2018 . Vol 4 No 6

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Information contained in this newsletter is current as at November 2018

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Australian
Alternative Dispute Resolution Law
Bulletin

General Editor's introduction

Kelly McIntyre *18 INNS OF COURT*

It is with great pleasure that we publish the sixth issue of the fourth volume of the *Australian Alternative Dispute Resolution Law Bulletin*. This issue is focused on the use of online ADR, conciliation and arbitration for both domestic and international purposes.

Our first article is from guest contributor Katrina Kluss, barrister in Queensland, regarding the rise of online dispute resolution and the use of technology across a number of forums including mediation, case appraisal, arbitration and adjudication. The use of artificial intelligence systems aimed at simulating the role traditionally plated by ADR practitioners is touched on by Katrina and raises some very interesting challenges to the industry. This is a very interesting article looking at the evolution of the digital revolution as it applies to ADR both internationally and domestically and I commend it to you.

The second article from guest contributors Gitanjali Bajaj of DLA Piper, and Lena Chapple of Thales, looks at the role of conciliation in the resolution of international disputes with direct reference to the United Nations Convention on the Law of the Sea Compulsory Conciliation proceeding between Timor-Leste and Australia. The authors bring with them a unique background of involvement and we thank them for such an insightful and informative article.

Last is an article from Damian Sturzaker, Partner at Marque Lawyers and visiting Professorial Fellow at the University of New South Wales. Damian considers the use of technology and the tyranny of distance. This article provides an interesting perspective on the use of Australia as a forum for arbitration and makes some logical suggestions as to how Australia can better place itself within the arbitration market internationally.

I would like to extend my personal thanks to all of the authors of the abovementioned articles, each of whom has provided intellectual insights which are both interesting and thought-provoking. From the editorial team, we hope you have enjoyed the articles produced in 2018 and look forward to the year ahead.

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Australian
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Mediation mediums: the benefits and burdens of online alternative dispute resolution in Australia

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Introduction

Online dispute resolution (ODR) is a term used to describe dispute resolution that is facilitated or assisted by information and communication technology.[1] It comprises facilitative mechanisms such as online mediation, advisory mechanisms such as online case appraisal, and determinative mechanisms such as online arbitration or adjudication.[2]

ODR can provide a platform to resolve disputes that are either synchronous or asynchronous.[3] Synchronous platforms provide access to communication between parties in "real-time", with all parties being actually or virtually present during the ADR process. Software applications such as Skype facilitate synchronous communication by way of videoconferencing technologies.[4] Asynchronous platforms enable communication to occur at different times for each party. An example of an asynchronous model is in circumstances where parties commence discussions about a dispute by way of email such that all parties are not engaged in the resolution process at the same time.[5]

In addition to more common ODR technologies such as Skype and email, there exist other technologies whereby artificial intelligence (AI) systems aim to simulate the role traditionally played by an ADR practitioner.[6] Some of these AI systems offer fully automated cyber negotiation which primarily focuses upon negotiating monetary settlements,[7] and providing a neutral platform to exchange settlement offers without the involvement of, or need for, a mediator.[8] These AI systems allow for either synchronous or asynchronous ODR.

This article will focus upon three formats in which ODR manifests in practice, namely: AI dispute resolution; online or electronic mediations and arbitrations; and online courts. It will first examine how these systems have developed both domestically and internationally, before discussing the benefits and burdens of ODR. It will then highlight potential ways in which ODR may develop and evolve in future. Ultimately, it will be concluded that while there are certainly advantages to integrating ODR into more traditional models of ADR, it is unlikely online platforms and information and communication technologies will replace the role of mediators and arbiters given the irreplaceable value of human insight and judgment in legal matters. Instead, ODR will increasingly assist traditional models in facilitating more efficient and cost-effective methods of resolving matters through ADR.

Online dispute resolution: an overview

Unlike the medical and financial sectors, the law has been somewhat dilatory in joining the digital revolution.[9] However, while there was initially some reticence about ODR in the legal field, not least because of concerns regarding dehumanisation of human-centric processes and an inability for technology to handle the varying complexity of legal cases, increasing client demand has required adaptation by justice systems to incorporate and interface with online platforms to resolve disputes.

The development of ODR has been recognised both internationally and domestically.[10] There have been four primary phases in the development of ODR to date, namely:[11]

- the hobbyist phase
- the experimental phase
- the entrepreneurial phase
- the institutional phase

Internationally, the *Fourth United Nations Forum on Online Dispute Resolution Report and Recommendations*[12] influenced ODR approaches at a global level. Domestically, Australia has reached the fourth developmental stage of ODR — the institutional phase.[13]

While initial ODR platforms were directed towards e-commerce disputes, these platforms are increasingly expanding to other areas of the law.[14] Examples of ways in which ODR has been, or is anticipated to be, incorporated into existing legal systems, both internationally and domestically, are discussed below.

ODR internationally

United States of America

Perhaps the most revolutionary ODR platform to date is the San Francisco-based "Modria", established in 2011.[15] Modria provides a software as a service (SaaS) product which can be used by anyone operating an online store.[16] Modria utilises a variable mapping system which collects and analyses relevant data to automatically attempt to resolve disputes that arise between vendors and purchasers. Modria maps the collected data to a list of rules nominated by the vendor, which define policies regarding refunds, returns, exchanges and credits.[17]

Modria has also been utilised outside the e-commerce space. In 2014, the Ohio Board of Tax Appeals engaged Modria as the software behind its new online resolution centre for tax appeals, which allows parties to file all documents online, access documents, and check the progress of the appeal and similar details, including access to the decisions once made, via an online portal.[18]

In addition to Modria, there are other SaaS products developed in the US which facilitate ODR, including Smartsettle, Cybersettle and eQuibbly.[19] Like Modria, most of these platforms utilise asynchronous, fully automated cyber negotiation processes to resolve disputes, at least at first instance.

Developers in the US have also created software, such as OneAccord, which enables synchronous negotiations with the involvement of a neutral third-party facilitator.[20] Mediation firms have also developed websites, such as Internet Neutral, SquareTrade and WebMediate,[21] which facilitate the resolution of disputes using traditional ADR methods, supplemented by online technology.

Canada

One of the first examples in the world of the integration of ODR into the public law system was the Civil Resolution Tribunal (CRT) in British Columbia, Canada, which "encourages collaborative dispute resolution and makes binding decisions" when parties are unable to compromise their disputes.[22]

The CRT was established in 2012 under the Civil Resolution Tribunal Act SBC 2012 (CRTA) as a voluntary service[23] with jurisdiction over small claims[24] and strata property disputes.[25] In 2015, the CRTA was amended to make the CRT mandatory for such claims. The CRT began accepting strata property claims in July 2016 and by July 2017[26] began resolving most small claims involving damages of up to $5000,[27] with a view to increasing the damages limit in future. The aim of the CRT is to provide "fair, affordable, flexible, and timely access to justice for the public".[28]

The CRT operates in three primary stages:[29]

- Stage 1 — Solution Explorer: An electronic tool named the "Solution Explorer" uses expert knowledge to provide users with legal information and resources, derived from interactive questions and answers between the electronic interface and the human users, to assist in managing or resolving their disputes.
- Stage 2 — Tribunal process: If the dispute is unable to be resolved with the assistance of Solution Explorer, the Solution Explorer initiates an online intake process which asks for information about the parties and the dispute and commences a claim with the CRT. The parties will pay a fee to commence the process, and will notify others involved in the dispute who have an opportunity to respond. The dispute then proceeds to a quick negotiation in which parties attempt to resolve the dispute. After the quick negotiation, a facilitator will attempt to assist the parties to reach a compromise. This facilitation may occur in person or online. If a compromise is reached, the agreement can be made into orders, which have the same power and effect as court orders.
- Stage 3 — Tribunal decision: If a decision cannot be reached by way of negotiation or facilitation, an independent CRT member will decide the outcome of the dispute, usually by way of electronically submitted documents and/or through telephone and videoconferencing platforms. The decision of the CRT member is enforceable and binding, although parties are entitled to seek leave to appeal to the courts.

On 23 April 2018, the Government of British Columbia proposed amendments to the CRTA in Bill No 22 of 2018. The Civil Resolution Tribunal Amendment Act SBC 2018 subsequently received Royal Assent on 17 May 2018.[30] These amendments, inter alia, extended the jurisdiction of the CRT to include certain disputes arising under the Cooperative Association Act SBC 1999,[31] the Societies Act SBC 2015,[32] and the Insurance (Vehicle) Act RSBC 1996.[33]

The Netherlands

In 2014, SaaS ODR platform "Rechtwijzer" was launched in The Netherlands.[34] It was the first ODR platform for managing and resolving difficult issues associated with divorce and separation, tenancy disputes, and employment disputes. Rechtwijzer moved away from the values of traditional ODR platforms relating to speed and efficiency, and instead focused on empowerment, interests and placing people ahead of rules.[35]

Initially, Modria and the Hague Institute for Innovation of Law (HiiL) guaranteed the hosting, maintenance and support issues, user testing and updates, with assistance also being provided by the Dutch Legal Aid Board (DLAB).[36] However, in March 2017, Modria, HiiL, and the DLAB ceased their cooperation around the Rechtwijzer platform.[37] Despite requiring approximately €2 million to develop the different versions of Rechtwijzer, as at April 2017, only 813 couples had used Rechtwijzer since its inception, and most matters were funded by the DLAB with very few involving private paying clients.[38] The issues associated with the success, or lack thereof, of Rechtwijzer were attributed to a lack of marketing, and an underestimation of the significant need for legal advice for users from the beginning of the separation or divorce process to the final resolution.[39]

In September 2017, the DLAB commenced working with a new ODR organisation, Justice42, to recreate Rechtwijzer, in the form of a new product called "uitelkaar.nl". Like Rechtwijzer, uitelkaar.nl aims to enable parties to work together in resolving disputes relating to divorce, with the assistance of experts as required.[40] One improvement made in the course of this recreation was the incorporation of more human assistance to users. The success of this recreation is not yet known, although it was reported that eight couples had successfully finalised their disputes in the first 3 months of the new platform going live.[41]

United Kingdom

In July 2016, Briggs LJ of the Judiciary of England and Wales published the *Civil Courts Structure Review: Final Report*, in which the merits and criticisms of the development of an online court in the UK were examined and discussed.[42]

The proposed Online Court comprises three stages in its procedure:[43]

- Stage 1 — Triage: An automated online triage stage intended to assist unrepresented litigants articulate their claim in a form the courts can resolve, and to also upload the relevant documents and evidence in support of their case.
- Stage 2 — Conciliation: This stage is handled by a case officer, who attempts to facilitate a resolution of the matter between the parties.
- Stage 3 — Determination: Matters that have failed to resolve are determined by a judge, either by way of face to face trial, video or telephone hearing, or a determination on the papers.

Overall, Briggs LJ noted that the predominance of feedback regarding the Online Court had been "firmly supportive of the essential concept of a new, more investigative, court designed for navigation without lawyers".[44] His Lordship identified that most of the criticism had been directed towards specific aspects of the design of the Online Court and the potential ramifications arising from same. In particular, the greatest concern had been in relation to the need to cater for litigants who would experience significant difficulty in communicating with the court via computer.[45]

Proposed amendments to legislation to enable the establishment of online court services were contained in the Prisons and Courts Bill 2016-17 (UK) which was first tabled in the House of Commons on 23 February 2017. However, despite reaching the committee stage in the House of Commons on 20 April 2017, the Bill fell with the dissolution of the UK Parliament on 3 May 2017.[46] It therefore remains to be seen whether the UK will pursue the transition to ODR platforms in its justice system in the near future.

ODR in Australia

While ODR has grown significantly in Australia, the progress has not been as rapid as some may have anticipated.[47] In 2003, it was predicted that ODR would be adopted and used by a significant proportion of the Australian population by 2010.[48] While the expected growth rates for ODR in the Australian market have not reached the predicted levels, there have been significant, albeit gradual, ODR initiatives commenced both in the form of synchronous and asynchronous methods in facilitative, advisory and determinative ODR processes.[49]

The growth of ODR in most sectors within Australia has been principally focused upon e-commerce and consumer-based systems which operate as first-tier complaints handling and dispute resolution procedures.[50] As ODR platforms have evolved, various changes in technology have transformed the way in which dispute resolution is undertaken. Advancements in technology and internet speed have resulted in processes including eCallovers,[51] eLodgment,[52] eTrials,[53] eCourts, and witness teleconferencing in applications and trials. For example, s 39PB of the Evidence Act 1977 (Qld) requires that expert witnesses provide evidence by audio-visual link or audio link. Practice Direction 1 of 2008 of the Supreme Court of Queensland stipulates the procedure for parties to follow should they wish to adduce evidence by telephone and video link.[54]

Perhaps the most comprehensive example of ODR in the Australian legal system is found in the Federal Court of Australia's eCourtroom.[55] The eCourtroom is a virtual courtroom used by judges and judicial registrars to assist with the management and hearing of some disputes in the federal jurisdiction. The types of matters heard in the eCourtroom include ex parte applications for substituted

service in bankruptcy proceedings, applications for examination summonses, and the giving of directions and other orders in general federal law matters. It is linked with eLodgment to facilitate the electronic filing of documents.

Outside of the courts, in the realm of ADR, ODR has also become an increasingly prevalent feature in conferences, mediations and, to a lesser extent, arbitrations. In 2013, the Australian Mediation Association (AMA) launched a virtual conferencing mediation service to facilitate mediation regardless of where the parties to a dispute are located.[56] However, the use of this service has been limited in the mainstream legal community, and it appears the online platform on which the AMA intended to provide this service is no longer accessible.

Nevertheless, ODR continues to be integrated into ADR processes, largely in the form of teleconferencing and video link, allowing parties to access and participate in the ADR processes synchronously, with the assistance of technology. There is, however, significant room for growth in this area particularly given Australia's isolated geographical location and vast continental size.

Benefits and burdens of ODR

There are clear benefits to implementing ODR, as part of both ADR and court litigation. Most notably, it can result in costs saving when compared to traditional ADR methods and litigation. In particular, for minor economic disputes and small claims, fully automated cyber negotiation platforms may provide an avenue for clients to avoid incurring significant, or indeed any, legal costs involved in retaining a lawyer in circumstances where the ODR platform may enable a resolution through the exchanging of offers without the need for legal representation, particularly where liability is not in issue.

Costs are also likely to be avoided or minimised if synchronous ODR methods are integrated into traditional methods of mediation and arbitration to allow parties located internationally or in rural areas to participate in the ADR process without incurring the costs of travel. This also increases the accessibility of ADR which can also make the process more efficient, thereby decreasing the costs involved. This is particularly beneficial in smaller disputes or in matters involving impecunious disputants for whom the cost of travel is not a feasible option.

However, while there are some evident advantages to engaging ODR platforms, mostly relating to the saving of time and costs, there are several potential risks that practitioners ought to bear in mind when considering engaging ODR platforms.

Along with the efficiency of using technology in ADR comes the risk to confidentiality of using third-party software and applications, particularly when discussing privileged information.[57] The Australian Dispute Resolution Advisory Council (ADRAC) reported that the sophistication of internet hacking increases with, if not exceeds the evolution of, ODR platforms.[58] Nevertheless, it is reasonable to expect that the incentive for, and therefore likelihood of, hacking in relation to the majority of legal disputes is negligible.

Further, it is usually more difficult for advocates, mediators and arbiters to build rapport with, and the confidence of, the parties. This can be exacerbated if stable internet connection and sufficient internet speed cannot be guaranteed, thereby interrupting the fluidity of negotiations. Similarly, conducting ADR purely online or via communication technology can present difficulties when private discussions are required between parties and their legal advisors. In that regard, communication facilities and online resources must be available not only for the joint negotiation sessions but also for the individual break-out sessions in order to be of real value.

Moreover, where parties are not required to appear or participate in person, there may be a perception that those parties are not invested in the process of resolving the dispute resulting in a less enthusiastic approach by all parties in the ADR process. In such circumstances, the costs saved by parties avoiding the need to travel to a mutual mediation or arbitration location are of little overall benefit, particularly when the costs of travel are compared with the legal costs of protracted litigation. Indeed, in large commercial disputes, the saving of costs associated with attending an ADR process in person is of minimal significance, if any.

The absence of parties appearing in person also presents a strategic issue for legal practitioners who lose the opportunity to assess how potential witnesses might present in court should the matter proceed to trial. This assessment can often be influential in convincing parties to resolve the matter to avoid the potential detriment to a case by reason of a poor-performing witness.

Further, the absence of human insight, empathy, and guidance provided to users of ODR platforms in relation to emotionally complex legal matters, such as those proposed to be dealt with by Rechtwijzer, is susceptible to creating, rather than abating, confusion among disputants thereby detracting from the intended benefits of ODR in those circumstances. Indeed, the lack of tailored legal advice provided to users of Rechtwijzer proved problematic to the success of that particular ODR platform.

An additional difficulty with the increased use of, or reliance upon, ODR is the disadvantage to clients who are not technologically savvy or who do not have access to computers or a reliable internet connection. Thus, while ODR platforms may assist those in regional or

international locations to access ADR more conveniently, this access is of little benefit if those seeking to use the ODR services are unable to use the requisite technology in order to meaningfully participate in the process.

These burdens have the potential to result in less, rather than more, effective results arising from the ADR process.

A further issue with the increasing prevalence of, and reliance upon, ODR platforms was described by Ms Penelope Gibbs, director of Transform Justice and a former magistrate in the UK, who observed that the transition to online and virtual justice, particularly in the context of criminal law proceedings:

> … threatens to significantly increase the number of unrepresented defendants, to further discriminate against vulnerable defendants, to inhibit the relationship between defence lawyers and their clients, and to make justice less open.[59]

Indeed, an increased reliance on fully automated cyber law platforms would likely result in an increased number of self-represented litigants which would in turn have the effect of placing a substantial and undue burden on the judicial system in circumstances where matters have failed to resolve and therefore come before the courts without prior, or with minimal, legal guidance, advice or representation.

Finally, there are also significant issues presented by ODR platforms intended for use in the legal field which are developed and managed by non-lawyers. In most, if not all, jurisdictions in the world, persons who are not qualified to practise law are prohibited from providing legal advice to members of the public. As such, if ODR platforms intend to provide legal advice, rather than simply provide resources and information, they must engage with legal practitioners to ensure any advice is provided by a person qualified to do so. This is crucial to not only ensure ODR platforms abide by the governing laws of a given jurisdiction, but also to ensure these processes accord with the community expectation of the standards and integrity of the legal profession.

The future of ODR

The benefits provided by ODR are similar to those offered by other forms of ADR — time and cost efficiency, autonomy, and user empowerment. It is therefore likely that ODR platforms will continue to evolve and integrate with more traditional legal processes. The ADRAC reported that, provided there is a reliable technological capacity, including adequate internet service provision and widespread service accessibility, the future developments in ODR are effectively boundless.[60]

Modria has proposed the concept of ODR to be replaced by the notion of cloud-based dispute resolution whereby information and communication technologies facilitate secure case management and the implementation of other cloud-based technologies. The ADRAC has suggested whether the term "ODR" ought to be replaced with Dispute Resolution in the Cloud (DRIC).[61]

Nevertheless, as more entities move to implement or integrate ODR, security and confidentiality must remain a paramount priority for laypersons and legal practitioners alike. However, while there is presently a lack of accountability, regulation and guidelines to monitor and govern ODR in the legal sector, the nature of ODR is that it can "incorporate internationally cooperative accountability and regulatory mechanisms".[62] This provides some degree of security to those engaging in ODR, although there remains room for improvement in this area.

With the implementation of adequate armament around ODR platforms and their users, ODR has the potential to be an effective and efficient process choice for resolving disputes, which, when conducted appropriately, is likely to increase justice accessibility. However, regardless of how advanced ODR platforms become, they will nevertheless be unable to sufficiently replicate or replace the capacity for empathy and emotional intelligence which is of crucial importance in ADR processes. Instead, ODR is likely to increasingly assist the traditional models by facilitating more efficient and cost-effective methods of resolving matters through ADR.

Conclusion

ODR is best placed to enhance, rather than replace, traditional ADR processes. While there is significant scope for ADR to be supplemented by ODR platforms, there remain concerns regarding security, confidentiality and indiscriminate accessibility in using ODR. Further, in the absence of legal advice and guidance, there is potential for the courts to be inundated by a large number of unrepresented litigants when disputes fail to resolve via the ODR platforms. As such, while there are advantages to integrating ODR into traditional models of ADR, it is unlikely to replace the role of mediators and arbiters given the irreplaceable value of human insight and judgment in legal matters.

As information and communication technology continues to evolve, a shift towards ODR in the law is inevitable. Legal practitioners should therefore recognise the increasing prevalence and utility of ODR processes and communication technology, and incorporate these methods which can complement their practice and benefit their clients. Incorporating ODR into traditional ADR methods strikes a balance between advancing the efficiency and modernity of the profession and increasing access to justice, without forsaking the integrity of the judicial process.

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An analysis of conciliation and its role in the resolution of international disputes, having regard to the UNCLOS Compulsory Conciliation proceeding between Timor-Leste and Australia and other instances of conciliation

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Conciliation is the "vanilla" of international dispute resolution; it is present in countless legal rules and instruments, receives benevolent lip-service from the legal community, and is the subject of active legal reform. Yet, in practice, conciliation in international dispute resolution conciliation is neither taboo, like litigation, nor the flavour-of-the-century, like arbitration; corporations remain hesitant to embrace the method in their international dealings, and one is unlikely to hear "let's conciliate" from their legal representatives.

However, conciliation has recently received some remarkably good press. In 2018, the compulsory conciliation proceedings between the Democratic Republic of Timor-Leste and the Commonwealth of Australia under the United Nations Convention on the Law of the Sea (UNCLOS)[1] came to a close; the process resulted in the resolution of the deeply entrenched and complex maritime boundary dispute between the two states in less than 2 years. Why conciliation succeeded where decades of other efforts failed has left the world eager to understand exactly what the process involved, and what conciliation has to offer in other contexts.

This article looks at conciliation in international dispute resolution, assessing its framework, status, instances of use and lessons ascertainable from examples of success. The authors propose that conciliation is a dispute resolution mechanism whose time has come, and that its key attributes and potential for reform make conciliation a vital procedure in addressing the growing dissatisfaction with adversarial dispute resolution in the international commercial and investor-state dispute settlement (ISDS) context.

I What is conciliation?

At its most simple, conciliation is a process whereby a neutral third party is engaged to assist two or more parties in resolving a dispute. The conciliator is not empowered to make any binding determinations, but recommendations may be accepted. This is about where the simplicity ends.

The first issue with the concept of conciliation lies in differentiating it from mediation. At best, conciliation differs from mediation only by degrees;[2] some suggest that the difference lies in a conciliator's power to make proposals and draw up settlement terms;[3] others argue that the difference is only a matter of terminology based on comparative law differences.[4] From the authors' experience, mediation in practice is largely "facilitated negotiation", whilst conciliation can be more structured, with greater mandate given to the conciliator.[5] The Conciliation Commission in the Timor-Leste and Australia conciliation observed that "procedurally, conciliation seeks to combine the function of a mediator with the more active and objective role of a commission of inquiry."[6]

The fact that the terms are used interchangeably only adds to the difficulty.[7] For example, the United Nations Commission on International Trade Law's (UNCITRAL) Working Group II (Dispute Settlement) (Working Group) has recently resolved that the term "mediation" should replace "conciliation" in the UNCITRAL conciliation texts.[8] The Working Group has clarified that the change in terminology does not have any substantive or conceptual implications.

Even if one were to reluctantly accept that the two terms are interchangeable, the next issue that arises is the existence of multiple concepts of conciliation — for example, "rights-based" conciliation is where a conciliator considers the legal and factual merits of a case, taking into account the same in recommendations or settlement proposals. Another is "interest-based" conciliation, which focuses on the parties' underlying interests and building relationships to achieve solutions.[9] Instruments which provide for conciliation largely give a broad discretion to the conciliator to determine the conduct of the process, which can leave parties uncertain as to what type of conciliation they will experience.

The good news is that despite these (and other) difficulties in understanding conciliation there are key attributes by which it is easily recognisable, including as follows:

- The conciliator is independent and impartial.
- The process avoids zero-sum consequences, focusing on mutually beneficial (win-win) outcomes.
- It is flexible; the conciliator decides the process, and burdensome, rigid practices are generally avoided, such as transcripts, exchange of lengthy submissions, enforced deadlines, discovery and document exchange.
- It is consensual, though it may be a mandatory step-precedent to other dispute resolution procedures.
- Proceedings are generally without prejudice, confidential and private.
- The parties are encouraged to find solutions that are mutually acceptable. Unlike litigation/arbitration, the focus is not on only the facts and law, but all relevant information and interests. The parties also play a role in developing the resolution.
- It is much less destructive to relationships compared to litigation or arbitration, attributable to the elements above.
- The conciliator does not have the power to make binding resolutions.

Whilst the above all appear positive, conciliation is not without perceived difficulties, such as:

- a lack of jurisprudence, which creates uncertainty as to the path and potential outcome of proceedings[10]
- an impression that conciliation is weak, or that it is only a step before (or during) "real" proceedings[11]
- its reliance on the willingness of the parties[12] and
- the lack of a binding determination, or adequate mechanisms to enforce settlement agreements, which can potentially result in wasted costs and time[13]

These are all fair criticisms but not without solutions as discussed later in this article.

II Conciliation framework in the international setting

Conciliation procedures are contained in a myriad of international treaties, rules, investment agreements and commercial contracts. Some of the most widely known instruments include:

- the UNCITRAL Conciliation Rules 1980
- the UNCITRAL Model Law on International Commercial Conciliation 2002 (Model Law), noting that legislation based on or influenced by this Model Law has been adopted by 33 states[14]
- the International Chamber of Commerce (ICC) Mediation Rules 2014[15]
- the UNCLOS
- the Permanent Court of Arbitration (PCA) Optional Conciliation Rules 1996[16] and
- the International Centre for Settlement of Investment Disputes (ICSID) Convention Conciliation Rules 2006

The differences and similarities between these instruments are largely ascertainable by how key issues are addressed, for example:

- The ICSID framework is more prescriptive than most, described by some as formal and adversarial,[17] yet decidedly still a far cry from the dogmatism of litigation and (less so) arbitration.
- As to similarities, it is generally consistent under these instruments that conciliators will be entitled/required to:
  - conduct the conciliation in such a manner as they determine appropriate,[18] having regard to the parties' needs and wishes, and the context of the case
  - look at more than just the legal and factual aspects of the case[19] and
  - make recommendations and/or propose settlement terms.

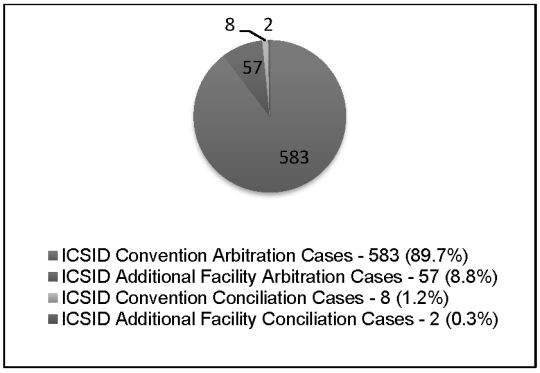
UNCITRAL is in the process of majorly reforming their conciliation (mediation) framework, which will include changes to the Model Law and the Conciliation Rules as well as the introduction of a convention on enforcement of settlement agreements reached through international commercial conciliation (mediation), akin to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[20]

III Conciliation in practice

Conciliation has been used for hundreds of years and is a method of choice in some jurisdictions. For example, China, Hong Kong and Japan have entrenched conciliation practices, court-mandated procedures, and a growing preference for med-arb (or concilio-arb). This can largely be attributed largely to a cultural preference for non-adversarial, reputation-retaining processes.[21] The reported efficacy of conciliation in these regimes seems to be a great credit to the dispute resolution method. For instance, the Department of Justice of the Government of Hong Kong reported in 2010 that with respect to

government construction mediations, around 70%–80% of all procedures commenced were resolved prior to transitioning from mediation to arbitration.[22] Further, according to statistics cited by Christine Kang in the *Fordham International Law Journal*, in 2014, of the 74,200 cases commenced within the 235 Chinese arbitral institutions, 65% of concluded cases were resolved by way of settlement through conciliation.[23]

However, in the international commercial and ISDS contexts, conciliation is less frequently used, as demonstrated by ICSID's 2018 caseload statistics (which provide a representation of proceedings under ICSID rules to date):[24]



Whilst the complexity of ISDS may be one cause for these statistics, the underutilisation of conciliation is as evident across other international commercial disputes. That said, the 2018 International Arbitration Survey indicates a growing trend for ADR methods, such as conciliation/mediation, in the international context.[25] According to the survey, whilst 97% of respondents' preferred method of dispute resolution is international arbitration, a greater proportion preferred it in conjunction with ADR (49%) than as a standalone method (48%). Comparatively, in 2015 those who preferred arbitration combined with ADR only constituted 34% of respondents. This represents considerable growth in the preference for ADR (even if as a partner to arbitration) in the past 3 years. Further, the survey reports that on analysis of the respondent subgroups, private practitioners and full-time arbitrators showed a preference for standalone international arbitration, whilst the in-house counsel subgroup showed a strong preference for international arbitration partnered with ADR (60%). On this trend, the survey concludes:

> … it … suggests that, even though arbitration continues to be the go-to dispute resolution mechanism, parties are increasingly resorting to various forms of ADR in the hope that a swifter and more cost-efficient resolution can be found to disputes before having them resolved by arbitration.[26]

IV Examples and observations

(A) Compulsory conciliation between Timor-Leste and Australia

Timor-Leste and Australia are coastal neighbours, with the Timor Sea lying between their southern and northern coasts, respectively. The area is known for its considerable hydrocarbon resources, in particular those within the Greater Sunrise field. Timor-Leste and Australia have unsuccessfully sought to delimit the maritime boundary between them since Timor-Leste's independence in 2002. In the period between 2002 and 2016, the parties concluded various interim arrangements, whilst relations on the issue worsened. By 2016, the parties were at a stalemate, in dispute over related issues before the International Court of Justice, and the already difficult task of maritime boundary delimitation looked increasingly complicated.

On 11 April 2016, Timor-Leste commenced compulsory conciliation[27] proceedings against Australia in accordance with Art 298(1)(a)(i) of the UNCLOS, with respect to the delimitation of a permanent boundary between their respective maritime zones. Conciliation is available where a contracting state (Australia in this case) has declared that it does not accept the binding dispute resolution mechanisms provided for in s 2 of Pt XV of the UNCLOS for disputes concerning maritime boundary delimitation. Timor-Leste is the first country to employ conciliation under the UNCLOS and utilise it successfully. On 6 March 2018, the conciliation proceedings between Timor-Leste and Australia concluded with the signing of the comprehensive Maritime Boundaries Treaty (Treaty) establishing the maritime boundaries between the two states. On 9 May 2018, the Conciliation Commission issued its report and recommendations (Report and Recommendations),[28] which is referenced herein to assess the key aspects of the conciliation process.

In accordance with the UNCLOS Annex V, which outlines some of the procedures applicable to an UNCLOS conciliation, each of Australia and Timor-Leste nominated two persons to the Conciliation Commission, subsequent to which consultation between the parties and party-appointed conciliators resulted in the appointment of the Chairman.[29] The five-member Commission consisted of eminent individuals from the legal and diplomatic world.[30] The parties also appointed the PCA to act as the Registry for the proceedings.

The Commission described its purpose as being to "hear the parties, examine their claims and objections, make proposals … and otherwise assist the parties in reaching an amicable settlement".[31] In accordance with Annex V, the Commission determined its own procedure, taking into account the parties' views as presented

during a procedural conference. The Commission adopted Rules of Procedure, which were relatively prescriptive and formal,[32] and adopted aspects of other rules (eg, UNCITRAL).

Shortly after the proceedings commenced, Australia challenged the competence of the Commission. The parties made written submissions on the issue, and in a very novel step, in August 2016, the Commission convened a hearing on jurisdiction in the Peace Palace in The Hague,[33] preceded by a public and live-streamed opening session, which touched on the substantive dispute and jurisdictional challenge. On 19 September 2016, the Commission issued its decision, confirming its competence to proceed.[34] The decision was publicly released in light of the emphasis on transparency and the importance of this test-case process. This is an example of how conciliation can be adjusted to suit the parties' needs, in this case the parties' needs and desires to transparently explain their positions and the proceeding to the public.

In October 2016, after consultation with the parties and as a first step to commencing the conciliation process, the Commission proposed confidence-building measures, with a view to removing major obstacles to progress and build trust.[35] Such measures included terminating controversial agreements, exchange of commitments to negotiate, discontinuing other adversarial proceedings, and exchanging written submissions.[36] These measures were accepted and implemented by the parties. The commencement of the process with confidence-building measures was perhaps one of the most important steps proposed by the Commission in clearing the way for negotiations.

Around 11 substantive, face-to-face meetings took place (some spanning several days). Other less formal meetings and conferences also occurred. The Commission largely met with the parties separately, so that they could "speak freely". However, at critical times the parties were brought together, either as an entire delegation, or with technical experts, or key individuals only. Some key observations are as follows:

- The meetings were frequent to ensure continued progress.
- The Commission alternated between the parties "for short, separate meetings on discrete points".[37]
- Various structures were employed, including presentational/court style, larger delegations in mediation style, smaller meetings with key players, and meetings with experts only.
- The Chairman would on occasion engage solely with key party representatives to gauge reactions and adapt the process.[38]
- "Home work" was set between each meeting, again, ensuring progress.

By August 2017, this approach resulted in an agreement on the central elements of a solution. From that point, the Commission and the parties worked together to resolve the terms of the Treaty as well as related agreements and transitional arrangements. The shift in the parties from defensive positions in July 2017 to collaborating on a solution and a technical text from August 2017 onwards was a truly remarkable achievement within a short period of time.

As to merits and substance, whilst the legal and factual issues were exhaustively explored, including with expert input, it is evident from the Commission's Report and Recommendations that the Commission engaged with the political, emotional and physiological aspects, and surrounding circumstances, with equal measure.

So what features of the Timor-Leste/Australia conciliation stood out? The process was initially very structured and, in a way, arbitration-styled. This allowed the parties to vent and fully articulate their positions, feelings and frustrations. It also ensured preparedness and commitment to the process. The ventilation of these positions to the public may have contributed to the healing process. The Commission moved wisely and quickly to confidence-building and did not avoid controversial issues in their measures. The process subsequently became more adaptable, involving intensive meetings and exchanges on issues beyond the boundary. The combination of written exchanges, bilateral and multilateral meetings, formal and informal discussions, and the presentation of independent proposals, ultimately moved the parties from defensive to constructive. The role of conciliators that instilled trust and brought experience, knowledge and innovation cannot be underemphasised; the Commission took a proactive role, looking at the issue from many angles and contributing ideas.[39] Finally, the bilateral relations between the states, and their shared respect for international law, were a key aspect to the ultimate resolution.[40]

The Timor-Leste/Australia Conciliation resulted not only in the Treaty, but also supportive sentiment of the process from both states.

(B) Jan Mayen Conciliation

On 28 May 1980, Iceland and Norway finalised the agreement between them concerning fishery and continental shelf questions (Agreement).[41] Pursuant to the Agreement, the parties set up a conciliation commission to propose a solution for the delimitation of the continental shelf in an area near Jan Mayen Island (Jan Mayen Conciliation). This commission was established

in August 1980, constituted of three members (including one national of each party) and was mandated to recommend the dividing line, taking into account Iceland's strong economic interests in the area, and geographical and geological factors, as well as other special circumstances.[42]

The commission held several informal and formal meetings, and intimately involved experts from relevant fields. However, the commission did not require submission of written or oral pleadings, though the commission had a background understanding of the issues from its two national members.[43]

The commission considered state practice, existing agreements between the parties, authority, expert views and other "special circumstances", such as Iceland's dependence on hydrocarbon resources, and the promotion of cooperation and friendly relations between the two parties.[44] In June 1981, the commission issued its report, proposing a joint development zone (among other things), which was accepted by the parties with an agreement finalised between them by October 1981.

This proceeding is an example of an efficient conciliation process, though it differs from others as it was tailored to the particular situation. The use of two national conciliators was important for efficiency and ensuring trust in the recommended solution, but would undoubtedly be less likely to work in other contexts. The use of experts and a scientific committee in this case was important, given the highly technical subject matter; this is a broadly extractable element.

(C) Conciliation between Tesoro and Trinidad and Tobago

In 1968, Tesoro Petroleum Corporation (Tesoro) and the Government of Trinidad and Tobago entered into a joint venture for the purchase and development of oil fields in Trinidad. Series of other agreements were also executed, one of which included a dispute resolution provision providing for ICSID jurisdiction, with conciliation followed by arbitration. Relations between the two parties became strained, and in August 1983, Tesoro initiated conciliation with respect to the wrongful blocking of dividends, along with other alleged breaches (*Tesoro v Trinidad and Tobago*).[45] Thanks to the writings of two of the legal representatives for the Government of Trinidad and Tobago, Lester Nurick and Stephen Schnably, we have an insight into the process.[46]

Nurick and Schnably emphasise that the selection of the conciliator was essential to ensuring party confidence and facilitating proper consideration of the conciliator's recommendations.[47] The parties agreed to have a single conciliator, appointing Lord Wilberforce, which Nurick and Schnably say "significantly expedited the commencement of the proceedings".[48]

The way substantive issues were explored sounds akin to arbitration; Tesoro issued an opening memorial, followed by a counter-memorial from the government (which raised an objection to jurisdiction), and then a reply from Tesoro. Further memorials and submissions were also issued throughout the proceeding.[49] A combative approach seems to have been taken in the procedural aspects; for example, in July 1984, Lord Wilberforce presided over a stratus conference, during which the parties reportedly made "extensive oral presentations" on procedural matters.[50] During the same, Lord Wilberforce invited both parties to submit, in confidence, their views on acceptable settlement terms, and determined that the government's objection to jurisdiction would be joined to the merits.

In February 1985, Lord Wilberforce issued his recommendation, along with a determination that ICSID had jurisdiction over the dispute. The recommendation provided an analysis of the merits (factual and legal) and proposed a settlement solution, apparently based on Lord Wilberforce's estimation of the parties' chances of success in adversarial proceedings.[51] Over a period of around 8 months, the parties negotiated on the basis of the recommendation, and sought further guidance from Lord Wilberforce. In October 1985, it was announced that the dispute had been settled.[52]

This is a more prescriptive and "rights-based" approach to conciliation than the Timor-Leste/Australia Conciliation, and the Jan Mayen Conciliation. Nevertheless, it resulted in a successful result. However, one can observe that some of the cost and time efficiencies were likely lost in this example.

(D) Unsuccessful attempts

Like any process, conciliation is not always a success. Stephen Schwebel writes of his experience in a mediation with respect to an ISDS, which was terminated almost immediately after commencement.[53] Though the details of the mediation are not shared, Schwebel observes that the parties approached the mediation with "inflexible" and onerous demands, no willingness to modify those demands, and a lack of preparedness (including by failing to provide sufficient information to the mediator). The dispute subsequently went to arbitration, but was settled prior to final award.[54]

This is an experience not unheard of to those who have experienced conciliation in the commercial context. What we can learn from Schwebel's observations of the unnamed mediation is that conciliation is not the right fit for every dispute, and that willingness and preparedness (which is perhaps a by-product of willingness) are important. On preparedness, Schwebel hypothesises that the benefit of full submissions in the arbitration was an element contributory to the early settlement of the dispute.[55]

(E) Observations from the authors

Having explored conciliation in the international context, a few key observations bear mention.

Lack of understanding and jurisprudence

Commercial parties hesitate to resort to conciliation because they don't fully understand what the process looks and feels like. Another major impediment to conciliation is its credibility; people perceive conciliation as weak, or only a precursor or interim step.[56] There are various measures that can be used to address this, such as harmonising the presently fragmented framework, introducing guidelines, handbooks and better model clauses, encouraging the sharing of experience on process and procedure, improving conciliator profiling such that a party understands the approach of potential conciliators, and educating legal professionals, commercial parties and public bodies. Private practice has a major role to play in this adaptation/education, as the 2018 International Arbitration Survey demonstrates they are more hesitant in embracing ADR to resolve cross-border disputes than their in-house counterparts, and thus risk failing to satisfy the innovation demanded by their clients.[57]

Enforcement

Conciliation in the international context will continue to flounder until there is a stable regime to enforce agreed outcomes. Without such measures, parties can be left with an empty agreement, and wasted time and costs. However, the Working Group's efforts are already resolving this issue. The proposed convention on enforcement of settlement agreements reached through international commercial conciliation (mediation) will allow for both enforcement of settlement agreements in signatory states, and the invocation of a settlement agreement as a defence against a claim.

Balance between structure and flexibility, and rights versus interests

There exists a tension between creating more structured rules for conciliation, and ensuring conciliation remains flexible and respectful of autonomy. The same tension exists for the role of the conciliator, in particular to what extent they should become involved in merits, as opposed to just interests.

Our case studies demonstrate differing approaches: in *Tesoro v Trinidad and Tobago* the procedure was relatively arbitration-like, and focused heavily on the legal and factual merits, using a "prospects" analysis to achieve resolution; in the Jan Mayen Conciliation, the context allowed for very little formal engagement, and the solution looked at many factors (including non-legal); and in the Timor-Leste/Australia Conciliation, the approach was both structured yet flexible, allowing for parties to advocate legal and factual positions, but then moving to address a far broader spectrum of issues through a continually adapting regime of exchanges and meetings.

While it is helpful to have different approaches, there is need for standardisation in a commercial context. This may, for example, be a set of rules where there is a default approach, which a conciliator can only diverge from in exceptional circumstances. The authors would further advocate for the standard to mirror the approach in the Timor-Leste/Australia Conciliation, which allowed a comprehensive presentation of issues, confidence-building, followed by facilitated negotiation-style meetings, and a conciliator mandate that allowed rights and interests to be considered. To reduce costs and time, tele/videoconferences could replace face-to-face meetings, and written exchanges could be limited.

Active conciliators

The importance of the conciliator is widely acknowledged,[58] and in cases of success, a resounding factor is that the conciliators are not only highly qualified, experts in their field, but also that they play an active role. Again, improving conciliator training and profiling can assist parties in selecting appropriate conciliators.

Impossible circumstances

The authors recognise that there are cases where conciliation simply won't work. In the Timor-Leste/Australia Conciliation, the Commission acknowledged that despite the parties approaching the proceedings "deeply entrenched in their legal positions", their "interests in the Timor Sea were such that it remained possible to envisage a mutually beneficial result meeting both sides' essential interests".[59] There are realities where there is no potential for a mutually beneficial solution, in such cases, conciliation may not succeed.

To conclude, the tide is turning for conciliation; the combination of crucial reform, a growing bank of jurisprudence, and the publication of the Report and Recommendations in the remarkable Timor-Leste/Australia Conciliation are conducive to a better understanding, a better framework, and therefore better use of conciliation. Conciliation provides a middle ground between negotiation and arbitration/litigation that is greatly suited to international dealings; it respects autonomy, whilst allowing an independent and reasoned analysis of a dispute, and consideration of factors beyond fact and law, that can result in a far better solution for the parties than a zero-sum judgment. What have we got to lose from conciliation? Not a whole lot. But there is a great deal to gain, as conciliation moves us from the concept of dispute, to mutually beneficial deal-making.

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Footnotes

1. United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (UNCLOS).
2. A Peters "International Dispute Settlement: A Network of Cooperational Duties" (2003) 14(1) *European Journal of International Law* 1 at 6.
3. D Girsberger and N Voser, *International Arbitration: Comparative and Swiss Perspectives*, 3rd edn, Schulthess Verlag, Zurich, 2016, pp 1–59 para 35.
4. See, for example, the discussion in L C Reif "The Use of Conciliation or Mediation for the Resolution of International Commercial Disputes" (2007) 45(1) *Canadian Business Law Journal* 20 at 22.
5. This same differentiator is supported by others, see, for example: above, at 21–2.
6. *Re Maritime Boundary between Timor-Leste and Australia* (Permanent Court of Arbitration, Case No 2016-10), *Report and Recommendations of the Compulsory Conciliation Commission* (9 May 2018) 17–18 para 52, https://pcacases.com/web/sendAttach/2327.
7. See, for example, the recognition of this changeability in the Permanent Court of Arbitration's Optional Conciliation Rules (effective 1 July 1996) 152, which states:

   > In modern international practice, the word "mediation" is sometimes used to designate a process that is very similar to the procedures for "conciliation" described in these Rules. In such cases, these Rules can also be used for mediation, it being necessary only to change the words "conciliation" to "mediation" and "conciliator" to "mediator."

8. The United Nations Commission on International Trade Law (UNCITRAL) has subsequently proposed the following footnote be included in the amended texts of the UNCITRAL Model Law on International Commercial Conciliation 2002 (UNCITRAL Model Law) and the UNCITRAL Conciliation Rules 1980:

   > "Mediation" is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing the [Convention/amendment to the Model Law], the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]. This change in terminology does not have any substantive or conceptual implications.

   UNCITRAL Working Group II (Dispute Settlement) Sixty-eighth session, New York, 5–9 February 2018, *Settlement of commercial disputes — International commercial mediation: preparation of instruments on enforcement of international commercial settlement agreements resulting from mediation — Note by the Secretariat* (A/CN.9/WG.II/WP.205) 3 https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/083/16/PDF/V1708316.pdf?OpenElement.
9. C Baltag (Ed), *ICSID Convention after 50 Years: Unsettled Issues*, Kluwer Law International, 2017, p 549.
10. P Schneider and T J Aristide Müller-Wolf *The Court of Conciliation and Arbitration within the OSCE: Working Methods, Procedures and Composition* Working Paper 16 (2007) 27 https://ifsh.de/file-CORE/documents/CORE_Working_Paper_16.pdf.
11. P Sanders (Ed), *New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other International Institutions*, Kluwer Law International, 1983, pp 4, 145-65. G Herrmann, "Conciliation as a new method of dispute settlement" in *New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other International Institutions*, P Sanders (Ed), Vol 1, Kluwer Law International, 1983, pp 145-65.
12. Above n 3, p 44.
13. For example, see the Permanent Court of Arbitration, above n 7, at 152 which states:

    > … conciliation has the best chance to succeed when all parties share the desire to participate, and that, if they do not, it may be more efficient to resort without delay to arbitration or judicial means.

14. UNCITRAL Model Law on International Commercial Conciliation 2002 www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html.
15. The International Chamber of Commerce (ICC) Mediation Rules 2014 replaced the ICC Amicable Dispute Resolution Rules 2001, which replaced older ICC conciliation rules.

16. With respect to these rules, they are based largely on the UNCITRAL Conciliation Rules 1980, and are for where at least one of the parties is a state.
17. Above n 9, p 531.
18. ICC Mediation Rules, Art 7; UNCITRAL Conciliation Rules, Art 7(3).
19. Example UNCITRAL Conciliation Rules, Art 7.
20. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
21. S J Burton "Combining Conciliation with Arbitration of International Commercial Disputes" (1995) 18(4) *Hastings International and Comparative Law Review* 637 at 638; above n 4, at 27–8.
22. Department of Justice (HK) Special Administrative Region *Report of The Working Group on Mediation* (2010) 15 www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf.
23. C Kang "Oriental Experience Of Combining Arbitration With Conciliation: New Development Of Cietac And Chinese Judicial Practice" (2017) 40(3) *Fordham International Law Journal* 919 at 922.
24. Source: World Bank The ICSID Caseload — Statistics (Issue 2018-1) https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf.
25. Queen Mary University of London and White & Case LLP *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) www.arbitration.qmul.ac.uk/research/2018/.
26. Above, at 5.
27. It must be noted that whilst participation in the conciliation process is mandatory under the UNCLOS mechanism used, the results are not binding.
28. Above n 6.
29. Above n 6, at 26 para 75.
30. The Conciliation Commission consisted of H E Ambassador Peter Taksøe-Jensen (Chairman), Dr Rosalie Balkin, Judge Abdul G Koroma, Professor Donald McRae and Judge Rüdiger Wolfrum.
31. Above n 6, at 17 para 51.
32. Above n 6, Annex 8.
33. Above n 6, at 28–9.
34. *Re Maritime Boundary between Timor-Leste and Australia* (Permanent Court of Arbitration, Case No 2016-10), *Decision on Australia's Objections to Competence* (19 September 2016) https://pcacases.com/web/sendAttach/1921.
35. Competence-building measures have been employed in other cases, such as the conciliation between Belize and Guatemala concerning their territorial and maritime boundary delimitation dispute.
36. Above n 6, at 32–4 para 95.
37. Above n 6, at 37 para 111.
38. See, for example, above n 6, at 48 para 155.
39. Above n 6, at 87 paras 293–4.
40. Above n 6, at 84 para 285.
41. As UNCLOS had not yet come into force at that time, the procedure did not take place under the convention, though the Commission did make reference to the Draft Convention of the Law of the Sea in its report.
42. Agreement between Norway and Iceland On Fishery and Continental Shelf Questions (28 May 1980).
43. *International Boundary Cases: The Continental Shelf*, Vol 1, Grotius Publications, 1992, p 699.
44. Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen *Report and Recommendations to the governments of Iceland and Norway, decision of June 1981* vol XXVII (1981) http://legal.un.org/riaa/cases/vol_XXVII/1-34.pdf.
45. *Tesoro Petroleum Corporation v Trinidad and Tobago* (ICSID Case No CONC/83/1).
46. L Nurick and S J Schnably "The First ICSID Conciliation: Tesoro Petroleum Corporation v Trinidad and Tobago" (1986) 1(2) *ICSID Review — Foreign Investment Law Journal* 340 at 344.
47. Above, at 345.
48. Above n 46, at 346.
49. Above n 46, at 347.
50. Above.
51. Above n 46, at 348.
52. Above.
53. S M Schwebel, *Justice in International Law: Further Selected Writings*, Cambridge University Press, New York, 2001, pp 318–19.
54. Above.
55. Above.
56. Z Péteri and V Lamm (Eds), *General Reports to the 10th International Congress of Comparative Law*, Budapest, 1981, pp 395–6.
57. Above n 25, at 5.
58. See, for example, above n 11.
59. Above n 6, at 84 para 285.

Australian
Alternative Dispute Resolution Law
Bulletin

Why Australia needs to move to Arbitration 2.0

Damian Sturzaker *MARQUE LAWYERS*

Introduction

There is a pressing need for arbitration to undergo a fundamental change if it wants to catch the growing tide of e-commerce disputes. The billions of dollars of transactions in the new economy are often conducted in an environment that is considered beyond the reach of traditional courts and usually of a value not considered economic to seek traditional remedies via the courts or arbitration. This paper[1] examines the powers that arbitrators have to adapt the traditional means of handling arbitrations to incorporate the use of technology so as to make it more suitable for the modern economy. It poses the question of whether online dispute resolution can transform Australia into a preferred place of arbitration for cost-effective and quick resolution of international disputes.

Over 20 years ago, before the Australian Centre for International Commercial Arbitration (ACICA), before the amendments to the International Arbitration Act 1974 (Cth) (IAA)[2] and when the best known Australian case on international arbitration was *Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals)*,[3] a prominent London international arbitration practitioner told me this:

> Australia has everything you need to be a successful centre of international arbitration. You have a stable economy and government, an independent and well trained judiciary, a good supply of lawyers, many of whom have significant experience in international arbitration and the cost of legal services is lower than most other jurisdictions. Your only problem is that you are 24 hours flying time from Europe. What you need to do is tow Australia to Europe.

While the flying time may have reduced since then as a result of the new Dreamliner's non-stop flights from Perth to London, this tyranny of distance has oft been cited as a major reason Australia has arguably under performed as an international arbitration centre.[4]

What has changed in those intervening two decades, however, is the pace and adoption of technological change. In a world where Australian companies like Atlassian provide cloud computing solutions around the world and companies like Freelancer allow Australians to bid on work as diverse as web page supply to aeronautical engineering for the National Aeronautics and Space Administration, then perhaps it is time to examine what technological change can mean for Australia in an arbitration context.

At the same time as this rapid technological change we have seen the ever increasing cost of international arbitration. In a 2015 survey by Queen Mary University and White & Case, it was reported that high cost was the most commonly cited "worst characteristic of arbitration" among survey participants.[5]

A failure to address costs concerns will cause users to turn away from arbitration. Older readers will remember the long construction arbitrations of the late 1980s and 1990s that effectively killed domestic arbitration in this country. In the United States similar cost pressures saw users turn to mediation.[6]

If costs can be reduced, then the market for arbitration will exponentially increase. Many smaller value disputes are just not affordable when the system of arbitration is hard wired to cater to large value, complex disputes. This "Rolls-Royce" approach to dispute resolution reminds one of the approach adopted by the taxi industry before Uber, the book industry before Amazon or the travel accommodation industry before Airbnb.

So how do we create "Arbitration 2.0"?

The arbitrator's role and the legislative and institutional frameworks available

Arbitrators are obliged to maximise efficiency and minimise costs and have a number of powers available to them to achieve this outcome. How should they focus these powers?

Party costs make up the bulk (roughly 83%) of the overall costs of arbitration proceedings.[7] These costs are made up of lawyers' fees and expenses, but in particular, expenses relating to the presentation of parties' cases such as witness and expert evidence costs. In his University of Sydney /Clayton Utz address in 2009, well-known international arbitrator Toby Landau QC despaired at the cost and uselessness of witness statements in arbitration.[8]

It follows that if one can lower the costs and time associated with this aspect of arbitration it will greatly decrease the overall cost and length of arbitration proceedings.

Section 39(2) of the IAA provides that arbitration is an efficient, impartial, enforceable and timely method to resolve commercial disputes.

Article 17 of the Model Law,[9] which is imported into Australian law via the IAA, states that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated equally and that each party is given a reasonable opportunity to present its case. Furthermore, the tribunal "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".[10]

Article 19(1) of the Model Law permits parties to agree on the procedure to be followed by the Arbitral Tribunal in the proceedings. In the absence of agreement, Art 19(2) allows the Arbitral Tribunal to conduct the arbitration in a manner it considers to be appropriate. This must be balanced with Art 18 which provides that the parties shall be treated equally and each party shall be given a full opportunity of presenting their case.[11]

As you would expect, the Australian Centre for International Commercial Arbitration Rules (ACICA Rules) adopt a similar approach.[12]

Like many institutions, the ACICA Rules reference the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration 2010 (IBA Rules). Article 8(1) of the IBA Rules provides that a witness can appear in person unless the tribunal allows the use of videoconferencing or other similar technology.

Additionally, the IBA provides a wide definition of what is a "document" to encompass electronic evidence which in turn means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means. Arguably "the use of text-mining and similar technologies by arbitrators should be encouraged without fear that arbitral institutions will oppose them".[13]

Article 25 of the International Chamber of Commerce (ICC) Arbitration Rules (ICC Rules) gives arbitrators recourse to a range of means for establishing the facts of the case: "The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."

Many arbitration institutions have responded to users' demands for an efficient and cost-effective dispute system by introducing expedited rules. This form of "Fast track" arbitration attempts to help alleviate cost and time concerns. The ICC[14] and ACICA[15] have expedited rules that offer streamlined arbitration with reduced scales of fees. Unless the parties agree to opt out, or the ICC Court deems the procedure to be inappropriate, the ICC expedited procedure applies automatically to claims with a value of up to US$2 million.

A further example of "Fast track" arbitration includes the Business Arbitration Scheme (BAS), developed by the Chartered Institute of Arbitrators in London (CIArb). The BAS provides simple, cost-effective and timely resolution of disputes of low to medium monetary value (£5000–£100,000) by arbitration before a sole arbitrator. A fixed fee of £1250 + VAT covers CIArb's administrative costs and the arbitrator's fees. The amount recoverable is limited to £1000 to dissuade parties from incurring high legal costs. Under the BAS rules, formal procedural steps are kept to a minimum such that the scheme is simple enough to allow most businesses to present their case without legal representation, and BAS offers a final and legally binding award in less than 90 days.[16]

How are the courts responding?

For their part the courts are not standing still on this issue.

Domestic courts are "open for international business" and are actively competing with arbitration for the work of resolving cross-border commercial disputes. Following the lead of commercial courts in London, New York and in the Middle East, courts in the Asia Pacific are indicating a willingness to broaden jurisdictional rules through the opening of international commercial courts.

In 2016, former Chief Justice Warren of the Supreme Court of Victoria called for the creation of an Australian International Commercial Court. She pointed to the need to implement technology and said that the Court should be high-tech and streamlined and implement electronic filing, video conferencing, e-dispute resolution and other technical innovations as technology develops.[17] Last year, Allsop CJ of the Federal Court suggested that had *Re Wakim*[18] not struck down one-half of the cross-vesting system, Australia would have an international commercial court operating today.[19] His Honour optimistically stated that a "cooperative arrangement may be possible among Australian courts … This is a venture worthy of national consideration."[20]

The second limb of the courts' challenge to arbitration is through the adoption of technology into court processes. The Federal Court has now issued Practice Notes[21] highlighting an overarching purpose to make available and encourage parties to use any technology available within the Federal Court or external technology suggested by the parties that may make the management or hearing of cases more efficient. This includes electronic filing (eLodgment), electronic hearings (eTrials), Virtual Courtroom processes avoiding the need for in-person appearances such as for the resolution of interlocutory disputes (eCourtroom) and video link and audio link hearing arrangements. It is proposed that these processes will be facilitated by an eRegistrar.

Abroad, China is the latest country to unveil a fully online "cyberspace court". The Hangzhou Internet Court, specialising exclusively in internet-related cases, tries cases via livestream. Proceedings are commenced, court fees are paid and all documents are submitted via an online portal, transcripts are generated electronically by voice identification software, and the general public can observe proceedings via a video feed.[22]

Elsewhere in our region, since it was established in 2015, the Singapore International Commercial Court has delivered over 30 judgments ranging from construction to banking and finance.[23] If the courts are embracing this change then the need for arbitration to do so is obvious. In some respects, this is already happening. The ICC, the American Arbitration Association, and the World Intellectual Property Organization Arbitration and Mediation Center have launched projects offering case management websites, virtual case rooms, extranets, and other IT tools allowing multiparty communications.

Is technology being used in arbitration?

Alexis Mourre, President of the ICC International Court of Arbitration, opened the 2017 ICC Conference entitled "Equal Access to Information & Justice: Online Dispute Resolution" by recognising that "there may be no more relevant topic than [online dispute resolution] for the future of dispute resolution".[24]

In 2015, the *Journal of Technology in International Arbitration* held its inaugural conference by Cisco telepresence technology.[25]

This technology claims to allow a person to feel as if they were present at a place other than their actual location. Participants in a mock arbitration concerning Homer's The Iliad were located in San Jose, Buenos Aires, Toronto, Washington, New York, Dublin, London, Paris, Brussels, Düsseldorf, Zürich, Vienna, Florence, Madrid, Hong Kong and Singapore. During the mock arbitration, tribunal members sat in three different locations, witness statements were transferred instantly using document sharing technology, and documents were also translated via Google Translate.[26]

The consensus regarding the experience was good. While some practitioners would prefer to be across the room from the witness, others thought one could get in to the habit of conducting an arbitration purely via telepresence. They said hot tubbing of multiple expert witnesses could work well virtually, with separate windows on a computer screen for each one. Windows could also be customised so that participants can not only view a witness, but other participants simultaneously. Expert testimony in arbitration proceedings could be transformed as traditional restrictions such as transport costs are removed. There was even discussion of conducting virtual site visits for tribunals avoiding costs and delay.

So, given the power there is under the Model Law and under institutional rules, to what extent is technology being used in the presentation of evidence in international arbitration?

Of course, there is an apprehension towards the use of technology. New technical innovations are unfamiliar and often misunderstood. This unfamiliarity could skew perceptions of technical innovations as "unsafe" or "impractical".

Even advocates of the use of technology such as Michael McIlwrath[27] tell stories of proposing the use of telepresence technology in dozens of arbitrations and not one tribunal actually agreeing to implement it.[28] One practitioner tells a story of an arbitration case in Singapore in which he asked that a London-based expert give evidence via video link. The other party objected, and in accordance with the 1999 IBA Rules the arbitrator held that the witness must attend in person. The witness was flown to Singapore, cross-examined for 30 minutes and then sent home.[29]

Some examples of common concerns include:

- *Costs of implementing technology* — implementing technical innovations can be costly. While some platforms such as Skype and Google are free, one party may prefer to use more expensive technology in the presentation of its case. Issues arise as to who should bear the costs of this in proceedings, particularly when a party may involuntarily have a particular technology imposed on them. Further, one party may have to provide training to the arbitrator and/or the other party if they are not familiar with a particular type of technology. As stated above, these are issues that can be dealt with as soon as possible such as at the case management conference. The cost of implementing a particular technical innovation can also be weighed up against the amount in dispute so that a common sense approach would determine whether it is beneficial to use such technology.
- *Confidentiality, data integrity and privacy* — third-party cloud-based data storage services such as Google may not have the required security to protect unwanted access to confidential documents. Security of videoconferencing software such as Skype and FaceTime is also a concern as it is possible for these communications to be intercepted. Each of these services also contains their own terms and conditions regarding rights of uses and privacy policies that may not be compatible with the local laws of certain jurisdictions. There could be issues of fairness if one party's

video link failed without the other being aware, which would lead to one side having inadvertent ex parte communication with the arbitrators.

- *Prejudice to a party* — one could argue that the use of technology in proceedings may give rise to a claim that a party was not given a full opportunity of presenting their case. It is foreseeable that this could affect the enforcement of an award under Art V(1)(b) of the New York Convention as a party may not have had the ability to present their case, or a full and fair opportunity to cross-examine a witness. However, whether this becomes an issue caused by the improper use of technology is yet to be seen.

Space does not permit a more detailed examination of these concerns however many of them involve "worst case scenario" outcomes. Back in 2004, an ICC report into the use of technology identified a number of potential issues,[30] none of which have been realised in any impactful way. On the rare occasion that an issue occurs, the impact is far less than what might have originally been thought.

In 2017, the ICC updated the report[31] stating that the benefits of technology in arbitration outweigh the risks. The Report offers basic guidelines on how to navigate the use of IT with other parties and the tribunal, and provides an analytical framework to assist parties and arbitrators on how to use IT in a fair, efficient and cost-effective way. It also highlights the concerns that IT poses such as cybersecurity and data integrity.

Other new technological innovations include big data, blockchain and blockchain-based smart contracts, machine learning and text-mining applications.

With respect to blockchain, there are several advantages for using arbitration as the dispute resolution mechanism — namely, the ease of cross-border enforcement under the New York Convention, arbitration's flexibility and its operation in a "decentralised manner". These attributes of arbitration are well-suited to smart contracts given the "transnational nature of this technology"[32] and the players involved, and because arbitration is "detached, to a certain degree, from the constraints of national laws", much like smart contracts.[33]

It is clear that for whatever reason, generally available technical innovations, be they video conferencing platforms such as Skype, cloud-based document management platforms such as Google Drive or even innovative arbitration platforms such as Kleros,[34] a fast, inexpensive, transparent and decentralised claim adjudication system, are not being used as effectively as they could be in order to save time and costs.

So whilst there will always be the billion-dollar investor state arbitration that requires Fort Knox-like security with purpose built platforms, the vast majority of arbitrations are more mundane and less sensitive and eminently suitable for the innovative use of technology.

Can technology make arbitration the preference for small-scale commercial or consumer disputes?

A particular niche that Australia might focus on is the growing number of quasi-consumer contracts that we see in the "sharing (or gig) economy". Presently any Uber driver in Sydney agrees under their terms of engagement to arbitrate all disputes in the Netherlands under Dutch law. If such a choice could be criticised perhaps any unfairness might be mitigated by the use of technology to enable the driver to give evidence from Sydney. If the costs of using the technology were borne by the corporate party or even the arbitral institution, that would also assist. For that matter if Uber can arbitrate Australian disputes in the Netherlands, why not the reverse?

The use of technology: a new frontier

Global e-commerce markets have been growing at double digits and are expected to surpass 4 trillion transactions by 2020.[35] It is estimated that disputes arise in 3%–5% of online transactions, totalling over 700 million in 2015 alone.[36] Kleros, using blockchain and crowdsourced specialists, has positioned itself as a multipurpose arbitration system that can resolve these disputes.[37] Kleros can adjudicate a variety of disputes such as small claim arbitration, service delivery, freelancing, crowdfunding, social media, intellectual property and online gaming.[38] Every step of the arbitration process (securing evidence, selecting jurors, etc) is fully automated.[39]

In order to use Kleros, the contract between the parties needs to have a clause stating that, *should a dispute arise, it will be adjudicated in Kleros*. Users will choose a type of court specialising in the topic of the contract. For example, a software development contract will choose a software development court; an insurance contract will select an insurance court.[40] Choice of law issues will be minimised as the contract will include reference to a seat that determines the nationality of the award. If a party wants recourse to courts, or the New York Convention, this could be provided for in the contract.

Chinese e-commerce giant Alibaba has adopted a similar method for dispute resolution via its user dispute resolution system. Volunteer registered users agree to serve as decision-makers. The system solves 99% of the

disputes arising in the platform and in March 2016, 920,000 active jury members rendered 150 million votes.[41] Jurors are rewarded with "positive reputation credit" which Alibaba uses for computing user credit scores and the credit rating can be translated into donations for a public cause, paid for by Alibaba.[42]

Bringing international disputes Down Under — the move to an Australian Arbitration 2.0

There are hundreds of institutions around the globe offering to administer international arbitrations.[43] If Australia is to have any chance to improve its attractiveness as a seat it must differentiate itself from these hundreds of other institutions, and in particular the heavy hitters of the global arbitration community such as the ICC, the Singapore International Arbitration Centre, the London Court of International Arbitration, the Hong Kong International Arbitration Centre, the International Centre for Dispute Resolution and the China International Economic and Trade Arbitration Commission.

One option to achieve this is for Australia to advertise itself as a place of arbitration that not only permits the use of technical innovations in arbitration proceedings, but actively encourages parties to utilise technology to save costs and time. It would need to be flexible to parties' needs. It may also need to be subsidised by technology companies, state or federal governments or even private enterprises.

Given the steps recently taken by the Federal Court to facilitate the use of technology there may be an opportunity for ACICA to jointly utilise such assets. If this occurred, then ACICA could immediately find itself propelled as a leader amongst international institutions in the use of technology.

Conclusion

A speaker at a conference in India[44] sought to explain the resistance to technological innovations such as case management websites, videoconferencing and live transcripts by quoting Douglas Adams in *The Salmon of Doubt*. Adams wrote:

> I've come up with a set of rules that describe our reactions to technologies:
>
> 1. Anything that is in the world when you're born is normal and ordinary and is just a natural part of the way the world works.
> 2. Anything that's invented between when you're fifteen and thirty-five is new and exciting and revolutionary, and you can probably get a career in it.
> 3. Anything invented after you're thirty-five is against the natural order of things.

I am not suggesting that to embrace change means that our arbitrators need to be under 35. I am suggesting that we have an opportunity to change the way we have approached arbitration and that will require an open mind for all arbitrators irrespective of age.

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Footnotes

1. Please note that this paper is a revised and updated edition of a similarly titled paper prepared in June 2016 in conjunction with the Chartered Institute of Arbitrators (CIArb) International Arbitration series, a joint initiative of CIArb Australia and the Federal Court, and held on 27 June 2016. The writer wishes to thank John Oddy and Danae Wheeler for their invaluable assistance in updating the paper.
2. See International Arbitration Amendment Act 2010 (Cth); Civil Law and Justice Legislation Amendment Act 2015 (Cth); Civil Law and Justice (Omnibus Amendments) Act 2015 (Cth).
3. *Esso Australia Resources Ltd v Plowman (Minister for Energy & Minerals)* (1995) 183 CLR 10; 128 ALR 391; BC9506416.
4. Only five International Chamber of Commerce (ICC) arbitrations were seated in 2015: see A Crockett and C Catterwell, Lexology, Involvement of Australian parties in ICC arbitrations rises steeply, 7 June 2016, www.lexology.com/library/detail.aspx?g=76bdb4a2-21f4-4504-9a9e-c35931a49b44. Compare this with the number of ICC arbitrations seated in France (84), United Kingdom (80) and Switzerland (77) in 2014: see G Born, *International Arbitration: Law and Practice*, 2nd edn, Wolters Kluwer, 2015, p 126.
5. D Jones AO *Using Costs Orders to Control the Expense of International Commercial Arbitration* (2016).
6. D Hensler and D Khatam "Re-inventing Arbitration: How Expanding the Scope of Arbitration is Re-Shaping its Form and Blurring the Line Between Private and Public Adjudication" (2018) 18(2) *Nevada Law Journal* 381 at 421–2.
7. Based on 221 ICC awards from 2012: ICC *Decisions on Costs in International Arbitration* (2015) 3 https://iccwbo.org/publication/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/.
8. T Landau "The day before tomorrow: Future developments in international arbitration" (Speech delivered at the Clayton Utz and University of Sydney International Arbitration Lecture, University of Sydney, 22 September 2009) www.claytonutz.com/knowledge/2009/september/the-day-before-tomorrow-future-developments-in-international-arbitration-with-toby-landau-qc.
9. United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial

Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985 with amendments as adopted by that Commission in 2006).

10. UNCITRAL Arbitration Rules (as revised in 2010), Art 17.
11. The full opportunity threshold will be met if the party has a reasonable opportunity. See International Arbitration Act 1974 (Cth), s 18C.
12. ACICA Rules, Arts 21.1–21.2.
13. G Vannieuwenhuyse "Arbitration and New Technologies: Mutual Benefits" (2018) 35(1) *Journal of International Arbitration* 119 at 123.
14. ICC Rules, Art 30 and App VI.
15. ACICA Rules, Art 7.
16. Chartered Institute of Arbitrators *The Business Arbitration Scheme (BAS)* (2016) www.ciarb.org/media/1444/bas-arbitration-rules-booklet.pdf.
17. P Durkin and M Papadakis "Chief Justice Marilyn Warren calls for fast-track business court" *The Australian Financial Review* 12 May 2016 www.afr.com/business/legal/chief-justice-marilyn-warren-calls-for-fasttrack-business-court-20160511-gosm2u.
18. *Re Wakim* (1999) 198 CLR 511; 163 ALR 270; [1999] HCA 27; BC9903189.
19. Chief Justice James Allsop AO "The Role and Future of the Federal Court within the Australian Judicial System" (Paper presented at the 40th Anniversary of the Federal Court of Australia Conference, 8 September 2017).
20. Above.
21. See Central Practice Note: National Court Framework and Case Management (CPN-1) (25 October 2016); and Technology and the Court Practice Note (GPN-TECH) (25 October 2016).
22. "Chinese 'cyber-court' launched for online cases" *BBC News* 18 August 2017 www.bbc.com/news/technology-40980004?ocid=socialflow_twitter.
23. The Singapore International Commercial Court makes technology facilities available to the parties upon request such as teleconference, video conference and audio-visual facilities (including Mobile Infocomm Technology Facilities). For more information, see Singapore International Commercial Court, Recent Judgments, 12 November 2018, www.sicc.gov.sg/hearings-judgments/judgments; and Singapore International Commercial Court, Use of Technology at the SICC, 8 November 2018, www.sicc.gov.sg/forms-and-services/use-of-technology-at-the-sicc.
24. ICC "Three takeaways on how digital technologies are transforming arbitration" media release (30 August 2017) https://iccwbo.org/media-wall/news-speeches/three-takeaways-digital-technologies-transforming-arbitration/.
25. D Thomson "Virtual arbitration spells end to air miles?" (2015) 10(6) *Global Arbitration Review* (online).
26. The mock tribunal held that the Google Translation could be accepted in evidence for the purposes of speed and efficiency, subject to being certified at a later time.
27. Global chief litigation counsel for GE Oil and gas division and co-author of: M McIlwrath and J Savage, *International Arbitration and Mediation: A Practical Guide*, Kluwer Law International, 2010.
28. Above n 25.
29. P Megens "Technical innovation in arbitration — Rules and attitude can derail technology" (Speech delivered at the Chartered Institute of Arbitrators Asia Pacific Conference, Sydney, 27 May 2011).
30. ICC Commission on Arbitration and ADR Task Force on the Use of Information Technology in International Arbitration *Issues to Consider when Using Information Technology in International Arbitration* (2004).
31. ICC Commission on Arbitration and ADR Task Force on the Use of Information Technology in International Arbitration *Information Technology in International Arbitration* (2017) https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf.
32. C Morgan "Will the Commercialisation of Blockchain Technologies Change the Face of Arbitration?" (*Kluwer Arbitration Blog*, 5 March 2018) http://arbitrationblog.kluwerarbitration.com/2018/03/05/topic-to-be-confirmed/.
33. Above n 13, at 128.
34. Kleros, www.kleros.io.
35. eMarketer *Worldwide Retail and Ecommerce Sales: eMarketer's Estimates for 2016-2021* (2017) www.emarketer.com/Report/Worldwide-Retail-Ecommerce-Sales-eMarketers-Estimates-20162021/2002090.
36. E Katsh and O Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes*, Oxford University Press, 2017, p 67.
37. C Lesaege and F Ast, Kleros *Short Paper v 1.0.6* (2018) 1 https://kleros.io/assets/whitepaper.pdf.
38. F Ast and C Lesaege, Kleros, a Protocol for a Decentralized Justice System, 11 September 2017, https://medium.com/kleros/kleros-a-decentralized-justice-protocol-for-the-internet-38d596a6300d.
39. Above n 37.
40. Above n 37, at 3.
41. Above n 36, p 66.
42. Above n 36.
43. The precise number of institutions that administer international arbitrations is unknown. For example, there are over 180 institutions in China and over 200 in Latvia alone: see M J Moser and Y Jianlong "CIETAC and Its Work — An Interview with Vice Chairman Yu Jianlong" (2007) 24(6) *Journal of International Arbitration* 555 at 556; and I Kačevska "Latvia" (2014) *The European, Middle Eastern and African Arbitration Review*. One can only guess how many of these institutions also administer international arbitrations.
44. C Spalton "Time to increase IT in arbITration? A perspective from Bangalore" (2012) *Global Arbitration Review* (online).

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Cite this issue as (2018) 4(6) *ADR*
SUBSCRIPTION INCLUDES: 6 issues per volume www.lexisnexis.com.au
SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067
CUSTOMER RELATIONS: 1800 772 772
GENERAL ENQUIRIES: (02) 9422 2222
ISSN 2203-9317 Print Post Approved PP 255003/00764