ReSolution

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FROM THE EDITOR

Welcome to the 26th issue of ReSolution® in which we draw on the experience and knowledge of leading experts in the field to bring you commentary, articles and reviews on topical matters relating to domestic and international dispute resolution.

In this issue we feature multi-tiered dispute resolution clauses, the governing law of the arbitration agreement, whether an arbitration agreement protects a debtor from the threat of liquidation, and the government subsidised COVID-19 commercial lease arbitration and mediation service.

We also look at the much awaited UK Supreme Court judgment in *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (Respondent)* [2020] UKSC 48 (on appeal from [2018] EWCA Civ 817) handed down on 27 November 2020, which concerns the extent to which an arbitrator can, without disclosure and without giving rise to an appearance of bias, accept appointments in multiple references concerning the same or overlapping subject matter with only one common party.

In Case in Brief, we examine *Berkeley Square Holdings v Lancer Property Asset Management Ltd* [2020] EWHC 1015 (Ch), a case in which the UK High Court held that statements made in a without prejudice mediation paper were admissible for the purpose of rebutting allegations of fraud.

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I wish to take this opportunity to thank all our contributors. We are most grateful for the support we receive from dispute resolution professionals, law firms, and publishers, locally and overseas, that allows us to share with you papers and articles of a world-class standard, and to bring you a broad perspective on the law and evolving trends in the delivery and practice of 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.

Wishing you all a safe and enjoyable holiday season and a prosperous (and hopefully much better and kinder) New Year in 2021 from all of us at NZDRC.

Warmest regards,

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ReSolution:In Brief

UNCITRAL Regional Centre for Asia and the Pacific issues its annual report

The UNCITRAL Regional Centre for Asia and the Pacific (RCAP) presented a report on its activities in 2019-2020 to the United Nations Commission on International Trade Law (**UNICTRAL**). The report was presented to the Commission at its 53rd session held virtually in Vienna in July this year.

A main objective of RCAP is to raise awareness and promote effective understanding, adoption and use of UNCITRAL texts, in order to foster legal certainty in international commercial transactions.

The report sets out the activities undertaken in the 2019-2020 year in reaching out and providing technical assistance on international trade and commercial law reforms within the Asia-Pacific region to States, international and regional organisations, and development banks. The topics included dispute settlement, e-commerce, security interests and sale of goods.

The report highlights RCAP's active support of events and initiatives to raise awareness and promote effective understanding, adoption and use of a wide range of UNCITRAL texts, such as the Singapore Convention on Mediation, the UNCITRAL Model Laws on Electronic Transferable Records, Public Procurement, and Secured Transactions, and the United Nations Convention on Contracts for the International Sale of Goods.

Highly successful flagship events were reported on, such as the Incheon Law & Business Forum, held in the Republic of Korea; the Asia Pacific ADR Conference held in Seoul; the UNCITRAL Asia Pacific Judicial Summit.

The full report is available here.

Australia ratifies the Mauritius Convention on Transparency

On 17 September 2020, Australia became the sixth state party to ratify the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (**Mauritius Convention**), alongside Cameroon, Canada, Gambia, Mauritius, and Switzerland.

By becoming a party to the Mauritius Convention, Australia is consenting to apply the UNCITRAL rules on transparency in treaty-based investor-state arbitration (**Rules on Transparency**) to investor-state arbitration initiated in accordance with pre-existing investment treaties. The Mauritius Convention extends the application of the Rules on Transparency to investment treaties concluded prior to 1 April 2014, and therefore supplements pre-existing investment treaties with respect to transparency-related obligations.

The aim of the Rules on Transparency is to increase transparency and ensure public accessibility to investor-state dispute settlement (**ISDS**) proceedings. The Mauritius Convention, through incorporation of the Rules on Transparency, now considers both the public interest in such arbitrations and the interest of the parties to resolve disputes in a fair and efficient manner.

Going forward, this means investor-state arbitrations commenced under the ISDS provisions in Australia's investment treaties and under the Rules on Transparency will have certain documents made public. These include the notice of arbitration and response (Article 3) and hearings for the presentation of evidence or oral argument

(Article 6). Other key provisions of the Rules on Transparency can be found here.

The Mauritius Convention will enter into force for Australia on 17 March 2021. It remains open for signature, ratification, and accession by states and regional economic integration organisations.

For more up-to-date information on the Mauritius Convention and its status, visit the UNCITRAL website.

Singapore Convention on Mediation now in force

The United Nations Convention on International Settlement Agreements Resulting from Mediation (**Singapore Convention on Mediation**) applies to international settlement agreements resulting from mediation. It is a binding international instrument aimed at facilitating international trade, which came into force on 12 September 2020. It advocates mediation as an effective alternative method of resolving commercial disputes. In particular, it promotes the benefits of mediation being both time and cost efficient, as the parties do not need to resort to full court proceedings to enforce international mediation settlement agreements. The conciliatory nature of mediation is regarded as a significant benefit in trade relations, as it helps preserve relationships despite disputes arising between parties.

The United Nations predicts the Singapore Convention on Mediation will bring certainty and stability to the international framework on mediation and expects it to be an effective mechanism for the enforcement of international mediation settlement agreements. It is considered one of the most successful multilateral treaties prepared by the United Nations Commission on International Trade Law (**UNCITRAL**) since it opened for signatures on 7 August 2019, with 53 States having now signed. It remains open for signature, ratification, and accession by States and regional economic integration organisations.

The Singapore Convention on Mediation applies to international settlement agreements resulting from mediation which have been concluded in writing by parties to resolve a commercial dispute. It does not extend to non-commercial disputes such as employment or family matters.

Belarus and Ghana have both recently approved the Singapore Convention.

Approval by Belarus was effected on 15 July 2020 and it will enter into force there on 15 January 2021. Belarus has stated it believes the Singapore Convention will have a positive impact on the entire system of international commercial mediation.

Ghana became the 53rd state to sign the Singapore Convention on Mediation. This follows in the footsteps of Ghana ratifying the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards earlier this year. As a result, both domestic and international mediation is now recognised under Ghanaian law, with domestic mediation already enjoying statutory recognition in the Alternative Dispute Resolution Act 2010 (Act 798). With the signing of the Singapore Convention on Mediation, Ghana has taken a further step towards its goal of becoming a mediation and arbitration hub in Africa.

More information on the Singapore Convention including its purpose and key provisions is available on the UNCITRAL website here.

ReSolution:In Brief

New York Convention Updates

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) came into force in 1959 and is widely accepted as the foundation instrument governing international arbitration. Under this convention, contracting states are required to give effect and recognise arbitration agreements as binding, and recognise and enforce arbitral awards made in other states, pursuant to the rules and conditions outlined in the convention. Since its establishment, the New York Convention has significantly contributed to the increasing use of international arbitration as parties' preferred method of resolving commercial disputes.
The principal aim of the New York Convention is to ensure that foreign and non-domestic arbitral awards are recognised and enforced in the same way as domestic awards, regardless of the jurisdiction, and provide common legislative standards for doing so. A non-domestic award is regarded as an award which imports some foreign element into the arbitral proceedings, such as another state's procedural law.
A further aim of the Convention is to require courts to deny parties access to the court system, when granting such access would be in contravention of the parties' agreement to refer disputes to an arbitral tribunal.
More information on the New York Convention can be found here.

Three new signatories to the New York Convention: The Kingdom of Tonga, Ethiopia and Sierra Leone.

On 12 June 2020, the Kingdom of Tonga became the 164th State Party to the Convention. It came into force in Tonga on 12 September 2020 and will be applicable to arbitral awards issued on or after that date. This will be a welcome development for parties involved in international business disputes, as it means they can be certain that arbitration awards will be enforced in Tonga.
The move is a reflection of the growing recognition in the Pacific of the importance of arbitration in international dispute resolution. Tonga has historically had no legal framework to resolve cross-border disputes through international arbitration and this has stifled trade and investment in the nation. Pacific region member states such as New Zealand, Australia, the USA, China, South Korea and Japan are key trading partners of Tonga. For those states, there is now a credible dispute resolution and enforcement regime that will overcome the perceived and real uncertainties of settling commercial disputes in Tonga and enforcing arbitration awards through the local

court system. The UNCITRAL website notes that Tonga will apply the New York Convention only on differences arising out of legal relationships, whether contractual or not, that are considered commercial under Tonga's national law.

The next State Party to accede to the New York Convention was Ethiopia, where it will come into force on 22 November 2020. The Ethiopian economy has grown rapidly over the last decade and, while the market offers many opportunities, the Government of Ethiopia acknowledges doing business in the country has its challenges. Given enforcing contracts is one of the 11 indicia the World Bank uses to rank ease of doing business, Ethiopia's accession to the New York Convention should assist the Government in its stated goal of improving the country's Word Bank's Ease of Doing Business ranking, where it currently sits at 159.

On 28 October 2020, Sierra Leone deposited its instrument of accession with the United Nations Secretary General and became the 166th State Party to the New York Convention. The Parliament of Sierra Leone approved ratification of the Convention on 9 November 2018 and it will enter into force there on 26 November 2021. Sierra Leone has acceded to the Convention subject to three reservations, which are that it will only apply to:

- the recognition and enforcement of awards made in the territory of another contracting State;
- differences arising out of legal relationships, whether contractual or not, which are considered commercial under the laws of Sierra Leone; and
- arbitration agreements concluded and arbitral awards rendered after the date of its accession to the Convention.

Multi-tiered dispute resolution clauses: a reminder of the Court of Appeal's split decision

By Jo Delaney and Charlotte Hendriks

The dispute resolution clause is often referred to as the "midnight clause" as it is commonly reviewed at the 11th hour of the contract negotiations. As a result, many dispute resolution clauses, particularly arbitration clauses, are given insufficient consideration. Despite this multi-tiered dispute resolution clauses are commonly included in many agreements. The decision of *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82 is a timely reminder of the importance of carefully drafting the dispute resolution clause.

This case concerned an appeal from the Supreme Court of New South Wales on the question of whether a claim for unliquidated damages fell within the scope of the multi-tiered dispute resolution clause. The clause provided for the informal and formal dispute resolution of all disputes that "arise out of this Agreement" (**Clause 23.1**). The dispute resolution process provided, amongst other things, that where mediation was unsuccessful, any disputes that "concern any monetary amount payable and/or owed…under this Agreement" must be referred to arbitration (Clause **23.6.1**).

After an unsuccessful mediation, Gregory Hannigan (**Hannigan**) sought to refer the matter to arbitration pursuant to Clause 23.6.1. Inghams Enterprises Pty Ltd (**Ingham**) sought to restrain the referral to arbitration on the basis that:

- the dispute did not fall within the ambit of Clause 23.6.1 as a dispute "under this Agreement"; or, in the alternative
- Hannigan had waived his right to insist on compliance with Clauses 23.1 and 23.6.1 and refer the matter to arbitration as a result of court proceedings he had commenced in 2017 in which he successfully sought a declaration that the contract had been wrongfully terminated by Ingham (refer to *Francis Gregory Hannigan v Inghams Enterprises Pty Limited* [2019] NSWSC 321).

At first instance, Hannigan was successful in seeking to refer the matter to arbitration. Ingham then appealed to the Court of Appeal.

Court of Appeal decision

The Court of Appeal found that Clause 23.1 did apply to the agreement as, constructed broadly, it covered any dispute relating to the agreement, including a claim for unliquidated damages. However, the majority (Meagher and Gleeson JJA agreeing) allowed the appeal on the basis that the claim for unliquidated damages did not fall within the scope of Clause 23.6.1 as it was not a claim "under this Agreement".

Whilst the Court adopted a broad construction of Clause 23.6.1, the majority found that the dispute did not concern a monetary amount payable under the Agreement because:

1. the words "*a monetary amount payable and/or owed*" referred to an obligation owed by one party to the other to pay a monetary amount;
2. the phrase "*under this Agreement*" identified the contract as the source of the payment obligation; and
3. whilst unliquidated damages may be quantified by reference to performance under the contract, the actual source of the

obligation to pay the unliquidated damages is not contained within the contract but is an obligation arising by operation of law as a result of a breach.

As a result, the majority declared that the dispute was not subject to the arbitration agreement contained in Clause 23.6.1.

Interpretation of multi-tiered dispute resolution clauses

Justice Bell, President of the NSW Court of Appeal, disagreed with the decision of the majority in its assessment of whether unliquidated damages for breach of the agreement was a claim “under the Agreement”. Bell P found that the damages claim was a claim “under the Agreement”. Bell P gave extensive consideration to dispute resolution clauses, emphasising the importance of the courts taking a broad and liberal approach to the construction of dispute resolution clauses. His Honour noted, with reference to recent case law, that “*in Australia, unlike other jurisdictions, the process of contractual construction of dispute resolution clauses has not been overlaid by presumptions*”. In particular, his Honour commented: “*where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it.*”

Whilst this decision demonstrates that the Australian courts will continue to interpret dispute resolution clauses objectively with reference to orthodox principles of contractual interpretation, in reality, the application of those principles in practice is not entirely clear, as indicated by the split decision of the Court of Appeal.

The decision in this case demonstrates the need for clearer guidance on the interpretation of arbitration clauses and dispute resolution clauses in general. Unfortunately this guidance was absent from the decision of the High Court of Australia in *Rinehart v Hancock Prospecting Pty* [2019] HCA 13 (see here). This grey area of the law will continue to develop through decisions of the courts. The comprehensive analysis of the dispute resolution clause cases by Bell P (including the summary of relevant clauses in an Appendix to his Honour's judgment) is a significant contribution to this development.

Nonetheless, it is fundamentally important that parties give careful consideration to the drafting of dispute resolution clauses, particularly arbitration clauses, to ensure that the clause is clear, certain and enforceable and that it accurately reflects their intentions.

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English Supreme Court to decide approach to determining governing law of arbitration agreement

By Craig Tevendale, Olga Dementyeva and Rebecca Warder

On 27 and 28 July 2020, the Supreme Court heard an expedited appeal against a recent judgment of the Court of Appeal in *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] EWCA Civ 574, which we discussed in one of our previous blog posts. The Supreme Court is asked to consider two issues: (i) the correct approach to determining the proper law of an arbitration agreement; and (ii) the role of the court of the seat of arbitration in determining whether foreign proceedings give rise to a breach of an agreement to arbitrate.

Background

In June 2020, the Supreme Court allowed OOO Insurance Co Chubb ("**Chubb Russia**") to proceed with its appeal against the judgment in favour of Enka Insaat ve Sanayi AS ("**Enka**"). Chubb Russia was seeking to overturn the decision of the Court of Appeal, which precluded it from pursuing a subrogation claim in the Russian courts (the "**Russian Court Claim**"). The Court of Appeal had determined that the Russian Court Claim was brought in breach of the arbitration agreement (the "**Arbitration Agreement**") in the main contract (the "**Contract**").

The decision of the Court of Appeal

The Court of Appeal concluded that: (i) the English court as the court of the seat was necessarily an appropriate court to grant an anti-suit injunction and questions of *forum conveniens* did not arise; and (ii) the Arbitration Agreement in the Contract was governed by English law. In particular, on issue (ii) the Court of Appeal held that there was nothing to suggest an express choice of Russian law as the governing law of the Contract and/or the Arbitration Agreement. Accordingly, in the absence of any countervailing factors which would point to a different system of law, the parties had impliedly chosen that the Arbitration Agreement was governed by the law of the seat, i.e. English law. The Court of Appeal emphasised that if there is no express choice of law in an arbitration agreement itself, then it is necessary to review whether the express law of the main contract also applies to the arbitration agreement. However, the law of the contract would apply to the arbitration clause only in the minority of cases. In "*all other cases, the general rule should be that the…[arbitration agreement] law is the curial law, as a matter of implied choice*", unless there are powerful factors to counter this being the implied choice of law. If there is no implied choice of law, the law of the arbitration agreement will be the system of law with which the arbitration agreement has its closest and most real connection.

Russian court proceedings

As noted in our previous blog post, Chubb Russia filed the Russian Court Claim in May 2019. The decision of the first instance court dismissing the claim was published in full in May 2020. Although the Russian Court Claim was dismissed, the court also dismissed Enka's motion seeking dismissal

decision of the first instance court dismissing the claim was published in full in May 2020. Although the Russian Court Claim was dismissed, the court also dismissed Enka's motion seeking dismissal without considering the merits of the case in reliance on the Arbitration Agreement, noting that the dispute did not fall within the Arbitration Agreement. Both Enka and Chubb Russia appealed, and the Russian appellate court is due to hear the appeal at the end of October 2020.

Supreme Court hearing: brief overview of the parties' positions

Overview of submissions made by Chubb Russia

Chubb Russia argued that the Arbitration Agreement formed an integral part of the Contract, and therefore, upon the application of the rules of contractual construction, the Arbitration Agreement should be governed by the same system of law as the Contract (i.e. Russian law, being the law impliedly chosen by the parties). Chubb Russia also argued that it would be just and convenient for the English court to stay the English proceedings to allow the Russian court to determine whether it had jurisdiction to hear the Russian Court Claim.

Overview of submissions made by Chubb Russia

Enka argued that the Arbitration Agreement was a separate contract, and the starting point should accordingly be the Arbitration Agreement itself (rather than the Contract, as suggested by Chubb). By agreeing to arbitration seated in London, the parties (i) impliedly agreed that the Arbitration Agreement was governed by English law; and (ii) therefore submitted to the jurisdiction of the English courts to grant an injunction to restrain a breach of the Arbitration Agreement and to determine whether there was such breach.

Comment

This case is likely to become the leading English law authority on the applicable principles relating to the approach to determining the proper law of an arbitration agreement. It remains to be seen whether the Supreme Court agrees with the Court of Appeal in relation to the significance of the law of the seat for the purpose of determining the proper law of the arbitration agreement.

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Does an arbitration agreement protect a debtor from the threat of liquidation?

By Kent Phillips, James Kwan, Jonathan Leitch, Ben Hornan, Chris Dobby, Bilshan Nursimulu, Dr Rishab Gupta and Mayuri Tiwari Agarwala

In several Commonwealth jurisdictions, the corporate legislation allows creditors to petition a court to order the winding up of a debtor in circumstances where that debtor is unable to pay its debts as they fall due. Such legislation generally presumes that the debtor is insolvent if it has failed to comply with a statutory notice requiring the debtor to pay a certain debt within a given period of time (a *statutory demand*). Where the debtor disputes that debt, the court ordinarily determines whether that dispute is genuine; that is, whether the debtor has a substantial and *bona fide* defence to the creditor's claim. If the dispute is genuine, the court sets aside the winding up petition. The purpose of the exercise is to ensure that a statutory demand or winding up petition is not defeated by a debtor's spurious or frivolous defences.

The question arises, however, whether the court is precluded from proceeding with that determination where the alleged dispute is governed by an arbitration agreement. The judgments recently delivered in different Commonwealth jurisdictions show that the matter is far from being settled. Even where courts in different jurisdictions have reached the same conclusion, their reasoning differed to some extent. This article, which is co-authored by arbitration practitioners from different jurisdictions, considers the approach taken by the courts in some parts of the Commonwealth, as well as the practical commercial implications of the current case law.

The English Court of Appeal's invariable stay of winding up proceedings in favour of arbitration

In *Salford Estates (No.2) Limited v Altomart Limited* [2015] Ch. 589 [2014] EWCA Civ 1575, the alleged debtor invoked section 9 of the English Arbitration Act in its application for an order to stay a winding up petition. That provision requires a court to stay legal proceedings which are brought before a court in respect of a matter which is governed by an arbitration agreement, unless the court is satisfied that the arbitration agreement in question is null and void, inoperative, or incapable of being performed. The English Court of Appeal held that this provision is inapplicable to stay a winding up petition, which is not in itself a claim for payment due under a contract.

The Court nevertheless upheld the original stay order on alternative grounds. Because the Court's power to order the winding up of a company under the English Insolvency Act (as in other Commonwealth jurisdictions) is discretionary in nature, the Court considered that it should exercise that discretion by taking into account the legislative policy behind the Arbitration Act, which is to uphold the principle of party autonomy and exclude a court's summary determination of a dispute that is the subject of an arbitration agreement. As a result, the English Court of Appeal concluded that where a debt subject to an arbitration agreement is not admitted, the Court should stay or dismiss the winding up petition unless there are *"wholly exceptional circumstances"* [1], which the Court could not envisage.

In overturning the first instance decision granting a mandatory stay of proceedings, the English Court of Appeal endeavoured to uphold the policy of the Insolvency Act to a certain extent, noting that the intention of the Arbitration Act would not have been *"to confer on a debtor the right to a non-discretionary order [to stay a winding up petition] striking at the heart of the jurisdiction and*

Shopping centre owned by Salford Estates

discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts."[2] Inspite of this, the English Court also concluded that the Court should not encourage parties to use *"the draconian threat of liquidation"* as a method for bypassing an arbitration agreement, concluding that to do so *"would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act."*[3]

The reasoning in *Salford Estates* does not provide a comprehensive answer to all of the issues that can arise from the interaction between insolvency and arbitration. Further, no clear guidance was given as to in what *"wholly exceptional circumstances"*[4] the policy aims of the Insolvency Act might be favoured over those of the Arbitration Act, other than where there was another debt not subject to an arbitration agreement that could be used as evidence of inability to pay in support of the winding up petition.

Hong Kong's departure from the English approach

In *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd* [2020] HKCFI 311, the Hong Kong Court of First Instance rejected the reasoning applied by the English Court of Appeal in *Salford Estates*, which the Hong Kong courts had previously adopted. In *Dayang*, the debtor did not dispute the unpaid debt on which the winding up petition was premised, but instead alleged that it had a cross-claim. The Court held that in order to validly oppose the winding up petition, the debtor must show that its cross-claim gives rise to a *bona fide* dispute on substantial grounds. The existence of an arbitration agreement should be regarded as irrelevant to the exercise of the court's discretion to make a winding-up order. In particular, the Court rejected the contention that the presentation of a winding up petition *per se* amounts to a breach of an arbitration agreement and contravenes party autonomy: according to the Court, in petitioning for a winding up, a creditor is not submitting a dispute for the determination and/ or resolution of the Court. That debt is ultimately determined by the liquidator to whom the creditor submits its proof of debt, and it might be possible for the creditor to refer a liquidator's rejection of the proof of debt to arbitration.[5]

On that basis, the Hong Kong Court also disagreed with the English Court of Appeal's analysis that the determination of a winding up petition results in a summary judgment, which undermines the legislative policy behind the arbitration legislation. The Court held that summary judgments are final and conclusive judgments on the merits, whereas winding up proceedings do not involve a determination of disputes over liability.[6]

Referring to the English Court of Appeal's concern that the Court should not encourage an abuse of the liquidation regime, the Hong Kong Court held that the Court is conferred with other powers to deal with such tactics, for example, by awarding costs orders on an indemnity basis or damages for malicious prosecution if they proceed with petitions where they are aware that the debt is subject to a *bona fide* dispute on substantial grounds.[7]

For a more detailed review of the position in Hong Kong as it has developed, see the following Hogan Lovells publications:

- Back to basics - Hong Kong Court of Appeal queries approach to winding up petitions where arbitration is involved
- Winding-up Petition v Arbitration Clause: Hong Kong Court Dismisses Winding up Petition in Favor of Arbitration Clause
- A strong statement – Hong Kong court says arbitration agreement is "irrelevant" to the exercise of courts discretion in a winding up
- Singapore Court of Appeal ruling opens door for Hong Kong decision on arbitration / winding up priority

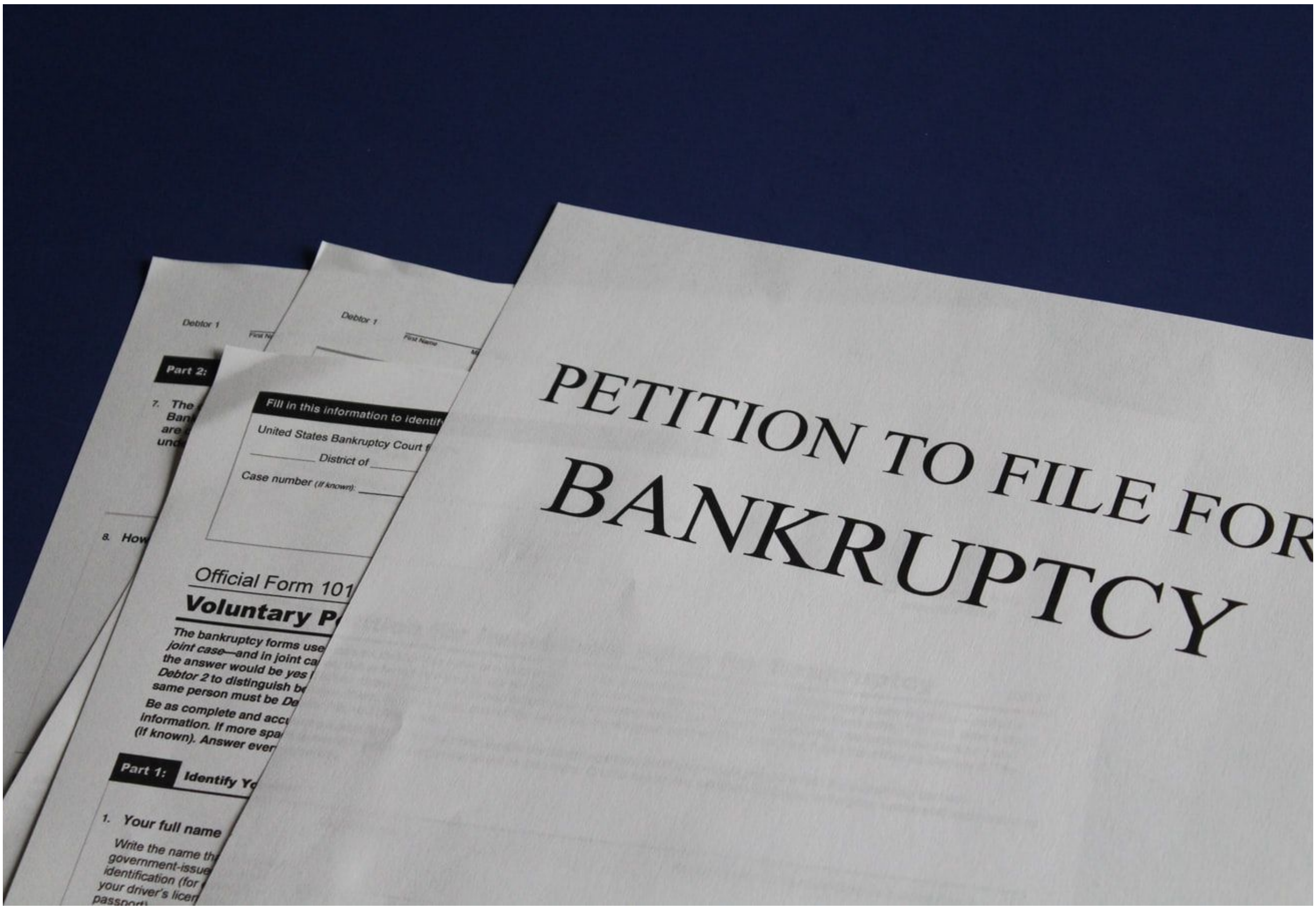
Singapore's partial acceptance of the English approach

In *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33, the Court of Appeal of Singapore considered that whereas a company should ordinarily show that there exists a substantial and *bona fide* dispute (the *"triable issue"* test) in order to obtain a stay of dismissal of a winding up petition, the standard of review of the disputed debt should be lowered where it is subject to an arbitration agreement. Taking a "pro-arbitration" approach, the Court decided to apply a *prima facie* standard, pursuant to which the Court will stay a winding up petition where the debt is not *bona fide* disputed and the application for a stay amounts to an abuse of process. As observed by the Hong Kong Court in *Dayang* in relation to the same approach taken in other Singapore cases, it is unclear how the *"bona fide"* or *"abuse of process"* test can be meaningfully distinguished from the apparently higher *"triable issue"* test.

The Singapore Court in *AnAn* adopted almost the same approach as the English Court in *Salford Estate,* that is, to stay or dismiss a winding up petition where the allegedly disputed debt falls within the scope of an arbitration agreement unless there are exceptional circumstances.

The Singapore Court's reasoning was two-fold. First, it held that it should apply the same standards to the question of whether a dispute subject to an arbitration exists when considering whether to set aside a winding up petition on the ground that the debt is disputed and subject to an arbitration agreement as it would when considering whether to stay court proceedings (under the arbitration legislation) in relation to a matter that is the subject of an arbitration agreement. Secondly, the Court held that there are no competing policies behind the arbitration and insolvency regimes when it comes to a dispute involving pre-insolvency rights and obligations that ought to be determined by arbitration. According to the Court, the contrary view assumes that the company against whom the petition is lodged, is in fact a debtor, which is precisely the question that the parties had agreed to refer to arbitration.

The Singapore Court's reasoning on both scores contradicts the analysis of the Hong Kong Court in *Dayang*. The English Court of Appeal in *Salford Estates* held similar views to the Singapore Court, but expressed itself differently, focusing on different aspects of the argument to those analysed in either *Dayang* or *AnAn*. Hence, it is impossible to say that there is any consistency in the approach taken by the Commonwealth courts.



India’s distinctive approach

In India, the legislative policy has created a distinct divide between in *rem* remedies (such as winding up / liquidation / insolvency proceedings) that are exclusively vested within the jurisdiction of specialised tribunals (like the National Company Law Tribunal (NCLT)) and other matters that arise out of in *personam* rights (such as recovery of monies), which are arbitrable.[8] Courts and tribunals typically refuse to stay or postpone winding up proceedings or insolvency applications in favour of arbitration on the grounds that the nature of legal remedy sought and the subject matter of two proceedings tend to be different.[9]

Until recently, winding up and liquidation of companies was governed solely by the provisions of the Indian Companies Act. However, in 2016, India introduced a special law – the Insolvency and Bankruptcy Code, 2016 (IBC) – that provided a time-bound manner to resolve issues relating to non-payment of debt taken by corporate debtors. IBC has put in place a mechanism where creditors have the option to initiate a recovery mechanism which either involves revival of the corporate debtor (where the company can pay its debt), restructuring or liquidation.

In cases where the underlying debt relates to a contract in which parties have agreed to submit their disputes to arbitration, an overlap between insolvency proceedings and arbitration can arise. In order to admit an insolvency petition, the NCLT would have to determine whether there is a “debt” and a “default”. Where a debt is disputed, the petition would not be admitted. In determining whether a debt is disputed, the NCLT has to decide if the dispute is *“real and not spurious, hypothetical, illusory or misconceived”.*[10] This does not mean that the NCLT is required to examine the merits of the dispute. Rather, as in Hong Kong and Mauritius (see below), the NCLT decides, on a *prima facie* basis, whether there exists any evidence in support of the allegation that the debt is disputed; if such evidence exists, the insolvency petition is not admitted.[11]

An illustrative case is *Indus Biotech Private Limited v. Kotak India Venture Fund-I*, where the NCLT (Mumbai bench) recently dismissed a petition for initiation of insolvency proceedings and referred the parties to arbitration.[12] The parties had entered into share subscription and shareholders agreements under which Indus had subscribed to

certain optionally convertible and redeemable preference shares. These agreements contained arbitration clauses. Kotak argued that there was a default by Indus as it had failed to redeem these preference shares. Accordingly, Kotak sought to commence insolvency proceedings against Indus. When considering whether there was a disputed debt, the NCLT referred the dispute to arbitration because the parties' dispute related to valuation of shares, conversion formula and fixing of IPO dates, all of which are matters that are arbitrable under Indian law.

The divided approach across the Commonwealth

While Malaysia seems to side with the English and Singaporean approach,[13] other jurisdictions such as the Eastern Caribbean Court of Appeal[14] and the Northern Irish Court of Appeal[15] have declined to adopt Salford Estates for the same reasons as advanced by the Hong Kong Court in *Dayang*.

Interestingly, the Supreme Court of Mauritius recently held that where a winding up petition is made on the basis that a company is unable to pay a given debt, the existence of an arbitration agreement does not prevent the Court from determining whether there is a bona fide dispute in respect of that debt.[16] In particular, the Court did not consider whether a lower standard of review should apply or whether the legislative policy behind the arbitration legislation requires a varied approach to its well-established case law in respect of insolvency proceedings. However, the relevant petition in that case preceded the coming into operation of the Mauritius International Arbitration Act, and the Court considered that the new arbitration legislation was inapplicable in the circumstances of the case before it. It is unclear whether the policy behind that new enactment (based on the UNCITRAL Model Law) and the standard of review of a matter for referral to arbitration under it would change the Court's approach to the determination of a winding up petition.[17]

Going forward, can the uncertainty in the courts' approach be contractually mitigated?

It is undeniably important for commercial parties to understand with certainty the procedure that will apply under their contracts and the legislative framework for the recovery of debts owed to them by a counterparty. Where the parties agree to refer their disputes to arbitration but do not intend to waive their rights to initiating insolvency proceedings upon a counterparty's default under the contract, it is strongly recommended that such intention be expressed in their contractual provisions. However, merely including provisions to deal with disputes by arbitration may not provide a sufficient defence.

In Sit *Kwong Lam v Petrolimex Singapore Pte Ltd [2019] HKCA 1220*, the Hong Kong Court of Appeal agreed that "it would make no sense to dismiss or stay an insolvency petition on the mere existence of an arbitration agreement when the debtor has no genuine intention to arbitrate".

What is unclear, however, is whether the parties can contractually exclude the application of an insolvency regime. The Hong Kong Court of Appeal held *obiter* that public policy precludes the contractual fettering of a creditor-petitioner's statutory right to petition for winding up[18], whereas the Hong Kong Court of First Instance disagreed with that view in *Dayang*.

End Notes

[1] *Salford Estates (No.2) Limited v Altomart Limited* [2015] Ch. 589 [2014] EWCA Civ 1575, [39].
[2] Ibid., [35].
[3] Ibid., [41].
[4] Ibid., [39]
[5] *Dayang (HK) Marine Shipping Co. Ltd v Asia Master Logistics Ltd* [2020] HKCFI 311, [71] and [76]
[6] Ibid., [81] to [83]
[7] Ibid, [86]
[8] *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532. See also *Shalby Ltd. v. Dr. Pranav Shah*, 2018 SCC OnLine NCLT 137; and *HDFC Bank Ltd. v. Satpal Singh Bakshi*, 193 (2012) DLT 203.
[9] *Corporate Ispat Alloys Ltd. v. Jayaswal Neco Industries Ltd*, Nagpur, (2016) 4 Bom CR 462; and *Shalby Ltd. v. Dr. Pranav Shah*, 2018 SCC OnLine NCLT 137.
[10] *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.*, (2018) 1 SCC 353, ¶37 (Mobilox). See also *K. Kishan v. Vijay Nirman Co*. (P) Ltd., (2018) 17 SCC 662.
[11] Id., Mobilox case, ¶51. See also *Karpara Project Engineering Private Limited Vs. BGR Energy Systems Ltd.*, 2019 SCC OnLine NCLAT 239).
[12] *Indus Biotech Private Limited v. Kotak India Venture Fund-I*, IA No. 3597/2019 in CP (IB) No. 3077/2019, NCLT (Mumbai Bench) decision dated 9 June, 2020.
[13] Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd (WA-28NCC-1146-12/20018)
[14] Jinpeng Group Ltd v Peak Hotels and Resorts Ltd (BVIHCMAP2014/0025 and BVIHCMAP2015)
[15] The City Hotel (Londonderry) Limited v Stephenson [2003] NICA 47
[16] Tostee v Property Partnerships Holdings (Mauritius) Ltd [2015 SCJ 41], upheld on appeal in Property Partnership Holdings (Mtius) Ltd v Tostee [2020 SCJ 65]
[17] The question as to whether insolvency laws superseded the otherwise applicable provisions of the Mauritius International Arbitration Act was also discussed in Trikona Advisers Limited v Sachsenfords Asset Management GMBH [2011 SCJ 440A], but the Court decided that the Act was not applicable on the facts of that case.
[18] But Ka Chon v Interactive Brokers LLC [2019] HKCA 873

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CASE IN BRIEF

High Court finds "without prejudice" statements contained in mediation paper were admissible to defend against allegation of fraud

By Antonia Brindle

The High Court has held that statements made in a “without prejudice” (WP) mediation paper were admissible as they were to be used to rebut allegations of fraud, by showing that the claimants had known about, and approved, the transactions said to constitute the alleged fraud: *Berkeley Square Holdings v Lancer Property Asset Management Ltd [2020] EWHC 1015 (Ch).*

The defendants relied on an established exception to the WP rule, which provides that evidence of WP negotiations is admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.
The court held that it would be “contrary to principle” if parties could rely on this exception to admit WP material into evidence to prove misrepresentation, fraud or undue influence, but could not admit such material to defend themselves against these allegations and uphold the agreement concluded between the parties. The WP material was therefore admissible under the established exception, or a “small and principled extension of it in the interests of justice”.
The decision acts as a reminder that the protection afforded by the WP rule is not absolute, and suggests that the fraud exception may extend further than previously understood.

Background

The underlying dispute concerns a fraud claim brought by Berkeley Square Holdings and others (the “Claimants”) against the manager of their London property portfolio (“Lancer”) and its directors and holding company (together the “Defendants”).
The Claimants allege that the Defendants were “complicit in a substantial fraud perpetrated on the Claimants by their own appointed representative” (the “Representative”), through an arrangement whereby Lancer’s management fees were significantly increased and part of those fees were paid to a company owned and controlled by the Representative. A major area of dispute between the parties is whether those payments were authorised by, and known to, the Claimants.

The Defendants argue that the Claimants were aware of these payments, and in fact ratified or affirmed them, as (at least) the payments were detailed in the factual background section to the Defendants' position paper exchanged during an earlier WP mediation between the parties in respect of Lancer's performance bonus. All the position papers were marked "Without Prejudice".

The Claimants applied to strike out the parts of the Defendants' defence which refer to the WP statements made in their position paper, on the basis that they are WP and therefore inadmissible. The Defendants argued that the statements were admissible under one or more exceptions to the WP rule, and that the statements should be admitted as evidence in support of their argument that the Claimants had known about such payments.

Decision

The High Court (Roth J) held that the WP statements were admissible.
Roth J noted that it is well established that the WP rule is not absolute and is subject to exceptions. He referred to the (non-exhaustive) list of exceptions to the WP rule found in *Unilever Plc v Proctor & Gamble Co* [2000] 1 WLR 2436. The Defendants in this case relied on three of the exceptions listed in *Unilever*, under which WP evidence may be admissible:

CASE IN BRIEF Continued

- to show that an agreement apparently reached during the negotiations should be set aside for misrepresentation, fraud or undue influence (the "fraud exception");
- to show that a statement made during the negotiations gives rise to an estoppel (the "estoppel exception"); or
- under an exception of rather uncertain ambit established in *Muller v Linsley and Mortimer* [1996] PNLR 74, in which WP negotiations were admitted to show that a party had acted reasonably to mitigate its loss in reaching a settlement of proceedings with a third party (the "Muller exception").

Fraud exception

Roth J noted that, although the fraud exception had not been applied in any reported English case to date, the description of it in Unilever had repeatedly been approved by the appellate courts and neither party suggested the exception did not exist.

Whilst the fraud exception, as expressed in *Unilever*, allows a party to rely on WP material to show that an agreement should be set aside on the ground of misrepresentation, fraud or undue influence, in this case the Defendants were trying to rely on WP statements to uphold the relevant agreement, and to rebut the allegations of fraud.

Roth J noted that, if Lancer had misled the Claimants by misrepresentation in the mediation, the fraud exception would have allowed the Claimants to rely on the WP statements. It would, he said, be contrary to principle to find that, where Lancer was truthful in the mediation, its statement could not be admitted to rebut a case of fraud.

Roth J therefore held that the WP statements were admissible either under the fraud exception, properly interpreted, or "by reason of a small and principled extension of it to serve the interests of justice".

On the basis of this exception alone, the judge dismissed the Claimants' application to strike out the parts of the Defendants' defence which relied on the relevant WP material. However, Roth J went on to consider the other two exceptions relied on.

Estoppel exception

Roth J considered that the Defendants would not have been able to rely on the estoppel exception. Here the Defendants were not seeking to rely on any representations made by the Claimants during the earlier mediation in order to found an estoppel. They sought instead to rely on the Claimants' silence in the face of the Defendants' own statements in the WP position paper. That was very different from the situation envisaged under the estoppel exception.

Muller exception

IIn considering the application of the *Muller* exception, Roth J referred to the analysis set out in two recent cases, with which he agreed: *EMW Law v Halborg* [2017] EWHC 1014 (Ch) and *Briggs v Clay* [2019] EWHC 102 (Ch) (which are summarised in previous blog posts here and here). According to that analysis, the rationale for the *Muller* exception is that a party cannot raise an issue to be tried but, at the same time, rely on the WP rule to prevent the court seeing the evidence needed to determine that issue.

Roth J held that the *Muller* exception could also have been applied because the Claimants' claim would not be “fairly justiciable” without disclosure of the privileged statements into evidence. In determining what “fairly justiciable” means, Roth J said: “it means that the evidence is so central to an issue which the party resisting disclosure has introduced that there is a serious risk that there will not be a fair trial if that evidence is excluded”.

In this case, the Claimants’ critical argument was that the Defendants had acted dishonestly and that the Claimants had been unaware of the relevant payments. Roth J held that ”justice clearly demands” that the Claimants should not be permitted to put forward such an argument whilst excluding evidence that they were told of those same facts some five years earlier, because to do so would create a “serious risk” that the court would be misled.

Roth J ‘s decision was also informed by the fact that the statements in question did not relate to the dispute which led to the earlier mediation (they were only ”peripheral” to those issues), and were exclusively statements made by the Defendants who were the same party trying to have them admitted in the present proceedings. Roth J therefore held that admitting the WP material would not risk undermining the public policy justifying the WP rule

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Herbert Smith Freehills is one of the world’s leading professional services businesses with 26 offices around the globe.

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The government subsidised arbitration and mediation service for commercial lease disputes due to COVID-19 restrictions

By Maria Cole

As all New Zealanders know, the lockdown periods necessitated by the COVID-19 crisis have had a considerable impact on the ability of businesses in New Zealand to continue to function. For most businesses, normal trade has been turned on its head. Many have struggled to meet day-to-day running costs, of which rental and outgoings due under commercial leases are often a major component. The flow-on of this is that many affected landlords also struggled to meet their financing obligations.

Although commercial leases in New Zealand make provision for foreseen emergencies, the unforeseen nature of the COVID-19 lockdowns went beyond the scope of those clauses. As a consequence, leases didn't provide struggling parties with an avenue to remedy the problems they were facing.

In May 2020, the Government responded by amending the Property Law Act 2007. It extended the notice period before cancelling a lease because of overdue rent from 10 working days to 30 working days. The notice period a lender must give before taking possession of, or selling, a mortgaged property was also increased. These amendments are temporary and currently expire on 23 December 2020. While these changes allowed some scope for relief for businesses, they didn't provide a platform for tenants of commercial leases to address the specific problems around access to their premises that the lockdowns had created.

Leases in New Zealand and states of emergency

Over the last decade, a declared state of emergency that has led to normal business operations being halted has occurred around eight times throughout New Zealand due to earthquake, fire, or flooding. The longest was after the Christchurch 2011 earthquakes, when tenants were unable to access leased commercial property in the red zone over a 66-day declared state of emergency period. Leases in place at that time were inadequate to deal with this.

The Christchurch earthquakes led to the Auckland District Law Society (ADLS) commercial lease form being amended in 2012 to include clause 27.5: the no access in an emergency clause. Clause 27.5 provides that, where a tenant is:

> …unable to gain access to the premises to fully conduct the tenant's business from the premises for reasons of public safety... or the need to prevent, reduce or overcome any hazard, harm or loss that may be associated with the emergency … a fair proportion of the rent and outgoings shall cease to be payable for the period commencing on the date when the Tenant became unable to gain access to the premises to fully conduct the Tenant's business from the premises until the inability ceases.

An 'emergency' is defined in clause 47.1 as including an epidemic. For tenants with the 2012

ADLS commercial lease, these provisions provided a welcome ability to seek relief and reduce outgoings over Level 4 and 3 Lockdown periods. However, not every commercial tenant has this lease in place and, even where they do, questions around access and establishing what a *fair proportion of the rent and outgoings* are have presented their own issues.

The Scheme

On 30 July 2020, the Government announced its intention to address these issues through a non-legislative scheme which would provide a subsidised arbitration and mediation service (the Scheme) to eligible parties with a qualifying dispute. Participation in the Scheme is entirely voluntary, even for parties to ADLS leases which include clause 27.5. Parties must agree to enter into these processes in order to access the Scheme.
The Ministry of Justice contracted three dispute resolution suppliers to provide the services under the Scheme, including NZDRC. There are differences in the processes and services provided by the three suppliers, including that NZDRC is currently the only supplier offering fully subsidised/funded arbitration under the Scheme for all cases (under the Scheme, suppliers are entitled to charge eligible parties an additional $2,000.00 over and above the government subsidy for arbitration – the fee for mediation is fixed).

Accessing the Scheme

Parties to a dispute will be eligible to access the Scheme if:

1. the dispute is a Qualifying Dispute;
2. at least one of the parties to the Qualifying Dispute meets the eligibility criteria; and
3. the applicants have not previously accessed subsidised mediation or arbitration services with a supplier contracted to the Ministry of Justice in respect of the Qualifying Dispute in question.

A dispute is a Qualifying Dispute if:

1. it is about the payment of rent and outgoings where the lessee to the lease has experiences a material loss of revenue during the Lockdown Period because of government restrictions put in place to combat COVID-19; and
2. the payment of rent and outgoings during the relevant Lockdown Period has not been the subject of an arbitral award between the parties to the dispute.

A business will be an Eligible Party for the purposes of the Scheme if:

1. the business is New Zealand based; and
2. it has 20 or fewer full-time equivalent staff:
   a. in the case of the lessee, per lease site; or
   b. in the case of the lessor, in total.

Arbitration or Mediation?

Eligible parties can only access fully subsidised mediation or arbitration (not both) under the Scheme. Accordingly, to the extent parties choose to mediate, this means they will be unable to access the subsidised arbitration service in the event of failure to settle at mediation. However, they may still access NZDRC's private low cost and fixed fee arbitration scheme if they agree to do so. This is discussed further below.

Mediation

If the parties elect to have their dispute mediated, enabling the parties to have a facilitated discussion and reach an agreement between themselves, any settlement agreement will be signed by all parties, making it a legally binding and enforceable order.

There does not need to be a rent abatement clause in the lease agreement in order to access the subsidised mediation service under the Scheme.

Mediations under the Scheme conducted through NZDRC will be controlled by its bespoke COVID-19 Commercial Lease Mediation Rules, and Commercial Lease Dispute Mediation Protocol. These provide a clear framework for parties entering into mediation, giving structure and certainty to the process.

Appointments will be provided within 1-2 business days of application and the mediation will typically take half-a-day (some may require longer). Prior to mediation, each party will provide the mediator and every other party with an analysis of the dispute, which identifies both the quantum and legal issues in dispute. These are provided at least three working days prior to mediation, to give each party and the mediator an opportunity to become better appraised with the issues at hand.

All mediation is to be conducted through videoconference. Support is available to parties who may be new to this software, as well as for technical assistance during the mediation.

Arbitration

As there is no general right at law for rent reduction for a tenant in the event that the tenant cannot access its leased premises in an emergency, parties will need to have a lease agreement that includes the provisions in clause 27.5 no access in emergency, or a similar provision, to found an arbitration claim for rent abatement under the Scheme or otherwise.

Arbitration provides parties in a commercial lease dispute the opportunity to put their issues before an experienced independent arbitrator. The arbitrator will prepare a confidential binding arbitral award which is enforceable by action or upon application for entry of the award as a judgement of the High Court. Arbitration under the Scheme will be conducted in accordance with NZDRC's COVID-19 Commercial Lease Arbitration Rules. This provides for an on the papers procedure, which means parties do not have to attending a hearing in person, resulting in a final award being issued within 45 days or less from the commencement date.

In reaching a decision, the arbitrator is limited to the question of whether the lessee is entitled to any reduction in the payment of rent and outgoings where the lessee has experienced a material loss of revenue during a Lockdown Period because of government restrictions put in place to combat COVID-19.

While the arbitration fee is fully met by the Ministry of Justice, each party will bear their own legal/ expert costs if they incur any.

Relevant Considerations

Any provider of arbitration or mediation services under the Scheme is required to consider the interests of both the lessee and the lessor in determining a fair reduction of rent and outgoings. Relevant considerations to assist a commercially fair outcome may include:

1. The respective financial positions of the parties,
2. Did either party have any applicable insurance cover?
3. Did the lessee have physical access to the premises, either in full or in part?
4. Was the lessee still able to generate income from their business?
5. Did the lessee obtain benefits from the premises, for example:
   a. storage or refrigeration of stock or having secure premises for important/valuable equipment; or

b. having virtual access to enable them to continue to operate their business off-site by using servers located on the premises; or

c. maintaining an IT system in a suitably air-conditioned environment.

6. Did the lessor have mortgage/finance obligations to meet for the premises?

7. Did the lessee access the government wage subsidies?

8. Did the parties qualify for government cashflow incentives?

9. What essential outgoings were still being paid by the lessor for the premises, for example rates, insurance, essential maintenance?

What if I am not eligible?

For those non-eligible parties who have rent relief disputes and wish to access mediation or arbitration services, NZDRC offers a low cost and fixed-fee service. This service was launched by NZDRC at the start of New Zealand's first COVID-19 level 4 lockdown.

Additionally, NZDRC provides arbitration and mediation services for parties who have other disputes regarding commercial leases. This comprehensive service may be accessed for any commercial lease dispute, including disputes of rent renewals, reinstatement and repair of premises, replacement and maintenance of the property, premises, fixtures and fittings.

Final notes

The Scheme aims to provide relief to small and medium sized businesses which have suffered significant hardship because of the COVID-19 level 3 and 4 lockdowns. Parties can access a new, fully funded dispute resolution process for every lockdown period*. The subsidised Scheme will be open to new applications until 31 March 2021.

After this date, the alterative avenues to settlement available under NZDRC's special COVID-19 low cost and fixed fee arbitration and mediation service for rent relief disputes will continue to be available.

For more information about the Scheme, eligibility and options for non-eligible parties please contact the NZDRC Registry staff or go to its website.

** This will be subject to the terms of any prior agreement(s) reached between the parties that provide otherwise.*

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NZDRC is recognised and respected as the country's most experienced and trusted provider of private commercial arbitration and mediation services and has been delivering commercial mediation and arbitration (including expedited arbitration) services under its institutional rules for over 30 years

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Government subsidised COVID-19 Commercial Lease Disputes Arbitration and Mediaton FAQ's

By Jesika Sabo and Maria Cole

Do both parties need to agree to participate?

Yes, parties who wish to access the scheme must agree to do so, whether they wish to arbitrate or mediate, even if they already have an agreement to arbitrate or mediate in the lease document. This is because they need to agree to enter into a process delivered specifically in accordance with the scheme. You can download a template agreement to mediate or arbitrate on NZDRC's website by clicking here.

What if the other party does not agree to arbitrate or mediate?

If the other party does not agree to use the subsidised scheme you may want to seek independent legal advice to see what your options may be. You may have a dispute resolution clause in your lease that gives you a contractual right to arbitrate or mediate.

Does my dispute qualify?

Parties to a dispute will be eligible to access the subsidised scheme if:

1. The dispute is a Qualifying Dispute;
2. At least one of the parties to the Qualifying Dispute meets the **Eligibility Criteria**; and
3. The applicants have not previously accessed mediation or arbitration services (whether with NZDRC or another provider contracted to the Ministry of Justice) in respect of the Qualifying Dispute in question.

Parties can only access fully subsidised mediation or arbitration. Accordingly, to the extent parties choose to mediate, this means they will be unable to access a subsidised arbitration service in the event of failure to settle at the mediation. However, they may still access NZDRC’s private low cost and fixed fee arbitration scheme if the other party agrees.

A dispute is a **Qualifying Dispute** if:

1. The dispute is about the payment of rent and outgoings where the lessee to the lease has experienced a material loss of revenue during a lockdown period because of government restrictions put in place to combat COVID-19; and

2. The payment of rent and outgoings during the relevant lockdown period has not previously been the subject of an agreement or arbitral award between the parties to the dispute.

The party **Eligibility Criteria** requirements for the subsidy are:

1. The business is New Zealand based;
2. The business has 20 or fewer full-time equivalent staff:
   a. in the case of the lessee, per lease site;
   b. in the case of the lessor, in total.

What is a full-time equivalent employee?

The Ministry of Justice defines this as:

A full-time equivalent employee must work 30 hours or more.

- One full time employee is equal to two part-time employees.
- A part-time employee works less than 30 hours per week. If an employee works variable hours, calculate the average hours worked each week over the last 12 months, or if less than 12 months, the average hours worked since employment

When does the subsidy expire?

The commercial lease arbitration and mediation scheme will be open to new applications until **31 March 2021**. New participants will not be able to apply for the scheme after this date.

If the contract is silent on this, NZDRC offers non-eligible parties a low cost and fixed fee arbitration or mediation service for rent relief disputes under the special COVID-19 service launched by NZDRC at the start of New Zealand's first COVID-19 lockdown. For any parties who do not meet the eligibility requirements, parties may still mediate or arbitrate their rent relief dispute (by agreement) but will need to meet the cost of doing that.

NZDRC also provides comprehensive commercial arbitration and mediation services for parties to commercial lease disputes including, for example: disputes over rent renewals, reinstatement of premises, and repair, replacement and maintenance of the property, premises, fixtures and fittings.

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Arbitrators, independence and impartiality – important guidance from the UK Supreme Court

Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC

By Melissa Perkin

On 27 November 2020, the UK Supreme Court handed down its judgment in the landmark case of *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. The decision has provided important clarification of the nature and scope of an arbitrator's duty to make disclosures of facts and circumstances that may give rise to doubts about their independence and impartiality. It also addresses how this duty interrelates with the duty of privacy and confidentiality, and the circumstances in which an arbitrator's failure to make a disclosure could give rise to an appearance of bias.

The Supreme Court reiterated the importance of the duty of impartiality as a core principle of arbitration law, which applies equally to party-appointed and independently-appointed arbitrators, and the need to apply an *objective observer* test, in determining whether circumstances exist that create the appearance of bias.

Background

Halliburton Company (**Halliburton**) provided cementing and oil well monitoring services to BP Exploration and Production Inc (**BP**) in the Gulf of Mexico. Halliburton entered into a liability policy with Chubb Bermuda Insurance Ltd (**Chubb**). Transocean Ltd (**Transocean**) also provided services to BP. Those services overlapped with those provided by Halliburton. Transocean was also insured with Chubb.

In 2010, the Deepwater Horizon oil spill occurred in the Gulf of Mexico, resulting in civil claims against BP, Halliburton and Transocean.

After a trial in the United States, the judgment apportioned blame between the parties and Halliburton concluded a settlement to agree the amount of damages. When Halliburton sought to claim a proportion of this settlement under its insurance policy, Chubb declined to pay Halliburton's claim. As a result, an arbitration was commenced. Both Halliburton and Chubb selected their own arbitrator but were unable to agree the Chairman of the arbitration, resulting in an application to the High Court in which Chubb's first-choice candidate, Mr Rokison QC, was selected.

In 2016, Halliburton discovered that following Mr Rokison's appointment and without Halliburton's knowledge, Mr Rokison had accepted appointment as an arbitrator in two other references, both of which arose out of the same Deepwater Horizon incident and involved Transocean.

Halliburton applied to the High Court to remove Mr Rokison as arbitrator on the grounds of perceived bias. That application was refused on the basis that there were no grounds for removing Mr Rokison under section 24(1)(a) of the Arbitration Act 1996.

The Court of Appeal dismissed Halliburton's appeal as on the facts of the case, there was no real possibility that the arbitrator was biased when viewed from the perspective of the fair minded and informed observer. The Court of Appeal found that the mere fact that an arbitrator accepts multiple appointments in overlapping subject matter with only one common party does not, of itself, give rise to an appearance of bias. The court also remarked that in keeping with best practice in international arbitration and as a matter of law, disclosure of the appointments should have been made.

Notwithstanding that, the court concluded that non-disclosure alone would not have led the fair-minded and informed observer to conclude that there was a real possibility of bias.

Court of Appeal dismissed Halliburton's appeal as on the facts of the case, there was no real possibility that the arbitrator was biased when viewed from the perspective of the fair minded and informed observer. The Court of Appeal found that the mere fact that an arbitrator accepts multiple appointments in overlapping subject matter with only one common party does not, of itself, give rise to an appearance of bias. The court also remarked that in keeping with best practice in international arbitration and as a matter of law, disclosure of the appointments should have been made. Notwithstanding that, the court concluded that non-disclosure alone would not have led the fair-minded and informed observer to conclude that there was a real possibility of bias.

Issues on appeal to the Supreme Court

Halliburton appealed the Court of Appeal's decision to the Supreme Court. Halliburton, asked the Supreme Court to rule on two questions, namely:

1. Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias; and
2. Whether and to what extent the arbitrator may accept appointments in multiple references without disclosure.

Supreme Court Decision

In a unanimous decision, the Supreme Court dismissed the appeal.

In relation to the first ground of appeal, the Supreme Court held:

- There may be circumstances in which the acceptance of multiple appointments with overlap with only one common partymight reasonably cause the objective observer to conclude that there is a real possibility of bias (at [152]).
- The objective test of the fair-minded and informed observer applies equally to judges and all arbitrators, and that in applying that test, it would be wrong to have regard to the characteristics of the parties to the arbitration. There is no difference between the test in section 24(1)(a) of the 1996 Act, which speaks of the existence of circumstances that *give rise to justifiable doubts as to [the arbitrator's] impartiality* and the common law test of whether the fair-minded and informed observer would conclude there is a real possibility of bias (at [55]). However, in applying the test to arbitrators, it is important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes (at [56]-[63]).

On the second ground of appeal, the Supreme Court held:

- Where the hypothetical observer would conclude that circumstances as at and from the date when the duty arose might reasonably give rise to a real possibility of bias, the arbitrator will be under a legal duty to disclose such appointments (at [122]). This legal obligation can arise when the matters to be disclosed fall short of matters which would cause the informed observer to conclude that there was a real possibility of a lack of impartiality. It is sufficient that the matters are such that they are relevant and material to such an assessment of the arbitrator's impartiality and could reasonably lead to such an adverse conclusion (at [116]).
- The duty of disclosure is not simply good arbitral practice but is a legal duty in English law (at [76]). It is a component of the arbitrator's statutory obligations of fairness and impartiality.
- A failure to make disclosure does not necessarily lead to a removal of the arbitrator, but is a factor that the fair-minded and informed observer would consider when making an assessment of whether there is a real possibility of bias (at [155]).
- If a matter would give rise to justifiable doubts as to an arbitrator's impartiality, the disclosure of that matter would not, as a general rule, remove this conflict (at [108]).
- Where the information which must be disclosed is subject to an arbitrator's duty of privacy and confidentiality, disclosure can be made only if the parties to whom the obligations are owed give their consent. Regard

must be had to the relevant custom and practice to ascertain whether consent can be inferred (at [88]-[89]).

In relation to the specific facts in this case, the Supreme Court held that:

- Mr Rokison had breached his legal duty of disclosure of the subsequent arbitrations in the first reference between Halliburton and Chubb. He should at the time of appointment have disclosed:
  - (i) the identity of the common party who was seeking the appointment of the arbitrator (in this case Chubb);
  - (ii) the nature of the appointment in the subsequent references; and
  - (iii) that the subsequent references arose out of the same incident (at [146]).
- Mr Rokison's failure to disclose his appointment in the subsequent reference, which was a potentially overlapping arbitration with only one common party, was a breach of his legal duty of disclosure (at [147]). The fair minded and informed observer, if she or he had considered the question at or around the date of acceptance may well have concluded that there was a real possibility of bias.
- The Supreme Court applied the common law test and refused to hold that the arbitrator should be removed on the basis that:
  - there appeared to have been a lack of clarity in English case law as to whether there was a legal duty of disclosure and whether disclosure was needed;
  - it was likely that there would not be any overlap between the references;
  - there was no question of Mr Rokison having received any secret financial benefit; and
  - there was no basis for inferring unconscious bias in the form of subconscious ill-will in response to the robustness of the challenge mounted on behalf of Halliburton (at [149]).

The Supreme Court's detailed judgment provides critical guidance for arbitrators, practitioners, institutions and arbitration users alike and is available on the Supreme Court's website.

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Former executive director of the New Zealand Bar Association, Melissa Perkin is an executive director at the New Zealand Dispute Resolution Centre Group, which includes ICRA (Independent Complaints and Review Authority), BDT (Building Disputes Tribunal), NZIAC (New Zealand International Arbitration Centre), and NZDRC (New Zealand Dispute Resolution Centre).

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Our news - in brief

2020 Thomson Reuters Building and Construction Law Conference

The New Zealand Dispute Resolution Centre and the Building Disputes Tribunal were delighted to be the supporting organisations of the Building and Construction Law Conference organised by Thomson Reuters. Originally scheduled for March this year, the event took place on 18 and 19 November in Auckland.

Panel members Catherine Green and Royden Hindle delivered the pre-conference workshop on Dispute Resolution in the construction sector. It was great to see such an engaged audience.

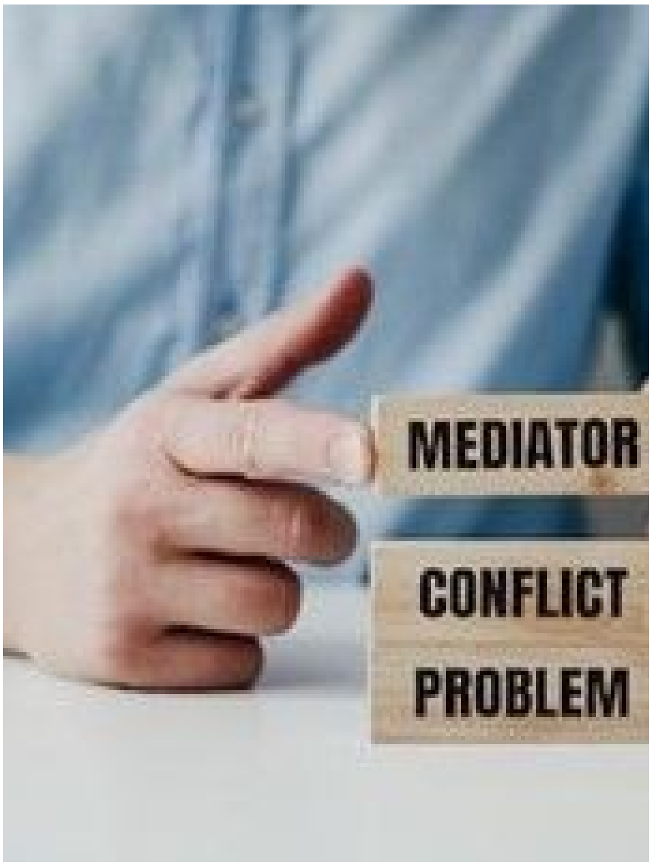
NZDRC Group Managing Director John Green, chaired the conference the following day, which addressed key legal, regulatory and compliance issues affecting the sector, including an overview of the proposed changes to building law.

Webinar: Lockdown Relief? Commercial Leases and COVID-19 Rent Disputes

On 23 October 2020, the New Zealand Dispute Resolution Centre and Mark Colthart presented a webinar for the Auckland District Law Society on the Government's scheme for subsidised arbitration and mediation for COVID-19 commercial lease rent disputes.

This presentation was designed to assist practitioners in understanding the options available and how they can best advise their clients on commercial lease rent disputes as a result of the COVID-19 lockdown.

The New Zealand Dispute Resolution Centre is currently offering fully subsidised mediation and arbitration for qualifying disputes under the COVID-19 Government scheme. To learn more, please visit www.nzdrc.co.nz.



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