bias that helps us to blame the victims for not leaving. And, she helps us to understand the various forms of violence and abuse that take place in homes across our cities and regions.

Unpicking the details from the people who were there, through the police reports and court transcripts we are told the story of Tamica who was bashed and stripped of her clothes in the middle of a Broome street, left with life threatening injuries to endure the indifference of the services that are meant to care for us. We learn how Tamica and her father fight to save her son who died a horrific death at the hands of her boyfriend and how it was they who left the Broome Courthouse carrying criminal convictions and an earful of trite platitude.

She spends time to explore and tell the real-life stories of children damaged by the abuse of their parents, stories of rehabilitation and survival. Stories that should galvanize our communities to change.

For me as an older male in the world and working as a mediator with families and workplaces it drives me to understand, to question and confront. The responsibility to change the way that men understand and relate to women lies at the feet of men. It is down to us to challenge the way we think and the way we act. As mediators we can't change the past, but we can help people to change the future, we don't dispense justice, but we can help people find it. And we should.

This book has been recognised and awarded. It earned the 2020 Stella Prize. Hill has been recognised with two Walkley's and numerous other awards for her work reporting on domestic abuse. The greatest award and recognition though, will be when people who care, and will commit to whatever change is in our gift read it, become inspired by it and make the changes we must make to move it from the genre of current affairs to that of history.

Book Review

Dispute Resolution: A Practitioner's Guide to Successful Alternative Dispute Resolution

By Michael Mills

Mieke Brandon and Elizabeth Rosa[1]

Abstract

The central focus of this book – the query: which dispute resolution approach and process is best – and when, how and why – is a question which the legal profession and decision makers have grappled with for many decades.[2]

This book demystifies what each dispute resolution process across the spectrum has to offer:[3]

Negotiation	*Mediation*	*Conciliation*	Arbitration	Litigation/Court
Chapter 2 and 3	*Chapters 4 and 5*	*Chapter 6*	Chapter 7	Chapter 8

Mills describes all the alternative dispute resolution (ADR) processes used in Australia, as well as internationally, with a focus chapter on Asia. In all his chapters, Mills has an eye on the human element in ADR processes and how an understanding of others' needs can assist a resolution. He also reminds us of the important message that ADR is not the alternative but the main form of dispute resolution in the 21st century. It is recommended reading for all legal practitioners, dispute resolvers, mediators and students in these fields as well as academics, trainers and coaches, or mentors and supervisors. The text is richly illustrated with case studies, anecdotes and illustrations together with don't and dos, such as various skills, techniques and interventions across the spectrum of dispute resolution processes identified in the text. Michael Mills is a leading commercial lawyer and "his work provides guidance in both choosing and applying the optimal dispute resolution approach to achieve a successful outcome".[4]

[1] Mieke Brandon: BA, MSc (App) is a registered FDRP and NMAS accredited. Elizabeth Rosa: BA, LLB is NMAS accredited.

[2] The Honourable JLB Allsop OA, Chief Justice, Federal Court of Australia, in Foreword (April 2017) vii.

[3] See 8, fn 28, 19 and Appendix 1.1.

[4] See back cover of the book.

Chapter 1 Introduction: Disputes and the Technique of Persuasion

The dynamics of conflict and dispute are introduced here with an explanation of the differences between a conflict and a dispute, together with a definition of "successful dispute resolution". Several case studies provide examples of conflicts and disputes, including a comparison between five conflict management categories: (1) *forcing*, (2) *avoiding*, (3) *compromising*, (4) *accommodating* and (5) *collaborating*.[5]

The pros and cons of a dispute resolution process by reference to litigation/court are added to provide an overview across the spectrum, including a range of techniques that may result in successful dispute resolution within each approach.[6] At the end of the chapter the author forecasts that there is increased scope "to resolve disputes much more successfully – whether that be through techniques to prevent the dispute worsening and/or to achieving their optimal resolution (measured by speed or need)".[7]

Chapter 2 Negotiation: Effective Skills and Approaches

The hurdles of people problems, human emotions and needs, such as the illustration and narrative around Maslow's basic human desires[8] are explored. Approaches to negotiation are described in the context of conflict management styles, collaborative, open (soft) negotiation,[9] positional (hard) bargaining[10] and principled negotiation.[11] In the conclusion, the author appropriately suggests that the techniques for creating value and principled negotiation largely overlap with techniques for effective communication and persuasion.

Chapter 3 Negotiation: Preparation and Techniques of Successful Negotiation

Effective communication and people skills are described as the cornerstone and mode of successful negotiations. Indeed, the process skills of attentive listening, communication, perspective and ability to build a productive relationship with the counterparty of any negotiation, are the platform for successful negotiation.[12]

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[5] [1.90] 18.

[6] [1.190] 37–39.

[7] Mills, 80.

[8] [2.80] 94–98.

[9] [2.303] 126–131.

[10] [2.370] 132–134.

[11] [2.380] 134–148.

[12] Mills, n 6, 162.

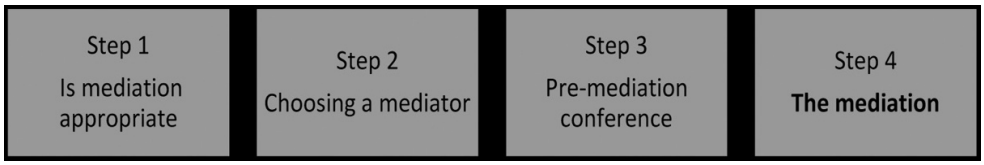
The first half of this chapter is highly influenced by the classic principles outlined by Fisher, Ury and Patton[13] which are used in most types of dispute resolution processes.[14] However, there is "no one right process, approach or silver bullet" because "negotiation is a dynamic human interaction in countless different circumstances" according to the author. The complexities of what type of negotiation process might work best for whom, when and with what particular content in which situation are discussed.

The second half of this chapter details everything the reader always wanted to know from preparation to advantages and disadvantages in the use of particular tactics and techniques, how to manage deadlocks[15] and process advantages, problems and limitations.[16]

The chapter ends with some habits of successful negotiators,[17] "golden rules" from the author's repertoire of top negotiation tips,[18] also acknowledging that there are many traps and no "one" approach that can promise a successful negotiation outcome.

Chapter 4 Mediation: The Process, Its Advantages, Problems and Limitations

There is a preliminary introduction to and description of mediation, the best use of mediation as dispute resolution processes, as well as its shortcomings, together with illustrations of the diamond model[19] with the description of the four steps to be taken before mediation session can be staged:



The purpose of the pre-mediation conference is to establish whether the parties have no barriers to be able to communicate with each other, and, as the author describes: "is there scope for a 'sensible discussion to occur between sensible people to seek to reach a sensible outcome?'"[20] At pre-mediation

[13] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement without Giving In* (Penguin, 3rd ed, 2011).
[14] [3.80] 174–175.
[15] [3.890] 267–271.
[16] [3.920] 271–274.
[17] [3.88] 265–267.
[18] [3.930] 274–294.
[19] Figure 4.1 Diamond model of mediation 300.
[20] Mills n 6, 300.

the mediator also establishes if mediation is appropriate and/or what type of mediation should occur. This is particularly important as previous negotiations may have failed, for whatever reason, and the parties seek a mediator who is accredited and familiar with a facilitative mediation process, with excellent communication and people skills, process and substance expertise, where appropriate, to guide the disputants.[21] A facilitative mediation diamond shaped model with top and a bottom triangle[22] is described, together with the purpose of each stage of the process followed by some of the advantages, problems and limitations of such a process.[23]

The National Mediator Accreditation System (NMAS) sets the criteria for the mediator standards[24] in Australia. The NMAS recognises the distinction between conciliators and mediators and describes conciliation as a "blended process" in which they use a typical facilitative approach of the mediator "with an additional limited advisory role".[25]

Chapter 5 Mediation: Preparing for and Conducting

Negotiation v Mediation is contrasted in Figure 5.1,[26] which illustrates the different stages in each process as well as areas that overlap. This chapter describes in detail how the process of commercial mediation, based on negotiation theory, is conducted. Each phase is explained with how a mediator uses their role, from an opening statement to private sessions and a negotiated outcome. In these types of dispute there are usually lawyers present as advocates with content expertise and once a deal is reached they can draft a legally enforceable agreement at the end.

Theories as to mediation's role are explored, including the "transformative mediation approach" as described by Bush and Folger, providing an opportunity for insight, interpersonal understanding, and creating longer term benefits for repair in the relationship between the disputants.[27] This approach in which the parties seek self-growth and empowerment is described in contrast to commercial disputes where a problem needs to be resolved.[28]

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[21] For additional information about pre-mediation see [4.60] 302–304.

[22] [4.40] 300.

[23] [4.140] 313–315.

[24] [4.210] 327. National Mediator Accreditation System (NMAS), effective from 1 July 2015. Many professional mediators are NMAS accredited and/or registered according to professional standard such as Family Dispute Resolution Practitioners (FDRPs). For NMAS, see <https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf>.

[25] [6.40] 393. NMAS standards, (above n 23), s 10.2.

[26] Figure 5.1, 336.

[27] R Bush and J Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (Jossey-Bass, 1994).

[28] [5.390] 384.

While mediation is often described as "assisted negotiation" it is a stand-alone process with its own models and approaches in which mediators develop their own styles within the classic facilitative model. This offers a selection, for example, to fit the process to the problem as outlined by the author who describes that there are important differences between "shuttle diplomacy",[29] constructive, transformative and directive mediation.[30]

Chapter 6 Other Dispute Solutions

Overviews of conciliation, dispute resolution boards, expert determination, early neutral evaluation and other forms of expert/case appraisal as well as mini-trials, online ADR and court ADR initiatives and processes are addressed in this chapter. Additionally ADR advocacy and the techniques of persuasion as well as pre-trial settlement and conferencing are discussed together with the advantages of each process to assist the reader to choose the best process for their client. Conciliation, for example, would be helpful if the parties want an independent third party to mediate discussions and *provide advice*.[31] Dispute resolution boards have been helpful in resolving disputes in complex construction and infrastructure projects. Expert determination and early neutral evaluation offer the benefit of having a dispute determined by a person with specialist knowledge.

Med-arb involves mediation and if the matter is not resolved, the mediator, as the arbitrator, can provide a non-binding evaluation of each party's case to assist settlement discussions. A mini-trial has the advantage of referring the dispute to the parties' own representatives (rather than a third party) to retain control over the resolution of the dispute. Online ADR is often used for consumer complaints handling, not yet for commercial disputes.[32] Other blended ADR such as the conciliation/arbitration model have been successful in the workers' compensation area.[33] The chapter ends with summaries of ADR processes that have been adopted by the Australian Federal and State Supreme Courts, in particular the referral of court matters to mediation and, in some cases, to settlement conferences. While the summary is comprehensive, it would be useful to know how often the less common processes, like early neutral evaluation, are used in Australia so the reader would know what practically can be recommended to clients.

[29] [5.290], [5.400].
[30] [5.390] 383–395.
[31] [6.50] 394.
[32] [6.330] 411.
[33] [6.330] 412.

Chapter 7 Arbitration: The Process, Its Advantages and Limitations

Arbitration is generally used when parties to a contract have agreed that any dispute will be resolved by that process.[34] Mills notes that the Australian Government has a goal of making Australia a "regional hub" for international arbitration.[35] The advantages of arbitration include time-saving (it is quicker to commence an arbitration than traditional court adjudication), the arbitrator has industry experience and there is neutrality and confidentiality.[36] A detailed outline of the process is provided to assist legal practitioners in this area.

Chapter 8 Adjudication: Preparing for and Conducting

This chapter outlines a "how to" manual for legal practitioners in running an adjudication/hearing. This pertains also to arbitration which is an adjudicative process. It gives useful steps for case preparation and research, evidence preparation and trial processes, including cross-examination. The "psychology of persuasion" and the "hierarchy of human needs" are brought in as helpful to bear in mind for advocacy.

Chapter 9 International Arbitration and Dispute Resolution: An Asian Perspective

Mills indicates that in "Western" countries, ADR processes are the norm as a way of resolving disputes. In Asian countries, such as in China, Hong Kong, South Korea and Japan, as well as developments in other Asia-Pacific countries, ADR is even more common.[37] In China, for example, "mediation has been the prevalent form of dispute resolution for thousands of years". Hong Kong has become an international arbitration hub.[38] There has also been a significant increase in the use of mediation in civil disputes in Hong Kong.[39]

In Summary

Mill's book shows us a range of dispute resolution options and the advantages and limitations of each process. While giving an overview, the author delves into each process and discusses the intricacies of conducting negotiations in those areas. A detailed guide for conducting negotiations as well as adjudication is given, which will be a valuable resource for lawyers, particularly those new to the area.

[34] [7.10] 437.
[35] [7.50] 441.
[36] [7.210] 467.
[37] [7.210] 467.
[38] [9.60] 575.
[39] [9.80] 577.

In his focus on legal and commercial mediations, he also highlights the emotions and human needs that underlie all conflicts.

The wide reach of *Dispute Resolution: A practitioner's guide to successful alternative Dispute Resolution* will make it a "go to" book for lawyers, students as well as mediators, trainers and educators.

This article was first published by Thomson Reuters in the Australasian Dispute Resolution Journal Volume 30/2 2020 Book Review: A practitioner's guide to successful alternative Dispute Resolution, by Michael Mills. Reviewed by Mieke Brandon and Elizabeth Rosa. For all subscription inquiries please phone, from Australia: 1300 304 195, from Overseas: +61 2 8587 7980 or online at legal.thomsonreuters.com.au/search

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Resolution Institute

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Legislation

International Arbitration Act 1974 (Cth). Abbreviations should be used in pinpoint references to delegated legislation, excepting at the start of a sentence.

Books

Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters (Professional) Australia Limited, 2011) 14.

Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters (Professional) Australia Limited, 4th ed, 2012) 10.

Journal Articles

Scott Ellis,‘Arbitrators and Self Represented Parties’ (2004) 23 (3) *the arbitrator & mediator* 20, 20–25.

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References should include (where available): author, document title, year, website name, pinpoint reference, URL and date of retrieval. The URL should be enclosed within angle brackets. The following style is preferred:

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1. Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters (Professional) Australia Limited, 2011) 14.
2. Ibid 57.
3. Scott Ellis, 'Arbitrators and Self Represented Parties' (2004) 23(3) t*he arbitrator & mediator* 20, 20–25.
4. Jones (above n 1) 33.

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- Promotes the use of mediation and DR – DR can help prevent, manage and resolve conflict and disputes in business, workplaces, families and communities
- Provides a voice for DR practitioners in public discussion about DR – we gather and represent members' views
- Provides an up to date listing of mediators and other DR practitioners – Australian dispute resolver directory can be accessed here: https://www.resolution.institute/australian-directory and the New Zealand dispute resolver directory can be accessed here: https://www.resolution.institute/new-zealand-directory
- Administers Australian domain name complaints and building and construction industry payment disputes in New South Wales, Victoria, South Australia, Australian Capital Territory, Tasmania, Western Australia, and Northern Territory.
- Assists organisations to develop effective dispute resolution processes.

10 great reasons to join Resolution Institute

1. We are a community of more than 3,000 members with an influential presence across Australasia and in the Asia Pacific region
2. We are owned by our members
3. Our members govern our organisation – the Board of Directors are members elected every two years by the membership

4. Members set our strategic direction – the Board of Directors regularly engages in strategic planning processes
5. Members have a voice on the organisation's future directions and on DR issues – we regularly seek input and feedback from members
6. We reinvest any financial surplus to secure its future, to deliver services to members and to promote DR in the community
7. We keep members informed through monthly editions of our e-newsletter, Pulse, through regular news and issue specific communications and through the extensive range of relevant resources on this website
8. We deliver opportunities to connect with colleagues and engage in CPD through regular webinars, local networking events, training programs, masterclasses and conferences
9. We provide quality accreditation and grading services in mediation, arbitration, adjudication, services and conflict management coaching, including national mediation accreditation (NMAS). Resolution Institute is the only qualifying assessment program for international accreditation with the International Mediation Institute (IMI) in Australasia
10. Our Professional and Fellow members have access to a competitive Professional Indemnity and Public Liability Insurance package and complaints handling service. We undertake to handle complaints sensitively, respectfully and carefully.

To find out more, visit http://www.resolution.institute/membership-information/become-a-member

Resolution Institute is a vibrant community of dispute resolution (DR) professionals including mediators, arbitrators, adjudicators, and restorative justice practitioners. Resulting from the integration of IAMA into LEADR, Resolution Institute is a not-for-profit organisation with more than 3,000 members in Australia, New Zealand and the Asia Pacific region. Resolution Institute encourages business, government and the community to use resolution processes to prevent, manage and resolve disputes, to assist in robust planning and decision making and to foster sound relationships.