Kluwer Arbitration Blog

Australian Arbitration Week Recap: The Great Debate – In an Emergency, Do You Arbitrate or Litigate??

David Anthony, Cara North, Alex Booth, Eleanor Clifford (Corrs Chambers Westgarth) · Saturday, November 12th, 2022

The annual "Great Debate" took place on the fourth day of Australian Arbitration Week. This event, organised with the support of hosting sponsor Corrs Chambers Westgarth, has now become a mainstay of Australian Arbitration Week, and involves a lively comedic debate between Team Arbitration and Team Litigation about which method of dispute resolution should reign supreme.

This year, the topic for the Great Debate was: *In an emergency – do you arbitrate or litigate?* The debate was both entertaining and informative, as each debater attempted to win audience votes through their knowledge of the law, legal-themed jokes and by making well-meaning jabs at the other side.

The debate was moderated by Julian Morrow a lawyer-turned-comedian known for *The Chaser*, who did an excellent job of keeping the debaters on their toes and the audience entertained.

Team Arbitration comprised of:

- Erika Williams (Counsel, Australian Centre for International Commercial Arbitration ("**ACICA**"));
- Michael Earwaker (Partner, Corrs Chambers Westgarth);
- Robert Heath KC (Barrister, Victorian Bar); and
- Kala Campbell (Associate, Corrs Chambers Westgarth).

Team Litigation comprised of:

- Matthew Critchley (Partner, Corrs Chambers Westgarth);
- Elizabeth Bennett SC (Barrister, Victorian Bar);
- Raj Pillay (Counsel, National Australia Bank); and
- Mark Wilks (Partner, Corrs Chambers Westgarth).

Team Arbitration

Erika Williams kicked off the event by saying that arbitration is like health care but with private

health insurance. You can choose the best hospital (the arbitral institution) and a specialist surgeon who is qualified to treat your specific ailment (the specialised arbitrator). Arbitration is therefore the best option in an emergency because you will get tailored, efficient and quick service. Ms Williams gave an overview of the procedure for an application for emergency interim measures of protection under the 2021 ACICA Arbitration Rules. She highlighted that ACICA shall use its "*best endeavours*" to appoint an emergency arbitrator within 1 day and the emergency arbitrator's decision is to be made within 5 days. Moreover, Ms Williams argued that applying for interim relief through arbitration is free from the burden of court rules and forms.

Michael Earwaker first spoke about the familiar experience of advising distressed clients about the benefits of emergency arbitration. He also discussed the joy of finding an arbitration clause hidden within a multi-tiered dispute resolution clause in the contract. Mr Earwaker stressed that by choosing arbitration as the mechanism for resolving disputes, including for interim relief, the client has already won because they aren't at risk of entering a multi-year process before the courts, which could include appeals before a decision is final. Mr Earwaker concluded by saying that arbitration is as respected as the courts.

Robert Heath KC described going to court as akin to playing *Wheel of Fortune*, as you never know what you're going to get. He spoke about the benefits of arbitration in avoiding the idiosyncrasies and rigidity of the court system, and the ability to specifically select an appropriately qualified arbitrator to address the factual circumstances of the dispute. Mr Heath explained how arbitrators are efficient and 'match-fit'. He also argued about the benefits of avoiding public knowledge of private, commercial disputes.

In closing, Kala Campbell provided the perspective of junior lawyers and the benefits they experience when being involved in emergency arbitrations. She pointed out the major benefit of being able to enforce interim arbitration measures in a significant number of jurisdictions under the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006). Ms Campbell concluded her argument by stating that arbitration has refined and improved all of the best aspects of litigation with none of the drawbacks.

Team Litigation

Matthew Critchley began the case for Team Litigation with a spirited retort by emphasising the benefits of resolving an emergency dispute in court, with its systems that have been in place for generations. He explained how the courts have everything you need in an emergency. There is never a question of whether the decision is binding or enforceable, courts have a range of emergency protections and a duty judge is always available to hear an urgent case.

Elizabeth Bennett SC spoke about the coercive power of the courts and their ability to enforce compliance, including through imprisonment for contempt of court. She argued that the public nature of court hearings promotes efficiency and high quality legal argument, particularly for emergency measures. Ms Bennett also discussed the hidden costs of arbitration and how judges have a greater public interest in seeing a dispute be resolved swiftly.

Raj Pillay spoke about the public benefits of litigation, the creation of precedent, and the special place that litigation holds in the public consciousness. He also argued about the benefits of the appeal process provided by litigation, which allows parties (and decision-makers) to correct errors

arising from the first instance.

In closing, Mark Wilks explained that it was very common for parties to an arbitration to end up in court when challenging the scope of an arbitration clause, or the jurisdiction of a tribunal. This means that all the positives of emergency arbitration can easily be lost if a party is unhappy and approaches the court as a result. He argued that it was better to cut out the "middleman" and proceed straight to litigation as the court system was in the best position to resolve disputes in a crisis.

Factors to consider in the arbitration versus litigation debate

As discussed in the recently published Corrs Chambers Westgarth Arbitration Guide 2022, to determine if an emergency arbitration proceeding should be preferred to seeking urgent relief before a court, the following should be considered:

- **Speed**: Consideration should be given to how quickly urgent relief can be granted. This will depend on the jurisdiction as the speed of court proceedings varies widely between jurisdictions. One benefit of emergency arbitration is the often short time limits specified by institutional rules for the issuance of a decision.

- **Cost**: The cost of emergency arbitration can be a deterring factor. The costs vary between institutions. However, the rules usually require the requesting party to pay fixed fees to cover the institution's administrative expenses and the emergency arbitrator's fees and expenses. For example, an emergency arbitration under the 2021 ACICA Arbitration Rules requires payment of an emergency arbitrator fee of A$10,000, with a further A$2,500 application fee payable to ACICA.

- **Confidentiality**: The fact that the arbitral process is typically confidential may be a decisive factor in preferring emergency arbitration over litigation. Indeed, this is noted as one of the key reasons why parties choose to arbitrate.

- ***Ex parte* relief**: Courts may be the only viable option for parties seeking interim measures without giving notice of the application to the other party. If there is a risk that a party is likely to dissipate or divest assets or destroy information, the secrecy and urgency of an *ex parte* application to a court will best preserve the assets or information.

- **Third parties**: The inability to bind third parties might be an important factor in choosing to seek urgent relief before a court rather than pursue emergency arbitration. As arbitration only binds the contracting parties, the arbitrator has no power to compel non-contracting parties to comply with interim orders. This is a significant disadvantage where for example a party needs to seek a freezing injunction against accounts held at third-party banks.

- **Enforcement and compliance**: While orders for interim relief granted by emergency arbitrators will be contractually binding on the parties to the arbitration, there are limited avenues available to enforce compliance. In addition, it is currently uncertain in many jurisdictions whether an interim decision by an emergency arbitrator, in the form of an order or an award, can be enforced

as an “award” under the New York Convention.

Conclusion

Ultimately, the audience vote was conducted and victory was declared for Team Litigation. Kala Campbell received the biggest laugh of the night and the award for best individual speaker.

We note that this recap was a collaborative effort between litigators and arbitrators. Any accusations of bias will be swiftly arbitrated/litigated once we decide which option is better.

This concludes our coverage of Australian Arbitration Week 2022. More coverage of Australian Arbitration Week is available here.

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