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ReSolution

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From the Editor

Tēnā koutou katoa

Welcome to the 38th issue of ReSolution.

Our work at NZIAC and NZDRC in this final quarter of 2023 has shown no signs of slowing down. I have had the privilege of being asked to present at several conferences and events over the last quarter, both domestically in New Zealand and abroad within the Asia-Pacific region. In preparing for these events, I have been particularly pleased to hear the strong interest in engaging in dialogue about how we can deliver private dispute resolution services more effectively and efficiently to support better access to justice. This is a critical objective that should always be front of mind when promoting and delivering any dispute resolution service.

ReSolution Issue 38 continues our work bringing together a broad range of topics from around the globe. In our feature article, we share our thoughts on the Southern Link, which identifies New Zealand as a critical trade and tourism connection between Asia and Latin America. This issue also provides commentary on developments related to consumer contracts, inter-partes correspondence, and whether fraud claims are arbitrable. We also take an in-depth look at the Incorporated Societies Act 2022, which came into force in October.

As always, I wish to take this opportunity to thank all those who have contributed to this issue of ReSolution. We are grateful for the support we receive from dispute resolution professionals, law firms, authors and publishers. 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.

Ngā mihi nui, nā
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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ReSolution *in Brief*

New Zealand Law Commission: tikanga in arbitration

On 21 September 2023 the New Zealand Law Commission released He Poutama (Te Aka Matua o te Ture | Law Commission) NZLC SP24, a study paper which reviews tikanga in Aotearoa New Zealand law. At pages 251–253 the Commissioners considered *The use of arbitration to resolve tikanga disputes.*

At present the Arbitration Act 1996 is more suitable for commercial disputes. The Commissioners suggested that new, tailored default rules in the Arbitration Act 1996 might work well for tikanga disputes. Due to high party autonomy in arbitration, there is already the flexibility to conduct arbitrations in te reo Māori, or on a marae, and to adapt rules of evidence and procedure under the natural justice rubric. Arbitrators can be appointed for expertise in tikanga. Ideally parties will agree from the outset as to how to promote a dispute resolution process consistent with tikanga (see *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1). In keeping with specialisation, appeals on points of law (or points of tikanga) might be directed to a specialist tribunal or to the Māori Land Court or Māori Appellate Court.

Wendy's arbitration

The franchisor of the Greenlane Wendy's Restaurant declined to renew the lease and declined to arbitrate the matter in *Wendco (NZ) Limited v Howley and Others* [2023] NZHC 2061 Justice van Bohemen ruled that there were insufficient prospects of success for interim orders to be granted, so as to support arbitration, so declined the application. The focus was on whether the parties had renewed the lease in 2018. The plaintiff had sought to institute arbitration but the defendant trustees had not agreed to it. Hon Raynor Asher KC was appointed arbitrator. Counsel for the defendants indicated his clients would attend the arbitration if the Judge directed that it occur. The arbitrator would take no steps until the Judge ruled on the application. The trustees undertook not to re-enter the premises pending the outcome of the litigation. Justice van Bohemen did not grant the interim orders sought, for the following factual reasons:

- There was no binding agreement in July 2018 to extend the lease and this was clear from the contemporaneous documents.

- In resolving whether there is a serious question to be tried, the courts will not look uncritically at the evidence. There was no serious question to be tried.
- No reasonable person, having the background knowledge of the key representatives of the parties, would interpret the key email correspondence as amounting to an agreement to extend the lease.
- By agreement in an *Addendum*, there was no serious question to be tried that the trust is precluded from using the Greenlane premises other than as a Wendy's Restaurant as long as a franchisee is willing to operate a Wendy's Restaurant from there.
- The plaintiff's lease had expired and it was bound to vacate the premises.
- The defendant trustees were of the view the plaintiffs could not succeed and would accordingly not agree to go to arbitration.

Orders declining the application were made accordingly as the plaintiffs had not satisfied the requirements of article 17B(1)(c) of Schedule 1 of the Arbitration Act 1996, that is, that *there is a reasonable possibility that the applicant will succeed on the merits of the claim*.

Sign of the times

In *Lumo Digital Outdoor Limited v Sullivan* [2023] NZHC 2357 Justice Gwyn considered an application for interim relief pending arbitration. The dispute was over a licence to use two digital billboards in Wellington and Porirua. The licensor purported to terminate the licence without offering the licensee a first right of refusal. The licensee sought to act on the arbitration clause in the licence and sought an injunction restraining the licensor from dealing with a third party media company for use of the signs.

Justice Gwyn granted the injunction with a short, finite

timeframe for the licensee to file a notice of arbitration. Her Honour considered (a) whether there was a serious question to be tried, (b) the balance of convenience, and (c) the overall interests of justice. She maintained a right of first refusal was triggered as soon as the two-year trial licence expired and the legal issues were matters on which the applicant might succeed. As to whether damages would be an adequate remedy, this was connected to the conduct of the parties. The respondent could not create its own inconvenience, in contracting with the third party competitor of the applicant, and have it weighed on the scales of inconvenience. The overall interests of justice favoured the granting of the injunction. The respondent was restrained from dealing with the third party competitor. The status quo for the licensee remained until the arbitration concluded.

Developer's arbitration

A developer of a retirement home sought an injunction against a subcontractor in *Foundation Village Limited and Anor v Growing Spaces* [2023] NZHC 2368, seeking interim orders (restraining the defendants from dealing with goods) prior to arbitration. The Court was called upon to see whether it had jurisdiction to grant the orders and if so, whether to grant them.

Justice Tahana held that the Court does not have jurisdiction to grant the orders sought by the plaintiffs because Schedule 1 of the Arbitration Act 1996 is prescriptive. The Court only has jurisdiction as limited to what is prescribed in Schedule 1. The relief sought was excluded and no general or residual powers to grant injunctive relief survived. The relief was sought by way of interlocutory injunction under rule 7.53 of the High Court Rules 2016 but could not *ride roughshod over the Act and the arbitration agreement*. The power to grant interim orders was focused on article 17 of Schedule 1, and this application did not align with that provision. The Court lacked jurisdiction and did not consider the merits.

New Code of Conduct adopted for arbitrators in investor-state dispute arbitration

The United Nations Commission on International Trade Law (**UNCITRAL**) has adopted the Code of Conduct for Arbitrators in International Investment Disputes. The Code was in development since 2017 and applies to arbitrators in investment arbitration. It also sets standards relating to integral components of the work.

The Code contains a mixture of new and old rules. For example, at Article 7 there is a prohibition on ex parte communications save certain circumstances, such as during the initial appointment of the arbitrator. Older duties are reinforced, such as the need to be independent and impartial.

Article 4 contains rules against "double-hatting". This is a practice where one individual acts in two different roles simultaneously. Unless there is agreement by the parties, no arbitrator may simultaneously act as either a legal representative or expert witness in another case involving the same measures, the same or related parties, or the same provisions of the same instrument of consent. This prohibition will generally continue after the end of the arbitrator's tenure for three years from that point.

Article 8 contains rules on confidentiality. Unless the parties agree otherwise, an arbitrator cannot disclose any information relating to proceedings. This includes releasing the draft of any award. An arbitrator also cannot comment publicly on a decision unless that decision is already public. This prohibition extends to any period where the award is being subject to review or challenged in the courts.

The Code will apply to arbitration proceedings only when the parties have consented to their incorporation. The International Centre for Settlement of Investment Disputes (**ICSID**) have said they will consult further with member states on the extent of the Code's application in ICSID proceedings.

English Law Commission publishes final review of Arbitration Act 1996

In ReSolution issues 35 and 36, we covered the English Law Commission's previous two portions of the review of the Arbitration Act. In September 2023, the English Law Commission released the report in full, in addition to draft legislation. In short, the report does not recommend full-scale changes to the Act, instead opting for *a few major initiatives, and a very small number of minor corrections*. In terms of the major initiatives, the Commission recommends:

- codification of an arbitrator's duty of disclosure;
- strengthening arbitrator immunity around resignation and applications for removal;
- introduction of a power of summary disposal;
- a revised framework for challenges under section 67 (substantive jurisdiction);
- a new rule on the governing law of an arbitration agreement; and
- clarification of court powers in support of arbitral proceedings and in support of emergency arbitrators.

The Commission also recommends these minor corrections:

- making appeals available from an application to stay legal proceedings;
- simplifying preliminary applications to court on jurisdiction and points of law;
- clarifying time limits for challenging awards; and
- repealing unused provisions on domestic arbitration agreements.

The report includes draft legislation, indicating how the Commission wishes the UK Government to implement the recommendations.

France challenges arbitration award in English Commercial Court

In *London Steam-Ship Owners' Mutual Insurance Association Ltd v French State* [2023] EWHC 2474 (Comm), the English Commercial Court reaffirmed several factors constituting an award under the Arbitration Act 1996 (UK). The decision stems from arbitration proceedings from 2019 between the French state and the London P&I Club (the **Club**). In those proceedings, the arbitrator issued an award against the French state. The French state argued against its enforcement. In its submissions to the Court, it argued that the awards could not be considered as such for the purpose of the Arbitration Act.

The Court rejected this argument on several grounds:

1. The award called itself an award. It purported to be an award.
2. It complied with the formal requirements for an award under section 52 of the Arbitration Act.
3. It dealt with the substantive rights and liabilities of the parties, setting out the reasoning of the arbitrator in detail.
4. There were matters for which the arbitrator expressed a concluded view. It was clear that the arbitrator's authority in these matters had reached a definitive end. Having issued the award, the arbitrator could not reach a different conclusion. It was a final decision, not a "provisional view".
5. Matters where the arbitrator left issues for later determination were marked clearly as "partial awards" for the purpose of section 47.
6. In Justice Butcher's view, a *reasonable recipient* of the award would have regarded it as such.

Regarding matter (6), Justice Butcher noted the position at common law that a reasonable recipient is likely one who considers the objective attributes of the decision relevant. Justice Butcher also provided his own views, going beyond the explicit statements of the authorities. In his view, a reasonable recipient would also consider matters such as whether the decision complies with the formal requirements of an award. Crucially, a reasonable recipient is somebody who has all the information that would have been available to the parties and the tribunal when the decision was made.

English Commercial Court considers whether appointment procedure failed

In *Global Aerospares Limited v Airest AS* [2023] EWHC 1430 (Comm), the Court was asked to determine a matter concerning an awkward attempt by two parties to appoint an arbitrator. The decision concerned Global Aerospares Ltd (the **claimant**) and Airest AS (the **respondent**), with the former supplying the latter with aircraft parts. When a dispute arose between the two, the matter was referred to arbitration. The arbitration clause was very brief, containing only the instruction that *this agreement is subject to English jurisdiction. If a dispute cannot be settled by negotiation it shall be settled by arbitration in London.* Crucially, this did not contain a provision for the appointment of arbitrators.

In the absence of a nomination, or specification of the number of arbitrators, sections 14(4) and 15(3) of the Arbitration Act 1996 (UK) will apply. As a result, the claimant used a Request for Arbitration document for the purpose of appointing an arbitrator. The document was sent to the respondent. At that time, the claimant also applied to the Court under section 18 of the Arbitration Act. Under this section, the Court will consider the merits of the claim put forward. In doing so, the Court held that the Notice met the requirements of the Act. However, the method of service did not meet the instructions in their broader contract that documents are to be in writing and served personally.

The Court declined to issue a section 18 direction. It was not satisfied that the procedure for appointing an arbitrator had failed. Specifically, the Court believed the appointment as a whole did not fail as it had not properly begun.

English anti-suit injunction

G v R [2023] EWHC 2365 dealt with an urgent application for an anti-suit injunction in the English High Court. This type of application prevents claims in different jurisdictions from being filed so that the one jurisdiction might be focused on. This application was required to prevent a hearing in Russia the following week. The parties differed on whether the arbitration agreement was governed by English law. The arbitration clause provided for the seat to be Paris. The Judge ruled that French law operated as that law applies to international arbitration.

The next issue was the proper forum for the anti-suit application for an injunction. Here the Court ruled that France was the appropriate forum to grant coercive relief in aid of the arbitration agreement. The test was *where the case may be more suitably tried for the interests of all the parties and the ends of justice*. That England was the appropriate forum must be shown clearly and distinctly. It could not be so shown; and despite anti-suit injunctions not being available in France, *substantial justice can be done in the arbitration in France*. There was therefore no jurisdiction to consider the application and whether it would have been granted under the ordinary test.

IT'S TIME

How New Zealand can bring together Latin America and Asia

Written by ALEXANDER LYALL

Is it time for work to begin again on the Southern Link project? Here, we identify the opportunities which have arisen since the easing of COVID-19 restrictions, and how New Zealand can take advantage of these.

In the early months of 2020, the world came to a screeching halt. The disruption caused by the COVID-19 virus to all facets of life was unprecedented, with global commerce lying among the wreckage. Travel became impossible, supply chains were disrupted and economies faced recession.

As COVID-19's economic impacts begin to fade, reminders of a world eager to connect emerge. From the perspective of our region, it is hard not to notice the enthusiasm for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**). Originally a group of 11 countries, the number has since expanded to 12 with the United Kingdom joining in July this year. The number may also expand soon. Uruguay, Ecuador and Costa Rica have formally applied while Colombia has expressed interest. From Asia, Taiwan applied in late 2021. China and South Korea have publicly expressed interest.

A great Southern Link between Asia and Latin America

In short, the Southern Link seeks to

“New Zealand could also allow its infrastructure, such as ports and airports, to facilitate efficient trade between the continents.”

In a good spot

→ New Zealand is ready to bring Latin America and Asia together

establish New Zealand as a business and economic hub between Asia and Latin America. The hub would allow businesses and community leaders to plan, collaborate, and resolve disputes. New Zealand could also allow its infrastructure, such as ports and airports, to facilitate efficient trade between the continents.

Asia and Latin America are two emerging market players. Both also have large populations, with Latin America having over 600 million people and East and Southeast Asia collectively having over 2 billion. Work putting the Southern Link in motion will see New Zealand in a position to facilitate trade and tourism between these behemoths.

To be clear, the Southern Link is not a new idea. Work had already started both prior to, and after, COVID-19, undertaken by multiple organisations. This includes the Ministry of Foreign Affairs and Trade, New Zealand China Council and the Centres of Asia-Pacific Excellence (**CAPE**). For further information, please see the report The Southern Link: Developing a Global Supply Chain authored by the New Zealand Institute of Economic Research (**NZIER**) and commissioned by the Ministry of Foreign Affairs and Trade and New Zealand China Council.

The benefit of having any trade link supported by credible and effective dispute resolution services was identified by the Argentine Chamber of Commerce for Asia and the Pacific in 2019 when it reached out to the New Zealand International Arbitration Centre (**NZIAC**) to enter into a memorandum of understanding for the purpose of *inter alia* promoting New Zealand as a fair, safe and neutral regional hub for international dispute resolution and seat for international arbitration in the Trans-Pacific Region under NZIAC's international dispute resolution rules.

Geographically and historically, New Zealand is best placed

Traditionally seen as an isolated country, New Zealand in fact sits in a strategic spot. Anybody who lives here understands all too well its distance from Europe. However, less has been said about its placement as the only country with a population in the millions to sit evenly between Asia and Latin America. As an example, Santiago is an 11-hour flight from Auckland. This distance is far, but minor compared to the flight times between Santiago and the many capitals of Asia.

New Zealand has other advantages. As outlined in the report above, New Zealand does not simply benefit from its geography. There are several factors which make New Zealand a sensible choice for such a hub:

- **Mutually accessible time zone**. The time zone between eastern Asia and Latin America ranges between 10 and 12 hours. A neutral time zone which allows for a typical gap of 6 hours with Latin America, and a 6-hour gap with Asia will make communication far more manageable. This will alleviate burdens for businesses on either side of the globe trying to reach one another.
- **Stress-free airports**. The Auckland and Christchurch airports are known for having minimal congestion. This provides security and ease for travel and the transportation of goods.
- **Multi-lingual.** English is the de facto language of business. However, New Zealand is also home to a large diaspora of many communities from Asia and Latin America. Speakers of Spanish, Portuguese, Mandarin, Korean, Tagalog, as examples, are not difficult to find in New Zealand.

Fair, prompt and cost-efficient dispute resolution

As is the nature of global commerce, an increase in relationships will lead to an increase in disputes. Fortunately, problems associated with this reality are mitigated if the hosting country has robust and transparent institutions. This is an apt description for New Zealand.

New Zealand is ranked second equal on Transparency International's global Corruption Perceptions Index, equal to Finland and behind only Denmark. In the Asia-Pacific region, New Zealand sits in first place. New Zealand's ease in accessing justice is partially the reason that the Argentine Chamber of Commerce sought a memorandum with NZIAC to provide dispute resolution services.

New Zealand's track record

New Zealand offers more than a physical location. Access to the country can provide insight into how New Zealand has been so successful in forging trade and investment relationships with so many of our neighbours. For a small country, New Zealand has done well to assemble the number of bilateral and multilateral agreements that it has. Among New Zealand's achievements in this area:

- **The Trans-Pacific Strategic Economic Partnership Agreement in 2005**. This was developed and signed with Singapore, Peru and Brunei. This has been described as a partnership which *set the scene* for the CPTPP. The partnership had the effect of reducing most tariffs between the partners.
- **The New Zealand-China Free Trade Agreement**. The FTA provided access to the world's second largest economy. New Zealand's ability to have this developed, signed and ratified was notable as it was the first so-called developed country in the world to do so.
- **Te Tiriti principles in the CPTPP**. New Zealand was able to establish exceptions within the CPTPP for Te Tiriti o Waitangi. This means Aotearoa New Zealand can always work to forge Te Tiriti partnerships without fear of breaching any provision under the CPTPP. This insight and experience will be useful to countries in both Latin America and Asia intending on allowing similar protections.

Conclusion

Relations between Asia and Latin America are moving quickly, but New Zealand's geography is not. It will always sit here, perfectly centred between Asia and Latin America. New Zealand's economic, legal and historical advantages are just as rock solid. It is now time to use these to our and the Asia-Pacific region's advantage.

About the authors

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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. Alexander can speak Spanish and has been trying to learn Mandarin for nearly two years.

Clubs, societies, and arbitration: the Incorporated Societies Act 2022

Written by **RICHARD PIDGEON**

The Incorporated Societies Act 2022 came fully into force in October 2023. Dispute resolution procedures must be included in a society's constitution. This article looks at the background of this potentially significant change and briefly foreshadows its impact.

Setting the scene

A fair proportion of New Zealanders are affected in some way by the operation of a civil, sporting, or cultural club or society incorporated under the Incorporated Societies Act 1908 (the **1908 Act**).

Many people's interests are promoted by joining together and benefiting from the positive features of the skeletal 1908 Act which Sir John Salmond drafted around 115 years ago. As the Parliamentary Select Committee report back on the Incorporated Societies Bill 2021 noted, the bill retained the *underlying principles of the current law* but codified into statute various statutory minima *since some of it is not in the 1908 Act but has built up in case law over time*.

Law reform

→ Alternative Dispute Resolution clause mandatory in Incorporated Society rules under new legislation

The Incorporated Societies Act 2022 fleshes out the duties, powers and obligations of members following the coming into effect and operation of the Charities Act 2005 and the Law Commission's/ Te Aka Matua Te Ture's (June 2013) Report: R129 *A New Act for Incorporated Societies* (the **2013 Report**).

One of the key changes to societies (which must re-register from the 1908 Act to the 2022 Act) is to require them to include dispute resolution clauses in their constitutions. The report back on the bill stated that the *bill would require a society to determine its own dispute resolution procedures and include these in its constitution*, (the requirement is set out in s 26(j) of the Act), either as model rules in Schedule 2 of the Act (see ss 40 and 41) or their own rules so long as they "satisfy the statutory minima" (a phrase noted repeatedly in chapter 8 of the 2013 Report).

The statutory minima are largely set out in section 39 (which requires procedures for resolving disputes to be consistent with natural justice) and each clause of the Model Rules in Schedule 2, which headings note:

...

(2) How a complaint [defined at s 38] may be made

(3) Person who makes complaint has right to be heard

(4) Person who is subject of complaint has right to be heard

(5) Investigating and determining dispute

(6) Society may decide not to proceed further with complaint

(7) Society may refer complaint

(8) Decision makers

Should a society's constitution not contain dispute resolution procedures, by virtue of clause 6 of Schedule 1 the constitution will be treated as including the Model Rules set out in Schedule 2. Using the Model Rules will create a presumption under section 41 that the society's rules are consistent with natural justice.

The 2013 Report noted *Gibson v New Zealand Land Search and Rescue Dogs Inc*[1] as a case where there were problems regarding natural justice.[2]

This article moves on to focus on sections 42 and 43 of the Incorporated Societies Act 2022, after recording the sections' background arising in the 2013 Report.

Express reference to alternative dispute resolution

The 2013 Report, *Chapter 8: Complaints and Grievances* notes variously:

- the courts have regularly held that members of societies can bring judicial review proceedings or claims in contract (they still can);
- this is expensive in *both time and money, and is highly likely to be divisive and potentially destructive within a society*;
- the Act will specify minimum standards of natural justice for affected members that society processes must satisfy;
- the processes may be made bespoke to suit the culture and purposes of their society and members;
- two types of disputes are common: (1) misconduct or disciplinary disputes usually brought by the society against a member; and (2) grievances brought by a member against other members, officers or the society itself (such as for breach of the constitution);
- the statute should not require appeal rights but should permit societies to include them in their disputes procedures (this does not exclude the possibility of judicial review); and
- arbitration was considered as an option, noting that *[T]he courts are accustomed to arbitration as an alternative to court action, with appeals to court generally restricted, mainly to allegations of bias, other natural justice issues or major procedural deficiency*.[3]

Arbitration has the distinct advantages of flexibility, informality, familiarity with technical subjects, confidentiality, and speed.[4] The

1 *Gibson v New Zealand Land Search and Rescue Dogs Inc* [2012] NZHC 1320, [2012] 2 NZLR 181 (HC and CA).

2 2013 Report at 125 and 131.

3 2013 Report at 135.

4 See D Williams and A Kawharu *Williams & Kawharu on Arbitration* (LexisNexis Wellington, 2017) at 1.1.9 "Perceived advantages and increasing popularity of both domestic and international arbitration"; and "Real Alternatives to Court Process [2010] NZLJ 380.

2013 Report also mooted the visitor system used in universities, but this concept has not been expressly carried through into the new Act.

As the select committee report on the bill noted:

> Dispute resolution can take many forms, such as mediation or arbitration, or approaches based on tikanga or other cultural practices. The bill does not specify which type of dispute resolution a society must use. Societies may decide which type of dispute resolution best suits their membership.

Sections 42 and 43 of the new Act

An arbitration clause is not inserted by operation of law, but arbitration might be the procedure used by a society in its rules or under the Model Rules in Schedule 2. In terms of this article, the most relevant sections of the Incorporated Societies Act 2022 are set out for convenience:

42 Constitution may provide for types of dispute resolution

(1) A society's constitution may provide that all or certain kinds of disputes must or may be submitted to any type of dispute resolution, including—

(a) consensual dispute resolution (for example, mediation, facilitation, or a tikanga-based practice); and

(b) determinative dispute resolution (for example, arbitration under the Arbitration 1996 or adjudication).

(2) This section and section 43 do not apply to the extent that other legislation requires a dispute to be dealt with in a different way (and the provisions of a constitution that relate to disputes have no effect to the extent that those provisions contravene, or are inconsistent with, that legislation).

…

[emphasis added]

43 Provisions relating to arbitration

(1) If a society's constitution provides that a dispute must or may be submitted to arbitration under the Arbitration Act 1996, the relevant provisions of the constitution must be treated as an arbitration agreement that is binding on the society and the affected member or officer.

(2) A society's constitution may prescribe procedural matters (not inconsistent with the Arbitration Act 1996) that govern an arbitration under this section.

One of the statutory purposes most relevant to this article is found at section 3(d)(iii):

> societies are private bodies that should be self-governing in accordance with their constitutions, any bylaws, and their own tikanga, kawa, culture, and practice, and should be free from inappropriate Government interference; …

In keeping with this discouragement of resorting to the courts section 9 of the Arbitration Act 1996 provides for that Act to be subject to the Incorporated Societies Act 2022. The society's rules may provide for their own procedures in an arbitration context or adopt other rules, such as the NZDRC arbitration rules. While the 2013 Report notes that Schedule 1 of the Arbitration Act 1996 is more likely to be adopted than Schedule 2 if the Arbitration Act 1996 system is adopted,[5] that overlooks the fact that Schedule 2 applies to every domestic arbitration unless the parties expressly agree otherwise.

Continuing judicial intervention and supervision

Regulations have been drafted, to support the new Act, they came into force on 5 October 2023. Approximately 24,000 societies incorporated under the 1908 Act are due to re-register under the Incorporated Societies Act 2022 from October 2023. The regulations set out what penalties will be imposed if the society's obligations are breached,[6] but one of the most relevant outcomes will be judicial intervention and continuing supervision. Notably, the High Court may place a society into liquidation under section 210(d) if the society's constitution does not comply with the Incorporated Societies Act 2022.

The new provisions promote internal dispute resolution to avoid *expensive and disruptive court*

5 2013 Report at 137 [8.54].

6 Such as a failure to register amendments to the constitution or changes in officers.

action as found in *Gibson,* for example. The contract methodology applicable to societies enables the members to develop their own rules, including arbitration clauses and, importantly, to enforce their rules contractually.[7] Courts might still intervene, but *societies must have procedures to deal with conflicts without – or at worst, before – going to court*.[8]

Arbitration as a form of alternative dispute resolution is mainstream and increasingly expressly provided for in New Zealand legislation, such as the alternative dispute resolution procedures in the Trusts Act 2019.[9]

The Incorporated Societies Act 2022 is another example. The New Zealand Dispute Resolution Centre (**NZDRC**), with experienced panellists available to act as arbitrators might assist societies of all sizes who select arbitration or adjudication (in whichever level of complexity, tailored to the society), or mediation as the society's internal, alternative dispute resolution method.

About the author

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7 As noted in *Finnigan v New Zealand Rugby Football Union (no 3)* [1985] 2 NZLR 181 (HC and CA); *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329; *Strand v Bays Music Centre Inc* [2013] NZHC 1870, [2013] NZAR 1068; and *Attorney and General v Institution of Professional Engineers New Zealand Incorporated* [2018] NZHC 3211, [2019] 2 NZLR 731.
8 2013 Report at 125 [8.2].
9 See A Butler, "Arbitration of trust disputes under the Trusts Act 2019" [2021] NZLJ 106.

LONDON CALLING

Written by ALEXANDER LYALL

What makes a consumer contract English?

Two recent decisions in the English Commercial Court have highlighted the importance of understanding who is at the end of your arbitration agreement. Arbitration is an attractive option to solve disputes, but as these two decisions show, the ability to enforce any resulting awards may depend on who, and where, they signed up.

The rights of a consumer

Both cases concerned parties who sought the safety of the Consumer Guarantees Act 2015 (the **CRA**). If successful, the parties could have the dispute heard in the United Kingdom rather than in a foreign jurisdiction. On a practical level, the goal of the parties was to have an arbitration award set aside.

To use the legislation to their advantage, the parties had to prove three matters related to the commercial activity. The party needed to show a) they were a consumer, b) their contract had a close connection to the United Kingdom, and c) it would be unfair to have the matter of the dispute heard in a foreign jurisdiction. As shown by the different outcome of the cases, this will be determined by a number of very circumstantial factors.

Payward v Chechetkin

In *Payward v Chechetkin*,[1] the party to an arbitration agreement in the context of a cryptoasset trading platform was found to be a consumer. The case developed after the respondent, Mr Chechetkin, incurred losses of over £600,000 trading on the cryptocurrency trading website Payward. Mr Chechetkin believed himself to be a consumer and so sought to pursue an action under the Financial Services and Markets Act 2000. Payward replied by focusing on the fact that an arbitration agreement had been signed by Mr Chechetkin as part of the terms and service of use. The Court looked at section 74 of the CRA and found that an arbitration award stemming from this agreement could not hold. The matters raised by the crypto dispute had to be dealt with by the UK rather than a foreign jurisdiction.

Eternity Sky Investments Ltd v Mrs Xiaomin Zhang

Meanwhile, the decision in *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang*[2] saw the Commercial Court reject the public policy challenge to an arbitration award. The commercial activity concerned Mrs Zhang's relationship with her late husband's fintech company. Mrs Zhang had signed a personal guarantee supporting the company and also held its shares. The business operated from and in Hong Kong but Mrs Zhang lived in London. Although deemed to be a consumer, Mrs Zhang was not able to have the award set aside.

Is the party a consumer?

One of the points the Courts reinforced was that *being a person of substantial means* does not mean that somebody cannot be a consumer.[3] That the individuals in both *Payward* and *Eternity Sky Investments* were of this description did not impact this assessment. Nor did it matter that Mr Chechetkin had a history of substantial involvement with crypto trading.[4]

In *Eternity Sky Investments,* the applicants argued that Mrs Zhang had a real business interest in her late husband's company. Mr Justice Bright applied a "functional link" test to see whether involvement with the company was for the sake of the company, or for the sake of Mrs Zhang. In Mr Justice Bright's view, the decision to sign the personal guarantee was an act motivated by love for her husband.[5]

However, the assessment for the shareholdings was more technical. The significance of the possession of these shares could not be excused by the marriage motivation, as it was for the personal guarantee. Rather, the possession had to be "non-negligible" for Mrs Zhang to have a functional link with the company.[6] Mr Justice Bright considered that the significance of the shareholdings lay in the percentage of the company's capital rather than market value. Mrs Zhang's holdings constituted 0.4% of the company. This could not give rise to a functional link.

Did the agreement have a close connection to the UK?

The decision to classify the party a consumer only becomes relevant if the binding contract has a close connection to the UK. Under the CRA, the protections afforded to consumers by the legislation are to apply even when the contract directs the governing law to be that of a foreign jurisdiction.[7]

In both cases, Mr Justice Bright assessed the origins of the term "close connection". Section 74, which contains the term, was enacted in part to reflect aspects of the Unfair Contract Terms Act (UK) and the European Community Directive on unfair terms in consumer contracts (the **Directive**). As a result of the CRA's furtherment of the Directive, Mr Justice Bright assessed the Court of Justice of

1 *Payward v Chechetkin* [2023] EWHC 1780 (Comm).
2 *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang* [2023] EWHC 1964 (Comm).
3 *Payward*, above n 1, at [71].
4 *Payward*, above n 1, at [71] and [76].
5 *Eternity Sky Investments,* above n 2, at [78].
6 *Eternity Sky Investments,* above n 2, at [75].
7 Section 74(1)(b).

the European Union's (**CJEU**) view on the definition. In *Commission v Kingdom of Spain* (C-70/03), the CJEU described the term as *deliberately vague* for the purpose of taking into account *various ties depending on the circumstances of the case*.

That the consumer themselves lives, works, or is a citizen of the UK cannot *automatically satisfy the test of close connection*.[8] A court looks further at the circumstances of that agreement.

It was at this stage of the test that Mr Justice Bright found the circumstances in Payward and Eternity Sky Investments to be different. In Payward, Mr Justice Bright found the facts to point clearly to the contract as being one with a close connection to the UK:

- Mr Chechetkin was a UK citizen living in England.
- Payward Ltd was a company incorporated in England.
- The services were paid for in UK sterling, paid for under transactions between English banks.

Eternity Sky Investments

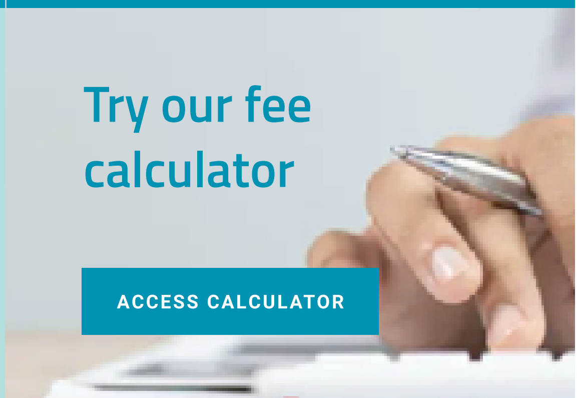
As the residency status of the consumer is of a lower importance, Mr Justice Bright looked at the relationship between Mrs Zhang's personal guarantee and Hong Kong. The connection between the two was *so great as to be overwhelming* because:

- The personal guarantee originated in Hong Kong. Its bond issue was held under the Stock Exchange of Hong Kong and subject to its GEM Listing Rules.
- Eternity Sky was not based in the UK. It did not do business there, nor did it seek UK customers.

Would dealing with a foreign jurisdiction be unfair?

Similarly, an assessment of fairness will depend on the circumstance.

8 *Eternity Sky Investments*, above n 2, at [102].



Consumer contracts

The English High Court looks at the circumstantial factors relevant under the Consumer Rights Act 2015

The main concern for the court is whether dealing in that jurisdiction would result in a significant imbalance for the consumer. Judge Bright adopted an objective test, asking whether a "reasonable customer" would have agreed to have the UK law heard in a different jurisdiction.[9] In *Payward*, Mr Justice Bright considered it likely that Mr Chechetkin would have selected arbitration to deal with the matters in contention but not in California.

Mr Justice Bright also considered the fairness question in *Eternity Sky Investments,* despite the findings about the connection of the contract making this exercise unnecessary. The assessment related back to Mrs Zhang's close relationship to Hong Kong. As the central question concerned fairness in overseas proceedings, it was relevant that Mrs Zhang could access lawyers.

Arbitration equipped for crypto

Although in *Payward* the enforcement of the award was held to be unfair, Mr Justice Bright highlighted that this did not mean the California-based arbitrator could not have dealt with the matter.[10] The question was specifically whether it would be fair on the consumer to engage in that jurisdiction. Furthermore, although the award could not be enforced, Mr Justice Bright stressed the arbitrator was nevertheless entitled to make the finding that they did.

Conclusion

The preference of the courts in England is to enforce arbitration. However, there will be occasions where public policy considerations will not make this possible. Once satisfied that the individual is a consumer, the courts will assess the context of the agreement. In these decisions, the outcome went both ways. The outcomes show the extent to which the courts will take a view of all the circumstances related to the arbitration agreement.

Crucially, the focus in these cases was the practical disadvantages of their legal processes being conducted outside of home. The decisions make it clear that arbitration itself offers a lot, including competent expertise in specialised areas like crypto disputes. As these increase, we may see arbitration continue to play a large role in this space.

9 *Payward,* above n 1, at [136].
10 *Payward*, above n 1, at [159].

HARNEYS

FamilyMart Privy Council decision

Just & equitable petitions susceptible to arbitration "hive off"

Written by **GRÁINNE KING** and **CATIE WANG**

In a recent decision of the Privy Council in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding*, on appeal from the Cayman Islands, the effect of an arbitration clause on the court's jurisdiction to wind up on the just and equitable ground was considered.

This decision concerns a long running dispute between FamilyMart China Holding Co. Ltd. and Ting Chuan (Cayman Islands) Holding, who were the shareholders in China CVS (Cayman Islands) Holding Corp. The shareholders developed and operated FamilyMart convenience stores in mainland China. The business was successful, however, the relationship between the shareholders deteriorated. The applicant petitioned to wind up China CVS in the Cayman Islands Grand Court on the just and equitable ground alleging misconduct in management and breach of directors' duties - with consequent loss of trust and confidence. The applicant also sought an order that the respondent be required to sell its shares to FMCH.

However, the parties' relationship was governed by a shareholders' agreement which provided that "any and all disputes in connection with or arising out of [the SHA shall be] submitted for arbitration". The respondent applied to strike out the winding up petition or, alternatively, for an order staying the petition under section 4 of the Foreign Arbitral Awards Enforcement Act.

At first instance, the Grand Court granted the stay in favour of arbitration. The Cayman Islands Court of Appeal overturned that decision, holding that the court had exclusive jurisdiction to determine whether a company should be wound up on the just and equitable ground. It held that it was only in cases where discrete issues could be "hived off" to arbitration that the court might stay a winding up petition, however in the case of *FamilyMart* no part of the winding up petition was susceptible to arbitration; it held that the petition involved an indivisible factual evaluation and declined to grant a stay. The decision was appealed to the Privy Council.

The Privy Council agreed with some of the Court of Appeal's analysis but held that, similar to the agreed facts and parties' admissions, there was no reason in principle why the court should not be bound by the determination of an arbitral tribunal. It held that although a winding up of a company lies exclusively within the jurisdiction of the courts, there may be issues in winding up proceedings, for example, breach of a shareholders' agreement, which can be referred to arbitration, notwithstanding that only the court can make a winding up order or a buyout order.

The Privy Council also held that in considering whether a matter should be referred to arbitration, the court must first determine what matters are raised in the court proceeding, and then determine in relation to each such matter, whether it falls within the scope of the arbitration agreement. The court should also follow the following principles: (i) the court must ascertain the substance of the dispute, (ii) a stay may be granted in relation to parts of the court proceedings, (iii) a matter requiring a stay must be a substantial issue that is legally relevant to a claim or defence and susceptible to determination by an arbitrator as a discrete dispute; it does not extend to peripheral or tangential issues (iv) the test entails a matter of judgement and common sense. While this approach may involve the fragmentation of the dispute, the Privy Council considered that this can be mitigated by effective case management by the court and the arbitral tribunal.

In this case, the Privy Council found that the issues of loss of trust and confidence and the irretrievable breaking-down of the relationship between the parties fell within the scope of the arbitration agreement, and therefore a mandatory stay was granted in respect of these issues under the Foreign Arbitral Awards Enforcement Act. It further found that these issues were an essential precursor to the determination of the petition; therefore, the Privy Council granted a stay of the petition under section 95(1)(d) of the Companies Act which provides that the court may make "any other order that it thinks fit".

This decision provides important clarity on the interplay between a contractual agreement to arbitrate and the shareholders' statutory right to petition to wind up a company on the just and equitable ground.

About the authors

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Gráinne King is a member of Harneys' Litigation & Insolvency practice group in the Cayman Islands.

Gráinne has been practising in the Cayman Islands since she joined Harneys in 2015. Prior to joining the firm, Gráinne was an associate in the Restructuring and Insolvency team at A&L Goodbody in Dublin. Her expertise includes advising insolvency practitioners and other stakeholders in relation to liquidations, restructurings, receiverships and commercial disputes. Gráinne also has experience in the area of fraud and asset tracing, appraisal litigation under s238 of the Companies Act and regulatory litigation. Prior to practising in the Cayman Islands, Gráinne acted for high-profile lending institutions in relation to the appointment of receivers, summary proceedings, implementation of consensual workouts with debtors and defence of injunctions, mis-selling and negligence claims. Gráinne is also a board member of the IWIRC International Board.

Catie Wang – Senior Associate

Catie Wang is a member of Harneys Litigation & Insolvency team in the Cayman Islands office. She has broad experience in multi-jurisdictional litigation concerning offshore companies operated in Asia, including just and equitable winding up, unfair prejudice claims, derivate claims, fair value appraisal litigation, and cross-border interim injunctions.

Before joining Harneys, Catie worked at two other leading offshore law firms in Hong Kong. Prior to that, she worked in an international law firm in Singapore and a family office in Sydney.

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GOING FOR GOLD

Latest ruling from English Court of Appeal in tug of war over Venezuelan gold reserves

Written by **KATE HOLLAND**

Deutsche Bank AG v Central Bank of Venezuela & Ors [2023] EWCA Civ 742 is the latest instalment in the UK battle between two rival boards of Venezuela's Central bank (the Central Bank) for control of Venezuela's gold reserves and for authority to represent the Central Bank in related arbitration in London. With Venezuela's 2018 election resulting in political turmoil over who is its legitimate President, the UK Supreme Court ruled in 2021 that the English courts must 'speak with one voice' with the UK Government, regarding who it recognises. The disputes over the gold are still ongoing and have already produced a series of court judgments on preliminary issues and the effect of the UK Government's changing recognition.

The Venezuelan presidential crisis

Challenge to the 2018 presidential election: the rival Presidents

After the death of Hugo Chávez in 2013, Nicolás Maduro became the President of Venezuela. In the next round of elections in 2018, Maduro claimed to have been re-elected as President for a second term. He swore himself in as President in January 2019.

Venezuela's National Assembly challenged the validity of the election process and result. It declared Maduro an usurper and

English courts clarify recognition and justiciability issues in Venezuelan gold disputes

→ The English Court of Appeal has issued the latest of a string of judgments in relation to two legal disputes over who should have control of Venezuela's overseas gold reserves.

that the position of President was vacant. In January 2019, the National Assembly declared Juan Guaidó as the interim President under the terms of the constitution, until re-elections could be held.

International support was divided between the two rival Presidents, with the US, UK, Australia and Canada supporting Guaidó, and Russia and China supporting Maduro. The US issued sanctions to cut off the Maduro administration's access to Venezuela's overseas assets.

On 4 February 2019, the UK Government issued a statement that it recognised Guaidó as the constitutional interim President of Venezuela. It described Maduro as a kleptocrat and his administration as an oppressive and illegitimate regime.

Removal of Guaidó as interim President in December 2022

During the following years of political stalemate, Guaidó failed to oust Maduro from power. Guaidó's support within Venezuela began to wane. In December 2022, the National Assembly voted to dismiss Guaidó and abolished the role of interim President. Elections are due to be held in 2024.

On 12 January 2023, the UK Government announced that it respected the National Assembly's vote removing Guaidó as interim President, effective 5 January 2023, adding that it continues not to accept Maduro's administration as legitimate.

The rival boards of the Venezuelan Central Bank

Appointment of the Maduro Board

In June 2018, Maduro appointed Mr Ortega to head the board of the Central Bank (the **Maduro Board**).

Transition Statute and appointment of the Guaidó Board

On 5 February 2019, the National Assembly passed a number of laws with the aim of taking control of Venezuela's overseas assets and giving the interim President the power to appoint ad hoc boards for public bodies (the **Transition Statute**).

Under the terms of the Transition Statute, Guaidó made a series of decrees and appointments. He

declared Maduro's appointment of Mr Ortega to the board of the Central Bank as null and void. He appointed an ad hoc board for the Central Bank, and appointed Mr Hernández as its head (the **Guaidó Board**). He authorised the Guaidó Board to represent the Central Bank abroad in management of foreign-held gold reserves.

Judgments of the Venezuelan Supreme Tribunal of Justice

The Supreme Tribunal of Justice (the **STJ**) is Venezuela's highest court. Between April 2019 and May 2020, the Maduro-elected constitutional chamber of the STJ issued a number of judgments declaring the Maduro Board of the Central Bank to be valid, and declaring the Transition Statute, Guaidó's decrees and the appointment of the Guaidó Board null and void (the **STJ rulings**).

Disputes in the UK for control of Venezuelan gold

In the UK, the two rival boards of the Central Bank became involved in two legal disputes over Venezuela's gold reserves held by Deutsche Bank and the Bank of England.

Deutsche Bank arbitration

The first legal dispute concerned a $120 million USD gold swap contract. Deutsche Bank was obliged to pay the proceeds of the gold swap contract to the Central Bank. The contract was governed by English law and required disputes to be referred to arbitration in London.

After Deutsche Bank received conflicting instructions from the Maduro Board and the Guaidó Board over payment of the proceeds, it referred the matter to arbitration.

Aside from the dispute over which of the two boards was authorised to give the instructions for payment of the gold under the contract, there was a further issue of which board was authorised to represent the Central Bank in the arbitration.

Bank of England litigation

In December 2018, the Maduro Board asked for the return of Venezuela's nearly $2 billion USD gold reserves held by the Bank of England. The Bank of England received conflicting instructions from the Guaidó Board, who asked the UK Government to ensure that the gold was not returned. The Bank of England refused the Maduro Board's request to return the gold.

The Maduro Board then commenced litigation against the Bank of England in the High Court, claiming it was in breach of its obligation to accept the Maduro Board's instructions.

Preliminary issues in the English courts – recognition and justiciability

The Maduro Board's challenge in both the Deutsche Bank arbitration and the Bank of England litigation (the **Disputes**) was based on the grounds that Guaidó was not entitled to make appointments to the board of the Central Bank, and therefore the Guaidó Board had no lawful authority to give instructions to Deutsche Bank or the Bank of England, or to represent the Central Bank in the arbitration.

This challenge led to two preliminary issues common to both Disputes being heard together in the courts:

1. **Recognition issue** – whether the UK recognised Mr Guaidó as the President of Venezuela.

   This question involved the application of the "one voice" doctrine of English constitutional law. Under this doctrine, the courts and the executive must speak with one voice. If the UK Government recognises a foreign state, government or head of state, then the courts must also recognise it.

2. **Justiciability issue** – whether the Maduro Board's challenge to the validity of the appointment of the Guaidó Board was an issue which was justiciable in the English courts.

   This question involved the **"foreign acts of state"** doctrine of English law. Under this doctrine, English courts cannot adjudicate on the legality of the legislative or executive acts of a recognised foreign state, government or head of state which take place within that state. The courts must recognise and give effect to those foreign acts without inquiry.

Maduro Board's argument

The Maduro Board argued that the Guaidó Board appointments were unlawful under Venezuelan law, given that the STJ rulings had declared that the National Assembly's Transition Statute and Guaidó's decrees and appointments under that statute were null and void. On that basis, it argued that the Guaidó Board had no lawful authority to give instructions or represent the Central Bank.

Guaidó Board's argument

The Guaidó Board argued that as the constitutional interim President, Guaidó was entitled under the Transition Statute to appoint the Guaidó Board. Therefore, the Guaidó Board had authority.

It argued that the validity of the Transition Statute and Guaidó's decrees and appointments was beyond challenge in the English courts. At the time of appointing the Guaidó Board, Guaidó was recognised by the UK Government as the President of Venezuela, and therefore his appointments were foreign acts of state under English constitutional law. Being foreign acts of state, they are non-justiciable in the courts, and the courts must give effect to the appointments without inquiry.

English court decisions

The various facets of these preliminary issues went all the way up to the Supreme Court, back down to the High Court, and then back up again to the Court of Appeal. At each instance the courts found in favour of the Guaidó Board.[1]

Matters became further complicated at the most recent Court of Appeal proceedings by the UK Government's recognition in December 2022 of the removal of Guaidó as interim President.

The upshot of this series of judgments on the preliminary matters can be summarised as follows:[2]

- The English courts must speak with one voice with the UK Government regarding who is the President of Venezuela.
- The UK Government recognised Guaidó as the interim President by virtue of its statement on 4 February 2019.
- Since Guaidó was recognised by the UK Government as the President at the time of his decrees and appointing of the Guaidó Board, his acts are the acts of a foreign state. Therefore, under the foreign acts of state doctrine, the courts cannot inquire into the validity of those appointments. They are non-justiciable and the courts must regard them as valid and effective without inquiry.
- Under the one voice doctrine, the STJ rulings nullifying Guaidó's acts and appointments cannot be recognised by the English courts, because the basis of their reasoning depends on a view that

1 See *Deutsche Bank AG London Branch v Receivers Appointed By the Court & Ors* [2020] EWHC 1721; *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2020] EWCA Civ 1249; *Maduro Board of the Central Bank of Venezuela v Guaidó Board of the Central Bank of Venezuela* [2021] UKSC 57; and *Deutsche Bank AG (London Branch) v Central Bank Of Venezuela* [2022] EWHC 2040.

2 *Deutsche Bank AG v Central Bank of Venezuela & Ors* [2023] EWCA Civ 742 at [95]–[100].

Guaidó was not the President, which contradicts the UK Government's view that he was.

- The UK Government ceased to recognise Guaidó as the President of Venezuela effective 5 January 2023 onwards. The statement ceasing to recognise him was forward-looking and not retroactive in effect.
- How the courts apply the one voice doctrine will depend on the facts of each case. On the facts of this case, the doctrine does not operate retroactively. The courts' previous rulings on the preliminary issues of recognition and justiciability are not altered by the fact that the UK Government no longer recognises Mr Guaidó as the President. Mr Guaidó was recognised as President by the UK Government at the time he appointed the Guaidó Board, and this is the material time.

Conclusion

The matter will now be remitted back to the High Court to determine the future course of the Deutsche Bank arbitration and Bank of England litigation over the gold reserves, in light of the fact that Guaidó is no longer recognised as the President of Venezuela.

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 in New Zealand.

REGULAR

Case in Brief:

Written by **ALEXANDER LYALL**

Notice of arbitration – make it valid or the award will not stand

A recent decision in the Hong Kong Court of First Instance has demonstrated what to avoid when serving a notice to commence arbitration.

In *G v P*,[1] the applicant was unsuccessful in their bid to have an award recognised. The Court took the view that as the notice arrangements had not been followed in accordance with the parties' arbitration agreement, the award could not be said to be fair.

1 *G v P* [2023] HKCFI 2173

Background

The applicant was a licensed money lender and with the respondent as borrower, entered into a loan agreement and supplementary loan agreement. The agreements were largely similar. The supplementary agreement contained a clause instructing the parties to seek arbitration in the event of a dispute. The main agreement stated that the governing law was that of Hong Kong. In the event of any discrepancy between the two agreements, the supplementary agreement would prevail.

A dispute arose between the parties. Arbitration occurred but the respondent did not participate.

Issues

Obligation to arbitrate

The respondent argued that

Double check that address

→ The Court of First Instance could not be sure about the notice of arbitration.

the supplementary agreement's dispute resolution clause could not work as an arbitration clause. The respondent relied on an observation in an earlier decision[1] which stated that there must be an element of compulsion in the agreement. The respondent argued that this element was absent.

Justice Mimmie Chan held that it was simply a matter of construction. The use of *shall,* as was the wording here, did not mean the clause was optional to follow. The applicant had invoked the clause to refer the dispute to arbitration, this meant the respondent was now obliged to go to arbitration. In coming to this conclusion, Justice Mimmie Chan cited a recent decision in the English Commercial Court, *Aiteo Eastern E & P Co Ltd v Shell Western Supply and Trading Ltd*.[2] This decision held that once an option to arbitrate conferred on a party had been exercised, the other party was bound to arbitrate.

Notice of arbitration

The respondent then argued that the applicant had not given proper notice of the arbitration. As a result, they had not participated. Justice Mimmie Chan acknowledged this as the *core issue and determining factor* of the case. If proper notice had not been given then the respondents could rely on section 86(1)(c)(i) of Hong Kong's Arbitration Ordinance.

Justice Mimmie Chan clarified that a notice of arbitration was a document initiating the arbitration, *equivalent of a Writ of Summons in court proceedings*.

Decision

The applicant relied on the fact that the notice to commence the arbitration was emailed to an address given in the supplementary agreement. In their view, this complied with the nominated arbitration body's rules. Justice Mimmie Chan disagreed. The only evidence that the notice was served was the contents of the award. Paragraph 11 of the award stated that the notice had been given to a XYZ@CHINAT.HK. This email address was different to that given in the supplementary agreement. This was a problem for the applicant as it meant the notice was likely served to this wrong and mistyped address, rendering it counter to the arbitration body's rules.

Justice Mimmie Chan stated that although the Court takes a pro-arbitration approach, this can only be undertaken if the arbitral process is *structurally intact* and there is *due and fair process*. This was absent in this case. Without evidence of the notice being served, the award was irregular and contradictory to the terms of the parties' arbitration agreement. The award was set aside.

1 *Tommy CP Sze & Co v Li & Fung (Trading) Ltd* [2003] 1 HKC 418.

2 *Aiteo Eastern E&P Company Ltd v Shell Western Supply and Trading Ltd* [2022] EWHC 2912 (Comm).

HERBERT SMITH FREEHILLS

English court retains power to award costs after arbitration challenge dismissed

Written by **ELIZABETH KANTOR & CHARLIE MORGAN**

In *Viking Trading OU v Louis Dreyfus Suisse SA* [2023] EWHC 2160 (Comm) the English Commercial Court clarified its discretionary power to grant costs of defending a s69 application under the English Act (Act) for permission to appeal an arbitral award, even if costs were not initially sought.

This decision provides helpful guidance on best practice for recovering costs in this and other arbitration-related claims.

Background

Viking attempted to appeal an arbitration award under s69 of the Act alleging various errors of law (the **Application**). Louis Dreyfus Suisse (LDC), the respondent, opposed the Application but did not initially seek to recover its costs. After Viking's application for permission to appeal was dismissed, LDC requested payment of its costs by Viking. When Viking refused, LDC applied to court for a costs order, and the judge awarded LDC £20,000 subject to Viking's right to challenge that order.

Viking subsequently challenged the order, arguing that (i) the court had no jurisdiction to make the order because its jurisdiction ended when it dismissed the application for permission to appeal; (ii) the general rule is that no party is entitled to recover their costs if the order does not mention costs; and (iii) £20,000 was excessive in any event.

Decision

Bright LJ emphasised the court's residual discretion to award costs after the fact ("ex post facto") but cautioned that this discretion will not be exercised lightly. He noted the lack of clear guidance on when and how a respondent should seek its costs in such cases and upheld his decision to award costs in this case. However, he reduced LDC's recoverable costs to £17,500 and further reduced that amount to account for a small award of Viking's costs incurred since the Order.

Nevertheless, Bright LJ considered the argument to be *"a close-run thing"*, and he commented that he *"would not want any practitioner or litigant who may read this judgment to assume that every respondent who successfully opposes an application for permission to appeal under s. 69 of the Arbitration Act 1996, but neglects to ask for costs when doing so, will invariably receive the benefit of a similar exercise of discretion. On the contrary, they should assume that they will not."*

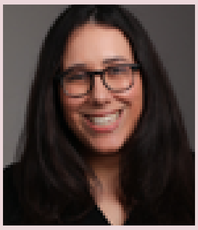
Comment

Bright LJ offered guidance on how respondents should approach costs in s69 application emphasising cost control, the importance of stating the desire for cost recovery in a respondent's notice and the potential to provide a statement of costs along with the respondent's notice and skeleton. He warned against causing unnecessary costs, which would be reflected in the judge's decision.

This case underscores the importance of seeking costs upfront to avoid inefficiencies. While cost recovery is discretionary and case-dependent, this decision provides useful guidance for s69 applications and potentially other claims under the Act.

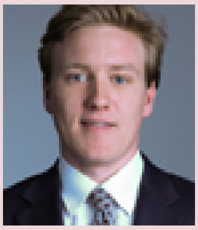
For more information, please contact Charlie Morgan, Partner, Liz Kantor, Professional Support Lawyer or your usual HSF contact.

About the authors



Elizabeth Kantor

Liz is an experienced international arbitration lawyer and solicitor advocate. She was admitted as a solicitor in England and Wales in September 2011 after completing her training contract at Herbert Smith Freehills LLP. Liz has spent her entire career in the international arbitration team at Herbert Smith Freehills LLP, in both the London and Singapore offices. She extensive experience of acting as counsel in large and complex international commercial and investment treaty arbitrations under all the major arbitration institutions. She recently became a professional support lawyer for the Herbert Smith Freehills LLP global arbitration team.



Charlie Morgan

Charlie has broad experience helping clients to resolve complex commercial disputes in the energy and technology sectors.

Charlie is an arbitration specialist, acting as counsel and advocate in ad hoc and institutional arbitrations in a number of jurisdictions. His experience includes resolving contractual and non-contractual disputes arising from clients' high value, strategic projects and transactions in energy, digital transformation and emerging technologies. He has acted for clients in disputes arising from shareholder and joint venture claims, investor-state contracts and treaty protections, VC investments, outsourcing projects, software development and purchase agreements, crypto and digital asset transactions, data migration and cloud computing.

ARTICLE

WHAT'S THE MATTER?

Written by **RICHARD PIDGEON**

***Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Others* [2023] UKSC 32 represents the first time the interpretation and application of the stay provisions of section 9 of the Arbitration Act 1996 (UK) (the Act) have been considered by the United Kingdom Supreme Court. The key issue here was whether Mozambique was attempting to litigate 'matters' it had agreed to arbitrate. The focus was on which 'matters' were encompassed within the arbitration agreement.**

Background

The Republic of Mozambique government (**Mozambique**) wished to capture greater profits from tuna fishing and extracting gas resources within its Exclusive Economic Zone. It sought ships, aircraft and local infrastructure including a shipyard to achieve this. Mozambique created three *special purpose vehicle* companies which it wholly owned that entered into three supply contracts with Privinvest for the projects. Financing came from Credit Suisse companies. Privinvest subcontracted with other companies in its group. Mozambique had to provide sovereign guarantees for the supply contracts, and the guarantees were covered by English law within the jurisdiction of England and Wales. Disputes emerged and

Tuna scandal

UK Supreme Court declines an application to stay the matter, in favour of trial.

Mozambique filed proceedings in England.

Mozambique advanced bribery, unlawful means conspiracy and dishonest assistance claims.[1] Its standing to sue was based on these allegations which arose from the procuring of the guarantees. It alleged a US$2billion fraud in what became known as the *"tuna bonds"* scandal. The supply contracts had three arbitration clauses within them, seated in Switzerland, but Mozambique was not a party to the supply contracts. However, for the purposes of the argument on the preliminary issue, the parties agreed under Swiss law that the Court should proceed as if Mozambique was bound by the arbitration agreements. This point was without prejudice to Mozambique's rights at trial. The sub-contracts had English choice of law terms. Privinvest and a sub-group of other defendants argued Mozambique's claims should be arbitrated and applied to the English High Court for a stay of proceedings under section 9 of the Act. The section 9 argument was a preliminary issue in the context of complex litigation.

Privinvest argued that the supply contracts had been performed and the goods delivered but Mozambique disagreed. Mozambique maintained the supply contracts were instruments of fraud or shams. Mozambique argued that Privinvest's stated defences to its above claims were not relevant "matters" which fell within the scope of the arbitration agreements.

The relevant parts of section 9 of the Act hold (emphasis added):[2]

9 Stay of legal proceedings.

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be

1 Collectively, 'economic torts'.

2 Section 9 of the Act gives effect to article II(3) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention").

referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

...

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

English lower Court decisions

The principal focus of the High Court judgment was whether Mozambique's claims fell within the scope of the three arbitration agreements. Justice Waksman held that Mozambique's claims did not fall within the scope of the three arbitration clauses. He declined to grant the stay.

The Court of Appeal disagreed and held that the reasonably foreseeable defences Privinvest raised were matters sufficiently connected to the supply contracts and accordingly fell within the scope of the arbitration agreements.

The Court of Appeal applied the *granular* test of Justice Popplewell in *Sodzawiczny v Ruhan*:[3]

> the court should treat as a 'matter' in respect of which the proceedings are brought any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement.

Lord Justice Carr for the Court of Appeal maintained:[4]

> ...the validity and genuineness of the supply contracts were bound to be raised by Privinvest as part of its defence against the allegations of dishonesty. They would be a matter in dispute as the Republic did not accept that the supply contracts were valid commercial contracts.

The Court of Appeal granted the stay but the Supreme Court later granted leave to appeal.

Interpretation of arbitration agreements and the Supreme Court decision

England adopts a pro-arbitration approach which involves taking a liberal interpretation of an arbitration agreement in order to respect the autonomy of the parties in determining how their disputes are to be resolved.[5] This is the context in which section 9 fell to be interpreted.

The Supreme Court outlined:[6]

> In this case, the substance of the controversy is whether the transactions, including both the supply contracts and the guarantees, were obtained through bribery and whether the defendants had knowledge at the relevant time of the alleged illegality of the guarantees and Mr Chang's lack of authority to execute them. An assertion of the extent to which each of the supply contracts gave value for money provides no answer to the assertion by the Republic that there was such bribery and such knowledge.

The Supreme Court unanimously upheld Mozambique's interpretation of section 9. None of the claims Mozambique made against Privinvest were stayed. The judgment focused on two issues: (a) the meaning of *matter* under section 9 of the Act; and (b) the scope of the arbitration agreements. The Supreme Court expressly disagreed with the granular test in *Sodzawiczny v Ruhan*.[7]

Lord Justice Hodge for the Court traversed caselaw from several

3 *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm), [2018] Bus LR 2419 at [43], emphasis added.

4 As summarised by the Supreme Court in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Ors* [2023] UKSC 32 at [37].

5 *Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] UKSC 38, [2020] 1 WLR 4117.

6 *Enka Insaat ve Sanayi AS*, above n 5, at [93]. Mr Chang was the former Mozambican Minister of Finance with purported authority to sign the sovereign guarantees.

7 *Sodzawiczny*, above n 3.

jurisdictions[8] to come up with an international consensus on the determination of *matters* which must be referred to arbitration:[9]

1. First, the court adopts a two-staged process:[10]
   a. Identify the "matter". The Court must find the substance of the dispute and not be overly respectful to the claimant's pleadings. The Court should have regard to the actual and foreseeable defences.
   b. Then ask: Is the "matter" covered by the arbitration agreement?
2. The "matter" does not need to encompass the whole of the dispute. A partial stay is permissible.[11]
3. The "matter" should not be *peripheral or tangential*. It should be an essential part of the claim or defence.
4. The test entails a matter of judgement and the application of common sense.[12]
5. When turning to '1b' (above), the Court should have regard to the context in which the "matter" arises in the legal proceedings and recognise a party's autonomy to choose which of several claims it wishes to advance.[13] Mozambique had conceded two issues should go to arbitration but the balance should go to trial.

Lord Justice Hodge also noted that the grant of a stay would be refused if a party *could have no real or proper purpose* for seeking a stay.[14] The Judge also declined to grant a stay on the partial defence based on Privinvest's quantification of damages if the economic torts were proved.

The substantive trial is listed for three months, and began on 2 October 2023 in the Commercial Court, London.

Conclusion

This decision contains an important discussion of the concept of a *matter*. Because the decision encapsulates article II(3) of the New York Convention,[15] further worldwide jurisdictions will be affected by this decision. New Zealand's version of the stay power is found at Schedule 1, article 8 of the Arbitration Act 1996. The domestic provisions should be interpreted on broad principles of general acceptance, in keeping with this decision.

On the same day as this decision was handed down, the Privy Council issued a judgment which also has ramifications for the stay of arbitral proceedings. *FamilyMart v Ting Chuan*[16] is considered in this edition of ReSolution. The legal analysis in the two decisions is more or less identical.

8 Hong Kong, Australia, British Virgin Islands, Cayman Islands and Singapore.
9 *Enka Insaat ve Sanayi AS*, above n 5, at [71]–[80].
10 *Enka Insaat ve Sanayi AS*, above n 5, at [48], [72]–[73].
11 *Enka Insaat ve Sanayi AS*, above n 5, at [74].
12 *Enka Insaat ve Sanayi AS*, above n 5, at [77].
13 *Enka Insaat ve Sanayi AS*, above n 5, at [78]–[80].
14 *Lombard North Central plc v GATX* [2013] Bus LR 68.
15 160 states have signed the New York Convention.
16 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33.

Labelling correspondence "without prejudice" will not always grant the user protection

Written by **SAM DORNE**

When is correspondence labelled "without prejudice" truly to be treated as such? The High Court of England and Wales has looked at this issue when deciding costs at the end of a claim. The Court set out guidance for when a party can successfully rely on the privilege that is intended by the term.

What is "without prejudice" correspondence?

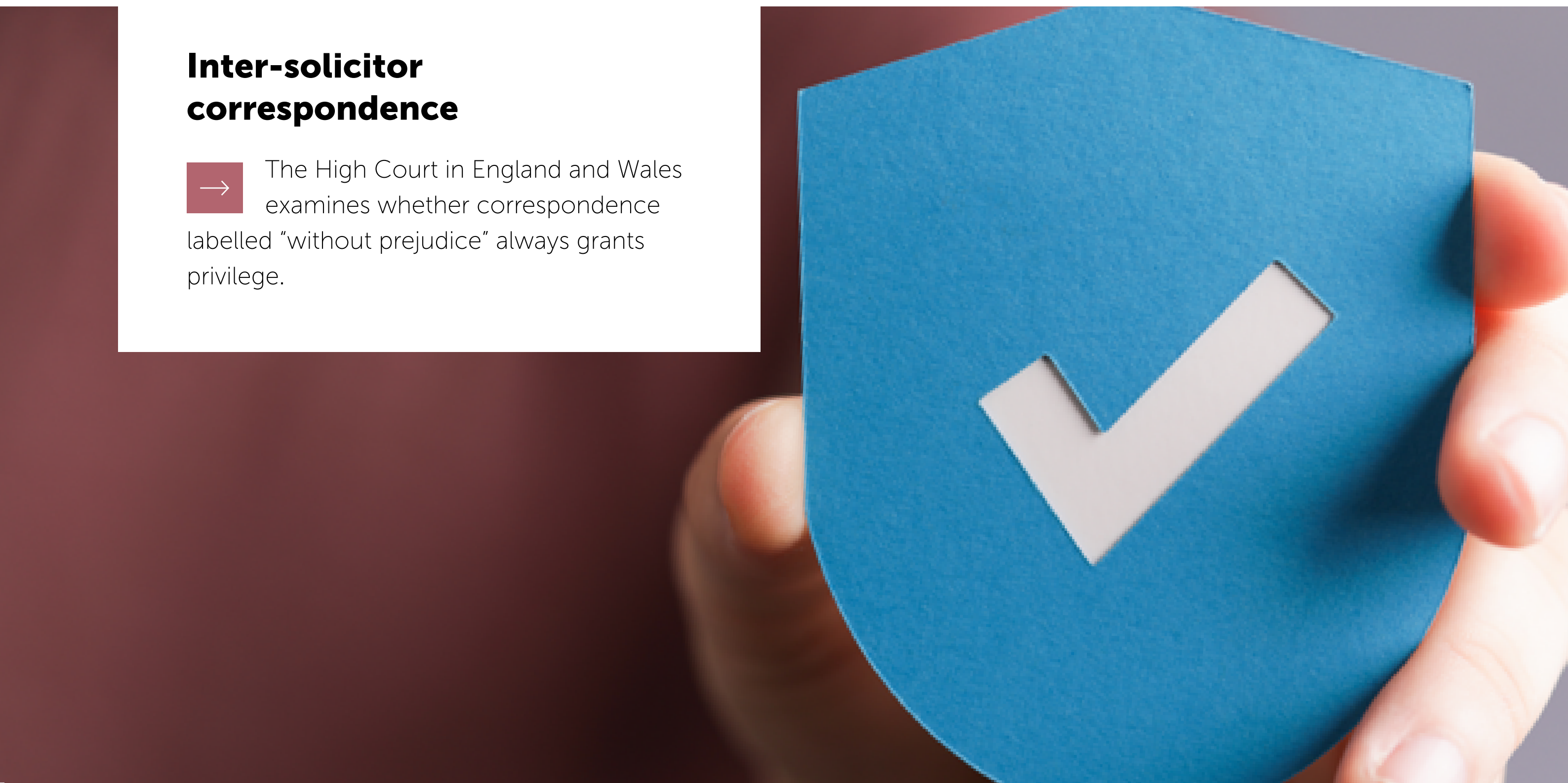
Anyone who has worked in any kind of legal setting will notice be aware of the term "without prejudice" or "without prejudice save as to costs" which is used ubiquitously and often inappropriately. It is not unusual for inexperienced or unskilled practitioners to add a "without prejudice" on every bit of correspondence regardless of the situation.

The term is broadly intended to foster candid communication and facilitate dispute resolution.

The fundamental purpose of marking communications as "without prejudice" is to shield them from being used as evidence in court proceedings, or to reserve them only for dealing with the issue of costs once the substantive issue has been decided. This protection encourages parties to speak freely during negotiations, fostering an environment where settlement

Inter-solicitor correspondence

The High Court in England and Wales examines whether correspondence labelled "without prejudice" always grants privilege.



discussions can occur without fear of later repercussions.

Parties nowadays reflexively mark communications "without prejudice" without fully considering whether the circumstances warrant such protection.

Labelling "without prejudice" is not determinative

The High Court in England looked at the issue of "without prejudice" correspondence in dealing with the costs in the case of *Jones v Tracey* [2023] EWHC 2256 (Ch).

In *Jones*, the High Court grappled with the question of whether inter-solicitor correspondence discussing the potential for Alternative Dispute Resolution (**ADR**) was truly "without prejudice" despite the correspondence being marked as such.

The heart of the matter revolved around a letter dated 7 June 2023, marked "without prejudice," sent by the defendant's solicitors. This letter, discussing the possibility of ADR without moving the trial date, became a focal point in determining costs following judgment for the claimant in a contested probate dispute.

The Court's ruling emphasised that the "without prejudice" marking, while a relevant factor, is not determinative. In this case, the Court considered the context and content of the correspondence, finding that despite the marking, the letter was not intended to be without prejudice.

The Court emphasised the importance of how a reasonably minded recipient would perceive the letter. Unmarked letters within a chain of communications related to settlement negotiations are generally treated as without prejudice, unless an opposite intention is glaringly obvious.

The 7 June 2023 letter, while

marked "without prejudice," was in response to an open letter discussing the possibility of ADR. It was part of a series of open communications dealing with the potential use of ADR. Despite the marking, the Court concluded that all these communications were open and intended to be so. The absence of an offer in the letter and its focus on ADR made it pertinent to consider.

The distinction between ADR and Court process

The decision highlights the distinction between the ADR process itself, typically conducted on a "without prejudice" basis, and correspondence about the mere possibility of engaging in ADR. The Court reasoned that such correspondence is "more likely to be open than without prejudice" as parties often intend to rely on it later, especially concerning cost issues.

Importantly, the ruling reflects the evolving acceptance of ADR as a standard practice in civil procedure. While proposals for ADR are generally conducted on a "without prejudice" basis, the Court acknowledged that not every communication about the possibility of ADR automatically falls under this protection.

The Court's approach aligns with the evolving landscape of civil procedure, where ADR is becoming a mainstream element. The decision implies that proposing ADR itself may not or should not be prejudicial to a party's case.

In this case, the Court found that the 7 June letter was part of a chain of communications, all intended to be open. Since it did not contain a specific offer and related to the general possibility of ADR, the Court deemed it open rather than "without prejudice".

Conclusion

Ultimately, the decision reinforces the idea that the determination of "without prejudice" protection involves an objective assessment of the communication's true nature. In this instance, the Court's ruling had implications for the costs awarded to the claimant and as such should not be shielded by privileged correspondence protection. Therefore, just because correspondence may be labelled "without prejudice" this does not automatically confer the right of privilege.

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

Arbitration – Arbitral autonomy and immunity – arbitrator compelled to give evidence

Written by
ANDREW RIGDEN GREEN

STEPHENSON HARWOOD
WEI TU CHINA ASSOCIATION

Song Lihua v Lee Chee Hon (former name: Que Wenbin) [2023] HKCFI 1954

Summary

A dispute arose as to whether an arbitrator ("QF") and a secretary to a tribunal ("Y") could be compelled to give evidence with regards to the conduct of QF during an arbitration hearing. The Respondent applied to set aside the Court's order ("Setting Aside Application") to enforce the arbitral award ("Award") of the Chengdu Arbitration Commission ("Commission"). The Respondent claimed that QF's conduct during

the 2nd hearing ("Hearing") makes the enforcement of the Award contrary to public policy.

The Hong Kong Court of First Instance ("the Court") discussed i) the nature of the Setting Aside Application, ii) whether QF can be ordered to give evidence as to his conduct during the Hearing, and iii) whether Y can be ordered to make statements and documents regarding QF's location at the time of the Hearing.

The Court made the following decision:

1. The procedure and admissibility of evidence for the Setting Aside Application should be determined by the Court under Hong Kong law; and
2. Courts' objective is to aid and encourage arbitration, as well as to protect arbitrators from threats of suit and collateral attacks; and
3. Arbitrators exercise judicial or quasi-judicial function, thus they are entitled to autonomy and judicial immunity.

Practical implications

Cannot compel arbitrators to give evidence

Hong Kong courts adopt a pro-arbitration approach, keeping court interference to a minimum, and recognizing and enforcing arbitration agreements and arbitral awards as judgements of the court. It is widely recognised that arbitrators exercise a judicial or quasi-judicial function. Therefore, in the absence of fraud or bad faith, arbitrators are entitled to immunity and autonomy, as well as court's non-interference. These approaches align with the public policy of Hong Kong, and courts' objective of encouraging the speedy resolution of disputes through arbitration.

PRC law and Hong Kong law

It was made clear throughout the judgement that proceedings and hearings taking place in Hong Kong are governed by Hong Kong law. Although the arbitration agreement and the Hearing in question are governed by Mainland law, it was repeatedly emphasised that the Setting Aside Application, and the admissibility and relevance of evidence to the Application are to be determined by the Court, under Hong Kong law.

Background

The Court granted leave to the Application to enforce the Award in Hong Kong. In January 2023, the Respondent made the Setting Aside Application on the grounds set out in s.95 of the Arbitration Ordinance. Together with the Setting Aside Application, the Respondent also filed several affirmations. In his 4th affirmation, the Respondent claimed that he sought to obtain the video recording of the entire arbitral proceedings, and information relating to the physical absence of QF from the Hearing. He asserted that these are relevant to the Setting Aside Application. The Respondent then applied to the Court by separate summons for a letter of request to be issued to the mainland Chinese judicial authority, to obtain testimonies from QF and Y. Relying on Article 6 of the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of mainland China and the HKSAR, the Applicant objected the Summons and orders sought. Following the objections raised by the Applicant, the Respondent amended the orders sought in the Summons, to seek only that the mainland Chinese Court should obtain statements from the witnesses.

Court's decision

Does the Hong Kong Court have jurisdiction to determine the admissibility of evidence?

The Court clarified that mainland Chinese law governs the parties' arbitration agreement and the procedures of arbitration, while Hong Kong law governs the hearing of the Setting Aside Application, so far as it relates to the procedures and admissibility of evidence. Therefore, it was wrong for the Respondent's counsel to suggest that the Court has the power to compel an arbitrator to give evidence, merely because the mainland Chinese Court does. The Court stated that it may take into consideration the fact that the mainland Chinese Court i) refused to request the Chengdu Arbitration Commission to provide the video recording of the arbitral proceedings, and ii) dismissed the Respondent's application to refuse enforcement of the Award.

Nonetheless, the admissibility of evidence for the Setting Aside Application is still a matter to be determined by the Hong Kong Court.

Can the Court compel an arbitrator to give evidence?

Rejecting the older authorities referred to by the Respondent's counsel, the Court decided that:

1. To protect arbitrators' discretionary and independent decision-making process, arbitrators, who perform a judicial function, should be entitled to the same immunity available to judges in respect of their decision-making in the process of arbitration, absent fraud or bad faith;
2. Courts should encourage and aid arbitrations, uphold parties' choice of arbitration as the manner of final resolution of their dispute, as well as ensure Court's non-interference, as per s.3 of the Arbitration Ordinance;
3. It is within the power and discretion of the tribunal, including QF, to decide how the Hearing was to be conducted. It is part of their decision-making process.

In making the decision and exercising his power in conducting the Hearing in the way he did, QF was performing his function as an arbitrator. Thus, he is entitled to immunity and cannot be compelled to give evidence.

As for the Request made to Y, due to the limited evidence Y could provide, the Court decided that it would be disproportionate to issue a Request for evidence from Y.

In view of all the above reasons, the Court decided that both QF and Y could not be asked to give evidence. The Summons were dismissed.

Case details

- Court: Court of First Instance
- Judge: Hon Mimmie Chan J
- Date of judgment: 31/7/2023

About the author

Andrew Rigden Green

Andrew is a dispute resolution partner at Stephenson Harwood and he is a Fellow of the Chartered Institute of Arbitrators and a member of the Singapore Chamber of Maritime Arbitration. He is an arbitration specialist with particular experience in dealing with shareholder disputes, joint venture disputes, asset financing disputes, international sale contracts, trade and commodity finance, marine disputes, shipbuilding and offshore oil & gas. Andrew is head of the international arbitration team in Hong Kong and co-head of Stephenson Harwood's Asia international arbitration team.

Andrew has extensive experience in multijurisdictional arbitrations, and in using courts to support such arbitration procedures (in particular to locate and to secure assets for eventual enforcement). He has conducted a number of ad hoc, institutional significant arbitrations both under institutional rules (HKIAC, CIETAC, SIAC, LCIA, ICC) and under trade association rules (ARIAS, LMAA, SCMA). He frequently team up with our international offices in Europe, Middle East and Asia to serve clients from a range of sectors, including shipping, aviation, construction, projects and energy, commodity and financial services. The arbitrations he has been dealing with as an international team have been seated in many different jurisdictions including China, California, Geneva, Germany, Hong Kong, India, London, New York, Paris, Singapore and Thailand. Many of these cases involve support from local courts in the form of anti-suit injunctions, asset preservation orders and freezing orders. Andrew has particular experience in jurisdiction disputes and in obtaining injunctions in support of litigation and arbitration.

Andrew also works closely with our CEPA association in Guangzhou which operates under the name Stephenson Harwood Weitu (China) Association, who appears before CIETAC, GAC, SHAC and the South China International Economic and Trade Arbitration Commission. We are ideally placed to handle applications in both jurisdictions.

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