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Arbitration review

July 2025

Welcome to the Thomson Geer Arbitration Review for July 2025.[1]

In this edition we provide an overview of the key developments in arbitration practice and procedure since January 2025, both within Australia and in the broader Asia-Pacific region. We also bring you news from further afield, including observations on the findings of Queen Mary University of London International Arbitration Survey Report 2025.

The decision in ***Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd*** [2025] NSWSC 610 will be of particular interest to arbitration practitioners: it concerned an application for a stay under the *International Arbitration Act 1974* (Cth) (**IAA**) and provides guidance on a raft of issues which arise in relation to the scope and effect of arbitration agreements, including the proper construction of arbitration clauses, the identification of "matters" in dispute, the arbitrability of issues and circumstances in which an arbitration agreement can be held to be inoperative.

We also introduce the newest member of our arbitration team, David Wright. David has practised in South East Asia, the Middle East and Europe and has extensive experience in arbitration under the rules of many of the world's leading institutions, including the ICC, Singapore International Arbitration Centre, Dubai International Arbitration Centre, and the London Court of International Arbitration. (David's profile is available **here**).

1 The contents of this update are provided for informational purposes only and do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied on as such.

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Table of contents

Recent Australian cases

Green Hospital Supply, Inc v Yi [2025] VSC 250

(stay of proceedings in aid of arbitration)

In May 2025, the Supreme Court of Victoria in *Green Hospital Supply, Inc v Yi* [2025] VSC 250 was asked to lift a stay of proceedings in favour of arbitration when the defendant to the application failed to progress the arbitration 'with reasonable expedition'.[2]

Green Hospital Supply, Inc (**GH Supply**) had commenced the proceeding to recover the sum of USD $12,510,000 claimed under share purchase agreement. In November 2024, the proceeding was stayed by consent, with the proviso that:

> *The stay be terminated upon the application made by the plaintiff in the event that the defendant does not do all things necessary to be done on her part to have the matters the subject of the proceeding referred to and determined in accordance with the arbitration agreement between the parties with reasonable expedition.*[3]

The relevant arbitration agreement referred disputes to arbitration administered by the Singapore International Arbitration Centre (**SIAC**) under the SIAC Rules in Singapore. The application for orders lifting the stay was filed in April 2025.

The judgment discloses that:

- GH Supply filed a Notice of Arbitration with SIAC on 26 November 2024; [4]
- GH Supply paid its share of the arbitration costs on 24 December 2024; [5]
- Ms Yi's Answer to the Notice of Arbitration was due on 10 December 2024; [6]
- Ms Yi failed to file the Answer and failed to pay her share of the arbitration costs; [7]
- Ms Yi claimed that she had been in hospital in December 2024, but at least one photograph she produced as evidence was found by an expert to be identical to a photograph Ms Yi had provided to GSH Supply in May 2024 and another was 'a photograph of a digital screen displaying an earlier photogram, casting doubt on the veracity of [Ms Yi's] representations'; [8]
- On or about 7 February 2025 Ms Yi's solicitors ceased to act for her in the Supreme Court proceeding and in the arbitration; [9] and
- On 17 March 2025 SIAC 'suspended its administration of the arbitral proceeding pursuant to Rule 34(6)(a) of the 2016 SIAC Rules. [10]

There was no appearance for Ms Yi on the hearing of GH Supply's application.

The Court confirmed that it had the power to lift a stay of proceedings 'that was imposed for case management purposes and in the interests of justice', [11] observing (at [19] – [21]) that:

> *19. ... As Hargrave J explained in UDP Holdings Pty Ltd (Receivers and Managers Appointed) v Ironshore Corporate Capital Ltd:*
>
> > *Such an order is properly characterised as a temporary stay made for case management purposes and in the interests of justice. Such a stay should be until further order, so as to allow any affected party to apply for the stay to be lifted where circumstances change.* [12]
>
> 20. *His Honour also observed that if a stay is ordered in such circumstances and the arbitration becomes unduly protracted, the Court can lift the stay if it is just and convenient to do so.*
>
> 21. *Similarly, in Civil Mining & Construction Pty Ltd v Cheshire Contractors Pty Ltd,* [13] *Henry J recognised that, even in circumstances where parties have been referred to arbitration pursuant to a contractual arbitration clause, if the dispute cannot be determined by arbitration due to come event or decision in the arbitration process, such a development may ground an application to lift the stay.* [14]

2 *Green Hospital Supply, Inc v Yi* [2025] VSC 250, [4] (Waller J) ('*GH Supply*').
3 Ibid [2].
4 Ibid [9].
5 Ibid [10].
6 Ibid [11].
7 Ibid.
8 Ibid [13].
9 Ibid [14].
10 Ibid [15].
11 Ibid [19].
12 *GH Supply* (n 3) [19] (Waller J), quoting *UDP Holdings Pty Ltd (Receivers and Managers Appointed) v Ironshore Corporate Capital Ltd* (2016) 51 VR 60, 72 [39].
13 (2021) 152 ACSR 346.
14 *GH Supply* (n 3), [19]-[21]; Ibid 360 [64] (Henry J).

Having stated the principles, his Honour then found that in this case, 'the evidence clearly establishes that [the] condition has been satisfied', [15] that Ms Yi 'has failed to file a Response to the Notice of Arbitration and failed to pay her share of the arbitration costs', [16] that '[t]hese failures have resulted in the suspension of the arbitration' [17] and that Ms Yi's conducts 'strongly suggests an intention to delay the resolution of the dispute'. [18]

His Honour accepted submissions from GH Supply that 'the consent order of 6 November 2024 constituted a variation to the arbitration agreement and that [Ms Yi's] conduct has rendered the arbitration agreement "inoperative" within the meaning of art 8 of the UNCITRAL Model Law'. [19] Rees J's observations *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)* were also cited:

> *An arbitration agreement may be 'inoperative' as it is unenforceable, has been amended by further agreement, is the subject of res judicate, has been set aside by a Court, has been frustrated or discharged by breach or by reason of waiver, estoppel, election or abandonment or has otherwise been repudiated.* [20]

His Honour observed that there was 'no risk of inconsistent findings as the arbitration [had] been suspended with no indication that [Ms Yi] intends to take any further steps in the arbitration', [21] adding (at [30]) that:

> ***... lifting the stay is consistent with the overarching purpose under the Civil Procedure Act 2020 (Vic) of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute.***

Orders were made lifting the stay and setting a timetable for the next steps in the Supreme Court proceeding. Ms Yi was ordered to pay the costs of the application. [22]

Oil Basins Limited v Esso Australia Resources Pty Ltd [2025] VSC 34

('kompetenz-kompetenz')

The first to third defendants in *Oil Basins Limited v Esso Australia Resources Pty Ltd* [2025] VSC 34 (described in the judgment as the **Applicants**) applied to the Supreme Court of Victoria for a stay of the whole of the proceedings under s 7 of the IAA, and for an order that the respondents to pay the Applicants' costs on an indemnity basis. [23]

These proceedings had a somewhat complex history, including an appeal to the Court of Appeal on the timing of the hearing of the application for a stay. [24] However, for the purpose of this note, the relevant arbitration agreement was contained in s suite of settlement documents which the Court defined as the **Settlement Agreement**. The Settlement Agreement was governed by the law of the State of New York, United States of America. The arbitration agreement provided, relevantly and omitting additional details contained in the clause, that:

> *Any dispute (other than a dispute required to be determined under clause 12) in any way arising out of or related to or connected with this Agreement shall be determined by arbitration in Melbourne, Victoria, Australia in accordance with the Commercial Arbitration Act 1984 (Vic).* [25]

Clause 12 of the Settlement Agreement provided for the determination of the gross value of hydrocarbons (and applicable royalty payments) to be determined by a special referee. A dispute arose between the parties as to whether the special referee's methodology could be modified by arbitration.

The arbitration was proceeding under an agreement between the parties referred to as the **Ad Hoc Arbitration Agreement** pursuant to which the parties had agreed that the law governing the arbitration was the IAA and that the agreement itself was 'governed by and must be construed in accordance with the laws in force in Victoria'. [26]

The judgment sets out the history of the proceedings which the Court observed 'goes back to arbitration proceedings in 1985' and 'is the product of a major resource project extracting hydrocarbons from under the seabed in Bass Strait off the south east coast of Victoria'. [27] That history is not set out in this note.

15 *GH Supply* (n 3), [23].
16 Ibid.
17 Ibid.
18 Ibid [24].
19 Ibid [16].
20 *GH Supply* (n 3) [26], quoting *WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2)* [2022] NSWSC 505, [117].
21 Ibid [16].
22 Ibid [32]-[33].
23 *Oil Basins Limited v Esso Australia Resources Pty Ltd* [2025] VSC 34, [1] (Croft J) ('*Oil Basins*').
24 See especially *Esso Australia Resources Pty Ltd v Oil Basins Limited* [2024] VSCA 240.
25 *Oil Basins* (n 24) [19].
26 Ibid [11].
27 Ibid [14].

The Applicants submitted that there was no dispute that there was a valid arbitration agreement, but that the dispute concerned the tribunal's competence to determine particular claims, defined as the **Depreciation Claim** and the **Decommissioning Claim**. [28] The judgment notes that these claims had been pleaded before the arbitral tribunal. Based on the governing law clause in the Ad Hoc Arbitration Agreement, the Applicants further submitted that the 'effect of the IAA and the imposition of the Model Law is to confirm the Kompetenz-Kompetenz principle applies to the scope of the authority of the arbitral tribunal in the arbitration' [29] (so that it could determine its own jurisdiction). The Applicants submitted further that 'in circumstances in which there is no issue as to the validity of the arbitration agreement which is not otherwise said to be unenforceable, a stay under s 7 of the IAA is to be granted'. [30]

The judgment involves a review of the decision in *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR with the Court observing (at [31]) that:

> *In Hancock, when answering the question as to whether the arbitration agreement there was 'null and void, inoperative or incapable of being performed' within the meaning of s 8(1) of the Commercial Arbitration Act 2010 (NSW), the Full Court admitted the potential of an exception to the Court's obligation to stay that proceeding in other circumstances. That exception was when the jurisdictional challenge was strictly confined to a short question of law that. once determined, would be dispositive. In that case, the Full Court said, in those circumstances, 'it might be less than useful for the Court not to deal with [that question]' (**Hancock Discretion**).* [31]

The Respondents' submission, as summarised by the Court (at [35]), was that:

> *... the Hancock Discretion to not grant a stay under s 7 of the IAA extends to issues of the scope of disputes that can unilaterally be referred to arbitration by a party to an arbitration agreement.*

His Honour analysed in detail the submissions made by each of the parties, concluding that those of the Applicants 'correctly [reflect] the current state of the authorities'. [32] His Honour observed (at [59]) that:

> *Whilst the Full Court in Hancock eschewed a rigid taxonomy or 'labels' with respect to [the stay issue], indicating that the approach in particular cases is dependent on issues and context, it is made clear that the jurisdiction and competence of the arbitral tribunal is to be respected and supported.*
>
> *This indicates a fundamental aspect of that jurisdiction, namely the application of the Kompetenz-Kompetenz principle as recognised at common law and in Article 16 of the Model Law; provisions which have the force of law in Australia under s 16 of the IAA. This approach is also consistent with Article 5 of the Model Law which prohibits a court from intervening except where so provided in the Model Law. There is no basis in the present proceeding for the Article 5 exception to arise.',*

And said further (at [62]):

> *The determination of the scope of an arbitration agreement is a determination as to the express or implied agreement of the parties. The process relies upon 'orthodox or implied principles of interpretation' having regard to 'context and purpose'.[...] The arbitration agreement the subject of this application (whether contained in the Settlement Agreement or otherwise) is couched in a suite of complete provisions in a suite of complex documents and the subject of a long history of various amendments and arbitral awards and determinations. Having regard to these matters it would, in my view, be absurd to suggest the possibility of, in effect, a summary determination of a discrete and narrow question of law devoid of consideration of any factual matters or context ...'*

His Honour then commented in detail on the 'operation of the proviso to the operation of s 7(2) of the IAA which is contained in s 7(5) which operates to prevent an order under the preceding subsection if the court finds that "the arbitration agreement is null and void, inoperative or incapable of being performed"'. [33] This provision was relied on by the Respondent.

Citing the commentary International and Australian Commercial Arbitration [34] his Honour observed that the power to determine whether the proviso is met is 'co-extensive between the courts and the tribunal' [35] (as discussed in Hancock). The Court quoted, amongst others, Hancock (at [66]):

> ***The real issue in any case is whether the Court should hear the separate attack or permit the arbitral tribunal to hear it, by staying its own proceeding. The proper answer to this question will depend on the nature of the attack and all the circumstances.*** [36]

28 Ibid [27].
29 Ibid [28].
30 Ibid [29].
31 *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR, [145].
32 *Oil Basins* (n 24) [56].
33 Ibid [65].
34 C Croft, D Stamboulakis, M Warren, *International and Australian Commercial Arbitration* (LexisNexis, 2022).
35 *Oil Basins* (n 24) [66].
36 *Hancock* [377].

The Court also referred to and cited with approval the judgment of Lyons J in *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* (2020) VSC 476 where his Honour in that case held that 'the proviso should be determined by the arbitrators, as it could not simply be determined – that is, there were complex legal or factual issues outstanding, and issues were "interrelated" to such a degree that "argument on one issue might well inform the determination of another"'. [37] His Honour concluded (at [67]) that:

> *In the present circumstances, to the extent that it may be said that the arbitration agreement (whether contained in the Settlement Agreement or otherwise) is subject to any proviso issues relating to it, borrowing from the words of Lyons J, of 'some legal and/or factual complexity' such that any proviso issue is a matter for the arbitral tribunal.*

> ***This position is also, in my view, consistent with the authorities to which reference has been made as to the respect to be paid to and support for the jurisdiction of the arbitral tribunal and, particularly, the operation and application of the doctrine of Kompetenz-Kompetenz.***

Costs of the application were reserved. [38]

Oil Basins Limited v Esso Australia Resources Pty Ltd (No 2) [2025] VSC 257

(order for indemnity costs)

In May 2025 the Supreme Court of Victoria heard an application by the first to third defendants in *Oil Basins Limited v Esso Australia Resources Pty Ltd* (No 2) [2025] VSC 257 for an order that the plaintiff (**Oil Basins**) pay costs on an indemnity basis for unsuccessfully resisting the order to stay the proceedings under s 7 of the *International Arbitration Act 1974* (Cth).

The costs sought by the defendants included costs of and incidental to an application for leave to appeal and an application for a stay in the Victorian Court of Appeal and the stay application in the Supreme Court. [39] The costs were sought on an indemnity basis.

Justice Croft summarised the defendants' submissions as follows:

> *... the [defendants] advanced two arguments: first, that a successful stay application under s 7 of the IAA constitutes a special circumstance which warrants a departure from the ordinary position on costs; and, second, in the alternative, that [Oil Basins] instituted the proceeding for an ulterior motive or wilful disregard of known facts or clearly established law, and which had no proper chances of success. The [defendants] submitted that, on either of these grounds, indemnity costs should follow.* [40]

Oil Basins resisted the orders sought, but accepted that the respondents were entitled to their costs for the stay application. Oil Basins' position was that costs should be ordered on the standard basis, referring to the:

> ... high threshold' of 'special circumstances' required to depart from the ordinary rule that costs be awarded on a standard basis, and contended that their application and opposition to the stay application was '[not] out of the ordinary. [41]

Oil Basins also challenged the defendants' claim that its objective in pursuing the litigation was for an ulterior purpose. [42]

His Honour commenced his analysis by citing the principles applicable to an award of costs on an indemnity basis, observing that under both the *Supreme Court Act 1986* (Vic), the *Supreme Court (General Civil Procedure) Rules* 2015 and the *Civil Procedure Act 2010* (Vic) 'provide the court with a broad discretion in determining the question of costs'. [43] His Honour continued (at [21]):

37 *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476, [206]-[207].
38 *Oil Basins* (n 24) [69].
39 In *Oil Basins Limited v Esso Australia Resources Pty Ltd (No 2)* [2025] VSC 257, [4] (Croft J) ('*Oil Basins No 2*').
40 Ibid [5].
41 Ibid [16].
42 Ibid.
43 Ibid [20].

> *The general rule is that the Court will only depart from the ordinary position if the case is exceptional or there is some special or unusual feature which justifies the exercise of the Court's discretion to order costs on an indemnity basis.* [44] *The threshold for departing from the ordinary rule is high and the Court must exercise appropriate caution in reaching the required degree of satisfaction. Indeed, in Ham v Australian Kung Fu (Wu Shu) Federation Inc,* [45] *Mukhtar AsJ stated:*
>
> > *[g]reat care must be taken in reaching a conclusion at the urging of a victorious litigant that the losing litigant somehow conducted itself delinquently as litigant so as to attract an indemnity order as if it were an expression of the court's admonition.* [46]

His Honour went on to explain that '[t]he categories of special circumstances are not closed and discretion is to be exercised in the circumstances of each case', [47] noting that recognised categories include where: (a) proceedings were commenced in wilful disregard of known facts or clearly stated law; (b) the applicant to proceedings commences those proceedings should have known they had no chance of success; and (c) there is unreasonable conduct. [48]

The Court accepted the submission that it should depart from the 'ordinary position' in this case. His Honour noted, however, that:

> *[I]t is not, however, necessary for present purposes to enter into the ongoing international debate on whether a special costs rule which carries a reverse onus should apply to challenges to arbitral awards or, in the context of this case, stay applications. …*
>
> *… [I]t is appropriate, in my view, to have regard to the nature of applications to the courts by way of enforcement or of challenges to awards as distinct from stay applications …*
>
> *… [T]he public policy position of the legislation is clearly directed to the facilitation and enforcement of arbitration agreements, and to discourage parties from seeking to obstruct the operation of such agreements. Whether this situation as it may arise in stay applications, as distinct from applications by way of enforcement of an award or a challenge to an award, may be thought to have different consequences in terms of costs appears to be an open question. In this respect, the former goes to allowing the arbitration to proceed unobstructed by court proceedings whereas the latter goes to the manner in which the arbitral proceedings are conducted and outcomes. …* [49]

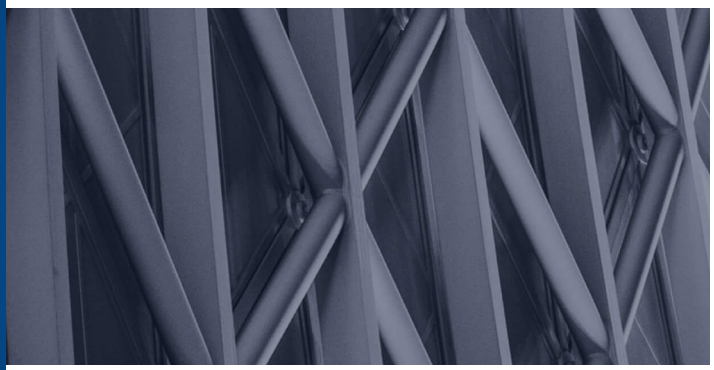
And, after considering international jurisprudence on this issue:

> *[F]inal resolution of the Australian position is now a matter for appeal courts and, possibly, legislatures.*[50]

In awarding costs on an indemnity basis, his Honour stated that the decision was not made on the basis of a special costs rules which carries a reverse onus, but on the basis of 'general costs principles' [51] as set out by Beach J in *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* (No 2) (***Sino Dragon***), [52] finding (at [36]) that:

> *… applying usual costs principles, where a party which has failed to resist an application under s 7 of the IAA to stay court proceedings in circumstances where the grounds of opposition had no reasonable prospects of success, it should be ordered to pay costs on an indemnity basis.*

His Honour did not find that the entitlement to indemnity costs extended beyond the costs of the stay application and reserved all other costs to the conclusion of the arbitral tribunal's decision on its jurisdiction. [53] His Honour concluded that an order for indemnity costs should be made in the applicant's favour (to be taxed immediately), but otherwise 'reserve[d] judgment for the costs incurred in relation to the balance of the proceeding'. [54]



Roadpost Inc v Beam Communications Pty Ltd [2025] FCA 120

(enforcement of foreign arbitral award)

In February 2025 the Federal Court of Australia made orders enforcing a foreign arbitral award made in Canada in circumstances where the award contained declarations made by the arbitrator.

44 *Colgate Palmolive Co & Anor v Cussons Pty Ltd* (1993) 46 FCR 225, 232–234.
45 [2011] VSC 498.
46 *Han v Australian Kung Fu (Wu Shu) Federation Inc* [2011] VSC 498, [31].
47 *Oil Basins No 2* (n 40) [23], citing *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2)* [2016] FCA 1169, [23]; *Ugly Tribe v Sikola* [2001] VSC 189, [8]; *Denlay v Commissioner of Taxation (No 2)* (2013) 302 ALR 237, [10].
48 Ibid [22].
49 Ibid [29]-[33].
50 Ibid [24].
51 Ibid [35].
52 [2016] FCA 1169.
53 *Oil Basins* (n 24) [49].
54 Ibid [63].

The award arose out of a dispute between joint venture partners. Pursuant to the award, Beam Communications Pty Ltd (**Beam**) was ordered to pay Roadpost Inc (**Roadpost**) the costs of the arbitration and the arbitrator also ordered that Beam was required to sell its shares in a joint venture company to Roadpost in accordance with the terms of the parties' joint venture agreement, 'with the purchase price to be determined in accordance with Article 12 of [that agreement]'. [55]

Roadpost sought enforcement of the award pursuant to s 8(3) of the IAA by way of an order that the award be enforced as if it were a judgment of the Court and a declaration that reflective of the declaration made by the arbitrator.

The Court was satisfied that it should make the order for enforcement, however, in relation to the proposed declaration, Stewart J observed:

> *... In the lead up to the final hearing listed for today, the parties reached agreement. However, I raised with the parties a query as to why Order 2 [being the declaration] is justified and appropriate, in particular having regard to what was said in Tridon Australia Pty Ltd v ACD Tridon Inc [2004] NSWCA 146 at [10]-[11] and Margulies Brothers Ltd v Dafnis Thomaides & Co (UK) Ltd [1958] 1 Lloyd's Rep 205 at 207. On those authorities, the making of a declaration in the terms of an award is not "enforcement" of the award and not an appropriate or proper order to make under a statutory provision, such as s 8(3), which provides that an award may be "enforced by the Court". It was not clear to me just what the Court was being asked to do by the proposed Order 2 – would it be ordering that something be done or would it be making a declaration of rights, and if the latter, what would the purpose be since the arbitrator has already made such a declaration and Order 1 would serve to recognise that order?* [56]

His Honour went on to note that it was not in dispute that the arbitrator had the power to make the order that he and that his Honour was not in doubt that the Court had the power to grant specific performance in enforcing an arbitral award. [57]

Having considered these authorities, his Honour made, inter alia, the following order:

> *It is ordered and declared that the Respondent sell its shares of [the joint venture company] to the Applicant, in accordance with the terms of [the joint venture agreement].* [58]

noting that the words "is required to" [59] were deleted, 'as they serve to detract from the force of the order for specific performance by introducing something in the nature of a declaration of rights'. [60]

Republic of India v CCDM Holdings LLC [2025] FCAFC 2

(enforcement of foreign arbitral award - waiver of state immunity)

This decision in *Republic of India v CCDM Holdings LLC* [2025] FCAFC 2 was an appeal of a single judge in the Federal Court of Australia in *CCDM Holdings LLC v Republic of India* (No 3) [2023] FCA 1266 where the Court held that '*India's agreement to the New York Convention constituted "by way of clear and unmistakeable necessary implication" submission by agreement within the meaning of s 10(2) of the [Foreign State Immunities Act 985 (Cth) (**FSIA**)] in respect of proceedings against it for recognition and enforcement, where the award and "what appears on its face to be an agreement with India to arbitrate the underlying dispute" is tendered ...*'. [61]

Section 10 of the FSIA provides, relevantly, that:

1. *A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.*
2. *A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia. ...*

CCDM Holdings LLC (**CCDM**) had brought an application in the Federal Court for enforcement of a foreign arbitral award. India claimed immunity under the FSIA. The trial judge found that India had submitted to the jurisdiction. [62]

The Full Court of the Federal Court took a different view, allowing the appeal.

55 *Roadpost Inc v Beam Communications Pty Ltd* [2025] FCA 120, [4] (Stewart J).
56 Ibid [6].
57 Ibid [10]-[12], citing *Tianjin Jishentai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767 and, in other jurisdictions, *Plaintiff v Eton Properties Ltd* [2011] HKCFA 31 at [4]; *Adamas Management & Services Inc v Aurado Energy Inc* [2004] NBQB 342 at [31]-[36]; *EGI-VSR LLC v Coderch Mitjans*, 963 F.3d 1112 (11th Cir. 2020) at 1124.
58 Ibid [2].
59 Ibid [13].
60 Ibid.
61 *Republic of India v CCDM Holdings LLC* [2025] FCAFC 2, [2] ('*India v CCDM*').
62 *CCDM Holdings LLC v Republic of India* (No 3) [2023] FCA 1266.

CCDM and India were parties to arbitral proceedings commenced under a bilateral investment treaty between India and Mauritius. The arbitration was conducted under the UNCITRAL Arbitration Rules (with some limited modifications) administered by the Permanent Court of Arbitration at The Hague. The tribunal issued an 'Award on Jurisdiction and Merits' and a 'Quantum Award' (the latter of which was the subject of the enforcement application).

The Full Court looked at the relevant provisions of the FSIA and the IAA (including the New York Convention). It observed, in relation to the New York Convention, that:

> *It is common ground that India ratified the New York Convention with effect from 11 October 1960 subject to the reservation allowed under Art I(3) that it would "apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the Law of India." Also, Australia acceded to the Convention with effect from 24 June 1975 without reservation.* [63]

The Court identified three issues for determination based on the trial judge's approach. [64]

First, the applicable principles for submission to jurisdiction; secondly, whether, by ratifying the New York Convention, India had submitted to the jurisdiction of the Court in relation to proceedings for the recognition and enforcement of a foreign arbitral award; and, thirdly, whether CCDM had established the 'commercial transaction' exception under s 11 of the FSIA.

These issues were encompassed by one ground of appeal:

> *... that the primary judge erred in finding that India, by ratifying the New York Convention, submitted within the meaning of ss 10(1) and (2) of the [FSIA] to the jurisdiction of the Federal Court to proceedings for recognition and enforcement of a foreign arbitral award in circumstances where the applicants for recognition and enforcement tender a copy of the award together with what appears, on its face, to be an agreement to arbitrate the underlying dispute.* [65]

Within that ground of appeal, there were 'six errors', two of which were noted as relevant for the appeal before the Full Court, namely:

(a) *The finding that India's agreement to Art III of the New York Convention includes both an agreement and a requirement by India that Australia recognise and enforce an award to which India is a party, and that the terms of Art III are inconsistent with India being able to oppose the recognition and enforcement of that award on the ground of foreign State Immunity; and*

(b) *The finding that the agreement of a signatory foreign State to the text of the New York Convention constitutes, "by way of clear and unmistakeable necessary implication", submission by agreement within the meaning of s 10(2) of the FSIA to the jurisdiction of the Federal Court of Australia in proceedings of the kind [here] and that there is no aspect of the text, purpose, objects or context of the New York Convention which would lead to a different conclusion.* [66]

The Court also observed that matters raised by a notice of contention had fallen away.

On the 'principal issue in the appeal' being whether India had submitted to jurisdiction, the Court considered two issues: first, whether by ratifying the New York Convention 'India [waived] foreign state immunity'; [67] and, secondly, whether in this case, 'the award [was] outside the scope of India's commercial reservation'. [68]

The Court applied the High Court's decision in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [69] and emphasised that the 'principle of international law to be that waiver of immunity, to be effective, is required to be "express"'. [70] The Court went on to say (also at [57]) that:

> *That should be understood as "requiring only that the expression of waiver be derived from the express words of the international agreement, whether as an express term or as a term implied for reasons including necessity [...]. Any inference of waiver of immunity "must be drawn with great care when interpreting the express words of that agreement in context". [...] If an international agreement does not expressly use the word "waiver", "the inference that an express term involves a waiver of immunity will only be drawn if the implication is clear from the words used and the context. [...] The expression of consent must be "in a clear and recognisable manner ...".*

India contended in the appeal that the trial judge was wrong in finding India had submitted to the jurisdiction in circumstances where India had ratified the New York Convention subject to a reservation that it would apply it only to 'differences arising out of legal relationships considered to be commercial under its law'. [71] In response, CDMM submitted that the '"commercial reservation" is a unilateral reservation that does not oblige other States to limit recognition and enforcement in the same way'. [72]

63 *India v CCDM* (n 62) [58].
64 Ibid [28].
65 Ibid [46].
66 Ibid [47], citing *CCDM Holdings LLC v Republic of India (No 3)* [2023] FCA 1266 [51], [58]-[61], [62]-[85].
67 Ibid [55].
68 Ibid [56].
69 [2023] HCA 11 (12 April 2023) (Kiefel CJ; Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ); 275 CLR 292; 97 ALJR 276; 408 ALR 658.
70 *India v CCDM* (n 62) [57].
71 Ibid [60].
72 Ibid [61].

The Court looked to the Vienna Convention in its analysis because *India's reservation is a reservation contemplated by Art 20(1) of the Vienna Convention*. It concluded that by virtue of the reservation that 'India has no obligation to Australia to enforce the New York Convention other than in respect of "differences arising out of legal relationships, whether contractual or not, which are considered as commercial" and, critically, vice versa' [73] and that:

> ***... [t]o be clear, that means that Australia has no obligation to India to enforce awards that do not arise from differences arising from legal relationships which, in India, would not be considered as commercial, and India has no right to insist on Australia enforcing such awards.*** [74]

Based on this, the Court found that the primary judge *'erred in concluding that by reason of Art III India requires Australia to enforce an award within the scope of the Convention'*, [75] the question then being, *'whether by ratifying the Convention subject to the "commercial reservation" India submitted to the jurisdiction of an Australian court within the meaning of s 10(2) of the [FSIA]'*. [76] The Court concluded that India had not waived foreign state immunity 'in respect of awards that do not determine differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of India'. [77]

As to whether the award was a 'non-commercial' award (being the second issue before the Full Court), the Court noted that, because of the submissions of the parties, 'consideration of this issue is [...] essentially a formality'. [78] The Court found (at [82]) that, '[i]n the circumstances, the award is not an award with regard to differences that arose from a commercial relationship'.

The Court allowed the appeal, setting aside orders made by the trial judge, and stating that 'India's interlocutory application to set aside the originating application on the basis that India is immune from the proceeding should have succeeded'. [79]

Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd [2025] NSWSC 610

(scope and effect of arbitration clause)

This decision concerned the *Commercial Arbitration Act 2011* (NSW) rather than the IAA. It remains instructive because it dealt with the proper construction of scope and effect of an arbitration clause.

The parties to the proceeding were parties to a joint venture deed for a large-scale energy infrastructure project. During the project, Clough went into voluntary administration and Elecnor 'exercised "step-in" rights under the [joint venture deed] to carry on the business of the joint venture and complete the balance of the works under [an] EPC Contract'. [80]

This proceeding has a complex factual background arising from a joint venture deed for a large-scale infrastructure project. It is beyond the scope of this publication to set out the detailed chronology, but the case is useful because it dealt with the following issues:

- First, the proper construction of an arbitration clause (both in scope and effect);
- Secondly, the application of s 7(2)(b) of the IAA and, in particular 'whether the proceedings involve any "matter" that is "capable of settlement by arbitration';
- Thirdly, whether the plaintiff had repudiated, waived or abandoned an entitlement to arbitrate by commencing proceedings. [81]

The starting point for the Court was that '[t]he principles for the construction of arbitration clauses are not in dispute, [l]ike any other clause of a commercial contract, an arbitration clause must be construed by reference to the language used by the parties, the circumstances known to them and the commercial purpose or objects to be secured by the contract' [82] and:

> *When construing an arbitration clause in a commercial agreement, the particular clause or sub-clause must not be construed in isolation but as part of the contract as a whole. Context and purpose thus play an important role in ascertaining the intended reach of an arbitral clause.* [83]

73 Ibid [68].
74 Ibid.
75 Ibid [70].
76 Ibid [71].
77 Ibid [75].
78 Ibid [76].
79 Ibid [83].
80 *Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd* [2025] NSWSC 610, [6] (Stevenson J) ('*Elecnor*').
81 Ibid [51].
82 Ibid [52]-[53].
83 Ibid [54].

The arbitration clause which was the subject of this proceeding provided, relevantly, that:

> *If the parties have not resolved the dispute or agreed an alternative dispute resolution process within 45 days of the dispute being referred in writing [by] the Steering Committee pursuant to clause 23.2 (or such longer period agreed between the parties), any party may, by written notice to the other parties, submit the dispute to arbitration in accordance with, and subject to, the Rules of Arbitration of the International Chamber of Commerce (**ICC Rules**) in effect on the date of [the joint venture deed].* [84]

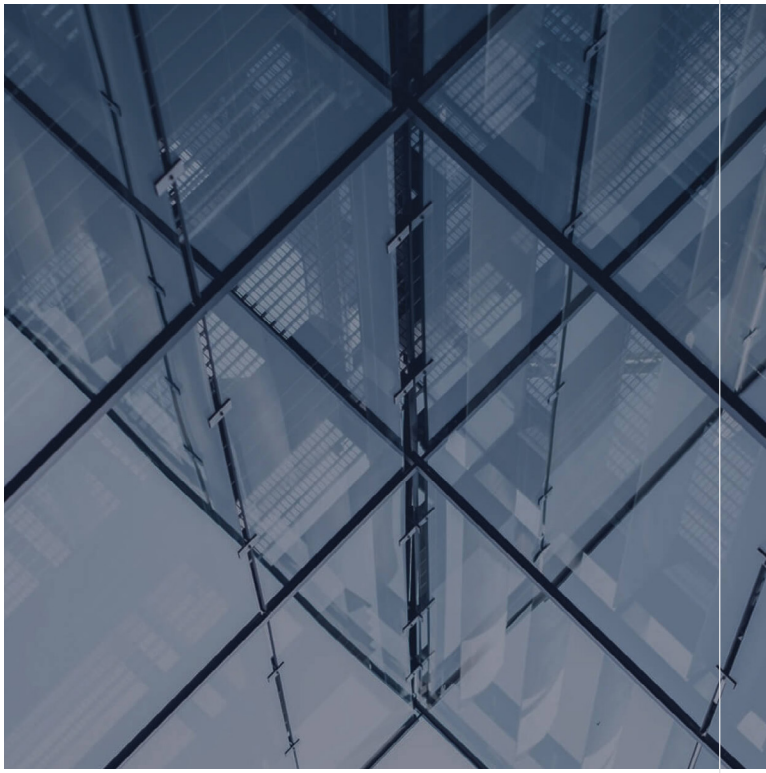
There were a number of issues raised by the parties in relation to the construction and scope of this clause:

- That the scope of the clause was limited to 'business, management and operational matters, or matters referred to but not resolved by the Steering Committee'; [85]
- That if the arbitration clause was engaged, it was 'non-mandatory' meaning that it:

  > *... permits arbitration but does not stipulate arbitration as the only form of dispute resolution and gives a party the choice to arbitrate or litigate [...] said to arise from the use in the Arbitration Clause of the word "may" and the absence of any express term prohibiting the parties from litigating disputes, coupled with the governing law clause in cl 26.2.* [86]

- That if arbitration is mandatory, the plaintiff has repudiated, waived, or abandoned the arbitration agreement; [87] and
- The clause gives each party a choice to litigate or require submission to arbitration so that, 'while [it] does not prevent both parties from agreeing to litigate, if one party insists on its right to arbitration, then [the clause] mandatorily applies'. [88]

In short, the Court favoured the first construction, that is, that the arbitration agreement was mandatory (subject to the dispute being arbitrable), and did not accept that the plaintiff had repudiated or waived or abandoned the arbitration agreement. Amongst other things, the Court found that if the arbitration agreement only permitted arbitration, then the arbitration clause 'would "serve virtually no meaningful purpose" and "would give rise to procedural uncertainties and confusion". [89] so that [a]rguably there would be no agreement to arbitrate at all'. [90] Additionally, the Court (at [71] and [73]) did:



> *71. ... not read cl 23.3 as conferring on the parties a choice to litigate with a requirement to submit to arbitration only if the other party later elects to arbitrate. [...]*
>
> *Here, as I have set out above, the [joint venture deed] establishes a compulsory multi-tiered framework for the non-binding resolution of disputes "in connection with" the [joint venture deed or the project]; having at its apex arbitration in Singapore on specified terms.*

The Court observed that this finding was consistent with the Court of Appeal's analysis in *ABB Power Plants Ltd v Electricity Commission of New South Wales t/as Pacific Power* [91] which upheld the conclusion of the trial judge:

> *"I do not think that [the arbitration clause] so far as it says the dispute 'may be referred to arbitration' is intended to give a choice between curial litigation to resolve the dispute, on the one hand, or referring the dispute to arbitration, on the other hand. That, it seems to me would not be consistent with the scheme of [the clause], with the care with which the conduct of an arbitration has been spelt out, or with the agreement confining interest to be award by an arbitrator, all of which seemed to me to point to arbitration as the next step, if invoked, being the sole next step".* [92]

84 Ibid [27].
85 Ibid [57].
86 Ibid [61].
87 Ibid [62].
88 Ibid [64].
89 G B Born, International Commercial Arbitration (3rd ed, 2021, Wolters Kluwer) at §5.04[D][5].
90 *Elecnor* (n 81) [71].
91 (1995) 35 NSWLR 596 at 599 (Handley JA) and 611 (Sheller JA).
92 *Elecnor* (n 81) [76], quoting *ABB Power Plants Ltd v Electricity Commission of New South Wales t/as Pacific Power* (Supreme Court (NSW), Giles J, 5 August 1994, unreported) BC9402904 at 9.

The Court also observed that its finding reflected the approach taken by the majority of the High Court in *PMT Partners Pty Ltd (in liq) v Australian National Parks & Wildlife Service* (1995) CLR 301 (when dealing with a multi-tiered dispute resolution clause containing an arbitration agreement). [93]

In making its finding, the Court provided the following guidance on the effect of an exception in the arbitration clause for urgent injunctive or declaratory relief and a non-exclusive jurisdiction clause contained in the joint venture agreement. From time to time both issues cause consternation and debate amongst arbitration practitioners. The Court's position was very clear:

> ***In my opinion, all that can be drawn from those provisions is that the parties have recognised that there may be disputes which are not arbitrable and thus do not fall within the terms of the Arbitration Clause. Submission to the non-exclusive jurisdiction of this Court serves to remove uncertainty as to where, and under what law, such proceedings or other litigation following arbitration, may be brought.***[94]

As to the scope, the Court rejected submissions made to limit its application (because it did not follow from provisions dealing with the functions of the Steering Committee or from other provisions in the joint venture deed, in particular, the definition of 'dispute').

Having examined the arbitration clause, the Court turned to the question of whether the proceeding should be stayed pursuant to s 7 of the IAA. The Court observed that there was common ground amongst the parties that the arbitration clause was an 'arbitration agreement' to which s 7 applied and that 'once s 7(2) was engaged unless the Court finds that the arbitration agreement is "null and void, inoperative or incapable of being performed" under s 7(5), a stay is mandatory; there is no discretion involved'. [95]

It identified the following questions relevant to s 7(2): first, whether there was a "matter'; secondly, whether the proceedings involved the determination of that "matter"; thirdly, whether the "matter" falls within the scope of the arbitration agreement; fourthly, whether that "matter" is arbitrable. As to the definition of a "matter", [96] his Honour said (at [94] and [95]):

> *94. A "matter" in the context of s 7(2) is a right or liability in dispute which is susceptible of settlement as a discrete controversy. It is not necessary that the dispute be co-extensive with the total controversy between the parties in a proceeding or the claims raised by those parties.*
>
> *95. Identification of the s 7(2) "matter" directs attention to the substance of the dispute; not to matters of form. It is necessary to consider not only the questions for determination in the proceeding and the manner in which the claim is pleaded, but also the "underlying subject matter upon which the pleadings, including the defence, are based. The meaning of a "matter" is also influenced by the construction of the arbitration agreement itself, and the question of whether the dispute is one that falls within the scope of that agreement.*

His Honour identified two matters for the purpose of the analysis. Moving to the question of whether those matters fell within the scope of the arbitration agreement, his Honour answered positively (with the reservation that the defences may not).

As to whether the identified matters were arbitrable, the Court observed that '[g]enerally, any dispute or claim which can be the subject of an enforceable award is capable of being settled by arbitration', [97] but in this case, one of the matters was not capable of settlement by arbitration (because it involved provisions of the *Corporations Act 2001* (Cth), raised questions which might affect creditors and that '[t]here may be a "legitimate public interest" in seeing that dispute "resolved by public institutions or in accordance with structures that are established by parliament rather than institutions and structures established by the parties"'. [98]

There were three further important points which arose in the judgment.

93 Ibid [78].
94 Ibid [83].
95 Ibid [91].
96 Ibid [92].
97 Ibid [109].
98 Ibid [110], quoting *Siemens Limited v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398 at 407; [2011] NSWSC 195 at [38] (Ball J, as his Honour then was).

First, what the Court referred to as the 'process point' because it involved the parties' deviation from the tiered dispute resolution process in the joint venture agreement. The submission was made that neither party could submit a dispute to arbitration because the parties had not followed the necessary steps. The Court did not accept this submission, noting, inter alia, that '[n]on-compliance with a preliminary procedure in a tiered dispute resolution clause is not a reason to refuse a stay under s 7(2) of the [IAA] unless the non-compliance impacts the operability of the arbitration agreement'. [99]

Secondly, whether the matters arise in proceedings between parties to the arbitration agreement. This arose because the defendants to the proceeding were Clough .... and the trustees of Clough's Creditors' Trust (**trustees**). This led to the question of whether the trustees were claiming 'through or under' Clough for the purposes of s 7(4) of the IAA which provides that:

> *For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.*

The Court made different findings in respect of the two matters. In respect of the first, the Court noted that it was not necessary for it to answer the question because of its finding on arbitrability. In respect of the second, because of the nature of the claim, it was satisfied that the trustees satisfied s 7(4). In making its findings, the Court set out the following principle:

> *A person claims "through or under" a party to an arbitration agreement when an "essential element" of that person's claim or defence is a right or interest vested in or exercisable by a party to the arbitration agreement. That may occur when the person "takes its stand upon a ground which is available to" the party to the arbitration agreement, and "stands in the same position vis-à-vis that party. The position is different where the person's claim or defence is a cause of action available to him or her alone.* [100]

Thirdly, whether the arbitration agreement was "inoperative"? This was relevant because the defendants relied on this ground in contending that no stay should be ordered. Again, the Court commenced with a statement of principle:

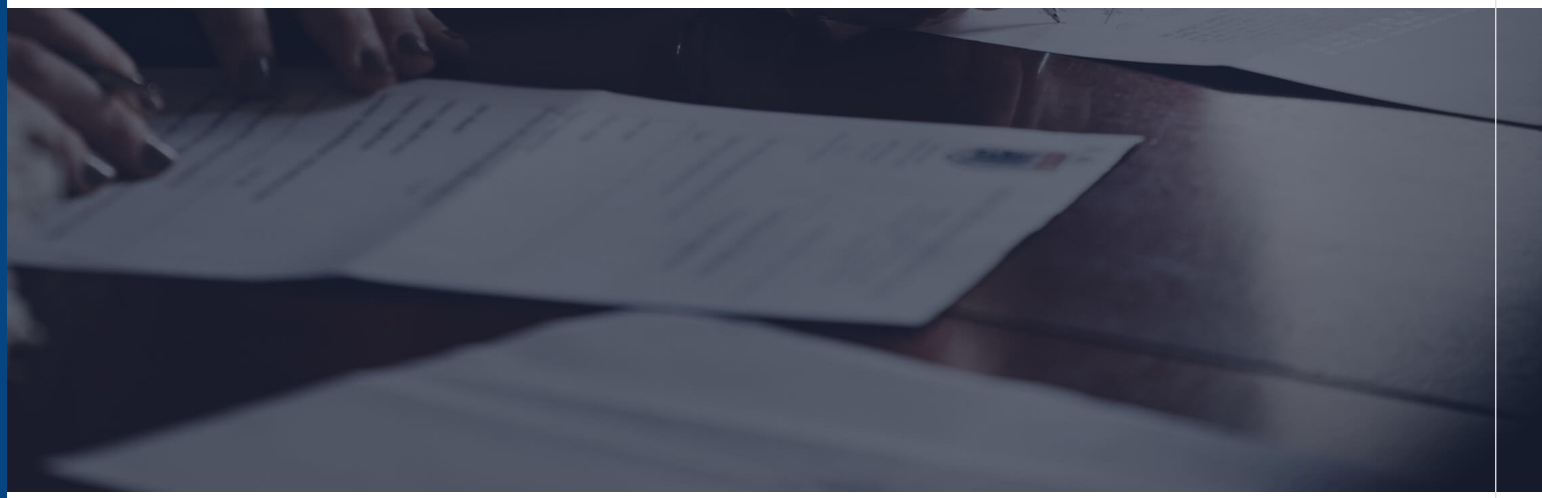
> *An arbitration agreement will be "inoperative" when it ceases to have contractual effect under the general law of contract. This can occur by way of, for example, repudiation, waiver, and abandonment. Because of the doctrine of separability, under which an arbitration clause is considered to be a contract independent of the underlying contract in which it is contained, the repudiation, waiver, or abandonment can have specific operation in relation to the arbitration clause in question.* [101]

The Court held that the commencement of the proceedings was not *repudiatory in nature* and:

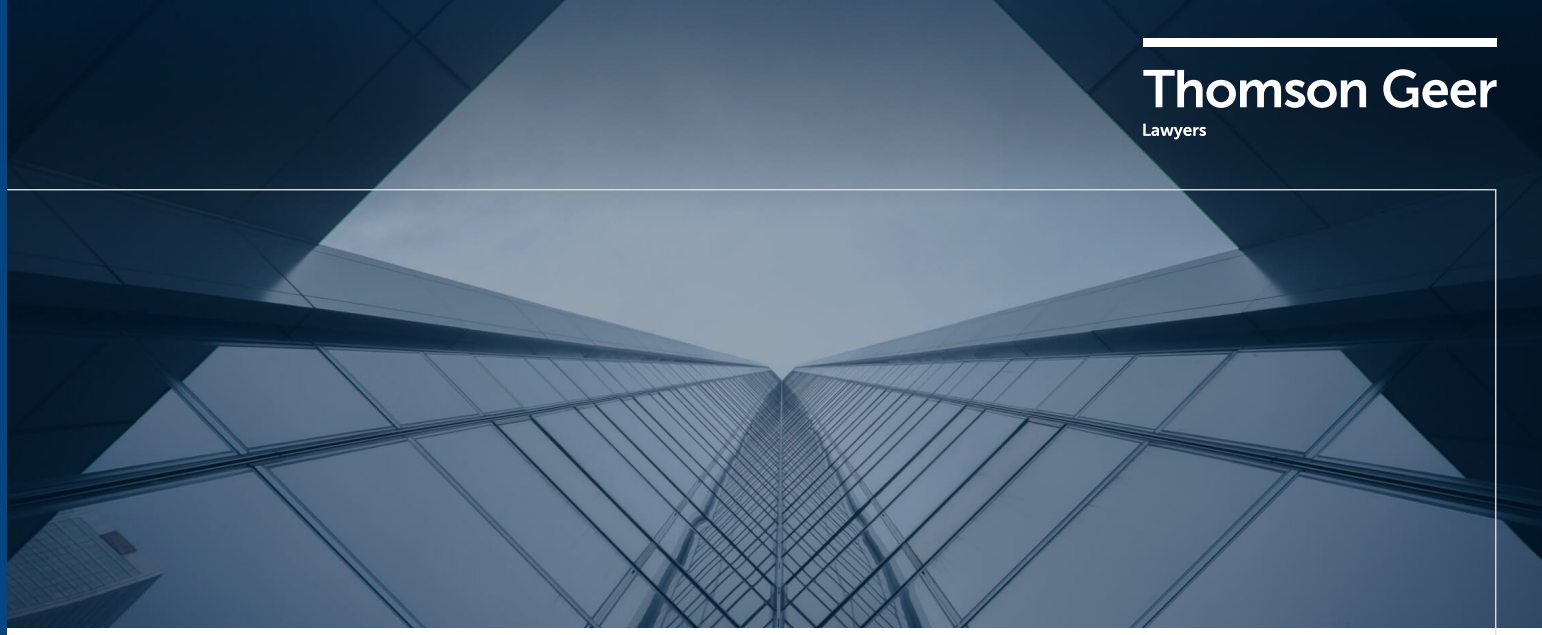
> *[The plaintiff's] proceedings concern a non-arbitrable matter and were commenced in circumstances where the status of the [trustees] as "through or under" parties was in issue. Seen in that light, the commencement of the proceedings did not objectively evince a repudiatory intent.* [102]

The Court reached a similar view on waiver and abandonment.

Consequential to the Court's findings, orders were made to stay claims defined as the Cross Claims. As to a cross-motion filed by the defendants in the proceeding, because the Court had found that the 'main proceedings' did not raise an arbitrable matter, the Court observed that the only basis on which that motion could be stayed was pursuant to s 67 of the *Civil Procedure Act 2005* (NSW). It saw no reason to do so. [103]



99 Ibid [115].
100 Ibid [122].
101 Ibid [126].
102 Ibid [128].
103 Ibid [134]-[135].



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ACICA

Sustainability Protocol

In January 2025, the Australian Centre for International Commercial Arbitration (**ACICA**) launched its 'Sustainability Protocol: Towards More Sustainable Arbitral Proceedings' (**Protocol**) designed 'to encourage parties and tribunals in arbitral proceedings to commit to resolving disputes in a more environmentally sustainable manner'.

The Protocol makes clear that 'the measures recommended in the Protocol are subject to the overriding principles of procedural fairness, equality of treatment, and the right to be heard'. It proposes that parties and the tribunal confer prior to, or during, the first case management hearing to consider which of the measures outlined in the Protocol can be adopted or implemented in the arbitration proceeding.

The Protocol sets out a number of recommendations. These include, for example:

- Encouraging electronic communications and documents and the use of shared technology platforms for receipt and organisation of all documents associated with the arbitration;
- The engagement of 'Green Data Centres' being centres 'which have committed to operate in an energy efficient manner, and/or which seek to reduce carbon emissions and use renewable energy';
- The preparation by parties and the tribunal of a 'carbon budget', including for the purpose of estimating likely CO2 emissions may be generated during the arbitration proceeding and how steps can be taken to reduce this estimate;
- The use of video conferencing for conferrals, joint meetings, case management conferences and hearings (so far as practicable);
- The use of hearing centres that have 'adopted the Green Protocol for Arbitral Hearing Venues';
- The preparation of 'Carbon Emissions Scorecards' at the conclusion of the proceedings to record 'each party's carbon emissions associated with the arbitration' (and the Protocol provides a template for this purpose); and
- The submission of Carbon Emissions Scorecards with submissions on costs.

The Protocol has been designed to provide separate and distinct recommendations which can be adopted as appropriate for each arbitration proceeding. Several the recommendations, if implemented, are likely to help parties manage costs (for example, limiting in person hearings, limiting travel, and conducting the proceedings with electronic documents and communications.

The Protocol also provides a good reference point for arbitrators to consider at the outset of the arbitral proceedings, identifying matters which might be raised with the parties at the first case management conference and, where appropriate, incorporated into the first procedural order.

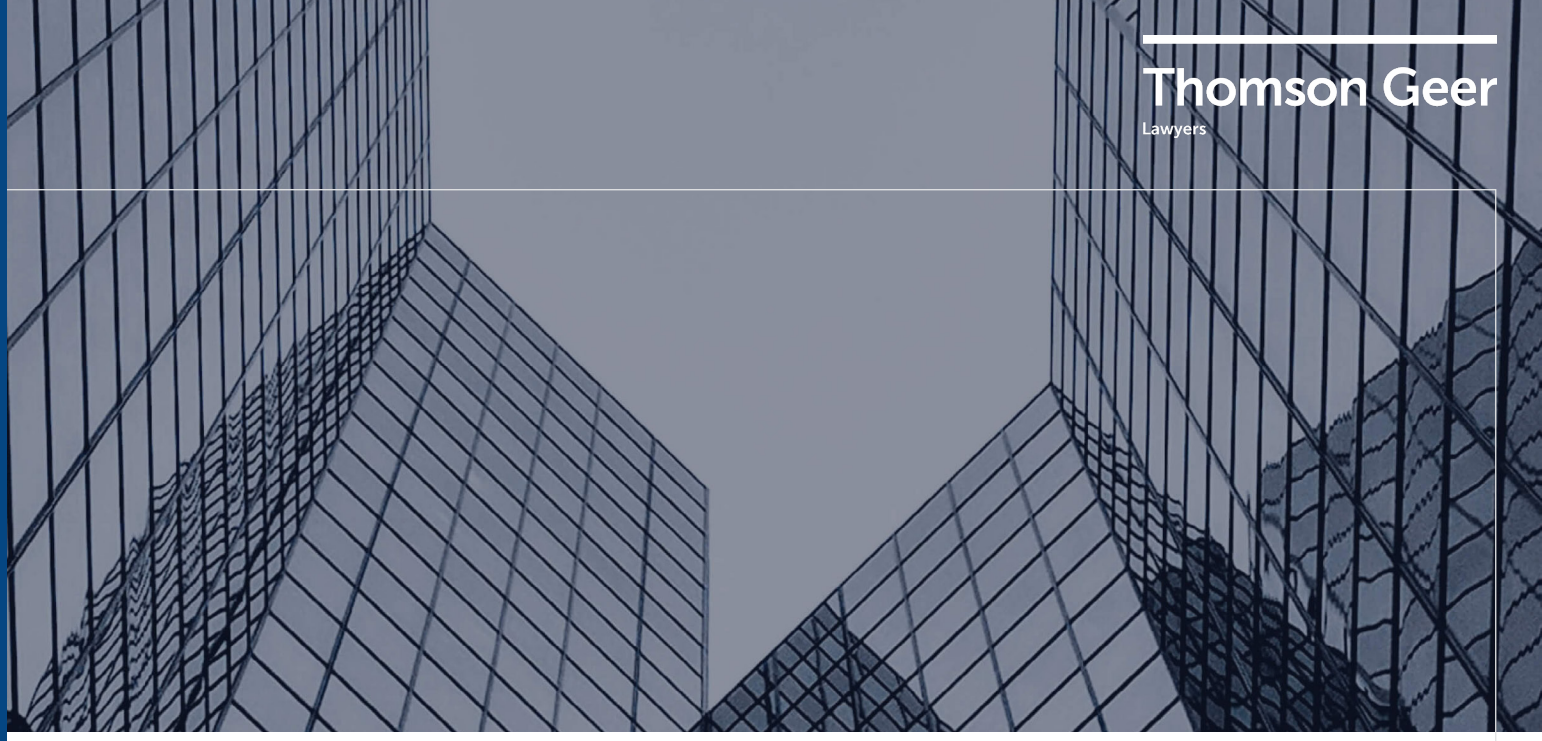
The Protocol is available through ACICA's website.

2024 statistics [104]

ACICA announced its 2024 statistics in a media release dated 24 June 2025, reporting that:

- During 2024 it administered 54 cases, 25 of which were new cases;
- The total value of the 54 cases (where the value has been quantified) is AUD $3.315 billion;
- 46% of the 'new administered' arbitration cases in 2025 were international in that they involved at least one party from outside of Australia;
- The primary industry sectors for 2024 cases were construction (31%), energy (15%) and finance (15%); and
- The leading seat for ACICA administered arbitrations was Sydney.

104 Australian Centre for International Commercial Arbitration, 'ACICA Releases Statistics for 2024' (Media Release, 24 June 2025).



Regional news

Hong Kong

Hong Kong International Arbitration Centre (HKIAC)

Compatibility of Arbitration Clauses

The HKIAC issued a Practice Note on Compatibility of Arbitration Clauses Under the HKIAC Administered Arbitration Rules on 20 January 2025 (**Practice Note**). [105]

The media release accompanying the issue of the Practice Note described the note as:

> *… [setting] out HKIAC's general practice in assessing the compatibility of arbitration clauses in multi-party, multi-contract scenarios under the 2018 and 2024 HKIAC Administered Arbitration Rules [**HKIAC Rules**] … and [explaining] HKIAC's general approach to the constitution of the arbitral tribunal in such scenarios.*

The background to the Practice Note is Articles 28 and 29 of the HKIAC Rules. Article 28 provides for consolidation of arbitration proceedings in certain circumstances. Article 29 provides that, subject to the terms of the Article, claims arising out of or in connection with one contract can be made in a single arbitration.

The primary focus of the Practice Note is on HKIAC's approach to the assessment of compatibility of arbitration agreements and the Practice Note makes it clear that it is not necessary that the arbitration agreements are identical. Instead, 'any differences must be surmountable by the parties, the tribunal and/or HKIAC'. The Practice Note confirms that HKIAC will take a 'pragmatic approach' and identifies three factors which, amongst others, are taken into consideration:

- *[W]hether, given the differences in the arbitration agreements, it is practically feasible and procedurally efficient for the claims to be heard in a consolidated or single arbitration;*
- *[W]hether the differences in the arbitration agreements undermine the consent of the parties, through their agreement to adopt the HKIAC Rules, to the possibility of determining claims under multiple contracts in a consolidated or single arbitration; and*
- *[W]hether permitting consolidation or a single arbitration would change the parties' agreement with respect to the arbitral procedure in a way that might leave the award open to challenge in the future.*

It also gives useful examples of situations where arbitration agreements have and have not been found to be compatible.

By way of example for the first, HKIAC found arbitration agreements which provided, respectively, for a sole arbitrator and for three arbitrators, to be incompatible. By way of example for the second, HKIAC found that arbitration agreements which were governed by, respectively, Hong Kong and English law were compatible because 'the two systems of law are sufficiently aligned to make it practicably possible to run a single arbitration'.

In addition to the assessment of compatibility, the Practice Note provides recommendations for drafting arbitration clauses in related contracts and provides guidance on the general approach to the appointment of arbitrators in multiple contract scenarios.

105 Hong Kong International Arbitration Centre, *HKIAC Issues Practice Note on Compatibility of Arbitration Clauses* (Press Release, 20 January 2025).

Statistics

HKIAC published its 2024 case statistics in February 2025.[106]

It reported 352 new arbitration cases in 2024, with just over 76% characterised as 'international' and 21% involving no party from either Hong Kong or Mainland China. The total value of disputes in arbitration cases during 2024 was approximately US $13.6 billion.

The top three industry sectors reported by HKIAC were:

- Commercial (14.5%);
- Sale of Goods (13.9%); and
- Corporate (13.6%).

The report contains detailed statistics on seat, governing law, language, arbitrator appointments (including role and nationalities of arbitrator), challenges to arbitrators, multi-party or multi-contract arbitrations, applications under the Hong Kong-Mainland China Arrangement on Interim Relief, emergency arbitrator applications, requests for expedited procedure and requests for early determination.

It also reports on third party funding disclosures and notes that:

> *Parties made disclosures of ORFSA [outcome-related fee structure agreements] in six instances in 2024. All six disclosures were made in cases administered by HKIAC. Three such agreements were entered into after the commencement of arbitration.*

Outcome-related fee structures are listed in Article 34.4 of the 2024 HKIAC Rules as a factor which a tribunal may take into account in determining whether costs of an arbitration are reasonable and whether and how to apportion the costs of an arbitration.

HKIAC Hub

In May 2025 the HKIAC announced the HKIAC Hub described as a new initiative designed to connect arbitrators and legal technology providers, observing in its press release that:

> *Through this platform, HKIAC will harness its global network to drive innovation, connect stakeholders, and redefine how technology is integrated into arbitral practice.* [107]

Case Law

Company A and Anor v Company C [2024] HKCFI 3505

(interim relief)

This case concerned an application by Company A for an injunction to restrain Company C from transferring assets to its subsidiary and for a worldwide *Mareva* injunction restraining Company C from disposing of its assets up to a nominated threshold. The application was made in aid of an ICDR-AAA arbitration and pending the issue of either the final award or the granting of interim measures by the tribunal.

The reason for the application was the announcement by Company A's subsidiary on the Shanghai Stock Exchange after the evidentiary hearing in the arbitration proceedings and while the tribunal was deliberating that Company C's subsidiary intended to dispose of an equity interest in Company C which, as the judgment notes, 'would include the transfer or disposal of [Company C's] existing business operations and assets to [Company C's subsidiary] and/or other companies connected to [Company C's subsidiary]'.[108]

The judgment further notes that:

- Company A *believed that*, 'in light of the aforesaid, [Company C] intended to fraudulently divest its assets to render itself judgment proof, which would render any potential arbitral award to [Company A] nugatory'; [109]
- Company A had made an application to the tribunal for interim measures to prevent the 'fraudulent transfer', [110] seeking orders restraining Company C from completing the transfer of assets from to its subsidiary and an order that Company C deposit security equal to Company A's claim in an escrow account (referred to as the **Escrow Relief**);
- The tribunal had directed the filing of submissions in relation to the application, had not ordered interim measures, but agreed that Company A could apply in the interim to the Hong Kong Courts for relief; [111]
- The injunctions were initially granted *ex parte* and at the *inter partes* hearing Company C offered undertakings to the Company A pending the tribunal's determination of the interim measures' application; [112]

106 Hong Kong International Arbitration Centre, *2024 Case Statistics* (Web Page, 2025).
107 Hong Kong International Arbitration Centre, *HKIAC Launches Hub* (Web Page, 9 May 2025).
108 *Company A and Anor v Company C* [2024] HKCFI 3505, [6].
109 Ibid [6].
110 Ibid [10].
111 Ibid [11].
112 Ibid [13]-[15].

- In parallel with the application to the courts, Company C offered Company A guarantees as security to protect Company A's position; [113] and
- The tribunal did not consider the guarantees sufficient and indicated it would grant interim relief (inviting the parties to submit a proposed order and objections); [114]
- At the time of the hearing before the Hong Kong court, the only remaining issue between the parties (before the tribunal) concerned an escrow arrangement.

Company C opposed the relief sought from the Court on the basis that the tribunal had already 'disposed of and granted the interim measures sought by [Company A] in the Arbitration'. [115] It also submitted that the Court should not exercise its discretion to grant interim relief and that it was neither appropriate nor just and convenient for it to do so.

The Court observed that the requirement that the Court exercise its discretion '"sparingly", and only where there are special reasons to utilize the power were indisputable', [116] but that:

> *... it is precisely because the power of the Hong Kong court to grant interim measures is for the purposes of facilitating the process of the arbitral tribunal outside Hong Kong [...] that the orders sought by the Plaintiffs in the OS should be granted in this case, in order to support the Tribunal and to facilitate the orders the Tribunal has so far made in the Arbitration.* [117]

Adding, that '[o]n the facts, the history of the case and the progress of the Emergency Relief Application before the Tribunal can best be described as procrastination, and frustration'. [118] The Court then set out the salient historical facts, finding that it was clear from recent procedural orders that the tribunal still had to rule on application for interim relief and that the terms of the escrow arrangement were not finalised. It continued that:

> *Even if the Defendant is right, that the Tribunal already granted the interim measures, by ordering the Defendant's payment of its cash and non-cash assets in to an escrow account, coupled with an order for the execution of an escrow agreement (on terms to be agreed or finalised), it is clear beyond peradventure that the Tribunal's directions for the parties to negotiate and to finalize an escrow agreement have fallen on deaf ears and have not been complied with by the Defendant despite the lapse of over 4 months ...*

> ***... such delay and non-compliance on the part of the Defendant should not in any event be condoned by any court, when the object and aim of the Ordinance is for the Court to facilitate the fair and speedy resolution of disputes by arbitration ...*** [119]

The Court made orders in the form sought by Company A, including an order for costs in its favour.

Singapore

Singapore International Arbitration Centre (SIAC)

2024 Annual Report

SIAC released its 2024 Annual Report in March 2025 which included its case statistics. [120]

SIAC reported that:

- 625 new cases were filed in 2024, 91% of which were international cases;
- SIAC administered 585 cases under the SIAC Rules;
- The total sum in dispute for 2024 was USD $11.86 billion;
- 143 applications were made for an expedited procedure, of which 66 were accepted;
- There were 101 applications for consolidation, of which 64 were granted and 13 applications for joinder, of which 4 were granted;
- 21 emergency arbitrators were appointed; and
- Out of 78 applications, 40 were allowed to proceed to early dismissal and 16 were granted.

The Annual Report shows that Australian parties are in the top ten foreign users at SIAC.

The key industry sectors using SIAC arbitration were 'trade' (29%) and 'commercial' (19%).

113 Ibid [16]-[18].
114 Ibid [42].
115 Ibid [20].
116 Ibid [23].
117 Ibid [24].
118 Ibid [25].
119 Ibid [39]-[40].
120 Singapore International Arbitration Centre, *SIAC Records Steady Growth* (Press Release, 25 March 2025).

Case Law

DJP & Others v DJO [2025] SGCA(I) 2 (DJP)
('copy-and-paste' award)

The Court of Appeal of the Republic of Singapore handed down judgment in the above case in April 2025. The decision has been referred to colloquially in press as a 'copy-and-paste' [121] case.

The appeal proceeding is best summarised by quoting from the appeal judgment:

> *This appeal raises issues relating to an arbitrator's duty of independence and impartiality where he finds himself adjudicating upon related but separate arbitrations. The [appellants] seek to reverse the decision of the High Court Judge (the "Judge") to set aside an award (the "Award") on the ground that it had been rendered in breach of the rules of natural justice. The Judge found that the arbitral tribunal (the "Tribunal") had impermissibly used two previous awards (the "Parallel Awards") issued in other arbitrations involving the same respondent but different claimants to those here, and to all of which the same presiding arbitrator but neither of the co-arbitrators was party, as from which a substantial portion of the Award was prepared, but with changes such that the Award would appear to deal with the issues ventilated in the arbitration (the "Arbitration") [...] Out of the 451 paragraphs in the Award, it was undisputed that at least 212 paragraphs were copied and pasted from the Parallel Awards.* [122]

The appellants' submission was that 'the Tribunal's reference to the Parallel Awards had no material impact on the outcome of the Arbitration'. [123]

The judgment sets out in some detail the background to the arbitration and the related arbitration proceedings, including a comparison of the three proceedings. The Court observed that there were some similarities, but noted that there were also 'several points of distinction'. [124]

The trial judge set aside the award on grounds that it was rendered in breach of the rules of natural justice.

The Judge did not make findings in relation to two other grounds which were the subject of submissions, namely, that the tribunal had acted in breach of the agreed arbitration procedure and that the tribunal had conducted the arbitration in a manner which was contrary to Singapore public policy.

The respondent to the appeal submitted that a 'fair-minded and appropriately informed observer would undoubtedly, and quite reasonably, suspect that the Tribunal did not approach the Arbitration with a fair and open mind'. [125]

The Court of Appeal observed that it was in agreement with the trial judge that the 'principal complaint concerns the alleged breach of natural justice'. [126] The Court set out the principles of natural justice and referred to extensive authorities in this regard. It observed that '[a] case such as the present, where an award is substantially copied from another source, may implicate either or both of the fundamental rules of natural justice'. [127]

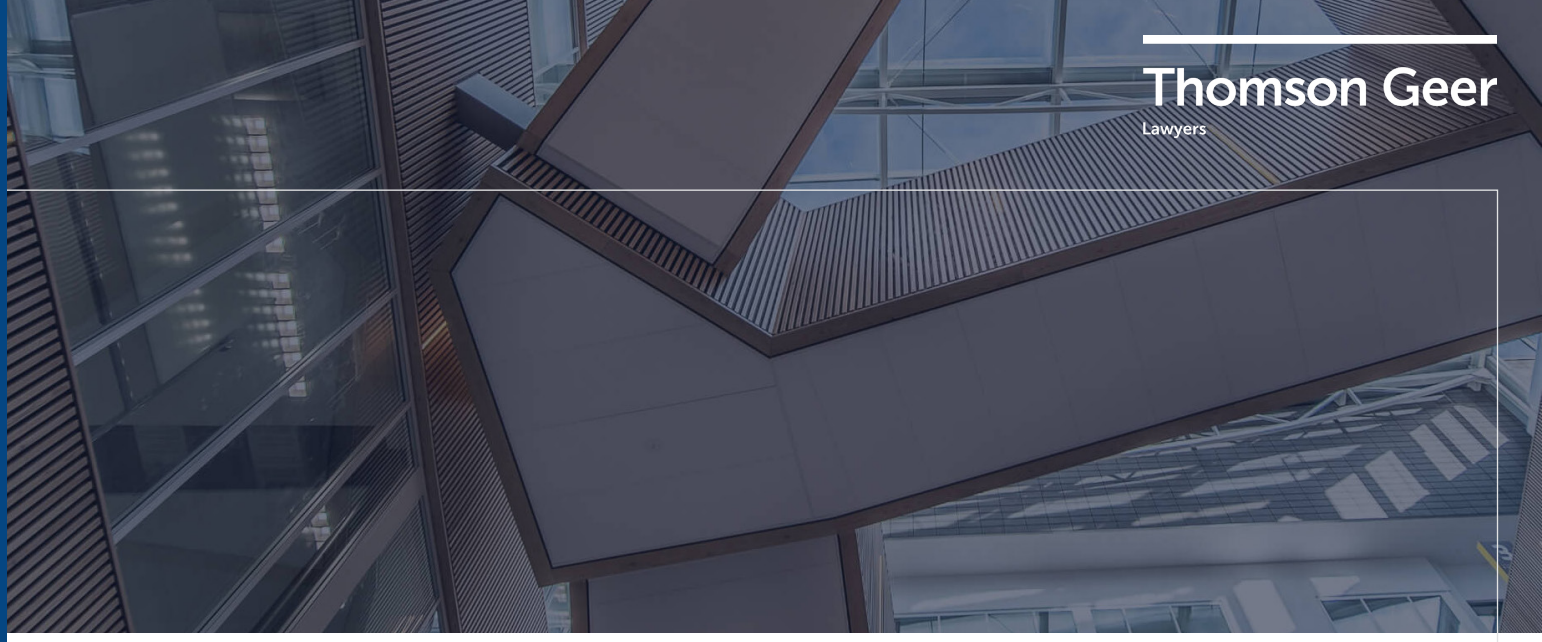
The Court spent some time identifying the source of the material which had been copied over into the award which was the subject of the appeal, noting that where, as here, the source was another award, 'much will likely depend on the nature of the material that is reproduced, as well as on the degree of proximity between the dispute at hand ... and the proceedings from which that material emanated ...'. [128] The Court then compared the case before it with 'cases involving judicial copying', [129] distinguishing the two.

The Court's conclusion after further analysis was that the answer to the question of 'whether a fair-minded and informed observer would, after considering all the relevant facts and circumstances, reasonably apprehend or harbour the suspicion that by reason of what the President had done, he was materially influenced by the earlier decisions that he had been party to in the [parallel arbitrations], was plainly in the affirmative' [130] and agreed with the trial judge that 'the allegation of apparent bias has been made out'.[131] As to the respondent's second submission that 'the Tribunal impermissibly drew on materials that the parties did not have access to and could not address', [132] the Court again agreed with the trial judge that 'there had been a breach of the fair hearing rule'. [133]

The Court also considered whether the award should be set aside in part. It rejected this submission because 'the breach of justice in this case does not relate to discrete or limited issues ventilated in the Arbitration'. [134]

The appeal was dismissed.

121 See, eg, LexisNexis Arbitration Expert, *'Setting aside a "copy and paste" arbitral award (DJP and others v DJO)'* (Web Page, 23 April 2025); Susannah Moody, 'Indian arbitrators behind "copied and pasted" award come to light' (*Global Arbitration Review*, 8 April 2025).
122 *DJP & Others v DJO* [2025] SGCA(I) 2, [2].
123 Ibid [3].
124 Ibid [20].
125 Ibid [32].
126 Ibid [35].
127 Ibid [40].
128 Ibid [43].
129 Ibid [47].
130 Ibid [70].
131 Ibid [79].
132 Ibid [80].
133 Ibid [82].
134 Ibid [87].



DOI v DOJ & Ors [2025] SGHC(I) 15

One month after the Court of Appeal handed down judgment in DJP, a decision of the Singapore International Commercial Court reached a similar decision.

The claimant in this case sought orders that an award be set aside on grounds that:

> *the Majority did not apply their mind to the evidence and arguments in the arbitration but came to their decision with a close mind, as shown in particular by what it said was the cut-and-paste copying in the award of the contents of the awards in prior arbitrations.* [135]

Giles IJ (for detailed reasons set out in the judgment) found that 'the Award should be set aside for breach of the rules of natural justice by apparent bias in the form of prejudgment'. [136]

South Korea

KCAB International

2024 Annual Report

The KCAB International Annual Report 2024 [137] reports that in 2024:

- KCAB received 349 new cases with a value exceeding US $548 million;
- 52% of international arbitration cases were conducted under an expedited procedure;
- A significant number of cases handled by KCAB were from China and the United States; and
- 35% of cases involved construction (which includes energy and environment) and 16% involved IT.

Other news

Queen Mary University of London International Arbitration Survey Report 2025

The White & Case Queen Mary University of London 2025 International Arbitration Survey Report, *The path forward: Realities and opportunities in arbitration* [138] was published in June 2025.

The survey is described as investigating 'current trends in user preferences and perceptions, and opportunities to shape the future innovation and development of the practise of international arbitration'. [139]

Our report in the following paragraphs refers to some of the findings reported from the survey (and is not intended to be a full analysis of the detailed report).

Amongst other things, the survey showed that:

- 87% of respondents continued to choose international arbitration for cross border disputes (including in conjunction with other alternative dispute resolution procedures);
- Users of arbitration are facing challenges as a result of geopolitical or economic sanctions and 30% chose a different seat for this reason;
- Award debtors continue to comply voluntarily with awards in many cases.

Conduct of arbitral proceedings

The surveys undertaken by Queen Mary University of London provide insight into what users of arbitration like and dislike about the arbitral process. This year's report contains the following observations:

135 *DOI v DOJ & Ors* [2025] SGHC(I) 15, [1].
136 Ibid [133].
137 KCAB International, *Annual Report 2024* (Report, 2025).
138 Queen Mary University of London School of International Arbitration and White & Case, *2025 International Arbitration Survey: The Path Forward: Realities and Opportunities in Arbitration* (Report, 1 June 2025).
139 Ibid 1.

> ***The behaviours that most negatively impact efficiency in arbitration include adversarial approaches by counsel (24%), lack of proactive case management by arbitrators (23%) and counsel over-lawyering (22%). Respondents called for greater proactivity and courage from both counsel and arbitrators to address inefficiencies.*** [140]

On the other hand, users viewed expedited procedures and early determination of unmeritorious claims or defences as the most effective mechanisms for enhancing efficiency. Users also reported 'excellent experiences' with procedures such as paper only arbitration.

The survey findings on the behaviours which have an adverse impact on arbitration proceedings do not come as a surprise. Nor does the call for greater proactivity and courage from counsel and arbitrators. The inherent flexibility of the arbitral process means that there are fewer boundaries to rein in parties who seek to abuse the process. Arbitrators, in particular, need to move away from what has been described as 'due process paranoia' and be prepared to make bold procedural directions to keep the arbitration proceedings moving efficiently. This course is not inconsistent with procedural fairness; efficiency in arbitration calls for a balance.

The survey also raised the question of the involvement of parties in the arbitral process:

> *Many interviewees suggested that clients can feel sidelined by counsel when they should be fully involved in decisions concerning the cost and speed of proceedings. Some suggested it would be good practice for clients to participate in case management conferences.*

The suggestion that parties have greater involvement again does not surprise. Counsel and arbitrators sometimes forget that arbitration is the parties' process.

The survey asked respondents for their experiences and views on public interest in arbitration. Interestingly, in this context the report states that:

> *Confidentiality of arbitration [...] can be viewed as both beneficial for delicate or reputation-sensitive disputes, and problematic for the potential to shield improper conduct of state entities from public scrutiny.* [141]

The survey reports mixed views on whether international arbitration proceedings should be open to the public, that is, no longer 'private', but 'greater support for publication of redacted awards, especially for disputes involving States or state entities'. [142]

Artificial intelligence

Unsurprisingly, one of the topics which was raised with respondents was the use of artificial intelligence in arbitration. The report states:

> *The general consensus is that, over the next five years, international arbitration and its users will adopt, and adapt to, AI. Respondents predict that arbitrators will increasingly rely on AI (52%) and that new roles to work with AI will emerge (40%). The enthusiasm for greater use is tempered, however, by the desire for transparency, clear guidelines and training on the use of AI.* [143]

Respondents were asked the question of what drives the greater use of AI by participants in international arbitration with time and cost savings at the top of the list. Whilst the survey clearly reported caution amongst respondents in using AI, the third most popular reason for increased use of AI was the potential 'to reduce human error and inconsistencies'. [144] Other reasons included the perception of competitive disadvantage if AI were not used and '[c]lient or other stakeholder expectation for participants to use AI'. [145]

Respondents were also asked what acted as deterrents to the greater use of AI. The number one deterrent was risk of undetected AI errors and bias, following closely by risk of confidentiality or data breaches and lack of knowledge or experience. Fifth and sixth in line were interesting:

- *Risk of challenges to awards on due process grounds where arbitrators used AI; and*
- *Risk of ethical infractions or compromising the integrity of the arbitral process.* [146]

There has been less commentary than one might expect to see around the due process concern. When tribunals began delegating aspects of their award writing to tribunal secretaries, there was considerable debate about whether this was appropriate in circumstances where the appointment as arbitrator was a personal appointment.

140 Ibid 15.
141 Ibid 21.
142 Ibid.
143 Ibid 27.
144 Ibid 29.
145 Ibid 30.
146 Ibid.

Over the past decade (perhaps longer), this debate has subsided and the focus has now moved from tribunal secretaries to AI. The arguments around the use of AI are analogous to some of the arguments used in the context of tribunal secretaries. The survey discloses that respondents are comfortable with arbitrators using AI for a number of tasks: calculating damages and costs (77%); summarising submissions or evidence (66%); drafting procedural parts of awards and orders (60%). The majority, however, do not approve of arbitrators using AI to assess merits or accuracy of evidence/submissions or to draft reasoning for awards and decisions.

We are not aware as yet of any challenge to enforcement of an arbitral award in a domestic court on grounds that the tribunal used AI in its decision-making capacity. It is unclear whether this is because tribunals are using AI in a limited way, because the use of AI is not apparent or because parties and tribunals are setting boundaries up front as to how AI might be used. In any event, it does seem that this is a space to watch.

International Chamber of Commerce (ICC)

ICC Commission

Bronwyn Lincoln attended the ICC Commission on Arbitration & ADR in Paris in April. The ICC Commission is described as the 'ICC's unique think tank enabling thought leadership in the field of dispute resolution by pooling expertise and raising awareness and understanding around practical and legal issues in arbitration and ADR.' Bronwyn was appointed by the Australian ICC National Committee to the ICC Commission.

Meetings of the ICC Commission are confidential.

2024 statistics

The ICC published preliminary statistics on arbitration and ADR in February 2025, and final statistics on 24 June 2025 reporting that 841 cases were filed with the ICC during 2024. The leading industry sectors differed from those reported by other institutions and were more closely aligned to those of ACICA. Construction/engineering and energy sectors accounted for 44% of new cases with other leading sectors including: transportation, financing and insurance and specialised technologies.

The report observed that:

> *While ICC arbitrations arise from a very broad range of contracts, the most frequent types in 2024 arbitration filings were construction/engineering; purchase and sale; share purchase/transfer and shareholder agreements; distribution/franchising; and joint venture, consortium or partnership contracts.*

The ICC noted that the average amount in dispute during 2024 was US $130 million in new cases and US $211 million in cases pending at the end of the year.

The Thomson Geer arbitration team consistently sees arbitration agreements which provide for arbitration under the ICC Rules, regardless of the nationality of the parties or the selected seat. This is consistent with the ICC report that cases in 2024 came from 136 countries around the world. 12.3% of cases were reported from East and South East Asia and Pacific with 15% of these involving state or state-owed parties.

Similar to the reports of the regional arbitral institutions, the ICC provides statistics around the constitution of tribunals (including nationalities and repeat appointments), places of arbitration, language and governing laws.

The ICC reports that 577 awards were published in 2024. One of the steps taken in ICC arbitration which sets the ICC apart is the scrutiny of each award by the ICC Court. The report discloses that in 2024, 71 draft awards were '*returned to the arbitral tribunal for further consideration before the ICC Court could approve them*'. The report also discloses that in 2024 dissenting awards were made by way of a separate award document in 32 cases and within the award itself in 11 cases. In recent years there has been robust debate within the arbitration community about the value of dissenting awards, in circumstances where there is essentially no appeal and it is the majority award which would be the subject of enforcement proceedings by a domestic court. The Thomson Geer arbitration team will be watching this statistic in the 2025 report from the ICC.

Chartered Institute of Arbitrators (CIArb)

CIArb publishes its 'Guideline on the Use of AI in Arbitration (2025) [147] (**Guideline**) in March.

It is designed to:

> *... give guidance on the use of AI in a manner that allows dispute resolvers, parties, their representatives, and other participants to take advantage of the benefits of AI, while supporting practical efforts to mitigate some of the risk to the integrity of the process, any party's procedural rights, and the enforceability of any ensuring award or settlement agreement.*

The Guideline is set out in four parts:

- Benefits and risks of the use of AI in arbitration;
- General recommendations for the use of AI;
- The arbitrator's powers to give directions and make rulings on the use of AI; and
- The use of AI in arbitrations by arbitrators.

It also provides templates, including a template procedural order.

147 Chartered Institute of Arbitrators, *Guideline on the Use of AI in Arbitration (2025)* (Report, 19 March 2025).

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