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Russell Thirgood, Editor[1]

Welcome to the June 2021 edition of *the arbitrator & mediator*

I am delighted to give this introductory message on the occasion of the 40th anniversary of *the* a*rbitrator & mediator*. This is a milestone event in the journal's history and sees it continue to explore new and innovative ideas in the dispute resolution space. As Australia continues to grapple with the COVID-19 pandemic, innovation is key, if dispute resolution wishes to continue to adapt so as to serve the needs of parties.

I am also happy to announce that we have partnered up with the Newcastle Law School, a unit within the University of Newcastle, in the publishing of the journal. Senior students of the Newcastle Law School will assist my team and I with proofreading of submissions. The purpose of this partnership is to ensure that the journal continues to strive for excellence both in the substance and form of the various submissions that are received.

The coronavirus global pandemic has been challenging on many fronts for so many people. In the dispute resolution industry practitioners and parties alike have had to adapt and use technology and new processes to ensure that disputes are either avoided or resolved in fair and efficient ways. It may be that historians of the future will look back to this moment in time and regard it as a turning point in the way that communities, families, work colleagues and businesses have been forced to communicate and adapt to a new way of life. Adversity brings with it innovations and many of the authors who have submitted papers to this edition of the *arbitrator & mediator* explore this theme, perhaps with a degree of optimism as to what the future may hold.

My board colleague, Mieke Brandon writes an interesting and innovative paper on the use of 'genograms' or pictorial charts within the practice of family dispute management. The background information about the cultural heritage, familial relationships and personality traits of each party to a family dispute management, Ms Brandon writes, provides invaluable aid in better managing family disputes. Not only are genograms immediately easy to read, Ms Brandon argues, but are a valuable additional systems' thinking tool in the dispute resolution toolbox. Much can be learned from the addition of visual aides to an area which is so dominated by verbal and written materials.

Dr Richard Manly QC and Toby Shnookal QC explore the importance of determining exactly when an arbitration matter was commenced, otherwise known as when the arbitrator 'entered upon the reference.' The authors explore the various legislative and common law stances on how to determine when an arbitrator has entered upon the reference, as well as Resolution Institute's Arbitration Rules. Although

[1] CCIArb FRI Arb 1.

the case-law is as yet unsettled, headway is made in finding the common ground and a path towards a coherent set of principles.

Richard Chesterman QC provides a valuable and insightful 'cautionary tale' about arbitrators asking for security for costs. The author examines both the 2016 and 2020 versions of Resolution Institute's Arbitration Rules and delves into the powers that arbitrators have in respect to making orders in respect of security for costs and staying proceedings.

Jill Goldson navigates the complexities involved in including children in difficult and protracted family disputes. Ms Goldson writes in favour of a social science backed, judicially approved, professional intervention in ossified family disputes which she christens Therapeutic Family Facilitation (TFF). These interventions are extremely effective, Goldson argues, for combatting the resistance/refusal dynamics of child contact which so often create painful impasses in family dispute situations. This innovation may be the key to resolving the often damaging back and forth of protracted legal disputes which are so often damaging to the children caught in the crossfire.

Sylvia Tee and Andy Lau examine the various approaches to insolvency arbitrations through different jurisdictions around the world. Although insolvency disputes have traditionally been conceptualised as being within a court's domain, the authors show that many facets of such disputes are arbitrable and, in fact, more suited to arbitration. Encouragingly, the general sentiment in Australian courts is that insolvency-related proceedings may be stayed in favour of arbitration in certain circumstances.

Elizabeth Harris writes regarding her reflections on the creation of the Court of Arbitration for Art (CAfA), established in 2018, for the purpose of reviewing authenticity disputes in the art world. Ms Harris takes the position that the confidentiality of CAfA is a perfect fit for the art world. The author examines the background conditions, negotiations and issues which brought about the need for the CAfA, as well as the process of its creation. It is argued that CAfA's success was because it was built around the idiosyncratic needs and nature of the art industry, and that it therefore stands as a case study for the adaptability of arbitration as a dispute resolution model.

Albert Monichino QC rounds out the journals section with a paper arguing that the 'notoriously protracted and acrimonious' world of shareholder and trust disputes may be best dealt with through arbitration rather than public litigation. This article lays out, step by step, the anatomy of a typical shareholder or trust dispute including the relevant legislative context. The author contends that these disputes are not only arbitrable, but the privacy, flexibility and finality of an arbitration is perhaps the preferred method for resolving such disputes which are often acrimonious and personal in nature.

The *arbitrator & mediator* is excited to introduce a new category of entry into the journal titled 'Practitioner's Notes.' This category includes the practical observations and insights of dispute resolution practitioners made during the course of their work. These accounts, written outside the context of academic writing, will speak to other practitioners from a professional development viewpoint.

The first of these Practitioner's Notes is a deeply moving account by Barbara McCulloch about the mediations attempting to repair the relationship between deeply religious parents and their gay son. The life story of this young man, who remains anonymous throughout the piece is powerfully punctuated by the mediator's commentary on how she is feeling throughout the mediation process. The overall effect is to place the reader in the mediator's shoes to gain a better appreciation of the enormous importance that 'peacemakers' like Ms McCulloch provide to the communities that they serve.

Rod Holm contributes a Practitioner's Note examining and comparing the language used in criminal justice and restorative justice systems. Using the powerful story of a car crash between a pregnant mother and a professional truck driver as a case study, Mr Holm matches the various labels applied to each party on the path that was taken to the resolution of their dispute and healing of their relationship. This case study describes what many dispute resolvers know on an instinctive level; that the strict

binaries of the criminal justice system often lead to unanticipated and perhaps unhelpful issues, where the more inclusive language of restorative justice can be transformative to both parties' understanding of a dispute.

Anthony Fawcett provides the final entry setting out from a practical viewpoint the operation of the *Construction Contracts Act* 2002 (NZ). Similar in many ways to the various Security of Payment Acts in Australia which govern the building and construction industry, Fawcett sets out the time, cost, and enforcement advantages of bringing claims under this Act.

Rounding out this edition of the journal, we are also pleased to offer a variety of case notes and book reviews. We would like to thank the Hon David Byrne QC, Donna Ross, Sharin Ruba, and Phillip Greenham for their contributions.

Mapping the family relationships' system: The strategic use of a genogram

Mieke Brandon*

Abstract

This article explores the benefits of using a three-generational genogram or family chart to work systemically with two or more members of a family in dispute. A genogram assists to understand family patterns of behaviours and decision making and provides clues to the origin of family stories which may be helping or hindering the resolution of their conflict. Each person's family origin and/or ethnic background can have an influence on how clients react when they are in conflict. By using multigenerational chart family mediation practitioners, family legal practitioners and participants will get a better overview of the context in which the dispute is centred. No mediation is held in isolation. There are often several others who fear they could be harmed or hindered by outcomes as a result of a confidential process in which the participants use their self-determination to gain an outcome that is to their mutual satisfaction.

Introduction to working systemically

A dispute within a family or between two people of a family is seldom held in isolation; once such a dispute becomes known, members of the family tend to have an opinion, want to influence and/or take sides. This type of influence can emotionally undermine the self-determination of mediation participants, unless it comes out in the open during the exploration of their needs, fears and interests in a facilitative mediation approach. To be able to fully see the family from a multi-generational perspective can assist practitioners not only to gain knowledge of the family structure but also to highlight family dynamics.

The following is a brief introduction to thinking systemically when working with people in relationship conflicts.[1] Lederer and Jackson describe systemic concepts as a 'the whole being more than the sum of its parts, because the way in which the parts operate in relation to each other needs to be incorporated in any definition of the whole'.[2]

* BA, MSc (App) AM registered FDRP, accredited under NMAS, author of many articles and co-author of *Mediating with Families* (Thomson Reuters, 4th ed, 2018) and Conflict and Dispute Resolution (Oxford University Press, 2007). Mieke is very grateful for the comments and support from colleagues and friends.

[1] Mieke Brandon and Linda Fisher, *Mediating with Families* (Thomson Reuters, 4th ed, 2018) 1-2.

[2] William J Lederer and Don D Jackson, *Mirages of Marriage* (WW Norton & Co, 1968); see 45-8 'The System Concepts'.

The family relationship map is used to gain understanding of the system of the relationship of the disputants as well as the potential impact of the wider system. 'The systems that foster and aggravate conflicts consists also of cultures, beliefs, attitudes and ways of thinking and acting that exist inside each of us; between friends and couples; in marriages and families'.[3] Cloke also reminds that 'All conflicts are experienced personally and acted out by individuals, leaving the system, context, culture and environment that create and contribute to them largely invisible'.[4]

Eddy states that '[f]amily systems theory describes families as operating like the solar system: each member of the family has a 'pull' on every other member of the family – like gravity pulls planets towards each other and other forces push them away, so that they stay in balance spinning around each other in a predictable orbit'.[5] He describes how these systems have characteristics that are common: They: a) are powerful; b) seek stability; c) create roles; d) are part of a larger social system; and e) are resistant to change.[6]

Legal practitioners and family practitioners work with all types of families in dispute, such as separating or separated couples, property and finances, elder[7] or parent/adolescent, wills and estates, parent/adolescent disputes and relationship mediation. Hence practitioners are assisted by this knowledge to develop an understanding of typical dynamics managing any dispute between two or more members of a family and their relationships with others in the context of their extended family attitudes, beliefs and values.

Mapping the family system

In any family mediation a genogram or family chart[8] can be used to locate two individuals and their relationship with each other in the family system, and to illustrate their differences in perceptions and impressions of their dispute. Such a simple genogram is used to establish factual data. However, many disputants come from complex family systems and a more elaborate family chart helps to have an overview of the current situation of their family.

[3] Kenneth Cloke, 'The Future of Mediation: Towards a Conflict Revolution' (Web Page, January 2015) <http://www.mediate.com/articles/ClokeFuture.cfm>.
[4] Ibid.
[5] Bill Eddy, 'Misunderstanding Family Systems in Today's Divorces (Part 1)' (Web Page, 11 March 2014) <https://www.highconflictinstitute.com/hci-articles/misunderstanding-family-systems-in-todays-divorces-part-1>.
[6] Ibid.
[7] See Kay Feeney, 'Settlements and Spousal Maintenance for the Elderly' (2019) 29 *Australasian Dispute Resolution Journal* 173.
[8] These two terms are used interchangeably throughout the remainder of this article.

Originally the genogram was used by Bowen[9] and other family therapists who found it useful to contextualise clients' 'issues' by developing a multigenerational 'map' of the client's family. Systems theory was widely used by therapists like John Haynes, who was a very highly regarded family mediator teaching mediators to use this.[10] Genograms became useful in the medical world as well as in family mediation. LeBaron and Pillay suggest that '[w]hen we hold relationship at the center of our map, it reminds us that we are ultimately interdependent. Our relationships are carriers for our identities, passions and meanings. Whether it is our conflict or we are helping others, we are always part of a relational system'.[11] By using a genogram the structure of the multigenerational family is depicted and the patterns of their interactions can illustrate their closeness, distance and conflictual dynamics.[12] A useful example, at this early stage, is provided in Figure 1.4 below.

The next section will illustrate and describe as much as possible how these concepts are used in conflicts between family members.

The use of a genogram in all types of family dispute management

A genogram is a visual representation of a family structure which provides information on the individuals, who make up a family and their relationship to one another through the use of symbols.[13] A simple genogram is used to establish (i) factual data on the current generation of a family, (ii) descriptions of individuals and their relationship with each other, and (iii) differences in perceptions and impressions.[14] A traditional diagram may not adequately represent the way many people from different cultures live within larger groups and/or extended families. [15] Colour can be used to represent cultural groups or intercultural marriages or relationships and can show people adopting a new culture besides the one with which they primarily identify.[16] Intercultural marriages or relationships can be identified using colour or a made up symbol (see, for example, Sergei and Anneke in Figure 3 below).

The genogram allows information to be gathered on one or all participants in mediation and may also show an element of their connection to the outside world.[17] When one person from a partnership (as in family dispute resolution)[18] seeks mediation or a person as part of a married couple seeks relationship

[9] See Murray Bowen, *Family Therapy in Clinical Practice* (Rowman & Littlefield, Maryland ed. 2004).
[10] Personal conversation with Michael Hunt 13 April 21; see also John M Haynes, 'Mediation and Therapy: An Alternative View' (1992) 10 *Mediation Quarterly* 21.
[11] Michelle LeBaron and Venashri Pillay, Conflict Across Cultures Conflict Across Cultures: A Unique Experience of Bridging Differences (Intercultural Press, 2006) 144.
[12] Mieke Brandon, 'Use of the Genogram in Training Mediators and Mediation Sessions' (2001) 4(4) *The ADR Bulletin* 45.
[13] Ibid 45.
[14] Ibid 48.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] See Brandon and Fisher (n 1) 59-62.

mediation, a genogram can be drawn to show how that person sees their family system and the relationships interactions. When both people from a relationship seek mediation, such as family dispute resolution (FDR) and relationship mediation, current relationship and previous relationships and/or future relationships and/or children from these relationships can jointly be identified by the participants.

The genogram can be tailor made to each matter; for example, a family lawyer may want to use a family chart or map to depict specific information (births, deaths, marriages, de-facto, separation or divorce, children and multicultural relationships).[19]

According to Bowen the 'emotional system' is conceptualised as a 'complex amalgamation' of 'nature *and* nurture' so that family life experiences and circumstances influences 'multigenerational patters; family functioning and family process; sibling functioning and a host of additional significant social, environmental and emotional factors'[20] (see further Figure 10 below). As Que and Weston state:

> Our sense of wellbeing is closely linked with how happy we are with our relationships with other people, especially those that are most important to us. Of these, relationships within families loom large, affecting all members, the family as a whole, and the community. If relationships in the family are supportive and enjoyable, then the challenges we face both within and outside the family can seem less daunting than otherwise. The souring of family relationships, on the other hand, can be devastating experience in which our 'refuge' can become a 'minefield'.[21]

Depicting a multigenerational genogram

Traditionally male and female symbols were depicted differently, males as a square symbol, and females as a circle symbol.[22] However, the awareness and representation of gender and gender expression can be acknowledged by using specific symbols to identify the diversity[23] to the people in dispute where this is important to them.[24]

[19] Brandon (n 11) 47.
[20] See Wayne F Regina, *Applying Family Systems Theory to Mediation* (University Press of America, 2011); see also Brandon and Fischer (n 1) 86-89.
[21] Lixia Qu and Ruth Weston, 'Snapshots of Family Relationships' (Institute of Family Studies, May 2008) 5 <https://ifs.gov.au/sites/default/files/publication-documents/ssreport08.pdf>.
[22] See 30 Free Genogram Templates & Symbols Home (Web Page, 9 November 2016) <https://www.freetemplatedownloads.net/30-free-genogram-templates-symbols.html>.
[23] See Genogram Analytics, 'Identifiers' (Web Page) <http://www.genogramanalytics.com/genogram_symbols.html>.
[24] Ibid.

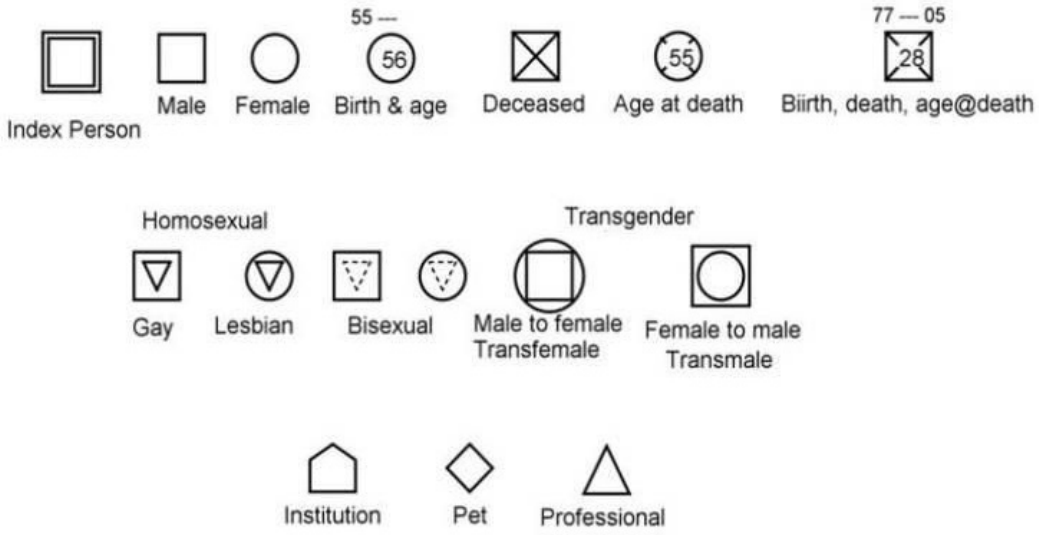

Figure 1: Identifiers

Alternatively, if this is not requested or unknown by practitioners, basic genogram symbols can be used (see Figure 2) or one or two different shapes can be used for each participant (see Figure 3).

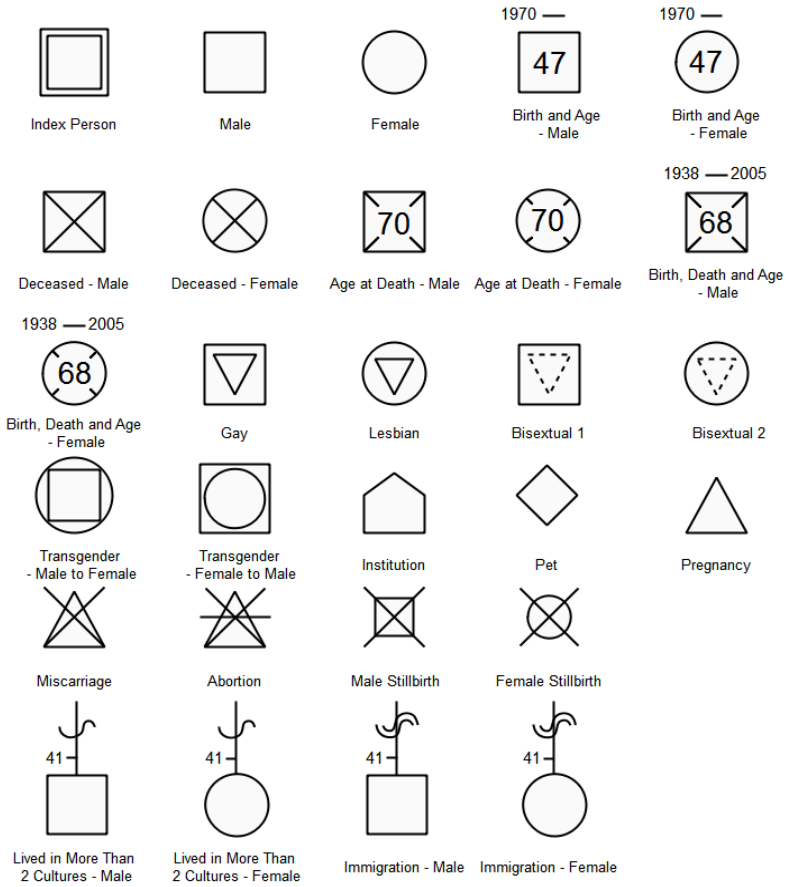

Figure 2: Basic genogram symbols

Alternatively, any other symbol can be used and/or creative illustrations added.[25] The following section gives some brief examples of family maps or genograms in different family mediation scenarios.

Elder mediation

The genogram used in elder family mediation (Figure 3) of Otto and Inger's family (who are in the process of assisting Otto's mother about the possibility of going into a nursing home) usefully illustrates several dynamics. We can see that:

a) in each generation a child has died in Inger's family, and that Otto's father is deceased;
b) it is clear that due to the names of several people there may be cultural issues, values and traditions that could be important for the Otto's mother Fanny (aged 82) to discuss;
c) the role of the Fanny's own children and the grandchildren may also be significant (depending on how close these are to her);
d) there are particular lines between Otto and Sergei and Fanny and Inger; these mean that Otto is not on good terms with Sergei (but is close to his Mum and Anneke); and Anneke and Inger are close as well (see Figure 4 below for details about the meaning of line symbols).

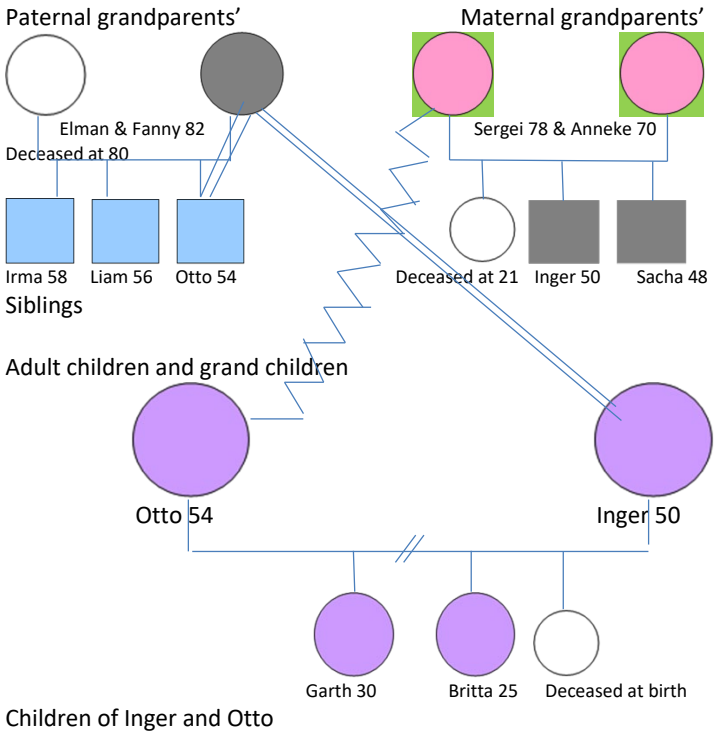

Figure 3: Family map or family chart illustrating the extended family of Otto and Inger

[25] See Catherine Barrett et al, *Gender Genograms: A Resource for the Families of older Trans and Gender Diverse People* (2019) <https://alicesgarage.net/wp-content/uploads/GenderGenogramResourceHere-1.pdf>.

Who is the client?

In this case Fanny is the client and her adult children are discussing and negotiating how best Fanny can be housed now she is no longer able to look after herself at her home. Any decision she makes will probably be with the assistance of Otto, but it is also likely that his wife Inger will have some discussion with him privately and/or is participating in the mediation itself. After certain plans are made and Otto comes home to announce this to his children, those children may have something to say about it. This can either be supportive of the outcome Fanny is looking for or one or all children could be strongly against these plans and express those views.[26] These can be common problems in elder and/or wills and estates mediation as well.[27]This demonstrates how important it is to consider other family members by using multigenerational map that shows the 'family system'.

As seen above, mapping a family relationships chart can provide an overview of:

- Individuals within the family and their relationships with each other, or intra family relationships, which can include changes in closeness and levels of conflict over the family's or relationship life cycle;
- Relationships interactional patterns in an extended family can be illustrated through these symbols.

Hoag explains how 'the map is not the territory'[28]as he believes that '[o]ur brains will use whatever maps we give them'.[29] Hence he sees a tremendous value in the 'therapeutic use'[30] of working with family maps. He maintains that mapping: 'allows us to accept our thoughts and feelings for what they are — just thoughts, just feelings. … We can become curious about them, we can evaluate them, and we can change them if other thoughts or feelings would be more useful, healthy and life affirming', By improving our maps he suggests 'we can improve the quality of our lives, our experiences, our relationships, our health and our success'.[31]

[26] For more information about elder mediation and its areas for mediation, see ADRAC, 'DR, older people and Elder Mediation' (14 September 2016) <https://f77b663a-db93-4dd8-823d-909937839d69.filesusr.com/ugd/34f2d0_81944e1a41e74e8ea09811335076f42a.pdf>.
[27] See Brandon and Fisher (n 1) 232-245 on wills and estates mediation.
[28] The distinction between a map and a territory made its debut in Alfred Korzybski's seminal work, *Science and Sanity: An Introduction to Non-Aristotelian Systems and General Semantics* (1933); see John D Hoag, 'The Map Is Not The Territory' (Web Page, 2021) <http://www.nlpls.com/articles/mapTerritory.php>.
[29] Hoag (n 28).
[30] Ibid.
[31] Ibid.

Couple and/or family interaction patterns

Genograms are also often illustrated with how close or distant people in family relationships are. The following symbols highlight this:

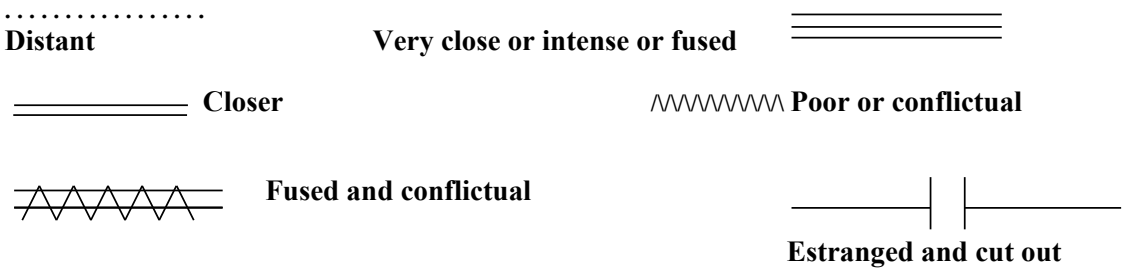

Figure 4: Depicting familial relationships

Figure 5 shows how close, distant and conflictual relationships (for example) can be depicted on a family map.[32]

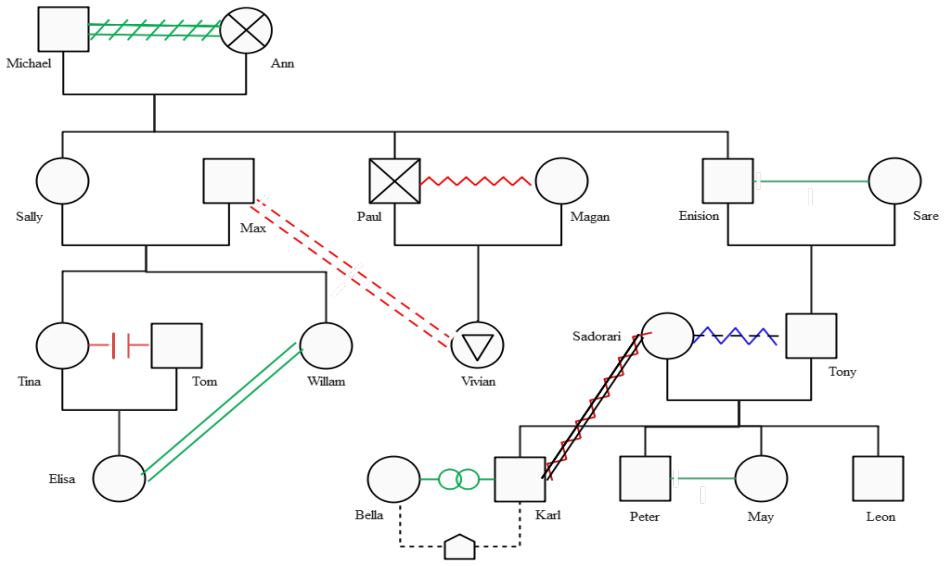

Figure 5: An example of a complex genogram

Family dispute resolution

Family legal practitioners and family dispute resolution practitioners (FDRPs) significantly benefit from mapping families, when they deal with couples who are separating, have separated or are divorced and /or re-partnered. Following figure shows a very simple version of the family of divorced and separated parents.

[32] See James Freeman, 'How to Create a Genogram Quickly' (Web Page, 19 May 2021) <https://www.edrawsoft.com/genogram/how-to-create-genogram.html>.

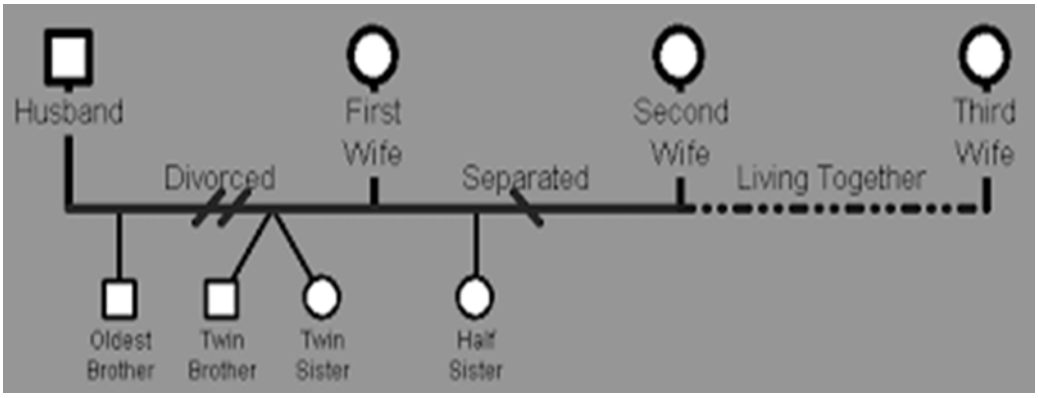

Figure 6: A genogram showing divorced and separated parents

Using a multigenerational family map, that depicts the full context of the family system is, however, more useful in the end, as this helps to show who else may be impacted by the decisions that parents' make on behalf of their children. Many grandparents, for example, either have regular responsibility of their grandchildren as care givers, or are trying to spend some (or more) time with them.

This is particularly relevant in matters that involve property and finances. It may help to discover how potential offspring can be financial supported, or if and when parents (for example) have given or loaned money to the couple, or one of the partners has had an inheritance or compensation claim or been given a redundancy package. The question becomes what impact may this have on their perspectives and ultimate settlement?

When separated or divorced parents attend FDR,[33] a FDRP or family legal practitioner familiar with multigenerational charts would ask about the interactions, not only between the co-parents, and the grandparents of the children, but also the relationship between the co-parents and their new partners ie if any.

A traditional family chart for a separated and/or divorced family shows all the parents, the grandparents, and how the children reside with each parent. Figure 7, for example, shows that Rowena lives in a de-facto relationship with Manfred and her children and that Phillip is re-married to Carmelita and they live together with their twin boys. This is illustrated through a dotted line around each group forming a 'family'. The identification of new partners and additional children (who the Swedish call bonus parents

[33] Mieke Brandon, 'Practice Note – Relationship Mediation: A Facilitative Process for People in Intimate Relationships to Enrich their Togetherness' (2020) 1 *Dispute Resolution Review* 19 <https://drr.scholasticahq.com/article/17993-relationships-mediation-a-facilitative-process-for-people-in-intimate-relationships-to-enrich-their-togetherness>.

and bonus children rather than blended families or stepfamilies)[34] is another benefit of an inclusive approach to the generation of a family chart that illustrates the complexity of a family system.

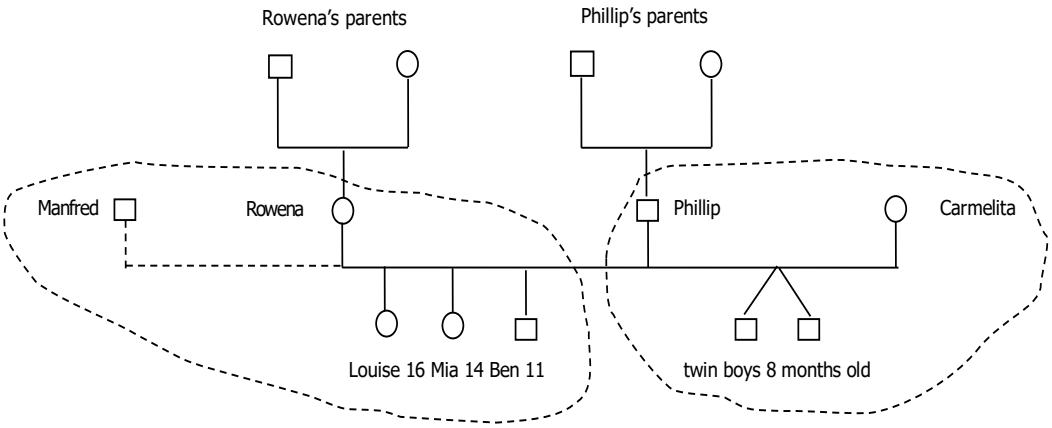

Figure 7: Family chart showing divorced and re-partnered parents

Relationship mediation

'Relationships mediation' (also known as marital mediation) uses a facilitative mediation approach to focus on the wellbeing of relationships; as well as each partners' strengths and hopes to be able enrich their togetherness through exploration of their goals for their individual and joint interests for the future. Relationships mediation is for people in ongoing relationships who are experiencing difficulties and are willing to work through their issues in a collaborative way. It is potentially appropriate for people, regardless of gender, who wish to remain in intimate committed relationships, whether married or not married, with or without children.[35]

In Australia, s 12G of the *Family Law Act 1975* (Cth) states:

> Family Dispute Resolution Practitioners (FDRPs) must give a married person who is considering a divorce, or considering going to court about their children or their finances,

[34] See BonusFamilies, 'More on the Origin of 'Bonusfamilies' (Web Page, 2020) <https://bonusfamilies.com/about/more-on-the-origin-of-bonusfamilies/>. See also Claire Gillespie, 'Bonus Family is the Name We Use for Stepfamily' (Web Page, 29 March 2019) <https://www.parents.com/parenting/divorce/blended-families/bonus-family-is-the-name-we-use-for-stepfamily/>. The article begins: '[t]he language we use when describing families is critical. So move over wicked stepparent, and make way for the bonus one!'.

[35] Mieke Brandon, 'Introducing Relationship Mediation for FDR Practitioners and Other Experienced Mediators in 2021' 31 *Australasian Dispute Resolution Journal* 63; see also Mieke Brandon, '"I love you when, I love you if, I love you because …": Relationships Mediation' (2018) 29 *Australasian Dispute Resolution Journal* 1.

> information about family counselling and FDR services available to help with reconciliation. Information does not need to be given if the FDR practitioner believes they already have the relevant documents or they believe there is no reasonable possibility of reconciliation. They also need to provide information on services that assist reconciliation.

The above section has the effect that Family Dispute Resolution Practitioners (FDRPs) have an obligation during Intake or Premediation to assess and explore how each client considers their separation process, either as the 'leaver' or the 'left' or if the decision is mutual.[36]

Historically, FDRPs have reported that some couples decide they do want to stay together as a result of having had meaningful discussions between them during the FDR mediation session(s). Referral to relationship mediation (RM) would most likely have been highly beneficial for these clients. The opposite can also occur; it may be that parents or partners in RM decide, after one or two sessions, to separate and a referral goes to FDR.

Genograms are relevant when they help to create positive changes in all family mediations and in particular in RM. Mapping the family can assist the couples to understand how they may be supported and or hindered by their parents in their decision making or how some grandparents are taking over the upbringing of the children and in that process criticizing the one or both parents and/or demeaning both of them in their role, profession, or the way they run their finances and household.

Since a family chart can illustrate where transition difficulties may have arisen as a result of preserving or preventing some relationship patterns it can also assist partners to acknowledge and transform their ability to learn different communication patterns between partners that create a more balanced and functional relationship.[37]

Legal practitioners' obligations

Section 12E of the *Family Law Act 1975* (Cth) outlines the obligations of legal practitioners in proceedings under that Act:

> **Obligations on legal practitioners**
>
> (1) A legal practitioner who is consulted by a person considering instituting proceedings under this Act must give the person documents containing the information prescribed under section 12B (about non-court based family services and court's processes and services).

[36] Brandon and Fisher (n 1) 95–102 see information about how the 'leaver' and the 'left' experience the process of the separation.

[37] See François Bogacz, Thierry Pun and Olga M Klimecki, 'Improved Conflict Resolution in Romantic Couples in Mediation compared to Negotiation' (2020) 7 *Humanities and Social Sciences Communications* [132] <https://www.nature.com/articles/s41599-020-00622-8>; see also Darlene Lancer, 'Power, Control & Codependency' (Web Page, 2016) <https://psychcentral.com/lib/power-control-codependency#1>.

> (2) A legal practitioner who is consulted by, or who is representing, a married person who is a party to:
>
> (a) proceedings for a divorce order in relation to the marriage; or
>
> (b) financial or Part VII proceedings in relation to the marriage;
>
> must give the person documents containing the information prescribed under section 12C (about reconciliation).
>
> (3) A legal practitioner representing a party in proceedings under Part VII must give the party documents containing the information prescribed under section 12D (about Part VII proceedings).
>
> ***Note: For other obligations of legal practitioners in relation to Part VII matters, see sections 60D and 63DA.***
>
> (4) A legal practitioner does not have to comply with subsection (1), (2) or (3) if the practitioner has reasonable grounds to believe that the person has already been given documents containing the prescribed information mentioned in that subsection.
>
> (5) A legal practitioner does not have to comply with subsection (2) if the practitioner considers that there is no reasonable possibility of reconciliation between the parties to the marriage.

The obligation is to provide information to clients. The obligation requires an assessment of whether there is reasonable possibility of a reconciliation.

The provision above means that legal practitioners' have similar obligations as FDRPs and are required, where appropriate, to make an assessment and provide information (s 12E(5)). Referral to counselling or relationship mediation or any other helping agency can assist clients to reconsider and where appropriate work on reconciliation rather than immediately separate or seek a divorce. Legal professionals in their work with clients may also be assisted by using a family chart or genogram as described above in other family mediation types of dispute. The next section describes how legal professionals, FDRPs and other family practitioners and/or supervisor can use a family chart or genogram. The following section outlines twenty key points explaining when and how genograms can be used strategically in these processes.

The strategic use of genograms: The when and the how

In pre-mediation or first consultation

Figure 8 below illustrates a family chart based on an interview with one person. Note the 'you', indicated by a double circle, which is here an imaginary person who first requests FDR.[38]

[38] See Singapore Association of Social Workers, 'Blast from the Past: The Increasing Interest in the Systemic Approach to Family Work' (Web Page, 2011) <https://www.social-dimension.com/2011/07/blast-from-the-past-the-increasing-interest-in-the-systemic-approach-to-family-work/comments/>.

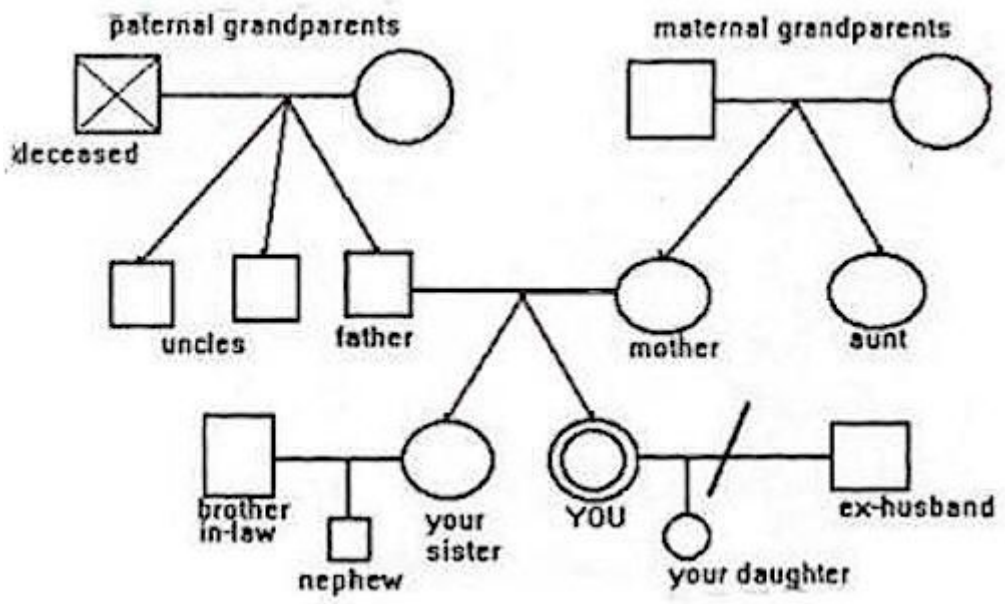

Figure 8: Example of family chart from an interviewee's perspective

1. The first strategy is to ask permission to depict, in confidence, a family chart as soon as client A talks about their dispute within a family environment. The benefit for practitioner is that they immediately have a picture on their file of this client's perspective or interpretation of the dispute with one or more others. Subsequent information from other clients involved in the dispute can, in confidence, be added to the original person's map.

Such a family map is for the practitioner's private file only; it cannot be shared as it was made in confidence with each person separately.

When client B subsequently talks about their dispute with client A (in a joint session, for example), they may have a similar and/or different perspective of the same dispute. If appropriate a joint family map can be created between them as homework and/or in a mediation.

2. When a genogram has been made by the disputants separately the benefit for practitioners is that they immediately get an inkling of the level of complexity from both clients A and B. This can assist practitioners to establish that mediation may or may not be helpful based

on an assessment of physical and emotional safety and/or capacity to participate in a facilitative mediation process.[39]

3. When practitioners establish mediation is appropriate they might first refer a couple to relationship mediation (for eg to see if a separation is really what partners are seeking or that they want to try to enrich their relationship so that the separation may not be in their best interest).

If a dispute resolution process is assessed as most suitable by legal practitioners, they could decide to refer to other relevant professionals, provide information, suggest resources and other information and/or take on a client.

Family dispute practitioners can refer for legal advice, provision of information, access to resources, family counselling, parenting courses and other educational opportunities. They may also offer a view on which process may be most helpful (eg a zoom or phone mediation, a solo or co-mediation or a shuttle process online).

4. It is important that when practitioners form hypotheses at a pre-mediation stage about the clients' issues (ie before they come to mediation) they do not try to fit all later information in to them.[40]

In joint mediation sessions

Figure 9 shows an example of completed genogram created in a joint session, with a side list of symbols and their meaning in this instance.

[39] Relationships Australia, 'Introduction of Family Law DOORS Best Practice Universal Risk-Screening' (Web Page) <https://www.relationships.org.au/news/stories/introduction-of-family-law-doors-best-practice-universal-risk-screening>; s ee also Mark Dickinson, 'Assessment of Suitability for Family Dispute Resolution' (Blog Post, 14 January 2020) < https://adrresearch.net/2020/01/14/assessment-of-suitability-for-family-dispute-resolution/>.
[40] Brandon and Fisher (n 1) 386-387.

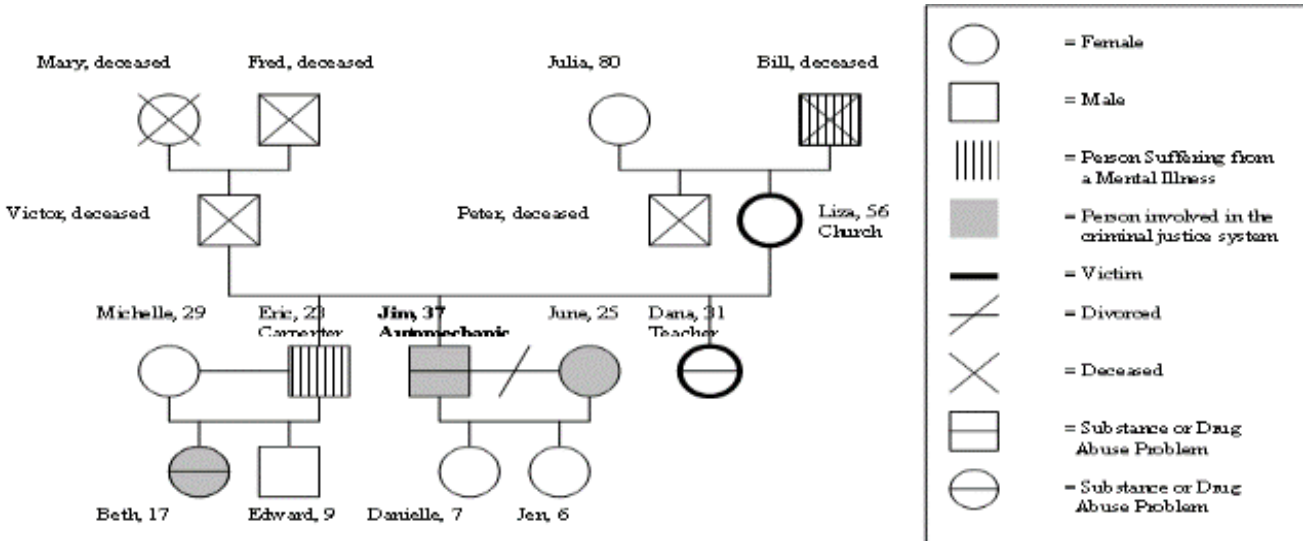

Figure 9: Example of completed genogram

5. Using a genogram strategically in the beginning of a mediation session might trigger a discussion on how everyone fits into the family, and how each relates to the other. This may help a participant (or some or all participants) to open up and provide more information about the family situation. For example, in parent/adolescent mediation, adolescents are often much more willing to describe their family situation with the assistance of drawing a family chart, rather than simply talking about themselves.

   Using the board to draw the family chart, either in the beginning or as a result of an impasse in the middle of a session, encourages the participants to reflect upon and share their detailed perspectives of their family.

6. Strategically the genogram can help to 'separate the people from the problem'[41] as the activity focuses on the family's 'problems' rather than each other.

7. A family chart can also illustrate what the issues for each person; this can help to inform a mutual agenda for the exploration stage of the mediation process.

8. A map of a family can strategically be suggested at any stage of a mediation session to try to find 'common ground'.[42]

[41] William Fisher and Roger Ury (with Bruce Patton), *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books, 2nd ed, 1991) 11.
[42] See Lesley Allport, 'Exploring the Common Ground in Mediation' (PhD Thesis, University of Birmingham, 2015) <https://etheses.bham.ac.uk/id/eprint/6746/1/Allport16PhD.pdf>.

The benefits of using such family maps far outweighs the time it takes to fulfil this as a strategic intervention as genograms can be used for two people or a large group of family members.

In private sessions

Checking how the mediation is going for each participant provides feedback for the practitioner, which may minimise negative views later on.[43]

9. Referring back to the genogram helps the person to focus on what is possible in the circumstances (ie as practitioners work on how the individual can change in order to progress their ideas and possibilities and work towards a mutual satisfying outcome in a joint session).

Always introduce the purpose of the genogram and be transparent about the benefits for you as a practitioner, and explain how it can help the clients to see the context in which they are struggling, with whom in particular and why. This may help to lessen the emotional upheaval and find ways to gain understanding of the others, their needs, fears, hope and goals for the future as well as ways to change behaviours.

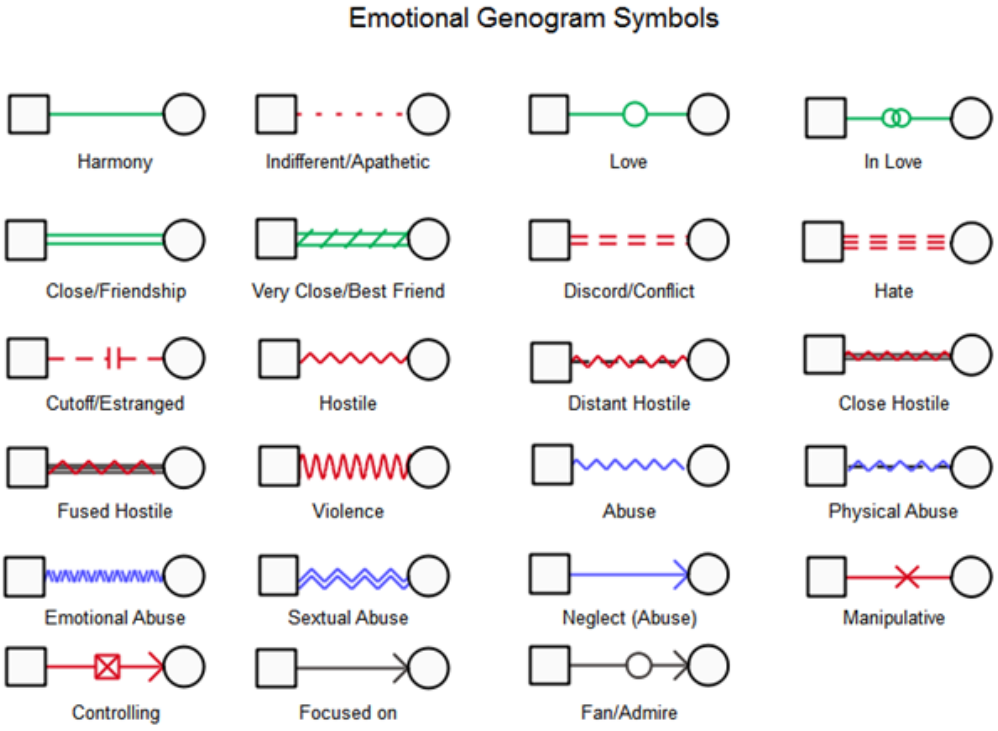

Figure 10: Emotional genogram symbols[44]

[43] See Mieke Brandon, 'Self-determination in Australian Facilitative Mediation: How to Avoid Complaints' (2015) 26 *Australasian Dispute Resolution Journal* 44.
[44] See 'How to Make a Genogram Online' (Web Page) <https://www.edrawmax.com/genogram/how-to-make-a-genogram/>.

Figure 10 above shows how additional symbols can add information to assist in understanding the relationship(s) between partners and/or the whole family. It is vitally important if manipulation, physical and/or mental abuse and coercive controlling behaviours, for example, are taking place. These behaviours may not have been divulged in premeditation and/or could become exacerbated behind the scenes as a result of mediation. This is particularly important for practitioners to remember as a check point in private sessions as these may need to be managed according to ethical codes of conduct of the profession.[45]

Negotiation stage in joint session

10. Referring back to the genogram helps all participants to focus on what is possible focus on what is possible in the circumstances (ie as practitioners work on how each individual can change and contribute their ideas and possibilities as the parties work towards a mutual satisfying outcome in a joint session).

11. Practitioners also encourage participants to put their ideas forward and reality test how this would work in practice; the response of another family member (for eg a child or children), including their enthusiasm for the suggestions, can then be drawn out to identify areas of mutual interest.

12. Practitioners summarise proposals that may satisfy the interests of participants in the mediation. They could also check the genogram as to who else in the family may be a stakeholder, or beneficiary of the result of the planned outcome, and/or could later object to the suggested outcome.

Negotiations based on underlying interests create 'a broader array of possible outcomes that are likely to be more appropriate to their situation'.[46]

Agreement writing

13. When writing a parenting plan or any agreement, remember that no agreements can be made on behalf of people who are not in the mediation.

[45] Ethical Considerations are discussed further below.
[46] Carole J Brown, 'Facilitative Mediation: The Classic Approach Retains its Appeal' (Web Page, December 2002) <https://www.mediate.com/articles/brownc.cfm>.

14. Since mediation is a confidential process discussion needs to take place about how and when significant others such as grandparents, children and others are being informed of the outcome of the mediation settlement (which could have an impact on extended family).

15. Remember the 'Satisfaction Triangle';[47] substantial, procedural and relational agreements must reflect mutuality[48] and address future interactions within the family.

16. Include review periods when appropriate and/or refer to legal advice if participants need to have their agreements made legally binding.

In debriefing or reflection

17. When practitioners use a mentor, supervisor or someone to debrief with (or do this by themselves) the family chart gives them the information about strategies they may have used, and to reflect on how these worked (or not) and why.

18. It can also assist practitioners to discuss this in detail with their mentor or supervisor (especially if some time has passed since they saw these clients). A family chart may bring back memories of what went well and what could have been done differently. This may also be a good reminder before follow up sessions, indicating what to avoid and what techniques to use next.

19. When another practitioner is due to take the matter over from the first practitioner (as a result of a complaint or any other reason), a family chart and debriefing notes are always helpful for the person picking up the case. From time to time clients may want to review their agreements and a different practitioner can see the family system from the map and note things that have changed. This is particularly beneficial for parenting plans (especially as children develop and get older, and their needs and interest may change). In such cases the developmental needs of the children and the parental family environment may have changed significantly as can be seen in Figure 7.

[47] The Triangle of Satisfaction is a model created by Christopher Moore; see Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (Jossey-Bass, 4th ed, 2014); see also Viaconflict, 'Triangle of Satisfaction' (Web Page, 31 March 2013) <https://viaconflict.wordpress.com/2013/03/31/triangle-of-satisfaction/>.
[48] See Mieke Brandon and Tom Stodulka, 'The Exploration Phase in Facilitative Mediation: from Dispute to Mutuality' (2015) 63 *the arbitrator & mediator* 78.

Ethical considerations

When focusing on current and past facts and information, such as when people married or divorced or came to the country they now reside in, practitioners need to be sensitive as some clients may be particularly vulnerable recalling these events. Discussions need to be pre-empted with information about how confidentiality will be managed and participants' level of discretion considered.[49] Further, practitioners should always be vigilant about their 'duty of care' regarding family violence which could take many forms.[50]

It is vital that while constructing a family chart that practitioners observe and listen to any influences on the construction as participants can subtly influence each other through verbal (tonal, inflection, word emphasis, phrasing of questions, description of issues or use of metaphor) as well as non-verbal (venue , room layout, body language, positioning, greetings, eye contact and gestures) communication.[51] Clients may be hesitant to participate as information may have been destroyed by war or because of genocide, slavery or being part of the stolen generation or other such circumstances.

Not all participants in family dispute resolution warm towards the idea of fulfilling a self-administrated task to draft a genogram and may even consider this private and/or a 'waste of time'.[52] The participants' attitudes need to be constantly monitored by the practitioner so the purpose at all times is transparent so the completion of any information about the past and current situation is 'collaborative partnership'[53] between practitioners and clients.

Practitioners need to remain sensitive about how information is discussed in pre-mediation, in joint sessions and/or in private mediation sessions and beyond. Since different processes have different contractual obligations (such as differences in 'agreements to mediate', for example), notice must be taken about of what part in dispute resolution approaches is confidential and what is not,

Brandon and Fisher suggest that all practitioners working with families do well to learn from their own visual representation and relationships symbols in their own situation by doing a genogram.[54] This is important for all practitioners to avoid projecting their own experiences onto those of their clients to

[49] Brandon (n 11) 50.
[50] Ibid.
[51] Ellen F Wachtel, 'The Family Psyche over Three Generations: The Genogram Revisited' (1982) 8 *Journal of Marital and Family Therapy* 335.
[52] Bruce P Kuehl, 'The Solution-oriented Genogram: A Collaborative Approach' (1995) (21) *Journal of Marital and Family Therapy* 239.
[53] See Alan Carr, *Family Therapy: Concept, Process and Practice*, (Wiley & Sons, 2nd ed, 2006) 231.
[54] Brandon and Fisher (n 1) Appendix 1.

avoid bias, remain impartial, and even-handed with their clients. According to Alan Watts: 'We know the world by a process of constantly transforming it into ourselves.' [55]

Conclusion

A simple genogram establishes a pictorial map of: factual data of the current generations of a family; line symbols to describe individuals and their relationship with each other; and words added to express differences of perceptions and impressions. A traditional diagram may not be enough to demonstrate cultural sensitivity (eg for cultural groups and/or for extended families); genograms may need expansion; and colours may be used to represent cultural groups, people adopting a new culture and/or a culture they identify with. Ideally multigenerational genograms are used to provide the context of a larger family system.

The use of genograms strategically is a valuable additional systems thinking tool in the dispute resolution toolbox. Family mediators and family legal practitioners all assist family members in managing change. Practitioners' use various dispute resolution processes and a range of skills, techniques and strategies to facilitate the re-building of relationships in its many forms. In facilitative family mediation the participants self-determine this at a level that they see as appropriate for now and into their future to be able to manage disputes in a different way.

All dispute resolution practitioners need to stay tuned into what works best for what couple or group of disputants rather than using the same recipe for every matter or everyone. Through mentoring, supervision and reflective practice all family practitioners need to look for change within themselves too, remaining open to new ideas, professional development, and the development of their thinking, deep listening and rapport building as well as their technical, creative, and strategic practice.

[55] John David Hoag, 'The Map Is Not the Territory' (Article) <http://www.nlpls.com/articles/mapTerritory.php>.

When does an arbitrator enter upon the reference?

Dr Richard Manly QC[*]
Toby Shnookal QC[†]

Introduction

From time to time, it may be important to discover the date of commencement of an arbitral proceeding or when the arbitrator has 'entered upon the reference'. There are reasons why it is necessary to know precisely when an arbitration has commenced, and they include:[1]

(i) the general law of limitation of actions applies to arbitrations in the same way as it applies in civil proceedings. The claimant must commence his arbitration within the periods stipulated in the relevant Limitation of Actions Statute;

(ii) the parties may, by their contract, have agreed that any arbitration must be commenced within a specified time limit, failing which the right to pursue the arbitration or the claim itself, will be barred;[2] and

(iii) the date of commencement of arbitration affects the position under the conflicts of laws where the proper law of the contract is one law, and the law of the arbitral procedure is another. In that circumstance the law of contract would apply up to the date of commencement of the arbitration and thereafter the law of the procedure would apply.[3] Parties are free to agree on what is to be regarded as commencing arbitral proceedings in accordance with the principle of party autonomy.

This article considers those issues.

Commencement of arbitral proceedings

Section 21 *Commercial Arbitration Act*

The issue of 'entry upon the reference' does not arise under the Uniform Acts ('*CAA*') in place in Australia[4] because of s 21 which provides:

[*] Chancery Chambers, Melbourne.
[†] Expert Determination Chambers, Melbourne.

[1] Sundra Rajoo, 'Commencement of Arbitration' (2002) XXXI (2) *The Journal of the Malaysian Bar* 115.

[2] Such clauses are often referred to as 'Atlantic Shipping' clauses; see *Atlantic Shipping & Trading & Co Ltd v L Dreyfus & Co* [1922] 2 AC 250.

[3] International Tank & Pipe AAK v Kuwait Aviation Fuelling Co KSC [1975] Lloyd's Rep 8.

[4] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); and *Commercial Arbitration Act 2017* ACT).

> Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Section 21 is a non-mandatory provision which comes into effect 'unless otherwise agreed by the parties'. This allows the parties to specify an alternative point at which they consider the proceedings to have commenced. The commencement date of the arbitration is typically relevant in the determination of a limitation period.[5]

Common law position

The position at common law is that where parties have agreed on a procedure for the commencement of an arbitration then that procedure has to be followed.[6] Slavish procedural adherence is not required and the court 'did not adopt an unduly strict or technical approach',[7] in determining whether the requirements set out in the arbitration agreement had been met.[8] Where the parties have not agreed to a specific process for the commencement of arbitral proceedings then a written request to refer a dispute to arbitration would suffice.[9] However, this would turn on the facts of each case and in particular the terms of the arbitration agreement itself.

In *Gosford Meats Pty Ltd v Queensland Insurance Co Ltd* the NSW Court of Appeal reviewed the requirements of a notice of arbitration and observed:

> All that is necessary is a manifestation, sufficiently clear and certain, of an intention or desire that there should be arbitration. There must of course be an existing unresolved difference, but it is not essential that the nature of this difference be stated as part of what is only a manifestation of the intention or desire of the parties with respect to a matter which is common ground between them.[10]

Rule 2(5) Resolution Institute Rules 2020

The recently published Resolution Institute Rules 2020 ('2020 Rules') are also of assistance. Section 21 of *CAA* is supported by 2020 Rule 2.5 which provides:

> A notice shall be deemed to have been received on the day it is delivered in accordance with Rule 2.2, Rule 2.3 or Rule 2.4 or attempted to be delivered in accordance with Rule 2.4. A notice transmitted by electronic means to a designated or authorised address is deemed to have been received on the day it is sent, except that a Notice of Arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

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[5] Doug Jones, *Commercial Arbitration in Australia* (Law Book Co, 2nd ed, 2013) 270–273.
[6] Transpetrol v Ekali Shipping (The Aghia Marina) [1989] 1 Lloyd's Rep 62, 65–66.
[7] MJ Mustill and SC Boyd, *Commercial Arbitration* (Butterworths, 2nd ed, 1989) 198.
[8] *Nea Agreza SA v Baltic Shipping Co Ltd* [1976] QB 933, 945 (Lord Denning MR).
[9] Ibid 945.
[10] [1970] 3 NSWR 400, 405 (Sugarman P, Asprey and Holmes JJA).

We now move to consider the more amorphous expression of 'entry on the reference' and its meaning.

Entering on the reference

Some statements and instruments use the expression 'entering on the reference', which is susceptible of a number of meanings. In circumstances where the expression has not been defined (which is more often than not) it will become apparent that a determination of the issue is particularly fact sensitive and difficult to nail down. What follows is a discussion of our findings based on our research.

The law society conveyancing arbitration rules and 'entering on the reference'

These Rules are of some utility because they provide a clear definition of what action constitutes 'entry on the reference' by an arbitral tribunal. The Council of the Law Society of New South Wales resolved that, where parties have entered into a Contract for Sale of Land – 2005 edition, Contract for the Sale and Purchase of Land – 2014 edition or any subsequent edition of the Contract and a dispute has arisen between them, and pursuant to the terms of that Contract the parties have agreed to submit the dispute to arbitration, then the parties shall be taken to have agreed that the arbitration shall be conducted in accordance with the Rules. These Rules provide an example where there is a 'deemed' entry upon the reference by an arbitrator.

Rule 5 'Entry on Reference to Arbitration' provides:

> 5.1 The Arbitrator shall, within seven (7) days of receiving advice of his or her appointment or agreed appointment, give written notice to the parties of the time and place of a Preliminary Conference which the parties or their duly authorized representatives shall attend. At or prior to that Preliminary Conference, the Appointed Arbitrator may advise any conditions he or she wishes to impose (including provision of security for the fees and expenses of the Appointed Arbitrator) and request the agreement of the parties to such conditions. Failure to respond to the Arbitrator's request not later than the holding of the Preliminary Conference shall be deemed to be a failure to agree to the conditions.
>
> 5.2 On the parties agreeing to any such conditions, the Arbitrator shall accept appointment and shall then be deemed to have *entered on the reference* as Arbitrator.
>
> 5.3 If any party fails to attend the Preliminary Conference or does not agree with the conditions of the Appointed Arbitrator, then the Appointed Arbitrator shall notify the parties and the Law Society in writing within three (3) working days as to whether he or she accepts appointment as Arbitrator notwithstanding that non-appearance or disagreement. On acceptance of appointment, the Appointed Arbitrator shall be deemed to have *entered on the reference* as Arbitrator. If appointment is declined by the Appointed Arbitrator, then the Law Society President shall within ten (10) days appoint a replacement Appointed Arbitrator.
>
> 5.4 Where the Arbitrator has entered on the reference as Arbitrator, the arbitration shall be fixed for a time, date, place and timetable agreeable to the parties and the Arbitrator. If the parties are unable to agree on a time, date and place or upon a

> timetable, the Arbitrator may give directions stipulating these. These directions are binding upon the parties. (emphasis added)

Arbitration Act 1951 (Papua New Guinea)

The question of when the arbitrator entered on the reference may still be of relevance. It is likely to be of relevance in arbitrations conducted pursuant to arbitration statutes that have not adopted the Model Law,[11] for example, the *Arbitration Act 1951* (Papua New Guinea) (‘*the PNG Act’*). [12] In statutes of this nature time limits may operate from when the arbitrator entered upon the reference.

The *PNG Act* predates independence and was adopted by sch 2.6 of the *Constitution of the Independent State of Papua New Guinea 1975*. The *PNG Act* is archaic when compared to other arbitral legislation that has adopted the Model Law. It is to be observed the PNG government is presently considering the Arbitration Bill 2019 for domestic and international arbitrations. The Bill aims to reform the regulation of arbitration within PNG and bring it substantially into conformity with the Model Law and the United Nations’ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) (‘*the New York Convention’*).[13] However, commentators have observed that in the Bill there are a few divergences from the status quo.[14]

For present purposes, the relevant provision of the *PNG Act* is sch 1 ‘Provisions to be implied in Submissions’ at cl 3 which provides:

> 3. The arbitrators shall make their award in writing within three months after *entering on the reference*, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them from time to time extend the time for making the award. (emphasis added)

The expression ‘entering on the reference’ is not defined in the *PNG Act* and is ambiguous as it can be construed as meaning any number of things, for example:[15]

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11 Model Law means United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration: With Amendments as Adopted in 2006*, UN Doc A/40/17 (21 June 1985). It was amended by the United Nations Commission on International Trade Law on 7 July 2006 (see UN Doc A/61/17 (7 July 2006)). The CAA, the Australian *International Arbitration Act 1974* (Cth) (IAA) and the *Arbitration Act 1996* (NZ) are based on the Model Law.

12 See by way of example *Arbitration Act 1940* (India) Sch 1; *Arbitration Act 1976* (Samoa) Sch 1; *Arbitration Act 1996* (Solomon Islands) First Sch; *Arbitration Act 2008* (Tuvalu) s 8(3); *Commercial Arbitration Act 2006* (Norfolk Island) in s 15(1) uses the expression ‘enter on the arbitration’; *Arbitration Act 1939* (Trinidad and Tobago) Sch 1 and *Arbitration Act 1994* (Brunei) s 13.

13 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959). PNG acceded to the New York Convention on 17 September 2019 and the Convention came into force for PNG on 15 October 2019. With PNG accession to the Convention, companies are afforded greater certainty that agreements to arbitrate disputes and resulting foreign arbitral awards will be enforceable in PNG.

14 Jeremy Quan-Sing, Caitlin Moustaka and Ebony Back ‘PNG proposes a new regime for arbitration’ *Allens Insight* (online, 26 February 2020) <www.allens.com.au/insights-news/insights/2020/02/png-proposes-a-new-regime-for-arbitration/>.

15 Jolly Steel Industries Pvt Ltd v Union of India AIR 1979 Bom 214, [7] (Deshpande J).

(i) accepting appointment to the office of arbitrator; or

(ii) doing some act as the arbitrator, eg issuing a notice to the parties calling for a procedural conference; or

(iii) applying the tribunal's mind to the dispute; or

(iv) hearing the evidence itself.

An arbitral proceeding can be viewed as consisting of two stages. The first concerns administrative acts whereas the second stage consists of effective adjudicative acts in furtherance of the work of arbitration, namely of proceeding to decide the issues in dispute between the parties. The arbitrator cannot be said to have 'entered on the reference' unless the second stage has been reached.[16] This is a factual issue.

Under the provisions of the *PNG Act* and in particular sch 1 an arbitrator is required to act as an arbitrator in a number of ways (and it is noted four different expressions are used) and these include:

(i) 'entering on the reference' (cl 3);

(ii) an arbitrator may be 'called upon to act' (cl 3);

(iii) 'proceeding on the reference' (cl 6(c)); and

(iv) making an award (cl 8).

What do the Australian commentators say about 'entering upon the reference'[17]

John B Dorter and Gary K Widmer

The issue has been discussed by John B Dorter and Gary K Widmer in their text:[18]

> **Entering upon the reference**
>
> The identification of the disputes or differences referred to the nominee raises the question of when he enters upon the reference. This is of course important for the prima facie time limitation of three months (two in Western Australia) under the third item (or (c)) of the schedule, especially as the arbitrator (unlike the court) cannot (honestly) enlarge the time retrospectively. Many arbitrators see this restriction on them as a hardship and the law has already been changed in Queensland so as to allow an arbitrator to make his award at any time, subject to his removal for failing to enter upon, and proceed with, the reference with all reasonable dispatch. (Nevertheless, an arbitrator with an award remitted to him is still prima facie restricted to three months.) On the other hand, arbitrators should not necessarily see the fact of their being functus officio as altogether bad because, although they do not have any positive powers to correct procrastinating tactics, the threat of the time running out

16 Ibid [13].

17 Surprisingly the issue is not referred to in the index to Mustill and Boyd (n 9) or David St John Sutton and Judith Gill, *Russell on Arbitration* (Sweet & Maxwell, 22nd ed, 2003).

18 *'Arbitration (Commercial)'* in *Australia: Law & Practice* (The Law Book Co, 1979) 43-4.

can be effective against a dilatory claimant; especially if the result would be that he would thereby be unable to fulfil the *Scott v Avery* conditions.

There is very old authority that an arbitrator does not enter upon the reference until he enters into 'the matter' of it, either with both parties before him or under a peremptory appointment enabling him to proceed ex parte.[19] That case was concerned with a statutory provision which required the making of the award within three months of both appointment and having entered on the reference. It was also peculiar to the facts of a remission back to the arbitrators, including the non-attendance more than once by the party alleging that the time had run out because it commenced to run from the date of the order for remission.

More recently, the Court of Appeal in England[20] has rejected an express submission that:

> 'There is a distinction between an arbitrator accepting office and his entering upon a reference. An arbitrator does not enter upon a reference when he accepts the office of arbitrator.'

The Court held that arbitrators enter upon the reference as soon as they have accepted their appointment and, if the reference be to more than one arbitrator, when they have communicated with each other.

The important point for arbitrators is that when they have been nominated and write to the parties appointing a preliminary conference, they should not state that they have accepted the reference but should simply refer to themselves as nominees, reserving the formal acceptance of their appointment until they have obtained the parties' agreement to all the preliminary matter desirable for the conduct of the arbitration.

John JA Sharkey and John B Dorter

Further discussion has been provided in the text written by John JA Sharkey and John B Dorter:[21]

(15) Accepting the appointment

At about this stage the nominee/arbitrator should be in a position, if not already, to confirm whether or not he wishes to proceed as arbitrator in the particular arbitration.

The question is important because arbitrations can miscarry if some of the fundamental items listed above have been misunderstood.

The question is also important as to its timing. Many contracts still provide, in their arbitration agreements or clauses, for express time limitations running from the arbitrator entering upon the reference, for example, making their award. The uniform *Commercial Arbitration Act*, in leaving the time for making of the award to the common law, does not strike down such express contractual provisions. Further, the Act does not identify the point of time when an arbitrator enters upon the reference but only when the arbitration is deemed to have commenced, that is both different and much earlier ie the giving of the notice of dispute etc.[22]

Where identification of the point of time of the arbitrator entering upon the reference is important, the best method is for him to have evidenced it expressly. The wise practice of

19 *Baker v Stephens* (1866-1867) 2 QB 523.
20 Iossifoglu v Coumantaros [1941] 1 KB 396.
21 *Commercial Arbitration* (The Law Book Co, 1986) 95-6.
22 Ibid 30.

> reserving unto himself the status of nominee beforehand avoids argument. Accepting the office of arbitrator is not to be distinguished from entering upon the reference. The latter involves acceptance of the appointment and, if there is to be more than one arbitrator, communication between them (*Iossifoglu v Coumantaros* [1941] 1 KB 396). Communication of the acceptance must also be made to the parties. (*Tradax Export SA v Volkswagenwerk AG* [1970] 1 QB 537, [1970] 1 Lloyd's Rep 61; *Edm JM Mertens & Co. PVBA v Veevoeder Import Export Vimex BV* [1979] 2 Lloyd's Rep 372)
>
> There is to be distinguished older authority to the effect that an arbitrator does not enter upon the reference until he enters into 'the matter' of it, upon either both parties appearing or a peremptory hearing enabling him to proceed ex parte. That authority, (*Baker v Stephens* (1867) LR 2 QB 523) turned on a statutory provision requiring the making of the award within three months of not just the appointment of the arbitrator, but also his having entered upon the reference. It was particularly concerned with its own facts and circumstances of remission, default by a party in attending on several occasions and then that defaulting party alleging that time had expired, on the argument that the time ran from the date of the order for remission.

Marcus Jacobs

The final commentator is Marcus Jacobs:[23]

> **When does an arbitrator enter on a reference?**
> The question as to when an arbitrator enters on a reference is the subject of a definitive decision of the Calcutta High Court in *Ramanath Agarwalla v Goenka & Co*.[24] In that case, it was decided: 'An arbitrator enters on a reference when he first applies his mind to the dispute or controversy before him depending on the facts and circumstances of each case.' The application of the arbitrator's mind must be as functioning arbitrator in order to decide the issues submitted for decision.[25]

Two conflicting views about when an arbitrator enters upon the reference

There appears to be two conflicting views in the English cases.

Baker v Stephens

The first view is provided in *Baker v Stephens*.[26] In that case by s 15 of the *Common Law Procedure Act 1854*[27] an arbitrator acting under any document or compulsory order of reference, or under any

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[23] *Commercial Arbitration: Law & Practice* (The Law Book Co, 1990) vol 1, [3.360].
[24] AIR 1973 Cal 253. It is to be noted this case has not been cited in any Australian decisions, and the reasoning on the question was obiter.
[25] Ibid 258 (Mitra CJ).
[26] (1867) LR 2 QB 523.
[27] Section 15 provided as follows:

> Award to be made in Three Months, unless Parties or Court enlarge Time.
> The Arbitrator acting under any such Document or compulsory Order of Reference as aforesaid, or under any Order referring the Award back, shall make his Award under his Hand, and (unless such Document or Order respectively shall contain a different Limit of Time) within Three Months after he shall have been appointed, and shall have entered on the Reference, or shall have been called upon to act by a Notice in Writing from any Party, but the Parties may by Consent in Writing enlarge the Term for making the Award; and it shall be lawful for the Superior Court of which such Submission, Document, or Order is or may be made a Rule or Order, or for any Judge thereof, for good Cause to be stated in the Rule or Order for Enlargement, from Time to Time enlarge the

order referring the award back, shall make his award, if no other time is fixed 'within three months after he shall have been appointed and shall have entered on the reference; or shall have been called upon to act [sic]'.

The Court held that an arbitrator enters on a reference, not when they accept the office of arbitrator, or takes upon himself the functions of arbitrator by giving notice of his intention to proceed, but when they enter into the matter of the reference, either with both parties before them, or under a peremptory appointment enabling them to proceed ex parte.

In this case the question was whether the award had been made in time (ie within three months). Chief Justice Cockburn considered the words 'entering on the reference' were somewhat ambiguous and observed:

> the only sound construction appears to me to be that the three months must date from the time the arbitrator actually enters upon the reference: not from the time that he merely takes upon himself the office of arbitrator by accepting the reference, but from the time he takes upon himself and exercises the functions of arbitrator …[28]

Justice Blackburn expressed the opinion that the words 'entering on the reference' were susceptible of bearing two different meanings.[29] The first was 'accepting the office of an arbitrator'. His Honour found this was not what the words meant. This is so, because the words 'or shall have been called upon to act' in s 15 implied that the arbitrator had already accepted the office. Accordingly, 'entering upon the reference' meant something else than merely accepting the office. Here the arbitrators had given a notice of their intention to proceed peremptorily and this was no doubt a step in the reference. It gave them the right to proceed ex parte if both parties failed to appear. The second meaning is 'beginning to hear the parties'. Justice Blackburn held that the latter was the proper interpretation to be placed on the words as time should be given to the arbitrators for preparation before proceeding with the arbitration and before the hearing actually commenced. Justice Mellor and Shee J were of the same opinion.[30]

Iossifoglu v Coumantaros

The second view is provided by the Court of Appeal in *Iossifoglu v Coumantaros*.[31] In this case a contract of sale contained an arbitration clause which provided that should 'any dispute arise between

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> Term for making the Award; and if no Period be stated for the Enlargement in such Consent or Order for Enlargement, it shall be deemed to be an Enlargement for One Month; and in any Case where an Umpire shall have been appointed it shall be lawful for him to enter on the Reference in lieu of the Arbitrators, if the latter shall have allowed their Time or their extended Time to expire without making an Award, or shall have delivered to any Party or to the Umpire a Notice in Writing stating that they cannot agree.

[28] (1867) LR 2 QB 523, 526.
[29] Ibid 526-7.
[30] Ibid 527 (Mellor J) 527-8 (Shee J).
[31] [1941] 1 KB 396. It is to be noted that the earlier decision of *Baker* was not referred to in the judgment.

the sellers and buyers under this contract, the same shall be referred to persons in London, one to be appointed by each of the parties hereto. In case the arbitrators so appointed disagree they shall appoint an umpire'.[32]

A dispute arose and each party appointed an arbitrator. One of the two arbitrators repeatedly endeavoured to arrange a meeting with the other, but the latter failed to arrange such a meeting. The arbitrator then unsuccessfully endeavoured to obtain the consent of the latter to the appointment of an umpire. Application was then made to the court for the appointment of an umpire under s 5 of the *Arbitration Act 1889*.[33]

The Divisional Court held that an umpire should be appointed to deal with the question in dispute between the parties.[34] Before the Court of Appeal counsel for the appellant submitted there could not be a 'disagreement' within the meaning of the submission to arbitration unless and until the arbitrators have entered upon the reference, and that does not take place until the arbitrators have met and discussed matters.[35] The endeavour to fix a date for entering upon a reference is a preliminary step to the reference and is not an entering upon a reference. The submission was that there is a distinction between an arbitrator accepting office and his entering upon a reference. An arbitrator does not enter upon a reference when they accept the office of arbitrator.

In a very brief judgment the Court of Appeal held the two arbitrators had entered upon a reference as soon as they accepted their appointment and communicated with each other about the reference.[36]

This case has been followed in Australia in *Duntech International Pty Ltd v Pike Industries Pty Ltd*.[37] In that case two arbitrators (Messrs Sarah and Godfrey) were appointed as arbitrators to a construction dispute and conducted a procedural conference at which the plaintiff asserted the arbitration agreement was void. The two arbitrators advised they would not proceed unless the parties entered into Terms of Engagement. The plaintiff refused. The two arbitrators adjourned the procedural conference and took no further action. The Master Builders Association appointed a second pair of arbitrators. Relevantly

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[32] Ibid 396.
[33] The abbreviated form of section 5 is taken from the decision at [1941] 1 KB 396, 398 as follows:
(I) *Arbitration Act*, 1889, s. 5: In any of the following cases … (c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him; …. Any party may serve …. The arbitrators …. With a written notice to appoint an …. umpire …. If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an …. Umpire …. Who shall have the like powers to act on the reference and make an award as if he had been appointed by consent of all parties.
[34] [1941] 1 KB 396, 398 (Viscount Caldecote CJ), 399 (Hawke J), 399 (Humphreys J).
[35] Ibid 400.
[36] Ibid 400 (Scott LJ), 401 (MacKinnon LJ), 401 (Luxmoore LJ).
[37] (1987) 3 BCL 283.

the court held that the second appointment was itself void because arbitrators Sarah and Godfrey had already entered upon the reference.

Accordingly, it was the case that arbitrators Sarah and Godfrey had acted like arbitrators in conducting the preliminary conference. Even though their Terms of Engagement were rejected by the plaintiff after which they refused to continue with the arbitration, the court still regarded them as having 'entered in the reference'. It would appear that all they did was conduct a procedural conference, presumably listen to preliminary argument on the validity of the arbitration agreement and in the face of the plaintiff's refusal to execute their Terms of Engagement they refused to continue with the arbitration. That however was enough to satisfy the court that they had 'entered upon the reference'. Put another way, their conduct was consistent with them having accepted the role of arbitrators and acted accordingly.

It is interesting to note under rule 41 of the 2020 Rules that where a party does not agree to an arbitrator's Terms of Engagement, the arbitrator (or nominee arbitrator) may refuse to act as arbitrator, may withdraw as arbitrator or may proceed as arbitrator.

Discussion

As was observed in *Ramanath Agarwalla v Goenka & Co*[38] the expression 'acting as an arbitrator' is wider than 'entering on the reference'. The Calcutta High Court referred to the dictionary meaning of 'to enter on', in the context in which the expression has been used in the *Arbitration Act 1940* (India) First sch, cl 3[39] is 'to take the first step upon or in' or 'to begin to deal with the subject'. And further:

> Entering on the reference, therefore, refers to the first step that the Arbitrator takes in the reference, that is to say, when he begins to deal with the reference. The Arbitrator, under the Act, may have to do various ministerial acts but the doing of any of the ministerial acts is not entering on the reference. It is only when he first applies his mind to the dispute referred to him that he enters on the reference. When, however, in a particular case, he first applied his mind to the dispute would depend on the facts and circumstances of that case [40]…

In *Ramanath Agarwalla v Goenka & Co*[41] the Judge also referred to the decision in *Soneylal Thukar v Lachhminarain Thakur*[42] which stated that:

[38] AIR 1973 Cal 253, [28] (Mitra CJ).
[39] Clause 3 provides: 'The arbitrators shall make their award within four months after entering on the reference or having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.'
[40] AIR 1973 Cal 253, [29].
[41] AIR 1973 Cal 253, [30] (Mitra CJ).
[42] AIR 1957 Pat 395, [5] (Choudhary J).

> an arbitrator does not enter upon a reference the moment he accepts to work as an arbitrator, nor can it be said that he enters upon a reference only why he actually hears the reference. An arbitrator enters upon a reference, when, after having accepted the reference, he applies his mind and does something in furtherance and execution of the work of arbitration. The exact date as to when an arbitrator enters on the reference in a particular case however, has to be determined on the facts and circumstances of the case.

And further in *Ramanath Agarwalla v Goenka & Co*: [43]

> An Arbitrator does not enter on the reference as soon as he assumes the office of an Arbitrator. An Arbitrator does not necessarily enter on the reference when he actually commences the decision of the matter in the presence of both parties or ex parte. An Arbitrator enters on a reference when he first applies his mind to the dispute or controversy before him depending on the facts and circumstances of each case …

Insofar as there is a distinction between 'first applies his mind to the dispute [sic]' and 'does something in furtherance of the works of arbitration' it is probably not a real one. This is so because the only time an arbitral tribunal really does apply its mind to a dispute is when a direction is made in the furtherance of the arbitration. As for evidence to establish that an arbitral tribunal has applied its mind to the dispute, it is likely that will occur in the procedural conference or arises from the act of notifying the parties of entry upon the reference.

'Entering upon the reference' does not mean the date when an arbitral tribunal is appointed by the court or an arbitral institution or the parties. It does not occur by reason of the actual appearance of the parties before the arbitrator.

It seems that the expression means some effective step must be taken by the tribunal in furtherance of resolution of the disputes referred for determination. It will include calling the parties to appear in connection with the dispute referred for determination by the giving of a direction intimating to the parties that the arbitral tribunal intends to proceed ex parte in the case of non-appearance. It will include the making of any direction with which the parties are required to comply. It would probably include agreeing Terms of Engagement with the parties or making a statement to the parties that the arbitral tribunal has accepted the appointment. In the *Iossifoglu* decision the court referred to the communications of acceptance of appointment. However, beyond these possible landmarks no hard and fast rule for interpreting the expression 'entering on the reference' can be given. It is a factual question 'ascertained on the basis of the record and the facts and may differ from case to case'.[44] Even where a tribunal adopts the once common practice of declaring to the parties (at some point) that the arbitral

[43] AIR 1973 Cal 253, [35] (Mitra CJ).
[44] *Jagat Singh & Sons v Garrison Engineer* AIR 1991 JK 43, [5] (Sethi J).

tribunal has entered upon the reference, that unilateral declaration might not be determinative of the factual situation.

Security for costs: A cautionary tale

Richard Chesterman*

Abstract

The writing of this article was prompted by a recent experience in an arbitration which threw up a question to which there appeared no ready answer. The point appeared novel. I could not find any relevant discussion in any textbook on arbitration. Two very experienced arbitrators whom I consulted had not encountered the contention raised before me and could not suggest an answer to it. The purpose of this article is to explain the answer which did emerge for the assistance of others who may be confronted by the same argument.

Introduction

The arbitration was a domestic one between corporations registered and resident in a neighbouring country whose Arbitration Act was more than half a century old and rudimentary in its provisions. The parties however had agreed to conduct their arbitration in accordance with the Resolution Institute's Arbitration Rules 2016 ('2016 Rules'). There was both a claim and a counterclaim. After some hesitation both claimant and respondent sought orders for security for costs against the other. Each application included a request that in the event of security being ordered the claim and/or counterclaim be stayed pending the provision of security.

The claimant was a company with substantial assets so, in accordance with authority, an order for security for costs was unnecessary. The counterclaiming respondent, however, appeared of doubtful worth and the counterclaim fell within that small category of case in which it is appropriate to order security for costs against a counter claimant. Accordingly, I ordered security and stayed the counterclaim until the security was provided.

The respondent did not provide the security although its shareholder and director had claimed to possess considerable wealth. The arbitration languished for several months. Eventually the respondent brought an application under art 26(6) to terminate the order for security, on the ground, among others, that an arbitrator acting under the 2016 Rules has no power to stay proceedings. The Rules say nothing about a stay.

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The question that had to be answered was whether there was power to order a stay as an adjunct to an order for security for costs and what was the source of any such power. It arose under the provisions of the 2016 Rules, which of course have been superseded by the Resolution Institute's Arbitration Rules 2020 ('2020 Rules'). Notwithstanding the supersession the article appeared worth writing because some arbitrations may still be wending their way to final award under the 2016 Rules and, more important, because the same argument may be raised under the 2020 Rules.

The power to stay does exist, and has two sources, three for the 2016 Rules.

Article 26(1) of the 2016 Rules provides that an arbitral tribunal may 'grant interim measures'. Article 26(2) defines such a measure as any temporary measure by which, at any time prior to final award, the arbitral tribunal orders a party 'for example and without limitation' to preserve property or evidence, or to maintain the status quo so as to not to render the arbitration process ineffective.

The problem arose from the wording of art 26(3) which says: 'Without limiting paragraph (2), the arbitral tribunal may make orders with respect to any of the following: (a) Security for costs …'.[1]

Paragraph 6 of art 26 provides that the arbitral tribunal can modify, suspend or terminate an interim measure upon application of any party, or, exceptionally, on its own initiative.

Article 26 contains no reference to staying proceedings, or part of them, in its fairly elaborate treatment of interim measures. The argument that the arbitrator had no power to make an order not specifically permitted by statute or the arbitration rules the parties agreed on to regulate their arbitration had apparent force. The Arbitration Act in the jurisdiction which was the seat of the arbitration said nothing about stays, or interim measures, or security for costs in particular. Arbitrators have only the powers the parties by their agreement confer on them. In my case they were those contained in the 2016 Rules. There appeared no obvious answer to the argument that there was no power to stay proceedings consequent upon an order for security for costs.

The 2020 Rules are different. Rule 26 is marked by its brevity. It provides: 'The arbitrator may, at the request of a party, grant interim measures.'[2]

There is no explanation of what an interim measure is, or is meant to achieve, and no identification of specific measures which the arbitrator is empowered to make. The argument may, however, be

[1] Arbitration Rules 2016 (Cth) art 26 (3).

[2] Arbitration Rules 2020 (Cth) r 26.

advanced under this rule, as it was under the previous one, that in the absence of a specific conferral of power an arbitrator cannot stay proceedings until, for example, ordered security for costs is paid. A stay of proceedings is not, it may be argued, an interim measure but a sanction to enforce compliance with the measure or at least to protect a party from the consequences of noncompliance.

The argument that an arbitrator has no power to stay proceedings pending the provision of ordered security relied heavily on some remarks of Judge Thornton QC sitting as an Official Referee in *Guaranteed Asphalt (London) Ltd (in Administrative Receivership) v Taylor Woodrow Construction Ltd*.[3] The case was an application to remove an arbitrator for alleged misconduct and bias. After a series of false starts and frustrations the arbitrator had ordered one party to pay costs occasioned by its noncompliance with earlier orders and ordered that the proceedings be stayed until the costs were paid. The arbitration had been conducted in accordance with the Charted Instituted of Arbitrators Arbitration Rules 1988. At an early stage in proceedings, the arbitrator had ordered the claimant to pay £80,000 by way of security for costs and ordered a stay of proceedings pending payment. About that order Judge Thornton said:

> The provision of security was ordered under art 13.2 of the applicable Arbitration Rules which allows him to order any party to provide security in any manner as the arbitrator thinks fit. I have doubts as to whether that provision allowed the arbitrator to stay the arbitration until a security for costs order has been complied with but since the security was provided as ordered ... this is immaterial.[4]

Dealing with the later orders which led to the application for removal the judge said:

> The arbitrator does not have a general power to order a stay of the arbitration. His duty is to resolve disputes that have been referred to him. This duty, which arises ... from an implied term of his appointment, is reinforced by the Arbitration Rules adopted for this reference. Article 5.1 provides:
>
> > "In the absence of procedural rules agreed by the parties or contained herein, the Arbitrator shall have the widest discretion allowed by law to ensure the just, expeditious, economical and final determination of the disputes".
>
> An arbitration which has been stayed is not subject to any final determination let alone an expeditious determination. Thus, if there is a power to order a stay, it must be found in the rules.
>
> Counsel for (the respondent) argued that the order was akin to a security for costs order and that 13.2, which deals with the arbitrator's powers to order security for costs includes the power to order security by way of deposit, bank guarantee or in any other manner as he sees fit. Thus, either because "any other manner" includes the imposition of a stay or because

[3] *Guaranteed Asphalt (London) Ltd (in Administrative Receivership) v Taylor Woodrow Construction Ltd* [1998] EWHC Technology 317.

[4] Ibid [6].

> there is an implied power to order to stay arising as a necessary adjunct to these powers, the arbitrator had power to order a stay in this case.
>
> I have doubts as to whether, even when ordering security, the arbitrator would have the power to impose a stay pending compliance with the order, in cases where this Article governs the procedure. The 'any other manner' appears to relate to the method of providing the security and not to what is to happen if the ordered security is not provided. The suggested implied power, arising by analogy with court proceedings, does not appear to be a necessary adjunct to Article 13. However, I need not decide that difficult point since the order was not a security for costs order, although its effect was closely analogous to one. …[5]

There are two strands in this reasoning. The first is that unless legislation or the parties' agreed rules confer a specific power to stay proceedings an arbitrator has no such power. The second is that a power to stay proceedings should not be implied because it would be inimical to an arbitrator's overriding obligation to decide disputes expeditiously and economically. That obligation is commonplace, if not universal. It appears in art 17 of the 2016 Rules and rule 17 in the 2020 Rules. Similar provisions appear in all the modern commercial arbitration acts.

The reasoning, if correct, would apply as much to the 2020 Rules as to the 2016 Rules. Neither contains a specific grant of power to stay proceedings, and arbitrators working under both are obliged to provide an expeditious and economical resolution to the dispute.

Judge Thornton did not apparently consider the consequences of the conclusion that an arbitrator could order security for costs but not a stay of proceedings. The one without the other would be a futility. A party who was ordered to provide security but whose proceeding was not stayed could proceed with its claim thereby exposing its opponent the very harm the order for security was meant to obviate. 'Pointless' and 'useless' are adjectives which could equally be applied to an order that a party provide security for costs but allows it at the same time to proceed with its claim without providing the security. It must not be forgotten that orders for security for costs are only made in well-defined circumstances and where a corporate claimant appears to be unable to pay its opponent's costs if its claim fails. Orders for security are not made where a claimant is likely to succeed but only in those cases where success is doubtful or cannot be predicted. The whole purpose of an order for security for costs would be lost if the party against whom the order was made could proceed regardless.

These observations are obvious. They led Eveleigh LJ to say in *The Argenpuma*: 'A stay of proceedings is an integral part of an order for security for costs.'[6]

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[5] Ibid [78]-[80].
[6] *The Argenpuma* [1984] 2 Lloyd's Rep. 563, 565 (CA).

That you cannot have one without the other should necessarily lead to the conclusion that a power to stay proceedings must be implied in a conferred power to order security for costs. The existence of an arbitrator's obligation to proceed quickly and cheaply to final award is surely a slight basis for denying the implication of the power to stay. To think that a stay of proceedings as an adjunct to an order for security for costs cannot be compatible with the duty to be efficient and economical is to take a very simplistic view of the arbitral process.

The High Court does not share Judge Thornton's reluctance to find implied power to do something which is necessary for the implementation of an express power. The point was discussed in *Pelechowski v Registrar, Court of Appeal* which the majority (Gaudron, Gummow and Callinan JJ) referred with approval to the judgment of Dawson J in *Grassby v The Queen* where Justice Dawson had stated:

> [A] Magistrates Court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. … However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise …[7]

Their Honours went on:

> Justice Dawson concluded that recognition of the existence of the powers which an inferior court must possess by way of necessary implication will be called for:
>
> > whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be derived by implication from the statutory provisions conferring the particular jurisdiction.'
> >
> > The term 'necessary' in such a setting .... is to be understood… as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided .... In this setting the term "necessary" does not have the meaning of 'essential', rather it is to be "subject to the touchstone of reasonableness.[8]

Although the judgment was concerned with the implied powers of inferior courts, the principle applies to all grants of power conferred by statutes and subordinate legislation: grants are construed so as to include everything necessary for the exercise of the express power on the presumption that provisions conferring power are not meant to result in futility when the power is exercised. This is the (obviously correct) view of the authors of 'Interpretation', Herzfeld and Prince, second edition at 9.210.

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[7] *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435, at 451 [50] citing *Grassby v The Queen* (1989) 168 CLR 1, 16 (Dawson J).
[8] *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435, 451 [50] (Gaudron, Gummow and Callinan JJ).

Given the intimate connection between orders for security for costs and stays of proceedings, and the principle of necessary implication, the power to order security for costs must include and extend to a power to stay proceedings until security is provided. Such a power is 'reasonably required or legally ancillary to the accomplishment of the specific remedy…' of security for costs. The power conferred by art 26(3) and rule 26 cannot be exercised effectively unless an arbitrator can compel compliance with an order for security by staying a claim until security is provided.

The Resolution Institute's Arbitration Rules are not statutory provisions. They take effect as a result of the contract of the parties who submit their dispute to arbitration. The parties agree that the arbitrator shall have the powers, and the responsibilities, set out in the Rules. The principle described in *Pelechowski* though framed in terms of statutory interpretation is equally applicable to the interpretation of powers conferred by contract. The necessity of avoiding futility in the exercise of power whether based in statute or contract demands the implication of the ancillary power. The five conditions needed for the implication of a term into a contract identified in *BP Refinery (Westernport) Pty Ltd v Hastings Shire*[9] are easily satisfied. The implied power to stay is (1) reasonable, (2) necessary to make the contract effective, (3) obvious, (4) capable of clear expression, and (5) does not contradict any express term of the contract.

The second basis for concluding that an arbitrator does have power to order a stay is found in art 17 of the 2016 Rules and rule 17 of the 2020 Rules. They are relevantly identical. Article 17 provides:

> (1) Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

Rule 17 provides:

> (1) Subject to the provisions of any applicable Act, these Rules, and any other agreement of the parties, the arbitrator may conduct the arbitration in such manner as he or she considers appropriate, provided that the parties are to be treated equally and that at an appropriate stage of the arbitration each party is given a reasonable opportunity to know the case to be presented by every other party and to present its case. The arbitrator, in exercising his or her discretion, shall conduct the arbitration so as to avoid unnecessary delay and expense and provide a fair and efficient process for resolving the parties' dispute.

[9] *BP Refinery (Westernport) Pty Ltd v Hastings Shire* (1977) 180 CLR 266, 282-3 (Lord Simon of Glaisdale, Viscount Dilhorne, Lord Keith of Kinkel).

The article and the rule confer a power on arbitrators which is very generally expressed. The arbitrator may conduct the arbitration as he or she considers appropriate provided the parties are treated equally and fairly in the presentation of their respective cases. The conduct of an arbitration includes all aspects of it, and any order or requirement that may be made with respect to the presentation and hearing of the parties' claims. An order to stay a claim or a counterclaim pending the satisfaction of a condition imposed with respect to its presentation, such as an order for security for costs, is part of the conduct of an arbitration. Subject to the obligation to treat parties equally and fairly, there will obviously be occasions when it is appropriate to order security for costs. On those occasions it is also obvious that it will be appropriate to stay a claim until the order is complied with. The power to do so comes from art 17 and rule 17.

There is a third basis for concluding there is power to stay proceedings. It applies only to the 2016 Rules and not the subsequent ones.

Article 26(3), as noted, confers on an arbitral tribunal the power 'to make orders with respect to ... security for costs ...' The power is not limited to making orders *for* security for costs, but *'with respect to'* such orders. The phrase means 'relating to', and denotes the widest connection between subject matters. It considerably widens the type of order which may be made: an order may be made which relates to security for costs. If the order relates to or is connected to an order for security for costs the power to make it is expressly conferred by art 26(3). As Eveleigh LJ pointed out, a stay of proceedings is very closely connected indeed to an order for security for costs.

Conclusion

Although arbitrators might prefer to have their powers specifically set out in plain terms, there can be no doubt that whether under the Resolution Institute's 2016 Rules or 2020 Rules, arbitrators have power to order security for costs and to order that the proceeding in respect of which the order was made to be stayed until the order is complied with and security has been provided.

Child inclusion in family mediation in the context of highly conflicted parental separation and potential alienation

Jill Goldson[*]

Abstract

This paper describes an extension of the research and clinical practice on child inclusion at the time of parental separation. The overwhelming support for child inclusive mediation by parents, children and mediators along with the promising results of skilful and sensitive practice, makes this an intervention of immense potential value. Irresolution about child and parent contact is already problematic for the wellbeing of children; high conflict and disrupted parent-child relationships create extreme risks of maladjustment. Resistance/refusal dynamics of child contact with parents can ossify into parental alienation with lengthy and destructive impasses, compounded by delay in the court process. In this paper I argue for a social science and judicial interlock which mandates research informed, clinical practice to address the unjustified resist/refuse behaviours, without compromising external investigations. I have termed this intervention Therapeutic Family Facilitation (TFF). The intervention is based on promising evidence that high conflict family disputes can be heard and resolved in a timely way in a judicially mandated process, in an out-of-court intervention. Resolving family impasse, by means of empirical and qualified practice, counters the damage to children and their families — which is considered by researchers and experts to be a public health issue.

Background

In 2013, mediation was made mandatory via the *Family Dispute Resolution Act 2013* (NZ) ('FDR Act'). Parties in dispute about care arrangements for their children under the *Care of Children Act 2004* (NZ) were mandated to attend mediation in an effort to resolve their dispute before they could make an application to court. Exemptions included violence and mental health and addiction issues. Progressing into court was to

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be by way of exemption — either parties failed to find agreement, or one party refused to attend. In explaining the reform, the Honourable Judith Collins, then Minister of Justice (2013) stated that the Government's top priority in family law reform was to put children's needs first. Mediation as an out of court intervention has had mixed results in many of the jurisdictions in which it has been implemented. New Zealand is no exception.

In 2018 a further review of family justice was ordered by the Minister of Justice, Hon Andrew Little, to consider the 2014 reforms as they related to assisting parents and guardians to resolve disputes about parenting arrangements or guardianship matters. Led by Rosslyn Noonan, an Expert Panel in 2019 released a document, *Te Korowai Ture a-Whanau* (Joined Up Services),[1] with recommendations for changes to family law policy and practice. The aim of these recommendations was to bring together both the in and out of court elements of family justice services, in an attempt to address dysfunctional silos and fragmentation in family law. The development and recommended implementation of changes was to improve the wellbeing of children and young people by enhancing access to justice for children, parents and whanau. One of the key areas discussed was that of building capability and capacity within the court to allow for children's participation.

Amending the *Care of Children Act 2004* (NZ) and the *Family Dispute Resolution Act 2013* (NZ) to include child participation as a guiding principle was considered a priority in the 2019 review. The Bill before Parliament makes express reference to the United Nations' *Convention on the Rights of the Child* (UNCROC) to require parents and guardians to consult children on matters that affect them.[2] Recommendations were made to the Ministry of Justice to stocktake appropriate models and research of child participation.

Current situation

For a number of reasons outside the scope of this paper, the process of out of court family dispute resolution (FDR) has not had a good uptake.[3] It is quite possible that it will cease to be mandatory once the family justice recommendations are tabled. Nevertheless, there remains a significant opportunity to prioritise

[1] Ministry of Justice, *Te Korowai Ture a-Whanau: The Final Report of the Independent Panel examining the 2014 Family Justice Reforms* (Final Report, 2019) <https://www.justice.govt.nz/assets/Documents/Publications/family-justice-reforms-final-report-independent-panel.pdf>.
[2] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); Family Court (Supporting Children in Court) Legislation Bill 2020 (NZ).
[3] For a detailed analysis, see Megan Gollop, Nicola Taylor and Nicola Liebergreen, Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms – Parents' and Caregivers' Perspectives – Part 2 (Research Report for the New Zealand Law Foundation, 2020) <http://www.nzlii.org/nz/journals/NZLFRRp/2020/4.html>.

children in the process of FDR, which can go beyond traditional agreement making and act on children's rights to participate, be consulted or to comment.

The significant question seems to be whether the process of FDR, as an agreement forming process, is sufficient in itself to be in the best interests of the children. Are we as mediators, to paraphrase,[4] neutral facilitators of negotiations between two parents — or are we direct advocates for the children who are the subject of the dispute? Quite what the best practice is for child participation has yet to be clearly defined.

Significantly, if evidence-based best practice for children is upheld, then consumers of family law need access to a child participation model. From a systemic point of view, we know that if children are not coping, then there is little chance that their parents will either. Two issues reside: firstly, that the parties to the dispute are already locked in high conflict, and secondly, that their children will have been (and at least indirectly will still be) exposed to conflict. Some children will be managing the transition to different structures within their family. Others will be mired within a chronic, ongoing and toxic dispute, which has been a feature of their childhood. Such chronic conflict has serious consequences for their mental health.

Given that around 95% of parenting dispute cases settle without court action,[5] the majority of children have not had an opportunity to be heard in matters that affected them (despite the fact that NZ is a signatory to UNCROC). These children are not the subject of specialist reports, and nor do they have a lawyer appointed for them.

We know that children fare better without the delay of prolonged in court legal processes where their parents become ever more entrenched in dispute. Prioritising children who are struggling with the worst of the lingering acrimony, and its dysfunctional impact, is a paradigm shift in family law. The emphasis on primarily working with parents to resolve disputes over their children's care has thus shifted towards involving children in the process.[6]

Two major propositions inform the rationale for the practice of child inclusion in family law contexts. Interparental conflict is now recognised as a significant factor in causing deep distress to children and one which profoundly compromises adjustment to separation. Evidence of impacts to children's wellbeing and mental health has caused researchers to view the degree and extent of the conflict surrounding the separation

[4] Donald T Sasponek, 'The Voice of Children in Mediation: A Cross-Cultural Perspective (1991) 8 *Mediation Quarterly* 325.
[5] Mark Henaghan and Bill Atkin, *Family Law Policy in New Zealand* (Lexis Nexis, 4th ed, 2013).
[6] Jill Goldson and Nicola Taylor, 'Child-inclusion in dispute resolution in the NZ Family Court' (2009) 6 *New Zealand Family Law Journal* 201.

as a variable of grave significance. Diminished parenting capacity during the separation,[7] and in the year or two following, affects parental ability to nurture and protect their children. Far from being able to help children with their worries over this time, parents can often inadvertently add to their children's distress. If a key determinant of child wellbeing is the extent to which parents are able to cooperate and manage their conflict post mediation, then an intervention which encourages parents to think of their children, rather than focus on their own hostility and grief is positively implicated in the ongoing mental health of that child.

Secondly, a growing body of evidence indicates that children experience ongoing distress when they are not told what is happening and when adults do not take their feelings and views into account.[8] The majority of children affected by parental separation yearn to make sense of their situation by being part of the negotiation process concerning the rearrangement of their family.[9] They have no choice but to be involved in the actual restructuring of their family's post separation relationships.

The child interview covers the child's feelings about the current arrangements and their hopes for the future, without putting them in a position of having to decide or say what they want. The interview is carefully paced and signs of trauma are carefully monitored. Feedback to parents is a highly skilled conversation with parents about their child's responses. The role is being an ally for the child and a support for the parents. This feedback to parents about their child's self-reported position — illustrated by the ways their child reports trying to make sense of their world — can result in the underpinning of an agreement. If this agreement comes from the right place, it will carry a level of conciliation, which will enhance durability.[10] This is a poignant use of motivational interviewing and one which has the potential to generate the parental atonement so urgently needed by the child.

Child inclusion in family dispute resolution constitutes a distinct discipline,[11] blending knowledge of developmental psychology, attachment theory and family systems theory with skills drawn from counselling and mediation. It balances rights-based justice with an ethical mandate to protect and enhance the family in transition. Engaging children in this way not only recognises a child's rights and agency, but also responds to the contextual needs of that child and family for skilled help through the separation and

[7] E Mark Cummings and Patrick T Davies, 'Effects of Marital Conflicts on Children: Recent Advances and Emerging Themes in Process Oriented Research' (2002) 43 *Journal of Child Psychology and Psychiatry* 31.
[8] Anne B Smith, Megan Gollop and Nicola Taylor, 'Children's Perspectives of their Parents' Separation' (2000) 12 *Child and Family Law Quarterly* 34.
[9] Jill Goldson, *Hello I'm a Voice, Let Me Talk: Child-inclusive Mediation in Family Separation* (Innovative Practice Report No 1, 2006) <http://thefamilymatterscentre.co.nz/wp-content/uploads/2015/08/Hello_Im_A_Voice.pdf>.
[10] Jennifer E McIntosh, Caroline M Long and Yvonne D Wells, Children Beyond Dispute: A Four Year follow up Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution (Report, 2009).
[11] Ibid 6.

parenting dispute which has arisen. A child inclusive intervention therefore involves working systemically with the family to embrace a process that prioritises the developmental health of the children affected by the dispute — it is much more than just talking with a child to hear their views. It is possible for the parties to reach an agreement by relaying the child affect via feedback to the parents.

When properly delivered by trained professionals, child inclusive practice is a targeted, short term, dispute resolution process with a therapeutic outcome for the entire family. It is not therapy per se, and its context is socio legal. Implementing a child inclusive model early in the family law process provides an opportunity to identify and deal with conflict before it gets polarised into intransigent parental positions, with consequent harmful impact on the children.

Estrangement and alienation

Central to the latter part of this paper is the fact that children of separated parents need to retain ongoing meaningful relationships with each parent. This is more easily realised when parents' affective responses to their children are as sensitive and positive as possible, and each parent is able to buffer the child from the more destructive aspects of parental conflict, as described above. This model can also be applied to the later stages of the family court process — either close to court application or post order — or indeed as an application in the resist/refuse dynamic. This is variously known as alignment or alienation.

Parental alienation is inadequately summed up as a 'tug of love'. Sadly, the experience of a child targeted by one separated parent who poisons that child's entire relationship with the other parent is far more sinister than a 'tug of love'. The reality is that in some cases a parent can, deliberately or unconsciously, turn the perception of a child against the other parent — where such a negative view cannot be justified by past history or by any aspect of the parent-child relationship. This unjustified, and wholly negative, view of the absent parent is profoundly harmful for that child.

To alienate children from the other parent they have loved is an abuse and needs to be understood as such. We are talking about unjustified rejection, not rejection of an abusive or dangerous parent. Fathers alienate children from mothers, and mothers from fathers. Children in these situations don't just lose a parent, they frequently lose everyone in the rejected parents wider family as well: grandparents, cousins, aunts and uncles – and an entire cultural heritage to which it was their birth right to belong.[12]

[12] Kwame Owusu-Bempah, Children and Separation: Socio-Genealogical Connectedness Perspective (Routledge, 2009).

The narratives and discourse surrounding parental alienation can be mis-understood and mis-informed. Conversations may become reduced to the rights of a father or the rights of a mother. It is unequivocally about the rights of a child to have quality relationships with both parents, siblings, grandparents and extended families post-divorce or separation. Children do best when they can have a good relationship with both of their separated parents. A few parents find setting aside their adult issues harder to do than meeting their children's needs. It only takes one parent not collaborating to result in an enduring high conflict. Even where a parent has behaved badly (excluding a situation where there is a justifiable reason for a child to avoid contact, as with family violence), children mostly still want to repair and continue their relationship with the only parents they have.

Children in the middle have to cope, but enduring high conflict is very bad for children. Adults too struggle with such gaps in communication, and children are very aware of the tense handovers from one parent to the other.

Sometimes each parent will see the tense transition as a sign that the child does not want to go to the other parent. The vast majority of children I meet professionally tell me that they do want to see their other parent. They just don't want the transition to be so difficult. These handovers can be made easier with careful planning. Difficult situations of this type most commonly occur where once there was a loving relationship between child and parent.

One result of conflict is that children will take sides. Children resist the pain of the loyalty bind, and a pattern emerges where a child will start to resist post-separation contact with a parent. Sometimes, if they have contact with both parents, they might side with whichever parent they are with at the time. But the more alienated child will overwhelmingly side with one parent against the other. Even if contact continues, we still find that strongly resistant patterns of behaviour from the child can take place. It is a coping mechanism for the child who cannot be expected to understand why they feel compelled to reject their parent. Trying to make sense of a post separation world, where their parents appear to be at war, creates pressures which are simply too great for the child or young person. The child will split off their feelings from the previously loved parent.

Then the parent who is being rejected needs to find a way to take the rejection and to try and find a way to grow a better relationship again. Without informed therapeutic assistance, and with no communication with the other parent, finding a way through this impasse with a confused and upset child is virtually impossible

for many rejected parents.[13] If the favoured parent is complicit in encouraging this behaviour, then the child becomes caught up in a sinister coaching exercise, and will become deeply resistant to seeing their other (rejected) parent under any circumstances.

Extreme refusal, which goes unmediated, can become overwhelmingly miserable, and is emotionally abusive for the child. Strong feelings and responses from the friends and families concerned can stoke the fire further, and the purely legal route will struggle to avoid the adversarial process. Delays and lack of nuance typically inflame an already aggravated family context. Court orders can be to no avail as the damage of delay plays a potent role. The situation is one of emotional abuse and it plays out in all combinations of gender of parents, extended family, and of the children caught in the middle. The damage is incalculable.

It is important to remember that whilst it may seem that a child's rejection of a parent is rooted in something the rejected parent has done, it is in fact a coping mechanism. Children who are facing enduringly high conflict between their parents are likely to cope in just the way most people do — they side with one parent against the other. Finding an intervention, as parents, to work a way through this impasse is extremely important. Therapeutic mediation can definitely assist, if both parents will agree to try this route. Restoring a child's mental health is an imperative in responsible parenting — and worth all and any effort.

Effective work in such cases can be paralysed by analysis and delay, and in New Zealand there is currently no suitable framework for dealing with such issues.

Social science and judicial interlock

As with all issues in the psychology of the family, there are degrees of intensity — from alignment to pure alienation, and everything in between. At the heart there is conflict and the power struggle which fuels it. Sometimes both parents are engaged in the conflict and the child takes a stance and aligns with one parent over the other in order to cope. Sometimes the alienation springs from the delusional state of one parent who completely believes that the other parent must be excluded at all costs — and a pathway of implacable hostility is entered into, with no rational basis.

[13] Karen Woodall and Nick Woodall, Understanding Parental Alienation: Learning to Cope, Helping to Heal (Charles C Thomas Ltd, 2017).

To get caught up in arguments about definition and ideology eclipses the damage being done and prolongs it. Entire academic papers and conferences are focused on this rapidly occurring virus in the lives of separated families. One size will not fit all. Parental alienation is becoming increasingly recognised globally with several countries having legislated against it, In the UK the Child and Family Court Advisory and Support Service (CAFCASS) have recently acknowledged the phenomenon and produced pathways to aid their staff who find themselves faced with parental alienation in their work.[14]

In a keynote address in 2018, Lord Justice McFarlane (now President of the Family Division, High Court of Justice in England and Wales) indicated that the ongoing debate about attribution is of less importance than the ability to recognise the relevant parental behaviours. His Honour expressed the view that legal processes could more usefully:

> concentrate on the particular behaviour of the particular parent in relation to the particular child in each individual case. If that behaviour was found to be abusive, then action [needs to be] taken irrespective of whether or not a diagnosis of a particular personality or mental health condition in the parent can be made.[15]

The ongoing debate about whether the resist/refuse dynamic is a syndrome of alienation or not, is far less relevant to the health of our children and families than our ability to recognise the parental behaviours which are so child adverse. It is these behaviours that need to be the focus of family law and it is these parental behaviours to which a rapid assessment for differentiation and definition of issues needs to be applied. An unjustified rejection of a once loved parent is not the same as the rejection of a dangerous or abusive parent. Screening for abuse, ill mental health and/or addiction is part of the differentiation process. Further, the sooner the trends in an individual resist/refuse family dynamic can be observed, the sooner preventive measures can be applied to inhibit a drift to an intransigent presentation.

Delay is the friend of alienation. It is profoundly harmful for children. It is of utmost urgency that a drift to estrangement is picked up as early as it is detected.

The 2019 NZ Family Justice Review still languishes as a Bill, and within that Bill is the strong recommendation that child participation is thoroughly reviewed as a central plank in family justice. The

[14] Child and Family Court Advisory and Support Service, *The Child Impact Assessment Framework and its Development* (Web Page) <https://www.cafcass.gov.uk/grown-ups/parents-and-carers/divorce-and-separation/the-child-impact-assessment-framework-and-its-development/>.
[15] Lord Justice McFarlane, 'Families Need Fathers Conference 2018: Keynote Address by Lord Justice McFarlane' (Speech, 25 June 2018) 3 <https://www.judiciary.uk/wp-content/uploads/2018/06/speech-lj-mcfarlane-fnf.pdf>.

2014 reforms were intended to be more responsive to the needs and interests of children caught up in disputes over their care or contact, yet no specific proposals were made about children's participation in decision making. Whilst the benefits of participation to children and to decisions made about them are clear in the academic literature, they are not adequately reflected in practice.

The recommendations of the 2019 Report are that the Ministry of Justice, in conjunction with relevant experts and key stakeholders, undertake a stocktake of appropriate models of child participation, including FDR. The stocktake should also include: a consideration of key principles for children's participation, including requiring professionals to promote children's participation.[16]

The court was never designed to be a therapeutic agency. Lawyers have access to the legal process but not to a system of understanding. The separation and divorce impasse inflames an already aggravated system. Mediators and child consultants must have a systems understanding but they do not have ready access to the legal system or the power of the court. So as the 2019 review suggests, partnership is vital, and we need it to tackle the resource heavy problem of a child resisting contact with a parent post separation — a critical issue for both consumers and practitioners of family law.

Rather than therapy per se, working with families caught in a resist/refuse dynamic is dispute resolution with a therapeutic outcome. The work is best understood from a family systems perspective and needs to be brief, targeted and crafted to fit flexibly with the particular family. It is not about fixing the child (which is not only unhelpful, but is, in fact, contraindicated). It is about recognising that the resist/refuse dynamic typically originates from a multiplicity of sources in a family system. An informed understanding about how to facilitate the family around these barriers is essential.

My proposal of Therapeutic Family Facilitation (TFF) (unpublished) is an extension of child inclusion and flows into a human rights perspective. The intervention I describe is based on promising evidence that family disputes can be heard and resolved in a judicially mandated process in out of court intervention. Once heard without delay, the family system can recover and become a resilient, rearranged family. The barrier to this is the resistance of a family, typically one parent and a child, to changing the dynamic of estrangement.

[16] Ministry of Justice (n 1) 7.

The model I propose uses customised psycho-educational materials, particularly using research, along with a challenge and a call to parents to change the dynamics. Appropriate and sensitively implemented child participation needs to be part of this. My proposal is that this intervention would follow the completion of attempted mediation (including a no show), and on the subsequent certificate of exemption, a triage recommendation and Settlement Conference would signal the judicially mandated process.

Years of experience suggest that the intransigent parent will frequently not participate comprehensively or voluntarily in these processes. Family justice which works for children, needs to mandate that the parents in question have an obligation to resolve the problem, and to receive proper help. To permit all therapeutic efforts (such as attendance and compliance) to be screened by confidentiality, is a further compromise of child health and resources — particularly time. If the parents have not done the work, then further consideration should be given to the parent failing to take the help offered; help which is designed to restore their child's relationship with the other parent.

Although mediation and therapy typically takes place behind a wall of confidentiality, in these entrenched cases of unjustified rejection of a parent, the work needs to be mandated, and reported with a restrained and considered confidentiality waiver about the observed parental co-operation.

The process, facilitated by professionals trained in an understanding of resist/refuse dynamics, should be followed up by a judicial review, which focuses on the accountability of those charged with a child's wellbeing. The vital key here is the development of a mandated relationship between the judge and the parents, attended by professionals trained in child and family work in this challenging context.

This timely and robust intervention creates an understanding/differentiation of the reasons behind a child's rejection of a once loved parent. The work is central to the welfare and best interests of the child, and underpins the knowledge that a social science and legal interlock is significant in the production of positive outcomes, as opposed to corrosive delay.

A facilitator would need to be competent in the work required: the skill set includes understanding the differentiation in the resist/refuse alienation dynamic, understanding of family systems, cultural contexts, child psychology, attachment theory, family law and mediation skills as well as experience in child and family work. A clearer picture of the inherent dynamic will quite quickly emerge as the case goes through a programme designed to evaluate the parental capacity to support the child in attachment needs to the other parent. Domestic violence and abuse screenings are significant.

The implicit contract in the intervention makes it a requirement that the parents cooperate with joint parental meetings. Significantly they must invest in the process by facilitating the child's presence at individual meetings with the previously rejected parent.

The intervention would be no more than 10 weeks, with a court date to be set in the event no agreements are made. Research indicates that 10 weeks is sufficient for progress to be made — if progress is not being made, then the specific parent blocking progress will typically be obvious. Further directions can then be made by the court with regard to the parent who has failed in their responsibility to engage in transparent work to build up their children's relationship with the rejected parent. This might include consequences for the parent who has blocked progress and/or the grant of an appropriate remedy to other parties.

This style of intervention is suitable for families where there are high degrees of blame and conflict. The inherent design produces a comprehensive analysis of the capacity of each parent to recognise and change behaviours in a therapeutic setting. The parents who lack this capacity, for whatever reason, are returned to the court process. This urgent and strength-based intervention supports parents in their demonstrable responsibility to their children. The requirement for review after two months to make sure the progress has remained consistent is significant.

The arguments about the ideology of such an intervention need to be understood from an evidence-based framework, and facilitators' must be scrupulous about screening out any abusive coercion. The child's needs and robust mental health must be given priority.

Conclusion

Family law must pave the way for families to feel respected and treated fairly in a timely manner. Children and parents need to be protected from drawn out litigation. It is crucial too, that the minority of cases that unequivocally need court intervention are not held up. Our challenge now is to overview the ambit of our reforms and to sketch in the detail, so that real benefits can be achieved for families and justice, with a thorough understanding of child inclusive dispute resolution.

The insolvency and arbitration intersection: A review of recent regional approaches to the question of arbitrability

Sylvia Tee[*] and Andy Lau[†]

Abstract

Insolvency-related disputes are often perceived as being exclusive matters for determination by the courts. This is an oversimplification. As demonstrated by legal developments in recent years, a range of disputes may arise from the various facets of an insolvency, some of which are in fact arbitrable. As there is presently no global uniform approach to the question of whether a certain dispute is arbitrable, this article reviews the approaches adopted by the courts in different jurisdictions and their development going forward.

Introduction

In the midst of the pandemic and global economic climate, it is timely to revisit the common misconception that insolvency-related disputes are non-arbitrable. For too long the discourse has focused on traditional notions of arbitrability, despite the fact that arbitrability is an intricate concept which has evolved and continues to adapt as the business and legal environment progresses.

The misconception that insolvency-related disputes are not arbitrable appears to arise from the characterisation of insolvency as a public, statute-governed regime. The insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors. The tension seemingly arises because, in contrast, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution.[1] There are therefore contrasting legal realities at play: insolvency is a public matter, whereas arbitration is a private process.

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[1] *Larsen Oil & Gas Pte Ltd v Petroprod Ltd* (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] 3 SLR 414, 418 [1] (VK Rajah JA for the Court) ('*Larsen Oil*').

The conclusion that insolvency-related disputes are not arbitrable is, however, an over-generalisation. Diverging approaches to this tension have developed in different jurisdictions. These differences are important because the choice of seat for the arbitration clause potentially has an impact on whether parties can present a winding up petition for unpaid debts owed by a possibly insolvent counterparty or whether the parties have to first resort to arbitration to determine the subject matter of the dispute. When considering the seat, parties are often concerned with the enforceability of arbitral agreements and awards[2] and accord relatively less weight, if any, to what would prevail in instances where the underlying dispute intersects with insolvency. This issue deserves far more attention as the going concern of businesses has become a key consideration in the current economy.

In light of this, what insolvency-related matters are arbitrable? There is no short answer as there is generally no list of matters which are not arbitrable. This is an area of law that is evolving as judicial norms change. The categories of insolvency-related matters which are arbitrable, those that have been determined not to be arbitrable and how different courts have adjudicated on the intersection between arbitration and insolvency-related disputes all need to be taken into consideration.

Arbitrability

Arbitrability concerns whether or not disputes of a certain type are capable of resolution by arbitration. In considering arbitrability, there are two key questions to consider: does the type of dispute fall within the scope of the parties' arbitration agreement, and is it capable of being settled by arbitration (or is it reserved for the courts)?

The former question is a question of interpretation: is the arbitration agreement broad enough to apply to the particular type of dispute? The latter question is less straightforward as it is jurisdiction-specific: the applicable legal system in each jurisdiction determines which issues are capable of being resolved through arbitration or whether it is a matter which falls within the exclusive jurisdiction of the courts.[3] This overrides any agreement between the parties.

[2] School of International Arbitration (SIA), Queen Mary University of London and White & Case LLP, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (2021) <http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>.
[3] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration: With Amendments as Adopted in 2006*, UN Doc A/40/17 (21 June 1985) and UN Doc A/61/17 (7 July 2006) art 1(5).

Arbitrability in an insolvency context

Across various jurisdictions there appears to be a common theme of differentiation between 'core' insolvency disputes and 'non-core' insolvency disputes, the former being typically non-arbitrable as opposed to the latter which are generally arbitrable.

At a high level, 'core' insolvency claims are those which are central to the winding up process and must be before the court, either because they relate to liquidators' powers to be conferred by the court under the relevant legislation or because they affect third party rights. These claims might include applications for winding up or liquidation, to reschedule a company's liabilities, to operate it under some form of receivership or administration, or to distribute pro rata payments to designated creditors and owners.

The rationale behind reserving these claims for the exclusive domain of the courts was articulated in *WDR Delaware Corporation v Hydrox Holdings Pty Ltd*[4] ('*Hydrox*') as follows:

- It affects the legal status of a person and has serious consequences for the company, and the creation and dissolution of an artificial legal entity is a matter of governmental authority;
- It affects third parties' rights because the process of liquidation creates restrictions on the disposition of property;
- It is in the public interest to ensure there is a standardised process of liquidation, supervised by the court process and in the public domain so that it is transparent.

'Non-core' claims are those which are incidental to the winding up of the company and will generally not run into the concerns set out above. While this continues to be an evolving and expanding area of law, the types of insolvency-related claims that are generally regarded as 'non-core' include:

- Professional negligence claims brought on behalf of insolvent companies arising from professional services contracts containing arbitration clauses, including claims against auditors, investment advisors or managers and other professional advisors, whether brought before or after the company enters into liquidation;
- Contractual claims brought by creditors against insolvent companies, seeking to recover debts arising under contracts containing arbitration clauses;
- Contractual claims brought on behalf of insolvent companies against their debtors, seeking to recover debts arising under contracts containing arbitration clauses.

[4] (2016) 245 FCR 452, 475 [131] (Foster J).

Apart from the above areas of general agreement however, there is at present a fine line in carving out 'core' issues of insolvency from the rest. The difficulty in such matters is further compounded by the absence of a universal insolvency regime; there is no global consensus on what constitutes a 'core' insolvency claim, which is largely a consequence of diverging insolvency regimes in different jurisdictions.

This also calls to the fore a further question – what happens when a dispute involves both 'core' and 'non-core' insolvency issues? There are differing regional approaches towards this question, which requires balancing the inherent conflict between the public nature of winding up proceedings and the private nature of the arbitration process.

The remainder of this article will consider the judicial approaches adopted by Australia, the United Kingdom, Hong Kong and Singapore in handling these tensions.

Comparative jurisdictional approaches

Australia

The general sentiment among Australian courts is that insolvency-related proceedings may be stayed in favour of arbitration. The courts will look beyond the nature of the relief sought and consider the substance of the dispute: if the substantive dispute is not central to the insolvency of the company, the court will generally stay the matter and refer it to arbitration even where, as in a winding up petition, the arbitral tribunal is unable to grant the relief sought.

Two decisions applying the same reasoning will illustrate how there could be different outcomes.

A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd[5] ('*A Best Floor*') concerned an application seeking a stay of a contributory's winding up proceeding on the ground that it was subject to an arbitration clause contained in the joint venture agreement between the two contributories. Justice Warren held the arbitration agreement was void insofar as it purported to preclude the court's power to wind up the company because it had the effect of obviating the statutory regime for winding up the company under the *Corporations Act 2001* (Cth).[6] While *A Best Floor* has often been taken to stand for the proposition that insolvency-related proceedings are not arbitrable in Australia, it is important to note that the arbitration agreement in that case

[5] *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170. [6] Ibid [18].

purported to exclusively vest in the arbitrator the ability to wind up the company. This is a unique feature of the case that played a pivotal role in its outcome, and should not be overlooked.

This becomes apparent when contrasted with the subsequent decision of *Hydrox*. As with *A Best Floor*, *Hydrox* involved a joint venture agreement between the two shareholders of a company which contained an arbitration clause, and an application by one of the shareholders for relief in the form of a winding up order. Unlike *A Best Floor*, however, the winding up orders were sought on the grounds of oppression and on just and equitable grounds. The Federal Court of Australia ordered a stay to the proceedings on the basis that it was subject to the arbitration clause. The Court held that the majority of the dispute was amenable to resolution in an arbitration setting, and was therefore willing to allow the arbitral tribunal to determine all parts of the dispute, with the exception to the decision on whether the company should be wound up. The mere fact that one party sought a winding up order did not 'alter the characterisation of the real controversy between the parties'.[7] In other words, the winding up order was sought as relief and not because of any grounds of insolvency; the substance of the dispute was about the performance of contractual obligations.

This is consistent with the general approach of analysing the substance of the dispute in determining whether to grant a stay of proceedings and refer the matter to arbitration. In doing so, the Australian courts have demonstrated their willingness to preserve the autonomy of the parties by not interfering with the arbitration process where the substance of the underlying dispute is capable of being resolved by arbitration.

United Kingdom

Similarly, courts in the United Kingdom have generally held that winding up proceedings may be dismissed or stayed and the underlying disputes referred to arbitration. The test adopted is whether there are 'wholly exceptional circumstances' which justify a court's refusal to grant a stay or dismiss proceedings subject to an arbitration agreement.

Salford Estates (No 2) Ltd v Altomart Ltd (No 2) ('*Salford Estates*')[8] remains the leading authority in the United Kingdom although it has been the subject of some criticism. In that case, a dispute arose in relation to a lease which was subject to a broad arbitration agreement providing that 'any dispute or difference' arising out of or in connection with the lease would be referred to arbitration. The dispute resulted in a final

[7] *Hydrox* (n 4) 483 [162] (Foster J).
[8] *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* ('Salford Estates') [2015] Ch 589.

arbitral award which the lessee did not pay, following which the lessor presented a winding up petition. The lessee sought to strike out or stay the petition.

The court found that its discretionary power to wind up a company had to be exercised in a manner consistent with the policy embodied in the *Arbitration Act* and the parties' agreement to arbitrate, except in 'wholly exceptional circumstances'. As such, winding up proceedings involving disputed debts subject to an arbitration agreement ought to be stayed or dismissed and the disputed debt referred to arbitration. The fact that a debt is not admitted is sufficient to constitute a dispute under the Act and a court is not required to investigate whether or not the debt is a bona fide dispute on substantial grounds but should seek to give effect to the arbitration agreement. Such an approach discourages parties from pursuing winding up proceedings to bypass an arbitration agreement.

Salford Estates was applied, with some reluctance, in the subsequent case of *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd.*[9] In that case, a company brought an action to strike out or dismiss a winding up petition pursuant to an alleged debt arising under a standard service agreement which was subject to an arbitration clause. Mr Steinfeld QC, sitting as deputy High Court judge, considered the *Salford Estates* decision placed a 'very heavy obstacle' on a party petitioning for a winding up order by requiring the court to dismiss the decision without considering whether there exists a bona fide dispute on substantial grounds.[10] However, considering himself bound by the formulation in *Salford Estates,* Mr Steinfeld QC dismissed the petition on the basis that the debtor disputed the debt and the dispute went beyond a non-admission. The dispute was referred to be determined by the arbitrator.

The *Salford* approach remains authoritative in the UK, as demonstrated by the recent decision in *Telnic Limited v Knipp Medien un Kommunikation GmbH.*[11] Sir Geoffrey Vos, Chancellor of the High Court upheld a stay against a winding up petition on the basis that the debt was not admitted and was subject to an arbitration clause. The petitioning party had sought that the stay be dismissed on the basis that the dispute raised by the opposing party was unmeritorious and that Telnic was balance sheet insolvent. However, the court applied *Salford* and refused to inquire into the merits of the case because the allegations of balance sheet insolvency and unlawful distribution were unclear and inconclusive. Accordingly, there was nothing out of the ordinary to take it into the realm of 'wholly exceptional circumstances', and therefore no basis for it to depart from the usual course of staying or dismissing the petition.

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[9] *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [2015] BCC 877.
[10] Ibid [10].
[11] *Telnic Limited v Knipp Medien un Kommunikation GmbH* [2020] EWHC 2075.

Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp ('*Nori Holding*')[12] involved a dispute arising from the termination of certain loan and pledge agreements entered into between the parties. Some of the agreements contained arbitration clauses, while others contained dispute resolution clauses conferring jurisdiction on the Moscow courts. The loans were subsequently restructured and a temporary administrator was appointed for the respondent. The administrator commenced proceedings on behalf of the respondent seeking to invalidate the restructuring and reinstate the loan and pledge agreements, relying on a provision of Russian insolvency law which was similar to a claim to set aside a transaction at an undervalue. On the application of the claimants, the English Commercial Court granted an anti-suit injunction against those proceedings, holding that they fell within the scope of the arbitration agreements, and were arbitrable. In doing so, the court held that the arbitration clause did not contain any express exclusion of disputes of any kind, and there was no good reason to imply a limitation to the effect that the clause does not extend to a claim in insolvency proceedings. As to arbitrability, the court held that it is necessary to focus on the nature of the claim rather than whether it is characterised as an insolvency claim. A claim based on a transaction at undervalue could have been brought before the insolvency process intervened and it is a dispute which is arbitrable regardless of its label.

In *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* ('*Riverrock Securities*'),[13] the English Commercial Court granted an interim anti-suit injunction against insolvency proceedings brought in Russia, on the basis that the avoidance claims brought in those proceedings fell within the scope of the arbitration agreement between the parties and were arbitrable. Contrary to the respondent's position that the arbitration agreement did not extend to a claim to set aside an undervalue transaction, the Court held that the avoidance claims fell within the scope of arbitration because the agreements were expressed in expansive terms. Justice Foxton also held that the relief claimed was an insolvency form of relief, but that did not in itself render the claims non-arbitrable.

In both *Nori Holding* and *Riverrock Securities*, the English Commercial Court specifically declined to adopt the position taken by the Singapore courts, which is discussed in further detail below.

[12] *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm).
[13] *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm).

Singapore

The Singaporean authorities have departed from the English authorities in two key ways. First, rather than requiring 'wholly exceptional circumstances' to exercise their discretion not to stay insolvency proceedings in favour of arbitration, the courts have held that a stay may be declined if there is an 'abuse of process', including circumstances where the debt is admitted on both liability and quantum. Secondly, the courts have held that there is a presumption that arbitration clauses do not apply to claims that could only be brought in insolvency, unless the clauses expressly provide that they do.

Both of these propositions are illustrated by the leading authority of *Larsen Oil*.[14] *Larsen Oil* involved a claim by Petroprod Ltd (Petroprod) and four of its subsidiaries, each of which was in liquidation, to set aside payments which the companies had made to their former manager, Larsen Oil and Gas Ltd (Larsen), shortly before the companies were wound up. These payments were alleged to have amounted to unfair preference or undervalue transactions and/or been made with the intent to defraud. Larsen applied to stay the proceedings on the basis of an arbitration clause in its management agreement with Petroprod. The Court of Appeal began by identifying the tension between the principle of party autonomy underlying the arbitration process and the policy of centralisation of disputes in the insolvency context:[15]

> Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors. The appeal before us raised an interesting and novel point of law relating to the interfacing of these two policies where private proceedings could have wider public consequences. To what extent ought claims involving an insolvent company be permitted to be resolved through the arbitral process?

The court first considered the construction of the arbitration agreement. It found that the assumption that the parties would have preferred a dispute resolution mechanism which could deal with all disputes in a single forum did not apply to claims that could only be brought in an insolvency context. As such, it made sense to 'draw a line' between private remedial claims, which could be determined by arbitration, and claims that can only be made by a liquidator/judicial manager of an insolvent company.[16] For this reason, the arbitration clause could not be construed to cover Petroprod's avoidance claims in the absence of express

[14] *Larsen Oil* (n 1).
[15] Ibid 418 [1] (VK Rajah JA for the Court).
[16] Ibid 423 [21].

language to the contrary. Notably, the English Court has stated that the *Larsen Oil* approach is not part of English law[17].

In considering the concept of arbitrability more generally, a further distinction was drawn between disputes involving an insolvent company that 'stem from its pre-insolvency rights and obligations' and those that arise 'only upon the onset of insolvency due to the operation of the insolvency regime'.[18] In light of the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management, a dispute arising from the operation of the statutory provisions of the insolvency per se will be treated as non-arbitrable even if parties expressly include them within the scope of their arbitration agreement.[19] On the other hand, disputes that stem from a company's pre-insolvency rights and do not affect the substantive rights of other creditors are arbitrable when the arbitration is only to resolve private disputes between the parties to the arbitration agreement.[20]

The leading decision of *Larsen Oil* has been followed in subsequent cases.[21] In *AnAn,* the Court of Appeal confirmed that the 'triable issue' standard ordinarily required to stay or dismiss winding up proceedings does not apply where such a dispute is subject to an arbitration agreement. Instead, a debtor who challenges a winding up application on the basis of a debt subject to an arbitration agreement need only satisfy the 'prima facie' standard of review. Thus when a court is faced with a disputed debt subject to an arbitration agreement, winding up proceedings will be stayed or dismissed as long as (a) there is a valid arbitration agreement between the parties; and (b) the dispute falls within the scope of the arbitration agreement, provided that the dispute is not being raised by the debtor in an abuse of the court's process.[22]

The court gave several reasons for applying the lower 'prima facie' standard of review, noting that 'the reduced standard promotes coherence in the law, gives effect to the principle of party autonomy and helps to achieve cost savings and certainty in the law'.[23]

In this regard, the court departed from the test adopted by English courts, which requires 'wholly exceptional circumstances' to exist before a stay application is refused in favour of arbitration. In finding

[17] *Riverrock Securities* (n 13) [56] (Foxton J).
[18] *Larsen Oil* (n 1) 431 [45] (VK Rajah JA for the Court).
[19] Ibid 431 [46].
[20] Ibid 431-2 [47].
[21] See *Silica Investors Ltd v Tomolugem Holdings Limited* [2015] SGCA 57 ('*Tomolugen*'); *BWG v BWF* [2020] 1 SLR 1296 ('*BWG'*) and *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] 1 SLR 1158 *('AnAn*').
[22] *AnAn* (n 21) 1179 [56] (Steven Chong JA for the Court).
[23] Ibid 1179 [57].

that this standard was too high, the court decided that a stay or dismissal of insolvency proceedings in favour of arbitration should be brought unless there is an 'abuse of process', including circumstances where the debt is admitted on both liability and quantum.

Singapore could be viewed as a middle ground in its approach to the conflict between arbitration and insolvency-related proceedings: a preferred deference to arbitration is coupled with a residual discretion to facilitate insolvency proceedings by protecting the liquidator's right to commence such proceedings in court.

Hong Kong

The position regarding the arbitrability of insolvency disputes in Hong Kong remains divided. In their early consideration of this issue, the Hong Kong courts emphasised that the interaction between an arbitration clause and insolvency was very much dependent on the facts and circumstances of each case. In the case of *Re Sky Datamann (Hong Kong) Ltd,*[24] Yuen J held that the Court was not bound to strike out or stay a winding up petition on the grounds of non-payment of a debt merely because the relevant contract contained an arbitration clause or because arbitration had commenced; it was a matter for the discretion of the court in each case. The arbitration agreement did not automatically take priority over the jurisdiction of the court. Rather, the approach was that the court should exercise its discretion having regard to all the relevant circumstances, including the financial position of the company, the existence of other creditors, and the position taken by them.

This approach was departed from in the decision of Harris J in *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd*[25] ('*Lasmos*') which in essence followed the English decision of *Salford Estates*. Justice Harris granted the stay of a winding up petition on the basis that three conditions were satisfied: (i) the company disputed the debt; (ii) the contract from which the debt arose contained an arbitration clause; and (iii) the company had taken steps to commence the contractual arbitration.[26] The court stayed the winding up petition without considering whether there was a bona fide underlying dispute on substantial grounds; it was enough for the debtor to assert that the debt was disputed and point to arbitration proceedings on foot.

In adopting an approach preferring arbitration, this decision brought Hong Kong in line with the approach of other common law jurisdictions like the United Kingdom and Australia. However, as with *Salford*

[24] *Re Sky Datamann (Hong Kong) Ltd* [2002] HKLRD (Yrbk) 22.
[25] *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449.
[26] Ibid [31].

Estates, the *Lasmos* approach has also been the subject of criticism. In *But Ka Chon v Interactive Brokers LLC*[27] ('*But Ka Chon*'), the Court of Appeal dismissed an appeal on not setting aside a statutory demand because the dispute should have been arbitrated. However, in obiter it commented that the Lasmos approach constitutes a significant curtailment of the creditor's statutory right to petition for bankruptcy and that preventing a creditor from exercising the statutory right to petition for winding up on the ground of insolvency would be 'contrary to public policy'.[28] A similar obiter comment was also expressed in *Sit Kwong Lam v Petrolimex Singapore Pty Ltd.*[29]

Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics[30] ('*Dayang*') continued with this competing approach, in which DHCJ Wong SC wound up the company despite there being an arbitration agreement. One party presented a winding up petition based on an unpaid debt, whereas the other party did not dispute the debt but raised a counterclaim in relation to an alleged breach of the agreement and submitted that the dispute should be resolved by arbitration. The court found that, while it was not obliged to stay the proceedings under s 20 of the *Arbitration Ordinance* as that section applied only to actions and not petitions to wind up, it could exercise its discretion to do so. As a matter of principle, it considered two distinct approaches by which this discretion could be exercised:

- The first approach, known as the '*Salford-Lasmos* approach', involved the three-part test set out by Harris J in *Lasmos*. This is generally perceived as a pro-arbitration approach;
- The second approach, known as the 'traditional approach', stated that it was insufficient for a party to simply assert that it disputed the debt; rather, that party had to demonstrate a bona fide dispute on substantial grounds before the court would exercise its discretion to stay the proceedings.

Ultimately, the court adopted the 'traditional' approach and refused to grant the stay on the basis that the respondent did not have a bona fide dispute on substantial grounds. The decision in *Dayang* demonstrates that the law in this area in Hong Kong remains in a state of flux and poses intriguing questions for an appellate court to determine going forward.[31]

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[27] *But Ka Chon v Interactive Brokers LLC* [2019] 4 HKLRD 85.
[28] Ibid 105 [62] (Kwan VP).
[29] *Sit Kwong Lam v Petrolimex Singapore Pty Ltd* [2019] 5 HKLRD 646, 658-9 [34]-[39] (Kwan VP for the Court). Note that *Sit Kwong Lam* did not involve an insolvent company.
[30] *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics* [2020] 2 HKLRD 423.
[31] Ibid (n 30) 457-62 [88]-[99].

Concluding remarks

While several jurisdictions have, in response to the potential influx of insolvency-related claims triggered by the pandemic, introduced amendments to their insolvency regimes, others have not. Australia introduced significant reform to the corporate insolvency regime to (amongst other things) provide a simplified debtor in possession restructuring process and a simplified liquidation pathway. In the United Kingdom, temporary measures suspending use of statutory demands and restricting winding-up petitions have been introduced. In Singapore, whilst some temporary measures such as an increased monetary threshold for winding-up proceedings were introduced in 2020, a Simplified Insolvency Programme has been launched in early 2021 providing for a simplified winding-up programme and debt restructuring for micro and small companies. Hong Kong has been relatively quiet, although a corporate rescue bill is expected to be tabled for legislative discussion in 2021. This will potentially introduce a statutory corporate rescue procedure in Hong Kong but is unlikely to provide immediate relief. It remains to be seen how these measures across jurisdictions will impact insolvency proceedings in a post-pandemic era.

With businesses around the world being impacted by the pandemic, and in view of the disruption to court proceedings and associated delays, the development and expansion of matters deemed to be arbitrable is critical to timely resolution of disputes. Savvy multinational corporations are appreciating the nuances in the different jurisdictions to ascertain what is most attractive to them in terms of certainty of processes available to resolve disputes. The insolvency process and arbitration can co-exist.

How courts tackle the issue of arbitrability of insolvency-related disputes differs across jurisdictions and remains an evolving area of jurisprudence. There are jurisdictions which tend to be more 'arbitration-friendly' towards insolvency-related disputes including Australia and the United Kingdom. Singapore is also in the same category but takes a more nuanced approach. On the other side of the coin, Hong Kong remains undecided on how to approach the tension between arbitration insolvency-related proceedings.

Accordingly, parties should be strategic in considering these potential issues when drafting their arbitration agreements and should revisit the applicable case law in the relevant jurisdiction or jurisdictions as and when issues arise before deciding on the appropriate choice of forum.

Sculpting the rules of the Court of Arbitration for Art: Facilitating commercial outcomes to art world disputes

Elizabeth Harris*

Abstract

In 2018 the Court of Arbitration for Art (CAfA) was founded as a joint initiative of Authentication in Art and the Netherlands Arbitration Institute. Focusing on the issue of authenticity disputes — a key economic and legal concern in the art market — this article examines the manner in which the CAfA Rules have been drafted to account for the specific needs of parties to art-related disputes. The article concludes that by taking consideration of — rather than fighting against — the economic imperative for secrecy and confidentiality in art disputes, the CAfA Rules promise a commercially intelligent forum for the resolution of art market disputes.

Part I: Introduction

In 2021, *The Art Market 2021* report (a publication of Art Basel and UBS) revealed that the global art and antiques market brought in US $50.1 billion.[1] The daily news has familiarised many of us with the workings of this supercharged (and super lucrative) legitimate market: In March this year, many outlets jumped on the $69 million sale of an NFT artwork by digital artist Beeple.[2] Popular culture has, in turn, frequently made use of the workings of the *illegitimate* art market for blockbuster storylines (think *The Goldfinch* and *The Thomas Crown Affair*). However, in between the legitimate and illegitimate art markets sits a 'grey' market, awash with art of shaky provenance and dubious authentication. While such art may be undesirable to own as it will suffer when appraised,[3] much of it does change hands, leading to inevitable disputes regarding authenticity and attribution.

This article examines how the establishment of the Court of Arbitration for Art (CAfA) caters for this inevitability, offering a specialised approach to dispute resolution for art market participants. Part II

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[1] Clare McAndrew, The Art Market 2021 (Annual Report, 2021) 30 <https://d2u3kfwd92fzu7.cloudfront.net/The_Art_Market_2021.pdf>.

2 Scott Reyburn, 'JPG File Sells for $69 Million, as "NFT Mania" Gathers Pace', The New York Times (online, 11 March 2021) <https://www.nytimes.com/2021/03/11/arts/design/nft-auction-christies-beeple.html>.

3 Elizabeth von Habsburg et al, 'Art Appraisals, Prices and Valuations' in Clare McAndrew (ed), Fine Art and High Finance (Bloomberg Press, 2010) 31, 55-6.

explains the importance of authenticity in the art market – for dealers, collectors and experts – and related issues. Part III discusses the establishment of CAfA and its unique characteristics. Part IV examines how the CAfA Arbitration Rules[4] account for the unique problems faced by art market actors through a tailored and commercially sensitive approach to its structure and proceedings. It also asks how CAfA and the Rules may adapt to changes in the art market, such as the advent of non-fungible tokens (NFTs). In light of this analysis, Part V concludes that the establishment of CAfA and the CAfA Rules provide a structure from which authenticity disputes can be approached and assessed with business acumen.

Part II: Authenticity and attribution as issues in the art market

Authenticity and attribution are two unique risks in the art market.[5] This article adopts the definition of 'authenticity' given by Walter Benjamin in his essay *The Work of Art in the Age of Mechanical Reproduction*. Benjamin stated that the 'presence of the original is the prerequisite to the concept of authenticity'.[6] He differentiated an (authentic) original from a reproduction, saying a reproduction lacks the original's 'presence in time and space, its unique existence at the place where it happens to be'.[7] I also use 'authenticity' as it relates to forgeries: An authentic work is one that was actually created by the artist it is purported to have been created by.[8] The term 'authenticity' is closely tied to the question of attribution, which refers to the assignment of a work as having been authored by a particular artist.[9] Another question of legitimacy which sits alongside authenticity and attribution is that of a work's provenance. 'Provenance' describes the origin of a work and is often explained by reference to the chain of title for an art object.[10] Provenance is an issue that frequently arises in relation to art restitution and disputes concerning cultural heritage.[11]

The problems of 'authenticity', 'attribution', and 'provenance' exist as a (dysfunctional) family that the art world has to reluctantly accept in its political and commercial operations. The interesting political and philosophical questions that these problems generate are outside the scope of this article, which focusses instead on how these issues (and the unavoidable disputes they beget) are treated commercially in the art market.

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[4] Court of Arbitration for Art, CAfA Arbitration Rules (adopted 1 January 2019) ('*CAfA Rules*') <https://www.cafa.world/docs/CAfA%20Arbitration%20Rules.1.pdf>.
[5] Thomas C Danziger and Charles T Danziger, 'The Illegal Art Trade' in Clare McAndrew (ed), *Fine Art and High Finance* (Bloomberg Press, 2010) 287, 287.
[6] Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Hannah Arendt (ed), *Illuminations: Essays and Reflections* (Schocken Books, 1969) 1, 3.
[7] Ibid.
[8] Tate, 'Art Term – Authenticity', *Art Terms* (Web Page) <https://www.tate.org.uk/art/art-terms/a/authenticity>.
[9] Tate, 'Art Term – Attribute', *Art Terms* (Web Page) <https://www.tate.org.uk/art/art-terms/a/attribute>.
[10] Ronald D Spencer and Gary D Sesser, 'Provenance: Important, Yes, But Often Incomplete and Often Enough, Wrong', *Artnet News* (online, 26 June 2013) <https://news.artnet.com/market/the-importance-of-provenance-in-determining-authenticity-29953>.
[11] See, eg, Geoffrey Robertson, *Who Owns History?* (Knopf, 2019).

From a risk perspective, these problems pose a considerable threat to art market confidence. In the *Deloitte Art & Finance Report 2019*, 77% of wealth managers surveyed said that a lack of transparency in the art market was the greatest threat to its credibility. Whereas 84% said that one of their key sources of concern was issues related to authenticity and provenance.[12] Purchasers' high sensitivity to issues of authenticity is illustrated by the abundance of authenticity verification service providers.[13] 4ARTechnologies,[14] Artory[15] and Verisart[16] are just a few 'art-tech' start-ups who have found their way in the Deloitte Report.[17]

As a highly specialised market, one may wonder why collectors can't just rely on experts to tell them whether a piece is the 'real deal'. The obvious answer is that of course the art world has many ways of verifying or supporting attribution and provenance. However, these methods are not flawless by any means. Take, for example, the use of a *catalogue raisonné*, which is the most obvious (for dead artists at least) way to verify attribution of a work. A *catalogue raisonné* is a comprehensive list of all known works by an artist (or group of artists), sometimes limited in scope by medium or date range.[18] *Catalogues raisonnés* can be politically sensitive documents. When in 2015 Gerhard Richter disowned works from his early West German period (1962 to 1968) — characterised by realistic, figurative works — specifically excluding them from his *catalogue raisonné*, he caused great consternation within the market.[19] The significance of a work's inclusion in a *catalogue raisonné* is such that its *exclusion* can render it practically worthless,[20] prompting legal action. In *The Mayor Gallery Ltd v The Agnes Martin Catalogue Raisonné LLC et al*[21] the plaintiff (Mayor Gallery) claimed millions of dollars in damages arising from the refusal of a foundation established by Agnes Martin's heirs to include a number of authentic works in a *catalogue raisonné* of Martin's work that it had published. The Court held in favour of the foundation, deciding that experts are free to decide on the (non-)inclusion of works, and that opinions on authenticity of this kind do not represent warranties.[22]

For living artists, the obvious way to clear up murky attribution is to go to the artist and confirm the piece's attribution with them. However, this avenue too is fraught with risk. Art lawyers Thomas and Charles Danziger tell a story of a well-known painter refusing to issue a written authentication to a

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[12] Deloitte and ArtTactic, *Art & Finance Report 2019* (Art & Finance Report series, No 6, 2019) 171 <https://www2.deloitte.com/lu/en/pages/art-finance/articles/art-finance-report.html>.
[13] Ibid 180-3.
[14] '4ARTapp', *4ARTechnologies* (Web Page) <https://www.4art-technologies.com/services/>.
[15] 'How It Works', *Artory* (Web Page) <https://www.artory.com/how-it-works/>.
[16] 'Learn', *Verisart* (Web Page) <https://verisart.com/learn>.
[17] Deloitte and ArtTactic (n 12).
[18] 'Catalogues Raisonnés Users' Guide', *International Foundation for Art Research* (Web Page) <https://www.ifar.org/users_guide.php>.
[19] Henru Neuendorf, 'Collectors Alarmed As Gerhard Richter Disowns Early Works From West German Period', *Artnet News* (online, 21 July 2015) <https://news.artnet.com/art-world/gerhard-richter-omits-art-from-catalogue-318665>.
[20] Quentin Bryne-Sutton, 'Arbitration and Mediation in Art-Related Disputes' (1998) 14 *Arbitration International* 447, 448.
[21] The Mayor Gallery Ltd v The Agnes Martin Catalogue Raisonné LLC et al (NY Sup Ct, 655489/2016, 2 July 2019).
[22] Ibid slip op 7, 11, 14.

collector because it was 'just a student work', even though the painter had in fact authored the piece![23] Artists may also be unreliable sources of truth, as they have their own economic incentives – Giorgio de Chirico was infamous for predating copies of work from more lucrative periods of his life.[24]

Artists themselves are not the only art market players with an economic imperative to authenticate or fail to authenticate a work. For collectors and dealers, limiting the supply of originals or the size of an artist's *oeuvre*,[25] or deciding to attribute a work to an artist's studio rather than the artist themselves, has an obvious effect (art historically and commercially) on the value of that specific work and other works by the artist. Even authentication committees are not immune from commercial pressure. Like an art teacher praising a child's 'abstract' finger painting to the parent who pays their tuition fees, experts who charge for opinions have a financial incentive to provide a favourable one.[26] This makes it challenging to find a reputable independent authenticator.

With decisions on authenticity and attribution being so political and having such drastic commercial implications, it is no wonder that experts have become increasingly reluctant to offer their opinions on authenticity and attribution, due to the reputational and legal implications of an incorrect attribution.[27] This is best exemplified by The Andy Warhol Art Authentication Board. The Board was closed in 2011 by the Warhol Foundation, due to a slew of lawsuits arising from collectors displeased by adverse decisions as to the authenticity of works they owned.[28]

The financial drivers for the various art market players described above show that, in a world without a single source of truth, disputes about attribution and provenance are unavoidable. The inevitability of such disputes is clear to all art market participants. Despite this recognised and unfortunate truth, in such a close-knit market anyone can understand that the victim of a false attribution may not wish to expose themselves by initiating litigation.[29] Indeed, confidentiality concerns can be a major barrier even to investigating claims, never mind litigating them: In one instance in the United States, a buyer sought to revoke a sale based on incomplete provenance, arguing that the provenance constituted a warranty under the Uniform Commercial Code.[30] Although the buyer accepted the work was authentic, the buyer argued that the lack of verifiable provenance back to the artist's studio made the work difficult to

[23] Danziger and Danziger (n 5) 294.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Charles Danziger and Thomas Danziger, 'On the Case: The Real Deal on Authenticity', *Artnet News* (online 8 May 2014) <https://news.artnet.com/market/on-the-case-the-real-deal-on-authenticity-14695>.
[28] Daniel Grant, 'New Legislation Would Protect Art Authenticators Against "Nuisance" Lawsuits', *Observer* (online, 6 April 2014) <https://observer.com/2014/06/dont-shoot-the-messenger-if-passed-new-legislation-would-protect-art-authenticators-against-nuisance-lawsuits/>.
[29] Noor Kadhim, 'Arbitration in the Art World and the Court of Arbitration for Art: Heading Towards a More Effective Resolution of Art Disputes?' (2019) 24 *Art, Antiquity and Law* 223, 227.
[30] Spencer and Sesser (n 10).

resell.[31] A major practical issue for the seller was that previous owners did not want their identities made public, making it impossible to develop a more complete provenance.[32]

All of these conditions culminate in a strong drive for confidentiality in the art market, making confidentiality a key tenant of the CAfA Rules. Moreover, CAfA's reliance on independent experts (at least more independent than the classes of experts described above) provides a forum well-suited to both the art market's suspicion of outsiders and its internal politics. The way that the CAfA Rules have been drafted to align with commercial drivers is detailed further in Part IV, following an overview of the establishment of CAfA in Part III.

Part III: Establishment of the Court of Arbitration for Art

The brainchild of William Charron, an art lawyer at Pryor Cashman, [33] the Court of Arbitration for Art was established in 2018[34] as a joint initiative of the Netherlands Arbitration Institute (NAI) and the Authentication in Art foundation (AiA).[35] The NAI is an alternative dispute resolution organisation founded in 1949.[36] The AiA is a non-profit organisation located in the Hague, comprised of 'a group of prominent art world professionals who joined together to create a forum that can act to catalyse and promote best practices in art and authentication'.[37]

During its development, CAfA was intended to serve as a court for the resolution of legal disputes involving the (in)authenticity of paintings.[38] By the time of its launch on 8 June 2018, the Court's remit had expanded to include all art related disputes.[39] In addition to providing arbitration, CAfA facilitates mediation under the CAfA Mediation Rules and the AiA/NAI Adjunct Mediation Rules.[40]

The CAfA Rules came into force on 1 January 2019,[41] meaning parties can now submit a dispute to CAfA arbitration through a contractual arbitration clause or submission agreement.[42] Allowing for submission of disputes to CAfA under a submission agreement provides for the art market's notorious

[31] Ibid.
[32] Ibid.
[33] Sarah Dewar, 'Court of Arbitration for Art Opens its Doors', *Denver Law Review* (Online Article, 5 July 2019) <https://www.denverlawreview.org/dlr-online-article/court-of-arbitration-for-art-opens-its-doors>.
[34] 'Court of Arbitration for Art', *CAfA* (Web Page) <https://www.cafa.world/cafa/about_us/>.
[35] Riah Pryor, 'Art arbitration panel in The Hague steps up a gear to tackle complex disputes', *The Art Newspaper* (online, 8 May 2020) <https://www.theartnewspaper.com/news/art-arbitration-panel-steps-up-a-gear-to-tackle-disputes>.
[36] 'Netherlands Arbitration Institute - Welcome', *Netherlands Arbitration Institute* (Web Page) <https://www.nai-nl.org/en/>.
[37] 'About Us', *Authentication in Art* (Web Page) <https://authenticationinart.org/about-us/>.
[38] 'CAfA: A Brief History', *Authentication in Art* (Web Page) <https://authenticationinart.org/cafa/>.
[39] Ibid.
[40] 'Mediation', *Court of Arbitration for Art* (Web Page) <https://www.cafa.world/mediation/>.
[41] *CAfA Rules* (n 4).
[42] Ibid explanatory note [3.1].

reliance on 'gentlemen's agreements' and handshake deals.[43] Where a sale has not been documented, the parties can agree to submit the dispute to CAfA through a submission agreement.[44] This also facilitates submission of disputes to CAfA in its early years, noting that it is not known how many art market players are currently including CAfA arbitration clauses in their contracts.

Although CAfA is still in its nascency, the CAfA Arbitration Rules evidence the Court's commercial outlook and appreciation of the unique customs and characteristics of the art market.

Part IV: Commercial sensitivity and the Court of Arbitration for Art rules

Having provided an overview of some of the unique commercial problems faced by the art market concerning attribution, Part IV examines how two themes of the CAfA Rules cater to the resolution of disputes arising from these problems. The first of these is the emphasis placed on utilising the services of art market experts, both as arbitrators and as expert witnesses. The second is the confidential nature of CAfA proceedings and decisions, and the level of control given to disputants to determine whether the decision handed down in their dispute is published.

Arbitrators with art market nous and a curated expert pool

Like the historical *lex mercatoria* — a medieval concept that merchants were the best adjudicators of their own disputes, given their experience in transactions and familiarity with the market[45] — the CAfA Rules facilitate a considered collaboration between legal and art-market experts to come to a solution that will be accepted by art market players. The CAfA Rules accommodate specialised determination of disputes through the use of two 'pools': an arbitrator pool and an expert pool.

The arbitrator pool

Article 11(6) of the CAfA Rules mandates that CAfA disputes be determined by arbitrators drawn from the arbitrator pool.[46] The Explanatory Notes to the CAfA Rules explain that the arbitrator pool is 'composed of international lawyers with demonstrated experience in litigating or counselling clients in art law disputes and/or international arbitration'.[47] The Explanatory Notes identify an example of such

[43] Jane Parsons and Claire Morel de Westgaver, 'A New Arbitral Institution for the Art World: The Court of Arbitration for Art', *Kluwer Arbitration Blog* (Blog, 17 June 2018) <http://arbitrationblog.kluwerarbitration.com/2018/06/17/a-new-arbitral-institution-for-the-art-world-the-court-of-arbitration-for-art/>.
[44] *CAfA Rules* (n 4) explanatory note [3.4].
[45] Richard Howarth, 'Lex Mercatoria: Can general principles of law govern international commercial contracts?' [2004] 10 *Canterbury Law Review* 36.
[46] *CAfA Rules* (n 4) art 11(6).
[47] Ibid explanatory note [2.1].

art law disputes as those involving 'unique, market-specific considerations'.[48] Friederike Gräfin von Brühl, a partner at K&L Gates and one of the experts appointed to the arbitrator pool,[49] said that the appointment of art market experts as arbitrators means there 'is no more need to explain the ABC of the art market in a courtroom'.[50] The first round of recruitment for the pool resulted in the appointment of thirty specialists with arbitrator experience,[51] while a second round of a further hundred and seventy appointments focussed on qualified art lawyers and market experts.[52] While the existence of a compulsory pool of arbitrators means that disputants must trust CAfA's management team to appoint the 'right people',[53] these rounds that target different groups of potential arbitrators seem to be aimed at providing an appropriate mix of specialities.

Although arbitrators are drawn from industry, their duty to CAfA is made clear. Article 11 imposes duties on arbitrators of CAfA to confirm their independence and impartiality upon accepting their mandate,[54] and to communicate any justifiable doubts as to their impartiality or independence if such doubts arise during arbitral proceedings.[55]

The method of appointing arbitrators should inspire faith in CAfA among art market participants. By appointing art market experts, CAfA will eliminate the delays arising from having to 'educate' a judge on the art market. The default number of three arbitrators for a panel[56] also avoids having to educate decision makers on certain domestic laws, accounting for the international character of the art market by providing a range of specialities on any given panel.

The CAfA Rules do, however, provide for circumstances where the pool fails to provide arbitrators with the necessary speciality for a dispute. Article 11(6) allows for arbitrators to be appointed from outside the arbitrator pool 'only in the event of compelling reasons'.[57] The Explanatory Notes give an example of compelling reasons as 'the desirability of an arbitrator with a very specific background and the absence of such an arbitrator in the Arbitrator Pool'.[58]

The adaptability of the arbitrator pool may help CAfA to respond more effectively to the changing needs of the art market. As briefly mentioned in Part I, 2021 has seen a dramatic rise in the prominence

[48] Ibid.
[49] 'Pool of Arbitrators – Friederike Gräfin von Brühl', *Court of Arbitration for Art* (Web Page) <https://www.cafa.world/arbitration/pool/friederike_gr%C3%A4fin_von_br%C3%BChl/>.
[50] Pryor (n 35).
[51] Ibid.
[52] Ibid.
[53] Kadhim (n 29) 232.
[54] *CAfA Rules* (n 4) art 11(4).
[55] Ibid art 11(5).
[56] Ibid art 12(2).
[57] Ibid art 11(6).
[58] Ibid explanatory note [5.1].

of non-fungible tokens (NFTs) in the art world. NFTs have been feted as a way of authenticating digital works; by bundling a work with an NFT, the argument is that the authentic work will be identifiable.[59] In fact, NFTs seem only to complicate questions of authenticity. The recent mass-issuing of NFTs was described by David Hockney as the domain of 'international crooks and swindlers'.[60]

Leaving aside a discussion of the intricacies of blockchain technology, the problem with NFTs in the art market was summarised by *Slate* magazine as that 'the NFT tells you whether you have *a* copy. It does not tell you whether you have *the* copy'.[61] Only the token (not the artwork) is 'non-fungible', and anyone can make an NFT of any digital artwork.[62] The possibilities for disputes abound. With its focus on generating a pool of expert arbitrators, will the next round of appointments to CAfA include blockchain technologists? Considering that NFTs are an emerging market, will CAfA's restrictions around appointments hinder the efficient resolution of disputes? Will there be enough dual NFT/art experts who can be appointed, to ensure the Court achieves its objective of avoiding explaining the basics of the art market to decision makers? As the AiA seeks to promote 'leadership and shape dialogue'[63] it is hoped that CAfA will find a way to adapt to the modernisation of the art market.

Despite the challenges posed to the market by such developments, it is clear that arbitrators are expected to have a finger on the pulse of the art market, as art 42 ensures that arbitrators cannot simply sit in an ivory tower. Article 42(4) states that 'In any event, in its decision the arbitral tribunal shall take into account any trade usages'.[64] Note 9.2 puts even more emphasis on market nous, saying 'the arbitral tribunal is to base its decisions on the rules of law, while *respecting* any applicable (art) industry trade usages',[65] implying that art market practices are to be maintained rather than merely considered. Article 42 ensures that the operation of law will be tempered by 'insider' knowledge of the art sector, factoring into decision making the unique aspects of the art market discussed in Part II. Indeed, art 42(3) goes so far as to allow parties, by agreement, to authorise the arbitral tribunal to 'decide as amiable compositeur',[66] eschewing the strict application of legal rules in favour of general notions of fairness and equity.[67]

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[59] Kal Raustiala and Christopher Jon Sprigman, 'The One Redeeming Quality of the NFTs Might Not Even Exist',*Slate* (online, 14 April 2021) <https://slate.com/technology/2021/04/nfts-digital-art-authenticity-problem.html>.
[60] 'Season 3, Episode 13', *Waldy and Bendy's Adventures in Art* (4 April 2021).
[61] Raustiala and Sprigman (n 59).
[62] Ibid.
[63] *CAfA Rules* (n 4) explanatory note [1.1].
[64] Ibid art 42(4).
[65] Ibid explanatory note [9.2] (emphasis added).
[66] Ibid art 42(3).
[67] Anya George, 'The Hidden Amiable Compositeur', *Kluwer Arbitration Blog* (Blog, 20 April 2015) <http://arbitrationblog.kluwerarbitration.com/2015/04/20/the-hidden-amiable-compositeur/#:~:text=An%20arbitrator%20who%20decides%20a,the%20terms%20will%20be%20used>.

The expert pool

Article 28(7) states that '[o]n issues of forensic science or the provenance of an art object, the only admissible expert evidence shall be from an expert … appointed by the arbitral tribunal. The arbitral tribunal may appoint such experts from within the Expert Pool'.[68] The Explanatory Notes offer insight into the design of the expert pool. Note 2.2 states that 'Art authenticity is typically understood to be evaluated according to standards of connoisseurship, provenance research and forensic science'. In appointing experts to the pool, CAfA seems to be attempting to set an industry standard for the quality and stature of experts who can determine these disputes.

By restricting evidence on forensic science (closely related to issues of attribution and authenticity) and provenance, the CAfA Rules account for the insular nature of the art market. The art market is not accustomed to trusting outsiders, even if that outsider is a judge. In *Greenberg Gallery Inc v Bauman*,[69] the Court held that the disputed work was an authentic Alexander Calder, despite contradictory testimony of Klaus Perls, the recognised authority on Calder. The decision allowed the seller to retain the purchase price of $500,000. However, the art market's response was to exclude the work from Calder's *catalogue raisonné*, and the work remained unsold. Patently in the eyes of the art market Perls was the greater authority on Calder. In handing down its decision, the Court stated that while Perls' assessment would destroy the piece's market value, '[t]his is not the market, however, but a court of law, in which the trier of fact must make a decision based upon a preponderance of the evidence'.[70] There is a clear disjunct here between the law and commercial realities.

The incentive that exists in art market litigation to find a 'friendly' expert is nullified in CAfA arbitration. Explanatory Note 2.2 states that providing the pool is an alternative 'to having disputing parties retain their own respective experts … with such experts then advocating for their sides'.[71] As art lawyer Luke Nikas says, the CAfA 'experts are responsible to the objective or truth. Their loyalty is to the arbitration panel'.[72] This eliminates the risk (common in most industries when it comes to litigation) of parties adducing the evidence of paid expert witnesses who have an obvious incentive to provide evidence that supports their employing party's position (no matter what they say when they make their oath in court). Article 28(7) appears to be an appropriate solution to the risk and expense of parties producing their own experts in a field fraught with fraud and reputational concerns. In a recent

[68] *CAfA Rules* (n 4) art 28(7).
[69] *The Greenberg Gallery Inc v Bauman,* 817 F. Supp. 167 (D.D.C. 1993) ('*Greenberg Gallery*') <https://law.justia.com/cases/federal/district-courts/FSupp/817/167/1459430/>.
[70] Ibid 174.
[71] *CAfA Rules* (n 4) explanatory note [2.2].
[72] Laura Gilbert, 'New tribunal aims to provide expertise and impartiality for art disputes', *The Art Newspaper* (online, 7 May 2018) <https://www.theartnewspaper.com/news/new-tribunal-aims-to-provide-expertise-and-impartiality-for-art-disputes>.

article, Noor Kadhim asked why the expert pool provision was made to apply to provenance research,[73] presumably because collectors and dealers would hold much of this information themselves. Explanatory Note 2.2 appears to answer this question, highlighting the fact that parties 'may retain their own consulting experts to assist in their work with, and examinations or cross-examinations of, such tribunal-appointed experts'. In this way, development of expert evidence becomes a rigorous, collaborative effort, that is standardised and quality assured by CAfA's expert pool.

Finally, art 61 limits the liability of 'any expert that may have been appointed by the arbitral tribunal', stating that they: 'shall not be liable either by contract or otherwise for any damage caused by their own or any other person's acts or omissions or caused by the use of any aids in or involving arbitration, all this unless and insofar as mandatory Dutch law precludes exoneration.'[74]

As discussed in Part II with regard to the Warhol Foundation, those engaged in art market disputes are not beyond suing experts as a result of harm suffered arising from their opinion. Article 61 should operate to allay the fears of experts who appear before the Tribunal that an undesirable opinion will put them at risk of civil suit.

Confidentiality

In Part II, this article briefly noted the widespread desire for confidentiality in the art market, and how this can dissuade disputants from pursuing litigation. Article 6 of the CAfA Rules states that '[a]rbitration is confidential and all persons involved either directly or indirectly shall be bound to secrecy, except and insofar as disclosure ensues from the law or the parties' agreement'.[75] The promise of confidentiality addresses the commercial impetus for art market players to avoid the public process of litigation.

The drive for confidentiality is motivated by the desire of art market participants to preserve their reputations (whether personal or professional) and the commercial need to maintain the legitimate status of a piece. Bryne-Sutton describes one instance that underlines how these two factors are intertwined:[76] An impressionist painting was sold, having been attributed to a well-known artist by an expert. However, the dealer did not disclose to the purchaser the fact that a prior, contradictory opinion as to attribution existed. When the purchaser discovered the prior attribution, they threatened to sue the dealer. The dispute went to mediation, through which process the dealer agreed to give the purchaser another painting of lower value from the gallery's stock. In exchange, the collector would return the

[73] Kadhim (n 29) 231.
[74] *CAfA Rules* (n 4) art 61.
[75] Ibid art 6.
[76] Bryne-Sutton (n 20) 450.

disputed painting to the dealer. This outcome – diverting the dispute from the courts – allowed the dealer *and* the painting to maintain their reputation, saving the dealer embarrassment and giving them an opportunity to further investigate attribution and resell the painting.

The important factor to remember is that judgments on attribution can be very subjective.[77] The objective information which informs these opinions, such as scientific and historical knowledge, improves over time but is not a panacea. For example, tools of technical analysis such as radiocarbon and thermoluminescent dating may determine the age of a piece,[78] but not the artist who made it. In addition, the art market's respect for an attributor's 'gut instinct' (which can be correct) is not one shared by the rules of evidence. Considering the liability of attribution to change, it can be unfair (commercially speaking) to allow public litigation to negatively affect the value of a work.[79] Even if a work's authenticity or attribution is successfully defended, the suit can cast a pall over the work. In *Greenberg Gallery* (discussed above), the disputed work, a mobile by Alexander Calder, remained unsold after the case was decided, despite the fact that the Court held it was a legitimate Calder work.

So far, so (secretly) good. However, in a dilemma worthy of an article on game theory, it is worth noting that the confidential forum offered by CAfA may actually dissuade disputants from using the Court. The threat of negative publicity and a decrease in a work's value implicit in litigation may motivate dealers *not* to include confidential arbitration clauses[80] in agreements. The threat of a public dispute may put collectors off going to court, or put pressure on them to settle, to the benefit of a dealer.

Confidentiality is further enhanced by art 51 which concerns the publication of awards of CAfA. Article 51 provides that the NAI can have the award published an anonymised form (without party names or identifying facts)[81] in the *Tijdschrift voor Arbitrage* arbitration journal.[82] The award will not be published if one of the parties lodges an objection to the administrator within two months of the date of the award.[83] This provides some security to parties who may either be embarrassed by the dispute, or who do not want their collections tainted by association: imagine being David Mirvish, the Canadian collector who invested in multiple paintings sold by the notorious Knoedler gallery who the director of Netflix hit *Made You Look: A True Story About Fake Art* speculated was (among other victims of the fraud) 'too embarrassed to talk'.[84]

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[77] Ibid 452.
[78] Danziger and Danziger (n 5) 296.
[79] Bryne-Sutton (n 20) 452.
[80] Kadhim (n 29) 227.
[81] *CAfA Rules* (n 4) art 51.
[82] 'CAfA Arbitration', *Netherlands Arbitration Institute* (Web Page) <https://www.nainl.org/en/cafa/cafa_arbitration/>.
[83] *CAfA Rules* (n 4) art 51.
[84] David d'Arcy, 'How a Canadian documentary director got the major players in the Knoedler fakes scandal to speak on camera', *The Art Newspaper* (online, 1 May 2020) <https://www.theartnewspaper.com/interview/how-a-canadian-documentary-director-got-the-major-players-in-the-knoedler-fakes-scandal-to-speak-on-camera>.

Notably, although art 51 provides that the names of parties will be censored, the 'name or identity of the art object in question may be revealed'.[85] By identifying objects subject to a CAfA arbitration, the Rules balance confidentiality with art market legitimacy. This proviso goes some way to ensuring that questionable goods will not be recirculated in the market, although it is unclear why a collector would ever allow publication if it may decrease the value of the object.

A further problem arises when by identifying a work one might identify the owner (and therefore party to the dispute), generating an internal conflict in the operation of art 51. Mystery buyers and the image of the anonymous telephone bidder at a Sotheby's auction are familiar art market tropes that illustrate first, the public's fascination with art ownership, and second, the widespread wish of owners to stay out of the public eye. A recent example of these competing desires was the furore surrounding the identity of the buyer of da Vinci's *Salvator Mundi*, sold for $450.3 million in 2017.[86] This is not a major issue, since parties can object to publication, but how CAfA intends to deal with publication of decisions where identifying an object would identify a party (where they are well known as the owner) remains to be seen.

Where the parties do not object to publication, art 51 brings us back to the problem of a piece's value dropping after being subject to dispute resolution processes, as in *Greenberg Gallery*. The innate difference between the litigation over the Calder piece and the process set up under the CAfA Rules is that CAfA arbitration is led by members of CAfA's expert pool. This enfranchises members of the art market to determine their own disputes. Perls' opinion, provided to a layperson (so far as the art world is concerned), was trumped by the operation of generic evidence law and the regimented structures of litigation, which are not tailored to the unique character of the art market. This would be less likely in a CAfA arbitration due to the emphasis placed on art market involvement and expertise. Theoretically, changes in value as a result of a CAfA decision should align with art market value.

Overall, the balance CAfA has struck in arts 6 and 51 between art market legitimacy and confidentiality weighs heavily in favour of confidentiality. The ability of parties to object to the publication of decisions means that dubious objects could continue to circulate in the market to unwitting buyers. However, as the expert pool provides greater assurance of the legitimacy (in art market terms) of a decision, and as much of the need for CAfA derives from the issue that developments in scholarship and technology can result in differing decisions on attribution and authenticity over time, in this regard the CAfA Rules are

[85] CAfA Rules (n 4) art 51.

[86] David D Kirkpatrick, 'Mystery Buyer of $450 Million "Salvator Mundi" Was a Saudi Prince', *The New York Times* (online, 6 December 2017) <https://www.nytimes.com/2017/12/06/world/middleeast/salvator-mundi-da-vinci-saudi-prince-bader.html>.

a pragmatic offering to a predominately unregulated market that otherwise suffers without an appropriate dispute resolution forum.

Part V: Conclusion

The Court of Arbitration for Art is, as for any other alternative dispute resolution forum, not perfect for all disputes. However, the drafting of the CAfA Rules does present a tailored approach to arbitrating art market disputes, cognisant of the unique commercial pressures and risks faced by art market participants. Having provided a basic understanding of some of the unique market pressures in the art sector in Part II, Part III described how CAfA was established to respond to the market's needs. Part IV then discussed how two key themes in the CAfA Rules – the use of art market experts and the confidential nature of the forum – provide a foundation for a useful dispute resolution institution for the art world.

The bane of an art lover's life is hearing someone next to them in a gallery saying 'my kid could do that'. Any admirer of Pollock would balk at that. However, that same parent likely jealously guards their child's creations, asking them to put a handprint on, or sign their name before it is displayed on the fridge. If a parent's focus on attributing their child's work (no matter the quality) is understandable, then is it any wonder the art industry requires the paternalistic intervention of CAfA? At least CAfA, unlike an ordinary court, understands the market's whims, much as a parent understands their child.

Arbitration of shareholder and trust disputes

Albert Monichino QC*

Abstract

Shareholder oppression disputes are notoriously protracted and acrimonious. Private arbitration offers a viable and desirable alternative to traditional court proceedings for the resolution of such disputes. This article contends that shareholder oppression (and trust) disputes are arbitrable, by reference to recent Australian cases as well as leading cases in the Asia-Pacific region. It further contends that such disputes should be arbitrated and not litigated. To conclude, this article offers some tips to assist in drafting arbitration clauses within shareholder agreements, trust deeds and standalone submission agreements.

Introduction

Shareholder oppression disputes, sometimes referred to as 'corporate divorces',[1] are notoriously painful, protracted, and acrimonious. They are invariably litigated in the courts. However, private arbitration offers a viable and desirable alternative for resolving such disputes.

This article begins by describing the anatomy of a typical shareholder oppression dispute. Often parties choose to conduct their business through a combined corporation and trust structure. The trust is often a unit or discretionary trust. The company is invariably the trustee of the trust. The underlying protagonists (or entities related to them) are usually the directors and shareholders of the trustee company, and beneficiaries of the trust through which the business is conducted. A large proportion of these disputes involve small businesses, and most commonly, family businesses.[2]

This article explores the question of arbitrability of both shareholder oppression disputes and trust disputes by reference to recent Australian cases, as well as leading cases in the Asia-Pacific region. Having established that shareholder oppression (and trust) disputes are arbitrable, this article makes the case that such disputes *should* be arbitrated and not litigated. To conclude, various considerations are

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[1] Samantha S Tang, 'Corporate Divorce in Family Companies' (2018) 1 *Lloyd's Maritime and Commercial Law Quarterly* 19.

[2] Supreme Court of Victoria, Practice Note SC CC 8: Oppressive Conduct of the Affairs of a Company (18 May 2018) 2 [4.2] ('Oppressive Conduct of the Affairs of a Company').

discussed to assist in drafting arbitration clauses within shareholder agreements,[3] trust deeds and standalone submission agreements.

Anatomy of a typical shareholder/trust dispute

The legal framework

Section 232 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') provides that the Supreme Court of a state or territory or the Federal Court may make a relevant order if, among other things, there is actual or proposed conduct by or on behalf of the company which is oppressive, unfairly prejudicial, unfairly discriminatory, or contrary to the interests of the members as a whole.[4]

The offending conduct must be against a member in their capacity as a member, or alternatively in some other capacity (for example, in the capacity of a director, creditor or employee).[5] If satisfied that oppression has occurred, the court has a sweeping discretionary power under s 233 to make orders 'in relation to the company'. The most commonly sought order is for the buy-out of a member's shares.[6]

Where oppression cannot be established under s 233, plaintiffs have commonly argued that the circumstances render it 'just and equitable' to have the company wound up under s 461(1)(k) of the *Corporations Act*.[7] Significantly, a company may be wound up under this provision without any proof of oppressive conduct.

There are several limitations on the availability of the winding up remedy. First, where the plaintiff has brought the application with 'unclean hands'.[8] Second, where there is an alternative remedy available,[9] which need not be a legal remedy,[10] or where there exists 'fair machinery for the plaintiff to exit the company by being bought out', an application to wind up the company will ordinarily be refused.[11]

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[3] A shareholder agreement 'regulates the relationship between shareholders with regard to the management and control of the company': Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis, 17th ed, 2018,) [6.330.3].
[4] Corporations Act 2001 (Cth) ss 232 ('Corporations Act').
[5] Ibid.
[6] Ibid s 233.
[7] This may be on the basis that there is an irretrievable breakdown between the controllers of the company resulting in a lack of mutual trust and confidence: see, eg, *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97, [89] (Spigelman CJ); *Knights Quest Pty Ltd v Daiwa Can Company* [2018] VSC 426, [157]-[160] (Sifris J). Another basis may be where there is a deadlock in the management of the company: see, eg, *Exton v Extons Pty Ltd* (2017) 53 VR 520, 525 [18] (Sifris J) ('*Exton'*); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 360 [177] (Gummow, Hayne, Heydon and Kiefel JJ).
[8] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 387; *Re Amazon Pest Control Pty Ltd* [2012] NSWSC 1568, [22] (Black J). A plaintiff whose misconduct was 'causative of the breakdown in confidence upon which the proceedings were based' is not entitled to relief: *Jeruth Pty Ltd v Haybale Pty Ltd* [2004] VSC 319, [39] (Redlich J). See also *Guerinoni v Argyle Concrete & Quarry Supplies Pty Ltd* (1999) 34 ASCR 469, [28]–[43] (Kennedy J).
[9] *Corporations Act* (n 4) s 467(4).
[10] *Host-Plus Pty Ltd v Australian Hotels Association* [2003] VSC 145, [67] (Hansen J); *Exton* (n 7) 543 [84] (Sifris J).
[11] *McEwen v Combined Coast Cranes* (2002) 44 ACSR 244, [72] (Young J) ('*McEwen*'); see also *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458, 465 (Smith J).

Third, where the company is solvent and has a number of employees.[12] In that regard, it is often said that winding up is a remedy of last resort.[13]

The typical factual matrix

It is common for small and family businesses to conduct their operations through a combined company and unit trust structure.[14] Oppression disputes are often complicated by such combined structures. In these combined structures, parties typically own an equal number of shares in a company which is the trustee of the unit trust, and (either directly or indirectly) an equal number of units in the underlying unit trust. Less commonly, the company may be the trustee of a discretionary trust.

A unit trust is a species of fixed trust. The unit holders own a fixed share of the corpus of the trust. The original unit holders (together with the settlor and the trustee) sign the trust deed and there is invariably a provision in the trust deed providing that any transferee of the units takes the units subject to the terms of the trust deed.

Common oppression allegations include exclusion from participation in management, denial of access to corporate information, dilution of minority shareholding, and misappropriation of company funds or resources. Regardless of whether a buyout or wind-up order is sought, questions often arise as to the relief that the court can grant in respect of the underlying trust (where the real value of the business enterprise lies).[15]

Vigliaroni v CPS Investment Holdings Pty Ltd ('*Vigliaroni*') provides an example of a typical oppression dispute.[16] In *Vigliaroni*, a company director named Gargaro created several unit trusts and made several companies the trustees of those trusts. These companies, through the respective unit trusts, operated an interlocking Australia-wide business. Gargaro and his quasi-partner in the business, Ivan Vigliaroni (Ivan), through related entities, were shareholders and unit holders in the underlying trusts. Gargaro unilaterally excluded Ivan from the management of the companies and denied Ivan access to the books and records of the companies.[17] Gargaro (who acted as the company's financial controller) dealt with unitholder loans unequally and diverted $1.2 million into a unit trust in which he had majority ownership. He also siphoned off company/trust funds for his personal purposes, including for defending

[12] *Belgiorno-Zegna v Exben Pty Ltd* [2000] NSWSC 884, [157] (Hodgson CJ in Eq); *ASIC v ABC Fund Managers* (2001) 39 ACSR 443, 469–70 [119] (Warren J); *Re Wyndham Park Estate Pty Ltd* [2019] VSC 92, [43] (Sifris J) ('*Re Wyndham Park Estate*').
[13] *Re Dalkeith* (1984) 9 ACLR 247, 252 (McPherson J); *Exton* (n 7) 545 [89] (Sifris J), approved in *Re Wyndham Park Estate* (n 12) (Sifris J).
[14] Oppressive Conduct of the Affairs of a Company (n 2) 2 [4.2].
[15] See observations made by Young J (as he then was) in *Kizquari Pty Ltd v Prestoo Pty Ltd* (1993) 10 ACSR 606, 612 ('*Kizquari*').
[16] [2009] VSC 428 ('*Vigliaroni*').
[17] Ibid [77] (Davies J).

the oppression proceedings brought against him by Ivan.[18]

The trial judge held that Gargaro had engaged in oppressive conduct pursuant to s 232.[19] The difficult question was whether the Court had power under s 233 to order to compel Gargaro to sell his units in the unit trust of which the company was the trustee?

Gargaro argued, in reliance on a line of NSW cases,[20] that even if the Court found oppression on his part, it had no power to grant any order for the compulsory purchase of his units in the various unit trusts. This was rejected by Davies J who noted that s 232 requires, inter alia, consideration of whether there has been oppression in the 'conduct of a company's affairs',[21] which is defined by s 53 of the *Corporations Act* to include a trust's affairs where the company acted as trustee. It followed that the scope of the remedy in s 233 included relief in respect of conduct that affected a member/shareholder of the trustee company in that member's capacity as a beneficiary of the trust of which the company was trustee.

Justice Davies had no doubt that she had power under s 233 to make an order for the compulsory purchase of units in the underlying unit trusts. Her Honour opined that s 233 requires there be 'a rational and discernible link between the remedy, and the company in which the oppression had occurred'.[22] Applying this approach to the case at hand, she found the requirement was satisfied as the affairs of the several trusts were inextricably linked with the affairs of the trustee companies, such that a separation of interest between companies and trusts was plainly artificial.[23]

Justice Davies also observed that the High Court in *Campbell v Backoffice*[24] affirmed that s 232 and 233 should be interpreted broadly and not in the limited way they were in *Kizquari*. Although the correctness of *Vigliaroni* was doubted by Windeyer AJ in *Trust Company Ltd v Noosa Venture 1 Pty Ltd*,[25] that criticism was based on too narrow an interpretation of s 233 of the *Corporations Act* according to Ferguson J (as she then was) in *Wain v Drapac*.[26]

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[18] Ibid [78].
[19] Ibid [76].
[20] *Kizquari* (n 15). This was followed by *Ciccarello, Re Adelaide Property Development Pty Ltd v Cubelic* [2008] FCA 141, [28] (Mansfield J); *Surf Road Nominees Pty Ltd v James* [2004] NSWSC 61, [219] (Einstein J); *McEwen* (n 11) [46] (Young J); *Re Polyresins Pty Ltd* [1999] 1 Qd R 599, 614 (Chesterman J).
[21] *Corporations Act* (n 4) s 232(a).
[22] *Vigliaroni* (n 16) [68] (Davies J).
[23] Ibid [86]. Davies J at [69] considered that the NSW cases relied upon by Gargaro were not correctly decided, to the extent that they found the Court lacked the power to order compulsory buyouts of units in underlying unit trusts of which a company is trustee.
[24] (2009) 238 CLR 304, 334 [72] (French CJ).
[25] [2010] NSWSC 1334. An order in relation to a company may not include an order in relation to the affairs of the underlying trust of which the company acted as trustee: at [105].
[26] [2012] VSC 156, [287].

Ultimately, *Vigliaroni* extended the application of oppression remedies to combined company/trust structures (or at least those involving unit trusts where the aggrieved unit holder was also a shareholder in the trustee company). While *Vigliaroni* has been applied in Victoria,[27] it has been doubted in other Australian jurisdictions and by some commentators.[28]

Theoretically, equivalent relief to that provided in *Vigliaroni* could be granted where the relevant company is the trustee of a discretionary trust.[29] For example, an order might be made pursuant to s 233(1)(j) requiring the defendant to resign his/her position as an Appointor or Guardian under, and renounce their interest in, the relevant trust.[30] On the other hand, if oppression relief is not available in respect of unit trusts, a fortiori it is not available in relation to discretionary trusts.[31]

Victorian Law Reform Commission Report

The perceived deficiencies in remedies available to beneficiaries of trading trusts[32] led to a reference to the Victorian Law Reform Commission (VLRC) in 2015 to consider the issue.[33] The VLRC recommended that there should be a remedy for beneficiaries of trading trusts in respect of conduct in the affairs of a trust, similar to the remedies in s 233 of the *Corporations Act.* It considered that while some of the equitable remedies may, to some extent, fulfil the goals of the oppression remedy, those remedies were limited. Thus, the VLRC recommended that the *Trustee Act 1958* (Vic) be amended to include an oppression remedy (equivalent to that contained in ss 232–3 of the *Corporations Act*) which would be available to any beneficiaries of a 'trading trust' (including a discretionary trust).[34]

The VLRC recommendations are yet to be adopted in Victoria.

The New South Wales Law Reform Commission Report

The New South Wales Law Reform Commission (NSWLRC) considered the issue in 2018.[35] While it conceded that trusts law did not provide beneficiaries with equivalent remedies to shareholders under the *Corporations Act* oppression remedy,[36] the NSWLRC concluded that current trust law provides adequate remedies for a beneficiary who is 'oppressed'. The term 'oppressed' was used in the sense in

[27] See ibid. See also *Arhanghelschi v Ussher* [2013] VSC 253, [55] (Ferguson J); *Re Wyndham Park Estate Pty Ltd* (n 12) [44] n 20 (Sifris J); *Re Junior Academy ELC Pty Ltd (No 3)* [2019] VSC 161, [25] (Robson J).
[28] See, eg, Michael May, 'Oppression in the Context of Corporate Trustees' (2013) 87 *Australian Law Journal* 271; Braydon Heape, 'Oppression Proceedings and Trust Remedies: What Are the Limits?' (2013) 31 *Company and Securities Law Journal* 325.
[29] Although this is doubted, see Heape (n 28) 329.
[30] See, eg, *Re F Vitale & Sons Pty Ltd* [2018] VSC 111, [13] (Sifris J).
[31] See Heape (n 28) 329.
[32] Broadly speaking, a trading trust is a trust that holds property that is employed in the conduct of a business.
[33] Victorian Law Reform Commission, *Trading Trusts: Oppression Remedies* (Report, January 2015).
[34] Ibid [2.73]–[2.111].
[35] *NSWLRC Report* (n 28). Since *Vigliaroni*, there had been no cases of note on the topic prior to publication.
[36] Ibid [3.21].

which the term is used in company law.[37]

The NSWLRC concluded that companies and trusts are fundamentally different and thus the relationship between beneficiaries was not equivalent to that between shareholders, especially in the context of discretionary trusts.[38]

It considered that a compulsory buy-out order would have limited application (if any) in the context of a trust (other than a unit trust), and that it was undesirable to introduce a radical new remedy into trust law that would only operate in respect of a discrete category of trusts.[39]

The NSWLRC was not persuaded that an oppression remedy for discretionary trusts would be consistent with the defining feature of such trusts ie the trustee's discretion to discriminate between beneficiaries. In its view, it was undesirable to have such a remedy available for some trusts but not for others.

Finally, the NSWLRC considered that there were advantages in having consistency across the Australian jurisdictions which would be best achieved by the Commonwealth amending the *Corporations Act* to make it clear beyond doubt that the oppression provisions apply to the affairs of a trust (and if so, which trusts under what circumstances), as opposed to the issue being dealt with on a state-by-state basis.[40]

What is arbitrability?

Against that background, the question arises whether oppression disputes are arbitrable? Arbitrability concerns whether a dispute is capable of determination by arbitration.[41] For a matter to be capable of determination by arbitration, two requirements must be satisfied. First, the parties must have agreed to have it determined by arbitration.[42] Second, the domestic law must allow disputes of that kind to be determined by arbitration.[43] If the law renders a particular kind of dispute non-arbitrable, then the parties' consent to arbitrate is irrelevant.[44]

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[37] Ibid [3.26]. This is notwithstanding that the New South Wales Law Society and the New South Wales Bar Association, in their respective submissions to the NSWLRC, supported the VLRC recommendation.
[38] Ibid [3.21].
[39] Ibid [3.27].
[40] Ibid [1.9], [3.28], noting in particular the doubts expressed as to the correctness of *Vigliaroni.*
[41] Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) 182 [4.128].
[42] Ibid.
[43] Ibid; *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 97-8 [200]–[201] (Allsop J), cited with approval in *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452, 474 [125] (Foster J) ('*WDR Delaware Corp*'). See also Jeremy Sher, 'Arbitrability and the Impact of Fraud or Corruption on International Arbitration' (2010) 84 *Australian Law Journal* 702, 704.
[44] Greenberg, Kee and Weeramantry (n 41) 186 [4.139]; *Robotunits Pty Ltd v Mennel* (2015) 49 VR 323, 352 [65] (Croft J) ('*Robotunits*').

Non-arbitrability is a function of national laws treating certain disputes as requiring determination by their courts of law in a public forum, rather than by a private arbitral tribunal.[45] The learned commentator, Gary Born, points out that the non-arbitrability of certain kinds of disputes is generally founded in their 'public importance or a perceived need for judicial protections'.[46] The kind of disputes which are non-arbitrable differ between countries.[47]

Born observes that recently courts in developed jurisdictions have 'materially narrowed the non-arbitrability doctrine, typically applying it only where statutory provisions expressly require it'.[48] As Bathurst CJ stated in *Rinehart v Welker* ('*Rinehart*'), a dispute will only be non-arbitrable in 'extremely limited circumstances'.[49]

Arbitrability of shareholder disputes

Recent Australian cases

Three recent Australian cases deal with the arbitrability of shareholder disputes,[50] the most significant of which is *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* ('*WDR Delaware Corp*').[51] In *WDR Delaware Corp*, two foreign plaintiffs, WDR Delaware Corporation (WDR) and Lowe's Companies Inc (Lowe's), entered into a joint venture agreement with Woolworths Ltd (Woolworths), the purpose of which was to establish a chain of hardware stores in Australia, known as 'Masters'. The venture was to be conducted through a special purpose vehicle, Hydrox Holdings Pty Ltd (Hydrox). Lowe's, through WDR (its subsidiary), held one-third of the shares in Hydrox while Woolworths held the remaining two-thirds.

Clause 30.3 of the joint venture agreement contained a multi-tiered dispute resolution clause by which the parties agreed to refer disputes arising out of, or in connection with, the joint venture agreement to arbitration, if mediation was unsuccessful. The arbitration agreement specified Sydney as the seat of the arbitration, the law of New South Wales as the governing law and the rules of the Australian Centre for International Commercial Arbitration (ACICA) as the agreed procedural rules.[52]

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[45] Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 20; *Robotunits* (n 44) 351 [62] (Croft J).

[46] Gary B Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2nd ed, 2015) 87.

[47] For example, various jurisdictions refuse to permit the arbitration of disputes concerning criminal law, labour grievances, intellectual property, real estate, bankruptcy and domestic relations: ibid.

[48] Ibid. See also Robert French, 'Arbitration and Public Policy' (2016) 24 *Asia Pacific Law Review* 1, 14.

[49] (2012) 95 NSWLR 221, 258 [167] (Bathurst CJ) ('*Rinehart*').

[50] Re 700 Form Holdings Pty Ltd [2014] VSC 385 (Robson J) ('Re 700 Form Holdings'); *Brazis v Rosati* [2014] VSCA 264; WDR Delaware Corp (n 43); Re Infinite Plus Pty Ltd (2017) 95 NSWLR 282 ('Re Infinite').

[51] (2016) 245 FCR 452.

[52] *WDR Delaware Corp* (n 43) 459 [36] (Foster J). At the time, the relevant rules were the ACICA Arbitration Rules 2016.

The joint venture was unsuccessful, leading to a breakdown in the relationship between the parties. WDR Delaware Corporation and Lowe's alleged that Woolworths had acted oppressively, as it had taken control of the affairs and management of Hydrox without consulting WDR Delaware Corporation, Lowe's and their representatives at Hydrox.[53]

They commenced oppression proceedings against Woolworths, seeking that Hydrox be wound up under s 233(1)(a), or alternatively, s 461(1)(k), of the *Corporations Act.*[54] Woolworths sought a stay of the proceedings under s 7(2) of the *International Arbitration Act 1974* (Cth) ('*IAA*') and art 8(1) of the UNCITRAL Model Law on International Commercial Arbitration ('*Model Law*'), arguing that the dispute fell within the scope of the arbitration agreement contained in clause 30.3, and therefore should be determined by arbitration.[55]

WDR Delaware Corporation and Lowe's conceded the dispute fell within the scope of the arbitration agreement.[56] However, they contended the substantive issue was not arbitrable, arguing that whether a winding up order should be made in respect of Hydrox could only be determined by the Court.[57] Justice Foster rejected this argument and granted a stay of the court proceedings, holding that the dispute as to whether a winding up order should be made was arbitrable, even if the relief could only be granted by the Court.

According to his Honour, the dispute at hand concerned the way in which the parties had discharged their joint venture obligations as between each other (inter partes).[58] This framing of the dispute was reinforced by the finding that there was 'no substantial public interest … in the determination' of the dispute. In this regard, his Honour noted that Hydrox was solvent and no creditors had sought leave to participate in the proceedings, despite the case receiving 'considerable press coverage'.[59] Justice Foster held that while an arbitrator did not have the power to make a winding up order, the Court could later determine whether the requisite grounds for a winding up order were established.[60]

While *WDR Delaware Corp* supports the arbitrability of oppression disputes,[61] including those where a winding up order is sought in respect of a solvent company, it does not address the arbitrability of

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[53] Ibid 461-2 [54].
[54] Ibid 455 [11].
[55] There are several other sources of the power to stay proceedings in favour of arbitration, namely s 23 of the *Federal Court of Australia Act 1976* (Cth) and the inherent jurisdiction of the Court.
[56] *WDR Delaware Corp* (n 43) 460 [49].
[57] Ibid 475 [131].
[58] Ibid 483 [161].
[59] Ibid.
[60] Ibid 483 [162]. At [164], Foster J observed that the factual and legal basis of the dispute were arbitrable and any award(s) resulting from an arbitration would be considered by the Court when it considers making a winding up order.
[61] See also *Re Infinite* (n 50) [66] (Gleeson JA), citing *Rinehart* (n 49); *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 (Austin J); *Robotunits* (n 44).

oppression disputes where a winding up order is sought in respect of an insolvent company with several creditors. Additionally, the demarcation line between the court and the arbitrator in a case where winding up relief is sought as part of an oppression claim is somewhat blurry. It appears the arbitrator can determine whether the grounds for a wind-up order have been established, but a court tasked with enforcing any award will exercise discretion as to the ultimate relief to be granted, based on the arbitrator's findings.

Recent Asia-Pacific cases

The recent Australian cases[62] are consistent with recent case law in both Singapore and Hong Kong, resulting in Asia-Pacific convergence in this area of the law. The Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* confirmed that ordinarily shareholder disputes are arbitrable.[63] Likewise, the Hong Kong High Court adopted a similar conclusion in *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd*, emphasising that when assessing arbitrability, regard is had to the substantive dispute, and not the relief sought.[64]

Summary

The following six principles may be drawn from the Australian and Asia-Pacific cases in relation to the resolution of shareholder disputes by arbitration:

1. The court will first determine whether the dispute falls within the scope of the arbitration agreement.[65]
2. If it does, the court will then determine whether the dispute is arbitrable (by reference to the applicable domestic law).[66]
3. Generally, shareholder oppression disputes are arbitrable.[67]

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[62] See above nn 50–1.
[63] [2016] 1 SLR 373 ('*Tomolugen*'). Note, however, that this presumption may be rebutted in particular circumstances, such as where it would be 'contrary to public policy considerations involved in that type of dispute': at 403 [76] (Sundaresh Menon CJ for the Court).
[64] [2014] 4 HKLRD 759, 769-70 [21]-[22] (Harris J) ('*Quiksilver*'). The Court will interpret the scope of the arbitration agreement liberally, having regard to the context and purpose of the agreement. This approach was followed in *Champ Prestige International Ltd v China City Construction (International) Co Ltd* [2020] HKCFI 355, [10] (Harris J).
[65] *WDR Delaware Corp* (n 43) 457 [23] (Foster J); *Quiksilver* (n 64) 770 [22] (Harris J); *Tomolugen* (n 63) 416 [110] (Sundaresh Menon CJ for the Court).
[66] *WDR Delaware Corp* (n 43) 457 [23] (Foster J); *Quiksilver* (n 64) 770 [21] (Harris J); *Tomolugen* (n 63) 384 [24] (Sundaresh Menon CJ for the Court).
[67] *Tomolugen* (n 63) 410 [94] , approved in *L Capital Jones v Maniach Pte Ltd* [2017] 1 SLR 312, 316 [3] (Sundaresh Menon CJ for the Court); *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333, 355-6 [76]–[79], 357-8 [83] (Patten LJ), 361-2 [101]–[103] (Longmore LJ); *ACD Tridon v Tridon Australia* [2002] NSWSC 896, [216] (Austin J); *WDR Delaware Corp* (n 43) 472 [144] (Foster J); *Re Infinite* (n 50) [63]–[66] (Gleeson JA). See also Alistair Marchesi and Kanaga Dharamananda, 'The Arbitrability of Oppression and Winding-Up Actions' (2013) 87 *Australian Law Journal* 258, 266; James Emmerig, 'Can an Australian Company Use a Dispute Resolution Clause in Its Constitution to Bar Shareholder Class Actions?' (2015) 33 *Company and Securities Law Journal* 513, 518. This principle is not yet confirmed by an Australian intermediate appellate court. However, Croft J stated as a general proposition in *Robotunits* (n 44) that 'there is no sufficient element of legitimate public interest in matters involving the *Corporations Act* to make their resolution by arbitration … inappropriate': at [69]–[70].

4. Whether an arbitral tribunal has power to grant any particular relief sought does not deny the arbitrability of the dispute.[68] Where there is such power, the arbitrator will grant the relief or otherwise determine the relevant issues and leave the relief to be granted by the court on an application to enforce the award.[69] Where there is no such power, this will not affect the arbitrability of the dispute.[70]
5. Shareholder oppression claims may not be arbitrable in certain limited circumstances, particularly where the company in question is insolvent (and the rights of third-party creditors are involved).[71]
6. Courts are likely to stay the proceeding in favour of arbitration where there are arbitrable claims falling within the scope of a valid arbitration agreement, even if there are other related subsidiary claims or claims between related parties that do not.[72] This prevents a multiplicity of proceedings where the arbitrable claim is central to the resolution of the remaining claims.[73]

Arbitrability of trust disputes

The question arises whether disputes regarding the existence of, or breaches of, trust are arbitrable? For example, may parties legitimately include an arbitration clause in their unit trust deed? If they can, the controversy surrounding the correctness of *Vigliaroni* might be circumvented with an arbitrator being given the power to determine disputes in relation to both the trustee company and the underlying trust.

External trust disputes

Disputes regarding the existence of a trust, as well as breaches of trust,[74] are considered arbitrable.

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[68] *WDR Delaware Corp* (n 43) 483 [162] (Foster J); *Re Ikon Group Ltd (No 2)* [2015] NSWSC 981, [23] (Brereton J) ('*Re Ikon*'); *Dickson Holdings Enterprise Co Ltd v Moravia CV* [2019] 3 HKLRD 210, 221 [32] (Godfrey Lam J) ('*Dickson Holdings Enterprise*'). See also Marchesi and Dharamananda (n 67) 269.
[69] *WDR Delaware Corp* (n 43) 483 [162] (Foster J); *Quiksilver* (n 64) [23] (Harris J).
[70] *ACD Tridon v Tridon Australia* [2002] NSWSC 896, [216] (Austin J); *WDR Delaware Corp* (n 43) 483 [164] (Foster J); *Dickson Holdings Enterprise* (n 68) [32] (Godfrey Lam J); *Re Ikon* (n 68) [23] (Brereton J); Marchesi and Dharamananda (n 67) 269.
[71] *WDR Delaware Corp* (n 43) 483 [161] (Foster J); *Tomolugen* (n 63) 406 [83] (Sundaresh Menon CJ for the Court). A dispute involving the liquidation of an insolvent company will ordinarily be non-arbitrable because such disputes have a public interest dimension*: Tomolugen* (n 63) 406 [83]. However, where a dispute involving an insolvent company stems from the company's *pre-insolvency* rights and obligations, it may nevertheless be arbitrable if it does not affect the substantive rights of creditors*: Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414, 431-3 [47]–[51] (VK Rajah JA for the Court).
[72] *Re Infinite* (n 50) [68] (Gleeson JA); *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420, 436 [72]–[73] (Merkel J)('*Recyclers of Australia*'); *Casaceli v Natuzzi SpA* [2012] FCA 691, [49], [54] (Jagot J) ('*Casaceli*'); cf *Re 700 Form Holdings* (n 50) (described as 'an outlier': see *Tomolugen* (n 63) 431 [151], 432 [153] (Sundaresh Menon CJ for the Court)). This approach is consistent across Australia and Singapore: *Tomolugen* (n 63) 442-3 [187] (regarding Singapore); *Recyclers of Australia* (n 72) [72]–[73] (regarding Australia); *Casaceli* (n 72) [49], [54] (regarding Australia); *Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253, [47] (Marshall J) (regarding Australia). A similar position prevails in Canada: *Dalimpex v Janicki* (2003) 228 DLR (4th) 179; *Blind Spot Holdings Ltd v Decast Holdings Inc* (2014) 25 BLR (5th) 122.
[73] *Re Infinite* (n 50) [68] (Gleeson JA); *Recyclers of Australia* (n 72) [72]–[73] (Jagot J); *Re Ikon* (n 68); *Tomolugen* (n 63) 446-7 [191] (Sundaresh Menon CJ for the Court); *Quiksilver* (n 64) [23] (Harris J).
[74] *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, 543-4 [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

In *Fitzpatrick v Emerald Grain Pty Ltd*,[75] it was held that a dispute as to whether contracts between the parties gave rise to a trust relationship was arbitrable.[76] The Court took a broad, liberal and flexible approach to determining the scope of arbitration agreements in a trust context, finding that only in extremely limited circumstances will a dispute intended to be referred to arbitration be non-arbitrable.[77] The Court found that the equitable rights at issue in the underlying contractual trust dispute did not render the dispute non-arbitrable.[78] Chief Justice Martin emphasised that simply because an arbitrator may not be empowered to grant the entire suite of relief that a court may grant does not of itself render the dispute non-arbitrable.[79] Further, his Honour found that the mere fact that a matter may affect the interests of third parties who are not parties to the arbitration agreement will not preclude arbitration.[80]

In *Rinehart*,[81] the New South Wales Court of Appeal held that disputes regarding applications to remove trustees are arbitrable.[82] This is notwithstanding the supervisory jurisdiction of courts in the administration of trusts and conversely an arbitrator's lack of power to order the removal of a trustee.

Internal trust disputes

Arbitration of internal trust disputes (ie disputes between trustees and beneficiaries) pose greater difficulties in terms of arbitrability. The primary issue is determining whether parties are bound by arbitration agreements in trust instruments.

Unit trusts

Where a trust deed contains a properly worded arbitration agreement and is signed by ascertained beneficiaries with legal capacity in a company/unit trust context, there is no serious issue as to the enforceability of the arbitration agreement. The trustee and the original unit holders are contractually bound by the unit trust deed. Moreover, the deed usually contains a provision to the effect that a unit holder may transfer all or any of its units to a third party upon the transferee undertaking to be bound by the terms of the deed. Thus, transferee/beneficiary is also bound by the arbitration agreement.

Discretionary trusts

However, in the context of discretionary trusts, beneficiaries do not expressly agree to be bound by the terms of the trust deed. Indeed, they may not have been born or lack legal capacity at the time the trust

[75] [2017] WASC 206.
[76] Ibid [10] (Martin CJ).
[77] Ibid [90]–[91] (Martin CJ), referring to Bathurst CJ in *Rinehart* (n 49) 258 [167], 259-60 [173]–[177].
[78] Ibid [99] (Martin CJ).
[79] Ibid [100] (Martin CJ).
[80] Ibid [102] (Martin CJ).
[81] *Rinehart* (n 49).
[82] Ibid 259-60 [173]–[174] (Bathurst CJ), 266 [210] (McColl JA), 268 [225] (Young JA dissenting).

deed was established.[83] This 'more difficult question' of whether an arbitration agreement could be enforced against all beneficiaries was left unresolved in *Rinehart*.[84]

Deemed consent

As trust deeds are construed as 'unilateral acts of disposition' (rather than an agreement), the lack of consent may undermine the validity of the arbitration agreement.[85]

However, it may be possible to create a binding arbitration agreement through careful drafting in the context of internal trust disputes.[86] For example, the International Chamber of Commerce (ICC) has employed a condition precedent in its model trust arbitration clause (emphasised below):

> All disputes arising out of or in connection with this Trust [as defined in the trust instrument] shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.
>
> The settlor, the original trustee(s) and the original [protector(s)] [other original power-holder(s)] hereby agree to the provisions of this arbitration clause, and each successor trustee and [protector] [other powerholder], by acting or agreeing to act under the Trust, also agree, or shall be deemed to have agreed, to the provisions of this arbitration clause.
>
> *Any beneficiary claiming or accepting any benefit, interest or right under the Trust, shall be bound by, and shall be deemed to have agreed to, the provisions of this arbitration clause.*
>
> Subject to the law governing the Trust and without prejudice to any other confidentiality obligation that may apply:
>
> a) the arbitral proceedings, including the fact that they are taking place, have taken place or will take place, are private and confidential; and
> b) any award or decision rendered by the arbitral tribunal or any settlement agreement between the parties shall be kept confidential and shall not be disclosed to any person, except to the extent that disclosure is required by law or pursuant to any rule, requirement or request of any regulatory or governmental authority or stock exchange, or is necessary or advisable in the administration of the Trust or for the implementation or enforcement of the award or decision.[87]

Therefore, where parties accept the benefit under the trust instrument, agreement to the arbitration

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[83] SI Strong, 'Arbitration of Trust Disputes: Two Bodies of Law Collide' (2012) 45 *Vanderbilt Journal of Transnational Law* 1157, 1184.
[84] *Rinehart* (n 49) 260 [177].
[85] International Chamber of Commerce, 'ICC Arbitration Clause for Trust Disputes and Explanatory Note' (2018) *International Chamber of Commerce Publications*, [7] ('ICC Arbitration Clause for Trust Disputes and Explanatory Note'); Rafael Ibarra Garza, '(Un)enforceability of Trust Arbitration in Civil and Common Law' (2016) 22 *Trusts & Trustees* 759, 761.
[86] Lucas Clover Alcolea, 'Trust Arbitration: 99 Problems and 99 Solutions' (2020) 26 *Trusts & Trustees* 260; Andrew Holden, 'The Arbitration of Trust Disputes: Theoretical Problems and Practical Possibilities' (2015) 21 *Trusts & Trustees* 546.
[87] 'ICC Arbitration Clause for Trust Disputes and Explanatory Note' (n 85) 3 (emphasis added).

clause may be implied by that Act.[88] This alludes to the 'deemed acceptance theory' (or in the context of Australian law, 'deemed consent'), identified by Garza: 'The acceptance of the benefits deriving from the trust implies also acceptance of all obligations under the trust, including the obligation to arbitrate under the arbitration clause.'[89]

However, the main concern with clauses like the ICC model clause is that there remains uncertainty whether a court would accept that deemed consent of the discretionary beneficiaries equates to actual consent. That is, courts may not accept that discretionary beneficiaries have truly agreed to be bound by an arbitration clause in the trust deed.

The lack of legislative or judicial guidance in Australia leaves uncertainty as to whether such arbitration agreements are enforceable in all cases.[90] This is because 'there are real difficulties in enforcing trust arbitration clauses under the arbitration statutes that are predicated on the presence of an "arbitration agreement'', where discretionary beneficiaries are unascertained or lack capacity'.[91]

Legislative developments

In several jurisdictions, legislation has been passed to remedy the problem of lack of consent. These include New Zealand,[92] the Bahamas,[93] Guernsey,[94] Malta,[95] and multiple US states.[96] The UK Trust Law Committee has also recommended that the *Arbitration Act 1996* (UK) be amended to expressly allow for the arbitration of internal trust disputes.[97]

Commonly, such legislation ensures that representatives are appointed to protect the interests of beneficiaries who are unascertained or lack capacity and, if necessary, agree to be bound by an arbitration agreement on the beneficiaries' behalf.[98]

However, different jurisdictions have contemplated different mechanisms to appoint such representatives. For example, the *Trusts Act 2019* (NZ) requires that if a trust has beneficiaries who are

[88] Ibid [10]–[12]. See also SI Strong, 'Arbitration of Internal Trust Disputes: The Next Frontier for International Commercial Arbitration?' in Jean Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (Kluwer Law International BV, 2020) 971, 974 ('Arbitration of Internal Trust Disputes').
[89] Garza (n 85) 762. Regarding 'deemed acquiescence', see Holden (n 86) 550; Alcolea (n 86) 266.
[90] Matthew Conaglen, 'Trust Arbitration Clauses' in Richard C Nolan, Kelvin FK Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University Press, 2018) 128–9.
[91] Ibid 128. See also Holden (n 86) 550–1; Strong, 'Arbitration of Internal Trust Disputes' (n 88) 977.
[92] *Trusts Act 2019* (NZ) ss 142–8; Arbitration Act 1996 (NZ) s 10A.
[93] *Trustee Act 1998* (Bahamas) ss 87A, 91A, 91B, 91C.
[94] *Trusts Law 2007* (Guernsey) s 63.
[95] (Act II of 1996) (Malta) ch 387 art 15A.
[96] Fla Stat § 731.401 (2020); Wash Rev Code §§ 11.96A.120, 11.96A.270, 11.96A.310 (2012); Ariz Rev Stat Ann § 14-10205 (2012).
[97] Trust Law Committee, 'Arbitration of Trust Disputes' (2012) 18 *Trusts & Trustees* 296 ('Arbitration of Trust Disputes').
[98] *Trusts Act 2019* (NZ) ss 142-148; *Trusts Law 2007* (Guernsey) s 63.

unascertained or lack legal capacity, the court must appoint representatives for those beneficiaries if the trust is subject to an alternative dispute resolution process.[99] On the other hand, the UK Trust Law Committee has proposed providing arbitrators with authority to determine the involvement of representatives.[100] This proposal has not yet been implemented, and the UK awaits legislation regulating arbitration of internal trust disputes. The UK Law Commission is currently undertaking the 'Modernising Trust Law for a Global Britain' project, presenting an opportunity for re-evaluation.[101]

Alternatively (or in addition), legislation regarding internal trust arbitration may simply deem that the beneficiaries have consented. This confirms the enforceability of arbitration agreements in the context of trusts.[102]

Comment

Despite these challenges, arbitration of internal trust disputes is desirable and gaining support internationally, with commentators contending trust arbitration 'is at the cusp of a major breakthrough'.[103] One reason is that trust disputes, like shareholder disputes, are often familial and highly personal. Accordingly, they are well-suited to arbitration as outlined in the next section.

Desirability of arbitrating shareholder/trust disputes

Assuming that shareholder and trust matters are arbitrable, the question is whether arbitration is an attractive, if not preferable, option for the resolution of these disputes? There are seven factors justifying the desirability of arbitration.

First, arbitral proceedings are private and confidential.[104] This is critically important for shareholder/trust disputes, many of which involve a highly personal element. The parties are often family members or had a close relationship before the dispute. [105] Arbitrating such disputes eliminates the risk for publicly airing embarrassing or highly sensitive information which could cause reputational damage or attract the attention of regulatory authorities.[106] Indeed, courts prefer parties exhaust all

[99] (NZ) s 144.
[100] 'Arbitration of Trust Disputes' (n 97) 306. The arbitrator may have the power to appoint and remove representatives, make appropriate representation orders, and provide that persons represented under such orders will be bound by the award. This approach has been adopted in the Bahamas: *Trustee Act 1998* (Bahamas) s 91B.
[101] UK Law Commission, 'Modernising Trust Law for a Global Britain', *Project* (2020) <https://www.lawcom.gov.uk/project/modernising-trust-law-for-a-global-britain/>.
[102] See above nn 94, 96–7.
[103] Lawrence Cohen and Joanna Poole, 'Trust Arbitration: Is It Desirable and Does It Work?' (2012) 18 *Trusts & Trustees* 324, 324.
[104] For domestic arbitrations seated in Victoria: *Commercial Arbitration Act 2011* (Vic) s 27E ('*CAA*'). For international arbitrations seated in Australia: *International Arbitration Act 1974* (Cth) s 23C.
[105] Tang (n 1) 19.
[106] See, eg, *De Lutis* [2018] VSC 54, [14], where Elliott J noted that the evidence presented 'concerned certain members of the family deliberately engaging in tax fraud'.

alternative dispute resolution measures prior to litigating where the parties are family members.[107] Usefully, an arbitrator may assume the role of mediator or conciliator for domestic disputes.[108]

Second, the possibility to choose an expert decision-maker. Parties can select an arbitrator who is expertly qualified and has the skill and capacity to resolve their particular dispute.[109]

Third, the possibility to adapt procedures to the circumstances of the case. Arbitration can be quicker, cheaper, and less formal than traditional court proceedings.[110] This is because parties can tailor the procedural timetable by agreement to suit their specific requirements, insulating themselves from general delays in curial timetables.

Fourth, the relative finality of the process. Unlike litigation, arbitration does not involve the spectre of successive appeals.

Fifth, requiring proceedings to be brought in a single forum rather than in multiple fora.

Sixth, for disputes with an international dimension, a significant advantage of arbitration is the consistent international enforcement of arbitral awards due to the widespread international adoption of the *New York Convention.*[111]

Finally, parties may choose the governing law to regulate the determination of the merits of their dispute. In light of the division in judicial opinion in relation to the application of oppression relief to combined company/unit trust structures, parties can choose Victorian law as the governing law irrespective of whether the arbitration is seated outside Victoria.

Drafting considerations

Issues with arbitrating shareholder or trust disputes can be avoided, or at least minimised, if the arbitration agreement is drafted to suit the circumstances of the case.[112] This can be achieved by ensuring that the arbitration agreement has sufficient breadth to capture all breaches of duties owed by

[107] *Exton* (n 7) 525 [16] (Sifris J).
[108] *CAA* (n 104) s 27D.
[109] Lord Neuberger, 'Keynote Speech' (2015) 81 *Arbitration* 427, 429.
[110] Massimo Benedettelli, 'International Arbitration of Corporate Disputes: A Workable Balance between Two Dimensions of Party Autonomy' in Jean Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (Kluwer Law International BV, 2020) 985, 988; Lord Neuberger (n 109) 429. See also Standing Committee of Attorneys-General, 'Communique 16–17 April 2009' [2009] *SCAG Communiques*, 6.
[111] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('New York Convention').
[112] Alcolea (n 86) 275.

the controllers of a company and/or agreements with members whether in the form of a company constitution or a related shareholders agreement.[113] Hence, the mindless adoption of boilerplate arbitration clauses is to be avoided.

The relational words in the arbitration agreement should be as broad as possible. Expressions such as 'arising out of, relating to, or howsoever connected to the affairs of the company or the trust',[114] are to be preferred to expressions such as 'under the company's constitution, shareholder agreement or trust deed'. The arbitration agreement should not, however, be overly broad, so as to reduce the risk of it being perceived as circumventing the equitable jurisdiction of the courts in supervising trusts.[115]

The reported cases provide several examples of arbitration clauses inserted into the articles of association (ie constitution) of a company, requiring any difference relating to 'any of the affairs' of the company to be referred to arbitration.[116] *Tomolugen* contains an example of an effective arbitration agreement within a shareholders agreement:

> Without prejudice to any right of the Parties to apply to any competent court for injunctive relief, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) for the time being in force, which rules are deemed to be incorporated by reference in this clause. The tribunal shall consist of one arbitrator to be appointed by the chairman of the SIAC. The language of the arbitration shall be English.[117]

In the context of trust instruments, the ICC model trust clause (set out in full above) provides a good option. It makes explicit that a beneficiary's receipt of distributions is contingent upon compliance with the arbitration agreement contained in the trust deed. This may provide the necessary 'deemed' consent to arbitration by the beneficiaries.[118]

It is also important that any trust instrument provides for the appointment of a representative of beneficiaries who lack capacity to consent to arbitration (ie unborn, legally incompetent or not yet

[113] See Dickson Holdings Enterprise (n 68).
[114] See, eg, *Dickson Holdings Enterprise* (n 68) [40] (Godfrey Lam J).
[115] See generally Conaglen (n 90) 85–8.
[116] For example, *Newmark Capital Corporation Ltd v Coffee Partners Ltd* [2007] 1 HKLRD 718, [13] (Paul Shieh SC). This case was discussed in *Dickson Holdings Enterprise* (n 68) [40] (Godfrey Lam J).
[117] *Tomolugen* (n 63) 421 [123] (Sanduresh Menon CJ for the Court).
[118] See Holden (n 86) 550. However, Holden has identified that drafting a trust instrument such that the beneficiary's interest would only arise where they actually accept the terms of the arbitration clause may prove difficult where there is a beneficiary who cannot bind themselves to the arbitration agreement: at 550–1. Accordingly, the issue of 'deemed consent' encounters a number of practical problems. See also Strong, 'Arbitration of Internal Trust Disputes' (n 88) 974–5.

ascertained beneficiaries) who may represent them in any arbitral proceedings.[119] Ideally, the trust deed should also provide for payment of that representative's legal fees (payable out of the trust fund). Finally, steps should be taken to ensure that any dispute resolution clause in the company's constitution, shareholder agreement and/or trust deed are compatible with each other.

Concluding remarks

Developments in recent cases suggest it is now plain that shareholder oppression disputes are arbitrable. The 'arc of arbitrability' has extended into the domain of trusts in several ways: the arbitrability of disputes regarding the existence of trusts, the arbitrability of both internal and external trust disputes, and the availability of statutory relief in the corporation/unit trust structure context.[120] Previous barriers to arbitrability, concerns regarding creditors' rights, the public interest and the court's supervisory jurisdiction over trusts have in recent times been more carefully balanced with parties' freedom to resolve disputes in a manner of their choosing. Well-drafted arbitration clauses facilitate such choices. Accordingly, it is critical that arbitration clauses are adapted and appropriate to their context and the parties' specific requirements.

As shareholder and trust disputes are often regrettably personal and acrimonious, private arbitration invariably offers a desirable mechanism. This is particularly so given the flexibility, efficiency, and finality inherent to the arbitral process. For the business community, parties to trusts and families, arbitration has a lot to offer.

[119] Considering that in litigation proceedings a 'litigation friend' may be appointed as a representative for such a beneficiary, the inclusion in the terms of a trust a mechanism that provides for a similar representative in arbitral proceedings might overcome this problem: see 'ICC Arbitration Clause for Trust Disputes and Explanatory Note' (n 85) [14]–[15]. See also Alcolea (n 86) 269; Nicholas Le Poidevin, 'Arbitration and Trusts: Can It Be Done?' (2012) 18 *Trusts & Trustees* 307, 313. See also Strong, 'Arbitration of Internal Trust Disputes' (n 90) 977–8.
[120] Marchesi and Dharamananda (n 67) 270.

Practitioner Notes

Learning from Tai-chi when you are in conflict

Barbara McCulloch[1]

If you want to, you can find a million reasons to hate life and be angry at the world. Or, if you want to, you could find a million reasons to love life and live happily. Choose wisely.
Cari Welsh, *Beautiful Mess-A Women Connection*

Tai-chi is a practice of focus and especially a practice of focus on the present. The practice involves a series of movements which flow and become a physical manifestation of applying the flow principle to our thinking. I've found it really useful in my conflict resolution work.

This is the story of some family members who recognised that separating themselves from each other and carrying the burden of that separation wasn't working for them and so they decided to try something else. All the people in the story are adults.

I was approached by a charity asking if I could mediate between an adult child and his parents. I agreed to try, and we set up some individual private sessions. The adult child is in his 40s. He identifies himself as a gay man who was brought up in a deeply and fundamentally Christian family, the middle child of three. That would be enough, in answer to, what are the issues you hope to mediate with your parents about?' There is, however, much more to the story.

The man was a gifted child. His intellect was the stuff of bragging rights for his parents. His scholastic and athletic achievements were numerous. His older brother was envious of him, and his younger sister saw him as her hero. Apparently, this is not the bio of a gay man and so, when he discovered that his sexuality was different to the expectations of the people around him, the discovery was something to be ashamed of and certainly to be hidden.

And treated. *(I declare an absolute prejudice here: 'Gay Conversion Therapy' is not a therapy and it is not therapeutic. Ever.)*

[1] Barbara has been practising as a Conflict Resolution Specialist since 1986. She considers that her role is to support people in conflict so that they can make the best possible decisions together.

His family regarded his sexuality as a combination of a mental health issue and a sin. They organised interventions. The interventions didn't work, and the young man continued to identify himself as gay. 'Attention seeking behaviour', was the diagnosis his parents and their religious community came to. Further interventions ensued. The young man submitted and resisted. None worked.

The young man was invited to be a participant in an international student exchange for a year. The opportunity to escape was very tempting. He thought he might be able to work things out away from the glare of family expectations and church interventions. He accepted the invitation. He talked about the combination of fear and excitement and his memory of that is very clear.

He names the country that he visits and the main thing I know about it, is its deep devotion to Catholicism. *(I have a sense of dread about the next stage in the story and I allow myself to internally recognise and acknowledge my own emotion while I listen. By using my tai-chi practice of focus and allowing myself to listen intently to what is being said, I can also notice my own thoughts and feelings without them interrupting my listening.)*

What I notice most, is that when he tells this part of his story, he is happy. I ask him about what I've noticed, and he thinks for a minute: 'I had no idea', he says, 'that religion could make you happy. Not pretend happy; not happy-clappy, but really deeply comfortable'. I asked him what he thought the difference was and he said, 'love'. He learned that deep religious beliefs need not be in conflict with who someone is as a person (including their sexuality). He learned that as a young man, you were free to experiment and in fact, experimentation was encouraged.

(Note to self: I am not naïve and I am well aware of the undertones and hypocrisy here: youthful sexual experimentation is limited to young men; older men are still required to get married to a good woman and have children. Women of any age have no such permission to experiment. But I have a loud thing to learn: this is his story and he was happy then. Possibly he was happy for the only time in his life. It is not my job to disrupt that memory. Stay focussed on being the mediator and remember that focus is a super-power!)

Of course, the young man came home after his year of escape. He was admitted to a very prestigious course in a very prestigious university with a very prestigious scholarship and he brought a lot of prestige to his family.

The success gave him confidence and so, from time to time, he acknowledged to his family that he continued to have relationships with men. He understood that he couldn't flaunt this (flaunt is such an

expressive word); he couldn't take a partner to a family dinner. But he wasn't living at home and so his ability to be himself was more of a normal experience.

He qualifies and is in demand for work that others envy. He acquires property and beautiful things and donates some of his time to working with people who are struggling. He creates a life for himself.

What happened next is a series of shocks: he experiments briefly with illegal drugs, he engages with people who he initially finds exciting but transpire to be dangerous and (in his own words) he is punished severely by being raped and beaten.

Deep shame.
HIV positive.
Head injury.
Created life over.
All my own fault.

(Note to self: Use my tai-chi practice again: I am aware of having a need to know why and am aware that that is absolutely the wrong question to ask now. Why implies blame. I knew this academically but it's always good to discover something meaningfully. It's also not a clever idea for me to be so engrossed in the story that I lose track of my role here: slow down and reflect and give him the same opportunity).

Pause. Quite a long pause actually. He has trusted me with important information and I need to value the trust. Then the response: 'How did you deal with that?'

(I think that it's the tone that matters: the absolute show of empathy, the admiration for his courage to still be functioning, the genuineness of my curiosity).

He talks about trying to get his family to support him and how they didn't. Of course, this is why he is here. That's his pain.

(Another note to self: Watching someone in deep pain is one of the most uncomfortable experiences I know. Just reminding myself to be present and to hold the space open. I remember my tai chi breathing and I practise that very quietly and after a while, just like the tai chi teacher says, his breathing starts to be similar to mine. I'd really like to have my own emotional reaction and I'd favour crying and shaking and probably wine and swearing but I practise what I've been taught: notice, acknowledge, and then let it go).

We agree that I will meet his parents next.

I have to do a lot of work on myself to prepare for this meeting. I feel full of harsh judgements. In my preparation, I learn that because I believe so strongly in our ethical requirement for impartiality, I can convince myself to open my mind (just enough)!

They are an unremarkable looking couple, probably a bit older than me. (What had I expected? Horns and tails?) They are nervous in the way that most people are nervous when they first meet the mediator. They are very caring of each other: he makes sure that she is comfortable. She touches his arm to encourage him, reminding him that he's not here on his own. My mind opens a little more.

Of course, they have their own story. A long history of intergenerational violence and abuse and examples of it that could make you want to pull your own hair out. Again, I am full of admiration for the people who live their lives of deep suffering and still get up every morning, put their clothes on in the right order and talk in whole sentences.

(The tai-chi practice again: allow your own thoughts and feelings to occur and notice them but focus on the story-teller. I wonder sometimes, probably more often than is healthy, how people survive their own private rendition of a holocaust and then keep on being normal. It seems a big achievement: to deal with so much pain and yet we so often dismiss the achievement.)

They are wary of their son; his life choices have impacted on the rest of his family and they don't know if they can deal with him again. Christianity saved them, they tell me. It allowed them to both survive and function, and so they feel obliged to follow the rules.

There is a jarring note, which I cause, when I ask if they think that homosexuality is a choice. I try hard to keep my tone neutral because I can't manage curiosity but I can taste my own distaste and I hope desperately that they can't hear the power of it.

Of course it's a choice, is the answer.

What if it's not? I venture.

We have prayed about this and we know our truth.

(I experience a stalemate. I want to keep working with this family and I recognise that I have things to learn from the work. I have deep hope that things can be better. I have some confidence that I can

contribute to the bettering process. And so I have to get over myself and go back into tai-chi-mediator mind set.)

They describe their last experience of their son living with them and I acknowledge that the best I could say about their recollection is, 'that must have been really challenging'.

I ask them how they made sense of that event and they talk about reaching a conclusion (he was using methamphetamine) and seeking advice (protect yourselves and practise 'tough love'). I'm well aware of the theory.

I ask about their hopes for the mediation.

'We'd like our son back and we'd like him to renounce his homosexuality and return to the church'.

I ask what they think his hopes might be. *(All that mediation training really kicks in when you're in a tough place. When in doubt and tempted to react, ask a circular question).* They answer that they don't know but they are prepared to find out. Further, I conclude that this is the best I can hope for, at least for today.

The preparation for the first joint session of mediation was a combination of my mental preparation to support the people involved and thinking about a process that might have the best chance of achieving a good outcome for the parties. I am of the view that a standard facilitative process wouldn't be useful.

I settled on three things that I thought would work well: an introduction and a description of the process, both written on the white board to welcome the parties into the room. And a guideline. I am guessing that these people might value some rules.

My introduction said,
'We can't go back to the beginning and start again, not repeating our mistakes this time.
We can't undo the hurts we have caused and suffered; the blaming, the accusations and assumptions, the anger and the pain.
But if we start where we are, and we work together, we can create a better ending.'
My process said:
Tell your story.
Name your hurt.
Recognise our shared humanity.
Renew or release the Relationship.

I acknowledge the Introduction was inspired by a line I remember from CS Lewis and my Process comes from Desmond and Mpho Tutu's book, *The Book of Forgiving*. I couldn't talk about forgiveness because there had been a church and family process called 'forgiving' which held some bad memories.

My guideline said, 'Each person talks in turn without a fear of interrupting. At the end, the response is, Thank you for sharing that'.

(The son had been very afraid that his parents would want to pray over him to start the mediation and I knew that he would find that intrusive and belittling and a power grab and so, I had to find a replacement ritual. This is a family who are well versed in religious ritual and I knew from my initial private sessions that the flow of ritual, the provision of words to be said at the right time, was likely to be familiar and comforting to them all).

We agreed to use that framework. How do we mark that first and therefore important agreement? I acknowledged it briefly and positively. The son looked relieved. *(He had a support person with him and she had been in his private sessions, so she was well briefed).*

Each person told their story of what brought them to this place *(including the support person, which was a very nice touch)*. Interestingly, nobody interrupted the stories *(although there were a few snuffles to indicate disagreement*). I was pleasantly surprised at the amount of respect that was shown. Only I said, 'thank you for sharing that' but everyone else said 'thanks' at the end of each story.

Naming the hurts was a challenging exercise and interestingly, they used similar words: pain; broken trust and abandonment featured. I asked if they had realised that the other person would be feeling hurt or abandoned or let down and they hadn't made that connection. *(Small and silent offering of thanks from the mediator to the mediation training and books I've consumed over the years. Thank you for my learning to not say very much and to find and amplify anything mutual. It really works.)*

The start of shared humanity.

Some conflict, of course over details and, in particular, the conclusion the parents had made about their son's use of methamphetamine before they told him to leave their house, two years previously. The son was in so much pain and outrage that he couldn't speak, so I asked him if I could make some comments about that issue and he agreed. I had spent quite a lot of time, reading his ACC reports and there had been no reference to drug use of any kind. I relayed that to the parents.

Their response was both enlightening and predictable. Disbelief and ‘are you sure’ and justifications: ‘we asked the best people for advice and we took it’. It wasn’t however, helping the son to participate.

So, I asked them about their assumption of methamphetamine use and asked them how they’d come to their conclusion. All the signs, they said. Mood swings. Sleep terrors. Poor diet and poorer hygiene and bad teeth and easy distraction. Behaviour that was manic one day and catatonic the next.

The support person, a social worker, asked some questions:

Any drug paraphernalia?
No.

Any physical signs of drug use: say, needle marks?
No.

Has your son been deceitful in the past about his drug use?
Quite the opposite; very forthcoming about his life to date.

I asked them, what was it that made them conclude abuse of methamphetamine. They’d been to a showing of a documentary at their church about it and recognised signs and they’d talked to people at their church, including a recovering addict and they’d followed the advice they received.

So then the real story: the head injury from the beating. The fractured skull. Living in a car, because ACC thought he should be ‘getting over it by now’. Having limited income and being denied supportive accommodation because of the night terrors which prevented others from sleeping too. Not having access to regular showers. *(I found myself wondering about how you clean your teeth twice a day if you live in a car and about the small things we take so much for granted).*

And the accusation: ‘you threw me out of your house because you can’t stand the fact that I’m gay. You think that drug abuse and being gay are synonymous. You’re pleased I’m being punished because you think I deserve it. You hate me!’

And the denial: ‘We don’t hate you. We love you. We were told repeatedly that letting you stay at home was enabling your drug use. Telling you to leave was really hard for us. Your mother made herself sick, worrying about you. We love you. We thought we were doing the right thing.’

(What is the right amount of time to pause? The wrong timing can have very bad consequences. I think the mediator has to be very aware of everything in the room when nobody is talking and that is quite tiring. And then what do you do? When the not talking is not adding value to the process?)

Shall we have a break and some time to talk individually with me?

Thankfully, that was a good response. Everyone agreed.

I saw the parents first. My reasoning was that the son would physically need a longer break. And the parents, especially the mother needed to have her comments recognised and acknowledged. The son isn't there yet.

The parents needed to process their new information with me. Their guilt at getting their diagnosis wrong was strongly felt. How to reassure them that it was a mistake and something they could feel remorseful about and apologise for without leaving them with nowhere to go? *(Mediator training again: when in doubt, listen. Tai chi breathing again: go with the flow of energy that is available. Breathe through it).*

Coming to terms with a mistake, or at least beginning to come to terms with it. The enormity of the mistake and its ability to cause destructive reactions takes time and permission, I think, to deal with that in small chunks. Teach them about, when in doubt, breathe. Find out how he is, they said. Let him decide, what next.

Talking next to the son. His overwhelming pain from the rejection. And his deep concern about his mother's pain and his own inability to acknowledge her. Letting him cry. Stroking his arm. Handing him tissues. *(Tissues can be shredded into very small pieces and scattered everywhere! Learning not to be bothered by that).*

How did you think it would be today? Have we done enough for today? How would you like it to end for the day? *(Emphasising the present: there is more time after this day has finished. Important reassurances and putting him back in charge of decisions).*

I think we've done enough today, he said. I'd like to come back, but enough for today.

More shared humanity.

His parents are in another room and they accept that. They stand by the door and the father holds out his hand to his son. The son pauses and looks at the hand. And shakes it. The son and his support person shake my hand with some real warmth before leaving.

Deciding to renew the relationship.

The mother needs a hug. I discover that I can supply that, quite happily. More shared humanity. The parents think that something real has happened. They want to come back.

Trusting myself and my ability. Trusting my process. Being willing to take risks and most of all, being willing to learn. Those are my main learnings for today.

And remembering to tai-chi-breathe.

Language in the criminal justice and restorative justice systems

Rod Holm[*]

Abstract

This article will compare and contrast the language used in the Criminal Justice System with the language used in the Restorative Justice Conferencing process. Through a detailed analysis of one Restorative Justice case, it will seek to reveal the consequences of the language used in both systems. It will suggest that the language of the criminal justice system has a number of unintended negative consequences, while the language used in Restorative Justice Conferencing has a transformative potential.

Introduction

I will begin by referring to a road accident which was processed through both the Criminal Justice system and the Restorative Justice process. Consider therefore the following two statements:

> Your baby will be born shortly, and it will die; and
>
> You are charged with "dangerous driving causing injury" under s 61 of the *Land Transport Act 1961.*

Both statements are true, and utterly different. The first one was spoken and the other written. They inhabit utterly different worlds, with the first one from the Restorative Justice (RJ) process, and the other from the Criminal Justice System (CJS). They illustrate in miniature the whole argument of this article, that the language used in the two systems creates the final outcome of any case. The language in the first quote is spoken by a doctor and is part of the language of medicine. To put it in slightly more technical terms, we may say that it comes from a medical discourse.[2] The other stems from a legal discourse. Although they apply to the same person, they inhabit entirely different realms and may be

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[2] The term 'discourse' comes from the work of the post-modernist writer Michael Foucault. It is possibly one of the few remaining concepts of his that is still credited with validity. It is a useful heuristic device for talking about language. The larger theoretical underpinnings for this article may be found in the idea of Social Constructionism, see Vivien Burr, *Social Constructionism* (Routledge, 2nd ed, 2002). See also the author's thesis: Rodney Holm, 'Constructing a successful Restorative Justice Conference: A Tentative Analysis' (Masters Thesis, University of Waikato, 2014) especially 28-48.

said to be mutually antithetical. One is highly personalised, and the other completely objective. They lead to utterly different conclusions.

The back story is as follows:[3] a female driver had gone to sleep at the wheel and crashed into a delivery van coming the other way. That (male) driver's foot was badly broken and he was still on crutches months later. He had suffered significant economic loss as well. The female driver had been 20 weeks pregnant, and the pressure from the seat belt had caused her membranes to break. She was rushed to hospital and given the news that her child could not be saved.

However, the nursing staff did not give up, and through their skill and with some good fortune, they managed to delay the birth for four weeks, giving the child a fighting chance of survival. Mother and child remained in hospital for some weeks until his lungs had developed sufficiently for him to be taken home, while still connected to an oxygen tank.

For some time then, both drivers had been enveloped within a medical discourse. One life had been saved, and one body repaired. They had been conceptualised as 'patients', people in need of medical care through the state institutions. The observant reader will note that I have been describing them so far as 'drivers', because that is what they were, at the time of the accident. It is this issue of nomenclature that will form the constant theme of this analysis. I will argue that words do matter, that concepts do shape events, that there is a sense in which 'the word comes to constitute the thing'.

Language and identity

So the two people (one male and one female) were 'drivers', and then 'patients'. Once the medical regime had ended, however, they were no longer patients. Time passed, and while the child was gaining strength, and the male regaining mobility (and his ability to resume paid employment), the legal discourse began to kick in. From this time on, the nomenclature would change. In NZ, road accidents like this one, have been criminalised because someone has decided that the most appropriate social response to such social harm is to convict and punish one of the parties. No-one questions this. It is just the normal state of affairs, just 'how things are'. Break the law and get punished.

At this point, a new nomenclature took over, the words and concepts from the legal discourse. In effect, they were given a new identity. The female driver became an 'offender,' and the male driver became a 'victim'. The full jurisdictional power of the legal system swung into action, with its multitude of clerks, stenographers, probation officers, lawyers, and judges. There has been a powerful myth present for

[3] This was an actual case. As far as possible, I have omitted any identifying details. I have relied on my case notes for the substantive content.

many years, that justice is blind, and that this is the optimally beneficial way for it to be. It is a myth not much questioned, but it does have an ironical component, as I shall seek to show.

If we count the child in utero as a person, there were in fact four people involved in the accident. The two drivers, the female driver's husband (in the passenger seat) and the child. The law however, identified only two. For its purposes, the other two *did not exist.* In this way, the law constructed a version of reality to suit itself. If it requires whole bodies to be defined out of existence, then so be it. The law not only defines reality, it is the *only* reality. Words and concepts have such power! I cannot think of a clearer example of how mere words can constitute real states of affairs. Yet in this case, it was a state of affairs that bore only some relevance to what had actually happened. Justice is blind.

The concept of the 'wholeness of personhood' is of no interest to the law. There are only victims and offenders, one innocent and good, the other guilty and bad. Sometimes this rigid classification is accurate enough, as in the present case where the victim was genuinely innocent in that he did not contribute to his own injury in any way whatsoever. He suffered the consequences however, emotionally, financially and physically. The female driver accepted without argument that she was to blame, it was her fault. She pleaded guilty. The fact that she suffered too however, was of no interest to the court. It was not the physical suffering of a broken body, but the emotional terror of the likely death of her son. Her husband shared the feelings that went with this existential threat.

It will have become clear, I hope, that the courts have artificially restricted the use of the victim concept, so that we might speak of 'a reality created by the court' (with one victim), and a 'reality created by simple empirical investigation'. In this second 'reality', it is clear that two other people were harmed (victimised) by the female driver, namely her husband and child. Neither was involved in causing the accident, but both suffered the consequences. The husband was not physically injured but had to face the emotional terror of the likely death of his son and to jointly share the fears of his wife as well. The child suffered body trauma as his undeveloped lungs struggled for air, and the consequences of his body being invaded by medical procedures.

Yet in the eyes of the court, these two other victims did not exist. As we extend our analysis however, it is clear that we should speak of a fourth victim – the wife/mother. She suffered some physical trauma from the seat belt, but mostly the emotional trauma of expected infant death, quite apart from the travails of the birth itself. So now we might speak of three victims, and one offender/victim. It will be clear that this concept of binary categorisation (victim/offender) needs to be unpacked or deconstructed. I return to the concept of 'discourse'.

The concept of 'discourse'

So far, I have employed the Foucauldian idea of 'discourse' to try and make sense of the complexities of this case. It's great limitation is that while it identifies any number of discourses, it also treats them as separate but equal, thus providing no way for distinguishing the truth value or pragmatic usefulness of any one discourse over any other. This is an unsatisfactory state of affairs because it means that one can never take any course of action that might bring about change, because one cannot produce any intellectual or moral justification for taking up one position/discourse rather than another. It might be argued then, that the discourse concept has a hidden agenda or at least a hidden consequence: it is always a justification of the status quo, and a denial of the right to alter things.

So how then might we proceed? My answer is to try and unpack the unexamined assumptions in the various discourses and to determine their effects on the persons caught up in those webs of understanding. I will attempt to demonstrate that those effects can be judged against some other (external) criteria to determine which is the most beneficial course of action. To put it another way, which discourse should we put our faith in, and why?

So now I think I have established that we might speak of three victims, and one offender/victim. The first concept or categorisation that I shall examine therefore, is the concept of victim/offender. It is a highly problematic example of a binary opposition. It is fashionable now to dispense with this 'either/or' categorisation altogether on the grounds that it does not provide for nuance or the complexities of real-life situations. The preferred alternative is 'both/and'. The female driver is a good example of what we might call 'the union of opposites'. She is both this and that, both victim and offender – at the same time. This seems to me to be a clear example of the futility of trying to apply the strict rules of logic to the sheer messiness of human behaviour and human affairs.[4] The actual hard empirical evidence surrounding the accident which she had created, shows without any doubt, that she was both victim and offender. She both caused it and was harmed by it.

To some readers, this may seem so obvious as to be almost fatuous. Yet that is the point. The legal discourse cannot see this, or admit to it, because it is built on a whole set of other unstated assumptions about human behaviour and how it should be controlled. To put it another way, the legal discourse is sufficient unto itself, admitting of no contrary opinions or information. Those assumptions are firstly that the law is the penultimate method of social control (the ultimate sanction comes from the state monopoly of force). Secondly, that the abstract idea of 'law' finds embodiment in actual laws eg 'the *Land Transport Act 1961*'. When it is deemed that an actual law has been broken, a person is charged

[4] I am referring here to the third law of Aristotelian logic, namely that a thing 'is either A or not A'. It is commonly referred to as 'The law of the Excluded Middle'; see AC Grayling, *The History of Philosophy* (Penguin, 2019) 587.

with that offence, and the state then seeks to prove that the law was broken. When this is agreed or proved, the charged person is labelled as a convicted criminal. In this way, the person moves from the status of being 'an offender' (one charged with being guilty of 'an offence') to being a convicted criminal. The final stage is to punish them.

To punish someone for doing something wrong, is an idea deeply embedded in western societies, and probably most others as well.[5] For many it is so deeply embedded that it amounts to a foundational position. Children are taught it in the home. Further, it is powerfully reinforced by the system of compulsory schooling. For most it is never questioned while for many it is unquestionable.

Yet in the last decade or so the idea has come under critical scrutiny and there is a developing understanding that as a practice of social policy, it is often less than useful, sometimes even harmful. The discourse of the law however, remains welded to it (to use an engineering metaphor.) The current NZ government (2017-) has committed itself to reforming the legal system, but I do not see in its proposals, any hint of addressing this fundamental issue. This suggests that the submissions made to this point are far from radical and that this foundational issue will be left unaddressed.

The psychological roots of the need to punish stem from the desire for revenge. Or to put it most crudely, it goes like this: 'You hurt me, so I am going to hurt you'. As RJ facilitators, we came across it very powerfully in accidents causing death, with statements like: 'his victim was only 20 years old, so he should get 20 years in jail,' or, 'he was on drugs, and we want the maximum sentence that the law allows'.

But this brings me to a point which highlights the blindness of the law in its standard application: that frequently in our RJ cases we came across victims who were not interested in punishment for the person who had harmed them, but rather in the ability to recognise that all parties in a situation had been harmed, and all needed some way to healing, some way to find the path to peace with each other. (I will address this issue shortly, upon resuming my discussion of the case I raised at the beginning of this article). This astonishing ability to find forgiveness even under the greatest duress, was surprisingly widespread, and continued to amaze me whenever I came across it. It is my impression that this particular human response to tragedy receives very little publicity and is not widely known.

The point is that this pattern of human behaviour which rejects the idea of punishing an offender is one to which the law remains oblivious. In its obsessive desire to punish, the legal system monumentally

[5] For a particularly engaging and informative examination of this idea, see Morris B Hoffman, *The Punisher's Brain* (Cambridge University Press, 2014).

fails to reduce crime, or to practice a system which addresses the needs of offenders or the needs of victims. Nobody wins. Yet the system grinds on, much like some giant driverless bulldozer which is controlled by algorithms, crunching all in its path.

To conclude this section, I think I have established that the consequence of employing the discourse of the law is that it narrows itself to only two things, with the effect that it blinds itself to the needs of victims, sometimes even mandating them out of existence, and even when those victims demand some kind of savage retribution, finds that it cannot satisfy their demands either. The ineffectiveness of punishment as an administrative solution to a societal problem of how people might live together in peace is revealed in the failure of the two most commonly offered justifications for punishment, that it deters and reforms. Crime and recidivism continue unabated, and the evidence that punishment rarely changes behaviour is thus overwhelming.

The concept of 'offending' and the 'offender'

The other half of the binary opposite that we are examining is that of 'the offender'. When a person is classified in this way, then they become an object in the legal system. No other aspect of their identity is acknowledged or given any value because this might interfere with the neutral, impartial and objective administration of the law. Any idea of their full humanity, or what I called earlier, 'the wholeness of the person' is thought to be a distraction to the process of the law playing its way out so that social control (and therefore social harmony) can exist.

Yet anyone who deals with offenders knows that there are a multitude of needs that they have. The first one is the need to understand what is happening to them. A simple visit to any courtroom on a sitting day will reveal that it is an alien place filled with arcane language and ritual responses, with processes and procedures that are utterly mystifying and disorienting to the person who appears there as an offender. The person may not speak except through legal counsel. The judge may take fifty minutes to deliver their verdict, complete with a number of silences and much shuffling of paper. When it is delivered, the punishment bears no relation to the crime but is registered as an assault on the offender's body by some more powerful persons or things. Its chief significance, it might be argued, is that it renders the offender powerless. In this extraordinary, unrecognised and unintentional way, the offender is converted into a victim. They may well feel utterly victimised.

The first consequence of punishment then is that it increases the number of victims in the case and increases the amount of harm done. This is a paradox indeed. My argument by now will be clear: by defining the terms 'victim' and 'offender' as it does, the legal system creates more mayhem. Instead of providing a path towards social harmony, it frequently increases the amount of disharmony. The second

part of my argument should also be clear; that the words we use to describe things, the words we use to conceptualise things, are really important. The corollary to this is that words organise themselves into ideas and these are clumped together into discourses. Before any meaningful institutional change can be embarked upon, the meaning of words has to be clarified, along with a clear recognition of the discourse that those words have been organised into. In summary, the words we use do matter.

The concept of restorative justice

At this point, it is necessary to turn to another aspect of the legal system and to examine the language and discourses that pervade it, subjecting those terms to rigorous analysis and then comparing them with the language and discourses of the official legal system. I refer of course to the relatively recent practice of using Restorative Justice Conferencing as a supplementary process to address the issue of how the state should respond to criminality.[6]

In NZ, all cases that come before the District Courts have to be offered up to the Restorative Justice (RJ) process. About one quarter take up this voluntary option. As far as the legal system is concerned, the end point of the RJ process is a report to the judge outlining what was said in a meeting between offender and victim, whether an apology was offered (and accepted), and the nature of any agreed restitution (most often a form of money payment.) The judge has to read the report, and the most common response is for the sentence to be ameliorated in some way (eg a reduction of three months in a jail sentence.) In the city in which I worked, it was common for judges to make a point in their sentencing notes, of how helpful the RJ report had been to them. It is now a practice that is firmly ensconced in the wider legal system.

Yet it sits somewhat uneasily in there. There is a sense in which the RJ process is in the legal system, while not of it. Part of the reason is that it deliberately chooses different language by referring to 'a person who has harmed,' and 'a person who has been harmed'; harmer and harmed. This immediately reveals that an entirely different discourse is being utilised; the discourse of healing (rather than the discourse of punishment.) Following the groundbreaking work of Howard Zehr,[7] this way of looking at society sees 'crime' not as the breaking of a law, but as a breach of the social contract. This is a 180 degree turn and its significance cannot be overstated (although many people including facilitators have not picked up on this yet.)

[6] For those who are interested, see Douglas Bruce Mansill, 'Community Empowerment or Institutional Capture and Control? The Development of Restorative Justice in New Zealand's Adult Systems of Social Regulation Control and Punishment' (PhD Thesis, Auckland University of Technology, 2013) which describes in fascinating (if tendentious) detail a case that attempted to bridge the gap between the law and its Eurocentric assumptions, and burgeoning Maori rights.
[7] Howard Zehr, *Changing Lenses* (Herald Press, 2005). This book is regarded by many to be the foundation text in RJ theory. It is accessible and persuasive in its argument that we need a new way of looking at society and criminality.

The key concept is 'relationality'. It emphasises community and connectedness rather than individuality. In this sense, it is a bald attempt to transform how people at large might view the world or come to understand it. Not as individual consumers conceived of as freely floating atoms, but as persons caught up in multiple webs of connection. Assault, theft, injury to others, is seen as damaging to the social web. The most important thing therefore, is how that damage can be repaired. From this perspective punishment has no place, no legitimacy, nothing useful to offer.

It is at this point that the RJ process offers its most radical challenge to the existing legal system, because the RJ process denies the usefulness or the validity of the state assuming that for the purposes of instituting social control it should supplant the victim. That is, the state assumes that *it* is the victim, taking up the case for the prosecution on behalf of the victim. Because of this legal sleight of hand, the real victim's needs become invisible, unrecognisable, completely omitted from the equation.

The RJ process stands as a blatant contradiction to this long-established process, although I rather suspect that many people have yet to perceive it. RJ acts on the belief that the actual victim should get to talk to the actual offender, that the actual harmed person should be able to meet with, and have a conversation with, the actual harmer. This practice places RJ squarely at odds with police operating protocols because they actively discourage the harming person from making any contact with the harmed person, because in their way of looking at the world, this simply opens up the possibility of intimidation. From an RJ perspective, it simply opens up the possibility of peace. More than that, it is indispensable to making peace, it is the way of peace.

Again, to re-emphasise the point, words do matter.[8] They do not simply describe things or represent things. To a very large degree, they constitute that thing. What is the difference between using the word 'offender' and using the word 'harmer?' One constitutes the person as a bad person (who needs to be punished). The other constitutes the person as someone who needs to put something right (through apology and restitution.) One increases the amount of harm in the world, and the other decreases it.

Yet as things stand, the way RJ has been slotted into the official legal system is a very effective way of obscuring its influence, of neutering its capacity for doing good. It is simply one of many reports that a

[8] Te Uepu Hapai i te Ora, *Turuki Turuki* (2019) available at <www.safeandeffectivejustice.govt.nz>. This was a report commissioned by the Ardern Labour government as part of its intention to reform the justice system. It refers at various points to the need to find a new language as part of a new way of doing things. It leans towards the use of 'harmer and harmed'. In my view however, the authors fail to see the transformative potential in this change of language, and allow themselves to be submerged in the strong political currents around the centrality of the idea of race discrimination, the need for 'decolonisation', and the push for lowering the rate of Maori incarceration in the prison system. In proposing the substitution of one cultural pattern for another, they fail to recognise that the key component to any culture is language. In my experience, the RJ process (and its distinctive language discourses) has the ability to reach across cultures, as the case study in this article implicitly suggests. Unfortunately, this perception is not yet widely shared. In this way, a signal moment for transformative change may be lost for another generation or two.

judge receives and it is a minor part of the system, if sometimes a helpful part. Beyond all that, it has a transformative potential as I shall seek to show as I return now to the case that I began this article with, in an attempt to demonstrate how using this RJ process can remove harming person guilt and release the harmed person from the need for some kind of retribution. The truly astonishing part is that each party to the conflict has it in their power to offer a kind of resolution, a kind of redemption to the other. And it is all done by using the words that the RJ facilitator has prepared them to use.

The case in question

The two parties involved in this case were separated by distance, by geography, by social position, by marital status, by gender, by age, by culture and by language. The harming party was composed of female driver, husband and small child. The driver spoke no English, although her husband did. The harmed party was a male not in any relationship, and with no dependents, somewhat older. Both parties agreed to meet, but the health needs of the child meant that they could not travel to meet in person – several hundred kilometres.

We set up a Skype meeting with two facilitators, a licensed interpreter and the harmed person at our end. At the other end were the harming wife/mother and husband. By every conceivable metric, the parties were a long way apart. Ironically, and as an unintended outcome, the fact that it was a Skype meeting was to play a determining role in the end result.

Through the interpreter, the harming driver explained that she could not remember much about how the accident happened. She did recall a sneeze. She wept quietly much of the time. The harmed driver described his injuries and the severe economic consequences for him. He asked if they would pay him $15,000 NZD in restitution. The harming party (ie including the husband) said they had been put out of work by the accident and were full-time child minders, surviving on the generosity of friends. Nonetheless, they offered the most they could put together, $2,000 NZD.

This exchange took place early in the meeting, and the large gap between them posed a significant challenge to any kind of amicable resolution. As facilitator, I decided to let it sit there, and the conversation continued. The harming driver began to tell her story of what had happened to her and her husband as a consequence of the accident. She apologised profusely for the harm she had done to the other driver, and although she did not say so directly, it was clear that she had taken on a lot of guilt about that, but also on account of what she had done to her unborn child. The guilt shame and sadness lay there in her unceasing tears. She told a story of how many people had struggled mightily to keep the child alive.

Stepping outside her story for a moment, this is what the RJ process does. It allows people to tell their own story in words of their own choosing. She was therefore, telling us who she was, establishing her own identity as she understood it. She came across as a compassionate suffering woman.

Resuming the conference dialogue now: for his part, the harmed driver explained that he lived on his own and had no children of his own, but he asked a series of questions about the child's progress and the difficulties of caring for him at home. Responding to his warmth and concern, the harming couple said that they had named him in their own language as 'little warrior', and then the dialogue took a completely unexpected turn with the question 'would you like to see the child?' 'Ooh yes' the harmed driver said with enthusiasm.

So, they trundled the monitor down the corridor, and we all peered at this tiny child with a white patch on one cheek, and an oxygen mask nearby. 'Look, look', exclaimed the harmed driver, 'is he smiling?' 'Yes,' said the child's father, 'he is smiling at you'.

At that point the harmed driver was quite overcome, and everyone else took a deep breath as well. When he recovered enough composure to speak, he said: 'Look look I am going to withdraw my claim for $15000, and I want you to take that $2000 and spend it on your child. Buy him some clothes or something'. Everyone wept and it was the turn of the harming couple to be overcome. When they recovered sufficiently, they asked if the harmed man would like to keep in touch with them so that he could follow the child's progress through time. This too was accepted as the gift that it was, inviting a man to move from his isolated solitary existence into the full embrace of a loving family**.**

Some analysis

Clearly this was a place of healing for both parties. The mother was able to expiate guilt and shame and he was able to transcend the remnants of his anger. In the process, the harmed driver not only healed himself, but allowed their healing as well, by validating their suffering. By returning their offer of money, he was implicitly making a gesture of forgiveness, allowing therefore, much of her guilt and shame to fade away like the morning dew. In Howard Zehr's terms, this was a repair of the social contract, and its benefits extend far beyond the boundaries of those few people involved. It was all done by changing the language and allowing for a different discourse.

Compare that outcome with the alien objectified process of the Courtroom which accords no proper respect to either party by reserving all effective power to itself. That structure has taken a couple of hundred years to evolve, but it is now possible to see that its assumptions and practices are retrogressive and harmful to the effective construction of a more peaceful society.

The advantages of using adjudication to resolve construction disputes pursuant to the *Construction Contracts Act 2002* (NZ)

Anthony Fawcett[*]

Abstract

In New Zealand parties to a construction contract have the benefit of a number of dispute resolution options from which they can choose. Determination of smaller disputes up to $30,000 NZD are available via the Disputes Tribunal.[1] However if the disputes sum exceeds this amount, then this option is unavailable. It begs the question then, what is available? And does it actually work in practice? This article looks at adjudication as a dispute resolution method and discusses its advantages and disadvantages.

What is adjudication?

Adjudication is a legislated dispute determination process prescribed by the *Construction Contracts Act 2002* (NZ) ('*CCA*'). This is New Zealand's primary legislation relating to governance and regulation of the construction industry. It is similar to the Australian securities of payment legislation for the various states and territories,[2] but it also has some notable differences.

The purpose of the Act is set out in s 3, which states:

> The purpose of this Act is to reform the law relating to construction contracts and, in particular,—
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> (a) to facilitate regular and timely payments between the parties to a construction contract; and

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[1] See generally Disputes Tribunal of New Zealand, 'About the Tribunal', *Disputes Tribunal* (Web Page, 2 April 2019) <https://disputestribunal.govt.nz/about-2/>.

[2] See, for example, *Building and Construction Industry (Security of Payment) Act 2009* (ACT); Building and *Construction Industry Security of Payment Act 1999* (NSW); *Construction Contracts (Security of Payments) Act 2004* (NT); *Building Industry Fairness (Security of Payment) Act 2017* (Qld); *Building and Construction Industry Security of Payment Act 2009* (SA); *Building and Construction Industry Security of Payment Act 2009* (Tas); B*uilding and Construction Industry Security of Payment Act 2002* (Vic); *Construction Contracts Act 2004* (WA).

(b) to provide for the speedy resolution of disputes arising under a construction contract; and
(c) to provide remedies for the recovery of payments under a construction contract.

Basically put, a complaining party can have a dispute adjudicated by an impartial adjudicator if the dispute concerns a construction contract. The determination is binding until superseded by a higher authority (such as being litigated in court or via an arbitration pursuant to the *Arbitration Act 1996*).[3] The courts are highly reticent to 'not enforce' an adjudicators' determination and must enforce the determination other than in strict circumstances.[4] The Act goes as far as to set out expressly the only circumstances in which the court may not enforce the determination.[5] These include:

(a) that the amount payable under the adjudicator's determination has been paid to the plaintiff by the defendant:
(b) that the contract to which the adjudicator's determination relates is not a construction contract to which this Act applies:
(c) that a condition imposed by the adjudicator in his or her determination has not been met:
(d) that due to a change in circumstances, which was not caused in any part by the defendant, it is not possible to comply with the adjudicator's determination:
(e) that the date (if any) specified in the adjudicator's determination for compliance has not (yet) passed.

Without the prescribed conditions, the court must enter the adjudicators determination as a judgment.[6] There is no right of appeal under the CCA. If the adjudicators decision is 'incorrect', the courts are unlikely to reverse the determination; however, that determination may be subject to judicial review.
If courts did not support adjudication determinations in this way, then adjudication may be seen as an inferior dispute resolution option with any determination being able to be tied up in the civil judicial system once a determination is provided. This may undermine the initial purpose of the Act , which is to facilitate timely payments and dispute resolution.[7]

What does adjudication provide as a unique selling point?

Put plainly, the main advantages of adjudication under the CCA are cost and speed. The ethos behind the CCA is to ensure continual cashflow throughout the construction industry, by enabling quick resolution of disputes in a way which is not prohibitively costly to claimants. The Act adopts a 'pay

[3] CCA s 60.
[4] Condor International Limited v Steelhaus 2014 Ltd [2019] NZHC 296.
[5] CCA s s 74(2).
[6] Ibid s 74(4).
[7] Ibid s 3.

now, argue later' approach that mandates payment where certain draconian procedures have not been followed. Examples of these strict requirements can be found in ss 20 and 21 of the CCA, which provide for payment claims and payment schedules respectively.

This 'pay now argue later' approach may be warranted for default liability claims. However, where a legitimate dispute exists and the prescribed processes have been correctly followed by all parties, the CCA provides adjudication as a dispute resolution option to address genuine disputes.

As New Zealand already has established legal mechanisms for resolving contractual disputes under the general law, it is helpful to analyse the unique features of the CCA.

Procedural advantages

Adjudications are a streamlined process, void of the trappings, expenses and wait time of the courts. While there are costs (such as the adjudicators' fee, discussed below) associated with adjudication under the CCA, the overall cost and time involved in resolving disputes are significantly less than court proceedings, for several reasons.

Process

The instructions for adjudications are set out in Pts 3 and 4 of the CCA. The CCA is refreshingly clear when compared with court processes generally. The deadlines for submissions and responses are set out and interested parties are not expected to require an in-depth knowledge of law to use the Act as an instrument to resolve disputes. A reasonable understanding of construction law may well enhance the quality of a claim, but from a process perspective the instructions for submissions are such that legal qualifications are not necessarily required in order to gain an understanding of what must occur, and the relevant timeframes.

Beginning an adjudication

The adjudication process begins with the issue of a notice of adjudication (NOA). NOAs can be drafted and issued by any eligible party without much cost or expertise, contrary to the initiation of court proceedings which may be significantly more costly due to the process and need for lawyers. A short time later (two to five days), the parties may either agree to a particular adjudicator or have one assigned by an 'authorised nominating body'.[8] The Building Disputes Tribunal is the most popular among the range of authorised nominating bodies that perform functions relating to the CCA. Notice of adjudication can therefore be used as a relatively inexpensive and simple step to immediately highlight

[8] Ibid s 33.

the severity of an ongoing dispute to a responding party. This may have the effect of prompting resolution of the issues and can act as an incentive to commit to resolution of the particular points of contention in the dispute, or face an obligation to pay avoidable costs to the party at fault.

The fee

The claimant must pay the adjudicators fee in the first instance, usually in the form of a security deposit. The amount typically depends on the value of the claim. The costs are subsequently apportioned accordingly within the adjudicator's determination. This means that irrespective of which party pays the initial adjudication security fee, the final costs incurred by either party due to the adjudicators fee may be determined by the adjudicator.

Timing

Once an adjudicator is assigned and is willing to act, the claimant has five working days to submit its claim; and the respondent has the same time to respond to that claim.[9] Note that the claimant could effectively take as much time as it chooses to compile its claim prior to issuing the notice of adjudication. The initial five working day period may be extended by the adjudicator if a party would be prejudiced by having to respond in such a short time. It may not be fair if the respondent must respond within five working days to a claim which was prepared and substantiated over a substantially longer time-period.

Once the claim and responses are submitted, it is possible that there can be another round of submissions. This second round is named within the Act as the reply (claimant) and rejoinder stages (respondent). The adjudicator may also extend its determination deadline by a moderate duration,[10] but the Act continues to provide that those disputes must be determined within a particular time. The impact of a late determination may result in the adjudicator not being entitled to their fee.[11] The adjudicator then provides their determination on the matter, which can be enforced in the courts as a binding determination on the issue.

Representation

In addition to the simple process to initiate proceedings, parties can also represent themselves or be represented by any lay person (ie someone not legally qualified)[12]. This enables parties that would otherwise be prevented from pursuing a claim (due to the potential high cost of legal representation

[9] Ibid ss 36 and 37.
[10] Ibid s 46(2)(b).
[11] Ibid s 57(5).
[12] Ibid s 38B(2).

required when undertaking other dispute processes, for example) to access a form of dispute resolution. Other jurisdictions such as court proceedings, arbitration, and some adjudications abroad require licensed legal professionals to make submissions which restricts parties without sufficient cashflow from being able to commission those services.

Other matters of importance

Claimants also may request that an adjudicator determine the rights and obligations of the parties, in addition to payment disputes.[13] It may well be that a party seeks to have an obligation or right clarified and determined before it assesses its option to proceed with a monetary claim (or not). This is a useful tool, for example parties may disagree about interpretation of a time-bar clause or may dispute the definition of a defect. This enables understanding of a particular element of a dispute before embarking on a potentially expensive mission to pursue a claim.

Time

The availability and wait times of the NZ courts can take months to years depending on the issues. Adjudications have, in the first instance, a maximum prescribed duration of thirty working days.[14] This means that the claimant and respondent know that a determination will be provided within a relatively short period of time. The adjudicator may unilaterally extend the determination date by a further ten working days, in addition to the short wait while an adjudicator is appointed, which is typically three days and can occur sooner.[15] Notwithstanding these time periods, the parties may agree to an extension of time.[16] Nevertheless, the time frame within which an adjudication is concluded is significantly reduced compared with regular court processes.

Due to the speed and cost advantages, the Act works rather well in practice, but to understand its total worth we must also consider its disadvantages. Some of those disadvantages are set out below:

Unforeseen costs

There can be unforeseen costs. This can occur in two respects:

a. The adjudicators fee is higher than anticipated.
b. The case is ‘without substantial merit’ and/or a party acted ‘contemptuously’ during the proceeding.

[13] Ibid s 48(1)(b).
[14] Ibid s 46(2)(a).
[15] Ibid s 46(2)(b).
[16] Ibid s 46(2)(c).

Adjudicators fee

There are several 'types' of adjudication claims, with varying costs. Although there is only one process formally established by the CCA, there are practitioners who offer adjudication services for low value claims as a fixed fee. Other than this, the adjudicators fee is usually dictated by the time required by the adjudicator to determine the issue. The initial deposit paid by the claimant is a security only. There may be a partial refund if the adjudicators fee does not exceed the security, or (if the security is exceeded) there may be a significant bill to pay before the determination is provided. This means that parties operating at the limits of their cashflow must be careful to understand the potential cost when deciding to utilise the adjudication process.

'Without substantial merit'/'contemptuous'

The Act provides a remedy for parties who bring or defend claims without substantial merit. This seems fair; if there was no power to correctly apportion costs where frivolous claims were pursued, adjudication could be used to commercially harm other parties, irrespective of the strength of the claim. The respondent would be forced to spend resources defending its position, or a claimant would be required to use resources to counter unsustainable defences to the claim. The Act deals with this by affording the adjudicator the jurisdiction to decide:

a. How much of the opposing parties' costs must be incurred by the 'offending party' whose case is 'without substantial merit';[17]
b. How much of the adjudicators fee must be paid by the 'offending party'.[18]

Parties must be acutely aware of the strength of their case before embarking on an adjudication. Put short, adjudication is not a tool to be used lightly or for frivolous claims and defenses.

A quick decision in lieu of the right decision

The broad spectrum of construction disputes leads at times to complex disputes. Often claims are not entirely supported by documentation and some claims arise as a result of oral contracts. These things potentially add difficulty when seeking to correctly determine a dispute. There must at some point be a tradeoff between quality and/or accuracy of the determination against the need to provide the determination within the allotted periods of time. It is inevitable that faulty determinations will arise. The purpose of the CCA is not to provide a correct determination.

[17] Ibid s 56.
[18] Ibid s 57(4)(a).

The priorities constructed in the CCA require a quick decision, even in lieu of the right decision. But an adjudicator cannot simply throw a proverbial finger in the air and guess regarding a dispute. The adjudication must be conducted in accordance with natural justice and the law, and it follows that the adjudicator must determine the issues, accordingly, however constrained by time. The courts are reticent to overrule an adjudication determination.[19] However, the courts see a stark contrast between 'overruling' an adjudicators determination simply due to a quality complaint and 'judicial review' which would focus on breaches of natural justice and jurisdictional issues (which may require intervention by the courts). If the parties are unhappy with the determination, they are free to litigate the issue at court or arbitration. In this sense, adjudications under the CCA are considered as temporary.

Conclusion

This article has provided a brief overview of the adjudication process provided by the CCA. It has shown that adjudication has procedural and financial advantages when compared with claims brought under the general law of contracts through regular court processes. Yet it also acknowledges that the CCA process, at times, forgoes accuracy for speed, yet remains subject to a degree of judicial oversight. Parties are therefore advised to assess the strengths and limitations of adjudication processes under the CCA when considering the best pathway to resolving a construction contract dispute in New Zealand.

[19] *Rees v Firth* [2011] NZCA 668.

Book Review

A Synopsis of ***Mediation Series: Making Mediation Law©***

by Nadja Alexander and Felix Steffek

Sharin Ruba*

This book is the second in a series of three books, *Mediation Essentials,*[1] *Making Mediation Law*[2] and *Integrated Conflict Management Design Workbook*[3]. *Making Mediation Law* is a guide to designing mediation policy and legislation. The focus of this synopsis is on the methodology of making mediation policy and law.

Mediation law affects all parties and can be designed into different forms from private contracts to codes of conduct to legislation. For mediation law to be effective, it requires a set of principles and techniques. The term 'mediation law' as used by the authors includes both policy and law.

Making Mediation Law is a practical and hands-on book drawing on international research, policy and practice, and offers valuable advice to a wide audience involved in the law-making process. The first part of the book focuses on common issues, definitions, and models of mediation. The later chapters bring in practical details on how to make mediation policy and law.

The goal of the book is to:

- describe the regulatory landscape of mediation
- outline the parameters of a regulatory project about mediation
- offer a step-by-step guide to making policy and law about mediation
- generate enthusiasm among a wide range of regulatory stakeholders to become involved in shaping the future of mediation.

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[1] Nadja Alexander, Fatma Ibrahim, and Jean-François Roberge, *Mediation Series: Mediation Essentials* (International Finance Corporation: World Bank Group, 2016).
[2] Nadja Alexander and Felix Steffek, *Mediation Series: Making Mediation Law* (International Finance Corporation: World Bank Group, 2016).
[3] Nadja Alexander, *Mediation Series: Integrated Conflict Management Design Workbook* (International Finance Corporation: World Bank Group, 2016).

The authors adopt a definition of mediation as a systematic process in which an intermediary facilitates communication between self-determining parties who are in conflict. The authors recognise that because mediation is a flexible and adaptable process, regulators find it difficult to formulate policy and law around mediation. However, the authors recognise and demonstrates in this book that mediation does already exist within a regulatory framework and it does not reside in a vacuum.

The authors' main focus is on what they term the 'Diversity-Consistency Dilemma' spectrum. They highlight and explain that each jurisdiction and organisation are on different points on this spectrum depending on their evolution in the practice of mediation.

In practical terms, *diversity* involves flexibility and innovation, whereas *consistency* involves regulation that can measure uniformity and quality of mediation. They recognise that over-regulating will inhibit the many opportunities for innovation development and follow the highly legalised path that arbitration has followed. The *dilemma* is therefore the tension between need for flexibility and innovation in mediation and the rigidity of regulation to achieve consistency.

The authors make the point that the idea that mediation *cannot* be regulated, is misinformed. They point out that regulation has always occurred in mediation through codes of conduct, practice standard and accreditation standards.

Mediation laws are made with the intention to regulate the behaviour between individuals. In practical terms, those laws encapsulate elements such as mediator accountability, transparency of mediation processes, mediation confidentiality, qualifications and skills of the mediator. While uniform law is possible to regulate the behaviour of individuals as set out in the preceding paragraph, flexibility is required in any regulatory framework or policy model if an interest-based mediation approach is taken.

As the authors clearly subscribe to interest-based or transformative mediation approach, they recognise that the aim of any dispute resolution policy is based on satisfying the differing legitimate interests of the parties involved. Therefore, different models of mediation are required to suit those varying interests.

The authors say that for people to access mediation, different models of mediation are needed to deal with different types of conflict. The level of regulation within the mediation process at each point differs.

Four access points are available which range from centralised to decentralised distribution of mediation

services, ie, from court referred mediation to community-based mediation, and it is balanced between the private marketplace input (deregulated) and public/government input (regulated). The authors provide case studies from different countries such as Austria, Bangladesh and Singapore (to name a few).

The authors postulate that choice of access leads to greater efficiencies and serves the interests of justice where the participants have their disputes resolved with minimum costs and to their satisfaction involving favourable benefits. A regulatory framework must therefore allow for this. This forms the foundation for economic prosperity and just outcomes.

The authors' research demonstrates that people often engage in dispute resolution processes that do not produce the best outcome for them as their real interests are not addressed. In addition, the existing regulatory framework may not be ideal. Therefore, creating a good mediation policy is one of the methods that can be used to address less than ideal decision-making behaviour by those who are involved in conflict and are faced with limited legal rules, policies and standards.

The authors suggest that for optimum results in creating good mediation policy, the possible tools are legislation, ministerial instruments, court rules, professional self-regulation, codes and contracts.

The authors set out two steps for creating mediation law. The first step is to consider:

a) who the interested parties are:
    i) The primary stakeholders are the parties of a current or of a future dispute. Their interests go further than economic expense and time but also include the lasting extent of the resolution, a shared advantageous outcome, 'individually tailored solutions', and an 'integrative and constructive method of dispute resolution';
    ii) Those who are directly or indirectly involved in contributing to mediation proceedings and or who earn an income from mediation;
    iii) Individuals who are not involved but are affected by the mediation particularly those who are close to the parties.

b) the general framework for dispute resolution process:
    i) In determining the general framework, the authors state that any regulatory framework is based on a definition of mediation and its implication where the free will of the parties is an essential element. Here the autonomy of the parties, to bind themselves to a solution can take the form of a contractual clause or a settlement agreement.

Additionally, according to the authors, '[r]egulating mediation requires distinguishing mediation from other forms of dispute resolution'.[4] In other words, the perspective of the parties and their experience of mediation is integral and further, the following questions are asked:

i) is each party's consent required to initiate the dispute resolution process?
ii) do the parties determine the procedure?
iii) do the parties determine the content of the result?
iv) is the parties consent required for the result to be binding?
v) do the parties choose a neutral facilitator?
vi) do the parties control the disclosure of information? and
vii) is the procedure confidential?

c) the principles that should guide the regulatory process:

The three relevant principles that guide the regulatory process are:

i) party autonomy where parties are self-determining,
ii) equality requiring similar situations are treated the same and
iii) efficiency meaning achieving maximum satisfaction at the lowest cost.

In the second step the principles that define the regulations are as follows:

a) the scope of the regulatory scheme can exist in the various forms:
   i) General mediation laws can extend to all mediation in a given jurisdiction.
   ii) Sector specific regulation refers to mediation laws in a specific industry, court, mediation programme, area of law, etc.
   iii) Integrated mediation laws focus on particular sectors, but they are not stand-alone laws and are incorporated into general regulatory instruments.
b) the regulatory stakeholders:
   i) The stakeholders range from legislators, policy makers, the courts and judges, legal practitioners, users, other professionals, professional organisations and dispute resolution institutes.
c) the target users/participants:
   i) They are mediators, users of the mediation services and mediation service providers.
d) the current or existing regulatory framework:
   i) Current forms include *hard law* such as legislation, ordinance, framework regulation,

[4] Alexander and Steffek (n 2) 18.

court practice direction, common law and *soft regulation* such as non-legislative standards like theNational Mediation Accreditation System (NMAS) where it illustrates the codes of conduct formediators and institutional mediation rules, private contract and mediation pledges and clauses.

e) what the regulatory framework should encompass:

Different aspects of mediation can be regulated. The four aspects are:

i) triggering mechanisms that initiate mediation (voluntary, mandatory, and others);

ii) process and procedure – the method mediation is to be conducted which include mediation process, appointments, payments, administrative matters;

iii) mediation practitioners standards and quality assurances; and

iv) the regulation of the rights and obligations of participants including lawyers, mediators and the parties.

f) type of rule or standard to be enunciated:

i) The function and the form of the various rules in the regulatory plan can be defined and framed as general and abstract or as concise, specific and targeted.

g) method to match function to form:

i) The authors provide a table to match the form of regulation to the appropriate mediation model that is proposed or being currently used.

The authors state, '[m]ediation policy should ideally be created with a view to the specific environment',[5] meaning the mediation policy or regulation must fit the users and not vice versa. The wholesale importation of a regulatory framework from one jurisdiction into another is a recipe for failure of theinitiative because a one-size-fits-all approach does not work. Therefore, when creating mediation law, the following has to be considered – specific conflict culture, particular rules and standards of the jurisdiction, historical development of dispute resolution, established practices of dispute resolution,unique moral guidelines and socio-economic particularities.

The authors note several attractive characteristics of mediation such as cost and time, flexibility, high success and satisfaction rates. They also set out four important success factors for the regulation of mediation. These factors are:

i) institutional integration of mediation where institutions such as the courts guide the resolution of disputes through mediation;

[5] Ibid 42.

ii) enabling mediation law that maintains the flexibility while placing mediation on equal footing with other dispute resolution mechanisms in both private and judicial landscapes;

iii) ensuring that information on mediation is readily available to participants and by creating awareness; and

iv) incentives to promote the use of mediation as a dispute resolution mechanism such as mediation as a first step before commencing litigation.

The book sets out clearly and concisely the steps needed to make mediation law. The book draws on best practice principles, international research, policy and practice. The authors also state that mediation law can take a variety of different forms from private contracts to codes of conduct to legislation but most importantly, it demonstrates that mediation law belongs to everyone[6].

[6] International Finance Corporation hereby consents to Sharin Ruba's noncommercial use of Making Mediation Law for the specific purpose of a synopsis to be published in *Arbitrator & Mediator 2021.* By use of the IFC Material, you agree to always identify the owner of the Material, namely, IFC, in the following format: © 2016 International Finance Corporation,, All Rights Reserved. Additionally, you agree to always provide attribution to the lead authors, namely, Nadja Alexander and Felix Steffek. You further agree not to charge for access to such content and not to modify, edit, or otherwise alter the Materials in any way. IFC does not warranty the truth of the Material, which is provided to you "AS IS" without any warranty of any kind, either express or implied. In no event shall IFC be liable for any loss, claim, damage or liability, of any kind or nature whatsoever, arising from or relating to the Material or any use thereof. Nothing herein shall constitute or be considered to be a limitation upon or a waiver of the privileges and immunities of IFC, which are specifically reserved.

Lawyer, Scholar, Teacher and Activist – A Liber Amicorum in Honour of Derek Roebuck[*]

Phillip Greenham[†]

I did not know Derek Roebuck. Having now reviewed *Lawyer, Scholar, Teacher and Activist – A Liber Amicorum in Honour of Derek Roebuck* I regret that I did not. Also, I feel that, in some small way, I now do.

This *book of friends* paints a fine picture of a man who contributed much to arbitration, the law, academia and society in general.

The book opens with reflections from Susanna Hoe, Derek's wife of almost 40 years. This chapter introduces the reader to the warmth, intellect and passion for social issues which was so much of the man. The glimpses into the loving journey shared by Susanna and Derek are most valuable and much appreciated. However, in Susanna's words, the writing does '… not descend into over-sharing'.

This opening chapter is followed by reflections from another nine of Derek's friends and colleagues. Each author recalling those aspects of their connections with Derek which left the greatest impression. Sometimes the same circumstances are touched upon by different authors from their own perspectives, providing a pleasing and informative roundness to the picture which is painted.

Part two of the book is a collection of three previously published items written by Derek. These chapters trace the history of arbitration from its earliest origins. They are a valuable and most interesting presentation of material and insights which will engage all who are interested in arbitration. They also provide a fine glimpse into the great wealth of other writings on this subject by Derek.

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[*] Lawyer, Scholar, Teacher and Activist – A Liber Amicorum in Honour of Derek Roebuck (1st ed), Edited by Neil Kaplan and Robert Morgan, HOLO Books: The Arbitration Press, 2021, ix + 555 pages: ISBN 978-0-9572153-9-9.

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Part three presents articles on arbitration and related topics from a collection of seventeen contributors. The breadth of contributors is a testament to Derek's impact and influence and the high regard in which he was held by so many. The contributors include Neil Kaplan, one of the editors of the book, Mary E Hiscock, Lord Neuberger, Jan Paulsson and Janet Walker and Doug Jones. Again, these contributions are very useful, insightful and interesting and will be much appreciated by arbitration practitioners. Part four is a collection of five papers presented as the Roebuck Lectures through the Chartered Institute of Arbitrators. Derek had a long connection with the Chartered Institute having been the editor of the journal of the Institute for ten years.

The book is a record of Derek's life, a reflection of the great warmth and regard which so many had for Derek, a collection of valuable and interesting material on arbitration and an enticing invitation to seek out more of Derek's writings. It will be much appreciated by those who knew Derek and will provide those who did not have that privilege an opportunity to appreciate the intellect, passion and embodiment of the higher qualities we each share which were part of Derek.

Case Note

Functus officio: A matter of law not consent

State of Western Australia v Mineralogy Pty Ltd [2020] WASC 58

Donna Ross, FCIArb FRI*

Abstract

When is an arbitrator functus officio: When the parties agree, the arbitrator so determines or the court decides? In this case, the same arbitrator had rendered two awards five years apart, in 2014 and 2019. The 1985 Commercial Arbitration Act referred to in the arbitration agreement had been repealed and replaced in 2012. The key issue was whether the savings and transitional provisions of the 2012 Act were engaged, which would allow a challenge of the 2012 Award under the more favourable 1985 Act. Whether the arbitrator continued to have jurisdiction throughout or was functus officio was determinative of the legislative regime applicable to the challenge.

Background

In 2013, Mineralogy Pty Ltd and International Minerals Pty Ltd (respondents) commenced arbitration against the State of Western Australia (State or appellant), alleging breaches of, an agreement with the State to develop an iron ore project in the Pilbara basin (State Agreement).[1] The State Agreement contained an arbitration clause, which referred to the *Commercial Arbitration Act 1985* (WA) ('*1985 Act'*).[2]

The arbitrator, the Hon Michael McHugh AC QC (McHugh or arbitrator), determined that the State's failure to consider a proposal made by the respondents was a breach of the State Agreement. No damages were assessed in that award, handed down in 2014, which was solely declaratory in nature. The State did not appeal the 2014 Award.

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[1] Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA).

[2] Ibid sch 1, cl 42(1).

Subsequently, what His Honour termed a 'fresh' dispute arose regarding, inter alia, whether the respondents' right to recover damages had been determined under the 2014 Award.[3] The dispute was referred to the same arbitrator in 2018. In his 2019 Award, in interpreting the legal implications of the 2014 Award, McHugh again ruled in the respondents' favour.

The State sought to appeal or challenge the 2019 Award in proceeding GDA 13 of 2019 under s 38(2) of the 1985 Act,[4] which had since been repealed and replaced by the *Commercial Arbitration Act 2012* (WA) ('*2012 Act'*).

The grounds for the State's appeal were that the arbitrator erred in law in determining that the appellant's single breach of contract gave rise to two distinct causes of action and that the respondents were not foreclosed from pursuing damages for either or both of them.

It is important to note that the 1985 Act allowed for broader grounds for appeal than the subsequent 2012 Act.

The respondents then applied for summary dismissal of the proceeding, on the grounds that the State's attempt to challenge the 2012 Award under the legislative regime of the 1985 Act was without merit.[5]

The application of the 1985 and 2012 Acts

The 1985 Act was replaced by the 2012 Act, effective 7 August 2013.[6] While the arbitration clause in the State Agreement specifically refers to the 1985 Act,[7] after 7 August 2013, the 2012 Act would apply, unless the savings and transitional provisions in s 43 of the 2012 Act are engaged.[8]

Relevantly, s 43(2) requires the arbitration to have been commenced prior to 2013 for the 1985 Act to apply.[9] Commencement is defined as both the dispute having arisen and the tribunal having been constituted prior to that date.[10]

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[3] *State of Western Australia v Mineralogy Pty Ltd* (n 1) [28]. [4] Ibid [1].
[5] Ibid [2].
[6] Ibid, ss 1B, 44.
[7] State Agreement (n 3), sch 1, cl 42(1).
[8] *Commercial Arbitration Act 2012* (WA) s 43.
[9] Ibid, s 43(2).
[10] Ibid, ss 43(3)(a)-(b).

Justice Martin readily opined that the requirements of s 43(3) were met with respect to the 2014 Award, since that dispute had clearly arisen, and the arbitrator appointed, prior to 7 August 2013. Therefore, the law governing the 2014 arbitration was the 1985 Act.[11]

However, to establish which of the two Acts was applicable to the 2019 Award, a temporal assessment was required.

On 20 December 2018, McHugh executed the directions proposed by the parties to determine if the 2014 Award prevented the respondents from pursuing their claims for damages. This was defined as the 'Finality Issue' in what McHugh termed a 'further arbitration'.[12] Thus, the constituting event was in December 2018, well after the 7 August 2013 deadline.[13]

For Martin J, the Finality Issue was a 'fresh interpretative dispute'[14] of the dispositive section of the 2014 Award, and therefore could only have arisen after 7 August 2013. His Honour also underscored the terminology used by the arbitrator himself in describing the reference as a 'further arbitration' in more than one instance in the 2019 Award.[15]

Consequently, for the purposes of s 43(3)(a) and (b) this further arbitration was commenced long after the enactment of the 2012 Act in August 2013. Hence, it is the more recent Act that governs any challenge to the 2019 Award.[16]

When did McHugh become *functus officio*?

Once a tribunal has handed down its final award, it becomes *functus officio* and its jurisdiction comes to an end.

In the present case, the timing was important with respect to the State's contention that the 1985 Act applied to the 2014 Award.

[11] *State of Western Australia v Mineralogy Pty Ltd* (n 1) [20]-[21].
[12] Ibid, [60].
[13] Ibid, [19].
[14] Ibid, [58].
[15] Ibid, [35], [60], [76]-[77].
[16] Ibid, [58].

This was despite, as Martin J highlighted, citing the 2019 Award, the 'specific, explicit and repeated acknowledgement of the inescapable legal conclusion that Mr McHugh was at then, *functus officio* as regards the first (2014) arbitration',[17] along with the fact that the parties had agreed that the arbitrator was *functus officio* in respect of the first arbitration that led to the 2014 Award.[18]

His Honour, however, emphasised that the parties' agreement was 'ultimately irrelevant' as *functus officio* arises as a matter of law', not by agreement.'[19]

Another point that corroborated the fact that the arbitrator no longer had jurisdiction in the 2014 arbitration was that prior to McHugh entering onto the reference, the respondents sought the appointment of the Honourable Ray Finkelstein AO QC for the damages claims.[20] Thus, the legal effects of the 2014 Award could have been determined by another arbitrator, in which case the issue of McHugh being *functus officio*, would not have arisen.

An arbitral tribunal can rule on its own jurisdiction, but not that of the court

An arbitrator's jurisdiction arises out of the agreement to arbitrate. As a result, based on the universally accepted concept of *Kompetenz-Kompetenz*, an arbitral tribunal can rule on its own jurisdiction. [21]

However, what an arbitrator cannot determine is the jurisdiction of a court to review or set aside an award. Justice Martin drew a clear distinction between the curial challenge against the 2019 Award and the arbitrator's jurisdiction to hear and resolve the parties' dispute.[22]

The jurisdictional question seems to have arisen due to confusion in paras 9 and 10 of the 2019 Award regarding McHugh's determination of his jurisdiction to resolve the Finality Issue and what was called the 'First Damages Claim' under the former 1985 Act.

[17] Ibid, [72]; This also led to McHugh declining to rule on one of the other preliminary issues, the section 46 issue, since he had no continuing jurisdiction under the 2014 arbitration: Ibid, [40].
[18] Ibid, [40].
[19] Ibid, [76].
[20] Ibid, [52].
[21] *Commercial Arbitration Act 2012* (WA) (n 10) s 16; United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008), Art. 16(1).
[22] *State of Western Australia v Mineralogy Pty Ltd* (n 1) [67].

This formed the basis of the State's contention that the 1985 Act was the applicable Act. Importantly, the State submitted that the Arbitrator's determinations as to his jurisdiction were conclusive and binding upon the court, and therefore the applicable law to its challenge of the 2019 Award should be the 1985 Act.

His Honour saw things differently and deemed that paras 9 and 10 of the Award referred merely to the laws applicable to the conduct of the arbitration and further stated, 'An appeal to a court is a creature of statute, not of the common law. Thus, it is only for the court, not for the arbitrator, to decide what is the applicable legislative regime, if any, conferring any appeal or review rights as against an arbitral award, as earlier made by an arbitrator'. [23]

Conclusion

The court found in favour of the respondents and the State's application for leave to appeal and the 2012 Award under the 1985 Act was dismissed as being untenable. The State's only potential recourse was therefore under the regime of the less favourable 2012 Act. [24]

While this decision differs from that of Croft J in a case where the arbitrator decided not to deal with all of the issues referred to arbitration - in that case costs, not damages - in which an award termed final by the arbitrator was not a final award for the purposes of the *Commercial Arbitration Act 2011* (Vic),[25] parties and tribunals should be mindful that awards that are solely declaratory in nature and do not deal with damages may be nonetheless final. This is particularly true in cases like this, where there are multiple references to the same arbitrator for related issues and successive awards. Further, if a challenge is deemed justified, it should be brought sooner rather than later to avoid being barred from an appeal or subject to a different legislative regime.

[23] Ibid, [68].
[24] This has not been pursued as the State has since passed the amendment act, which has caused a litany of proceedings including in the High Court and potentially through Investor State Dispute Settlement mechanisms. For a full description of these cases see: Donna Ross, 'Up in Smoke: Will Clive Palmer's Singapore company be denied standing in its ISDS arbitration against Australia as was Philip Morris Asia?' *Australian Dispute Resolution Bulletin*, vol. 6, no. 4.
[25] See Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd [2017] VSC 97.

Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd [2021] QSC 75

and

Great Union Pty Ltd v Sportsgirl Pty Ltd [2021] VSC 277

The Hon David Byrne QC*

Introduction

In each of these cases the application before the Court was brought by a defendant seeking to stay the proceeding and refer it to arbitration pursuant to the uniform Model Law based *Commercial Arbitration Act* s 8(1). In each case the plaintiff resisted the application, raising a question as to the ambit of the arbitration agreement, or as to its validity having regard to its statutory definition in s 7(1).

The relevant statutory provisions are in these terms:

> 7(1) An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not. …
>
> 8 (1) A Court before which an action is brought in a matter which is the subject of an arbitration agreement must ... refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Cheshire contractors case

Cheshire Contractors Pty Ltd (Cheshire Contractors) and Civil Mining & Construction Pty Ltd (CMC) were participants in a civil engineering project for the construction of roadworks for the Queensland Department of Transport and Main Roads (TMR). CMC was the principal contractor and Cheshire Contractors was its subcontractor. Under the head contract CMC was required to use only material that satisfied certain

* Hon David Byrne QC, retired Judge, Supreme Court of Victoria.

requirements of the specification. On a number of occasions Cheshire Contractors found that the material that was available in the vicinity of the work did not meet these requirements (out of spec materials) and CMC directed Cheshire Contractors as to how it might integrate or otherwise deal with this out of spec material. Cheshire Contractors then told CMC that it would make a claim for extra payment for the extra costs incurred in complying with this direction.

The case of Cheshire Contractors in the Court was based upon an agreement reached between it and CMC about how this claim might be managed. It was alleged that CMC requested Cheshire Contractors to provide it with a letter upon which it could make a latent conditions claim upon TMR seeking the extra cost incurred in using the out of spec material. The agreement further provided that CMC would make payment to Cheshire Contractors for its work in using this out of spec material 'on a basis consistent with any payment it received from TMR for its claim to be made on TMR'.[1] In due course CMC made a latent conditions claim on TMR and, with the assistance of Cheshire Contractors, received from TMR some $5M for the extra cost. When Cheshire Contractors, in turn, made a claim upon CMC for this, it was rejected. First, on the basis that under its subcontract there were imposed temporal and other requirements for the bringing of such a claim, which requirements had not been met. Second, because under clause 2.11 of the subcontract, it was required to 'fully inform itself' about the risks of encountering poor latent soil conditions.

The subcontract also contained in cl 12 a dispute resolution provision which, after the usual provisions for mediation and the like, provided in cl 12.3.3 that 'all disputes or differences shall be referred to arbitration in accordance with and subject to the Institute of Arbitrators and Mediators Australia (Queensland Chapter), Rules for the Conduct of Commercial Arbitrations'.[2] The expression 'dispute or difference' was defined in the subcontract to mean 'dispute or difference arising between the Parties',[3] that is, between CMC and Cheshire Contractors.[4] Attempts to resolve this matter were unsuccessful and Cheshire Contractors brought a proceeding in the Court seeking payment of some $1.4M for its extra work.[5] The nature and basis of the claim is described in para [17] of the judgment as follows:

> Cheshire Contractors complains that it was required to complete work and incur associated costs beyond that contemplated by the originally contracted Subcontract Works. By making and pursuing what was in effect CMC's out of spec claim, Cheshire Contractors alleges it lost the opportunity to make an alternative claim for damages or remuneration under and in compliance with the contract. Cheshire Contractors argues CMC is, or ought to be, estopped by convention

[1] *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QSC 75, [8] (Henry J) ('Cheshire Contractors judgment').
[2] Ibid (n 1) [25].
[3] Cl 12.3.1.
[4] *Cheshire Contractors* judgment (n 1) [15].
[5] Ibid [17].

> from denying that Cheshire Contractors is entitled to reasonable additional remuneration in respect of excavation and embankment works. Cheshire Contractors claims it is entitled to payment by CMC in the sum of [about $1.4M] plus GST as reasonable remuneration for works done by the respondent or, alternatively, the same sum as damages or compensation pursuant to ss 236 and 237 [of the] Australian Consumer Law … for loss suffered as a result of CMC's allegedly unconscionable conduct.

There was also a further Cheshire Contractors claim for the return of its bank guarantee.

Cheshire Contractors contended that cl 12.3.3 was not an arbitration agreement within the meaning of s 7 of the *Commercial Arbitration Act 2013* (Qld) because it purported to refer to arbitration all disputes and differences without qualification. First, the arbitration clause did not satisfy the statutory definition as it did not identify the legal relationship in respect of which the dispute to be referred to arbitration arose. Nor did it contain a description of 'the nature of the disputes referred so as to indicate, consistently with the s 7 definition, that they are disputes arising between the parties in respect of their defined legal relationship as parties to the contract.'[6]

His Honour accepted that, as a provision in a commercial contract, arbitration clauses should be interpreted so as to give effect to their commercial purpose and that they should not be construed narrowly. He held as follows: 'The clear tide of judicial opinion as to arbitration clauses, where the fair reading of them is not confined, is to give width, flexibility and amplitude to them.'[7]

Nevertheless, notwithstanding that the arbitration clause here contained no description or limitation as to the nature of the dispute to be referred to arbitration, the context in which the clause was found led to the conclusion that there was a defined legal relationship between CMC and Cheshire Contractors — that established by the subcontract that bound them — and that Cheshire Contractors' claim for extra payment for work that it was contracted to perform clearly fell within the arbitration clause.[8]

Cheshire Contractors' further contention that the arbitration clause was inoperable for uncertainty was rejected for the same reasons. Its arguments to the effect that the estoppel by convention claim and those based on unconscionability should be rejected because they were not based on the contract were also rejected. This was because the arbitration clause contains an implied term that 'the arbitrator should reach

[6] *Cheshire Contractors* judgment (n 1) [30].
[7] *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496, 504 [36] (Allsop J), adopted in *Cheshire Contractors* judgment (n 1) [35].
[8] *Cheshire Contractors* judgment (n 1) [52].

a decision according to the existing law of the land and should exercise every right and discretionary remedy given to a court of law.'[9]

His Honour's conclusion, then, was that all of Cheshire Contractors' claims must be referred to arbitration in accordance with cl 12.3.3. These claims included that for the return of the bank guarantee, notwithstanding that it was not a claim for payment for work performed under the subcontract. This was because this claim was part of Cheshire Contractors' unconscionability case.[10]

Great Union case

In 2017 the plaintiff, Great Union, leased to the defendant, Sportsgirl, commercial premises in the Centrepoint Mall in Melbourne. The lease in cl 37 made provision for the consequences to the lessee where the premises were damaged or the means of access to it were altered so that they became unfit for the lessee's occupation or inaccessible. Sub-cl 37.3(a) permitted the lessee to reduce its rental payments during such period of damage or loss of access and, in para (b) made provision for arbitration in these minimalist terms: If the parties do not agree on the reduction to apply under the previous clause, within seven days after the damage or interference with access occurs, then the proportion must be decided under the *Commercial Arbitration Act 1984*.[11]

The Great Union claim before the Court was for some $2.3M for unpaid rent. Sportsgirl denied this and defended the claim, relying upon its entitlement to abate the rental and seeking damages for unconscionable conduct in contravention of the Australian Consumer Law. It also sought a declaration that the lease was terminated for frustration arising out of the government regulations consequent upon the COVID-19 pandemic. Finally, it sought that the proceeding be stayed pursuant to s 8(1) of the *Commercial Arbitration Act 2011* (Vic) pending the determination of its rent abatement claim.[12]

In the course of argument, counsel for Sportsgirl accepted that the Great Union claim, and the defences raised by Sportsgirl, other than the rent abatement defence, should be heard and determined in the Court,

[9] *Cheshire Contractors* judgment (n 1) [59], referring to *Government Insurance Office v Atkinson Leighton Joint Venture* (1981) 146 CLR 206, 234-235 (Stephen J), 246-7 (Mason J).

[10] *Cheshire Contractors* judgment (n 1) [62].

[11] The reference to now repealed 1984 Act is taken to be a reference to the current 2011 Act; see *Commercial Arbitration Act 2011* (Vic) s 43(1).

[12] *Great Union Pty Ltd v Sportsgirl Pty Ltd* [2021] VSC 277 (Riordan J) [4] ('Great Union judgment').

but that, since these claims depended upon the outcome of the rent abatement defence, they, too, should be stayed pending the determination of that claim.[13]

With respect to the Sportsgirl rent abatement defence, it was put on behalf of Great Union that there were in fact two distinct issues: whether the factual basis for the lessee's entitlement to abate the rent had occurred (the entitlement issue), and, if so, what should be the amount of the abatement (the quantification issue)? It was then said that only the quantification issue might be arbitrable under cl 37(3)(b).[14] On behalf of Sportsgirl it was put that these two issues were intertwined so that the arbitration agreement should be interpreted in a way that led to both being referred to arbitration.

His Honour approached the question of construction of the arbitration agreement on the basis that it was a commercial document and that it should be approached with a predisposition to achieve the parties' purpose, and to do so in a commercially convenient way.[15] He noted that the quantification issue must involve the arbitrator forming a view about the existence and severity of the damage or interference with the leased premises. It would be inherently unlikely, his Honour observed,[16] that the parties would have intended that the resolution of the abatement claim to be bifurcated by having these two issues determined by different tribunals with the consequent risk of a duplication of evidence and cost and the risk of inconsistent or incompatible decisions. Accordingly, he rejected the Great Union submission and observed: 'Arbitration clauses should be read against the sensible presumption (in effect a rational assumption of reasonable people) that the parties do not intend the inconvenience of having possible disputes being heard in two places.' [17]

His Honour also rejected a further Great Union submission that a referral order should not be made unless the applicant, Sportsgirl established that its claim for abatement of rent was arguable or likely to succeed. To undertake that task would be for the Court to usurp the role of the arbitrator for the arbitrator. It is not the role of the Court under s 8(1) 'to act as a court of summary disposal filtering the matters that are suitable for arbitration'.[18] Both aspects of the rent abatement claim, therefore, were referred to arbitration, but not the other Sportsgirl claims.

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[13] Ibid [21].
[14] Ibid [10]
[15] Ibid [13].
[16] Ibid [16].
[17] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, 489 [166] (Allsop CJ, Besanko and O'Callaghan JJ).
[18] Ibid 483 [149].

On the question of a stay his Honour accepted that, where one of a number of claims in Court are referred pursuant to s 8(1), the Court might, in the exercise of its power to control its own proceedings, stay the unreferred claims pending the resolution of the referred claim.[19] This was put on the basis that, in the arbitration, Sportsgirl might succeed to the extent that the other claim might not be pursued. His Honour, however, concluded that the prospects of this were no more than speculative.[20] Accordingly a stay of those claims was refused.

Comment

The interest of these cases for arbitrators lies in their being examples of the modern approach of the Court to the construction of arbitration clauses in commercial agreements. It has three aspects:

First, it has been well established, at least since 1982,[21] that the interpretation of these agreements requires, not only a consideration of the words used, but also the circumstances known to all parties to the agreement at the time of contract. These circumstances will include the commercial purpose and objective of the agreement as may be inferred from the context of the passage to be construed, the genesis of the transaction, its background and the market in which parties were operating.

While an arbitration clause in such an agreement will be construed in accordance with these principles, this has in the past led to a careful examination of what disputes were covered by the terms of the clause. In the *Hancock Prospecting* case referred to above, for example, the relevant issue was whether a clause in a deed referring to arbitration 'any dispute under this deed' required a dispute as to the validity of the deed itself to go to arbitration. That case went to the High Court[22] where the decision of the Full Federal Court already referred to and its reasons were upheld and endorsed. The conclusion set out in that case, and applied in the present cases, was that the application of the conventional principles of construction of commercial agreements will apply to an arbitration clause in such agreements, but in a particular way.

The clause will not be interpreted narrowly. The Court, as part of its task of giving effect to the parties' commercial purpose, should give width, flexibility and amplitude to them. The High Court in the *Hancock Prospecting* case found it unnecessary to decide whether to follow the House of Lords in the UK[23] in

[19] *Great Union* judgment (n 12) [22], referring to *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420, 434-5 [65]-[66] (Merkel J).

[20] *Great Union* judgment (n 12) [24(a)].

[21] When *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337 was decided.

[22] (2019) 267 CLR 514.

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

deciding that there should be a special presumption in construing an arbitration clause, that the parties should be taken to have intended that all disputes arising out of the relationship between the parties to the agreement should be decided by the same tribunal.[24] The High Court was of the view that the orthodox approach to construction, with a focus on the commercial objective of the clause would suffice. The two cases here demonstrate the fulfillment of that expectation.

Second, the cases show a readiness to accept the effectiveness of an arbitration clause which requires the details of its implementation to be worked out. It will be recalled that the clause in the *Great Union* case was very spare: the dispute 'must be decided under the *Commercial Arbitration Act*'.

Third, they show a readiness to imply terms to give effect to the expectation that a bifurcation of the dispute should be avoided. In the *Cheshire Contractors* case where the relationship between the parties was established by the contract which they had entered into, the clause was construed to include claims that were not based on the contract. In the *Great Union* case, the liability issue was found to be arbitrable notwithstanding that cl 37(3)(b) did not in terms include it.

Finally, in these cases, as in the *Hancock Resources* case, the question of the arbitration agreement arose in a s 8(1) application for a referral to arbitration with a consequent stay. The approach of the Court in such circumstances to the construction of arbitration clauses may be seen by practising arbitrators as being interesting, but of little practical importance. Likewise, where the question arises in an application to the Court to set aside the award under s 34(2)(a)(iii) or to refuse to recognise or enforce it under s 36(1)(a)(iii). It may, however, arise where the arbitrator is required to deal with a challenge to jurisdiction under s 16(1) and to determine the existence, validity or ambit of the arbitration clause.

The High Court in the *Hancock Resources* case, however, remarked that the principles involved in the determination by the arbitrator of its own jurisdiction are 'not determinative of the issues raised in the appeals before it',[25] namely, the issues as to whether the proceeding in Court to set aside the deed because it was void, fell within the ambit of the arbitration clause so that the proceeding should be stayed under s 8(1). It is not at all clear what the High Court had in mind in making that observation.

It might be directed to the question how the arbitrator, in the exercise of the power conferred by the agreement of the parties to determine a dispute, may determine finally and conclusively, or at all, that the

[24] (2019) 267 CLR 514, 527-8 [19]-[21] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
[25] Ibid 526 [13].

conferral was ineffective because the arbitration agreement was void or invalid, or because the dispute did not fall within its terms. This puzzle is further complicated by the fact that, if the arbitrator rejects such a jurisdictional challenge, the question may be passed to the supervising court for a 'final' determination under s 16(10). And, further. it seems that the arbitrator's determination rejecting the challenge does not create an issue estoppel preventing a party from later renewing the challenge upon an application to enforce, recognise or set aside the resultant award.[26] Professor Jones' solution is that the determination of the arbitrator does not oust the jurisdiction of the Court as the final arbiter of jurisdiction questions; it is simply to resolve the matter as between the parties sufficient to enable the arbitral process to continue.[27]

And, what then is the status, in these circumstances, of a final decision made by the supervising court upholding the arbitrator's jurisdiction under s 16(10)? It appears, that, upon an application for the enforcement of a foreign award at least, where the jurisdiction of the foreign arbitrator is challenged before it, an Australian Court will determine the jurisdiction of the arbitrator afresh in accordance with the provisions of Australian law.[28] But this is a difficult area that may have to await further judicial consideration.

[26] See Dullah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2011] 1 AC 763, 810 [23]-[24] (Lord Mance).
[27] Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2nd ed, 2013) [6.320].
[28] IMC Aviation Solutions Pty Ltd v Altain Khuder LLC (2011) 38 VR 303.

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Legislation

International Arbitration Act 1974 (Cth). Abbreviations should be used in pinpoint references to delegated legislation, excepting at the start of a sentence.

Books

Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters (Professional) Australia Limited, 2011) 14.

Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters (Professional) Australia Limited, 4th ed, 2012) 10.

Journal Articles

Scott Ellis,'Arbitrators and Self Represented Parties' (2004) 23 (3) *the arbitrator & mediator* 20, 20–25.

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References should include (where available): author, document title, year, website name, pinpoint reference, URL and date of retrieval. The URL should be enclosed within angle brackets. The following style is preferred:

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1. Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters (Professional) Australia Limited, 2011) 14.
2. Ibid 57.
3. Scott Ellis, 'Arbitrators and Self Represented Parties' (2004) 23(3) t*he arbitrator & mediator* 20, 20–25.
4. Jones (above n 1) 33.

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Resolution Institute is the peak industry body across dispute resolution disciplines in Australia and Aotearoa, New Zealand.

We are a vibrant community of mediators, arbitrators, expert determiners, adjudicators, restorative justice practitioners and other dispute resolution professionals. We value integrity, excellence, innovation, collaboration, diversity and influence. We reflect these values in our work for and with our members.

Resulting from the integration of IAMA into LEADR, Resolution Institute is a not-for-profit organisation with more than 3,000 members in Australia, New Zealand and the Asia Pacific region.

Resolution Institute encourages business, government and the community to use resolution processes to prevent, manage and resolve disputes, to assist in robust planning and decision making and to foster sound relationships.