



Australasian Forum for  
International Arbitration

## Second AFIA Newsletter

**Christopher Kee**

**Keelins**

(AFIA Public Officer / Secretary)

It has been some time in between AFIA newsletters. There are many and varied reasons for this but a lack of momentum is certainly not one! AFIA is going from strength to strength. We will shortly be holding our 9<sup>th</sup> and 10<sup>th</sup> Symposia, in Sydney and Hong Kong respectively. Our membership numbers have increased dramatically over the past year and so has the AFIA reputation. We were approached to join YAP – a collective Young Arbitration Practitioners group.

During the year the choice was made to distribute to you information regarding matters we believed may be of interest as we received them. It was felt that given the temporal nature of conferences and the like it was better to pass them on straight away rather than wait for enough to fill an entire newsletter. Although we expect that practice to continue we do see the prospect of increased newsletters. We propose to have officially nominated reporters at each symposium conducted from now on. These reporters will take notes on the discussions raised by each question and their reports will be disseminated amongst the membership, much like in the first edition of this newsletter.

The final piece of important editorial information is the upcoming AGM. Under the Victorian *Associations Incorporation Act* we are required to conduct an AGM within three months of the end of the financial year (30 June). Thus the AGM will be held on 22 September 2006. Like last year people will be able to teleconference into the AGM provided they signal their desire to do so by 18 September.

**CK**

## Report on ICC Commission

**Simon Greenberg**

**Dechert**

(European Representative – Paris)

A special task force recently reported to the ICC on topical issues in international arbitration. The task force began as a response to the “complaints” that arbitration is becoming slow and expensive and more like litigation. The task force first examined where the costs in arbitration are. It found that approximately 82% of costs are party costs (i.e., counsel, experts, travel, etc.), 16% are arbitrators’ fees and travel expenses and approximately 2% are institutional fees.

One of the key recommendations that came up is that the parties should brief the Tribunal on the facts and arguments at the very beginning of the case (see reasons below). This would be a very interesting topic for discussion at a forthcoming Symposium.

In brief, the task force decided to come up with a list of non-binding guidelines which arbitral tribunals can distribute to parties for them to consider adopting to make their arbitration cheaper and faster.

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In summary the recommendations in the proposed guidelines are:

- involving the Arbitral Tribunal more on issues of proof, i.e. deciding which witnesses are/are not important and which documents are/are not important. For this purpose it is recommended that Arbitral Tribunals are fully appraised of the facts of the case and the parties' position at the outset of the arbitration. The task force found that often arbitral tribunals don't really know the file until a few weeks before the hearing when they start reading all the papers. The task force recommends that at a preliminary conference (i.e. time of preparing the terms of reference) parties make detailed submissions on their cases. The aim would not be to arm the tribunal to decide the issue but rather arm it to decide on the procedure. One experienced arbitrator suggested that any terms of reference hearing which takes less than 2 days is pointless!
- If arbitral tribunals are given more information about the case at the beginning, they will also be more willing to take a tougher approach on deadlines. As things stand, tribunals generally take the "safe" approach and allow extensive discovery and extend time limits because they do not understand the case at the stage that they are asked to decide such matters.
- With a better knowledge of the case from the outset tribunals would also be able to limit the number of witnesses attending hearings to those it actually wants to see cross-examined.
- The task force recommends putting more pressure on institutions such as the ICC which examine the Tribunal's procedural timetables. Currently timetables are being examined but there are never actually recommendations by the institution to modify them. The task force considers that institutions might be more pro-active in identifying excessively long timetables with respect to the particular case.
- The task force has identified repetition in counsel's submissions as a problem, and suggests that this adds substantial costs. They pointed out that often a case is set out in the Request for Arbitration and then substantially repeated with modifications in the Statement of Claim, repeated again in the second re-hearing memorial, and then repeated in the Closing Submission.
- Finally a point for the Arbitral Tribunal itself: it was recommended that tribunals be forced to comply with strict time limits for rendering the awards, such time limits to begin from the date of the final written closing submissions, for example, as some sets of arbitration rules already do.
- Experts: the task force found that there are in general far too many.
- Directions Hearings: the task force found that there are far too many. An early case management conference is needed. After that, directions' hearings, if any, should be held by telephone. It was also thought that telephone directions hearings are more productive than exchanges of "abusive" correspondence between counsels.
- It was suggested that a "practice" be developed such that when Tribunals award costs they look further than which party won or lost and also at the way that each party and each party's counsel has handled the case and whether it has done so efficiently and professionally. It was suggested that this might be a modification to the ICC and other institutional rules.
- Counsel's fee structures (i.e. more contingency fee based) were also proposed, to encourage rather than discourage efficiency. (SG: I agree. Contingency fees are not uncommon in Paris for arbitrations).
- There was floor discussion about the volume of documents submitted: One arbitrator commented that sometimes he receives more documents than he could possibly read in his entire lifetime. In holding pre-

hearing conferences arbitrators and counsel should refer to the UNCITRAL notes on organizing arbitral proceedings.

- There was also floor discussion about production of documents: One arbitrator announced that each side in the arbitration should be limited to one single request for production of documents. Another arbitrator thought that all document production requests should be made only after submission of the pre-hearing memorials so that the arbitral tribunal was well apprised of the case by the time document production requests were made so that he or she could properly decide on them.
- Finally there is a lot of support for the “Redfern Schedule” on production of documents. It was also generally felt that parties should be forced to explain in more detail the relevance of each document they are requesting. I.e., “I need this document because I intend to make this or that argument with it”.

**SG**

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## **Report on the 20<sup>th</sup> Annual Freshfields Lecture – “Achieving the Dream: Autonomous Arbitration” by Professor Julian Lew QC**

**Romesh Weeramantry**<sup>1</sup>  
(European Representative – London)

Clive James recently commented that in the 1950s the painter Jeffrey Smart taught the next generation of Australian art lovers the following truism: that painting had no nationalism, only painters in different places.<sup>2</sup> Move forward 50 years, change the discipline, and the same may be said of Professor Lew’s work. He has for numerous years been educating students and practitioners that international commercial arbitration ideally has no nationalism, only arbitrators sitting in different places. Autonomous arbitration has been his dream. In his Freshfields Lecture “Achieving the Dream: Autonomous Arbitration” he presented a cogent argument as to why this concept is now largely a reality.

The predominant theme of the Lecture was the increasing role of international arbitration as an autonomous dispute resolution process, governed not by national courts and laws, but by international commercial rules and practices. Nonetheless, Professor Lew did admit that inevitably there are “tentacles” that descend from the international arbitration domain into national jurisdictions in search of effective assistance when needed, for example, where enforcement proceedings are required.

Professor Lew gave an incisive historical review showing the scepticism of courts and legislation towards arbitration from the eighteenth century up to the 1950s. Subsequent to that period, he painted a picture of an increased internationalism in arbitration, which took place in the context of the cold war, post-colonialism, the collapse of communism, Asian “tiger economies” and developments in modern technology. These events, in his view, necessitated changes to the regime of international arbitration, bringing about the adoption of instruments such as the 1958 New York Convention, the 1966 ICSID Convention, the 1976 UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model Law. Such changes thus served to shift the focus from control and supervision by national law and courts to the freedom to arbitrate without national intervention.

Further support was provided for Professor Lew’s thesis in his discussion of the national legislation that has been adopted in strongholds of international arbitration. Liberal approaches towards arbitration were identified in the Swiss 1990 Private International Law Act, the Swedish 1999 Arbitration Act and the French 1981 New Code of Civil Procedure. In contrast, the English 1996 Arbitration Act was singled out for its more conservative approach, particularly its retention of substantial powers of court intervention. The autonomy of arbitration was also shown to

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be reflected in major international institutional rules.

Finally, reference was made to national court practice, particularly the pro-arbitration attitudes of the US and French courts. Cases such as *Chromalloy Aeroservices v Egypt*<sup>3</sup> (enforcing an award in the US despite annulment in Egypt) and *Hilmarton v OTV*<sup>4</sup> (enforcing an award in France despite it being set aside in Switzerland) were used to buttress his argument. On the other hand, concern was expressed regarding the review by English Courts of international arbitral decisions, particularly in the light of the various decisions rendered in *Lesotho Highlands Development Authority v Impreglio*<sup>5</sup> and *Occidental Exploration v Ecuador*.<sup>6</sup>

To those who now see autonomous arbitration as a reality rather than a dream, the Lecture was edifying. To the disbelievers, it still provided a wealth of thought-provoking material. No matter what view you have, there should be no controversy in concluding that Professor Lew has provided a broad, well-researched and illuminating view of a subject that will remain topical for years to come.

**RW**

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- 1 I should declare from the outset that Professor Lew is one of my Ph.D. supervisors. He is a Barrister/Arbitrator at 20 Essex Street, London, and is the Head of the School of International Arbitration, Queen Mary College, University of London. The Lecture has been published in *Arbitration International*, Vol. 22, No. 2 (2006), pp. 179-203.
  - 2 Clive James, "Modern Australian painting and the creation of cultural identity: Out from under the balcony", *Times Literary Supplement*, 1 September 2006, at p. 17.
  - 3 939 F. Supp. 907 (D.D.C.).
  - 4 (1995) XX YB Com. Arb. 663.
  - 5 [2003] 1 All ER 22; [2004] 1 All ER 97; and [2005] UKHL 43.
  - 6 [2005] EWCA Civ 1116; and [2006] EWHC 345 (Comm).

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## Recent Publications by AFIA Members

- Simon Greenberg & P. Dunham '*After Ten Years of Positive Developments, Does Confusion Remain in Brazil's Arbitration Law?*' *World Arbitration and Mediation Report* (2006) Vol. 17, No. 3, p. 80.
- Simon Greenberg & P. Dunham '*Balancing Sovereignty and the Contractor's Rights in International Construction Arbitration Involving State Entities*' *International Construction Law Review* (2006) Vol. 23, Part 2, p.130.
- Simon Greenberg '*ACICA's New International Arbitration Rules*' (2006) 23(2) *Journal of International Arbitration* p. 189.
- Sarah Hilmer '*The New Arbitration Rules of China International Economic and Trade Arbitration Commission*' *Australian Dispute Resolution Journal*, Vol. 16, No. 4, Lawbook Co., Sydney, Nov. 2005.
- Sarah Hilmer & Dr Wang Sheng Chang '*China Arbitration Law v UNCITRAL Model Law*' *International Arbitration Law Review*, Sweet & Maxwell, London, February 2006.
- Sarah Hilmer '*The Pork Case: Decision of the Federal Supreme Court of Germany of 2 March 2005 (VIII ZR 67/04)*' *Chinese Journal of International Law*, Oxford University Press, Oxford, February 2006.
- Christopher Kee '*Australian conditions imposed in stay of foreign arbitration matter*' *NSW Law Society Journal* August 2006.
- Christopher Kee & Jeremy Feiglin '*Legal Professional Privilege and the Foreign Lawyer in Australia*' (2006) 80(2) *ALJ* 131.



## AUSTRALASIAN FORUM FOR INTERNATIONAL ARBITRATION INC.

# NOTICE OF ANNUAL GENERAL MEETING

Notice is hereby given that the Annual General Meeting of members of the Australasian Forum for International Arbitration Inc. will be held at:

***Clayton Utz***

333 Collins Street, Melbourne, Victoria, Australia

on

**Friday 22<sup>nd</sup> September 2006 at 4pm**

### **TELECONFERENCE PARTICIPATION**

Participation can be by telephone conference. Anyone wishing to participate in this manner should advise Jonathon DeBoos ([jdeboos@claytonutz.com](mailto:jdeboos@claytonutz.com)) by 18 September 2006.



Australasian Forum for  
International Arbitration

# AUSTRALASIAN FORUM FOR INTERNATIONAL ARBITRATION INC.

## **ANNUAL GENERAL MEETING AGENDA**

1. Consideration and acceptance of new members  
(Refer to Appendix for current list of members)
2. Report by Co-chairs
3. Report by Secretary
4. General matters
5. Election of committee