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THE QUARTERLY JOURNAL OF NZDRC AND NZIAC

ReSolution

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From the Editor

Tēnā koutou katoa

Welcome to the 37th issue of ReSolution.

The third quarter of 2023 has seen work in the ADR sector in New Zealand continue apace. Continuing and growing interest in the proportionate dispute resolution options we offer through NZDRC and NZIAC is likely, at least in part, a result of commercial parties becoming increasingly mindful of how disputes can best be resolved when they arise. We are particularly pleased to see an increase in interest in our contractual adjudication offering. If you are interested in learning more, please do register for our upcoming webinar.

Our recent 'Risky Business' webinar was also well-received by a wide range of attendees from across the globe. I was privileged to have a stellar lineup join me, including Gracey Campbell (OmniBridgeway), Stephen Keen (Grant Thornton), Lauren Lindsay (Bankside Chambers), and David Campbell (Dentons Kensington Swan). With an impressive depth and breadth of experience to be shared, this event was invaluable to anyone doing business across borders. Please do keep an eye on future events and follow us on social media to keep informed.

In this issue of ReSolution we continue to canvass a broad range of topics from around the globe. In the mix this issue, Maria Cole reminds us that a losing party to an arbitration should not sit on their hands in any enforcement proceedings, Richard Pidgeon talks about the scope of confidentiality in documents disclosed in arbitration, and Kate Holland tackles the question of body language and the arguments for and against virtual proceedings.

As always, I wish to take this opportunity to thank all those that have contributed to this issue of ReSolution. We are delighted to be able to share world-class articles to bring a more comprehensive understanding of law and evolving trends in domestic and international dispute resolution. Contributions of articles, papers, and commentary for future issues of ReSolution are always welcome.

I do hope you find this issue interesting and useful. Please feel free to distribute ReSolution to your friends and colleagues – they are most welcome to contact us if they wish to receive our publications directly.

Catherine Green Editor

ReSolution is the quarterly journal of NZDRC and NZIAC, published online each February, May, August, and November. ReSolution contains a wide variety of articles on dispute resolution covering topics relevant to both the domestic and international markets, across a broad spectrum of dispute resolution practices.

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In this issue

ReSolution *in Brief*

New Zealand and European Union sign long-anticipated free trade deal

The New Zealand-European Union Free Trade Agreement has finally been signed after a near decade of negotiations. The agreement primarily covers a reduction of tariffs and duties, with certain industries expected to have up to 99.9% of tariffs removed immediately. This will concern exporters of kiwifruit, apples, Mānuka honey, onions, wine, fish, mussels and squid.

While the agreement contains many measured benefits for exporters, the level of benefits for investors is difficult to assess. The agreement contains clauses for investors, but there is little description of how a dispute may be resolved between the investor and the host state. For example, Articles 10.6 and 10.7 contain provisions for national treatment and most-favoured-nation treatment. These articles instruct the parties to provide treatment no less favourable than they would give to their own enterprises and towards third party countries. However, at Article 10.7(3) the agreement emphasises that this treatment does not include *dispute settlement procedures provided for in other international agreements.* This is consistent with recent free trade agreements signed by New Zealand. For example, the NZ-UK Free Trade Agreement implemented in May this year declines the use of investor-state dispute settlement mechanisms.

Third party stays court proceedings for arbitration to proceed

Mr Matteo Salerno, sole director and shareholder of Trigon Trading Pty Limited (in administration) (**Trigon**), obtained a stay of proceedings brought by King River Digital Assets Opportunities SPC (**King River**) in favour of arbitration occurring between Trigon and King River. Trigon was a digital trading business specialising in foreign currency and cryptocurrencies. In *King River Digital Assets Opportunities SPC v Salerno* [2023] NSWSC 510, the plaintiff sued Mr Salerno for US$20.4million for accessorial liability allegedly in breach of the Australian Consumer Law.

The essential element of Mr Salerno's defence was vested in or exercisable by Trigon, in so far as Mr Salerno alleged Trigon had committed no misleading or deceptive conduct. Under section 2(1) of the Commercial Arbitration Act 2010 (NSW) (CAA), Mr Salerno was found to be a person claiming through or under a party to the arbitration agreement (relying on *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13; (2019) 267 CLR 514 at [66]–[67] and *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8; (1990) 169 CLR

Trigon and King River

→ Trigon was a digital trading business specialising in foreign currency and cryptocurrencies.

332 at 342). In other words, he was tantamount to a party and he sought a stay.

Section 8(1) of the CAA required the Court to refer parties to arbitration where *an action is brought in a matter which is the subject of an arbitration agreement* and a 'party' requests the referral to arbitration *not later than when submitting the party's first statement on the substance of the dispute* unless the arbitration agreement is *null and void, inoperative or incapable of being performed*. Where the request is made by a 'party' and the requirements are satisfied the stay is mandatory, there is no discretion.

King River complained the contract prohibited third party benefit, but Mr Salerno was not claiming under the contract between King River and Trigon but rather under section 2(1) of the CAA. The arbitral tribunal was empowered to deal with questions of the scope and operation of the arbitration clause and the jurisdiction of the tribunal. The legal proceedings were stayed in favour of arbitration between King River and Trigon.

Japan: signatory to Singapore Convention and new Arbitration Act

On 9 June 2023, the Japanese Diet (legislative body) confirmed that the government will sign the United Nations Convention on International Settlement Agreements Resulting from Mediation (**Singapore Convention**). New legislation, the Act for Implementation of the United Nations Convention on International Settlement Agreements Resulting from Mediation, has already been enacted to implement the Singapore Convention and will enter into force when Japan signs the Singapore Convention. Importantly, the Singapore Convention will allow settlement agreements arising from international mediation to be enforced before the Japanese courts.

On 21 April 2023, the Diet approved the first major amendment to Japan's Arbitration Act in approximately 20 years, and this has four key changes:

- enhancing the enforcement of interim measures;
- validity of an arbitration agreement: less prescriptive in terms of the requirement that arbitration agreements need to be part of a fully written contract;
- jurisdiction over arbitration-related court proceedings: there is an emphasis on the Tokyo/Osaka District Courts (which will promote localised expertise); and
- translations of awards: awards do not have to be in Japanese anymore, in order to be enforceable.

The new Arbitration Act is expected to come into force in 2024.

Certainty via *C v D* (Hong Kong)

According to C v D [2023] HKCFA 16, a judgment from Hong Kong's highest Court, arbitrators, not courts should determine whether escalation clauses in arbitration agreements have been complied with. In the corporate dispute, the actual contract in question required first negotiation, then reference to C's and D's CEOs then, thirdly, to arbitration. D did not comply with these mandatory provisions and began arbitration proceedings without first referring the dispute to either company CEO. C protested, but the tribunal ruled against C and issued a partial award which C applied to set aside in the Hong Kong Court of First Instance. The focus of C's court action was that the tribunal lacked jurisdiction to hear the arbitration before the escalation clause had been complied with.

Both the Court of First Instance and the Hong Kong Court of Appeal ruled in D's favour, noting non-compliance with a precondition to arbitration is a question of admissibility, not jurisdiction. The Court of Appeal decision was the subject of a Resolution in Brief in Issue 34.

The Court of Final Appeal granted leave to appeal on the basis the matter was one of general and public importance, and a substantive decision was issued after a hearing. C raised two arguments:

1. reference to the CEOs was a condition precedent and there was thus no valid reference to arbitration; and
2. the distinction between admissibility and jurisdiction was irrelevant and this was jurisdictional in any event.

The Court of Final Appeal found the first argument was *untenable*. The majority found it a useful distinction in the second argument, as between admissibility and jurisdiction. The question of admissibility targets the claim, such as whether it is defective. The question of jurisdiction targets the tribunal, that is, whether consent to the tribunal's authority is denied, which involves impugning the arbitration agreement. The former is not reviewable by the Court under Article 34(2)(a)(iii) of the Model Law but the latter is. Justice Gummow felt the distinction was unnecessary as upon viewing the parties' intentions combined with the statute, C's challenge did not fall within the scope of Article 34(2)(a)(iii) of the Model Law, that is, there was a reference to arbitration.

The Court of Final Appeal agreed with the lower courts that the effect of the precondition to arbitration should be dependent on the parties' intentions. Arbitration is consensual and the issues of admissibility and jurisdiction should be left to the parties to decide as a matter of freedom of contract.

The Court of Final Appeal went beyond the Court of Appeal in adopting a principle that pre-

arbitration conditions should presumptively be considered matters of admissibility. To overcome the presumption, clear and unequivocal language was needed. This is a matter for arbitral tribunals to decide and not an issue for the courts.

Narrowed anti-arbitration injunction granted

Justice Mimmie Chan of the Hong Kong Court of First Instance has granted an injunction preventing the main thrust of a mainland Chinese arbitration in the long-running dispute 廈門新景地集團有限公司 *formerly known as* 廈門市鑫新景地房地產有限公司 *v. Eton Properties Ltd and Another* [2023] HKCFI 1327. The Court proceedings between Xiamen Xinjingdi Group Co Ltd and Eton Properties had been on foot since 2007 in various iterations. A prior arbitration had also occurred which granted an award in the plaintiff's favour. While proceedings were still on foot in the Hong Kong Courts, the defendant started a new arbitration which had been accepted for hearing by CIETAC in mainland China. The plaintiff submitted that the current arbitration was commenced by the defendants in bad faith, with a view to relitigating issues already determined in the enforcement proceedings in Hong Kong and to deprive the plaintiff of the fruits of the first arbitral award. The power to grant an anti-arbitration injunction was considered in *SA v KB* [2016] 2 HKLRD 1249. The Court has a jurisdiction to do so, on the basis of whether it is just or convenient. The power of the Court must be exercised with great caution and in circumstances which can be shown to be wholly exceptional, but also with due and proper regard to the objectives and principles of the autonomy, independence and finality of arbitration as enshrined in the Arbitration Ordinance. Justice Chan then cited English authority to the effect the courts' usual approach to anti-suit injunctions should *not* be automatically applied to anti-arbitration injunctions. Considerations of international comity are not present in the same way, but the principle of autonomy and independence of arbitration was. The plaintiff sought a wide-ranging prohibition on the defendants taking any steps under the new arbitration they had filed, and to take steps to discontinue those arbitral proceedings.

Justice Chan granted a narrower injunction to permit the arbitration, but to prevent overlap with prior proceedings and determined issues.

Prompt challenge required for serious irregularity claim

In a case regarding alleged mismanagement of a Turkish hotel, in *Radisson Hotels APS Denmark (Radisson) v Hayat Otel İşletmeciliği Turizm Yatırım Ve Ticaret Anonim Şirketi (Hayat)* [2023] EWHC 892, a claim for serious irregularity under section 68 of the Arbitration Act (UK) was rejected. The basis of the Court's rejection was that the applicant continued with the arbitration and took steps after it became aware of secret communication between one of the three arbitrators and a witness for the respondent. The judge relied on section 73(1) of the Arbitration Act (UK). Section 73 of the Act provides that:

> If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making [...] any objection [...] that the proceedings have been improperly conducted, [...] he may not raise that objection later [...] unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

The partial liability and causation award was issued before Radisson became aware of the emails, but the quantum aspect was still on foot. Radisson waited 23 days before issuing the proceedings in the English High Court, while participating fully in the arbitration. Hayat submitted that Radisson had waived the right to challenge the award pursuant to section 73. Radisson relied on the liability award being final so that section 73 was not applicable, but the Court interpreted the facts as that the arbitration continued until all matters had been resolved. The premise of section 73 is to ensure revelation of an irregularity is not strategically deferred, to be revealed only when an unfavourable substantive result emerges.

Once filed and alleging the irregularity late, the burden of proof passed to Radisson to show that it could not with reasonable diligence have discovered the broad grounds for the claim of serious irregularity, being the actual or apparent bias of the arbitrator. Radisson was not able to do this. The objection needed to be raised promptly (*Rustal Trading Ltd v Gill & Duffus SA* [2000] CLC 231) as soon as Radisson believed it had grounds for objecting.

High Court of England holds arbitral award against Spain

ReSolution Issue 36 discussed a decision by the High Court of Australia in finding that the Kingdom of Spain had waved its state immunity and an arbitral award could be enforced against it. In *Infrastructure Services Luxembourg SARL & Anor v Kingdom of Spain* (2023) EWHC 1226 (Comm), the High Court of England decided similarly on the same award.

Following a dispute under the Energy Charter Treaty in 2013, Spain and Infrastructure Services Luxembourg S.à.r.l (the **company**) began the process of having the dispute arbitrated. In 2018, the process was concluded and an award was made against Spain. As it did with the Australian High Court, the company sought to enforce the award in the English High Court.

Spain argued the award could not be enforced. Spain highlighted two issues as part of its argument. The first was that the English High Court did not have jurisdiction. Spain argued that secondly, the company had not complied with duties around disclosure.

The Court discussed a series of cases concerning enforcement of arbitral awards. It found the facts closely mirrored *Micula & Ors v Romania (European Commission intervening)* [2020] UKSC 5, and deemed the decision binding. In that decision, the Supreme Court had held that the United Kingdom, as a signatory to ICSID, is to conform to its scheme *that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits*. The Court also looked at the Australian High Court decision, finding it relevant even though they accepted that there were differences between the respective ICSID-enforcing pieces of domestic legislation.

Concerning the second point, the Court found that the information that the company had not highlighted for Spain was not material enough to set aside the decision. For example, the company had not provided the Court with a copy of *Republic of Moldova v Komstroy LLC (successor in law to Energoalians)* [2021] 4 WLR 132. However, in the Court's view, *Komstroy* aligned fully with an earlier decision which had been cited by the company.

Hearing refused when permission to appeal declined on papers

The English High Court declined an application for an oral hearing in *Osler v Osler* [2023] EWHC 1270 after an application on the papers to appeal under section 69 of the Arbitration Act 1996 (UK) was itself declined. The underlying arbitral award dealt with a valuation issue in a farming dispute and the applicant applied unsuccessfully in an orthodox fashion to set the award aside. The Judge noted in paragraph two of her ruling:

> This Order has been made by the court without a hearing pursuant to CPR PD 52B paragraph 7.1. Any party affected by the order may apply to have it set aside or varied within 7 days of the date of service upon that person.

Based on the wording of the Order, the applicant applied for an oral hearing to set aside or vary the award. The respondent opposed the application to vary on the grounds that the Court had no jurisdiction to grant an oral hearing after the initial application had been dealt with on the papers.

The High Court agreed with the respondent that it lacked jurisdiction, citing *WSB v FOL* [2022] EWHC 586, *Midnight Marine v Thomas Miller* [2018] EWHC 3431 and *BLCT (13096) Limited v J Sainsbury Plc* [2003] EWCA Civ 884 for the proposition that where an application for permission to bring a section 69 appeal had been dealt with on the papers there was no renewed right to an oral hearing. The application on the papers was a final determination and paragraph 2 of the Order could be excised under the *slip rule*.

This outcome confirmed the high threshold for section 69 applications for permission to appeal and that determinations on the papers are final, despite contrary indications in a Court order.

Ontario Court of Appeal examines tribunal's jurisdiction under UNCITRAL Model Law

The Ontario Court of Appeal has dismissed an appeal by an investor against the Russian Federation.

In Russian Federation v. Luxtona Limited, 2023 ONCA 393, the Court looked at an arbitral award made against Russia as it concerned a dispute under the Energy Charter Treaty (**ECT**). The Court held that under the UNCITRAL Model Law (the **Model Law**), parties can introduce fresh evidence on an application to set aside a decision by an arbitral tribunal.

The seat of the arbitral tribunal between Russia and Luxtona was in Toronto. Russia applied to the Ontario Superior Court to have the award set aside. One of Russia's points of contention was that it had only signed, not ratified, the agreement and that its laws were inconsistent with the ECT. Russia believed it had evidence to prove this, and consequently sought a *de novo* hearing. On a *de novo* hearing, parties have a right to adduce evidence relevant to the jurisdictional matter. Russia hoped that evidence concerning its laws could be examined.

In assessing whether there could be a *de novo* hearing, the Court of Appeal looked at a tribunal's right to rule on its own jurisdiction. This is found under Article 16(1) of the Model Law. The Court considered the *competence-competence* principle, calling it *fundamental* to international commercial arbitration. The principle allows an arbitral tribunal to rule on its own jurisdiction and primarily provides two functions. That is, competence-competence a) resolves the legal loophole where an arbitral tribunal lacking jurisdiction would lose its ability to make a ruling to that effect, and b) limits a party's ability to delay arbitration through court challenges to the tribunal's jurisdiction. Luxtona argued that this principle required parties to put all their evidence before an arbitral tribunal so that the question of jurisdiction could be definitively determined. The Court disagreed with this, stating that this would make the arbitrators the sole judge of their jurisdiction.

The Court looked at the international consensus on the appropriateness of a court reviewing the jurisdiction of the arbitral tribunal. In *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, the UK Supreme Court confirmed the consistent practice of the courts to examine or re-examine for themselves the jurisdiction of arbitrators. Courts in Hong Kong, Singapore and Australia have explicitly endorsed *Dallah* and its reasoning.

Canadian court refers parties in share purchase dispute to arbitration

In 2329716 Alberta Ltd. v Jagroop Randhawa, 2023 ABKB 297, the King's Bench of Alberta has declined an injunction application on the basis that the matter should instead be resolved by arbitration. The dispute concerned a disagreement over whether shares in a business had been purchased. The vendors believed that the purchasers had bought the shares improperly. Both parties believed the business was theirs to run as they liked, and the vendors sought relief to ensure access to business operations.

The Court noted that the purchase agreement signed between the parties had an arbitration clause. It stated that:

> Any dispute, controversy, or claim arising out of, relating to, or in connection with this [Share Purchase] Agreement, including with respect to the interpretation, breach, existence, validity or termination thereof … shall be resolved in accordance with the dispute resolution procedure set for this in this Section 12 …

The vendors centred section 7 of Alberta's Arbitration Act in their argument. At section 7(1), the Court can stay the proceedings if the issue being brought before it relates to the matter that was meant to be arbitrated. The vendors argued that the issue did not concern the type of matter intended under the arbitration agreement. The vendors were seeking actions, such as the rectification of corporate registry records and relief from oppressive conduct by the purchasers. These were, in the vendor's view, unrelated to a dispute about purchasing shares. The Court disagreed and did so with a view towards the phrase *arising out of, relating to, or in connection with* [the share purchase agreement], from the arbitration clause. Using a series of questions to track the cause and effect of various stages in the parties' disagreement, the Court comfortably came to the view that the present situation had arisen from the initial dispute over shares. With this conclusion in mind, the Court held that the dispute had to be resolved by arbitration.

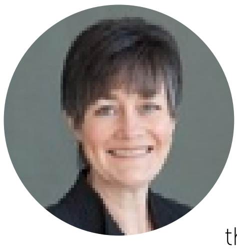
FEATURE ARTICLE

AS EASY AS ONE, TWO, THREE

Enforcement and recognition of foreign awards made in international arbitrations

Written by **MARIA COLE**

A Court's hands can be tied if a party does not ask for its assistance. In this case, the losing parties in an international arbitration had a foreign award enforced against them because they failed to ask the local Court to consider the law on when enforcement could be refused. Without that request, the Court's hands were tied and obtaining the orders was a straightforward process.



Background to the dispute

In mid-2018, Professor Ian Reeves CBE entered into an employment contract with the Respondents. The First Respondent, ALT Advisory (Jersey) Limited, is a company registered in the Channel Islands, and the Second Respondent, ALT Financial Group Limited, is an Australian registered company.

The employment contract contained an agreement to arbitrate any dispute between the parties under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The applicable law would be the law of England.

Seven months into the contract, Professor Reeves resigned. At that time, all his accrued entitlements under the contract were outstanding. In mid-2020, he issued a notice of dispute regarding his outstanding entitlements. The dispute was not resolved within the timeframe stipulated in the contract. Professor Reeves then filed a request for arbitration.

The Second Respondent proceeded to challenge the Arbitral Tribunal's jurisdiction on the basis that only one of its directors had signed the employment contract, which it argued *under Australian law would, in all probability, make it unenforceable* against it.

"An international arbitral award is recognised as binding and will be enforced except in limited circumstances"

Enforcement and recognition of foreign awards

This decision sets out the simple process involved in obtaining orders to enforce a foreign arbitral award and what happens when a losing party does not engage with a local court.

Issue of jurisdiction and determination of the merits

The Arbitral Tribunal found that the Second Respondent was bound by the employment contract and the agreement to arbitrate within it. This meant the Arbitral Tribunal had jurisdiction over the Second Respondent to hear and determine Professor Reeves' claims.

Professor Reeves proceeded to file further documents, including an amended statement of loss and a reply to questions which the Arbitral Tribunal had raised for the parties to consider. He advised the Tribunal he did not intend to apply for an in-person hearing, so the matter could proceed on the papers.

The Respondents filed no further documents. They did not respond to the Tribunal's questions, nor did they confirm whether they would seek an in-person hearing.

The Arbitral Tribunal delivered a Final Award in September 2022. It awarded Professor Reeves approximately US$820,000 against both Respondents, comprising damages, unpaid entitlements, legal costs and fees incurred, plus pre- and post-Award interest. There was also a separate award against the Second Respondent for costs and fees in connection to its objection to jurisdiction.

The Final Award was certified in Paris by the Secretary General of the ICC International Court of Arbitration in November 2022. Once again, the Respondents did nothing. Neither company paid Professor Reeves any part of the amount awarded in his favour.

Application to enforce the Final Award

In January 2023, Professor Reeves filed an application under the International Arbitration Act 1974 (Cth) (the Act) in the Supreme Court of Victoria at Melbourne for an order to enforce the Final Award against the Respondents.[1]

1 *Reeves v ALT Advisory (Jersey) Limited and ALT Financial Group Limited* [2023] VSC 249.

The Court recorded that Professor Reeves had entered into the employment contract with both Respondents and that the Second Respondent had provided a guarantee of the First Respondent's obligations under the contract. It then satisfied itself that the Respondents had been properly served with all documents and that it had before it the requisite evidence of the Final Award plus a certified copy of the arbitration agreement. Once that was done, it turned its mind to whether it should order enforcement of the Final Award.

The Act stipulates at subsections 8(5) and 8(7) that the Court may only refuse to enforce a foreign award in the following circumstances:

8(5) … in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, <u>at the request of the party against whom it is invoked,</u> refuse to enforce the award if that party proves to the satisfaction of the court that…

(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made…

…

8(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

The Court proceeded to consider the implications of the Respondents' failure to engage with the application to enforce the Final Award. It said that in the absence of any appearance by the Respondents, there was no basis for the Court to consider any of the matters set out in section 8(5), as it was clear such matters had to be raised *at the request of the party*. Furthermore, that party had the burden of establishing the matters on which it was seeking to rely as justification for the Court to refuse to enforce the award. In the absence of such a request, the Court's hands were tied. This meant that the enforceability issue raised by the Second Respondent before the Arbitral Tribunal was simply noted as the ground for the earlier jurisdictional challenge. There was no consideration at all by the Court of its merits.

The Court then noted there was nothing in the material before it to suggest it should refuse to enforce the Final Award under section 8(7), either because the subject matter of the Final Award was not capable of settlement under applicable law or that it would be contrary to public policy to enforce it.

Australia and New Zealand adopt the same approach

It appears the Respondents simply buried their heads in this matter. As a consequence, the only issues that the Court was required, or permitted, to consider before granting the orders to enforce the Final Award were whether the appropriate processes had been followed and whether the section 8(7) factors were engaged.

Both Australia and New Zealand are signatories of the UN Convention for the Recognition and Enforcement of Foreign Arbitration Awards 1958.[2] The grounds for refusing recognition or enforcement in New Zealand also require a losing party to request the court's assistance before the court may refuse an application to recognise or enforce an arbitral award.[3] The starting point in both countries is that an international arbitral award is recognised as binding and will be enforced except in the limited circumstances canvassed above. As shown, the enforcement process is straightforward and highlights the international appetite to encourage arbitration as a preferred method of dispute resolution.

2 In New Zealand, the recognition and enforcement provisions are set out in Article 35 of Schedule 1, Arbitration Act 1996.

3 Article 36 of Schedule 1, Arbitration Act 1996.

About the author

Maria Cole works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, including working with NZDRC and NZIAC. She was previously a civil litigation barrister for over a decade. During that time she worked on several multi-million dollar development disputes and was involved in arbitrations and mediations.

ARTICLE

Mining arbitration

In a Western Australian case involving a mining magnate's family, the confidentiality obligation over arbitration documents obtained in discovery was conditionally released.

Harman obligation released for documents from mining arbitration

Written by **RICHARD PIDGEON**

The implied undertaking of confidentiality in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 not to use documents discovered in a proceeding for collateral purposes was released in *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd* [No 21] [2023] WASC 169, with some conditions.

Background

Court proceedings were on foot in the Western Australian Supreme Court before, during and following an arbitration. The proceedings involved the family of mining magnate Gina Rinehart and the family mining business. It is a long-running court saga. Co-defendants Bianca Hope Rinehart (**Bianca**) and John Langley Hancock (**John**), two of Gina Rinehart's children, sought to use documents obtained during the arbitration *for any purpose* connected with the conduct of their defences in the court proceedings, despite the parties to the court proceeding including some who had not taken part in the arbitration. *Wright Prospecting Pty Ltd (Wright) v Hancock Prospecting Pty Ltd* (Hancock) [No 21] was the application which dealt with this issue.[1]

By way of explanatory detail, in the case of *Harman v Secretary of State for the Home Department*, a solicitor employed by the English Council of Civil Liberties was also engaged by a prisoner to sue the

1 *Wright Prospecting Pty Ltd v Hancock Prospecting Pty* Ltd [No 21] [2023] WASC 169.

Home Department.[2] The solicitor was deemed to be in contempt of court for using a confidential document outside the proceedings. This particular document had been obtained during discovery, read in open court, but then released to a journalist. The journalist wrote a scathing article. This action by the solicitor was found to be a civil contempt of court as a breach of the solicitor's implied undertaking to only use a discovered document in the court proceeding itself. This notion is termed the *Harman* obligation and covers arbitrations as well.

In the course of the discovery process in the *Wright v Hancock* court proceedings, John and Bianca sought to discover two categories of documents which arose directly from the arbitration. In pre-hearing directions conferences Justice Smith first made interim discovery orders permitting only the parties to the arbitration (who were also parties to the court proceedings) to inspect the arbitral documents Bianca and John wished to rely on. The non-party to the arbitration (who was part of the court proceeding) was initially prevented from inspecting the documents. There was some overlap between the arbitration and the court proceeding, but not completely so.

Hancock opposed the application to use the documents in the court proceedings, primarily stating the arbitral tribunal needed to give its permission, not the Court. Hancock alternatively submitted that in any event the Court should not exercise any power to permit use of the documents without clear evidence that Bianca and John had been unable to get a release from the arbitral tribunal.

Hancock also submitted that to make a ruling on the application was to intervene in an arbitration in breach of section 5 of the Commercial Arbitration Act 2012 (WA) (Act), which holds:

> **5. Extent of court intervention (cf. Model Law Art 5)**
>
> In matters governed by this Act, no court must

2 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

intervene except where so provided by this Act.

Decision

Justice Smith rejected the objections to the release of the *Harman* obligation. For the proper administration of justice, the *Harman* obligation must yield to production orders made by the court.[3] A court other than the one to which the *Harman* obligation was owed can make the order permitting use of the subject documents. Justice Smith held:[4]

> However, where a curial order is made in another proceeding which has the effect to bring those confidential documents into the other proceeding, the order also has the effect of yielding or overriding the Harman obligation owed to the first court or tribunal in respect of those documents. At the same time the order creates a new Harman obligation on the parties to other proceeding, which obligation binds all of the parties who receive the documents, and others who receive or inspect the documents such as counsel, solicitors and experts.

The Court ruled that it was entitled to make directions in the court proceedings in respect of the documents without being deemed to be intervening. There could be no:[5]

> jurisdictional void, in which the court is prohibited from determining disputes between persons who are not subject to an arbitration agreement because of the potential that its determination may overlap with issues in a dispute between parties that are so subject.

The fact some parties to the court proceedings were not party to the arbitration was a key element to the ruling. From the earlier interim orders, it was clear similar issues emerged in both the court case and the arbitration, and use of the documents was needed where there was *likely contribution of the document to achieving justice in the second proceeding*.[6]

Leave was granted to Bianca and John to use the documents obtained in the arbitration in the court proceedings. However, Justice Smith did not quite grant the application as sought. The application was not granted *for any purpose connected with* the conduct of their defences, but rather for trial preparation only. From there, any documents sought to be tendered in evidence would be subject to the usual rules of admissibility, relevance and privilege. As a protective measure, no party, especially the interested non-party (Gina Rinehart) was prohibited from seeking confidentiality orders in relation to the documents.

Conclusion

The confidentiality of documents disclosed in private arbitration is not absolute. The *Harman* obligation can yield to compulsive court orders in recognition of the *public interest in the promotion of the ascertainment of truth in litigation*.[7] From there, documents which are commercially sensitive can be protected by *an appropriate confidentiality regime*.[8]

About the author

Richard Pidgeon works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with NZDRC and NZIAC. He is a Doctor of Law, and previously practiced as a general civil litigation barrister in Auckland.

3 *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 33.

4 *Hearne v Street* (2009) 235 CLR 125 at [109]–[111] (Hayne, Haydon & Crennan JJ); applied in *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union (Ruling on Discovery)* [2015] VSC 352 at [21].

5 *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* [2020] WASCA 77, (2020) 55 WAR 435 [309]–[311], cited at *Wright Prospecting,* above n 1, at [111].

6 *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 at 225, cited at *Wright Prospecting*, above n 1, at [172].

7 *Wright Prospecting,* above n 1, at [192].

8 *Wright Prospecting,* above n 1, at [191].

ARTICLE

SIDLEY

Singapore International Commercial Court sets out test for the production of confidential arbitral deliberations

Written by **TAI-HENG CHENG, JENNIFER LIM, NATHANIEL LAI** and **LINMING HO**

SUMMARY
In the recent decision of *CZT v CZU* [2023] SGHC(I) 11, the Singapore International Commercial Court declined to grant orders for the production of an arbitral tribunal's records of deliberations because these records were confidential and the interests of justice did not warrant lifting the veil of confidentiality. This is the first time that a Singapore court has decided the question of when arbitrators can be ordered to produce their records of deliberations, and the decision reflects the Singapore courts' pro-arbitration stance.

On 28 June 2023, a three-judge bench of the Singapore International Commercial Court (the SICC) – consisting of Chua Lee Ming J (authoring), Dominique Hascher IJ and Sir Jeremy Cooke IJ – in *CZT v CZU* [2023] SGHC(I) 11 (*CZT v CZU*) rejected a party's applications for orders to produce an arbitral tribunal's records of deliberations, holding that evidence of tribunal deliberations was confidential and any exception to the confidentiality of deliberations would be found only in the "very rarest of cases". In the case at hand, the interests of justice did not outweigh the policy reasons for protecting the confidentiality of deliberations.[1]

1 *CZT v CZU*, ¶ 80.

This decision is the first time that a Singapore court has decided the issue of when it would order the production of the records of deliberations. It affirms the confidentiality of tribunal deliberations, and holds that an exception to such confidentiality would require that the "interests of justice in ordering the production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations", and in particular, would have to: (a) involve very serious allegations that (b) have "real prospects" of succeeding. This decision reflects Singapore's pro-arbitration jurisprudence.

Background

The defendant had commenced arbitration proceedings (the Arbitration) against the plaintiff under the 2017 Rules of Arbitration of the International Chamber of Commerce (ICC).[2]

A draft award was submitted to the International Court of Arbitration of the ICC (the ICC Court) for scrutiny, and the Secretariat of the ICC Court informed the parties in May 2021 that the ICC Court had approved the revised draft award (the May Award), which would be sent to the parties once it had been finalized and signed.[3] However, the tribunal later submitted another draft of the award to the ICC Court for scrutiny, and the Final Award was issued in September 2021.[4]

The Final Award was signed by a majority of the tribunal (the Majority), and found the plaintiff to be liable for damages.[5] One arbitrator (the Minority) did not sign the Final Award and instead

2 *CZT v CZU*, ¶ 8.
3 *CZT v CZU*, ¶ 13.
4 *CZT v CZU*, ¶¶ 14-16.
5 *CZT v CZU*, ¶ 16.

sent a copy of his dissenting opinion (the Dissent) to the parties.[6] In the Dissent, the Minority accused the Majority of "serious procedural misconduct", "continued misstating of the record", attempting "to conceal the true *ratio decidendi* from the Parties", "distortion of the deliberation history", lack of impartiality, and knowingly stating an incorrect reason for his refusal to sign the Final Award.[7] The Minority concluded that he had "lost any and all trust" in the Majority's impartiality.[8]

The plaintiff sought to set aside the Final Award in the Singapore High Court, on the grounds that: (a) the Majority had acted in breach of natural justice; (b) the Majority had exceeded the scope of submission to arbitration; (c) the agreed arbitral procedure of the parties had not been followed; and (d) the Final Award conflicted with the public policy of Singapore.[9]

In support of the setting aside application, the plaintiff also applied for orders for the production of the records of deliberations from each of the tribunal members (the Production Applications).[10] The proceedings were subsequently transferred to the SICC.[11]

The SICC's decision

The SICC declined to grant the Production Applications.[12]

It was undisputed that "the default position is that arbitrators' records of deliberations are confidential and are therefore protected against production orders".[13] The SICC noted that such protection is not expressly provided for in any statute,[14] but observed that it is an implied obligation in law, justified by several policy reasons: (a) confidentiality is a "necessary pre-requisite" for arbitrators to discuss the case frankly among themselves;[15] (b) it provides "[f]reedom from outside scrutiny" which thus enables arbitrators to reach their decisions "without restriction" and "without fear of subsequent criticism";[16] (c) it protects the tribunal from "outside influence", for example by discouraging the leaking of discussions or decisions by a dissenting arbitrator;[17] and (d) it helps to minimise "spurious" post-award challenges based on "matters raised in deliberations" and "is thereby critical to the integrity and efficacy of the whole arbitral process".[18]

However, the SICC also noted that the protection of the confidentiality of deliberations was not absolute.[19]

First, the SICC drew a distinction between: (a) situations where deliberations were protected by confidentiality, but an exception applied; and (b) situations where confidentiality did not apply in the first place.

- With regard to the latter category, the SICC held that the confidentiality of deliberations does not apply to "essential process issues" (for example, where an arbitrator has been excluded from deliberations), because they "do not involve an arbitrator's thought processes or reasons for [his or her] decision".[20]
- With regard to the former category, the SICC held that exceptions to confidentiality could be made "if the facts and circumstances are

6 *CZT v CZU*, ¶¶ 17-18.
7 *CZT v CZU*, ¶ 19.
8 *CZT v CZU*, ¶ 19.
9 *CZT v CZU*, ¶ 20.
10 *CZT v CZU*, ¶ 23.
11 *CZT v CZU*, ¶ 24.
12 *CZT v CZU*, ¶¶ 3, 80.
13 *CZT v CZU*, ¶ 43.
14 *CZT v CZU*, ¶ 42.
15 *CZT v CZU*, ¶ 44(a).
16 *CZT v CZU*, ¶ 44(b).
17 *CZT v CZU*, ¶ 44(c).
18 *CZT v CZU*, ¶ 44(d).
19 *CZT v CZU*, ¶ 45.
20 *CZT v CZU*, ¶ 50.

such that the interests of justice in ordering production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations".[21] Such an exception would be found only in the "very rarest of cases", as it would "take a very compelling case" to overcome the policy reasons for protecting the confidentiality of arbitral deliberations.[22] In particular, such a case would need to involve: (a) "very serious" allegations that (b) have "real prospects of succeeding".[23]

With the above principles in mind, the SICC then turned to consider the plaintiff's allegations that the Majority: (a) had decided a key issue on liability for reasons that were not contained in the Final Award, but in the May Award and thus breached the fair hearing rule; (b) had concealed its true reasoning behind the Final Award by submitting the May Award for scrutiny and later making material changes to it; and (c) lacked impartiality.[24]

The SICC held that an alleged breach of the fair hearing rule would not suffice to displace the confidentiality of deliberations, and in any event could be decided based on the arbitration record alone.[25]

The SICC also expressed doubt over whether an allegation that a tribunal had concealed its true reasoning was sufficient to constitute an exception, but opined that an alleged lack of impartiality could arguably constitute an exception because of the fundamental importance of impartiality in arbitration.[26]

However, the SICC did not come to a definitive conclusion on the issue because it held that the plaintiff had not shown that any of its allegations had real prospects of succeeding.[27] In support of its allegations, the plaintiff relied on various paragraphs in the Dissent.[28] However, the SICC held that the Dissent by itself was not sufficient because it did not "state any basis" for the "bare allegations", and represented only the Minority's "subjective views or opinions".[29] Further, it held that the Minority's allegation that the Majority lacked impartiality was based on his own "impression".[30]

Key takeaways

The SICC's decision is likely to be appealed given the novelty of the issue, and it remains to be seen whether and to what extent the Singapore Court of Appeal agrees with the SICC's approach. However, the SICC's decision as it stands provides some guidance to parties who may be considering to make (or resist) future similar applications for production.

- "Essential process issues" do not enjoy the protection of confidentiality of deliberations because such issues do not involve an arbitrator's thought processes or reasoning.[31]
- The production or disclosure of arbitral deliberations may be ordered if the interests of justice in making such an order outweigh the policy reasons for protecting the confidentiality of deliberations.[32] This would require allegations that are "very serious in nature" and have "real

21 *CZT v CZU*, ¶ 52.
22 *CZT v CZU*, ¶ 53.
23 *CZT v CZU*, ¶ 53.
24 *CZT v CZU*, ¶ 58.
25 *CZT v CZU*, ¶ 59.
26 *CZT v CZU*, ¶ 61.
27 *CZT v CZU*, ¶ 62.
28 *CZT v CZU*, ¶ 63.
29 *CZT v CZU*, ¶ 65.
30 *CZT v CZU*, ¶ 68.
31 *CZT v CZU*, ¶¶ 50-51.
32 *CZT v CZU*, ¶ 52.

prospects of succeeding".[33]

- A "very serious" allegation would be one that "attack[s] the integrity of arbitration at its core". For example, the SICC held that an allegation of corruption would qualify.[34] The SICC also observed that allegations of lack of impartiality "could" qualify, but did not reach a definitive conclusion on this issue.[35]
- For an allegation to have "real prospects of succeeding",[36] it must be more than a "bare allegation".[37] This leaves open the question of what level of detail would suffice to show that an allegation had "real prospects of succeeding". One possibility may be evidence from the Minority himself, either through affidavit or oral testimony, but this may be difficult to obtain voluntarily in practice.

The SICC's broad "interests of justice" standard may raise concerns over dissenting arbitrators tailoring their opinions in a way that exposes tribunal deliberations to publicity. However, this decision has also made it clear that any allegation must be sufficiently supported by evidence and cannot simply be conclusory in nature. This standard of proof should be sufficient to quash any unmeritorious production applications in the future. Overall, this is consistent with the Singaporean courts' pro-arbitration stance: intervention is only warranted in the most exceptional circumstances.

It should also be noted that the SICC's approach is broadly in line with cases from other jurisdictions:

- For example, in the English case of *P v Q and others* [2017] EWHC 148 (Comm) (*P v Q*), which the SICC referenced, a party applied to remove two arbitrators for misconduct,[38] and sought disclosure of communications between the arbitrators and the tribunal secretary to support its application.[39] Similar to the SICC's approach, the English Commercial Court held that disclosure would be ordered only if the allegation has a "real prospect of success",[40] the documents sought are "strictly necessary for the fair disposal" of the application,[41] and it is appropriate for the court to exercise its discretion and make such an order considering all the circumstances of the case.[42] Applying this standard, the English Commercial Court declined to order disclosure.[43]
- Second, in the case of *Vantage Deepwater Co. v. Petrobras Am., Inc.*, 966 F.3d 361 (5th Cir. 2020) (*Vantage v Petrobras* (5th Cir.)), in which Tai-Heng Cheng had obtained an award of US$622 million plus 15.2% compound interest for the client, a dissenting arbitrator alleged unfairness in the proceedings.[44] The losing party sought to vacate the majority award and also filed motions for discovery from the dissenting arbitrator as well as the American Arbitration Association (which had conducted the arbitration). The Fifth Circuit affirmed the lower court's decision to dismiss the motions for discovery, holding that a "court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process".[45] It then held that none of the examples raised by the losing party (including the dissent) was enough to establish that the first instance court was wrong to refuse the discovery motions.

33 *CZT v CZU*, ¶ 53.
34 *CZT v CZU*, ¶ 53.
35 *CZT v CZU*, ¶ ¶ 61-62.
36 *CZT v CZU*, ¶ 53.
37 *CZT v CZU*, ¶¶ 65, 70.
38 *P v Q*, ¶ 1.
39 *P v Q*, ¶ 22.
40 *P v Q*, ¶ 68(1).
41 *P v Q*, ¶ 68(2).
42 *P v Q*, ¶ 68(3).
43 *P v Q*, ¶¶ 69, 77.
44 *Vantage v Petrobras* (5th Cir.), 5.
45 *Vantage v Petrobras* (5th Cir.), 15.

About the authors

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Tai-Heng Cheng is global co-head of Sidley's international arbitration and trade practice and co-managing partner of Sidley's office in Singapore. Clients turn to him to solve their most significant legal problems. He has won and collected nine-figure awards for clients both in commercial and investment-treaty arbitrations.

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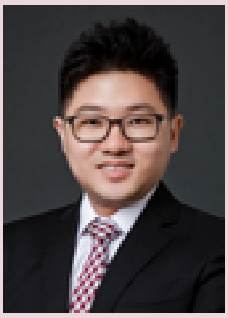
Z.J. Jennifer Lim is partner at Sidley, and focuses her practice on international dispute resolution and arbitration. She represents clients in investor-state and commercial arbitrations conducted under all major institutional and UNCITRAL rules seated in various jurisdictions around the world. Jennifer also has broad experience advising on general transnational litigation matters, including arbitration-related court proceedings and complex cross-border disputes, and sits as arbitrator under ICC and SIAC rules.

Jennifer is recognized as a Who's Who Legal (WWL) "Thought Leader – Global Elite 2023: Arbitration Future Leader", the highest accolade by the publication for outstanding lawyers aged 45 or under, and has been selected as a WWL "International Arbitration Future Leader" since 2019, where she was described as "one of the best arbitration lawyers of her generation" (2023).

Jennifer is qualified in New York, Hong Kong (non-practising), England & Wales, and Singapore. She is a member of the ICC Task Force "Addressing Issues of Corruption in International Arbitration".



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Nathaniel Lai is a counsel at Sidley, and focuses his practice on international arbitration and dispute resolution. He has acted for clients in international arbitration cases conducted under various institutional and ad hoc rules and in a wide variety of areas (including M&A, private equity, fraud, construction, sale of goods, life sciences, and technology disputes). He also has broad experience advising on general commercial litigation matters, including arbitration-related court proceedings, bankruptcy and insolvency issues, and complex cross-border disputes. Nathaniel is recommended by the Legal 500 Asia-Pacific 2023 for his International Arbitration experience. In addition to his work as counsel, Nathaniel is a member of the HKIAC's List of Arbitrators.

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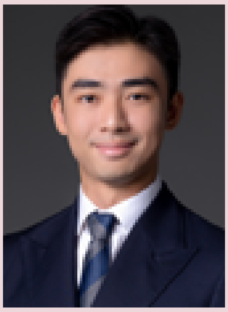

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Linming earned his LL.B. (First Class Honors) from the National University of Singapore, where he was one of the top two students in his first-year examinations. He also obtained his LL.M. from the University of Melbourne where his focus was on advanced commercial law and alternative dispute resolution.

ARTICLE

Serious irregularity standard in arbitration

Written by **RICHARD PIDGEON**

In *Cipla Limited v Salix Pharmaceuticals Inc* [2023] EWHC 910, the English High Court has confirmed a high threshold exists for successful challenges to awards on the basis that the arbitral tribunal committed serious irregularity because it failed to act fairly.

Background

In a 2009 agreement (the **Agreement**) Cipla Limited (**Cipla**) licensed Salix Pharmaceuticals Inc (**Salix**) to use some of its patent claims for amorphous rifaximin in exchange for obtaining royalties on the sales. Salix sold XIFAXAN® without paying royalties to Cipla. Cipla alleged sales of XIFAXAN® breached the Agreement as the drug contained amorphous rifaximin, but Salix maintained it contained only crystalline rifaximin (and no amorphous rifaximin).

Out of five possible patents there were two valid claims to amorphous rifaximin which were granted/issued patents and three claims

Irregularity standard in arbitration

In a dispute over pharmaceutical patents, the English Court of Appeal has confirmed the high standard for challenging an arbitral award based on serious irregularity.

were rejected because they had not been diligently prosecuted by Cipla. These two granted patents were the crucial focus of the argument.

The parties went to arbitration before Lord Neuberger of Abbotsbury, who produced an award dated 3 May 2022 (the **Award**). The Award found that Cipla:

1. proved the patents had amorphous rifaximin with the Figure 1 XRPD pattern, (which means that by x-ray powder diffraction analysis a distinct halo effect was produced);
2. failed to prove that the amorphous rifaximin in XIFAXAN® produced the Figure 1 XRPD pattern; and
3. failed to prove all amorphous rifaximin showed a Figure 1 XRPD pattern.

The Award dismissed Cipla's claim for a royalty for sales of XIFAXAN® tablets under the Agreement.[1]

Cipla's contentions

Cipla contended in *Cipla Limited v Salix Pharmaceuticals Inc*[2] that the tribunal had failed to act fairly under section 33 of the Arbitration Act 1996 (UK) (the Act) in so far as:[3]

- A serious irregularity emerged based on the tribunal's approach to the Figure 1 XPRD issue in a 26 October 2021 ruling (**26 October ruling**)[4] compared to how it was

1 *Cipla Limited v Salix Pharmaceuticals Inc* [2023] EWHC 910 at [22].

2 *Cipla*, above n 1.

3 Section 33 involves a duty to act fairly, impartially and to give a party a reasonable opportunity to put their case, answer their opponent's as well as the tribunal adopting procedures suitable to the circumstances of the case.

4 Whereby late evidence of Salix's as to polymorphism (different amorphous rifaximin giving off different XRPD patterns) was excluded.

handled in its Award. Cipla alleged that in the 26 October ruling the tribunal had ruled out evidence that different types of amorphous rifaximin gave off different XPRD fingerprints. Cipla assumed it was therefore able to rely on the inherency of amorphous rifaximin to only give a Figure 1 XRPD pattern. This meant Cipla did not focus on an issue it assumed was no longer live.

- The tribunal allegedly overlooked the evidence of one of Cipla's experts.

Therefore, after the Award was issued, Cipla applied under section 68 of the Act to challenge it on the basis of serious irregularity. The relevant part of section 68 holds:

> **68 Challenging the award: serious irregularity.**
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> (b) ...

Serious irregularity standard

It is a matter of natural justice that the parties are entitled to address the *essential building blocks* of the arbitrator's Award.[5] Nevertheless, parties face a *high hurdle*[6] to surmount under a section 68 challenge, otherwise noted as a *high threshold*[7] or *heavy burden*.[8] In *Ducat* it was noted that section 68 was *really designed as a long stop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*.[9]

The tribunal also does not have to refer to every piece of evidence:[10]

> Section 68 is not concerned with whether the tribunal has made the "right" finding of fact, any more than it is concerned with whether the tribunal has made the "right" decision in law. The suggestion that it is a serious irregularity to fail to deal with certain evidence ignores that principle.

High Court decision

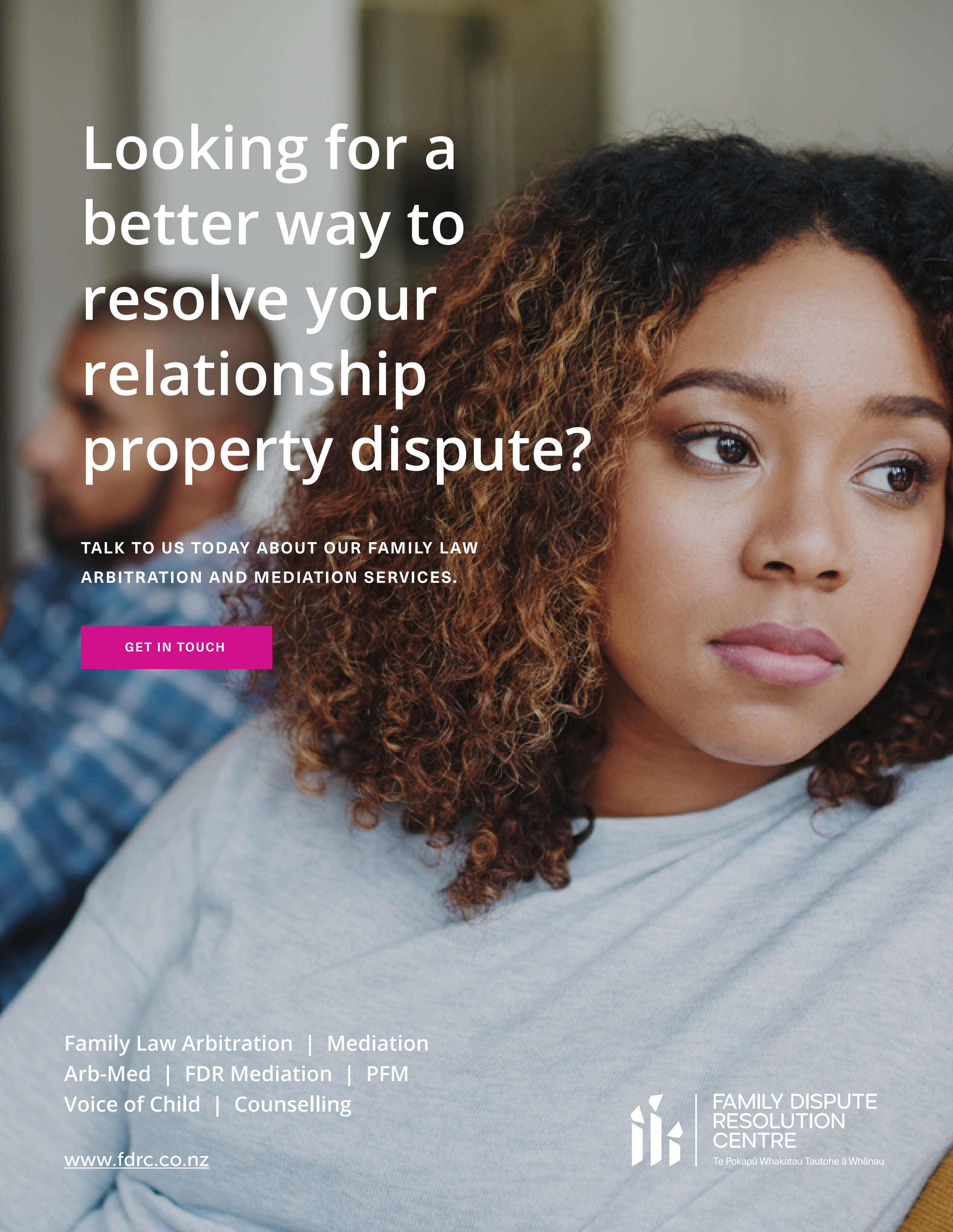
The High Court found for Salix in that the Award was not based on evidence or an issue which was not raised or argued. The Judge, Dame Moulder DBE, found that the 26 October ruling did not decide what issues were live in the arbitration. Cipla was still charged with proving to the civil standard that rifaximin in XIFAXAN® gave off Figure 1 XRPD patterns. Cipla failed to do this, hence the Award.

A secondary argument Cipla raised was that the tribunal had accepted its evidence in the 26 October ruling then overlooked or contradicted it in the Award. The Judge found that the tribunal had set out the *essential building blocks* for its decision and could not be faulted even if it did not refer to every piece of evidence.[11]

Conclusion

The English Courts will rarely intervene when a section 68 application arises. Something where the tribunal has *gone so wrong* as to require judicial correction is required. This case did not reach that standard by any measure. This case emphasises that England and Wales is an arbitration-friendly jurisdiction and that counsel should be clear in argument to clarify what issues need addressing, then address them.

5 *OAO Northern Shipping Co v Remolcadores De Marin SL* [2007] EWHC 1821 at [23].
6 *Ducat Maritime Ltd v Lavender Shipmanagement* [2022] EWHC 766 at [23] [***Ducat***].
7 *Lesotho Highlands Development Authority v Impregilo SpA and Others* [2006] AC 221 at [28].
8 *New Age Alzarooni 2 Ltd and Another v Range Energy Natural Resources Inc* [2014] EWHC 4358 at [12].
9 *Ducat*, above n 6, at [23].
10 *Cipla*, above n 1, at [99].
11 *Cipla*, above n 1, at [96].



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REGULAR

Case in Brief:

Leave for second appeal declined in lease dispute arbitration

Written by **RICHARD PIDGEON**

In *The Gama Foundation v Fletcher Steel Limited* [2023] NZCA 243, the Court of Appeal reiterated the strict New Zealand tests set out in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) and *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2008] 2 NZLR 591 for appellate intervention into arbitral awards and the requirement to set aside an award on public policy grounds.

Background

The Gama Foundation (**Gama**) leased industrial premises in Christchurch to Fletcher Steel Limited (**Fletcher**) from 2006 to 2016. The premises were damaged in the Christchurch earthquakes of 2010 and 2011. Fletcher had an obligation to repair and maintain the premises and yield them up in good repair at the expiry of the term. Fletcher had refrained from doing this as it would interrupt its business, and Gama ultimately undertook the works and sought

Second appeal declined

The Court of Appeal has declined to hear an appeal about an arbitral award regarding a leased property damaged in the Christchurch earthquakes.

reimbursement from Fletcher plus interest.

The general rule at common law is that the measure of damages for breach of the covenant to repair by a tenant is the cost of putting the premises into the state of repair required by the covenant.[1] The parties could not agree on the amount of damages, and this went to arbitration before Tomas Kennedy-Grant KC.[2] On 5 February 2020 an award was released and Gama succeeded in part and was awarded a sum of $320,000 (plus GST) which Fletcher paid.

High Court decisions

Gama's application for leave to appeal the award was declined.[3] This application was based on clause 5(2) of the second schedule of the Arbitration Act 1996 (the **Act**). The declinature was primarily as explained by the Court of Appeal in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* (*Doug Hood*),[4] for the pre-condition in clause 5(2) is designed to ensure disputes will not be referred to the High Court if, as between the immediate parties, the matter is largely academic.

An application to set aside the award under clause 34, Schedule 1 of the Act was also filed and disposed of. The award included paragraph 14, which determined that repudiation of Fletcher's obligations was not in issue. Gama maintained this was a misunderstanding and wished to set aside this element of the award and remit that part to the arbitrator for consideration and to calculate damages. On a

1 *Joyner v Weeks* [1891] 2 QB 31 (CA); *Māori Trustee v Rogross Farms Ltd* [1994] 3 NZLR 410 (CA).
2 At issue was whether the repairs could have been carried out on a cheaper or more restricted basis.
3 *The Gama Foundation v Fletcher Steel Ltd* [2021] NZHC 633, (2021) 22 NZCPR 161. [High Court judgment]
4 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) at [11].

close study of the events at the arbitration, Justice Osborne ruled that counsel for Gama made the submission unequivocally in his opening that repudiation was not in issue. It was dealt with in the award. Gama denied making this submission. Gama submitted the arbitrator's disregard of Gama's *closing* submissions was a breach of the public policy of New Zealand[5] and the rules of natural justice.[6]

Justice Osborne declined to set aside this part of the arbitral award.[7]

On the papers, the High Court further declined leave for a second appeal to the Court of Appeal.[8] This application dealt with the High Court judgment for leave to appeal (not to set aside) and considered the test for leave under clause 5(5), Schedule 2 of the Act:[9]

(a) The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.

(b) Upon a second appeal, the Court of Appeal is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below.

(c) Not every alleged error of law is of such importance either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.

Court of Appeal decisions

On application, the Court of Appeal then granted special leave to appeal the High Court judgment on the following simplified questions:[10]

(a) Did the arbitrator err in finding that the rule in *Joyner v Weeks* precludes recovery of costs reasonably incurred in mitigation?

(b) If yes, which party bears the onus of proving the reasonableness of the costs incurred in mitigation?

(c) In all the circumstances, did the arbitrator err, when considering the reasonable and proper amount required to put the premises into the state of repair in which they ought to have been left, in failing to have regard to the prevailing circumstances at the time the lessor undertook the repair work?

Following a hearing on 23 February 2023, the Court of Appeal dismissed the second appeal against the High Court judgment.[11] The Court found the arbitrator had not erred in his interpretation of the rule in *Joyner v Weeks* as it applied to the facts. Furthermore, the Court would not have exercised its residual discretion to grant leave based on a combination of the eight *Doug Hood* factors.[12]

Conclusion

The decision confirms the strict parameters of applications to first obtain leave to appeal an award under clause 5, Schedule 2 of the Act and secondly, to try and set aside an award (on public policy grounds) under clause 34, Schedule 1 of the Act. This supports the proposition that New Zealand is an arbitration-friendly jurisdiction and courts will be very circumspect before intervening.

5 Article 34(2)(b)(ii) of schedule one of the Arbitration Act 1996.

6 *Gama Foundation v Fletcher Steel Ltd* [2021] NZHC 635 at [51],[52]; *Trustees of Rotaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 and *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* HC Wellington Civ-2008-485-2816, 17 July 2009.

7 *Gama Foundation v Fletcher Steel Ltd* [2021] NZHC 635 at [68].

8 *Gama Foundation v Fletcher Steel Ltd* [2021] NZHC 2514. The application dealt with the rule in Joyner v Weeks and the interest clauses of the lease.

9 As noted in *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2007] NZCA 355, [2008] 2 NZLR 591 which endorsed Cooper v Symes (2001) 15 PRNZ 166 (HC) at [12].

10 *Gama Foundation v Fletcher Steel Ltd* [2022] NZCA 314.

11 *Gama Foundation v Fletcher Steel Ltd* [2023] NZCA 243.

12 Precedent value, focal reason of award, was the arbitrator legally qualified, great significance to parties, substantial quantum, disproportionate delay, agreed finality of award and international nature of dispute.

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ARTICLE

LET ME HEAR YOUR BODY TALK

Hong Kong court refuses to set aside arbitral award over claim lawyer couldn't read witness' body language in virtual hearing

Written by **KATE HOLLAND**

In *Sky Power Construction Engineering Limited v Iraero Airlines JSC* [2023] HKCFI 1558, the losing party in an arbitration unsuccessfully applied to set aside the award on the basis that the virtual hearing had prevented it from adequately examining witnesses and presenting its case. The Hong Kong Court of First Instance found 'no merit' to this, and held that an in-person hearing would not have resulted in a different outcome. The decision highlights the Hong Kong courts' acceptance of virtual proceedings as the new normal in a post-pandemic world.

Let's get physical: arbitrator's first order

This case concerned an arbitration between a Hong Kong company, Sky Power Construction Engineering Limited (**Sky Power**) and a Russian company, Iraero Airlines JSC (**Iraero**). The arbitrator was based in London. The parties came to an agreement that while the arbitrator and some of the expert witnesses would attend the hearing remotely via video link, the parties' legal counsel and factual witnesses would attend together in person at a location in Moscow.

Sky Power Construction Engineering Limited v Iraero Airlines JSC [2023] HKCFI 1558

The Court acknowledged that virtual proceedings are commonplace since the pandemic, and that any difficulties cross-examining witnesses remotely are experienced by both parties.

The arbitrator made an order to this effect (**arbitrator's first order**).

Let's get virtual: arbitrator's second order

In the event, the hearing had to be postponed because the arbitrator caught Covid-19. Sky Power then announced that its only factual witness could no longer make the journey to Moscow to attend the hearing in person, due to the risk of contracting Covid during travel and also the disruption it would cause to his business.

Sky Power therefore requested that the hearing proceed on a fully virtual basis instead. Iraero objected to this, and wanted the hearing postponed until Sky Power's witness was able to travel to Moscow to attend in person.

Rather than postpone the hearing again, the arbitrator made a new order (in line with Sky Power's request) to proceed on a fully virtual basis (**arbitrator's second order**). The arbitrator would appear remotely by video link from London; Sky Power's counsel and witnesses would appear from Moscow; and Iraero's counsel and witnesses would appear from Irkutsk.

Enforcement order and application for set aside

Following the hearing, the arbitrator made an award in favour of Sky Power. Sky Power then sought recognition and enforcement of the arbitral award in Hong Kong. The Court of First Instance (the **Court**) granted Sky Power's application for an enforcement order.

Iraero applied for an extension of time to apply to set aside the enforcement order. The basis of its setting aside application was that the arbitrator's second order was a serious procedural error, and the outcome of the award would have been different had the hearing not been fully virtual. Iraero argued:

- Power to make order contrary to prior agreement

The arbitrator had no power to alter the parties' prior agreement (and the arbitrator's first order) and make the second order for a fully virtual hearing, especially given Iraero's objections to that change.

- Duty of equal and fair treatment

The arbitrator had failed in her duty to give equal and fair treatment to the parties by siding with Sky Power's request for a fully virtual hearing, over Iraero's objections.

- Assessment and testing of evidence

The fully virtual nature of the hearing prejudiced Iraero, because its legal counsel was unable to adequately present its case or adequately cross examine Sky Power's factual witness, or assess his demeanour, genuineness and authenticity. Also, Iraero's main witness had wanted the opportunity to present his oral evidence in person, due to his age.

No merits

The Court dismissed the extension of time application, finding no merit in any of Iraero's arguments for setting aside the enforcement order.

The arbitrator had the power to make an order contrary to the parties' prior agreement

The Court dismissed Iraero's argument that the arbitrator had no power to make the second order that the hearing be fully virtual. Under the arbitration agreement rules (based on sections 33 and 34 of the UK Arbitration Act 1996), an arbitrator has the power to decide all procedural and evidential matters, subject to the parties' right to agree on them.

The Court noted that while the parties had previously agreed on a semi-virtual hearing, once Sky Power had requested it be changed to a fully virtual hearing and Iraero opposed this, the parties could no longer be said to be in agreement:[1]

> There is clearly no basis for the Respondent to claim that the tribunal did not have power, in the absence of the Respondent's agreement, to direct the hearing … to take place in the form ordered, on virtual basis. The tribunal is given wide discretion and powers under the Act…

There was therefore nothing to constrain the arbitrator from deciding how the hearing would proceed; in fact in the absence now of party agreement on the matter it was her

1 *Sky Power Construction Engineering Limited v Iraero Airlines JSC* [2023] HKCFI 1558 at [36].

duty to make a decision. The parties' prior agreement did not prevail over the arbitration rules or the Act.

The arbitrator complied with her duty of equal and fair treatment

The Court also rejected Iraero's claims that the arbitrator had failed in her duty to act fairly and impartially as between the parties by making the second order for a fully virtual hearing despite Iraero's objections.

Rather, the Court found that the arbitrator had carefully considered this duty in making her decision, as well as her duty to adopt procedures which were suitable to the circumstances and to avoid unnecessary delay and expense.

The Court noted that the hearing had already been delayed and there was continued uncertainty around the pandemic and the risk of future travel restrictions. It agreed that in those circumstances it was appropriate for the arbitrator to decide to proceed on a virtual, rather than an in-person basis.

No prejudice in assessment and testing of evidence

The Court also rejected Iraero's claims that it had been prejudiced by being unable to cross-examine Sky Power's witness in person, and being unable to adequately scrutinise their demeanor. The Court made explicit reference to the fact that virtual hearings are now par for the course given world events. It again referred to the arbitrator's wide discretionary case management powers in matters of procedure, evidence and flexibility; powers which are not appropriate for the courts to interfere with or question:[2]

> Remote hearings are now commonplace in court proceedings as well as in arbitrations, even before but particularly more so after the pandemic... 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...

Further, the Court found that Sky Power did not gain any unfair advantage, because any inconvenience and difficulties Iraero may have experienced in putting its case and presenting and testing the witnesses' evidence were suffered by both parties.

Overall, the Court found no disadvantage to Iraero and that it had been given a reasonable opportunity to put its case and test Sky Power's case. The Court found no serious procedural error and disagreed that the outcome would have been different if the witnesses had given evidence in person:[3]

> I cannot see any real injustice or prejudice to the Respondent, in the sense that the outcome of the Arbitration could have been different, if the hearing had not been conducted on fully virtual basis. There is no permissible ground to set aside the Enforcement Order and refuse recognition of the Award.

Conclusion: A different animal?

Evidential procedures have evolved. The Court in this case recognised that virtual hearings are the new normal, and the decision seems to accept that the difficulties in presenting and testing witness evidence in a virtual setting are somewhat unavoidable.

In the face of this new breed of procedure, legal practitioners will have to adapt the traditional methods and approaches of presenting and challenging witness evidence. The days of cross-examination in the witness box are increasingly becoming a thing of the past, so the techniques for undermining an opponent's case will have to evolve too.

About the author

Kate Holland works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with NZDRC and NZIAC. She previously practised as a solicitor in the UK with an international commercial firm and has particular experience in trust law and succession planning.

2 Above n 1, at [39].

3 Above n 1, at [41].

Court orders parties back to arbitration

Written by **SAM DORNE**

The recent case of *Sesderma, S.L. v Seeky International Limited and Golong Co. Ltd* [2023] HKCFI 1619, heard in the Hong Kong Court of First Instance, examined the law of issue estoppel and the governing law of arbitration agreements.

An issue estoppel arose as a prior Hong Kong Court ruling held that the contract between the disputing parties which contained an exclusive jurisdiction clause had been superseded by the contract containing a China International Economic and Trade Arbitration Commission (**CIETAC**) arbitration clause.

The Court found that regardless of the issue estoppel the parties were bound by the arbitration clause and the proceedings were stayed.

Back to arbitration

The Hong Kong Court of First Instance has ordered parties back to arbitration in light of issue estoppel and their arbitration agreement.

Background

The dispute in question arose from a distributorship arrangement between Sesderma, S.L. (**S**) and Golong Co., Ltd (**G**). Initially, the parties entered into a 2017 agreement, which included an exclusive jurisdiction clause favouring the Hong Kong courts should any dispute arise. Subsequently, a 2018 agreement was concluded, extending G's distributorship to other jurisdictions and containing an arbitration clause for CIETAC arbitration in the People's Republic of China (**PRC**).

S commenced Hong Kong court proceedings against Seeky International Limited, an allegedly related company of G, advancing claims of trademark squatting and unlawful interference with business and contracts.

G was later joined as a defendant and applied to stay the proceedings, arguing that the claims fell within the scope of the arbitration clause in the 2018 agreement.

Court proceedings

The Court, presided over by Justice Mimmie Chan, granted the stay primarily on the basis of issue estoppel.

Issue estoppel is a legal doctrine that prevents a party from relitigating an issue that has already been decided in a previous case. It is based on the principle that once a Court has made a final decision on a particular issue, that decision is binding on the parties and cannot be re-litigated in subsequent proceedings unless by way of an appeal to an appellant Court.

As such, S was barred from arguing that the exclusive jurisdiction clause in the 2017 agreement applied to the dispute, as previous Court findings in enforcement proceedings had established that the 2017 agreement had been replaced and superseded by the 2018 agreement.

Furthermore, the Court held that even if issue estoppel did not apply, there was a prima facie case that the parties were bound by the arbitration clause in the 2018 agreement. The Court referred to expert evidence on PRC law, which indicated that the dispute over trademark squatting fell within the scope of the arbitration clause.

The Court also applied the "Fiona Trust" presumption, suggesting that absent clear language excluding certain questions, rational business people would likely intend any dispute arising from their relationship to be decided by the same tribunal.

In concluding, the Court held:

> a prima facie case is all that is required as to the existence of a valid arbitration agreement, and unless the point is clear that there is no such agreement, or that any arbitration agreement is invalid, inoperative or incapable of being performed, the matter should be referred to the tribunal for decision as to its own jurisdiction. There is no suggestion that the arbitration agreement in the 2018 Agreement is in any way invalid, inoperative or incapable of performance.

Conclusion

This case provides insights into the application of issue estoppel and the governing law of arbitration agreements. The Court's decision reinforces the importance of honouring arbitration clauses, and highlights the presumption that the governing law of the main contract will generally extend to the arbitration agreement unless exceptional circumstances dictate otherwise. This case serves as a reminder of the significance of carefully drafting and interpreting arbitration agreements to avoid potential disputes and ensure effective dispute resolution mechanisms.

About the author

Sam Dorne works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with NZDRC and NZIAC. He recently returned to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.

ARTICLE

LinkedIn Lips Sink Ships

The Singapore Court of Appeal has explained the kind of circumstances that need to be present if parties want proceedings to be heard in private.

LinkedIn lips sink ships

Singapore Court of Appeal finds India had already posted into the public domain

Written by
ALEXANDER LYALL

In a recent decision, *The Republic of India v Deutsche Telkom AG* [2023] SGCA(I) 4, the Singapore Court of Appeal helps clarify the circumstances where the amended privacy provisions of Singapore's International Arbitration Act may not apply.

Background

In 2005, Devas Multimedia Pvt Ltd (**Devas**), a company of which Deutsche Telekom AG (**DT**) is a large shareholder, entered into an agreement with the Indian state-owned entity, Antrix Corporation Ltd (**Antrix**). Devas was to construct throughout India a hybrid satellite and terrestrial communications service. By 2011, the agreement had been terminated and DT commenced arbitration proceedings in Geneva against the government of India, the whole owners of Antrix. DT argued that the annulment of the agreement violated the bilateral investment treaty between Germany and India.

The arbitral tribunal issued an award against India. In an attempt to have the award set aside, India initiated proceedings in the Swiss Federal Supreme Court but was unsuccessful. DT sought to have the award enforced in Germany and the United States, as well as in Singapore.

A plea for privacy in the Singapore Court of Appeal

For India, it was important that the Singapore Court of Appeal (the **Court**) dealt with matters confidentially. Part of the Court's orders for privacy included the direction that any information (including the identity of the parties) not be publicly revealed.

India rested its arguments for privacy on the clear fact that revealing information in the proceedings would exhibit crucial information from the arbitration proceedings. It would also reveal information from another arbitration between the companies involved in the dispute, Devas and Antrix.

One of India's primary fears was that any reputation it had as a worthwhile location for foreign investment would be damaged. As an example of what they feared, a public relations campaign against the Indian government had already begun. The website for the campaign heavily criticised the supposed mishandling of the business relationship between Devas and Antrix by the Indian government.

DT argues for open justice

Initially, DT shared India's view that the proceedings needed to be heard privately. DT had concerns about its creditors' potential fears. When this ceased to become an issue, DT took the position that the proceedings should be made public. DT highlighted the fact that the information was mostly in the public domain and so it did not matter if the Court proceedings were heard in public.

Parts of DT's arguments included the principles of allowing open justice and promoting the public interest. If successful, India would be relying on the Court's inherent powers to grant confidentiality orders. To invoke these powers would not be in the interests of justice. Furthermore, the case concerned an investment treaty arbitration. DT argued that this meant the subject matter was one of public interest. Where public interest is present, giving power to the principle of open justice should be a priority.

Should the information be public?

The Court, led by Chief Justice Sundaresh Menon, dismissed India's application for confidentiality.

In coming to the decision, the Court first outlined the general balancing act between making the subjected information public and keeping it confidential. The Court began by stating that although the

Court had an inherent power to make information confidential, its default should be to make the information accessible. The Court stated that to make a confidentiality order would contravene the hallowed principle of open justice. This disruption would mean that a confidentiality order should be an exception and not the norm.

After stating the Court's preference for open justice, the Chief Justice contended with the reality that this preference would have to be overruled if a statute mandated otherwise. That was the case here, as sections 22 and 23 of Singapore's International Arbitration Act (the **Act**) provided for *proceedings to be held in private* and that there are to be *restrictions on reporting of proceedings heard in private*. In short, proceedings concerning international arbitration will by default be held in private and made confidential. This, however, was subject to the Court's own views and it could direct that the enforcement proceedings be heard in open court at section 22(2) of the Act.

However, the Court questioned whether it was a specific type of information that was to be made confidential, rather than a blanket requirement. Sections 22 and 23 did little to comment on the type of information to be confidential by default, so the Court explored the history of the legislation.

The position that proceedings should be confidential by default had come into effect after a change in the legislation in 2022. Until that point, the position was that a party was to apply for confidentiality if it felt the proceedings needed to be such. At the time of the change, the minister responsible made clarifications around the intentions of Singapore's parliament.[1] Going forward, the default position of court proceedings dealing with arbitral awards was that they are to be held privately as a default. However, the Court could still order the hearing to be held in public and its judgment made public.

The Court read the minister's statement to mean that court

1 See discussion under Courts (Civil And Criminal Justice) Reform Bill.

proceedings would be private by default for the sake of the parties. It would attempt to keep the ordinarily private arbitration process confidential. This last point was important. It meant that the ordinarily strong preference for open justice would only be overruled if it meant the arbitration process could remain private. It stood to reason then, that if the arbitration process was not confidential, the Court could revert to its preference of open justice.

Citing *Dorsey James Michael v World Sport Group Pte Ltd,* the Court stated the principle as *the court should not be made to go through an empty exercise to protect confidentiality when there is nothing left to protect.*[2]

In response to India's fear of reputational harm, the Court suggested that, in fact, it was perhaps best for India for the proceedings to be held in the open.[3] If potential investors could hear India's side of events, they may be more inclined to trust the Indian government's processes in dealing with foreign investment.

Was India and DT's arbitration private?

The Court then found it necessary to see if the arbitration between India and DT fitted the description of arbitration undertaken privately. The Court looked at several instances relevant to the proceedings that indicated it had not been:

- Third-party websites had hosted the contents of interim and final awards issued in the arbitration.
- The Swiss Federal Supreme Court's decision was publicly available. The names of DT, Devas and Antrix were redacted, but not India's.
- Details were made public from enforcement proceedings occurring in the USA and in Germany. A publicly accessible news outlet covered the proceedings in Germany.
- A prominent international arbitration journal had expressly identified India and DT as parties to enforcement proceedings in Singapore.

Concerning the last point, India submitted that the journal had been published without verification from formal court documents. Unfortunately for India, they themselves had essentially confirmed their presence as a party in the proceedings. In March 2022, lawyers representing India in Singapore had published a post on LinkedIn identifying India as a party to the court proceedings. The lawyers stated the size of the award and provided a link to the article India has now distanced itself from. This post was only taken down when DT's lawyers contacted India's to highlight their concern at the information being shared.

Mindful of these elements, the Court viewed that the confidentiality of the arbitration had been lost.

Conclusion

The Republic of India v Deutsche Telkom AG outlines how the courts in Singapore may approach the changes to Singapore's International Arbitration Act. The amendment to the Act intended to change the default setting of how privacy is to be treated. However, the Court has still identified an inherent value in open justice; and indicated that proceedings should be conducted in this way when possible. Invoking section 22(2), as Chief Justice Sundaresh Menon did here, led the Court to actively assess whether the dispute warranted the default deference to privacy and confidentiality. Considering the Court of Appeal's approach, parties looking to enjoy confidentiality in Singapore should be cautious about what they share, and importantly, where they share it.

About the author

Alexander Lyall is a Research Clerk in The ADR Centre's Knowledge Management team, working with NZDRC and NZIAC. He gained his LLB from the University of Canterbury, and he also holds a BA in political science, media studies, and Te Reo Māori. His writing has previously been published by Radio New Zealand, The Spinoff and The Press.

2 *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 at [63].

3 *The Republic of India v Deutsche Telkom AG* [2023] SGCA(I) 4 at [46].

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