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Arbitration review

July 2023

Welcome to the Thomson Geer mid-year arbitration update.

In this update we identify key developments in arbitration practice and procedure, report on recent arbitration cases (in both Australia and regionally) and offer our insights into future trends.[1]

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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 upon as such.

1. Key developments in practice and procedure – Australia

Enforcement of foreign arbitral awards

Federal Court of Australia

In December 2022 the Federal Court of Australia made orders enforcing an award made by the Beijing Arbitration Commission (**BAC**) on 21 January 2021 (**award**) and entered judgment against the respondent in ***Guoao Holding Group Co Ltd v Xue (No 2)*** [2022] FCA 1584.

The application was made under s 8(3) of the *International Arbitration Act 1974* (Cth) (**IA Act**).

The primary ground on which the respondent resisted enforcement was that the award was contrary to public policy (s 8(7) of the IA Act).

Guoao was a Chinese construction company and the respondent was an individual based in Sydney. The respondent and two companies (Shanshuilin and Jubaoyang) entered into a Cooperative Development Agreement for the purpose of a property development. The agreement contained a dispute clause pursuant to which disputes were to be resolved through negotiation or, if that failed, *either party may submit the dispute to Beijing Arbitration Commission for arbitration*.

Disputes arose, involving both claims and counterclaims and the respondent (and related parties) referred these disputes to arbitration. An award was made on 26 January 2021 which required various payments (from both the applicant parties and the respondent party). The end position was that the three applicant parties owed sums to the respondent party pursuant to the award.

The judgment reveals that the award debtors unsuccessfully challenged the award in the Beijing No 4 Intermediate People's Court and in the Beijing People's Procuratorate No 4 Branch (noted as being *outside of the court system and [providing] for a form of political or civil supervision of courts*[2]). The applicant applied for, and was granted, an 'execution notice' in the Beijing No 3 Intermediate People's Court. The Court also made freezing orders in support of the notice. The judgment also reveals that as a result of the enforcement notice, a portion of the award was recovered, but the enforcement proceedings were then terminated because the award debtors had no further property available for enforcement.

The Court observed that the *conception of public policy in the IAA as adopted from the New York Convention is limited to the fundamental principles of justice and morality conformable with the international nature of the subject matter, namely international commercial arbitration*[3]. As to the respondent's submission that the award in question produced a real unfairness, the Court concluded that the *complaints about the award do not rise to the level of the award being contrary to fundamental norms of justice and fairness in Australia within the context of international commercial arbitration such as to enliven the public policy ground for resisting enforcement*[4]. The judgment set out a number of reasons for this conclusion, including that *it will generally be inappropriate for the enforcement court of a Convention country to reach a different conclusion on the same question of asserted defects in the award as that reached by the court at the seat of the arbitration*[5].

2 At [28]
3 At [32]
4 At [35]
5 At [36]

The respondent also raised procedural issues, in particular, whether the award creditor had satisfied the requirements for enforcement under the IA Act. The Court rejected the submissions, noting that it was *amply satisfied that the copies of both the agreement and the award have been duly authenticated and certified by the arbitral tribunal or an officer of the tribunal [...]*[6].

The Court was also satisfied with the translations provided to the Court.

The Court concluded that the award ought be enforced.

In ***Siemens WLL v BIC Contracting LLC*** [2022] FCA 1029, Justice Stewart made orders enforcing an award made in London under the rules of the London Court of International Arbitration (**LCIA**) and a second award made in Dubai under the ICC Rules.

In the case of each award, the award creditor was not able to produce an authenticated or certified hard copy, but his Honour observed that:

> *...the arbitral awards were provided to [the award creditors] by the secretariats of each of the LCIA and the ICC by email, and each award has apparently been signed by all three members of the arbitral tribunals. The rules of both the LCIA and the ICC permit the transmission of awards by electronic means by officers of their secretariats. I am therefore satisfied that the awards relied on by the applicants fulfil the requirement of authentication...*[7]

In making orders for enforcement, the Court made the following observations as to the appropriate form of order:

> *Siemens did not seek an order stating that the awards can or may be enforced as if they are judgments or orders of the Court, although other courts have on previous occasions made such orders. [...] In my view, it is unnecessary to make such an order, and nothing said by the High Court is to the contrary. It is sufficient to merely enforce the awards by giving judgment on them. That that is an appropriate order enforcing an award is well established...*[8]

Supreme Court of Victoria

Orders were also made for the enforcement of a foreign arbitral award by Croft J in the Supreme Court of Victoria in ***Professor Ian William Reeves CB v ALT Advisory (Jersey) Limited*** [2023] VSC 249.

The relevant arbitration agreement was contained in an employment contract between the parties. After issuing a partial award on jurisdiction, the tribunal delivered a final award in September 2022.

The award debtors did not appear, however the Court was satisfied that each had been properly served. In the absence of those parties, the Court observed that:

> *... there is no basis for the Court to consider any of the matters set out in s 8(5) of the [IA] Act having regard to which the Court may refuse to enforce an award. It is clear from these provisions that these matters are to be raised "at the request of the party" against whom the award is otherwise to be enforced and that party so raising either of these matters bears the burden of establishing any matter or matters relied upon.*[9]

The Court found that the final award should be enforced pursuant to s 8(2) of the IA Act.

Supreme Court of South Australia

The Supreme Court of South Australia also enforced a foreign arbitral award earlier this year in ***Nantong Drayson Composite Material Co Ltd v Greyco Pty Ltd*** [2023] SASC 52.

Nantong Drayson and Greyco had entered into an agreement relating to the supply by Nantong Drayson of goods to Greyco. Greyco failed to make payment under the terms of that agreement. Pursuant to the award made in China under the rules of the Chinese International Economic and Trade Arbitration Commission (**CIETAC Rules**), Greyco was ordered to pay Nantong Drayson the sum of US$229,885.03 and liquidated damages for overdue payment.

The award was made by a single arbitrator. Greyco did not participate in the arbitration. Article 39 of the CIETAC Rules expressly authorises an arbitrator to proceed with an arbitration *if the Respondent fails to appear at an oral hearing without showing sufficient cause.*

Nantong Drayson's application to enforce the award was filed with the Supreme Court in March 2023. Greyco's solicitors appeared in the proceeding to resist recognition and enforcement. Those solicitors subsequently withdraw and a director of Greyco made submissions on its behalf, including that he considered the arbitration process unfair, he did not appreciate the significance of it and at the time of the arbitration he was trying to negotiate with Nantong Drayson. The director also filed an affidavit in support of his submissions.

6 At [60]
7 At [24]
8 At [34]
9 At [22]

Nantong Drayson's submissions were that all pre-requisites for recognition and enforcement of the award under the IA Act had been filed with the Court and it relied on the limited bases on which a court may refuse to enforce under that Act. Stein J was satisfied that the contract between the parties and the award were duly authenticated and certified and that the English translation of the award provided by the plaintiff met the requirements of the IA Act.

Having regard to the objects and provisions of the IA Act and to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**) (to which both Australia and the People's Republic of China are parties), her Honour observed that:

> *The starting point of the IAA is that the Award must be enforced and I may only refuse to enforce the Award if the respondent establishes one or more of the matters provided for in ss 8(5) or 8(7) of the IAA.*[10]

Her Honour observed further that although certain matters had been raised by the Greyco director in affidavits filed in the proceeding, those matters had been raised by the Greyco director in affidavits filed in the proceeding, those matters (including assertions as to defects in goods supplied) *would not warrant a refusal to register and enforce the Award given the provisions of the IAA and the nature of the matters for consideration on any application for registration and enforcement*[11].

Stein J specifically noted that Greyco's failure to take part in the arbitral proceedings did not result from any failure on the part of the tribunal to accord procedural fairness.

Orders were made for the award to be registered as a judgment of the Court (with a related order that the quantum of the award be converted to Australian dollars at the exchange rate published by the Reserve Bank of Australia one business day before the making of the order).

Enforcement in investor-State disputes

The High Court's decision in *Kingdom of Spain v Infrastructure Services Luxembourg S.À.R.L. & Anor* [2023] HCA 11 was published on 12 April 2023.

The proceedings involved an application by the respondents (pursuant to s 35(4) of the IA Act) for recognition and enforcement of an award in the sum of €101 million obtained in an arbitration commenced under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (**ICSID Convention**).

Section 34(5) relevantly provides that an 'ICSID award' may be enforced in the Federal Court of Australia with the leave of the Court as if the award were a judgment of the Court. The notes to the section refer to the *Foreign States Immunities Act 1985* (Cth) (**FSI Act**), pursuant to which foreign States are immune from the jurisdiction of the courts of Australia, except as provided in that Act. As the High Court noted:

> *One circumstance where this immunity does not apply is where the foreign State has submitted to the jurisdiction, including by agreement. An "agreement" is defined to include a treaty. The relevant treaty in this case is the ICSID Convention.*[12]

Section 6 of the ICSID Convention provides, relevantly, that an arbitral *award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention* (Article 53(1)). Article 54 imposes an obligation on contracting states to recognise and enforce ICSID awards. Article 55 provides that *[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to the immunity of that State or of any foreign State from execution*.

Justice Stewart, at trial, concluded the agreement by Spain to particular articles in the ICSID Convention, *constituted a wavier of its immunity from recognition and enforcement, but not from execution of the award by the Court*[13]. The orders made by the trial judge included an order that Spain pay the award creditor €101 million.

The award creditor appealed. As the High Court stated:

> *On appeal, the Full Court of the Federal Court of Australia (Allsop CJ, Perram and Moshinsky JJ) held that immunity from a proceeding for recognition had been waived by Spain's entry into the ICSID Convention (and concomitant agreement to Arts 54 and 55), although immunity from court processes of execution, and perhaps also from enforcement, had not. The Full Court concluded that the orders of the primary judge went too far by "requiring Spain to do something". The Full Court made new orders including, in broad terms, an order recognising the award as binding on Spain, as well as that "judgment be entered" against Spain for €101 million, but providing that nothing in that order "shall be construed as derogating from the effect of any law relating to immunity of [Spain] from execution".*[14]
>
> (footnotes omitted)

10 At [33]
11 At [34]
12 At [3]
13 At [5]
14 At [6]

The issues before the High Court were whether Spain had waived its right to foreign state immunity and, if so, whether Spain's *amenability to jurisdiction is limited to "bare recognition" of the award, or to "recognition and enforcement" of the award, and whether the orders made by the Full Court amounted to enforcement*[15].

The Court found that Spain had waived its right to foreign state immunity in respect of recognition and enforcement, but not execution, of the award.

As to waiver, the Court rejected Spain's submission that the FSI Act only permits an Australian court to recognise a waiver where there are express words (not impliedly), finding that *[t]he waiver in s 10(2) is unmistakeable*[16].

As to the IA Act, the Court noted that although in some contexts the words 'recognition', 'enforcement' and 'execution' *have been used in vague, overlapping and even interchangeable senses*[17], *in the ICSID Convention in contrast, the words "recognition", "enforcement" and "execution" can be seen to be used separately and with different meanings*[18].

The Court observed that:

> *The further distinction between "recognition" and "enforcement", on the one hand, and "execution", on the other hand, is then drawn out in Arts 53-54 and Art 55. This is seen in the provision by Art 54(3) that execution is a matter to be governed by the domestic law of the Contracting State, and by Art 55 that none of the international obligations imposed by Art 54 extend so far as to derogate from the domestic law of the Contracting State concerning State immunity or foreign State immunity from execution. […] Whether or not enforcement against a State party to an award can lead to execution is left entirely to be determined under the domestic law of the Contracting State concerning State immunity or foreign State immunity from execution.*[19]

The Court observed that international commentary, the ICSID Convention *travaux préparatoires* and foreign jurisprudence (including as to interpretation of the ICSID Convention in French and Spanish) supported the distinction.

Spain's primary submission in opposing recognition and enforcement was that Art 54 of the ICSID Convention was *not concerned with awards sought to be enforced against a State in a foreign court*[20], but that in Australia, Art 54(1) only contemplated recognition and enforcement if the State had an award against an investor and sought enforcement in Australia, if an investor sought enforcement against Australia in an Australian court or *if an investor had an award against a foreign State and sought recognition and enforcement against the foreign State in an Australian court and the foreign State chose to waive immunity over the proceeding*[21]. Its alternative submission was that Art 54 contemplated only a waiver from court immunity from court processes relating to recognition (not enforcement).

The Court rejected Spain's submissions, observing that Spain's first submission required the text of the articles to *be read in a contorted manner*[22] and that:

> *The conclusion that the express terms of Art 54(1) involve a waiver of immunity from jurisdiction in relation to recognition and enforcement is also supported by the 1991 Report of the International Law Commission which, as explained above, was relied upon by Lord Goff in Pinochet [No 3] for his Lordship's cautious approach to inferences supporting a waiver of immunity.*[23]
>
> (footnote omitted)

The Court dismissed the appeal with costs.

Interim injunction in aid of international arbitration

In ***Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd*** [2022] NSWSC 1125, the issue before the Supreme Court of New South Wales was whether an interim injunction restraining the call on bank guarantees ought be continued. The injunction had been granted pursuant to s 7(3) of the IA Act in circumstances where the parties had agreed to arbitration to resolve their disputes.

The Court noted the requirement in Article 17J of the UNCITRAL Model Law that in issuing interim measures, a *court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration*. It stated further that:

> *Ordinarily, on an application to injunct a call on a bank guarantee, the plaintiff must demonstrate a strong or serious prima facie case […]. For the Court to be satisfied that an interlocutory injunction should be granted, it will likely be necessary to examine the plaintiff's suggested*

15 At [7]
16 At [29]
17 At [42]
18 At [43]
19 At [44]
20 At [67]
21 At [68]
22 At [69]
23 At [75]

> *prima facie case critically, which may involve construing the contractual provisions. This should not be taken as binding on the arbitral tribunal but simply what the Court needs to do in order to satisfy itself that it should preserve the status quo until the arbitral tribunal can finally determine the matter.*[24]

The arbitration had been commenced by notice of arbitration to the Secretariat of the ICC in July 2022. Shortly afterwards:

- Daewoo had sought (and obtained on an *ex parte* basis) an injunction to restrain the defendant from calling on a bank guarantee;
- INPEX had cross claimed, inter alia, for an order restraining the plaintiff's proceeding; and
- Daewoo sought an order staying INPEX's cross summons pursuant to s 7(2) of the IA Act.

The Court cited *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66, where Martin CJ (with whom Buss JA agreed), *considered that the power to make interim orders should be exercised "very sparingly" and should not be exercised to usurp the powers of the arbitrator [...]*[25].

The Court then considered in detail the principles applicable to the making of orders restraining calls on bank guarantees, noting that the Courts do not *approach this task any differently where the parties have agreed to arbitrate*[26].

As to whether Daewoo had a sufficiently strong prima facie case to support an extension of the injunction, the Court, following the Court of Appeal in *CPB Contractors v JKC Australia* .... (which had considered the same form contract), was not persuaded that it did. Similarly, the Court was not satisfied that the balance of convenience favoured the extension of the interlocutory injunction, observing that if Daewoo succeeded before the arbitral tribunal, *then I consider that damages are an adequate remedy save for any reputational damages*[27]. This potential prejudice was not considered sufficient to justify the injunction.

Stay of proceedings in aid of arbitration

Federal Court

In ***Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG (BBC Nile)*** [2022] FCAFC 171, the Federal Court of Australia made orders so as to stay proceedings in its court in favour of arbitration in London. The Full Court of the Federal Court of Australia determined two interlocutory applications exercising original jurisdiction at the direction of the Chief Justice.

The first application before the Court was an application for an injunction restraining the commencement or maintenance of proceedings other than in an Australian court. The second application was an application pursuant to s 7(2) of the IA Act for a stay of the proceeding before the Federal Court.

Section 7(2) of the IA Act provides, relevantly and in essence, that where proceedings instituted by a party to an arbitration agreement are pending in a court and the proceedings involve the determination of a matter capable of settlement by arbitration, the Court 'shall', on any conditions it thinks fit, stay the proceedings and refer the parties to arbitration.

Much of the judgment is concerned with the interpretation of the relevant bills of lading (which the parties agreed were governed by English law) and the construction of specific provisions of the *Carriage of Goods by Sea Act 1991* (Cth) (**CGSA**). The Court was asked to determine, amongst other things, whether an arbitration clause contained in the bills of lading was valid and effective. It found that it was and that the applicant and respondent were parties to the arbitration agreement.

A consequence of the Court's conclusion was that the application for an anti-suit injunction was refused and the application for a stay under the IA Act was granted, the Court observing that:

> *There is no residual discretion in the Court to refuse a stay in the present circumstances. Once the prerequisites in s 7(2) are satisfied, a stay is mandatory.*[28]

The decision of the Federal Court of Australia in ***Mansfield (Liquidator) v Fortrust International Pty Ltd, Palladium Investments International Pty Ltd (In liq)*** [2023] FCA 350 was concerned primarily with an application for the joinder of parties.

However, within this context and noting that there was no application for a stay before the Court at the time, the Court considered whether ss 120 and 121 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act)** were 'caught by' subs 7(2) of the IA Act. Sections 120 and 121 are concerned with undervalued transactions and transfers to defeat creditors.

The primary claims which were the subject of this matter were claims for restitution and declarations that a certain agreement was void (under the Bankruptcy Act). The agreement contained an arbitration clause requiring disputes to be settled by arbitration under the rules of the Singapore International Arbitration Centre.

24 At [3]
25 At [65]
26 At [72]
27 At [133]
28 At [109

The preliminary view expressed by the Court was that the relevant sections of the Bankruptcy Act were not caught by subs 7(2) of the IA Act and that *those claims do not fall within Art 8 of the Model law, not being claims which are the subject of the arbitration agreement.*

Supreme Court of New South Wales

The Supreme Court of New South Wales made orders staying its proceedings pending the referral of disputes to international arbitration in ***Construcciones y Auxiliar de Ferrocarriles SA v CPB Contractors Pty Ltd (No 2)*** [2022] NSWSC 1483.

CAF and CPB were parties to a contract containing an arbitration agreement and the judgment notes that it was common ground that this was an agreement to which s 7 of the IA Act applies.

The background to this judgment was complicated, but, relevantly, arbitration proceedings had not been initiated because the multi-tiered dispute clause (culminating in a referral to arbitration) required the President of ACICA to appoint an expert, and the President could not do so as a result of a conflict. This aside, the Court noted that the arbitration agreement *contemplates that all disputes between the parties concerning the Contract will be settled in accordance with the dispute resolution clauses, which have as their final step arbitration*[29].

The Court rejected a submission that the arbitration agreement was inoperative or incapable of being performed because CPB had made an unequivocal choice not to comply with the dispute resolution mechanism, concluding that:

> *It is true that as a consequence of the dispute between the parties, the agreement to submit the [relevant dispute] to arbitration was not capable of being performed immediately because it was first necessary to determine whether and how that dispute was to be referred to expert determination. But the fact that there are or were preconditions to an arbitration of the [dispute] that needed to be resolved does not mean that the arbitration agreement was inoperative or incapable of being performed. It simply meant that its performance has been delayed pending the outcome of a dispute concerning the operation of the dispute resolution clauses themselves.*[30]

Having observed that neither party appeared to want the extant dispute referred to expert determination, the Court ordered, relevantly, that the proceedings be stayed pending referral to arbitration and that, as a condition of that order, that CPB not raise as a defence in any such arbitration that the arbitral tribunal does not have jurisdiction to deal with the dispute because a precondition requiring that the dispute be referred first to expert determination has not been satisfied.

29 At [49]
30 At [54]

2. A snapshot of important developments – international

Singapore – governing law of subject matter arbitrability

In January 2023 the Singapore Court of Appeal published its judgment in ***Anupam Mittal v Westbridge Ventures II Investment Holdings***[31]**,** an appeal from the Singapore High Court which had found that the law of the seat governs the issue of subject matter arbitrability at the pre-award stage. The question for the Court of Appeal was whether in fact this issue was governed by the law of the seat or whether the arbitrability issue should be determined according to the law of the arbitration agreement.

In the introduction to the judgment, the Court of Appeal observed that:

> *... the threshold question had not been decided in Singapore. This appeal therefore gives us the opportunity to consider the matter and, additionally, provide some guidance on what law governs an arbitration agreement which does not contain an express choice of law.*[32]

Relevantly, the Court concluded that *the arbitrability of a dispute is, in the first instance, determined by the law that governs the arbitration agreement*[33], explaining that:

> *If it is a foreign governing law and that law provides that the subject matter of the dispute cannot be arbitrated, the Singapore court will not allow the arbitration to proceed because it would be contrary to public policy, albeit foreign public policy, to enforce such an arbitration agreement.*[34]

The Court added that if a dispute were arbitrable under the law of the arbitration agreement, but the arbitration was seated in Singapore and the subject matter was not arbitrable under Singapore law, the arbitration also could not proceed.

As to the law which governs an arbitration agreement, the Court's starting point was the three stage test established by *BCY v BCZ* [2017] 3 SLR 357. The first stage was to ask whether the parties had expressly chosen a law; the second stage was to consider, whether, in the absence of an express choice of law, the parties had made an implied choice; the third stage, if there was no express or implied choice, was to ask *which is the system of law with which the arbitration agreement has its closest and most real connection*[35]. The Court found that there was no express choice and that circumstances negated the most likely implied choice because *the implication would mean frustrating the parties' intention to arbitrate all their disputes*[36].

The Court concluded that determining the law with which the arbitration agreement had its closest and real connection was:

> *... a straightforward exercise. Under cl 20.2, the arbitration is to take place in Singapore. As the law of the seat of the arbitration, Singapore law will govern the procedure of the arbitration including challenges to the tribunal or its jurisdiction and the award when the same is eventually issued. Accordingly, Singapore law is the law of the arbitration agreement.*[37]

Whilst the observations and findings of the Court are important, so is the clear message emerging from this case of the significance of the parties' focus on the arbitration agreement (and the law governing it) at the time the agreement is drafted.

Timor-Leste – New York Convention

In January 2023, Timor-Leste became the 172nd party to the New York Convention with the Convention entering force on 17 April 2023.

Hong Kong – governing law and interpretation of dispute clauses

In March 2023, the High Court of the Hong Kong Special Administrative Region Court of First Instance in *China Railway (Hong Kong) Holdings Limited v Chung Kin Holdings Company Limited* [2023] HKCFI 132 considered the question of the governing law of a dispute resolution clause.

The Court's consideration arose in the context of an application to stay proceedings commenced in Hong Kong in favour of the Court of Wuhan. The success of the application depended on whether the relevant commercial agreement contained an exclusive jurisdiction clause, with the Court noting that:

- if there was an exclusive jurisdiction clause, the Court would normally stay in favour of the foreign court, but

31 [2023] SGCA 1
32 At [3]
33 At [55]
34 At [55]
35 Cited at [62]
36 At [74]
37 At [75]

- if there was a non-exclusive jurisdiction clause, the applicant would need to show that the foreign court was *clearly and distinctly the more appropriate forum*[38].

The question of whether there was a jurisdiction clause was a key issue in the proceeding with the Court identifying three possible clauses. Having selected one clause, the Court then turned its mind to the law governing that clause, applying the approach of the English Supreme Court in the seminal case of *Enka Insaat ve Sanayi AS v 000 "Insurance Company Chubb"* [2020] 1 WLR 4117 (and noting that this decision was in accord with jurisprudence in Hong Kong).

The Court observed:

> *Following Enka, the task of the Court is to discover the governing law of the jurisdiction clause by construing it against its context and discovering the parties' intentions; only if such intentions could not be discovered would one resort to the closest connection test. Further, in its task of construing the parties' intention, generally an express choice of law clause applicable to the main contract will also apply to the jurisdiction clause.*[39]

The Court found that the multiple agreements which were the subject of the proceeding should as a whole, identifying one jurisdiction clause which, in the Court's view, *is clearly the best indication of the parties' intentions as to the issue of governing law*[40]. The final question in relation to the clause was whether this clause was an exclusive or non-exclusive jurisdiction clause with the Court finding in the circumstances that the clause was non-exclusive.

Having found that the parties' agreement included a non-exclusive jurisdiction clause, the Court considered whether the foreign court was the more appropriate forum. Having regard to the particular facts of the case, including practical considerations such as the location of witnesses and the place of performance of the contractual obligations, the Court was not persuaded by the applicant's arguments. The application for a stay was dismissed.

This case is again a reminder of the importance of clear drafting; a suite of connected transaction documents should not, absent some specific reason, contain different jurisdiction clauses and where the parties want an exclusive jurisdiction clause, the jurisdiction clause must be clear.

38 At [16]
39 At [35]
40 Ibid
41 At [1]
42 At [35]
43 At [37]
44 At [39]
45 At [40]

Hong Kong – enforcement of arbitral awards

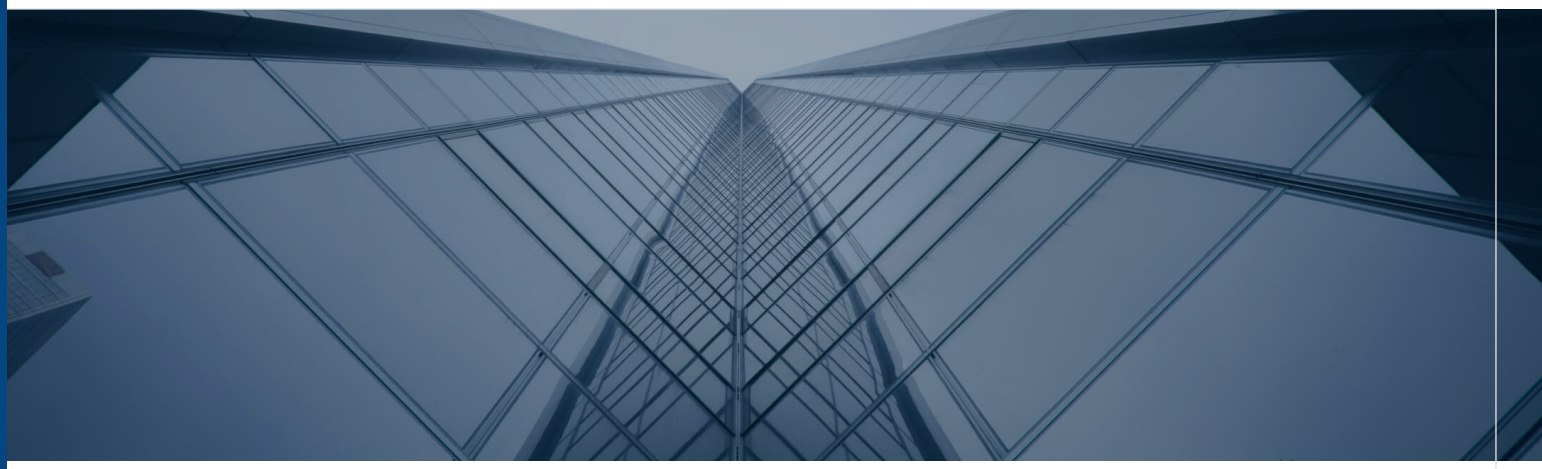
The pro-arbitration approach of the Hong Kong courts was demonstrated in the decision of the Hong Kong Court of First Instance in March 2023 in *COG v ES* [2023] HKCFI 294. The Court rejected public policy arguments by an award debtor seeking to set aside orders enforcing an arbitral award.

By contrast, in the same month in *Canudilo International Company Limited v Wu Chi Keung & Ors [2023] HKCFI 700,* the Court of First Instance considered *whether errors made by the arbitrator on facts and law can be so egregious and cause an outcome which is so unfair and unjust, that the Court cannot ignore the errors as enforcement of the award made would be repugnant*[41].

In this case, again an application to set aside orders enforcing an arbitral award, the Court examined in detail the procedural history of the arbitration proceeding, including the replacement of an arbitrator by the Hong Kong International Arbitration Centre (**HKIAC**), and the findings of the arbitrator expressed in a final award (adopting or relying on findings of the first arbitrator in an early award resulting from a bifurcated proceeding).

The Court observed that it had:

> *... grave concerns that Arbitrator 2 had not applied his own independent mind pursuant to the mandate given to him under the arbitration agreement to decide the dispute between the parties*[42] *and that, on the evidence, it was grossly unfair and unjust that Arbitrator 2 considered that [one of the parties] had already been given the opportunity to present their evidence and make their submissions before Arbitrator 1, had failed to do so, and should be bound [...]*[43] *where that party did not have the 'equal opportunity' to appear and to present and argue their case in the first part of the hearing*[44].
>
> *What is more disturbing, which in my view lies at the heart of [the applicant's] case, is not whether Arbitrator 2 had erred in law, and on facts as to the matters put before and decided by Arbitrator 1, but that Wu had not been given notice nor the reasonable opportunity to meet the case made against them in the hearing of the Arbitration on their liability.*[45]



The Court found that the relevant party had not been given a reasonable opportunity to present its case so that the arbitration was not conducted in accordance with the arbitration agreement and/or the agreed arbitration procedures. It concluded that:

> *...it would be contrary to our basic notions of justice and requirements for a fair hearing to enforce the Final Award, when Arbitrator 2 had failed independently to determine the issues in dispute [between the relevant parties], and had unfairly and unjustly deprived [the party] of the reasonable opportunity to present their case...*[46]

The Court added that the conduct of the arbitration by Arbitrator 2 was *seriously flawed or egregious, such that due process was denied*[47], and:

> *[The opportunity to present one's case] is fundamental to the process of fair trial, and the absence of such prerequisites of due process cannot be condoned by the Court, by recognizing and permitting enforcement of an award which has given rise to substantial injustice.*[48]

The Enforcement Order was set aside.

Hong Kong – virtual hearings

Virtual hearings are now a part of arbitration life. The Hong Kong Court of First Instance reinforced this in *Sky Power Construction Engineering Limited v Iraero Airlines JSC* [2023] HKCFI 1558 decided in May 2023.

The respondent applied for an extension of time to seek to set aside an order enforcing a foreign arbitral award on grounds that the arbitration was not conducted in accordance with the parties' agreement. In particular, the respondent complained of orders made by the tribunal, in the face of opposition from the respondent, for the hearing to be conducted as a virtual hearing. The respondent submitted that virtual hearing had prevented that party from presenting its case adequately.

In determining the application for an extension, the Court took into account the merits of the likely set aside application.

The decision ultimately turns on its facts, with the Court expressing the view that there were no merits in the respondent's setting aside application. It accepted that, where the parties did not agree on the conduct of the hearing, the arbitrator had a duty to decide on the procedure and that, having taken into account the circumstances of the case, that is what the arbitrator had done. The Court observed that it was not for the Court to interfere with the exercise by the arbitrator of *her discretionary and case management powers with regard to the flexibility of the arbitral process*[49] and that the arbitrator clearly had power to direct that the hearing be conducted on a virtual basis[50]. Leave to file the application out of time was declined and the summons dismissed.

On the question of remote hearings, the Court made the following useful observations:

> *Remote hearings are now commonplace in court proceedings as well as in arbitrations, even before but particularly more so after the pandemic, and the consequent difficulties created and impact on travelling and gathering. Whether it is appropriate in any particular case to permit the factual witnesses to give evidence at the hearing remotely, whether the effectiveness of cross-examination can be or was undermined, whether appropriate measures are required or were put in place to ensure the security of the process, are all matters for the consideration and final decision of the tribunal in the case. The arbitrator in this case had duly considered the difficulties and delay caused by the global pandemic, the need for a speedy resolution of the Arbitration without further postponements in the face of the changing situation and the evolving health regulations and travel restrictions, when she decided on the timing and format of the hearing. As reflected in*

46 At [44]
47 At [46]
48 At [50]
49 At [33]
50 At [36]

> *the Award, the arbitrator was obviously satisfied with the manner in which the virtual hearing was conducted, and the parties were not seen to have voiced any concern in the course of the remote hearing with regard to any interference or difficulties encountered.*[51]

Singapore – access to tribunal deliberations

In *CZT v CZU* [2023] SGHC(1) 11, the Singapore International Commercial Court (**SICC**) considered, in the context of an application to set aside an arbitral award, whether a party was entitled to access to records of the confidential deliberations of the tribunal.

The award in question was made under the ICC Rules; the final award was signed by two of the tribunal members, with the third arbitrator declining on the basis that he disagreed with the majority decision.

The request for records was directed first to the tribunal and ICC Secretariat. In the absence of a court order, the request was declined.

The application was made to the SICC under its applicable rules of civil procedure. Under these rules, the SICC had power to order the production of documents provided that specific objections (recorded in the rules) did not apply. The Court's view was that the applicant bears the burden of proving that the documents sought are relevant to the case and material to its outcome.

The scope of the application was narrowed during the hearing, but the applicant pressed for certain records of deliberations to support its contention that the majority decided the final award without disclosing reasoning and/or as a result of a breach of the fair hearing rule. The applicant contended further that the majority attempted to conceal the true reasons behind the award and lacked impartiality. The applicant accepted that records of deliberation are confidential, but submitted that this case was the exception to that rule.

There were three issues before the Court: first, when can arbitrators be ordered to produce records of deliberation in support of an application to set aside an award; secondly, whether, in this case, any of the objections under the SICC rules applied; and, thirdly, whether the documents had been described with sufficient particularity.

The Court observed that there is *no statutory provision in Singapore that expressly protects the confidentiality of arbitrator's deliberations* and that this issue was yet to be determined by the Singapore courts. It also noted that case law in Singapore was consistent with the default position that deliberations are confidential and that *there are well-recognised policy reasons for the protection of confidentiality or arbitrators' deliberations*[52].

The Court observed further that:

> *In our view, a case would fall within the exception [to this position] if the facts and circumstances are such that the interests of justice in ordering the production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations. [...]*
>
> *Clearly the facts and circumstances of the case must be so compelling as to persuade the court that the interests of justice in ordering production of the awards of deliberations outweigh the policy reasons for the production of the confidentiality of deliberations.*[53]

In this case the Court relevantly concluded, inter alia, that an allegation of a breach of the fair hearing rule was *not sufficient to displace the protection of the confidentiality of deliberations.* It was also not persuaded in this case that the other grounds pleaded in support of the set aside application were necessarily sufficient to constitute an exception, but noted that a definitive decision was not required because the applicant had not shown that the relevant allegations had real prospects of success.

Hong Kong – arbitrability and jurisdiction

In his article *The Chimera of Admissibility in International Arbitration – And Why We Need to Stop Chasing It*[54]..... Michael Huang referred to the *conventional wisdom [...] that there is a distinction between [an objection to admissibility as opposed to jurisdiction],* observing that:

> *To determine if an objection relates to jurisdiction or to admissibility, the critical test is whether the objection is attacking the tribunal or the claim.*

The May judgment of the Hong Kong Court of Final Appeal in *C v D* [2023] HKCFA 16 confirmed that issues of compliance with pre-arbitration procedures in an escalation clause do not affect jurisdiction; in the course of the judgment the learned members of the Court made a number of observations on the utility and relevance of the beforementioned distinction.

The question before the Court was whether a tribunal's decision that pre-arbitration procedures had been complied with was subject to review by the Court and could be set aside as a result of that

51 At [39]
52 At [44]
53 At [53]
54 Michael Huang, *Selected Essays on Dispute Resolution*, published 11 December 2018 (https://www.mhwang.com/).

review. The consideration of this question included interpretation of the Arbitration Ordinance in Hong Kong (which, as the Court notes, incorporates the provisions of the UNCITRAL Model Law).

The relevant dispute clause was contained in a contract between a Hong Kong company and a Thai company. It provided for certain pre-arbitration procedures, including an attempt to resolve the dispute through good faith negotiations. If the dispute was not resolved within 60 days of a request for negotiations, the dispute was to be referred to arbitration under the UNCITRAL Arbitration Rules, seated in Hong Kong and administered by the HKIAC.

The appellant (C) had objected to the arbitration proceeding on the basis that the parties had not fulfilled the pre-arbitration procedures. The tribunal had found that the procedures had been complied with. An award was issued against the appellant.

The appellant made an application to the Court of First Instance for an order setting aside the award on the basis that the tribunal was wrong in finding that the parties had complied with the pre-arbitration procedures. The Court of First Instance, and subsequently, the Court of Appeal dismissed the application. Both of the lower courts relied on the distinction between 'admissibility' and 'jurisdiction'. With permission, the appellant appealed to the Court of Final Appeal.

The judgment of Mr Justice Ribiero PJ sets out the relevant statutory scheme, including:

- the powers of the Court to interfere with arbitral process (Arbitration Ordinance, s 3);
- the power of the tribunal to determine its own competence (Arbitration Ordinance, s 34) (adopting Article 16 of the UNCITRAL Model Law); and
- the recourse available to a party by way of set aside (Arbitration Ordinance, s 81),

noting that:

> *...a party may challenge the tribunal's jurisdiction at the start of the arbitration and the arbitrators may rule on that objection either as a preliminary question or as part of a later award on the merits. If the tribunal takes the latter course and assumes jurisdiction, the resultant award can only be challenged by a setting aside application...*[55]
>
> (footnotes omitted)

and that a court may also 'interfere' with an arbitration by refusing enforcement of an arbitral award[56] or by ordering a stay of litigation in aid of arbitration[57].

As to the Court's powers, his Honour stated that:

> *... AO s 81 makes no mention of rulings by the tribunal on its own jurisdiction, although such issues are central to AO s 34. Nevertheless, there is a substantial correspondence between the classes of objection falling within the two respective sections [...].*
>
> *The Court is therefore clearly empowered to disturb an award on non-arbitrability or public policy grounds under AO s 81. However, those grounds are not mentioned in AO s 34 [...]. The statutory intent is apparently that such grounds should only be addressed if and when an award has been made. Additionally, [...] such grounds exceptionally involve judicial powers to enforce public policy whatever may be the intentions of the parties.*[58]

His Honour then considered the distinction between jurisdiction and admissibility, observing that this:

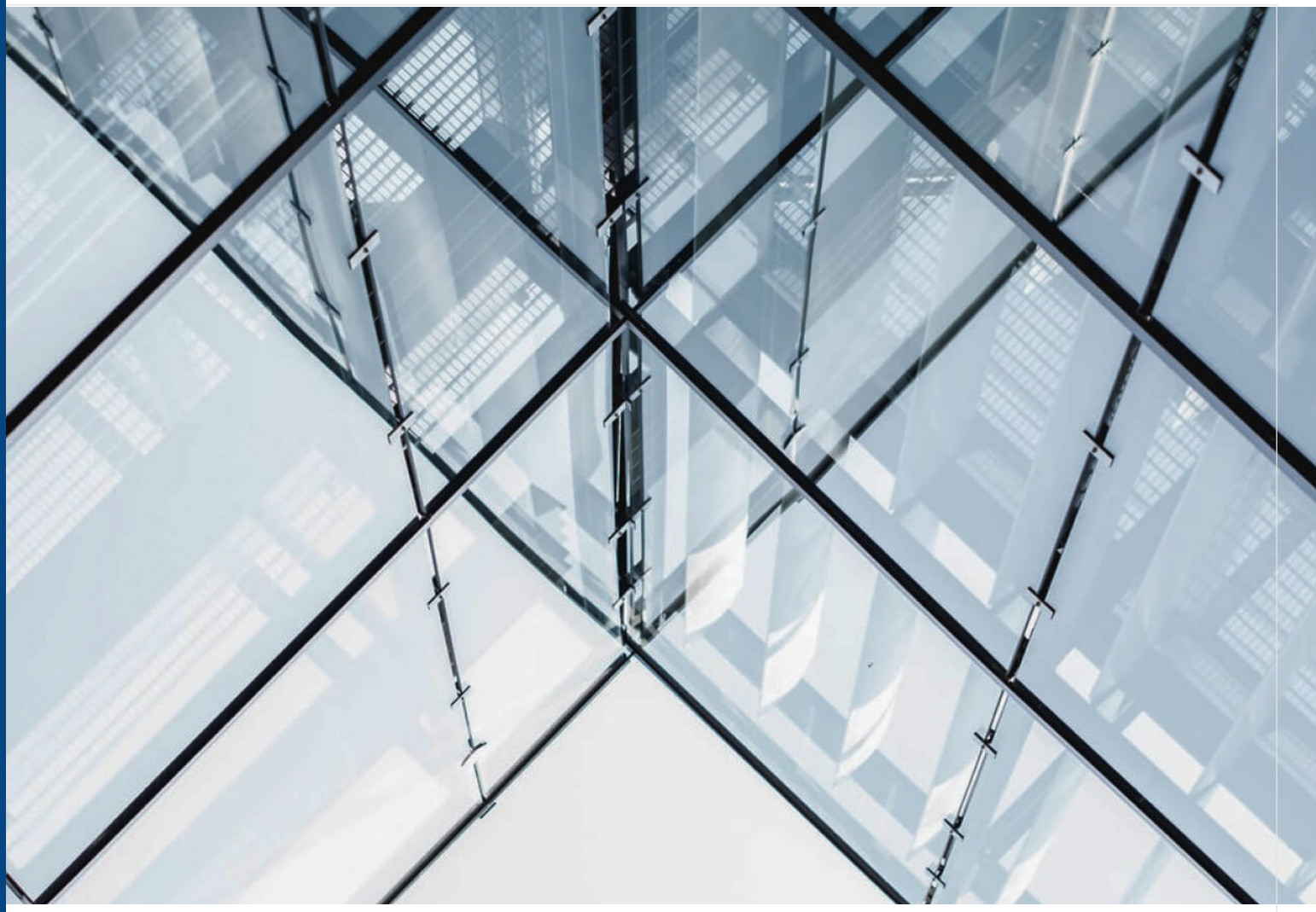
> *...involves distinguishing between a party's challenge to a tribunal's "jurisdiction" and a challenge to the "admissibility" of a particular claim. The principle is that the court may review a tribunal's ruling on the former, but not on the latter, category of challenge*[59]*,*

and that the *distinction has thus far been expressed, perhaps more descriptively, as a distinction between a challenge to the tribunal and a challenge to the claim*[60], an approach adopted by the Singapore Court of Appeal, the English High Court and the Supreme Court of New South Wales.

The appellant's submission was the non-compliance with a pre-arbitration procedure deprived the tribunal of jurisdiction. The question before the Court was whether the decision of the tribunal was reviewable.

His Honour's starting point was the parties' arbitration agreement and whether the parties expressly agreed that compliance with a pre-condition was amenable to the Court's review. Absent unequivocally clear language, his Honour's finding was that the Court could not arrive at that conclusion. Instead his Honour accepted that pre-arbitration conditions *should be regarded as presumptively non-jurisdictional*[61], this being *consistent with the consensual basis of the tribunal's jurisdiction*[62]. His Honour considered the distinction useful when deciding whether the Court had the power to 'interfere' in the arbitral process.

55 At [22]
56 At [25]
57 At [28]
58 At [24]
59 At [29]
60 At [33]
61 At [49]
62 At [50]



After having regard to a number of authorities from courts outside of Hong Kong, his Honour dismissed the appeal, concluding that the trial judge was correct in stating that the *objection in the present case seems to me to be one going to admissibility of the claim. There is no dispute about the existence, scope and validity of the arbitration agreement*[63]. Importantly, his Honour found that Article 2A of the UNCITRAL Model Law provided further reason for the finding, this requiring that in the interpretation of the Model Law, *regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith*[64].

The Court's decision to dismiss the appeal was unanimous, however members of the Court differed, inter alia, as to the value of the distinction between admissibility and jurisdiction (in the context of arbitration).

Notably, Mr Justice Gummow NJP concluded that:

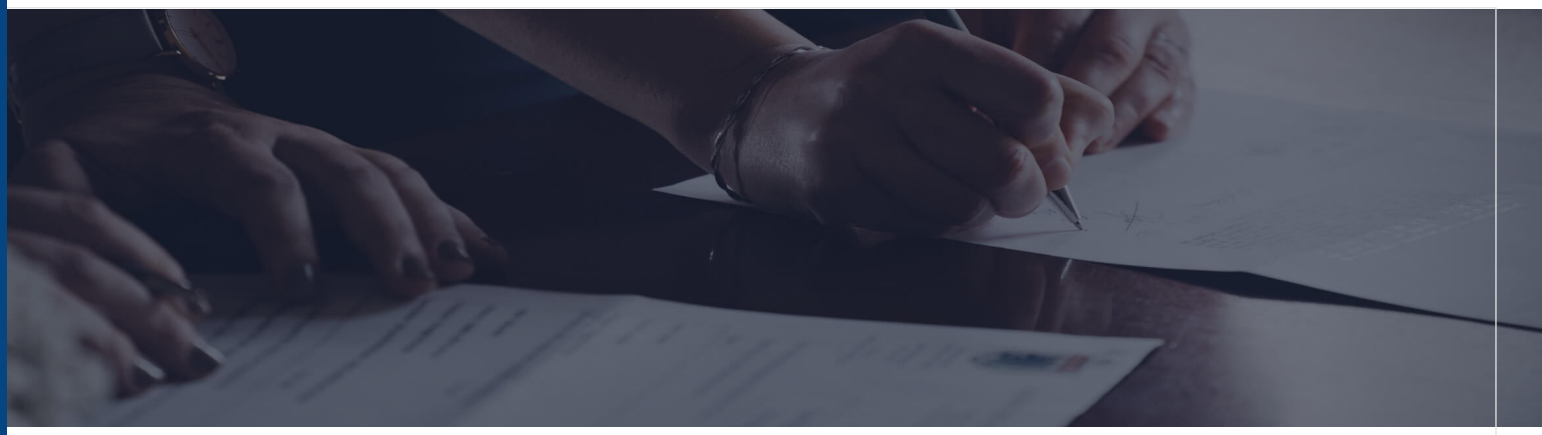
> *[t]he question is not whether an issue is of "admissibility" and therefore not a subject of curial challenge to "jurisdiction" but whether the applicant can bring itself within at least one of the grounds on which Article 34 permits recourse to a court to set aside an arbitral award. If none of those grounds applies then recourse to a court is not permitted, not because of classification of the issues as one of "admissibility", but because Article 34 of the Model Law (adopted by section 81 of the Ordinance) mandates that result*[65],

with the final observation that:

> *...when determining whether the court may set aside an arbitral award under section 81 of the Ordinance, the "admissibility/jurisdiction" distinction is an unnecessary distraction and presents a task of supererogation: there is no need to find the answer somewhere else when it is supplied by construing and applying the statute to the facts of the case.*[66]

The fact that the UNCITRAL Model Law is incorporated into the laws of Hong Kong through the Arbitration Ordinance means that this decision will provide guidance in other Model Law jurisdictions.

63 At [90]
64 At [91]
65 At [152]
66 At [159]



3. Key publications

UNCITRAL Draft Code of Conduct for Arbitrators

In March 2023 UNCITRAL Working Group III finalised a code for the conduct of arbitrators in international investment disputes. The Code was adopted at the hearing of the UNCITRAL Commission on 7 July 2023.

Queen Mary University of London Report

In January 2023 the Queen Mary University of London published its report on *Future of International Energy Arbitration Survey Report*. The focus of the report was on energy disputes, but the report notes that:

> *48% [of respondents] selected procurement and supply chain issues as the most likely cause of disputes over the next five years. This was followed by changes to regulatory frameworks (44%), oil and gas – supply and demand (38%) and changes in technology (35%).*

The report confirmed, consistent with an earlier report with a broader focus, that *[a]rbitration is seen as the most suitable forum for resolving energy disputes with London and Singapore the most popular seats of choice*. Neutrality was the clear winning feature of arbitration which was considered by respondents for resolving energy related disputes (63%), at least in part because *energy can often be a highly politicised issue*.

The report is, as always, comprehensive and it is beyond the scope of this publication to report on all findings. We do, however, note the following important observations from the report.

- In relation to climate change disputes:

  > *Arbitration is perceived as being least suitable to climate change disputes compared to the other sub-sectors, although even in this case arbitration was seen by the largest proportion of respondents (26%) as the most suitable forum for resolving disputes and was ahead of litigation (16%).*

- As for the role of third party funding in arbitration:

  > *84% of respondents indicated they believe there will be an increase in third party funding of international energy disputes, citing large amounts in dispute, increasing turmoil in energy markets leading to parties needing funds/cashflow, and the lucrative nature of these disputes.*

- On the question of investor-State settlement, *[m]any end users noted that they would only consider investor-State arbitration as a last resort or as part of a larger strategy to exit business operations in the host country in question*.

- As to the source of disputes in the energy sector over the past five years, energy transition ranked last, with construction of energy infrastructure and provision of equipment (including supply chain) ranked as number one (36%) whereas price volatility of raw materials and energy supply (oil, gas and other) was identified as the most likely cause for disputes in the short to medium term.

The survey underpinning this report was the first since the pandemic with respondents observing that:

> *... the widespread adoption of virtual hearings and meetings brought on by the COVID-19 pandemic has changed the nature of international arbitration practice for the foreseeable future, and arguably allows for more diversified and global participation in international arbitration. It also shows consistent (and encouraging) support for innovation in making international arbitration more economical, efficient, and accessible.*

4. News from arbitral institutions

In this section we report on news and developments from the key institutions administering international arbitration proceedings in the region.

Asian International Arbitration Centre

The Asian International Arbitration Centre **(AIAC)** announced the appointment of Datuk Sundra Rajoo as its Director in March 2023.

The AIAC reported one of the highest filings in the region in its 2022 Annual Report, with 810 matters referred to it for dispute resolution. Just over 17% of those filings were arbitrations of which almost 82% were administered (with a small number proceeding under the Fast-Track procedure in the AIAC Rules).

The AIAC also reported its first administered Islamic arbitration case under the AIAC i-Arbitration Rules published in 2021. The AIAC i-Arbitration Rules are *guided by Shariah principles*. Amongst other things, these rules require third party funding to be compliant with Shariah principles and the powers of the tribunal include the power to refer matters to a relevant Shariah Council and to appoint a Shariah expert.

When the AIAC introduced its 2021 Arbitration Rules, it also introduced into the procedure a summary determination procedure. Its 2022 Annual Report indicates that during that year, four summary determination cases were registered with AIAC.

Hong Kong International Arbitration Centre

In January 2023 the HKIAC published its annual statistics, describing them as setting 'a new record'.

Of 344 new arbitration filings during 2022, HKIAC reported that around 50% of these arose from contracts signed in 2020 or later. This data suggests that parties are moving relatively swiftly to refer disputes to arbitration when they arise (which historically has not always been the case). Australian parties featured in the 'top ten' users of HKIAC for 2022.

The report notes that 256 of the 344 arbitrations were administered (either under the HKIAC Rules or UNCITRAL Arbitration Rules) and just over 83% were international. The high number of administered arbitrations (as distinct from ad hoc), is consistent with the preference we see amongst our clients who are attracted to arbitration where an institution takes responsibility for the administration (including managing expenses and arbitrators' fees) and retains oversight over the proceeding.

International arbitration is often perceived as being used mostly for infrastructure and building and construction disputes. This perception is not supported by the statistics published by HKIAC. In 2022, almost 37% of HKIAC registered cases involved banking and financial services disputes, with corporate (just under 18%) and international trade/sale of goods (14%) in second and third place. Our experience is that international trade and sale of goods disputes increased significantly after supply chain disruption caused by Covid during 2020 and 2021.

Many arbitral institutions have moved to update their arbitral rules over the past five years to accommodate the increasing number of disputes which involve multiple parties (and multiple proceedings).

The report discloses that:

- of the 344 arbitrations submitted to it during 2022 involved 997 parties and 470 contracts;
- over 50% of cases involved multiple parties or contracts;
- 26 of the referred arbitrations involved one arbitration commenced under multiple contracts; and
- HKIAC received 10 requests for consolidation.

The report also provides an update on use of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by Courts of the Mainland and of the Hong Kong Special Administrative Region (**Arrangement**). This Arrangement, which came into force in October 2019, deals with *issues including the avenues of providing mutual assistance in preservation measures between the Mainland and Hong Kong, the scope of application for preservation measures, the application procedure, and the review and determination of an application*[67]. HKIAC reports that last year it 'processed 26 applications to 14 Mainland Chinese courts under the Arrangement seeking to preserve evidence, assets, or conduct worth a total of RMB7.6 billion'.

International Chamber of Commerce

The International Chamber of Commerce (**ICC**) celebrated its centenary in January 2023.

To coincide with this milestone, it published a Declaration on Dispute Prevention and Resolution (**Declaration**).

The Declaration sets out ICC's pledge for the next 100 years, including a pledge to ensure access to

67 See HKIAC website: https://www.hkiac.org/arbitration/arrangement-interim-measures

justice and the rule of law by providing accessible, affordable, predictable and efficient dispute prevention and resolution services to everyone, every day, everywhere.

It also addresses sustainability, pledging to *adopt sustainability measures to minimise our own environmental footprint by reducing energy consumption and waste, and supporting bold action to tackle climate change*.

The text of the pledge is available here: https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-centenary-declaration-on-dispute-prevention-and-resolution/#:~:text=Issued%20on%2019%20January%202023,prevention%20for%20the%20next%20century\

More recently, at the beginning of July 2023, the ICC published its guide to Facilitating Settlement in International Arbitration (https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/new-report-and-guide-to-drive-thought-leadership-in-dispute-prevention-and-resolution/). The document includes guidance to parties, tribunals and institutions on, inter alia, the facilitation of settlement through ongoing case management techniques and recognising mediation and settlement 'windows'.

Mumbai Centre for International Arbitration

Arbitration is developing at a rapid pace in India.

The Mumbai Centre for International Arbitration (**MCIA**) (established in 2016) reported in its 2022 Annual Report published earlier this year a 20% increase in its caseload over the previous year. It also reported that MCIA is administering a US$1 billion dispute between Adani Transmissions Ltd and Reliance Infra Ltd under the MCIA Rules.

Saudi Centre for Commercial Arbitration

The Saudi Center for Commercial Arbitration (**SCCA)** published revised arbitration rules effective 1 May 2023.

SCCA describes its new rules as *being in conformity with the latest international standards in the arbitration industry [taking] into account the best practices followed by other eminent arbitration institutions. Amongst other things, the SCCA Rules introduce the SCCA Court which will be in charge of making key administrative decisions relating to SCCA administered arbitrations*.

The SCCA Court was announced by the SCCA in late 2022 to replace the SCCA Committee for Administrative Decisions.

Singapore International Arbitration Centre

The Singapore International Arbitration Centre **(SIAC**) published its 2022 statistics in April 2023 as part of its Annual Report.

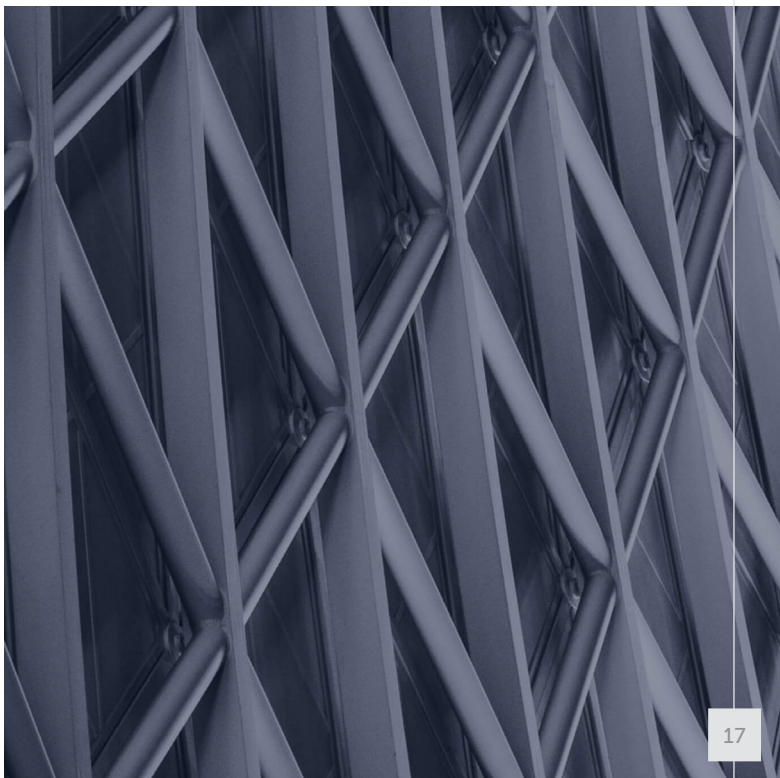
There were 357 new filings (of which 94% were administered) and 88% of these were international. Australia was in the top twelve foreign users.

The categories of disputes in claims filed with SIAC are different to those reported by HKIAC and included 21% related to 'trade', 20% related to 'commercial', 15% related to 'corporate' and 13% maritime/shipping. Disputes arose from contracts entered into from 2000 to 2022 (with 52% of new case filings involving contracts entered into between 2020 and 2022.

SIAC was one of the early adopters of 'early dismissal' proceedings in its rules. Article 29 of the 2016 SIAC Rules permits a party to apply to the tribunal for the early dismissal of a claim or defence on the basis that either a claim or defence is manifestly without legal merit or a claim or defence is manifestly outside the jurisdiction of the tribunal. The tribunal has discretion whether to allow an early dismissal claim to proceed.

SIAC reports that in 2022 it received 10 applications for early dismissal of which five were allowed to proceed, two were not allowed to proceed and one application was pending at the time the report was published. Three of the five which were allowed to proceed were rejected (with the remaining two pending).

In May 2023 SIAC announced that the SIAC Rules had been selected for the 33rd edition of the Annual Willem C. Vis International Arbitration Moot in 2024.



5. Our Insights

Arbitration remains the preferred option for the resolution of cross border disputes.

Its primary advantage is the ability of an award creditor to enforce an award in over 170 countries under the New York Convention. But it also offers confidentiality and flexibility in its process – with robust case management, arbitration proceedings can be conducted efficiently, adapt to unique features of commercial disputes and offer expedition.

The New York Convention remains key to the success of international arbitration. It is supported by the UNCITRAL Model Law, incorporated via domestic legislation in many jurisdictions around the world.

The cases discussed in this review showcase, both within Australia and regionally, the growing jurisprudence which is contributing to the provision of certainty around complex issues such as the admissibility/jurisdiction debate and the distinction between recognition and enforcement under the IA Act.

So what do we see for the balance of the year?

First, we see increasing case numbers in the Federal and State courts where parties are seeking enforcement of foreign arbitral awards and court support for international commercial arbitration (including the enforcement of arbitration agreements through stay of proceedings in favour of arbitration).

Secondly, we expect the number of arbitration proceedings in Australia to continue to rise. Initiatives such as the County Court Arbitration Scheme launched in mid-2022 are educating businesses about the benefits of arbitration and providing parties who have not previously considered arbitration the choice of having their disputes resolved by an arbitral tribunal (with an expedited timetable and, in most cases, capped tribunal fees).

Thirdly, we anticipate that Australian courts will continue to reference jurisprudence from other regional domestic courts, including international commercial courts, as those foreign courts draw on our courts' analyses in supporting international and harmonised interpretation and application of the New York Convention and Model Law principles.

Fourthly, there is little doubt that mediation (which is now taken for granted in litigation in Australia) will continue to infiltrate arbitration as a parallel avenue for resolution of disputes. The ICC guide referenced in this review is a key indicator of this development.

And on a practical level, we will no doubt continue to be challenged by innovative arguments of public policy (one of the grounds on which a court may refuse to enforce a foreign arbitral award under the IA Act), 'creative' arbitration agreements (most of which will survive if tested in Australian courts) and an increased focus on efficiency and sustainability in the conduct of arbitral proceedings.

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