Virtual Conference on "The Burden of Proof in International Arbitration"

On Monday, **October 26, 2020** at **15.00 CET**, the European Center for Arbitration and Mediation and The International School of Arbitration and Mediation for Europe, the Mediterranean and the Middle East organise their *Annual International Conference Med-Mid XIV* on "**The Burden of Proof in International Arbitration/La charge de la preuve dans l'arbitrage international"**.

The conference addresses four key issues of any international arbitration, which require a focussed and renewed reflection: 1) Oral Evidence: Fact Witnesses, Expert Witnesses, Parties and Witness Statement (Civil Law and Common Law approaches); 2) The applicable Law on matters such as the effects of the procedural law (Civil Law and Common Law approaches) on the taking of evidence; 3) Disclosure of documents: effects of only voluntary production of documents v. forced discovery; 4) The Arbitrator's authority as to evidence (Role as Umpire; wider ex officio authority as to evidence) as well as limits and support from State Courts.

Some worldwide renowned speakers will give their views. On panel one: Sir Michael Burton (London, U.K.) and Prof. Fabrizio Marrella (Venice, Italy); on panel two: Elie Kleiman (Jones Day, Paris, France) and Prof. George Bermann (Columbia Law, New York, USA); on panel three: Melanie Willems (Haynes Boone, London, U.K.) and Prof. Ercument Erdem (Istanbul, Turkey); on panel four: Prof. José Carlos Fernandez Rozas (Complutense Madrid, Spain) and John Fellas (Hughes Hubbard & Reed, New York, USA).

Here is the complete program: https://cour-europe-arbitrage.org/med-mid-xiv/

Participation is free, but registration is necessary.

Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd. –A third way to enforce China-seated arbitral awards made by foreign arbitration institution

Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd.–A third way to enforce China-seated arbitral awards made by foreign arbitration institution

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Background

Nationality of an arbitral award marks the source of the legal validity of the award. Most countries generally divide the awards into domestic awards and foreign awards, and provide different requirements for their recognition and enforcement. It is a common practice to determine the nationality of the arbitral award by the seat of arbitration, which is the so-called “territorial theory”. However, Chinese law adopts the “institutional theory”, which raises controversy concerning the nationality of the arbitral award made by foreign arbitration institutions located in mainland. After long-term debate in practice, the *Brentwood* Case[1] finally confirmed that China-seated arbitral awards made by a foreign arbitration institution shall be regarded as Chinese foreign-related awards.

Fact and decision

Guangzhou Intermediate People's Court (hereinafter, "the court") delivered the judgment on *Brentwood Industries v. Guangdong Fa Anlong Machinery Equipment Co., Ltd.* on 6 Aug 2020[2]. After *DUFERCOS* Case[3], it is another landmark case that granted the enforcement of arbitral award made by a foreign arbitration institution in mainland China.

Brentwood Industries (hereinafter, "plaintiff") concluded a sales contract with three Chinese companies (hereinafter, "defendants") and agreed that "any dispute arising out of or in relation to the agreement shall be settled by amiable negotiation. If no agreement can be reached, each party shall refer their dispute to the International Commercial Chamber (hereinafter, "ICC") for arbitration at the site of the project in accordance with international practice." Due to the defendants' delay in payment, theplaintiff submitted their disputes to the ICC for arbitration. Since the "project" mentioned in the arbitration clause was the "Guangzhou Liede Sewage Treatment Plant Phase IV Project" listed in Article 3 of the "Supplementary Agreement", located in Guangzhou, China, the seat of arbitration shall be Guangzhou, China. After defendants refused to perform the award, which was in favor of plaintiff, plaintiff resorted to the court for recognition and enforcement.

Under current Chinese law, there are two possible ways to enforce the arbitral award made by a foreign arbitration institution in mainland China: (1) Classify such an award as a foreign award by the location of the arbitration institution under Art. 283 Civil Procedure Law of the People's Republic of China (hereinafter, "Civil Procedure Law"), which provides that an award made by a foreign arbitration institution must be recognised and enforced by a people's court pursuant to international treaties or the principle of reciprocity. (2) Classify such award as non-domestic award provided by the last sentence of Art. 1(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, "New York Convention"), which provides that the convention shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Besides the aforementioned choices, the court provided a third way. It ruled that the arbitral award made by a foreign arbitration institution in mainland China shall be regarded as Chinese foreign-related arbitral award. If a party fails to

perform the arbitral award, the other party may refer to Art. 273 of the Civil Procedure Law for recognition and enforcement. Under Art. 273 of the Civil Procedure Law, after an award has been made by an arbitration institution of the People's Republic of China for foreign-related disputes, no party may file a lawsuit in a people's court. If a party fails to perform the arbitral award, the other party may apply for enforcement to the intermediate people's court of the place where the domicile of the person against whom an application is made is located or where the property is located.

Comment

Since *Long Lide* Case[4], Chinese court had affirmed the validity of arbitration agreements providing arbitration proceedings conducted by a foreign arbitration institution in mainland China. But in practice, arbitral awards based on these agreements still face the dilemma in recognition and enforcement. Because in China, different from international practice, the nationality of an arbitral award is determined by the location of the arbitration institution instead of the seat of arbitration, which is referred to as the "institutional theory". Under Art. 283 Civil Procedure Law, to recognise and enforce an award made by a foreign arbitration institution by a people's court, the people's court shall handle the matter pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. It impliedly refers to the New York Convention. However, concerning the determination of the nationality of the arbitral award, the New York Convention adopts the "territorial theory", which provides: "this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought". The "territorial theory" adopted by the New York Convention collides with the provision of the Civil Procedure Law. The confusion on application of law has not yet been dispelled.

In response to the conflict between domestic legislation and international convention, judicial practice has shown inclination to convert towards the "territorial theory". For example, in *DMT* case[5], the nationality of an arbitral award made by ICC in Singapore was deemed Singapore rather than France. But in line with the "territorial theory", arbitral awards made in mainland China shall

therefore be deemed as Chinese awards. Under the "reciprocity reservation" filed by China, the New York convention shall only be applied to the recognition and enforcement of awards made in the territory of another contracting state. Hence, the New York Convention shall not be applied to China-seated arbitral awards.

As early as *DUFERCOS* Case, the court defined the arbitral award made by the ICC in Beijing as non-domestic and therefore enforced it under the New York Convention. However, it failed to clarify what exactly constitutes a non-domestic award and how to interpret the reciprocity reservation. Originally, both non-domestic awards and reciprocity reservation were methods to encourage the acceptance and enlarge the application of the New York Convention. Conversely, their coexistence has impaired the effect of the New York Convention.

From this perspective, the Guangzhou Intermediate Court did find another way out by completely avoiding such conflict. The current Chinese law divides arbitral awards into: (1)domestic awards; (2)Chinese foreign-related awards; (3)foreign awards. Compared with domestic awards, Chinese foreign-related awards take into account the particularity of foreign-related factors, and the review standards for recognition and enforcement are less strict, subject to procedural review only. Compared with foreign awards, Chinese foreign-related awards can be set aside by Chinese court, which makes them under more restrictive supervision. That is reason why some argued that China-seated arbitral awards will be subject to stricter supervision by Chinese court because there are more diversified judicial review channels.[6] Indeed, arbitral awards made by Chinese foreign-related arbitration institution are under triple supervision carried out by the seat of arbitration, the place of recognition and enforcement, and China. But it should be noted that when it comes to China-seated arbitral awards made by foreign arbitration institution, China, as the seat of arbitration, has the inherent power to review the arbitral award and set it aside. Moreover, according to Art. 70 and Art. 71 of the Chinese Arbitration Law, reasons for setting Chinese foreign-related arbitral awards aside do not exceed the scope of reasons for refusing recognition and enforcement of these awards. Therefore, they are not imposed with any additional burden by being regarded as Chinese foreign-related arbitral awards. Concerning the recognition and enforcement of Chinese foreign-related award, Art. 274 of the Civil Procedure Law provided a more tolerant standard than the New York Convention. Compared with Art. 5 of the New York Convention, the legal capacity of the parties to the agreement and the final effect of the award are

no longer obstacles to recognition and enforcement. Since arbitral awards made by foreign arbitration institutions are regarded as Chinese foreign-related award, they are treated more favorably than foreign awards concerning recognition and enforcement. Left the legal problems behind, it showed China's effort to support the arbitration within the current legislative framework.

However, Chinese foreign-related arbitral award itself is a distorting product of the conflicts between "institutional theory" and "territorial theory". Application of Art. 273 of the Civil Procedure Law can only temporarily ease the tension. "Institutional theory" stipulated by Chinese law is an issue left over from history. "Foreign-related arbitration institutions" historically referred to the China International Economic and Trade Arbitration Commission (hereinafter referred to as CIETAC) and China Maritime Arbitration Commission (hereinafter referred to as CMAC). They were established respectively in 1954[7] and 1958[8]. At that time, only CIETAC and CMAC can accept foreign-related arbitration cases, while domestic arbitration institutions can only accept domestic arbitration cases. Accordingly, arbitral awards made by different arbitration institutions were divided into Chinese foreign-related arbitral awards and domestic arbitral awards. However, nowadays, such restrictions are extinct in practice. In 1996, the State Council of People's Republic of China issued a document stating that: "The main responsibility of the newly established arbitration institution is to accept domestic arbitration cases; if the parties to a foreign-related arbitration case voluntarily choose the newly established arbitration institution for arbitration, the newly established arbitration commission can accept the case."[9] In fact, there is no longer division of foreign-related arbitration institution and domestic arbitration institution. Hence, the "institutional theory" can no longer meet the needs of practice. Under the "territorial theory", the arbitral awards are divided into domestic awards, non-domestic awards and foreign awards. We may wonder whether China would revoke the reciprocity reservation, the obstacle in recognition and enforcement of non-domestic arbitral awards, in the future. Would China-seated arbitral awards made by foreign arbitration institution be defined as non-domestic awards by then? To get out of the dilemma once for all, the responsibility remains on the shoulder of legislative body.

[1]
https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?doc

Id=bded4e3c31b94ae8b42fac2500a68cc4

[2]
https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4

[3]
https://www.pkulaw.com/specialtopic/61ffaac8076694efc8cef2ae6914b056bdfb.html

[4] https://www.pkulaw.com/chl/233828.html

[5]
http://www.pkulaw.cn/fulltext_form.aspx/pay/fulltext_form.aspx?Db=chl&Gid=bd44ff4e02d033d0bdfb

[6]Good News or Bad News? Arbitral Awards Rendered in China by Foreign Arbitral Institutions Being Regarded as Chinese Awards available at: https://www.chinajusticeobserver.com/a/good-news-or-bad-news-arbitral-awards-rendered-in-china-by-foreign-arbitral-institutions-being-regarded-as-chinese-awards?from=timeline

[7] http://www.cietac.org/index.php?m=Page&a=index&id=2

[8]
http://www.cmac.org.cn/%E6%B5%B7%E4%BB%B2%E7%AE%80%E4%BB%8B

[9] http://cicc.court.gov.cn/html/1/218/62/83/440.html

New Article on Choice of Law in Latin American Arbitration

Gilles Cuniberti (University of Luxembourg) and Manuel Segovia (European Law Institute, formerly University of Monterrey) will soon publish an empirical study of choice of law in Latin American arbitration in the THEMIS-Revista de Derecho (Choice of law in Latin American Arbitration: Some Empirical Evidence and Reflections on the Latin American Market for Contracts).

The abstract reads as follows:

The aim of this Article is to assess the preferences of parties to Latin American international business transactions when they choose the law governing their contracts. For that purpose, we have conducted an empirical analysis of data that we were able to gather from arbitral institutions active in Latin America, with a focus on years 2011 and 2012. We then offer some reflections on the results and assess whether they can be explained by the territorial approach of choice of law in Latin America, the importance of the United States as a trading partner for Latin American countries and the extent to which Anglo-American lawyers are present on Latin American markets.

The Article is a follow-up of similar studies conducted by G. Cuniberti, including one on Choice of Law in Asian Arbitration.

Chinese court refuses enforcement of an IFTA Arbitration award

Shawn He reported recently on a Chinese judgment refusing the declaration of enforceability of an arbitral award issued by the Independent Film & Television Alliance Arbitration Court.

The Tianjin Intermediate People's Court dismissed the application on two

grounds: No standing to be sued of the Chinese company, and notification vices.

One point which should be highlighted is the duration of the proceedings: The application was filed on March 2018, and the judgment (in first instance) was rendered on May 2020…

Uber Arbitration Clause Unconscionable

In 2017 drivers working under contract for Uber in Ontario launched a class action. They alleged that under Ontario law they were employees entitled to various benefits Uber was not providing. In response, Uber sought to stay the proceedings on the basis of an arbitration clause in the standard-form contract with each driver. Under its terms a driver is required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500. In response, the drivers argued that the arbitration clause was unenforceable.

The Supreme Court of Canada has held in *Uber Technologies Inc. v. Heller*, 2020 SCC 16 that the arbitration clause is unenforceable, paving the way for the class action to proceed in Ontario. A majority of seven judges held the clause was unconscionable. One judge held that unconscionability was not the proper framework for analysis but that the clause was contrary to public policy. One judge, in dissent, upheld the clause.

A threshold dispute was whether the motion to stay the proceedings was under the *Arbitration Act, 1991*, S.O. 1991, c. 17 or the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5. Eight judges held that as the dispute was fundamentally about labour and employment, the ICAA did not apply and the AA was the relevant statute (see paras. 18-28, 104). While s. 7(1) of the AA directs the court to stay proceedings in the face of an agreement to

arbitration, s. 7(2) is an exception that applies, *inter alia*, if the arbitration agreement is "invalid". That was accordingly the framework for the analysis. In dissent Justice Cote held that the ICAA was the applicable statute as the relationship was international and commercial in nature (paras. 210-18).

The majority (a decision written by Abella and Rowe JJ) offered two reasons for not leaving the issue of the validity of the clause to the arbitrator. First, although the issue involved a mixed question of law and fact, the question could be resolved by the court on only a "superficial review" of the record (para. 37). Second, the court was required to consider "whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge" (para. 45). If so, the court is to decide the issue. This is rooted in concerns about access to justice (para. 38). In the majority's view, the high fees required to commence the arbitration are a "brick wall" on any pathway to resolution of the drivers' claims.

The majority then engaged in a detailed discussion of the doctrine of unconscionability. It requires both "an inequality of bargaining power and a resulting improvident bargain" (para. 65). On the former, the majority noted the standard form, take-it-or-leave-it nature of the contract and the "significant gulf in sophistication" between the parties (para. 93). On the latter, the majority stressed the high up-front costs and apparent necessity to travel to the Netherlands to raise any dispute (para. 94). In its view, "No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it" (para. 95). As a result, the clause is unconscionable and thus invalid.

Justice Brown instead relied on the public policy of favouring access to justice and precluding an ouster of the jurisdiction of the court. An arbitration clause that has the practical effect of precluding arbitration cannot be accepted (para. 119). Contractual stipulations that prohibit the resolution of disputes according to law, whether by express prohibition or simply by effect, are unenforceable as a matter of public policy (para. 121).

Justice Brown also set out at length his concerns about the majority's reliance on unconscionability: "the doctrine of unconscionability is ill-suited here. Further, their approach is likely to introduce added uncertainty in the enforcement of contracts, where predictability is paramount" (para. 147). Indeed, he criticized

the majority for significantly lowering the hurdle for unconscionability, suggesting that every standard-form contract would, on the majority's view, meet the first element of an inequality of bargaining power and therefore open up an inquiry into the sufficiency of the bargain (paras. 162-63). Justice Brown concluded that "my colleagues' approach drastically expands the scope of unconscionability, provides very little guidance for the doctrine's application, and does all of this in the context of an appeal whose just disposition requires no such change" (para. 174).

In dissent, Justice Cote was critical of the other judges' willingness, in the circumstances, to resolve the issue rather than refer it to the arbitrator for decision: "In my view, my colleagues' efforts to avoid the operation of the rule of systematic referral to arbitration reflects the same historical hostility to arbitration which the legislature and this Court have sought to dispel. The simple fact is that the parties in this case have agreed to settle any disputes through arbitration; this Court should not hesitate to give effect to that arrangement. The ease with which my colleagues dispense with the Arbitration Clause on the basis of the thinnest of factual records causes me to fear that the doctrines of unconscionability and public policy are being converted into a form of ad hoc judicial moralism or "palm tree justice" that will sow uncertainty and invite endless litigation over the enforceability of arbitration agreements" (para. 237). Justice Cote also shared many of Justice Brown's concerns about the majority's use of unconscionability: "I am concerned that their threshold for a finding of inequality of bargaining power has been set so low as to be practically meaningless in the case of standard form contracts" (para. 257).

The decision is lengthy and several additional issues are canvassed, especially in the reasons of Justice Cote and Justice Brown. The ultimate result, with the drivers not being bound by the arbitration clause, is not that surprising. Perhaps the most significant questions moving forward will be the effect these reasons have on the doctrine of unconscionability more generally.

Justice Andrew Bell opines on arbitration and choice of court agreements

By Michael Douglas and Mhairi Stewart

Andrew Bell is a leader of private international law in Australia. His scholarly work includes *Forum Shopping and Venue in Transnational Litigation* (Oxford Private International Law Series, 2003) and several editions of *Nygh's Conflict of Laws in Australia* (see LexisNexis, 10th ed, 2019). As a leading silk, he was counsel on many of Australia's leading private international law cases. In February 2019, his Honour was appointed President of the New South Wales Court of Appeal.

Recently, in *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82, his Honour provided a helpful exposition of the principles applicable to dispute resolution agreements, including arbitration and choice of court agreements. His Honour dissented from the majority of Justices of Appeal Meagher and Gleeson.

Background

Inghams Enterprises, the Australian poultry supplier, entered a contract with Gregory Hannigan by which Hannigan would raise and feed chickens provided by Inghams.

The contract was to continue until 2021 but in 2017 Inghams purported to terminate the contract for alleged breaches by Hannigan. Hannigan successfully sought a declaration that the contract had been wrongfully terminated; see *Francis Gregory Hannigan v Inghams Enterprises Pty Limited* [2019] NSWSC 321.

In May 2019 Hannigan issued a notice of dispute to Inghams seeking unliquidated damages for losses he incurred between 8 August 2017 and 17 June 2019 while the contract was wrongfully terminated. Following an unsuccessful mediation in August 2019, Hannigan considered that clause 23.6 of the contract—extracted below—entitled him to refer the dispute to arbitration.

Hannigan's referral to arbitration was premised by a complex and tiered dispute resolution clause: clause 23. Compliance with clause 23 was a precondition to commencing court proceedings. The clause also contained a requirement to provide notice of a dispute; to use 'best efforts' to resolve the dispute in an initial period; and to then go to mediation. If mediation were unsuccessful, then the clause provided that certain disputes must be referred to arbitration. Relevantly, clause 23 included the following:

'23.1 A party must not commence court proceedings in respect of a ***dispute arising out of this agreement*** *("Dispute"), including without limitation a dispute regarding any breach or purported breach of this agreement, interpretation of any of its provisions, any matters concerning of parties' performance or observance of its obligations* ***under this agreement****, or the termination or the right of a party to terminate this agreement) until it has complied with this clause 23.'*

'23.6 If:

23.6.1 the dispute concerns ***any monetary amount payable and/or owed by*** *either party to the other under this agreement, including without limitation, matters relating to determination, adjustment or renegotiation of the Fee under Annexure 1 under clauses 9.4, 10, 11, 12, 13 and 15.3.3 …*

23.6.2 the parties fail to resolve the dispute in accordance with clause 23.4 within twenty eight (28) days of the appointment of the mediator

then the parties must (unless otherwise agreed) submit the dispute to arbitration using an external arbitrator (who must not be the same person as the mediator) agreed by the parties or, in the absence of agreement, appointed by the Institute Chairman.' (Emphasis added.)

Inghams sought to restrain the referral to arbitration and failed at first instance; see *Inghams Enterprises Pty Ltd v Hannigan* [2019] NSWSC 1186.

Inghams sought leave to appeal. In hearing the question of leave together with the appeal, then granting leave, the two key issues for determination by the Court of Appeal were:

- Whether a claim for unliquidated damages could fall within the scope of

the arbitration clause which required claims to be concerning monetary amounts '*under this agreement*' (the construction issue); and
- Whether Hannigan had waived his entitlement to arbitrate by bringing the proceedings in 2017 (the waiver issue).

The construction issue

Meagher JA, with whom Gleeson JA agreed, determined Hannigan's claim for unliquidated damages for breach of contract was not a claim 'under' the contract and therefore did not fall within the terms of the arbitration clause in clause 23.

The phrase 'monetary amount payable and/or owed' referred to a payment obligation by one party to another. Read with the phrase 'under this agreement', the clauses required that the contract must be the source of the payment obligation to invoke the requirement to arbitrate. A claim for unliquidated damages was beyond the scope of the clause.

The majority and Bell P thus disagreed on whether an assessment for unliquidated damages for breach of contract is 'governed or controlled' by a contract because the common law quantum of damages considers the benefits which would have been received under the contract. The majority found that liquidated damages are a right of recovery created by the contract itself and occur as a result of a breach; unliquidated damages for a breach are compensation determined by the Court.

Bell P included provided a detailed discussion of the interpretation of dispute resolution clauses and considered the orthodox process of construction is to be applied to the construction of dispute resolution clauses. That discussion is extracted below. Bell P's liberal approach was not followed by the majority.

The waiver issue

The Court found that Hannigan did not unequivocally abandon his right to utilise the arbitration clause by initiating the breach of contract proceedings against Inghams for the following reasons:

1. Hannigan did not abandon his right to arbitration by failing to bring a damages claim in the 2017 proceedings.

2. In 2017 Hannigan enforced his rights under clause 23.11 by seeking declaratory relief.
3. The contract explicitly required that waiver of rights be waived by written notice.
4. The bringing of proceedings did not constitute a written agreement not to bring a damages claim to arbitration.

It was noted that if Hannigan had sought damages in 2017 then Ingham's waiver argument may have had some force.

President Bell's dicta on dispute resolution clauses

In his dissenting reasons, Bell P provided the following gift to private international law teachers and anyone trying to understand dispute resolution clauses:

Dispute resolution clauses may be crafted and drafted in an almost infinite variety of ways and styles. The range and diversity of such clauses may be seen in the non-exhaustive digest of dispute resolution clauses considered by Australian courts over the last thirty years, which is appended to these reasons. [The Appendix, below, sets out a table of example clauses drawn from leading cases.]

Dispute resolution clauses may be short form or far more elaborate, as illustrated by the cases referred to in the Appendix. They may be expressed as service of suit clauses… They may provide for arbitration… They may be standard form… They may be bespoke… They may be asymmetric… They may and often will be coupled with choice of law clauses… They may be multi-tiered, providing first for a process of mediation, whether informal or formal, or informal and then formal, before providing for arbitral or judicial dispute resolution…

Dispute resolution clauses are just as capable of generating litigation as any other contractual clause, and the law reports are replete with cases concerned with the construction of such clauses. The cases referred to in the Appendix supply a sample.

Such clauses have also spawned specialist texts and monographs…

The question raised by this appeal is purely one of construction. It is accordingly desirable to begin by identifying the principles applicable to the construction of a dispute resolution clause. …

It has been rightly observed that "the starting point is that the clause should be construed, just as any other contract term should be construed, to seek to discover what the parties actually wanted and intended to agree to"…

In short, the orthodox process of construction is to be followed…

In the context of dispute resolution clauses, whether they be arbitration or exclusive jurisdiction clauses, much authority can be found in support of affording such clauses a broad and liberal construction…

In Australia, unlike other jurisdictions, the process of contractual construction of dispute resolution clauses has not been overlaid by presumptions cf [some other jurisdictions]. Thus, in [Rinehart v Welker (2012) 95 NSWLR 221] at [122], Bathurst CJ, although not eschewing the liberal approach that had been adumbrated in both Francis Travel and Comandate to the construction of arbitration clauses, rejected the adoption of a presumption … the presumption was that the court should, in the construction of arbitration clauses, "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", and that the clause should be construed in accordance with that presumption, "unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction…

In [Rinehart v Hancock Prospecting Pty Ltd (2019) 93 ALJR 582], the plurality indicated that the appeals could be resolved with the application of orthodox principles of construction, which required consideration of the context and purpose of the Deeds there under consideration… In his separate judgment, Edelman J described as a "usual consideration of context" the fact that "reasonable persons in the position of the parties would wish to minimise the fragmentation across different tribunals of their future disputes by establishing 'one-stop adjudication' as far as possible"… This may have been to treat the considerations underpinning [leading] cases… as stating a commercially commonsensical assumption…

The proper contemporary approach was eloquently articulated in the following passage in [Hancock Prospecting Pty Ltd v Rinehart (2017) 257 FCR 442] (at [167]) which I would endorse:

"The existence of a 'correct general approach to problems of this kind' does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement. But part of the assumed legal context is this correct general approach which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly. One aspect of this is not to approach relational prepositions with fine shades of difference in the legal character of issues, or by ingenuity in legal argument… another is not to choose or be constrained by narrow metaphor when giving meaning to words of relationship, such as 'under' or 'arising out of' or 'arising from'. None of that, however, is to say that the process is rule-based rather than concerned with the construction of the words in question. Further, there is no particular reason to limit such a sensible assumption to international commerce. There is no reason why parties in domestic arrangements (subject to contextual circumstances) would not be taken to make the very same common-sense assumption. Thus, where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it." (Citations omitted.)

Bell P's appendix

Schedule of Jurisdiction and Arbitration Clauses		
Case Name	**Citation**	**Clause**
Tanning Research Laboratories Inc v O'Brien	(1990) 169 CLR 332; [1990] HCA 8	"10. Arbitration. Any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof."
IBM Australia Ltd v National Distribution Services Ltd	(1991) 22 NSWLR 466; (1991) 100 ALR 361	"9. Governing Law and Arbitration This Agreement will be construed in accordance with and governed by the laws of New South Wales. Any controversy or claim arising out of or related to this Agreement or the breach thereof will be settled by arbitration. The arbitration will be held in Sydney, New South Wales and will be conducted in accordance with the provisions of the *Commercial Arbitration Act*, 1984 (as amended). The decision of the arbitrator(s) will be final and binding."
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd	(1996) 39 NSWLR 160; (1996) 131 FLR 422	"ARTICLE 19 *Arbitration* Any dispute or difference arising out of this Agreement shall be referred to the arbitration in London of a single Arbitrator to be agreed upon by the parties hereto or in default of such agreement appointed by the President for the time being of the Royal Aeronautical Society. The and the provisions of the Arbitration Act 1950 and any statutory modifications or re-enactments therefore for the time being in force shall apply. (sic) ARTICLE 20 *Applicable Law* This Agreement shall in all respects be interpreted in accordance with the Laws of England."
Akai Pty Ltd v People's Insurance Co Ltd	(1996) 188 CLR 418; [1996] HCA 39	"Governing Law This policy shall be governed by the laws of England. Any dispute arising from this policy shall be referred to the Courts of England."

FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association	(1997) 41 NSWLR 117	"This Reinsurance is subject to English jurisdiction", with a manuscript addition: "Choice of Law: English"
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers (No 5)	(1998) 90 FCR 1; (1998) 159 ALR 142	"Any dispute arising from this charter or any Bill of Lading issued hereunder shall be settled in accordance with the provisions of the *Arbitration Act* 1950 and any subsequent Acts, in London, each party appointing an Arbitrator, and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto. This Charter Party shall be governed by and construed in accordance with English Law. The Arbitrators and Umpire shall be commercial men normally engaged in the Shipping Industry. Any claim must be in writing and claimant's Arbitrator appointed within six months of the Vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived."
Recyclers of Australia Pty Ltd v Hettinga Equipment Inc	(2000) 100 FCR 420; [2000] FCA 547	"*Applicable Law, Pricing and Terms of Sale*: Any contract between Buyer and Hettinga shall be governed, construed and interpreted under the law of the State of Iowa, and shall be subject to the terms and conditions listed below. Any Purchase Order issued by Buyer as a result of this quotation shall be deemed to incorporate the terms and conditions of this quotation. If there is any conflict between these conditions of sale and those of the buyer, these conditions shall control … … *Arbitration*: All disputes hereunder, including the validity of this agreement, shall be submitted to arbitration by an arbitrator in Des Moines, Iowa USA under the Rules of the American Arbitration Association, and the decision rendered thereunder shall conclusively bind the parties. Judgment upon the award may be entered in any court having jurisdiction."
HIH Casualty & General Insurance Ltd (in liq) v RJ Wallace	(2006) 68 NSWLR 603; [2006] NSWSC 1150	"ARTICLE XVIII SERVICE OF SUIT The Reinsurer hereon agrees that: i. In the event of a dispute arising under this Agreement, the Reinsurers at the request of the Company will submit to the jurisdiction of any competent Court in the Commonwealth of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court. ii. Any summons notices or process to be served upon the Reinsurer may be served upon MESSRS. FREEHILL, HOLLINGDALE & PAGE M.L.C. CENTRE, MARTIN PLACE, SYDNEY, N.S.W. 2000 AUSTRALIA who has authority to accept service and to enter an appearance on the Reinsurer's behalf, and who is directed, at the request of the Company to give a written undertaking to the Company that he will enter an appearance on the Reinsurer's behalf. iii. If a suit is instituted against any one of the Reinsurers all Reinsurers hereon will abide by the final decision of such Court or any competent Appellate Court. ARTICLE XIX ARBITRATION: Disputes arising out of this Agreement or concerning its validity shall be submitted to the decision of a Court of Arbitration, consisting of three members, which shall meet in Australia. The members of the Court of Arbitration shall be active or retired executives of Insurance or Reinsurance Companies. Each party shall nominate one arbitrator. In the event of one party failing to appoint its arbitrator within four weeks after having been required by the other party to do so, the second arbitrator shall be appointed by the President of the Chamber of Commerce in Australia. Before entering upon the reference, the arbitrators shall nominate an umpire. If the arbitrators fail to agree upon an umpire within four weeks of their own appointment, the umpire shall be nominated by the President of the Chamber of Commerce in Australia. The Arbitrators shall reach their decision primarily in accordance with the usages and customs of Reinsurance practice and shall be relieved of all legal formalities. They shall reach their decision within four months of the appointment of the umpire. The decision of the Court of Arbitration shall not be subject to appeal. The costs of Arbitration shall be paid as the Court of Arbitration directs. Actions for the payment of confirmed balances shall come under the jurisdiction of the ordinary Courts."
Comandate Marine Corporation v Pan Australia Shipping Pty Ltd	(2006) 157 FCR 45; [2006] FCAFC 192	"(b) London All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping one to be appointed by each of the parties, with the power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any dispute arising hereunder shall be governed by English Law. …"
Armacel Pty Ltd v Smurfit Stone Container Corporation	(2008) 248 ALR 573; [2008] FCA 592	"21.3.1 This Agreement must be read and construed according to the laws of the state of New South Wales, Australia and the parties submit to the jurisdiction of that State. If any dispute arises between the Licensor and the Licensee in connection with this Agreement or the Technology, the parties will attempt to mediate the dispute in Sydney, Australia. 21.3.2 In the event that there is a conflict between the laws of the State of New South Wales, Australia and the jurisdiction in which the Equipment is located, then the parties agree that the laws of the State of New South Wales shall prevail. 21.3.3 If the licensee is in breach of this Agreement, the Licensee must pay to the Licensor on demand the amount of any legal costs and expenses incurred by the Licensor for the enforcement of its rights under this Agreement and this provision shall prevail despite any order for costs made by any Court."
BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd	(2008) 168 FCR 169; [2008] FCA 551	"(b) Any dispute arising out of this Charter Party or any Bill of Lading issued hereunder shall be referred to arbitration in accordance with the Arbitration Acts 1996 and any statutory modification or re-enactment in force. English law shall apply … (c) The arbitrators, umpire and mediator shall be commercial persons engaged in the shipping industry. Any claim must be made in writing and the claimant's arbitrator nominated within 12 months of the final discharge of the cargo under this Charter Party, failing which any such claim shall be deemed to be waived and absolutely barred."

Paharpur Cooling Towers Ltd v Paramount (WA) Ltd	[2008] WASCA 110	[Background: "Clause 22 of the contract provides that when any dispute arises between the parties any party may give to the other party a notice in writing that a dispute exists. Clause 22 then sets out a process by which the parties are to endeavour to resolve the dispute. If they are unable to do so, Paramount (as Principal) at its sole discretion:"] "[S]hall determine whether the parties resolve the dispute by litigation within the jurisdiction of the courts of Western Australia or arbitration under the Commercial Arbitration Act. [Paramount] shall notify [Paharpur], by notice in writing, of its decision to refer the dispute to litigation or arbitration within 28 days of either [Paramount] or [Paharpur] electing that the dispute be determined by either litigation or arbitration." "'Dispute' means a dispute or difference between the parties as to the construction of the Contract or as to any matter or thing of whatsoever nature arising, whether antecedent to the Contract and relating to its formation or arising under or in connection with the Contract, including any claim at common law, in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration or a dispute concerning a direction given and/or acts or failing to act by the Engineer or the Engineer's Representative or interference by the Principal or the Principal's Representative."
Electra Air Conditioning BV v Seeley International Pty Ltd ACN 054 687 035	[2008] FCAFC 169	"20. Dispute Resolution 20.1 If at any time there is a dispute, question or difference of opinion ("Dispute") between the parties concerning or arising out of this Agreement or its construction, meaning, operation or effect or concerning the rights, duties or liabilities of any party, one party may serve a written notice on the other party setting out details of the Dispute. Thereafter: (a) senior management of each party will try to resolve the Dispute through friendly discussions for a period of thirty (30) days after the date of receipt of the notice; and (b) if senior management of each party are unable to resolve the Dispute under Section 20.1(a), it shall be referred to arbitration in accordance with the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators and Mediators Australia. The number of arbitrators shall be 1. The place of arbitration shall be Melbourne, Australia. The language of arbitration shall be English. The arbitral award shall be final and binding upon both parties. 20.2 Pending the resolution of the Dispute under Section 20.1, the parties shall continue to perform their obligations under this Agreement without prejudice to a final adjustment in accordance with any award. 20.3 Nothing in this Section 20 prevents a party seeking injunctive or declaratory relief in the case of a material breach or threatened breach of this Agreement." "25. Governing law and Jurisdiction This Agreement is governed by the laws of Victoria, Australia. Subject to Section 20, the parties irrevocably submit to the courts of Victoria, and any courts of appeal from such courts, in relation to the subject matter of this Agreement."
Ace Insurance Ltd v Moose Enterprise Pty Ltd	[2009] NSWSC 724	<u>Policy</u> "Should any dispute arise concerning this policy, the dispute will be determined in accordance with the law of Australia and the States and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory of Australia." <u>Expona Endorsement</u> "Provided that all claims which fall under the terms of this endorsement, it is agreed: (i) the limits of liability are inclusive of costs as provided under supplementary payment in this policy. (ii) that should any dispute arise between the insured and ACE over the application of this policy, such dispute shall be determined in accordance with the law and practice of the Commonwealth of Australia."
Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)	[2010] NSWCA 196; (2010) 79 ACSR 383	<u>Limited Partnership Agreement</u> "This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England and all the parties irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the Private Placement Memorandum or the acquisition of Commitments, whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Agreement or Private Placement Memorandum or the acquisition of Commitments shall be brought in such courts. The parties hereby waive, to the extent not prohibited by applicable law, and agree not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that it is not subject personally to the jurisdiction of such courts, that any such proceedings brought in such courts is improper or that this Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court." <u>Deed of Adherence</u> "14. This Deed of Adherence and the rights, obligations and relationships of the parties under this Deed of Adherence and the Partnership Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England. 15. The Applicant irrevocably agrees that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed of Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Deed of Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments shall be brought in such courts. The Applicant hereby waives, to the extent not prohibited by applicable law, and agrees not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that the Applicant is not subject personally to the jurisdiction of such courts, that any such proceeding brought in such courts is improper or that this Deed of Adherence, the Partnership Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court.
Faxtech Pty Ltd v ITL Optronics Ltd	[2011] FCA 1320	"the agreement shall be interpreted, construed and enforced in accordance with the laws of England, and the parties submit to the jurisdiction of the competent courts of England (London)."

Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd	[2013] WASCA 66; (2013) 298 ALR 666	Asset Sale Agreement "16.2 Governing Law and Dispute Resolution (a) This agreement is governed by the laws of Western Australia. (b) Subject to clause 16.2(d), the procedures prescribed in this clause 16 must be strictly followed to settle a dispute arising under this agreement. (c) If any dispute arises out of or in connection with this agreement, including any question regarding the existence, validity or termination of this agreement; (1) within ten Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions; (2) failing settlement by negotiation, either party may, by notice to the other party, refer the dispute for resolution by mediation: (A) at the Singapore Mediation Centre (SMC) in Singapore; (B) under the SMC Mediation Procedures; (C) with one mediator; (D) with English as the language of the mediation; and (E) with each party bearing its own costs of the mediation; and (3) failing settlement by mediation, either party may, by notice to the other party, refer the dispute for final and binding resolution by arbitration: (A) at the Singapore International Arbitration Centre (SIAC) in Singapore; (B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause; (C) to the extent, if any, that the UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC Arbitration Rules in force on the date of this agreement will apply to the arbitration; (D) with the substantive law of the arbitration being Western Australian law; (E) with one Arbitrator; (F) with English as the language of the arbitration; and (G) with each party bearing its own costs of the arbitration. (d) Nothing in this clause 16: (1) prevents either party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 16; or (2) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party." Guarantee Agreement "9.9. Governing law and jurisdiction (a) This document is governed by the laws of Western Australia. (b) Subject to clause 9.9(c)(iii)(G), the procedures prescribed in this clause 9.9 must be strictly followed to settle a dispute arising under this document. (c) If any dispute arises out of or in connection with this document, including any question regarding the existence, validity or termination of this document: (i) within 10 Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions; (ii) failing settlement by negotiation, any party may, by notice to the other parties, refer the dispute for resolution by mediation; and (A) at the Singapore Mediation Centre (SMC) in Singapore; (B) with one mediator; (C) with English as the language of the Mediation; and (D) with each party bearing its own costs of the mediation; and (iii) failing settlement by mediation, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration: (A) at the Singapore International Arbitration Centre (SIAC) in Singapore or in Hong Kong; (B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause; (C) to the extent, if any, that UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC Arbitration Rules in force on the date of this agreement will apply to the arbitration; (D) with the substantive law of the arbitration being Western Australian law; (E) with one arbitrator; (F) with English as the language of the arbitration; and (G) with each party bearing its own costs of the arbitration. (d) Nothing in this clause 9.9: (i) prevents any party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 9.9; or (ii) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party."
AAP Industries Pty Limited v Rehaud Pte Limited	[2015] NSWSC 468	Supply Agreement "The agreed place of jurisdiction, irrespective of the amount in dispute, is Singapore." Conditions of Purchase "This contract shall be construed in accordance with and governed in every respect by the laws of Singapore, and all disputes arising out of or in connection with this agreement shall be brought in the courts of Singapore."

Rinehart v Rinehart (No 3) (and *Rinehart v Welker*, in relation to the Hope Downs Deed; and *Rinehart v Hancock Prospecting Pty Ltd*, in relation to the Hope Downs Deed and April 2005 Deed of Obligation and Release)	(2016) 257 FCR 310 (and (2012) 95 NSWLR 221; and [2019] HCA 13; (2019) 366 ALR 635)	April 2005 Deed of Obligation and Release "This Deed shall be governed by and shall be subject to and interpreted according to the laws of the State of Western Australia, and the parties hereby agree, subject to all disputes hereunder being resolved by confidential mediation and arbitration in Western Australia, to submit to the exclusive jurisdiction of the Courts of Western Australia for all purposes in respect of this Deed." Hope Downs Deed "20. CONFIDENTIAL MEDIATION/ARBITRATION In the event that there is any dispute under this deed then any party to his [sic] deed who has a dispute with any other party to this deed shall forthwith notify the other party or parties with whom there is the dispute and all other parties to this deed ('Notification') and the parties to this deed shall attempt to resolve such difference in the following manner. 20.1 Confidential Mediation (a) the disputing parties shall first attempt to resolve their dispute by confidential mediation subject to Western Australian law to be conducted by a mediator agreed to by each of the disputing parties and GHR (or after her death or non-capacity, HPPL); (b) each of the disputing parties must attempt to agree upon a suitably qualified and independent person to undertake the mediation; (c) the mediation will be conducted with a view to: (i) identifying the dispute; (ii) developing alternatives for resolving the dispute; (iii) exploring these alternatives; and (iv) seeking to find a solution that is acceptable to the disputing parties. (d) any mediation will not impose an outcome on the disputing parties. Any outcome must be agreed to by the disputing parties; (e) any mediation will be abandoned if: (i) the disputing parties agree; (ii) any of the disputing parties request the abandonment. 20.2 Confidential Arbitration (a) Where the disputing parties are unable to agree to an appointment of a mediator for the purposes of this clause within fourteen (14) days of the date of the Notification or in the event any mediation is abandoned then the dispute shall on that date be automatically referred to arbitration for resolution ('Referral Date') and the following provisions of this clause shall apply; (i) in the event that no agreement on the arbitrator can be reached within three (3) weeks of the Referral Date, the arbitrator will be Mr Tony Fitzgerald QC (provided he is willing to perform this function and has not reached 74 years of age at that time), or in the event Mr Tony Fitzgerald QC is unwilling or unable to act, the Honourable Justice John Middleton (provided he is no longer a Judge of the Federal or other Australian Court and provided he has not reached 74 years of age at that time), and irrespective of whether either of these persons have carried out the mediation referred to above, or in the event that neither is willing or able to act, (ii) subject to paragraph (iv) below by confidential arbitration with one (1) party to the dispute nominating one (1) arbitrator, and the other party to the dispute nominating another arbitrator and the two (2) arbitrators selecting a third arbitrator within a further three (3) weeks, who shall together resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties; (iii) if the arbitrators nominated pursuant to paragraph 2(a)(ii) are unable to agree in the selection of a third arbitrator within the time provided in paragraph 2(a)(iii), the third arbitrator will be designated by the President of the Law Society of Western Australia and shall be a legal practitioner qualified to practise in the State of Western Australia of not less than twenty (20) years standing. (iv) in the event that a disputing party does not nominate an arbitrator pursuant to Clause 2(a)(ii) within twenty-one (21) days from being required to do so it will be deemed to have agreed to the appointment of the arbitrator appointed by the other disputing party. (b) The dispute shall be resolved by confidential arbitration by the arbitrator agreed to by each of the disputing parties or appointed pursuant to paragraph 2(a)(i) above (or if more than one is appointed pursuant to paragraph 2(a)(ii) then as decided by not less than a majority of them) who shall resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties. (c) The arbitration will take place at a location outside of a Court and chosen to endeavour to maintain confidentiality and mutually agreed to by the disputing parties and failing agreement in Western Australia and the single Arbitrator or the Chairman of the Arbitral Tribunal as the case may be will fix the time and place outside of a Court for the purposes of the confidential hearing of such evidence and representations as any of the disputing parties may present. If any of the parties request wheelchair access, this will be taken into account in the selection of the premises and parking needs. Except as otherwise provided, the decision of the single arbitrator or, if three arbitrators, the decision of any two of them in writing will be binding on the disputing parties both in respect of procedure and the final determination of the issues. (d) The arbitrators will not be obliged to have regard to any particular information or evidence in reaching his/their determination and in his/their discretion procure and consider such information and evidence and in such form as he/they sees fit; (e) The award of the arbitrator(s) will be to the extent allowed by law non-appealable, conclusive and binding on the parties and will be specifically enforceable by any Court having jurisdiction. … [21. the deed] shall be governed by and be subject to and interpreted according to the laws of the State of Western Australia"." August 2009 Deed of Further Settlement "16. The CS Deed and this Deed will be governed by the following dispute resolution clause: (i) the parties shall first seek to resolve any dispute or claim arising out of, or in relation to this Deed or the CS Deed by discussions or negotiations in good faith; (ii) Any dispute or claim arising out of or in relation to this Deed or the CS Deed which is not resolved within 90 days, will be submitted to confidential arbitration in accordance with the UNCITRAL Arbitration Rules then in force. There will be three arbitrators. JLH shall appoint one arbitrator, HPPL shall appoint the other arbitrator and both arbitrators will choose the third Arbitrator. The place of arbitration shall be in Australia and the exact location shall be chosen by HPPL. Each party will be bound by the Arbitrator's decision. (iii) A party may not commence court proceedings in relation to any dispute arising out of or in relation to this Deed or the Original Deed or the CS Deed; (iv) The costs of the arbitrators and the arbitration venue will be borne equally as to half by JLH and the other half by the non JLH party. Each party is responsible for its own costs in connection with the dispute resolution process; and (v) Despite the existence of a Dispute, the parties must continue to perform their respective obligations under this Deed."

Mobis Parts Australia Pty Ltd v XL Insurance Company SE	[2016] NSWSC 1170	"The place of jurisdiction for any dispute arising out of this Policy shall be Bratislava", with an anterior clause: "This Policy shall be governed exclusively by Slovakian law. This also applies to Insured Companies with a foreign domicile."
Parnell Manufacturing Pty Ltd v Lonza Ltd	[2017] NSWSC 562	"16.5 Governing Law/Jurisdiction. This Agreement is governed in all respects by the laws of the State of Delaware, without regard to its conflicts of laws principles. The Parties agree to submit to the jurisdiction of the courts of Delaware."
Royal Bank of Scotland plc v Babcock & Brown DIF III Global Co-Investment Fund LP	[2017] VSCA 138	"This Letter Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York applicable to contracts executed in and to be performed in that State. Each of the parties hereto (a) consents to submit itself to the personal jurisdiction of the United States District Court for the Southern District of New York or any court of the State of New York located in such district in the event any dispute arises out of this Letter Agreement or any of the transactions contemplated by this Letter Agreement, (b) agrees that it will not attempt to deny or defeat such personal jurisdiction or venue by motion or other request for leave from any such court and (c) agrees that it will not bring any action relating to this Letter Agreement or any of the transactions contemplated by this Letter Agreement in any court other than such courts sitting in the State of New York. THE PARTIES HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THEM AGAINST THE OTHER IN ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT."
Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd	(2019) 99 NSWLR 419; [2019] NSWCA 61	Risk Transfer Agreement "The parties shall strive to settle any dispute arising from the interpretation or performance of this Agreement through friendly consultation within 30 days after one party asks for consultation. In case no settlement can be reached through consultation, each party can submit such matter to the court. The English Courts shall have the exclusive jurisdiction for all disputes arising out of or in connection with this Agreement." Promotion Agreement "This Agreement is governed by the law in force in New South Wales. The parties submit to the non-exclusive jurisdiction of the courts having jurisdiction in New South Wales and any courts, which may hear appeals from those courts in respect of any proceedings in connection with this Agreement."

Conclusion

Respectfully, Bell P's dissenting reasons are to be preferred to those of Meagher JA, with whom Gleeson JA agreed. Bell P's reasons are more consistent the weight of authority on construction of arbitration and choice of court agreements in Australia and abroad. On the other hand, the majority approach shows that Australian courts often do not feel bound to follow the solutions offered by foreign courts to common private international law problems.

Michael Douglas co-authored this post with Mhairi Stewart. This post is based on their short article first published by Bennett + Co.

Equality of the parties in investment arbitration – public international law aspects

Written by Silja Vöneky, University of Freiburg

Note: This blogpost is part of a series on „Corporate social responsibility and

international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

I. Introduction

1. The question of the status of transnational corporations in investment arbitration is of central importance for the division of spheres of responsibility, for the pursuit and enforcement of values, and thus for the bases of legitimation of the international legal order today.

2. The promotion of foreign direct investments and the deepening of economic cooperation between States to promote economic development with the common welfare objective of increasing the prosperity of the peoples of the contracting States parties has been the legitimating basis of the ICSID Convention, which is central to investment protection under international law, and of the bilateral investment protection agreements.

3. Investment protection law, as part of public international law – from its basis and purpose – should not be understood as a departure from a state-centered international order.

4. From the point of view of international law, the following questions have to be answered: What are the implications for the investment protection regime and investment arbitration as its core

a) if the triad justifying economic globalization (foreign private investment – promotion of economic development – promotion of prosperity) loses its persuasiveness as a paradigm for its justification in a normative sense, and

b) if a discourse of delegitimization prevails that accuses profit-oriented transnational corporations in their role as investors of irresponsible conduct, which is incompatible with the public welfare, and States of enabling this conduct to the detriment of their own population by means of international treaties establishing investment arbitration?

5. The aim to align investment treaties with the principle of sustainable development can be seen by the reforms initiated by States, groups of States, and the United Nations Conference on Trade and Development; besides, this aim

should have an impact on already existing investment treaties and investment arbitration as far as it is coherent with international law.

II. Transnational corporations as equal parties under international law within the framework of investment arbitration

6. A necessary condition for the equality of the host State and an investing foreign corporation as parties is that both by consent agree to arbitration in respect of a legal dispute directly related to an investment, i.e. that the State, which is a contracting party to the ICSID Convention and a subject of international law, besides ratifying the convention additionally gives its written consent (Art. 25 (1), Art. 36 (2) ICSID Convention), which has a threefold function (legitimating element, transformative element and constitutive element).

7. For various reasons, the procedural equality of the host State and the transnational corporations within the framework of a concrete arbitration procedure is justified and thus legitimate with regard to the international legal order as a whole. In particular, it complies with the principle of fair trial and the rule of law as enshrined in international law.

8. The principle of the equality of the parties does not preclude that transnational corporations are given preferential access to arbitration on the basis of international treaties and that arbitration is open only to transnational corporations.

9. The principle of the equality of the parties is inter alia observed during the composition of an arbitral tribunal if the judges are appointed by both parties in the same manner and each judge fulfils criteria which plausibly ensure impartiality. However, the appointment by the parties is not a necessary condition for the equality of the parties.

10. Questions about how to implement the principle of the equality of the parties arise in the arbitral proceedings themselves, in particular with regard to the possibility that several investors seek to bring their claims against the same host State, with regard to the admissibility of a counterclaim by the host State, with regard to the admissibility of “amicus curiae briefs” (third person submissions), with regard to the so-called equality of arms, and with regard to the problem of safeguarding confidentiality interests (in particular State secrecy).

11. Questions of the applicable law within the scope of the merits, such as the possibility of the host State to invoke justifications under international law (e.g. necessity) and the principles of interpretation of the investment protection agreements, are not considered to be questions of the principle of the equality of the parties.

III. (Un)justified unequal treatment to the detriment of transnational corporations as parties with regard to corruption problems

12. The decisions of arbitral tribunals, which deny their jurisdiction or the admissibility of the investor claim if the defendant host State asserts corruption, are convincing (only) with regard to limited types of cases.

13. The lack of jurisdiction of the tribunal or the inadmissibility of the investor's claim does not seem to be justified even if the transnational corporation's act of corruption made the investment possible in the first place: The contrary reasoning in investment arbitration decisions, based inter alia on the wording of bilateral investment treaties, the scope of the host State's consent and/or a violation of fundamental general principles (such as, inter alia, the so-called "clean hands" principle, the "international public policy" or "transnational public policy", or the principle that no one shall profit from his/her own wrong) is not convincing for various reasons .

14. The same is true even more – in accordance with recent investment arbitration decisions – if the foreign investor acted corruptly after the investment had already been initiated in the host State.

15. Instead, corruption should be taken into account in the decision on the merits of a case in accordance with the objectives and principles of the international legal order in such a way that central values of investment protection are not disproportionately undermined, but nevertheless relevant disadvantages arise for transnational corporations if they engage in acts of corruption abroad for or during investments. This can be achieved if the amount of investors compensation is reduced for example by a multiple of the sum of the corruption.

16. When considering acts of corruption in the merits of a case, the arbitral tribunal should therefore consider the distribution of responsibility, the pursuit and enforcement of global values, and the bases of legitimacy of the current international legal order, also taking into account the state's anti-corruption

obligations, in particular as enshrined in anti-corruption conventions and human rights treaties.

IV. Concluding remarks

17. The procedural equality of host States and transnational corporations within the framework of an investment arbitration procedure has no implications on the status of transnational corporations in the international legal order as a whole; other views, which argue that transnational corporations are (full or partial) subjects of international law in a normative sense, exceed the – *de lege lata* – narrowly limited equality.

18. The risks associated with a normative enhancement of transnational corporations in the international legal order present another argument against the view that corporations are (full or partial) subjects of international law. These risks are hinted at in the delegitimization discourse, which grants profit-oriented companies less influence in the international legal order of the 21st century.

19. Even without the status as subjects of international law, transnational corporations can be bound by norms of international law (international law in the narrow sense and so-called soft law). The UN Guiding Principles for the Business and Human Rights are, inter alia, of particular relevance.

20. If – with good reasons – foreign direct investments by transnational corporations continue to be promoted via international law as a means of increasing prosperity in the participating States for the benefit of the respective population, the public-good orientation of international investment arbitration tribunals should be further developed, on the one hand, by reforming the constitutional aspects of the arbitral procedure, and, on the other hand, by further focusing their jurisprudence on public-good aspects including the proportionate protection of responsible investments.

Full (German) version: *Silja Vöneky,* Die Stellung von Unternehmen in der Investitionsschiedsgerichtsbarkeit unter besonderer Berücksichtigung von Korruptionsproblemen – Unternehmen als völkerrechtlich gleichberechtigte Verfahrensparteien?, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F.

Müller, 2020, pp. 339 et seq.

Equality of the parties in investment arbitration – private international law aspects

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Note: This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.

1. In investor-state arbitration, one has to distinguish between arbitral proceedings which are initiated on the basis of a contract concluded between the investor and the host state, on the one hand, and arbitral proceedings which are initiated on the basis of a bilateral investment treaty, on the other hand. In the latter case, there is no arbitration agreement in the traditional sense. This entails a unilateral right of the investor to initiate arbitral proceedings. Granting the host state the right to bring a counterclaim might compensate this asymmetry up to a certain degree.

2. Whether the host state has the right to bring a counterclaim, depends on the dispute settlement mechanism provided for in the bilateral investment treaty. For future investment treaties, it is recommended to grant the host state such a right. When the investor introduces arbitral proceedings on the basis of such a treaty, the investor usually declares his consent with the entire dispute settlement clause. If, at this moment, the investor expressly excludes the right of the host state to bring a counterclaim which is provided for in the bilateral investment treaty, there is no correspondence between the declaration of the host state and

the declaration of the investor to submit the dispute to arbitration. Consequently, if the host state refuses to participate in the arbitral proceedings on such a basis, the arbitral tribunal does not have jurisdiction to decide the case.

3. The subject matter of treaty-based investor-state arbitration generally concerns regulatory measures of the host state. This makes a considerable difference in comparison to commercial arbitration, which focuses on the interests of private actors. This difference entails different procedural principles, primarily as far as questions of confidentiality and transparency are concerned.

4. There are, however, procedural principles of particular importance, which reflect the cornerstones in a system based on the rule of law in its substantive sense and require, as such, observance in all types of proceedings independently of the subject matter. The principle of equality of arms is one of these principles. Tribunals shall ensure that both parties are in an equal position to present their case. If there is a systemic superiority of one group of parties, tribunals have to be particularly vigilant and, if necessary, to intervene proactively in order to compensate factual inequality.

5. The principle of equal treatment of the parties is not only to be respected within one and the same proceeding. Treating two types of party – states on the one hand and investors on the other – differently in general, i.e. not just in a specific proceeding, would likewise amount to a violation of this principle. If certain questions concerning the burden and standard of proof arise in one procedural situation typically in the interest of the host state and in another procedural situation typically in the interest of the investor, the tribunals should deal with those questions in the same manner.

6. Investments which are in conformity with the law as far as their object is concerned, but which are corruption-tainted due to corruption that took place when the investment was made lead to discussions about the content of international public policy. Against this background, there would appear to be a practice for tribunals to deny jurisdiction or admissibility of the arbitral proceedings in cases concerning corruption-tainted investments. Actually, this leads to a denial of justice. International public policy, however, does not require such an approach. A comparison with the treatment of corruption cases in commercial arbitration shows this very clearly. The circumstances of the individual cases are too manifold; a one-fits-all solution construed at the level of

jurisdiction or admissibility is not convincing. The arbitral tribunals should rather undertake a comprehensive analysis on the basis of the applicable substantive rules of law in order to take into account the particular circumstances of each individual case. State interests can be properly respected via mandatory rules and international public policy.

Full (German) version: *Stefan Huber*, Die Stellung von Unternehmen in der Investitionsschiedsgerichtsbarkeit (unter besonderer Berücksichtigung von Korruptionsproblemen) – Unternehmen als gleichberechtigte Verfahrensparteien?, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 303 et seq.

Arbitration in Smart Contracts – Code Naïve v Code-Savvy

Written by Hetal Doshi & Sankalp Udgata

Combining law, computer science and finance in unprecedented ways, "Smart Contract" is the latest addition to the unending list of Internet of Things. Unlike a traditional contract, which only lays out the terms of agreement for subsequent execution, a smart contract autonomously executes some or all of the terms of the agreement as it are usually based on Block-chain. It has the potential to reshape our understanding of contract and technology law. The shift from the code naïve to the code-savvy, has surfaced problems in dispute resolution beyond the existing legal perception which this article aims at analysing and resolving.

Working of the Smart Contract

By removing the need for direct human involvement, a smart contract is deployed on to a distributed Trustless Public Ledger. However, in order for the smart

contract to work efficiently, exactly specified conditions for the execution of the contract are necessary, otherwise, it will be impossible to automate the process. Also, smart contracts receive information from outside block-chain platform through the use of ***Oracle*** programs that mediate with external databases and are entered into the block-chain technology.

A Hornet's Nest

Smart contract come with their own sets of limitation and drawbacks. Following are few of the many problems, inevitable in resolving disputes over smart contracts. Interestingly however, although these problems may be encountered by an Arbitral Tribunal, arbitration (with requisite checks) is the most efficient mechanism to deal with such problems.

Enforceability Quandary

1. A) Formal Enforcement

A very fundamental and critical impediment, Courts and Tribunals are consistently skeptical in enforcing such unconventional contracts. Although the use of automated communication or system to conclude contracts or make it binding on the parties has been long accepted by the business community, a Tribunal is often troubled with disparity in validity of smart contracts over conflicting jurisdictions.

Secondly, Article 2.1.1 of UNIDROIT (PICC) undoubtedly includes automated contracting. However, problems may arise in relation to codes meeting the *in writing* requirement of UNCITRAL and the New York Convention.

1. B) Substantive Enforcement

The artificial nature of contracting deprives actions of the human touch. Complexities arise when there a subsequent smart contracts. For example, if there is a supplementary smart contract, consent for which is sought from the parent contract. Since it is the codes in the parent smart contract that initiate the subsequent contracts and transactions and the performance, can consent be said to have been given by a mere code and is such consent valid and enforceable against such code.

A Hitch in the Seat

Given the distributed nature of block-chain i.e. a ledger which is spread across the network among all peers in the network and the operation of Smart Contracts, it is important to agree a seat for the arbitration to avoid satellite disputes about the applicable seat and/or procedural law.

Problems in Execution- Irreversibility and Irremediability

Since they are theorized to be complete contract by focusing on *ex ante* rather than *ex post*, they eliminate the act of remediation, by admitting no possibility of breach. However, the *DAO case* was incomplete as it failed to anticipate the possibility that coding errors could result in unexpected wealth transfers. In addition, smart contract may deal with commercial scenarios so complex and unpredictable that the code will fail to embed all possible answers to all possible questions.

Further, if the smart contract contains a mistake, security flaw, or does not accurately capture the parties' intent, the smart contracts will be difficult to modify or change, due to a block-chain's resilient and tamper resistant nature. The program will continue to blindly execute its code, regardless of the intent of the parties or changed circumstances. When the transaction is more complex, involving multiple players (humans or machines), multi-component assets and diverse jurisdictions, computer code *smartness* may easily turn into plain *dumbness*.

Needless to mention, a Tribunal or a Court will encounter several problems in executing a decision vis-à-vis a smart contract such as:

1. Lack of in-rem jurisdiction- Reversing a transaction on a decentralised ledger with several contributors that may not even be parties before the Tribunal.
2. Excusing future performance or specific performance- Since they operate automatically and are not flexible.

The Truth about Consent

Contracting also has issues such as duress, fraud, forgery, lack of legal capacity and unconscionability which require human judgement and cannot be scrutinised by a smart contract which simply functions on a series of binary inputs. Moreover, though it provides guarantee of execution to certain extent, it cannot verify

whether the contracting parties have the legal capacity to get into legal relationships or business capacity to make an agreement.

It also does not care whether there truly exists *consensus as idem* between contractual parties, there is no possibility for the contract to be void or voidable. However, although codes are not natural language that might be vague or ambiguous, leaving space for interpretation. For a consensual dispute resolution mechanism like arbitration, the indispensable requirement of free consent and the evaluation of intention of parties cannot be comprehended by a smart contract that stands deprived of reason and morale.

This may be an issue in circumstances where the Smart Contract is entered into by a computer, is in code and/or and does not create legally binding contractual obligations under the applicable law. The solution to this can be that the Arbitration clause can become part of the *Ricardian contract* which like any other similar contract is a hybrid form of smart contract which is partly in human readable form.

The Catch in Imputing Liability in a Dispute

The code smart is sadly not insusceptible to security vulnerabilities and exploits like *forking*, which could cause a smart contract to operate unexpectedly and invalidate transactions, or worse, enable a third-party to siphon digital currency or other assets from contracting parties accounts. Scary, isn't it?

However, since a Tribunal is only an *in personam* jurisdiction, it can barely inspect or issue directions against such third parties. Such vulnerabilities might also jeopardise the secrecy that arbitration aims to achieve.

It is not unjust to say that such a contract is dangerous enough to attract *strict liability* in case of any harm caused due to an error in coding. That, juxtaposed with the existence of foreseeable risk in execution of smart contracts poses a potentially huge hurdle to the exponentially growing use of block-chain technology.

Furthermore, disputes, to summarize, may arise:

1. between the parties of a smart contract, or
2. between two conflicting smart contracts.

Since the code smart is a form of artificial intelligence replacing human involvement, it is the second set of disputes where a Tribunal or Court will be troubled with the attachment of liability.

Cutting the Gordian knot – checks and suggestions

Given our shift from *not so smart contracts,* we must keep an eye for the following checklist while dealing with dispute resolution in smart contracts.

Formality requirements

Parties should therefore ensure the arbitration agreement meets any formality requirements under the governing law of the arbitration agreement and Smart Contract, the law of the seat and wherever the award is likely to be enforced.

Choice of seat

Parties should base check whether in their chosen seat,

1. Domestic law does not render a Smart Contract illegal or unenforceable
2. The disputes likely to arise are arbitrable
3. The codified arbitration agreement in question will be upheld and enforced by the supervisory courts.

Tribunal with specialist technical knowledge

Some Smart Contract disputes will be fairly vanilla contract law disputes, but others will be of a highly technical nature, for example, where the code does not operate as expected. Pursuant to the novel nature of the smart contract the importance of having a tribunal familiar with the technology against the importance of having the dispute decided by experienced arbitrators becomes crucial.

Severable arbitration clause

Although the *doctrine of separability* protects the validity of an arbitration clause, the dispute resolution clause should always be kept independent of any smart codes.

Localised Termination Clause

Given the automated and perpetual nature of smart contracts, there should be an option to terminate the contract. Although non-amenability is an essential feature of a smart contract, the option to cede away from the distributed ledger (terminate the contract) should be sole switch available the each of the contributors. The code may prescribe conditions for pulling the plug, i.e. create joint switches. Therefore, a party shall not be able to terminate its obligations without assent from any of its debtor on the ledger. As a result, once the debt is settled either by payment of dues or by an award of a Tribunal, the parties may pull the plug.

Power of Pardon

Each party to a smart contract should be at liberty to excuse payment by a debtor in under a direction by a tribunal or a Court in case of a *force majeure* or any other scenario where performance is liable to be excused.

This list, although non-exhaustive, will certainly sustain best practices in arbitration until the next great invention in the sphere of technology and business will live to fight another day.

Three Tickets, One Seat – A Methodological Anatomy Of The Indian Practice Of Determination Of Seat Of Arbitration

Written by Sankalp Udgata & Hetal Doshi, National Law University (NUSRL), Ranchi

The choice of arbitration as the default system of resolution of commercial disputes, which was initially restricted to the foreign parties is now being reciprocated by even the Indian parties, thus setting the stage for India being a global hub for commercial arbitration. Surprising as it is, commercial agreements worth billions have but a succinct recording of a seat of arbitration. Sloppy as they are, these poorly drafted dispute resolution clauses open the doors to a tsunami of litigation which simply intervene and delay the entire resolution process thereby defeating the very virtue arbitrations proclaim to instil.

Since arbitrations are out-of-court proceedings, they do not by themselves command the authority of the sovereign. Therefore, every arbitration must be guided and overseen by a Court that has supervisory jurisdiction over it. This Court is the Juridical Seat of the arbitration as determined by the parties and the most important concept that the territorial situs of the Seat denotes. In absence of a positive determination by the parties in the arbitration agreement, the Tribunal or a Court whose supervisory jurisdiction is sought must first determine the Seat and consequently whether it has the jurisdiction, as the Juridical Seat, to hear the matter.

However, arbitration in India has been a Hornet's nest if not a Pandora's box to say the least. Admittedly, the vast majority of problems associated with international commercial arbitrations taking place in India revolve around the uncertainty in the Courts' approach to determination of the seat when the parties have failed to choose one. The Indian Courts, much rather the Supreme Court of India ("**SCI**") has shown a consistent disparity in applying any particular method for determination of the Seat in such situations. This article aims to reconcile the various tests that the Supreme Court of India has applied over the years and attempts to plot their reasoning into three distinct methods for determination of a seat when the arbitration agreement fails to explicitly document one. This article also discusses the various factors relevant in each method with examples and can therefore serve as a catalogue for practitioners as well as valuable literature to the academia.

I. Seat <=> Venue Method

Representing the most widely accepted view, this method is applicable when parties have at least chosen a particular geographic location as the venue for the arbitration to take place without specifically designating a Seat. Finally, setting

the clock straight and reconciling to the globally accepted rules, the SCI in Soma JV case held that the venue of arbitration shall be the default Seat in absence of any *contrary indica*. (¶63)

For it to be the default Seat, the venue must exist in absence of any of the following factors that, over the years, the Court has found to be *contrary indications* to venue being the Seat.

- Designation of an alternate place as Seat

When there is an *express designation of the arbitration venue,* combined with a supranational body of rules governing the arbitration the venue shall be the seat unless the parties have designated *any alternative place as the seat*. (Shashoua, ¶34,42)

- Existence of a national set of *lex arbitri* or proper law

Despite having designated London as the venue of arbitration, the SCI held Bombay to be the Seat in the 2014 Enercon Case. In making this determination, the Court was heavily swayed by the fact that the laws specifically chosen by the parties in the contract to apply to different aspects of the dispute were Indian laws.

- Existence of an alternate place of making of award

Since it is necessary for the arbitral award to be made and signed at the place of arbitration as determined by Section 20 of the 1996 Arbitration Act ("**Act**"), an award made at one of the two designated venues resulted in the venue where the award was not signed was not the Seat in the Soma JV case.

- Venue of an arbitration proceeding

The Court has on several occasions differentiated between the venue of arbitration proceedings from the venue of an arbitration proceeding for the later cannot be construed as anything but a convenient location for the conduction of a meeting. (2012 Enercon case)

II. Inverse Closest & Most Real Connection Method ("**Inverse-CMRC**")

The globally acclaimed CMRC test is used to determine either *lex arbitri* or the *proper law governing the arbitration agreement* when the *place of arbitration* has

been decided as the same would be the law most closely connected to the choice of place. While the English Courts in Peruvian Insurance Case applied the law of the place of arbitration as the *lex arbitri*, in the Sulamerica Case, applied it to the proper law governing the arbitration agreement as they had the most real connection to the place chosen by the parties. India has also used the test in a peculiar way to apply the *lex arbitri* to the whole of the agreement. This proximity is essentially based on the *legal localisation of the place*.

However, India has been applying the above test somewhat inversely based on the *geographic localisation of the law* instead. Bemusing everyone, the SCI in Enercon Case applied the Inverse CMRC Method to determine the Seat to be India as it was most closely and intimately connected to the lex arbitri and the proper law of the contract, both of which were Indian. The Indian model seems to presume that the parties could not have contemplated a delocalised *lex arbitri* or proper law. Be that as it may, where a supranational set *lex arbitri* or proper law exists, the first method will prevail as these laws will not be sufficient *contrary indications*.

III. Cause of Action Method

This is an unsuitable method of determination of seat. In this case, if the arbitration agreement does not reveal a Seat then the Courts of the place where the *cause of action* arose will be considered as the Juridical Seat of the arbitration. This is derived from the definition of 'Court' under Section 2(1)(e) of the Act which also includes the Court that would have jurisdiction over the question if it formed the subject matter of a suit.

Understanding this to mean that the legislature has intended to give jurisdiction to both the Court of arbitration and the Court having territorial jurisdiction over the place where the cause of action arose, concurrently, the SCI has caused tremendous controversy by in *Paragraph 96* of BALCO judgment. However, when read wholly and not in isolation, BALCO judgment very distinctly states that if *concurrent jurisdiction* were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer and therefore Courts were intended to exercise *supervisory jurisdiction* to the *exclusion* of other Courts as provided under Section 42. (Soma JV case, ¶51)

Therefore, since the application referred to under Section 42 can only be

legitimately made to the Court of the Seat, this method is only useful where seat could not be determined by any of the above methods maybe owing to lack of any territorial nexus.

Conclusion

The contradictory judgments of the English and Indian Courts over the determination of Seat in the Enercon case caused a delay of two years and has painted a Medusa of how the incongruous views of Courts across jurisdictions terrorise the development of international commercial arbitration. Therefore, arbitrations anchored in India or involving Indian parties must be planned in a manner eliding with the recent set of "pro-arbitration" trends in determination of Seat.

Although there is no specific order of precedence for application of these methods, their very nature and the manner of their application till date suggest that the Seat-Venue method takes precedence over the other two owing to its strong territorial nexus. Ideally thus, upon failure of this method owing to the presence of a sufficient *contrary indica*, should the Inverse-CMRC method be applied followed by the Cause of Action method as the last resort in this three-fold method for determination of Seat.