

***Smoking, Oligarchs,
Mighty Ships and Footy:***
**Settlement of International
Commercial Disputes**

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Settlement of International Commercial Disputes

Overview

- I. **The *New York Convention 1958***
- II. **International Commercial Arbitration: A Brief Overview**
- III. **The Permanent Court of Arbitration (PCA), The Hague**
- IV. **The London Court of International Arbitration (LCIA), London**
- V. **The Court of Arbitration for Sport (CAS), Lausanne**
- VI. **International Arbitration Tribunals Generally**

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I. The *New York Convention 1958*

- International trade through history. The development of *lex mercatoria*.
- An anarchical world...
- International trade and international security. The post-WWII trade boom and the demand to facilitate trade and the settlement of trade disputes, through a dispute resolution mechanism where arbitral Awards can be enforced internationally (Cf curial Judgments).
- Australia is a party to the bilateral treaty for the *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1994* with the United Kingdom. However, Australia is not party to the *Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971*. Cf *Foreign Judgments Act 1991* and the *Foreign Judgments Regulations 1992* – ‘final and conclusive judgment’; ‘money sum certain’ – common law principles remain.
- The *New York Convention 1958* – an analysis.

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II. International Commercial Arbitration: Overview

- Arbitration Agreement. Elements and the notion of separability.
- The seat of the arbitration (Cf. venue). The *lex arbitri* (Cf. governing law of the contract more generally) and the rules governing the conduct of the arbitration. For Australian seated arbitrations, conduct of the arbitration regulated by the *International Arbitration Act 1974* (UNCITRAL Model Law). The role of the supervising Court.
- Commencement of arbitration: Notice of Dispute pursuant to Arbitration Agreement and appointment of arbitrator(s).
- The Procedural Hearing(s).
- The Hearing: Form (comparison of say common law and civil law approaches); Equality between the parties; Privacy/Confidentiality.
- The Award – formal requirements.
- Enforcement. Challenges to enforcement?
- Advantages of arbitration: Enforceability; speed; cost; confidentiality; etc.

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III. The PCA: Smoking and Oligarchs

- The PCA established in The Hague (The Peace Palace) in 1899. PCA arbitrators hear disputes arising out of treaties/conventions (bilateral and multilateral, trade and investment) where the parties agree to arbitration. Cf. ICSID arbitration facilitated through the World Bank.
- *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12. Australia's 2011 plain paper packaging legislation for sale of cigarettes; PM challenged the legislation under a 1993 trade agreement between AUS & HKG on the ground that the new laws amounted to an expropriation of its intellectual property rights; PM failed on issue of admissibility. PM changed corporate structure to gain BIT protection. AUD\$50M costs bill.
- *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227. USD\$100B claim by Yukos shareholders against Russia for expropriation of Yukos assets (ie. energy nationalisation). Numerous procedural challenges to the arbitration. Enforcement of \$50B award refused by the Netherlands courts.

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IV. The LCIA: Mighty Ships and Everything Else!

- The LCIA is one of the largest and busiest arbitral institutions in the world.
- Located at 70 Fleet Street, London EC4.
- Disputes range from maritime to joint-venture to general commercial/contractual disputes to financial services disputes to infrastructure and energy disputes.
- Arbitration agreement (disputes clause) or submission agreement enlivens jurisdiction.
- Barristers/Solicitor Advocates from around the world.
- LCIA Rules and Guidelines.
- LCIA Costs.
- Advantages of institutional arbitration.
- Enforceability.

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V. The CAS and Sports Arbitration. Footy?

- What is sports arbitration?

Sports arbitration is the private adjudication of 'sporting disputes'.

- Sports arbitration has been principally conducted by the Court of Arbitration for Sport ('**CAS**') since its foundation in 1984, after the idea of an international sports tribunal was first conceived in 1981 by then IOC President, Juan Antonio Samaranch, in response to the growth in the number of sports-related disputes at a time when sport (especially Olympic sport) was becoming more international and professional.
- The CAS is an international arbitration tribunal which determines sporting disputes by producing arbitral awards which are legally binding upon parties to a 'sporting contract' (ie. Athletes and Clubs/NFs/NOCs and by association IFs and the IOC) in accordance with the *New York Convention 1958*. It is permanently seated in Lausanne, Switzerland.

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V. CAS - Jurisdiction

- The CAS derives its jurisdiction from:
 - Dispute resolution clauses in the 'sporting contract' & under OC, Arts 15(4), 59-61 and WADC Art 22.3, which in turn import the CAS Code.
 - CAS able to rule on its own jurisdiction. (*PAOK FC v HFF and Panathinakos FC CAS 2014*; *Hill v ASADA and Cycling Australia CAS 2013*). The CAS jurisdiction is 'compulsory' for most athletes.
- CAS permanent seat in Lausanne, SUI (lex arbitri) (world-wide arbitrations)
 - Awards enforceable under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 1958.
- In 1994, ICAS was established to ensure independence of CAS. (ICAS Statute, S4-7. Cf WADA Constitution; WADA Code (2013), Rationale & Part III).
- CAS independence upheld by the SFT in 2003. (*Lazutina and Danilova v IOC, FIS and CAS*, SFT 2003).
 - Limited grounds of review of CAS Awards. (Cf *Federal Code of Private International Law (SUI)*, Arts 190, 191; *Hondo v WADA* and *Canas v ATP SFT*, 2007).
 - Swiss Arbitral supervisor jurisdiction (See SFT Decisions: *A v FCB & FIFA* (2010); *Valverde v WADA & Ors* (2011); *Matuzalem v FIFA* (2012) and *Federal Code on Private International Law 1987 (SUI)* Arts 190 & 191)
- CAS, final court of 'merit' appeals. 400+ Arbitrators, closed list, 600+ cases pa.

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The Essendon 34: An Australian Case Study

- Players successful in overcoming ASADA's allegations at the AFL Anti-Doping Tribunal (a domestic tribunal). (*ASADA v 34 Players* (2015) AFL ADT Decision) Original hearing, not an arbitration – because the AFL had signed up to the WADC thereby binding players to the WADC via AFL standard player contracts, any final review for ADRV decisions made by the AFL ADT was to the CAS (WADC, Arts 4.4, 13.1, 13.2. Cf Art 22.4 where government signatories to the UNESCO Convention defer to arbitration as being the preferred means for the resolution of ADRVs. Cf *ASADA v 34 Players* [2014] VSC 635).
- WADA (intervening) and successful on appeal before the CAS. (*WADA v Bellchambers and Others* (2016) CAS Award). A circumstantial case: 'links in the chain' v 'strands in the cable'. 'Thymosin' = 'Thymosin B'?
- Players' challenge (against the CAS Code R57 'de novo' appeal process [where new evidence was admitted on appeal] dismissed by the SFT because the jurisdictional objection was not pressed before the hearing on the merits – ie. prior to Appellants adopting the Order of Procedure (*Bellchambers and Others v WADA* 2016 4A 102-2016)).

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VI. International Arbitral Tribunals Generally

- International Chamber of Commerce (ICC), Paris
- Singapore International Arbitration Centre (SIAC), Singapore
- Asian International Arbitration Centre (AIAC), Kuala Lumpur
- Hong Kong International Arbitration Centre (HKIAC), Hong Kong
- Chinese International Economic and Trade Arbitration Commission (CIETAC), Beijing
- Australian International Arbitration Centre (ACICA), Sydney and Melbourne
- American Arbitration Association (AAA), New York
- OBOR arbitration – the dispute resolution response to China's Belt (Land) and Road (Sea) Initiative: Massive infrastructure investment; 60 states; >USD\$1Tn worth of investment.
- Cultural differences in approaches to arbitration and dispute resolution: true international practice (amalgam of common law, civil law concepts).

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A Brave New World of Dispute Settlement...

- International commercial arbitration is a major growth area of legal practice throughout the world and in Australia – mainly due to: international capital flows and investment; reluctance of governments to fund large scale commercial disputes in State courts (ie. *BCCI v Bank of England* litigation – 12 year battle over the £16B collapse of BCCI; legal costs awarded to the Bank of England in the amount of £73.6m; the opening of the trial at first instance in 2004 took 6 months); advantages of private adjudication of commercial disputes.
- International Commercial Courts (Singapore; Xian/Shenzhen; Astana; Dubai DIFC) are also beginning to emerge in some jurisdictions.
- Australia does not benefit from a long established arbitration culture or indeed a history of being actively engaged in international dispute settlement, largely due to its isolation. For the Australian legal profession to thrive and grow in the years ahead, an international outlook and engagement in this emerging and necessary area of international legal practice is vital.