

INSIDE ARBITRATION: SPOTLIGHT ARTICLE: CHAD CATTERWELL

19 August 2020 | Global
Legal Briefings

Chad was promoted to the firm's partnership on 1 May 2020. Based in Melbourne, he spent time in our Hong Kong office between 2013 and 2016, and he continues to work on matters in the broader Asia-Pacific region.

YOU ARE A HERBERT SMITH FREEHILLS "LIFER" - YOU HAVE BEEN WITH THE FIRM YOUR ENTIRE CAREER. CAN YOU TELL US A BIT ABOUT YOUR BACKGROUND AND THE KEY STAGES OF YOUR CAREER LEADING UP TO YOUR PROMOTION?

I started with the firm in 2007 as a Graduate in the Melbourne office, or more specifically what was then known as an Articled Clerk. In the early years, most of my work was litigation focused; in particular a number of significant class actions in the Australian courts. When Freehills and Herbert Smith merged in 2012, I saw an opportunity to expand my horizons and adopt a more global mind-set by pivoting my practice towards international arbitration.



That led to a secondment to the firm’s arbitration team in Hong Kong, which was a “game-changer” for me. I spent just under three years in Hong Kong, and really benefitted from being part of a practice that is internationally-facing, and leads the field in Asia. What’s been great is that I’ve continued to work seamlessly with the team in Hong Kong and elsewhere in our global network since returning to Australia.

WHAT ATTRACTED YOU TO DISPUTE RESOLUTION?

I gravitated very early towards disputes work, and have never looked back. In a dispute, there are always two sides to every story. Sophisticated commercial parties rarely behave capriciously and generally have reasons for their actions. Regardless of the legal merits, clients place a premium on knowing that their side has been heard and understood by a court or tribunal. It's my role to tell my client's story, and ensure it is properly heard. This can be challenging, even more so where the dispute crosses borders and takes the client outside its comfort zone. I find it particularly rewarding to shepherd my clients through an international process like arbitration.

HOW DO ARBITRATION AND LITIGATION COMPARE, IN YOUR VIEW?

The core elements of both processes – the preparation of evidence and related legal analysis – are very similar, but the material is packaged and presented in different ways. So you need the same core skills, but also a familiarity with the procedural and practical nuances.

I find that arbitration often “gets to the point” more quickly; there aren't the pleadings points, for example, that can become somewhat pedantic in the litigation space.

One area in which arbitration and litigation differ is that court procedure is of course specific to the jurisdiction in question, whereas international arbitration has developed a broadly “standard” procedure that applies regardless of the seat. Personally, I am fortunate to practice in both international arbitration and the Australian courts, where the courts are robust and the procedure, although obviously different from arbitration, is reasonably smooth and effective. I might have answered this question differently if my experience of litigation was in another jurisdiction.

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IS IT NECESSARY TO BE A “SPECIALIST” ARBITRATION LAWYER, OR CAN A LITIGATOR DO ARBITRATION EQUALLY WELL?

Depending on your local market, I think you can certainly practice in both fields, but you need to be mindful of the differences in procedure and practice between the two mechanisms and adapt your approach as appropriate. You do need to have, at least, some “specialist” arbitration expertise to effectively run an international arbitration. It only leads to frustration if you try to approach an international arbitration exactly as you would approach litigation before a local judge. For example, courts and arbitrations take very different approaches to pleadings. In my experience, arbitration pleadings are more flexible; the parties' cases tend to adapt and develop during the course of the arbitration. As long as the cases are clear by the time of the hearing, most arbitrators have no objection to that flexibility. Litigators and judges, on the other hand, can find that fluidity uncomfortable compared to the more rigid rules of pleading they are used to.

YOU HAVE MOVED BACK TO AUSTRALIA, BUT CONTINUE TO WORK FOR CLIENTS IN ASIA. HOW DO YOU MANAGE THE GEOGRAPHICAL GAP?

Pretty seamlessly, to be honest. Technology really does allow us to collaborate effectively across borders. It is crucial that I already had strong contacts across Asia – both within the firm and with clients. That really makes a difference; once you have those relationships, it is possible to deliver a great product and first-class service across offices and borders. The Global Arbitration Practice at Herbert Smith Freehills has been operating this way for a long time, but COVID has really proven how effective it can be. I also have a time zone advantage; Australia is a couple hours ahead of Asia, so I can get ahead of overnight developments before the day starts for my colleagues and clients in Asia.

WHAT IS YOUR VIEW OF THE AUSTRALIAN ARBITRATION LANDSCAPE?

Arbitration is now firmly established here as a key method of resolving disputes in the construction sector. Depending on the mix of parties those arbitrations may be either domestic or international arbitration. The same is true of the Australian energy and resources sector, particularly in Western Australia. Since I returned to Australia in 2016, the number of draft arbitration agreements that come across my desk has increased steadily. I can only anticipate that that will result in more live arbitrations here in the future.

If you look at Australia's export markets, Australian corporates are very active across Asia, for example, in manufacturing and industrials and in some consumer goods, particularly food and beverages. Australian technology start-ups, in the fintech space and more generally, are also increasingly active regionally and globally. I think there is potential to grow the practice of arbitration in Australia in all those sectors.

Australian Centre for International Commercial Arbitration has a survey that is "in the field" now, which will provide some more data on the scale of arbitration happening in Australia and involving Australian corporates. It will be very interesting to see the results.

In terms of expertise, I think the local arbitration community has reached critical mass in terms of the numbers of practitioners with genuine international experience and an international mind-set. Our firm, for example, benefits from having a large number of lawyers who have spent time outside Australia, in more established arbitral centres like Hong Kong, Singapore, and London. When we return, we bring that expertise back with us. It is incumbent on us to help educate our clients and colleagues on the real benefits of arbitration when transacting across borders and in the sectors I mentioned above.

My sense is that there has also been an uptick in the number of judgments dealing with arbitration related matters. Those judgments are addressing some very thorny issues in a very sophisticated way.

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COVID-19 HAS VASTLY INCREASED THE USE OF TECHNOLOGY IN BUSINESS. HOW WILL THAT IMPACT DISPUTE RESOLUTION?

Technology, like arbitration, is not constrained by national borders, so the two are a natural fit. We're seeing a number of sectors – banking, mining, logistics and others – moving fast to embrace digitisation and automation opportunities. These projects are typically high-value, and usually business critical. Against that background, we will almost certainly see more technology-related disputes, many of which will have a cross-border element. Arbitration is the natural forum.

The technology projects we're seeing at the moment are also very complex. They often involve a complicated array of configuration and customisation of software to create a solution that is fit for purpose. Disputes emerge where there are cost overruns, delays, scope changes and outcomes that fall short of expectations. That will sound very familiar to arbitration lawyers who practice in the construction sector. Often, as in construction disputes, it is not one issue that leads to a total relationship breakdown or project failure, but rather “death by a thousand cuts” that build over time. Unpicking the complex web of allegations to attribute “blame” and, more pertinently, contractual responsibility, becomes a detailed forensic exercise.

We're also seeing some corporates opt for partnering and alliance contract models for some longer term technology development projects. It will be interesting to see whether those structures prove resilient to disputes. However, experience tells us that disputes do commonly arise in the course of these longer term arrangements, despite best intentions, as those who practice, for example, in the energy sector will know well. The digitisation agenda is straining some more business-as-usual IT outsourcing relationships, so we may see some contentious terminations and challenges in that space too.

Finally, we're also, of course, seeing a wide array of M&A activity as well as private equity and venture capital investment into the tech sector. There's a mass of start-ups, all jockeying for position and often, it seems, looking to deploy the “get big quick” strategy to stay ahead. They're often involved in repeat M&A and other investment activity, where the valuations are tricky and there can commonly be risks and challenges that are undiscovered at the time of transacting. All of this will be familiar to lawyers and clients who do post-M&A disputes in other sectors. The energy in the M&A market and the very significant valuations that we are seeing looks, to me, a lot like the sort of activity that we saw during the boom in investment into China 5 to 10 years ago that led to a raft of post M&A disputes.

Overall, I see a lot of opportunity for arbitration in the technology sector. Arbitration lawyers will need to upskill their understanding of the substance of these disputes, though. This creates a real opportunity for younger lawyers in this space, and for those with relevant tech expertise, who will stand out from the crowd.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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